

Title 115

ETHICS COMMISSION

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**115-04-01-01. Definitions**

1. "Disqualifying Conflict of Interest" means one of the following:
  - a. A Potential Conflict of Interest disclosed pursuant to this rule which the Public Official has determined requires recusal and abstention from further action in the matter; or

- b. A Potential Conflict of Interest disclosed pursuant to this rule which the Neutral Reviewer has determined requires the Public Official to recuse and abstain from further action in the matter.
- 2. "Potential Conflict of Interest" means a Public Official as part of the Public Official's duties must make a decision or take action in a matter in which the Public Official 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.
- 3. "Gift" means a gift not otherwise permitted under Article XIV of the North Dakota Constitution, N.D.C.C. Chapter 54-66, or N.D.A.C. Chapter 115-03-01.
- 4. "Immediate Family" means a Public Official's parent, sibling, spouse, grandparent, grandchild, stepchild or child by blood or adoption.
- 5. "Neutral Reviewer" means the individual or committee designated by an agency, legislative body, board, commission, or committee to receive disclosures of Potential Conflicts of Interest and determine whether the Potential Conflict of Interest is a Disqualifying Conflict of Interest. In the absence of a rule or policy designating a Neutral Reviewer, the following shall apply:
  - a. If a Public Official with a Potential Conflict of Interest is a member of a legislative body, board, commission or committee, the remaining individuals who are members of the legislative body, board, commission or committee shall be considered as the Neutral Reviewer;
  - b. If a Public Official with a Potential Conflict of Interest is an employee of the legislature, the Public Official's supervisor may be considered as the Neutral Reviewer;

- c. If a Public Official with a Potential Conflict of Interest is a member of the Governor’s cabinet, the Governor’s designated ethics officer shall be considered as the Neutral Reviewer;-
  - d. If the Public Official with a Potential Conflict of Interest is an appointed Public Official, the appointing official shall be considered as the Neutral Reviewer; or
  - e. If none of the above apply, the Public Official shall make the determination but must report the disclosure and decision in the manner set forth in 115-04-01-05 within 7 calendar days. -
6. “Public Official” means any elected or appointed official of the North Dakota executive or legislative branches, including members of the Ethics Commission, members of the Governor’s cabinet and employees of the legislative branch.
  7. “Relationship in a Private Capacity” means a past or present commitment, interest or relationship of the Public Official in a matter involving the Public Official’s immediate family, individual’s residing in the Public Official’s household, the Public Official’s employer, or employer of the Public Official’s immediate family, or individuals with whom the Public Official has a substantial and continuous business relationship.
  8. “Significant Financial Interest” means a direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public, however, 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.

**115-04-01-02 Disclosure of Potential Conflict of Interests**

1. This section shall only apply if an agency, board, or commission does not have a current conflicts of interest statute or rule.

2. When a matter comes before a Public Official and the Public Official has a known Potential Conflict of Interest, the Public Official must disclose the Potential Conflict of Interest to the appropriate Neutral Reviewer.
3. The disclosure of Potential Conflict of Interest must be made prior to the Public Official taking any action or making any decision in the matter and must provide sufficient information concerning the matter and the Public Official's Potential Conflict of Interest. Disclosure shall be on the written form approved by the Ethics Commission as set forth in Section 115-04-01-05.
4. The Public Official may elect to recuse themselves from participating in the matter without a determination by the Neutral Reviewer.
5. In emergency or other exigent circumstances where time is of the essence, and a Public Official is not permitted or is otherwise unable to abstain from action in connection with the matter, the Public Official must disclose the Potential Conflict of Interest and the action with the Neutral Reviewer in the manner requested by the Neutral Reviewer. The disclosure must occur within 7 calendar days of the Public Official's action in the matter.
6. Upon the completion of the required disclosure of a Potential Conflict of Interest, the Public Official may voluntarily recuse himself and abstain from further action in the matter.

