

North Dakota Ethics Commission Meeting

Minutes of December 15, 2021

Live Stream MS Teams

1. Call to Order: The meeting was called to order by Vice Chair Cynthia Lindquist, at 9:00 a.m. The following members of the Ethics Commission were present: Paul Richard, Ward Koeser and David Anderson. Also present were Ethics Commission legal counsel Allyson M. Hicks, Executive Director Dave Thiele, and Office Manager Holly Gaugler. Chair Ron Goodman was not present.
2. Approval of Agenda: The agenda was discussed for this meeting with no additions.
3. Approval of Minutes: The minutes of the 20 October 2021 meeting were discussed with no changes.

Motion: Commissioner Richard moved to approve the minutes of October 20, 2021 with no corrections. Motion was seconded by Commissioner Koeser. Vice Chair Lindquist called for a voice vote on the motion. The motion was approved by unanimous voice vote.

4. Budget Update: Office Manager Holly Gaugler provided a budget update as of November 30, 2021. Gaugler reported November 2021 expenditures of \$21,038 leaving a remaining biennial budget of \$516,127. Gaugler also reported projected expenditures for the remainder of the biennium (December 1, 2021 through June 30, 2023) at an estimated \$491,422 which would leave an approximate ending balance of \$24,705 on June 30, 2023. Gaugler advised the Commission that the ending balance would likely rise as the Commission continues to have MS Teams virtual meetings rather than in-person meetings. She also noted that the budget update for October 2021 is on the website under the December 2021 meeting data.
5. Executive Director Thiele Update:
 - On October 21 Thiele briefed the Bank of North Dakota Board of Directors. The second week of December he also briefed the Joint North Dakota Water Convention on the background of the Ethics Commission as well as “best practices” for boards and commissions regarding conflicts of interest.

- Thiele discussed the current audit of the ND Ethics Commission being conducted by the ND State Auditor's Office. The auditors pointed out that current Article 115-02-01-03(7) states that summarily dismissed or referred complaints would be reported to the Commission during executive session and that has not been our current practice nor was it the intent of the Commission. Confidential information would not be discussed and his report would provide only a general background of the nature of the complaint. If it was appealed, the Commission would then go to executive session. The Commission, with input from legal counsel Allyson Hicks, decided to remove all language regarding executive session as the Commission is held under current executive session laws for discussing confidential complaint information.

Motion: Commissioner Paul Richard made a motion to remove all references to executive session for dismissed complaints. This motion was seconded by Commissioner Dave Anderson. Vice Chair Lindquist called for a roll call vote. The motion was passed unanimously.

- Thiele briefed the Commission regarding complaint #21-008 where he had dismissed this complaint regarding a local board. Thiele provided statute to the complainant pertaining to conflict of interest as well as jurisdictional information of the Ethics Commission.
- Upcoming Calendar: Thiele asked the Commission set dates for the next six months of regular meetings: January 26th, February 23rd, March 23rd, April 27th, May 25th, and June 22nd, 2022 were dates agreed upon by Commissioners.
- Thiele discussed the upcoming strategic review meeting with the Governor set for March 1, 2022. A one-page agency summary which describes our agency and provides a starting point for our strategic review is due on January 14th. The March 1st meeting will be attended by Thiele, Commissioner Dave Anderson, and Holly Gaugler.
- Thiele discussed newly added FAQ's (frequently asked questions) to our website and asked for feedback from the Commissioners on suggested improvements. Thiele also discussed meeting minutes and posting of videos to the website. He recommended posting the video for sixty days or approval of the minutes, whichever is longest. Commissioner Richards suggested posting for six months and the Commission retaining a copy indefinitely. Legal Counsel Allyson Hicks advised against posting a video as minutes are the official record of the meetings. She also expressed concern of liability and left it up to the Commission to decide. Commissioner Richard asked that we look at all options to post the videos as "read only". The Commission also discussed posting a transcript in lieu of a video and that we look at those options as well consulting with

an IT professional at overall options. Gaugler would present options to the Commission regarding posting videos and transcripts to the website.

