



*Before the North Dakota Ethics Commission*

Requested by:  
Members of a State Board

**ADVISORY OPINION NO. 24-01**

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On September 3, 2024, the Ethics Commission (“Commission”) received an advisory opinion request from members of a North Dakota administrative board (“Board”). Based on its review of the request, the Commission decided to issue an advisory opinion pursuant to N.D.C.C. § 54-66-04.2. The Commission further determined the names of the persons in the opinion and request would remain a closed record. N.D.C.C. §§ 44-04-17.1(2), 54-66-04.2(5). The questions presented to the Commission for consideration are summarized below.

1. When an individual is the subject of a pending quasi-judicial proceeding before the Board and files ethics complaints against all Board members, do the pending ethics complaints create a potential conflict of interest for the Board members?
2. In the event the Commission concludes the ethics complaints do not create a potential conflict of interest, would further Board action in the quasi-judicial proceeding expose individual Board members to additional ethics violations?

**I. FACTUAL BACKGROUND**

For purposes of this advisory opinion, the hypothetical facts at issue are as follows. The Board initiated a quasi-judicial proceeding against an individual. While the quasi-judicial proceeding was pending before the Board, the individual filed ethics complaints with the Commission against all members of the Board. Prior to taking further action, the Board members must assess their ethical responsibilities under the state’s ethics rules for the appearance of bias in quasi-judicial proceedings.

**II. LEGAL BACKGROUND**

Article XIV, § 2(5) of the North Dakota Constitution states:

Directors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias, and shall disqualify themselves in any quasi-judicial proceeding in which monetary or in-kind support related to that person’s election

to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person. The legislative assembly and the ethics commission shall enforce this provision by appropriate legislation and rules, respectively. So as to allow for the adoption of such legislation or rules, this subsection shall take effect three years after the effective date of this article.

Following this constitutional directive to establish rules, the Commission adopted rules for the appearance of bias in quasi-judicial proceedings (“quasi-judicial rules”) on June 22, 2022. *See generally* N.D. Admin. Code ch. 115-05-01. The rules apply when “directors, officers, commissioners, heads, or other executives of agencies are called upon to perform a judicial act when the directors, officers, commissioners, heads, or other executives of agencies are not members of the North Dakota judiciary. This includes adversarial administrative hearings . . . .” N.D. Admin. Code § 115-05-01-02(6).

The quasi-judicial rules require “[w]hen a matter comes before a director, officer, commissioner, head, or other executive as part of a quasi-judicial proceeding, the director, officer, commissioner, head, or other executive must disclose any potential conflict of interest and campaign monetary or in-kind support.” N.D. Admin. Code § 115-05-01-03. The quasi-judicial rules define “potential conflict of interest” as:

“Potential conflict of interest” means a director, officer, commissioner, head, or other executive as part of his duties must make a decision or take action in a matter in which the director, officer, commissioner, head, or other executive has:

- a. Received a gift from one of the parties:
- b. A significant financial interest in one of the parties or in the outcome of the proceeding; or
- c. A relationship in private capacity with one of the parties.

N.D. Admin. Code § 115-05-01-02(5).

“Campaign monetary or in-kind support” is defined as:

all campaign contributions from a party to a proceeding of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether donated directly to the director, officer, commissioner, head, or other executive’s campaign or donated to any other person or entity for the purpose of supporting the director, officer, commissioner, head, or other executive’s election to any office within the current or immediately preceding election cycle which are known to the director, officer, commissioner, head, or other executive. No campaign contribution of any kind received prior to January 5, 2022, shall be included in this definition. No campaign contribution or in-kind support that is below the reporting level set forth in North Dakota Century Code chapter 16.1-08.1 shall be included in this definition.

N.D. Admin. Code § 115-05-01-02(2).

Identifying potential conflicts of interest and campaign monetary or in-kind support is the first step in the process to address any potential appearance of bias in a quasi-judicial proceeding. Once potential conflicts of interest and campaign support are identified, the director, officer, commissioner, head, or other executive must manage the disclosure and evaluation of whether there is an appearance of bias to a reasonable person. N.D. Admin. Code §§ 115-05-01-03 to -04. If an appearance of bias to a reasonable person exists, the director, officer, commissioner, head, or other executive must recuse. N.D. Admin. Code § 115-05-01-04(1). The quasi-judicial rules explain how to proceed if a substitute director, officer, commissioner, head, or other executive is needed due to a recusal. N.D. Admin. Code § 115-05-01-05.

The entire process under the quasi-judicial rules is summarized in six steps:

1. Prior to taking action or making a decision in the quasi-judicial matter, identify any potential conflicts of interest you may have or campaign support received.
2. On the record (if possible) declare the potential conflict of interest or campaign support received. Provide enough facts for others to understand the potential conflict of interest or campaign support received.
3. At this step, two options exist:
  - Option 1 – Recuse, then fill out and file the Commission’s approved quasi-judicial form (if you choose this option, the process is complete); or
  - Option 2 – Ask the neutral reviewer for help.
4. The neutral reviewer evaluates four factors listed in N.D. Admin. Code § 115-05-01-04(2).
5. The neutral reviewer determines an appearance of bias to a reasonable person exists and you shall recuse, or the neutral reviewer determines no appearance of bias exists and you may participate.
6. Regardless of the neutral reviewer’s decision, fill out and file the approved quasi-judicial form. It is available online: [ETH - Appearance of Bias in Quasi-Judicial Proceedings Disclosure - SFN 62344](#)

### **III. ETHICS ANALYSIS**

#### **A. Potential Conflicts of Interest**

To answer the Board’s questions, the Commission must first analyze whether a pending ethics complaint filed against a Board member by a party to a quasi-judicial proceeding meets the definition for a potential conflict of interest under the quasi-judicial rules. Because a pending ethics

complaint does not involve a “gift from one of the parties,” the Commission’s analysis will focus on whether it creates a “significant financial interest” or a “relationship in a private capacity” within the definition of a potential conflict of interest which may require recusal. As outlined below, the Commission concludes a pending ethics complaint does not create a potential conflict of interest for Board members.

