

**LETTER OPINION
2002-L-63**

October 25, 2002

Honorable Merle Boucher
State Representative
PO Box 7
Rolette, ND 58366-0007

Dear Representative Boucher:

Thank you for your letter inquiring about the legality of the North Dakota Wheat Commission using wheat checkoff monies for the purpose of lobbying. The one cent per bushel wheat checkoff is authorized by N.D.C.C. § 4-28-07. See also N.D.A.C. ch. 91-02-01. The wheat checkoff is the Wheat Commission's sole source of funding. Letter from Neal Fisher, Administrator, North Dakota Wheat Commission to John Fox, Assistant Attorney General (Aug. 27, 2002) (Fisher Letter). Any producer may request a refund of the wheat checkoff. N.D.C.C. §4-28-07(2). The Wheat Commission may use up to twenty percent of the checkoff monies "to support the commission's involvement in trade issues throughout the world." N.D.C.C. § 4-28-07(4).

The North Dakota Wheat Commission was established "for the purpose and with the objective of stabilizing and improving the agricultural economy of the state." N.D.C.C. § 4-28-01. The powers and duties of the Wheat Commission are very broad. 1959 N.D. Op. Att'y Gen. 26. Those powers and duties are set out in N.D.C.C. § 4-28-06 and include the power and authority:

1. To foster and promote programs aimed at increasing the sale, utilization, and development of wheat, both at home and abroad.
2. To publish and disseminate reliable information on the value of wheat and wheat products for any purpose for which they are valuable and useful to both processor and consumer.
3. To search for and promote new uses of wheat and wheat products.

4. To contract and cooperate with any person, firm, corporation, limited liability company, or association, or with any local, state, or federal department or agency for executing or carrying on a program or programs of research, education, and publicity.

. . . .

10. To exercise all express and implied rights, powers, and authority that may be necessary to perform and carry out the expressed purposes of this chapter and all of the purposes reasonably implied incidentally thereto or lawfully connected therewith and to adopt, rescind, modify, and amend all necessary and proper orders, resolutions, rules, and regulations for the procedure and exercise of its powers and the performance of its duties.

Id.

The “intent and purpose of [chapter 4-28 is] that the commission shall promote, aid, and develop the orderly marketing and processing of North Dakota wheat.” N.D.C.C. § 4-28-01.

Lobbying generally is defined as a “group of private persons engaged in trying to influence legislators, esp. in favor of a special interest”; to “try to influence legislators to pass (legislation)”; and to “try to influence (an official) to take a desired action.” The American Heritage Dictionary 738 (2d coll. ed. 1991). The provisions of state law regulating legislative lobbying describe a lobbyist as someone who:

- a. Attempts to secure the passage, amendment, or defeat of any legislation by the legislative assembly or the approval or veto of any legislation by the governor of the state.
- b. Attempts 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) and (b).

However, the law specifically exempts an “employee, officer, board member, volunteer, or agent of the state or its political subdivisions whether elected or appointed and whether or not compensated, who is acting in that person’s official capacity.” N.D.C.C. § 54-05.1-02(2)(c). The Wheat Commission is a state agency subject to the regulatory statutes pertaining to state agencies. 1959 N.D. Op. Att’y Gen. 18.

While a federal statute generally prohibits the use of federal money to lobby a member of Congress, the prohibition does not expressly apply to non-federal funds. 18 U.S.C. § 1913. Although a state statute does prohibit the use of state property or services for political purposes, the term “political purpose” is defined to mean “any activity undertaken in support of or in opposition to the election or nomination of a candidate to public office whether the activity is undertaken by a candidate, political committee, political party, or any other person but does not include activities undertaken in the performance of a duty of state or political subdivision office.” N.D.C.C. § 16.1-10-02(2)(a) (emphasis added).

This letter will discuss two types of lobbying activities that may involve the expenditure of checkoff funds. The first is lobbying activities carried on directly by the Wheat Commission or its employees. The second is lobbying activities carried on by other wheat organizations which have contracts with the Wheat Commission. According to information provided by the North Dakota Wheat Commission, its board members and staff are frequently asked to testify at hearings before congressional committees and government agencies involved in the trade area. The Commission also has had contact with government agencies and members of Congress in seeking investigations related to trade disputes. Fisher Letter (Aug. 27, 2002). The Commission noted that it has carefully avoided lobbying on certain issues such as the producer support aspects of federal farm policy, especially where farm program payment levels to individual producers are involved. Id.¹

To the extent Wheat Commission board members or staff are acting in their official capacity in carrying out the broad powers and duties they have under N.D.C.C. ch. 4-28 to foster and promote the sale, utilization, and development of wheat by contacting legislators or other government officials and by testifying before legislative bodies, it is my opinion that such activities would be lawful.