- Executive Director Thiele briefed the Commission on the November 30th administrative hearing and the requirements of the administrative hearing process. The only attendees at the November 30th hearing were seven individuals from NDPI. NDPI suggested that the Commission adopt an administrative hearing process that would include the Commissioners and dialogue from attendees and that the Commission provide more transparency in its option of rules through this process. Thiele discussed the timeline of the development conflict of interest rules with a draft at the July 28th 2021 Commission meeting that was substantially close to the final draft. Thiele did not recommend changing the administrative process to include public dialogue with the Commissioners as it is designed to take comments from the public and conduct individual research and come together as a commission at a regular meeting. Legal Counsel concurred with Thiele that our administrative process remain as they are and also expressed concern that individual dialogue between the public and a specific commissioner would not necessarily be the consensus of the Commission as a whole. Commissioner Richard concurred that the administrative process change, however, would rather change the Commission's procedures by requesting public comments earlier in the process, potentially as early as the first drafting. Thiele also concurred that public comment earlier in the process would be very beneficial and he would be reaching out to all concerned parties throughout.

6. Conflict Rule Comments Discussions: Commissioners individually reviewed all comments with specific concerns as well as nonspecific comments, as posted to the ND Ethics Commission website at ethicscommission.nd.gov. However, the Commission will not finalize an updated version until an Attorney General's opinion is issued. Executive Director Thiele indicated the comments sent by Mr. Mckean on the Caperton case will be used in conjunction with specific public comments as draft rules are revised by the Commission. Thiele walked the Commission through each comment with specific concerns.

- Howard and Kathleen Tweeten, October 27, 2021

This comment requested 115-04-01-01 (5.a.) Campaign donations made in accordance with North Dakota or federal law to be removed from the exclusion of "Significant financial interest" or "significant business interest". Thiele stated that this language was taken directly out of NDCC 54-66, he also stated that it was not the intent to not ever exclude because of campaign donations but understands the confusion and may be clarified in future revisions based upon the Caperton case. Commissioner Richard commented that the initial draft of the conflict rules was based on other states' rules, particularly the state of Nevada which had been considered in a case before the US

Supreme Court. He also commented that in his opinion, quasi-judicial and executive roles need to be split out in the rule draft.

- North Dakotans for Public Integrity, Inc. (NDPI), November 22, 2021

1. Definition of quasi-judicial in 115-04-01-01(6)

NDPI asked that the first sentence be deleted leaving the second sentence. Thiele explained that the definition was based on legal counsel Allyson Hicks' memo and the North Dakota Courts definition. Commissioner Richard also commented that this followed a ND Supreme Court definition of quasi-judicial.

2. Unauthorized Exemptions

- A. Campaign Contributions

Comment was similar to the Tweeten comment above to delete 115-04-01-01 (5.a.)

- B. Vague Language and Loopholes

Comment to delete 115-04-01-01 (5.b.) which Thiele stated also came directly from legislative language in NDCC 54-66-17. Hicks commented that language in NDCC 54-66, in her opinion, could not be ignored. Richard also commented that this language was consistent with the state's judicial court of conduct. Thiele asked that NDPI present a scenario where this could be an area of direct conflict.

- C. Rule of Necessity

Comment to delete all of 115-04-01-03 and replace with a requirement that all relevant entities have a policy that designates a substitute decision-maker if the responsible individual has a conflict of interest. Both Thiele and Richard commented that this will be further reviewed and clarified as the Commission looks at separate sections of the rule, splitting out quasi-judicial and executive actions.

- D. Loophole for Evading Disqualification

Comment to delete all of 115-04-01-03 and replace with a requirement that all relevant entities have a policy that designates a substitute decision-maker if the responsible individual has a conflict of interest. NDPI's concerns were that the rules provide loopholes restricting disqualification that are not provided for in the Constitution. Thiele stated that this was also related to the previous comment on "rule of necessity" and will likely be addressed by the Commission through the Caperton criteria.

