

**LETTER OPINION
2002-L-54**

October 3, 2002

Mr. William J. Brudvik
City Attorney
PO Box 547
Mayville, ND 58257-0547

Dear Mr. Brudvik:

Thank you for your message asking about potential conflicts of interest based on a city mayor being employed by a college as foundation director, and asking if the mayor could declare a conflict and abstain from participating in a city sales tax initiative involving the college.

Numerous statutes relate to conflicts of interest by public officials. Those that have application to city government include N.D.C.C. §§ 12.1-12-03 (declaring it unlawful to receive compensation for assistance in governmental matters), 12.1-12-04 (declaring it unlawful to receive compensation for a political endorsement), 12.1-13-02 (declaring it unlawful for a public servant to acquire a pecuniary interest, speculate, or wager based on official action or information), 12.1-13-03 (declaring it unlawful for a public servant to be interested in certain public contracts), 40-13-05 (prohibiting municipal officers in municipalities with a population of 10,000 or more from having a direct or indirect interest in contracts or work of the municipality without unanimous approval of the other governing body members), 40-13-05.1 (requiring disclosure to other governing board members of any personal interest a member has in a contract of the municipality), 44-04-22 (requiring a political subdivision governing board member's acting in a legislative or judicial capacity to disclose to the other board members a direct and substantial personal or pecuniary interest in a matter before the board and not participate in or vote on the matter without the consent of a majority of the rest of the governing board), 40-58-17 (prohibiting a public official or employee from any interest in a development or urban renewal project), and 48-02-12 (prohibiting any officer or employee from being interested in any public contract entered into pursuant to N.D.C.C. ch. 48-02 regarding construction of public buildings).

Your message does not indicate concern with matters of contract, so the statutes noted above relating to contracting with a city may not be relevant to your inquiry. But, depending on the relationship between a city and a local college, they could become

relevant at some time. The same circumstance applies to those matters in the criminal code, title 12.1, N.D.C.C. What conduct may take place in the future is unknown, but one holding public office whose employer may have a relationship to the public entity should be cognizant of the prohibitions noted above.

Section 44-04-22, N.D.C.C., may have the broadest applicability and be the one most directly related to your issue. It 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 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.

N.D.C.C. § 44-04-22.

That section does not apply to all interests a city governing board member may have in a "matter" before a board. It applies to those interests in the matter that are "direct and substantial" and "personal or pecuniary." 1995 N.D. Op. Att'y Gen. F-06. This office has defined the above-quoted terms as follows:

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.

Id.

Obviously, the existence of the regulated relationship under N.D.C.C. § 44-04-22 is highly fact specific. It is an issue that public officials should review closely with the city's attorney. If that review is not dispositive, then I suggest that whether a member may participate in a matter be decided by a majority vote of the remainder of the city governing body.

Your message stated that the city in question operates under the council form of government. N.D.C.C. ch. 40-08. Recognizing that the mayor in a council-governed city may not have many opportunities to vote (N.D.C.C. § 40-08-18), if the mayor is present and if the obligation to vote arises and a majority of the remaining board members consent under N.D.C.C. § 44-04-22 to the mayor's voting after disclosure of a potential conflict, then the mayor is not authorized to abstain. Northwestern Bell Telephone Co. v. Board of Comm'rs of Fargo, 211 N.W.2d 399, 403-04 (N.D. 1973).

I believe this information will be helpful in the determination of whether the mayor, under the circumstances you relate, may participate in and vote on matters that arise before the city council.

Sincerely,

Wayne Stenehjem
Attorney General

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