

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 95-F-06

Date issued: September 8, 1995

Requested by: Representative Rick Berg, District 45

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. § 40-13-05 or N.D.C.C. § 44-04-22 prohibits an employee of a state institution of higher learning from voting as a member of a city governing body on an issue involving such institution of higher learning.

II.

Whether the employee has a direct or indirect interest in a contract, work, or other business of the municipality pertaining to that state institution.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that neither N.D.C.C. § 40-13-05 nor N.D.C.C. § 44-04-22 prohibits an employee of a state institution of higher learning from voting as a member of a city governing body on an issue involving such institution of higher learning under the circumstances described in this opinion.

II.

It is my opinion that the employee does not have a direct or indirect interest in a contract, work, or business of the municipality pertaining to that state institution under the circumstances described in this opinion.

- ANALYSES -

I.

Unless a statute applies that would require or permit abstention, a member of a city governing body who is present

has a duty to vote. Northwestern Bell Telephone Co. v. Board of Commissioners of City of Fargo, 211 N.W.2d 399, 403 (N.D. 1973) (interpreting N.D.C.C. § 40-11-03, requiring yea and nay votes to be taken when voting on ordinances, as not leaving an option to abstain). When no statute applies that would require or permit abstention, and a member does abstain, that member will be considered to have voted with the majority. A&H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855, 859 (N.D. 1994); Northwestern Bell, 211 N.W.2d at 404.

Based on the factual information provided this office, I will assume the following facts: the member is employed by the state institution of higher learning as an assistant athletic director; the contract being developed, but not yet approved, involves the construction of a sports facility located on the grounds of the state institution; the member's compensation or job security is not dependent on the city governing body's decision in these matters; the member disclosed the potential for a conflict of interest on these matters; the city governing body held several votes on matters relating to the proposed contract, including financial obligations, joint powers agreements, leases, and architectural services contracts; and that these votes occurred both before and after August 1, 1995. The presence of additional or different facts could alter the application of this opinion to those circumstances.

Under Northwestern Bell, 211 N.W.2d at 403, a member of a city governing body must vote if present unless a statute authorizes or requires the member to abstain. Several statutes apply to conflicts of interest that may exist regarding public officials. The two statutes referred to in the opinion request, N.D.C.C. §§ 40-13-05 and 44-04-22, apply to several types of interests and matters. The first statute at issue is N.D.C.C. § 40-13-05, which provides:

Except as otherwise provided by law, no municipal officer, in a municipality having a population of ten thousand or more according to the last federal decennial census, shall be directly or indirectly interested in:

1. Any contract, work, or business of the municipality;

2. The sale of any article the expense, price, or consideration of which is paid from the municipal treasury or by any assessment levied by any act or ordinance; or
3. The purchase of any real estate or other property belonging to the municipality or which shall be sold for taxes or assessments or by virtue of any process issued in any suit brought by the municipality.

Provided, however, that the foregoing shall not be applicable if unanimously approved by the other members of the governing body of the political subdivision by a finding unanimously adopted by such other members and entered in the official minutes of the governing body, to be necessary for the reason that the services or property obtained are not otherwise available at equal cost.

This statute does not directly address whether a member of a city governing body is authorized to vote on a matter. However, it also does not authorize abstention from voting or provide for a replacement for disqualified board members.

Other statutes regarding conflicts of interest may also apply if a particular kind of matter is before a city governing body. N.D.C.C. § 40-13-05.1 requires disclosure when a member "has any personal interest, direct or indirect, in any contract requiring the expenditure of public funds." N.D.C.C. § 48-02-12 prohibits a member from being "pecuniarily interested or concerned directly or indirectly in any public contract [altering, repairing, or constructing a public building]" exceeding twenty-five thousand dollars. See Letter from Attorney General Nicholas J. Spaeth to Lawrence P. Kropp (June 26, 1990) (N.D.C.C. § 48-02-12 applies only to public contracts for altering, repairing, or constructing public buildings); Letter from Attorney General Robert O. Wefald to David M. Wheelihan (April 13, 1983) (same). The North Dakota Criminal Code, N.D.C.C. § 12.1-13-03, prohibits a member from voluntarily becoming "interested individually in [a] sale, lease, or contract, directly or indirectly. . . ." These

three statutes also do not directly address whether a member of a city governing body is authorized to vote on a matter in which the member has an interest.