E. Definition of “Gift”

Comment regarding the exemption of campaign contributions under the definition of “gift” stating Article XIV does not allow that exemption for conflict of interest. Both Richard and Thiele commented that this would most likely be rewritten upon the adoption by the Commission of the Caperton criteria.

F. Definition of “Conflict of Interest”

Comments made by Hicks, Thiele and Richard agreed that this definition will change as the rules are split out by quasi-judicial and executive.

3. Two Commission Decisions Related to Draft Rules

NDPI also commented on the request for an Attorney General opinion and his conflict with issuing an opinion. The Commission did not want to revise their original request to include the Caperton case as it was getting very late to request a revision. The other concern regarding Commission decisions was the format of the November 30th administrative hearing. Both Thiele and Richard commented that although it clearly followed the appropriate process of an administrative hearing, earlier requests for comments in the rule drafting would likely make this type of hearing more acceptable to NDPI.

- Aaron Mckean Memo, November 12, 2021

Memo concluded that Article XIV of the ND Constitution advances federal due process protections guaranteed by the 14th Amendment of the US Constitution and does not conflict with any rights protected by the First Amendment. The Commission appreciated the comments made by Mr. Mckean bringing the attention of the Caperton case to the Commission. The Commission discussed the Caperton case as it highlights the importance of due process and first amendment rights and will likely be a significant part of the future discussion of conflict rule changes by the Commission. Richard also welcomed further public comments.

- Eric Murphy, November 29, 2021

Comments were that conflict of interest is all a normal part of the role of a legislator and the issue is with the ability of individuals in government to properly manage those conflicts. The Commission’s comments were that this will be addressed in the separation of quasi-judicial and executive as the rule is revised.

- Sara Vogel and Gregory Stites, December 6, 2021

Comments cited three different Supreme Court cases including the Nevada Commission on Ethics v. Carrigan as not supporting the exclusion of campaign contributions in the Ethics Commission current draft of the conflict rules. Thiele commented that these cases would be reviewed as the Commission works through Caperton criteria and revised draft conflict rule.

- NDPI - Legal Analysis by Greg Stites, December 7, 2021

This was a legal analysis based on the AG Letter Opinion 2020-L-09 that the rules of the Ethics Commission in its domain supersede statutes enacted by the Legislature and has the authority to establish the process for recusal. Thiele agreed that the Commission has broad authority however each entity would be better served by establishing their own process for recusal. Commissioner Koeser voiced concern on recusal of an elected official voted in by public vote. Commissioner Richard commented that as an elected official they are aware of conflicts that may arise in accepting campaign donations. He also stated that the judicial campaigns may be an area worth looking at as in the judicial system they are not allowed to participate in campaign committees in their election.

The Commission did not go over in detail the nonspecific comments. Thiele stated that in general they expressed their displeasure with the direction of the Commission's draft rules. Commissioner Richard stated that he appreciated all comments and reiterated the need to seek comments and feedback earlier in the rule drafting process.

7. Due Outs Before Next Meeting: Thiele recommended that the Commission place the conflict rule on hold until the issuance of an Attorney General's Opinion. He also recommended that Hicks, Richard and Thiele would work on the separation of quasi-judicial and executive for the rule as a draft work with a potential deadline of January 5th. Hicks would provide an analysis of the Caperton case. Commissioner Richard also suggested an earlier special meeting in January. Vice Chair Lindquist called for a motion to continue discussion of the conflict rule at the next meeting of the ND Ethics Commission.

Motion: Commissioner Ward Koeser made a motion to discuss the draft conflict of interest rule at the next ND Ethics Commission meeting. This motion was seconded by Commissioner Dave Anderson. Vice Chair Lindquist called for a roll call vote. The motion was passed unanimously.

8. Further Business: The Commission discussed the on-line COGEL Conference held in early December. Next year's conference is scheduled to take place in Montreal, Canada.
9. Adjourn: Commission, having no further business, was adjourned at 11:34 a.m. The next meeting is scheduled for January 26, 2022, at 9:00 a.m. by MS Teams.

Approved on 26 Jan 2022 
Dave Thiele, Executive Director, North Dakota Ethics Commission