

LETTER OPINION
93-L-357

December 17, 1993

Mr. Blaine Nordwall
Office of Economic Assistance
ND Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505-0250

Dear Blaine:

Thank you for your letter requesting an opinion regarding the legality of the Silver Haired Education Association's lobbying the state Legislature. The Association is a contract provider to the Division of Aging Services of the North Dakota Department of Human Services under Title III of the Older Americans Act of 1965 (hereafter Act) as amended. 42 U.S.C.A. ?? 3021-3030r.

Title III of the Act provides funding to state agencies and area agencies on aging to serve individuals 60 years of age and older by entering into cooperative arrangements for the provision of supportive services and multipurpose senior centers. 42 U.S.C. ?? 3002(38), 3021(a)(1), 3023. The mission of the agencies on aging is to assist older persons in leading independent, meaningful and dignified lives in their own homes and communities as long as possible. The agencies are to proactively carry out a wide range of functions related to advocacy, planning, and information sharing to enhance community-based systems serving persons 60 years of age and older. 45 C.F.R. ?? 1321.7, 1321.53. To be eligible for grants under Title III, a state agency is required to develop and administer a state plan and "serve as the effective visible advocate for the elderly within the State." 45 C.F.R. ? 1321.9. See also 42 U.S.C. ?? 3025(a)(1)(D), 3027(a); North Dakota State Plan on Aging at 57 (hereafter State Plan) (October 1, 1991, extended through September 30, 1994).

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The Division of Aging Services is designated as the state and area agency under Title III of the Older Americans Act. 42 U.S.C. ?? 3025(a)(1), 3025(b)(5)(A), 3025(c)(5); 45 C.F.R. ?? 1321.7(a), 1321.9, 1321.55(a)(1). See State Plan at 7. The Division is to serve as an advocate to "evaluate and comment on Federal, State and local plans, budgets, regulations, programs, laws, levies, hearings, policies, and actions which affect or may affect older individuals and recommend any changes in these which the State agency considers to be appropriate." 45 C.F.R. ? 1321.13(a)(1). See also 42 U.S.C. ? 3025(a)(1)(D); 45 C.F.R. ?? 1321.9(a), 1321.61; State Plan at 45.

Under the state plan, the Division is authorized to enter into contracts with providers of education and training services pursuant to 42 U.S.C. 3027(a)(19). The Division contracts with the Association "for the identification of issues, education of seniors about the issues, and empowerment of the seniors to advocate on their own behalf for the changes that are needed." State Plan at 47. The State Plan provides for "continuation of funding for the . . . Association and continued coordination with other senior advocacy organizations." State Plan at 47.

Under a Purchase of Service Agreement between the Division and the Association dated August 26, 1993, (hereafter Agreement) the Association "agrees to provide Education and Advocacy services in accordance with the proposal . . . attached as Appendix 1" of the Agreement. Agreement ? II at 1. The Association further agrees to identify four priority issues of concern to the elderly, to recruit and train delegates to a mock legislative session to be conducted by the Association in 1994 at which bills and resolutions relating to issues concerning the elderly are to be passed. Agreement, Appendix 1, C, at 6. During the 1995 legislative session Association "members [are] to provide testimony as appropriate." The Association agrees to "[p]rovide issue and data information when requested, if feasible, for testimon[y] and legislative committee work." Agreement, Appendix 1, C,

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at 5. The Association agrees to "[r]espond to requests from public officials or agencies to provide testimony on issues related to aging" during the legislative session as part of its proposed advocacy services. Agreement, Appendix 1, C, at 6.

The Division has specifically inquired whether the Association may engage in lobbying activities before the North Dakota legislature. No North Dakota law prohibits lobbying activities on the part of the Association assuming that Association representatives otherwise comply with the requirements of North Dakota Century Code (N.D.C.C.) ch. 54-05.1 governing lobbying activities. Under that chapter, an Association representative may be required to register as a "lobbyist" with the Secretary of State's office. N.D.C.C. § 54-05.1-02(1).

No provision of Title III of the Act precludes lobbying activities before the North Dakota Legislature on behalf of the Association. Federal regulations preclude the

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Association from attempting to influence an officer or employee of any federal agency, a member of Congress or an employee of Congress in connection with the awarding of a federal contract, the making of a federal grant, a federal loan or entering into any federal cooperative agreement. 45 C.F.R. ? 93.100(a).