The second statute referred to in the opinion request is N.D.C.C. § 44-04-22, which was passed by the 1995 State Legislature. See 1995 N.D. Sess. Laws ch. 423, Senate Bill No. 2383. This new statute became effective on August 1, 1995 and applies to votes or discussions on matters by a city governing body occurring on or after that date. N.D. Const. art. IV, § 13. This is the only statute that authorizes or requires a member of a city governing body to abstain from voting. Therefore, if it does not apply, the member in this opinion has a duty to vote. Northwestern Bell, 211 N.W.2d at 403.¹

N.D.C.C. § 44-04-22 provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to

¹ When the governing body is acting in a judicial or quasi-judicial capacity, even if a statute applies that would require or permit abstention, if such abstention would result in a failure of justice, the "rule of necessity" requires the member to vote anyway. Opdahl v. Zeeland Public School Dist., 512 N.W.2d 444 (N.D. 1994); Larson v. Wells County Water Resource Board, 385 N.W.2d 480, 484 (N.D. 1986); Danroth v. Mandaree Public School District No. 36, 320 N.W.2d 780, 783-84 (N.D. 1982); First American Bank & Trust Co. v. Ellwein, 221 N.W.2d 509, 514-15 (N.D. 1974). However, this rule does not apply when the governing body is acting in a legislative capacity. Letter from Attorney General Heidi Heitkamp to Doug Mattson (December 13, 1994); see also Shaw v. Burleigh County, 286 N.W.2d 792, 795 (N.D. 1979). While there may be a legal provision for calling in a substitute instead of having the member vote, the only such provision in North Dakota law is N.D.C.C. § 54-44.3-03(3) (regarding state personnel board members).

the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

This statute does not apply to all interests a member of a city governing body may have in a matter, but only those interests that are "direct and substantial" and "personal or pecuniary." Thus, if the member has either a "direct and substantial personal interest" or a "direct and substantial pecuniary interest," then N.D.C.C. § 44-04-22 applies and prohibits the member from voting on that matter without the consent of the "majority of the rest of the body."

The adjectives "direct," "substantial," "personal," and "pecuniary," which modify the word "interest," are not defined in this statute. These adjectives have acquired a certain meaning in the legal field relating to conflicts of interest.

When interpreting a statute, "[t]echnical words and phrases and such others as have acquired a peculiar and appropriate meaning in law . . . must be construed according to such peculiar and appropriate meaning or definition." N.D.C.C. § 1-02-03.

Direct means "operating by an immediate connection or relation, instead of operating through a medium." Black's Law Dictionary 459 (6th ed. 1990). "A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain, and not contingent or doubtful." Id. at 460. Substantial means "[o]f real worth and importance; of considerable value; . . . something worthwhile as distinguished from something without value or merely nominal." Id. at 1428, citing Seglem v. Skelly Oil Co., 65 P.2d 553, 554 (Kan. 1937); see also Miller v. Commissioner of Internal Revenue, 84 F.2d 415, 418 (6th Cir. 1936) ("In the commonly accepted legal sense, a substantial interest is something more than a merely nominal interest. . . ."); Yetman v. Naumann, 492 P.2d 1252, 1255 (Ariz. Ct. Ap. 1972) ("substantial interest" defined in statute as any interest other than a "remote interest"). Personal means "[a]ppertaining to the person; belonging to an individual; limited to the person." Black's Law Dictionary at 1143. A pecuniary interest is "[a] direct interest related to money in an action or case." Id. at 1131. It is my opinion

that the terms "direct," "substantial," "personal," and "pecuniary," as used in N.D.C.C. § 44-04-22, have the meanings indicated above.

The primary purpose of statutory construction is to ascertain the intent of the State Legislature. Production Credit Assoc. v. Lund, 389 N.W.2d 585, 586 (N.D. 1986). In looking to legislative intent, it is presumed that a "just and reasonable result" "feasible of execution" is intended, and that "[p]ublic interest is favored over any private interest." N.D.C.C. § 1-02-38. "The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to ensure that their decision will not be an arbitrary reflection of their own selfish interests." E.T.O. Inc. v. Town of Marion, 375 N.W.2d 815, 819 (Minn. 1985) (quotation omitted). "The object of conflict of interest statutes is to remove or limit the possibility of personal influence which might bear upon an official's decisions." Yetman, 492 P.2d at 1255, citing United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961). Likewise, the underlying intent of N.D.C.C. § 44-04-22 apparently is to prevent board members from having a conflict of interest by removing or limiting the possibility that personal influence might bear upon an official's decision. This purpose should guide the application of N.D.C.C. § 44-04-22 to a particular situation.

Whether a member of a governing body has a "direct and substantial personal or pecuniary interest" is very fact specific. See e.g., State v. Robinson, 2 N.W.2d 183, 190 (N.D. 1942). Most questions of this type can be answered with the assistance of the city attorney. However, if the issue is still in doubt, I suggest that whether a member may participate on a matter be decided by a majority of the rest of the body under N.D.C.C. § 44-04-22.

Relevant considerations would be the type of position held by an employee of a state institution of higher learning who is also a member of a city governing body and the issue that is before the city governing body. However, these are not the only considerations that may have a bearing on whether there is a "direct and substantial personal or pecuniary interest." Under the definitions above, the fact that the member is

employed by a party involved in a matter before the city governing body is not enough. There must be some significant, certain interest of personal or financial benefit to the member that runs directly between the member and the matter.