Section 4-28-08, N.D.C.C., provides that “[a]ll money in the state wheat commission fund is appropriated on a continuing basis to the commission for carrying out the purposes of this chapter.” Since, as pointed out above, checkoff funds are the sole source of funds for the Wheat Commission, it would likewise be lawful for Wheat Commission board members and staff to expend checkoff funds when carrying out their powers and responsibilities, including lobbying; however, they are not authorized to expend more than twenty percent

¹ The Wheat Commission provided a copy of a March 24, 1961, policy statement reciting, in part, that the “commission shall in no way enter into the research, the formulation, or modification of legislation having to do with state or national policy as regards domestic production controls and pricing. The commission may, however, call to the attention of producers, producer organizations, agencies of the government, and others concerned, recommending changes when necessary in matters which are of an administrative nature that affect the marketing of wheat or wheat products.”

of the checkoff monies to support the Commission's involvement in trade issues.² N.D.C.C. § 4-28-07(4).

Wheat Commission board members and staff not only engage in wheat promotion and lobbying activities, but also enter into agreements with other wheat organizations for a number of purposes, including research, information dissemination, trade promotion, etc. The Wheat Commission provided this office with several contracts it has with other organizations, and also follow-up reports from those organizations detailing their work and accomplishments on behalf of the Wheat Commission and other affiliates. Some of these wheat organizations also engage in lobbying activities which presumably are supported, at least in part, by the wheat checkoff funds paid to them by the Wheat Commission. Presumably, such contracts are being entered into under the authority of N.D.C.C. § 4-28-06 to foster and promote programs aimed at increasing the sale, utilization, and development of wheat, to disseminate reliable information about wheat and wheat products, to promote new uses of wheat, and to contract and cooperate with other organizations or governments for executing or carrying on programs of research, education, and publicity. Id.

According to the North Dakota Wheat Commission,³ two of the contracts with wheat organizations, U.S. Wheat Associates (USW) and Wheat Export Trade Education Committee (WETEC), focus on the goals of market development and expanded exports. These two agreements are each only one page in length and neither specifically refers to legislative lobbying. However, the WETEC agreement does mention distributing research information and data to decision-makers involved in formulating policies. The USW annual report for the year 2001 mentions providing testimony to a congressional panel relating to a proposed "Asia-U.S. Free Trade Area" and testimony to Congress urging the end of trade sanctions against certain countries such as Iran, Cuba, and North Korea.

The Wheat Commission also supplied copies of contracts with the National Association of Wheat Growers (NAWG), the North Dakota Grain Growers Association (NDGGA), and the U.S. Durum Growers Association (USDGA). These agreements likewise do not explicitly provide for legislative lobbying activities by these organizations on behalf of the Wheat

² Two examples of the North Dakota Wheat Commission using funds to lobby on behalf of trade issues are contained in the Commission's annual report for fiscal year 1999-2000. The report mentioned the role of the North Dakota Wheat Commission in campaigning on Capitol Hill to pass a bill in 2000 to permanently normalize trade relations with China in order to increase trade and reduce transportation costs. The report also noted that the Commission would work with national wheat organizations to encourage Congress to revisit the issue of trade restrictions with Cuba and to end the embargo on Cuba.

³ Fisher Letter.

Commission.⁴ However, the follow-up reports to the Wheat Commission from these organizations do indicate participation in lobbying activities. The NAWG's Fiscal Year-end Activity Report (June 14, 2002) details the following: NAWG has a two-person government affairs department with legislative specialists; NAWG officers and board members have traveled to Washington to lobby regarding the farm bill (e.g., "NAWG representatives made well over 60 visits to Congressional offices on the Farm Bill in the first five months of 2002" and "NAWG also developed a line of communication with both the House and Senate agricultural staffs, receiving important information as the farm bill developed as well as through the negotiations of the Conference Committee."); and NAWG officials have worked with congressional officers on disaster assistance, transportation issues, intellectual property issues, trade policy, water rights, pesticide harmonization, etc. Id.