The Association, a North Dakota nonprofit corporation, is an educational organization exempt from federal income tax pursuant to I.R.S. Code ? 501(c)(3). 34 Am. Jur. 2d Federal Taxation ?? 7895, 7918 (1992). See also Agreement, Appendix 1, G. Federal law provides a tax exemption to a 501(c)(3) organization so long as no substantial part of its activities consists of attempting to influence legislation, which includes action by Congress, a state legislature, or a local legislative body. 34 Am. Jur. 2d Federal Taxation, ? 7915 (1992) (citing 26 U.S.C. 501(c)(3), 26 C.F.R. ? 1.501(c)(3)-1(c)(3)). See also Association By-Laws, article II at 2 (March 19, 1992), set out in the Agreement, Appendix 1, G. Tax exempt organizations can make limited lobbying expenditures without losing their tax exempt status. 33 Am. Jur. 2d Federal Taxation ?? 7915, 7916 (1992) (citing 26 U.S.C. ? 501(h)).

An attempt to influence legislation includes attempting to affect the opinions of the general public and attempting to communicate with any member or employee of a legislative body or any government official or employee participating in the formation of the legislation. 26 U.S.C. ? 4911(d)(1). Influencing legislation, for these purposes, also includes communications between the organization and its members or other persons which encourage communication with the Legislature or government officials participating in the formulation of legislation. 26 U.S.C. ? 4911(d)(3). However, there are activities that are not considered an attempt to influence legislation, including:

(A) Making available the results of nonpartisan analysis, study, or research;

(B) Providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;

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(C) Appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax exempt status, or the deduction of contributions to the organization;

(D) Communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and

(E) Any communications with a government official or employee, other than

(i) A communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or

(ii) A communication the principal purpose of which is to influence legislation.

26 U.S.C. ? 4911(d)(2). Arguably, the Association will not endanger its federal tax exempt status if it limits itself to such activities which are consistent with its bylaws which state in part that the association will, upon written request, "provide technical assistance to members of legislative bodies, hold open, nonpartisan forums on general issues affecting seniors, and inform its bona fide members about what is going on legislatively," that "[n]o substantial part of the activities of the [Association] shall be the carrying on of propaganda or otherwise attempting to influence legislation," and that the Association will not intervene in any political campaign on behalf of any candidates for public office but shall instead confine its activities to issue oriented matters. Association By-Laws, art. II (March 19, 1992), set out in the Agreement, Appendix. 1,G.

The federal exceptions to lobbying activities are only relevant to the Association's federal tax exempt status. Even if the Association complies with federal requirements to maintain its tax exempt status, its activities may constitute lobbying for purposes of registration under N.D.C.C. ch. 54-05.1. Under North Dakota law, a lobbyist is any person who, in any manner whatsoever, directly

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or indirectly shall "[a]ttempt to secure the passage, amendment, or defeat of any legislation by the legislative assembly or the approval or veto of any legislation or by the governor of the state," or who shall "[a]ttempt to influence decisions made by the legislative council or by an interim committee of the legislative council." N.D.C.C. ? 54-05.1-02(1). A lobbyist must register with the Secretary of State and receive a certificate of registration and a lobbyist identification badge. N.D.C.C. ? 54-05.1-03(1). Exemptions from registration are provided for legislators, private citizens appearing on their own behalf, employees of the state or political subdivisions who are acting in their official capacity, and persons invited by the chairman of the Legislative Council or by the chairman of an interim committee of the Legislative Council to appear for purposes of providing information. N.D.C.C. ? 54-05.1-02(2).

Whether activities of the Association require registration as a lobbyist is a fact determination to be made in the first instance by the Association in consultation with its attorney.

Thus, while federal regulations or a prohibition contained in a federal appropriation may preclude lobbying of Congress, 45 C.F.R. ?? 93.100(a), 1321.13(b), 1321.61(d), no federal or state law or regulation precludes the Association from lobbying activities in North Dakota with respect to the state Legislative Assembly if it has properly registered with the Secretary of State pursuant to N.D.C.C. ? 54-05.1.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tam/eee/jfl