**115-04-01-03 Neutral Reviewer Assessment of Potential Conflict Disclosures, Decision and Action**

1. This section shall only apply if an agency, board, or commission does not have a current conflict of interest statute or rule.
2. If a Public Official elects not to recuse himself from the matter, upon receipt of a Public Official's disclosure of a Potential Conflict of Interest, the Neutral Reviewer shall evaluate the disclosure, may request further information from the Public Official regarding the disclosure, and shall determine if the disclosed Potential Conflict of Interest constitutes a Disqualifying Conflict of

Interest.

3. Upon completion of the review of the Potential Conflict of Interest, the Neutral Reviewer shall communicate to the Public Official one of the following:

- a. The Potential Conflict of Interest does not constitute a Disqualifying Conflict of Interest, and the Public Official may participate in the matter; or
- b. The Potential Conflict of Interest does constitute a Disqualifying Conflict of Interest, and the Public Official shall recuse himself and abstain from participating in the matter.

~~4.~~ If applicable the Neutral Reviewer shall comply with the requirements of N.D.C.C ch.

44-04 in its consideration and review of the Potential Conflict of Interest. During any discussion of a Potential Conflict of Interest, upon request by the Neutral Reviewer, the Public Official may provide additional information regarding the Potential Conflict of Interest and the matter in question. Where N.D.C.C ch. 44-04 applies, the Public Official may not be asked to leave the discussion of the Potential Conflict of Interest, however, the disclosing Public Official may voluntarily leave the meeting at which the discussion occurs.

~~5.~~ If the Neutral Reviewer is a group of individuals in which the Public Official is a

member, the Public Official may not vote on the issue of whether a Potential Conflict of Interest constitutes a Disqualifying Conflict of Interest. The Public Official may not be counted for purposes of determining whether a quorum is present. Any quorum requirement established under statute or rule shall be reduced as though the Public Official were not a member of the group of individuals that constitutes the Neutral Reviewer.

6. The following standards shall guide the review and decision of the Neutral Reviewer with respect to any Public Official's Potential Conflict of Interest:

- a. Appropriate weight and proper deference must be given to the requirement that a Public Official perform the duties of elected or appointed office, including the duty to vote or otherwise act upon a matter, provided the Public Official has properly disclosed the Potential Conflict of

Interest as required by this rule.

- b. A decision that requires a Public Official to recuse or abstain from further action or decision in a matter should only occur in cases where the independence of judgement of a reasonable person in the Public Official's situation would be materially affected by the disclosed Potential Conflict of Interest.
- c. The review of a Potential Conflict of Interest and any decision that would require a Public Official to recuse himself or abstain from further involvement in a matter shall consider any applicable North Dakota law which precludes the Public Official from recusal or abstention in the matter.
- d. It is presumed that a Public Official does not have a Disqualifying Conflict of Interest if the Public Official would not derive any personal benefit which is greater than that accruing to any other member of the general public or any general business, profession, occupation, or group affected by the matter.
- e. Any guidance issued by the Ethics Commission, including informal guidance, advisory opinions, rules, standards, and precedent.

#### **115-04-01-04 Quasi-Judicial Proceedings**

- 1. Article XIV, Section 2(5) of the North Dakota Constitution establishes a requirement that Public Officials who are directors, officers, commissioners, heads, or other executives of agencies avoid the appearance of bias in any Quasi-Judicial proceeding. This section is only applicable to directors, officers, commissioners, heads, or other executives of agencies who are involved in Quasi-Judicial proceedings.
- 2. Definitions applicable to Quasi-Judicial Proceedings:
  - a. Definitions set forth in Section 115-04-01-01 are applicable to this section unless otherwise set forth in this section.

b. “Appearance of bias to a reasonable person” means that the interest in question would create in reasonable minds a perception that the director, officer, commissioner, head, or other executive’s ability to carry out Quasi-Judicial responsibilities impartially and without bias is impaired.

c. “Campaign Monetary or In-Kind Support” means all campaign contributions 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 N.D.C.C. ch. 16.1-08.1 shall be included in this definition.

d. “Quasi-Judicial” means the 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, but does not include public hearings where:

- i. There are not pre-identified parties;
- ii. Only public input or comment is being received; or
- iii. The hearing is for quasi-legislative purposes, such as administrative rulemaking or rate setting.