The agreement between the North Dakota Wheat Commission and NDGGA mentions assistance in obtaining funding from government sources for wheat research and programs, and communication aimed at educating government agencies and policymakers about producer needs regarding crop insurance. The North Dakota Grain Growers Association 2001-2002 Annual Report to the North Dakota Wheat Commission on North Dakota Grain Grower Activities lists meetings in Washington regarding restoration of funding cuts for the USDA-ARS Red River Valley Agricultural Research Center in Fargo and discussions with Senator Dorgan and his staff on pending federal legislation. It also recites that the NDGGA made "dozens of trips to Washington to see to it that the North Dakota wheat producer was treated fairly in the new farm bill" and that "NDGGA traveled to Washington, D.C. numerous times during this past fiscal year to meet with congressional staff." Id.

Finally, the Memorandum of Agreement Between the North Dakota Wheat Commission and U.S. Durum Growers Association (2001) recites that USDGA is to support activities, including programs and communications, aimed at educating government agencies and policymakers of producer needs regarding crop insurance. The U.S. Durum Growers Association 2001-2002 Outline mentioned that it was part of the lobbying effort for the recently passed farm bill with two trips to Washington, D.C.

In your letter you note that there has been a difference of opinion over the years as to whether the use of wheat checkoff monies for lobbying is lawful. Although I have determined that direct lobbying activities by the Wheat Commission board members or employees who are acting in their official capacity in carrying out their powers and duties under N.D.C.C. § 4-28-06 constitute lawful activities, a further question is raised when

⁴ The agreements do, however, allude to representing their affiliates on such matters as trade issues, research, crop protection, environmental regulation, education of government officials, and the like.

wheat checkoff monies are paid to organizations pursuant to contracts and which may be used, in part, to engage in lobbying efforts.

A similar issue was addressed in a letter issued by this office in 1993. See Letter to William Drummond (Dec. 20, 1993). In that letter the question was raised whether the North Dakota Barley Council could give money to the U.S. Feed Grains Council (whose membership consisted of agri-businesses, state checkoff groups such as the North Dakota Barley Council, producer associations, and organizations such as the Farm Bureau). The U.S. Feed Grains Council used its funds to disseminate information but did not make political contributions to candidates. Id. It had been determined by the Internal Revenue Service that the group's activities constituted lobbying for tax purposes. Id. The letter concluded that "[i]f U.S. Feed Grains Council is a group lobbying for the promotion of barley, the North Dakota Barley Council may have the statutory authority to contract with the lobbying group." It is instructive that the North Dakota Barley Council had the same basic statutory authority (N.D.C.C. § 4-10.4-07(1)) as the North Dakota Wheat Commission has in N.D.C.C. § 4-28-06(4).

In 1994 N.D. Op. Att'y Gen. L-49, the question was raised whether the Garrison Diversion Conservancy District, a governmental entity, could lawfully join the Greater North Dakota Association (GNDA), a private organization which, among other things, supported the Garrison Diversion Unit at legislative interim committee meetings. The Garrison Diversion Conservancy District had the authority to promote the construction, maintenance, and operation of the Garrison Diversion Unit, as well as the authority to contract with a private association to disseminate information to promote the Garrison Diversion Unit. Id. The opinion concluded that "[w]hether the GNDA actually promotes the construction, maintenance, or operation of the Garrison Diversion Unit is a question of fact for the [Garrison Diversion Conservancy] District, not this office, to determine. Consequently, it is my opinion that the District does not have the express or implied authority under N.D.C.C. ch. 61-24 to join the GNDA and pay membership fees except to the extent that the District determines the GNDA promotes the construction, maintenance, or operation of the Garrison Diversion Unit." Id.

Likewise, in the present case, it is up to the North Dakota Wheat Commission to determine, as a factual matter, whether its contracts with various wheat-related organizations and the lobbying activities of those organizations promote the sale, utilization, and development of wheat within the meaning of N.D.C.C. § 4-28-06. If it is determined by the North Dakota Wheat Commission that the lobbying activities of these contracting organizations fulfill the Commission's statutory purposes and that these contracting organizations otherwise comply with applicable laws regulating lobbying activities, then the use of checkoff monies for such statutory-related purposes is, in my opinion, lawful. If any of the wheat producers subject to the checkoff disagree with the

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North Dakota Wheat Commission's determination, such producers are able to seek a refund of the checkoff levy in the manner provided in N.D.C.C. § 4-28-07(2).

Sincerely,

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Attorney General

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