Applying these definitions in light of the purpose behind the enactment of N.D.C.C. § 44-04-12, it does not appear that the member described in this opinion would have a "direct and substantial personal or pecuniary interest" that would prohibit the member from voting without majority vote. First, as explained above, this opinion assumes that the member's compensation or job security is not dependent on the city governing body's decision, therefore the member's involvement cannot be subject to personal financial motivation and is not a "direct and substantial pecuniary interest."

Second, although it is a close question, the member does not appear to have a direct and substantial interest, i.e. an important or significant interest, under these circumstances.

Based on the member's personal experience as an employee in the athletic department of the state institution, the member apparently believed that a new sports facility in the proposed location would benefit the city's residents. There is no suggestion that the member will receive significant personal or financial benefit from the construction of the facility. Under the circumstances described in this opinion, it appears that any benefit the member could possibly receive from the construction of the facility is not significant and therefore not a "substantial interest."

Finally, the potential conflict of interest in these circumstances arises out the member's employment with the state institution. The matters described in this opinion involve the city and the state institution, not the individual members of the city governing body. This is not a situation where the member is a party to a contract or directly benefits from the city governing body's action. See 1994 N.D. Op. Att'y Gen. 136 (president of city governing body would be interested in PACE loan agreement between city and business owned by that official); State v. Pyle, 71 N.W.2d 342 (N.D. 1955) (township board member directly interested in contract between township and member's partnership); State v. Robinson, 2 N.W.2d 183 (N.D. 1942) (state employee directly interested in contract between state and corporation in which employee

was officer and substantial stockholder). Instead, the concern is that a grateful state institution will reward its employee for facilitating the construction of this facility. Under the circumstances described in this opinion, such an interest would involve a third party, would not be certain, and would therefore not be a "direct interest" between the member and the matter before the city governing body.

In conclusion, the member has no "direct and substantial personal or pecuniary interest" as those terms are used in the statute and defined in this opinion. Therefore, N.D.C.C. § 44-04-12 does not prohibit the member from voting on the matters described in this opinion. Because no statute authorizes or requires the member to abstain from voting, it is my opinion that the member has a duty to vote on those matters if present.

II.

This conclusion does not mean that the city governing body may enter into a contract or engage in work or business in which a member has a prohibited interest, or that the member does not have an interest that may result in criminal liability. N.D.C.C. § 40-13-05 still prohibits the governing body from entering into such a contract, or engaging in such work or business, without the unanimous approval of the city governing body based on a finding that the services or property obtained are necessary. See 1994 N.D. Op. Att'y Gen. 136. N.D.C.C. § 48-02-12 contains a similar prohibition for public construction contracts exceeding twenty-five thousand dollars in value, and N.D.C.C. § 12.1-13-03 imposes criminal liability if the member is directly or indirectly interested in a "sale, lease, or contract. . . ." However, based on the facts described in this opinion, it does not appear that the member has a prohibited interest under any of these statutes.

None of these statutes define the term "interest," but as explained above, it has some technical meaning as applied to conflicts of interest. One possible definition of "interest" is a "feeling of curiosity or concern about something." The American Heritage Dictionary 669 (2d coll. ed. 1991). However, the State Legislature certainly did not intend to prohibit members of city governing bodies from being curious or concerned about matters before it. Instead, the term

"interest" as used in these statutes means "[r]egard for one's benefit or advantage; self-interest." Id. (emphasis added). Put another way, an "interest" is a "personal proprietary or pecuniary interest. . . ." Black's Law Dictionary at 812. "Interest" should not "include a mere abstract interest in the general subject or a mere possible contingent interest. Rather, the term refers to a pecuniary or proprietary interest, by which a person will gain or lose something as contrasted to general sympathy, feeling, or bias." Yetman, 492 P.2d at 1255. As this office has previously concluded, an "interest" must be one "that accrues beneficially to the officer." Letter from Special Assistant Attorney General Vance Hill to J.R. Bernabucci, Sr. (March 20, 1962) (emphasis added).

Whether an interest exists as defined above depends on what benefit or advantage the member would receive from the action of the city governing body. Is the benefit unique to the member, or is it no greater than the benefit received by other city residents? As previously discussed in this opinion, it does not appear that the member would receive any improper benefit from the construction of the facility. Without such a benefit, I see nothing wrong with the member using personal experience acquired through the member's employment to advocate and vote in favor of a matter pertaining to the member's employer. Therefore, it is my opinion that the employee would not have a direct or indirect interest in a contract, work, or business of the municipality pertaining to that institution under the circumstances described in this opinion. The same conclusion would apply to the interests prohibited in N.D.C.C. § 48-02-12 and N.D.C.C. § 12.1-13-03.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

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