**1. Significant Financial Interest**

A potential conflict of interest can exist when a Board member participating in the quasi-judicial proceeding has “a significant financial interest in one of the parties or in the outcome of the proceeding.” N.D. Admin. Code § 115-05-01-02(5)(b). Under N.D. Admin. Code § 115-05-01-02(8), a “significant financial interest” is “a direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public; however, [it] does not include investments in a widely held investment fund, such as mutual funds, exchange-traded funds, participation in a public employee benefits plan, or lawful campaign contributions.”

Here, a pending ethics complaint filed by a party to the quasi-judicial proceeding does not meet the definition for a “significant financial interest.” A pending ethics complaint is not “a direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public.” No financial connection exists between the Commission’s processing of an ethics complaint, an individual Board member, and the outcome of the quasi-judicial proceeding. Therefore, a pending ethics complaint filed by a party to a quasi-judicial proceeding does not create a significant financial interest for a Board member.

**2. Relationship in a Private Capacity**

A potential conflict of interest can also exist when a Board member participating in the quasi-judicial proceeding has a “relationship in [a] private capacity with one of the parties.” N.D. Admin. Code § 115-05-01-02(5)(c). Under N.D. Admin. Code § 115-05-01-02(7), a “relationship in a private capacity” is “a past or present commitment, interest or relationship of the director, officer, commissioner, head, or other executive in a matter involving the director, officer, commissioner, head, or other executive’s employer, or individuals with whom the director, officer, commissioner, head, or other executive has a substantial and continuous business relationship.”

Here, a pending ethics complaint does not create a relationship in a private capacity between a Board member and one of the parties to the quasi-judicial proceeding. Specifically, a pending ethics complaint filed against a Board member does not involve the Board member’s employer. An ethics complaint proceeding before the Commission is not a legal proceeding involving an individual’s employer whether it is a private employer or a state employer. While it may have overlapping facts related to the Board member’s service with the state and actions taken in that service, it is a legal proceeding against an individual person under the Commission’s jurisdiction.

Similarly, a pending ethics complaint cannot create a new “commitment, interest or relationship” in a matter involving individuals with whom a Board member “has a substantial and continuous business relationship.” By simply filing an ethics complaint, no new substantial and continuous

business relationship is created between a Board member and the person filing a complaint with the Commission. Any relationship in a private capacity between those individuals would have existed before the ethics complaint was filed and may have even led to the filing of the ethics complaint.

Therefore, a filed ethics complaint does not create a relationship in a private capacity between a Board member and a party to a quasi-judicial proceeding who filed a complaint against the Board member. For the reasons outlined above, the Commission concludes the filing of an ethics complaint itself does not create a potential conflict of interest for a Board member.

### **B. Additional Ethics Liability**

The Board members next asked whether further action in the quasi-judicial proceeding which precipitated the allegations in the ethics complaints would expose them to additional ethics violations. The Commission concluded a pending ethics complaint itself does not create a potential conflict of interest for a Board member in a quasi-judicial proceeding. The Commission further concluded a pending ethics complaint itself does not require Board members to recuse from the proceeding. Nonetheless, Board members must remain cognizant of all ethical responsibilities throughout a quasi-judicial proceeding—potentially including those issues alleged by the facts of the pending ethics complaint. *Cf.* N.D. Judicial Ethics Advisory Committee, Op. 93-1 (1993) (explaining a complaint filed against a judge by a party to a judicial proceeding is not enough by itself to require recusal from the proceeding, but the judge “must examine the allegations of bias or prejudice” raised in the complaint).

Additional factors may exist or come into existence which could create a potential conflict of interest for individual Board members. Board members have a continuing duty to disclose potential conflicts of interest and/or campaign support received as those issues come up during quasi-judicial proceedings. The six-step process from the quasi-judicial rules walk a Board member through the process for disclosing and managing potential conflicts of interest and campaign support as they arise.

Future violations of the quasi-judicial rules, other ethics rules, or any other state law related to transparency, corruption, elections, or lobbying could be part of the investigation of a pending ethics complaint or additional ethics complaints. N.D. Const. art. XIV, § 3(2).

## **IV. CONCLUSION**

The Commission answers the Board members’ questions as follows:

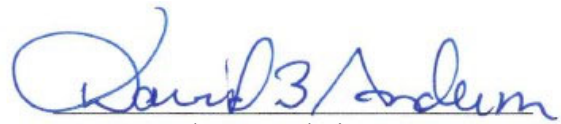
1. When an individual is the subject of a pending quasi-judicial proceeding before the Board and files ethics complaints against all Board members, the pending ethics complaint itself does not create a potential conflict of interest for the Board members.

2. Board members must remain cognizant of all ethical responsibilities throughout a quasi-judicial proceeding, including those raised in a pending ethics complaint.

In accordance with N.D.C.C. § 54-66-04.2, the Commission will publish this advisory opinion on its website. The Commission thanks the Board members for seeking advice regarding this issue.

This advisory opinion was approved by the Commission at a special meeting held on December 2, 2024.

Dated this 2nd day of December, 2024.



Dave Anderson, Chair  
North Dakota Ethics Commission