3. When 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 known Potential Conflict of Interest and Campaign Monetary or In-Kind Support.

- a. The disclosure must:
  - i. Be made in the manner set forth in 115-04-01-05;
  - ii. Be made to the parties to the quasi-judicial proceeding;
  - iii. Be made prior to the hearing and prior to the agency, board, or commission making any substantive ruling in the matter; and
  - iv. Provide sufficient information concerning the Potential Conflict of Interest or Campaign Monetary or In-kind Support to put the public on notice of the material facts of the matter.

4. As provided in Section 115-04-01-02(5), the Public Official shall voluntarily recuse himself from any further involvement in a Quasi-Judicial proceeding where the Potential Conflict of Interest or Campaign or Monetary In-Kind Support creates an appearance of bias to a reasonable person.

5. The following factors should be considered to determine whether a Potential Conflict of Interest or Campaign Monetary or In-Kind Support creates an appearance of bias to a reasonable person:

- a. The size of the contribution;
- b. The degree of involvement in the campaign;
- c. Whether the contribution is within the current or immediately preceding election cycle;
- d. Whether the Campaign Monetary or In-Kind Support, was made by a party of the proceeding;
- e. The issues involved in the Quasi-Judicial proceeding; and,



- f. Other factors known to the director, officer, commissioner, head, or other executive that creates an appearance of bias to a reasonable person.
- 6. The director, officer, commissioner, head, or other executive may consult with or defer to the Neutral Reviewer in determination of whether a Potential Conflict of Interest or Campaign Monetary or In-Kind Support creates an appearance of bias to a reasonable person.
- 7. A violation of Article 14, Section 2(5) of the N.D. Constitution or these rules will not be found if:
  - a. The director, officer, commissioner, head, or other executive consults with and adheres to the Neutral Reviewer's suggested course of action;
  - b. The director, officer, commissioner, head, or other executive acts in good faith; and
  - c. The disclosed material facts surrounding the Potential Conflict of Interest or Campaign Contribution or In-Kind Support are substantially the same as the facts presented in the Complaint.
- 8. After disclosure to the parties involved in a Quasi-Judicial proceeding of a director, officer, commissioner, head, or other executive's Potential Conflict of Interest or Campaign Monetary or In-Kind Support, all parties to the Quasi-Judicial proceeding may voluntarily consent, in writing, to the director, officer, commissioner, head, or other executive's continued involvement in the Quasi-Judicial proceeding.
- 9. In Quasi-Judicial proceedings in which a director, officer, commissioner, head, or other executive recuses themselves from further involvement in the proceeding, the department, agency, board, commission, or other public entity involved in the Quasi-Judicial proceeding shall determine whether a substitute is required to act in the place of the director, officer, commissioner, head, or other executive. The procedure to assign a substitute for the director, officer, commissioner, head, or other executive shall be determined by North Dakota law or rule. In the absence of applicable North Dakota law or rule, the department, agency, board, commission or public entity may adopt policies consistent with this rule

to address vacancies caused by a Public Officials recusal or abstention in any Quasi- Judicial proceeding.

**115-04-01-05 Disclosure Form and Documentation**

1. Disclosure required under these rules shall be made using the form approved by the Ethics Commission and available on the Ethics Commission website. The form will allow Public Officials and directors, officers, commissioners, heads, or other executives of agencies to input information and attach relevant documentation.
2. The Neutral Reviewer or director, officer, commissioner, head, or other executive shall document the decision regarding any disclosures on the approved form. Upon completion, the Neutral Reviewer or director, officer, commissioner, head, or other executive shall provide a copy of the completed form to the disclosing Public Official, the relevant department, agency, board, body, commission or committee, and to the Ethics Commission.
3. Departments, agencies, boards, commissions or public entities shall document in the official minutes of a proceeding information, if applicable, that a Public Official or director, officer, commissioner, head, or other executive has been recused from any further involvement in the matter.

**115-04-01-06 Adoption of More Restrictive Rules**

Any agency, office, commission, board, or entity subject to these rules may adopt conflict of interest rules that are more restrictive than these rules but may not adopt conflict of interest rules that are less restrictive.