

MEMORANDUM

TO: Ron Goodman, Chair, North Dakota Ethics Commission

FROM: Allyson M. Hicks, Assistant Attorney General, General Counsel to North Dakota Ethics Commission

RE: Quasi-Judicial Proceedings

DATE: May 25, 2021

The Ethics Commission requested a memorandum exploring the following three questions:

- 1) What does the term “quasi-judicial” refer to as utilized in N.D. Const. art. XIV, § 2(5);
- 2) What does the term “financial interest” refer to as utilized in N.D. Const. art. XIV, § 2(5); and
- 3) Whether the phrase “shall disqualify themselves” is an absolute phrase or whether any exceptions would exist.

I will address each of these inquiries separately.

QUASI-JUDICIAL

The term “quasi-judicial” is utilized in several areas of the North Dakota Century Code (N.D.C.C.).¹ The Supreme Court has previously defined “quasi-judicial”:

This Court, in *KFGO Radio, Inc. v. Rothe*, 298 N.W.2d 505, 510 (N.D.1980), quoted directly from *Black's Law Dictionary* (5th ed. 1979) to define both the terms quasi-judicial and quasi-judicial act. The current edition has essentially the same definitions: “quasi-judicial—Of, relating to, or involving an executive or administrative official's adjudicative acts; quasi-judicial act—A judicial act performed by an official who is not a judge.” *Black's Law Dictionary* 1278–79 (8th ed. 2004). Other jurisdictions have considered what the term “quasi-judicial act” means. See also *Romano v. Bible*, 169 F.3d 1182, 1187 (9th Cir.1999) (a commission that conducts hearings with many of the traditional safeguards of courts and then issues orders is performing a quasi-judicial act), *cert. denied*, 528 U.S. 816, 120 S.Ct. 55, 145 L.Ed.2d 48 (1999); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1540 (9th Cir.1993) (an administrative

¹ See N.D.C.C. §§ 14-12.2-01, 26.1-18.1-23, 27-02-08, 32-12.1-03, 44-04-22; and 61-04.1-06.

determination is quasi-judicial when the agency is required to adjudicate disputed facts in particular cases); *Field v. Kearns*, 43 Conn.App. 265, 682 A.2d 148, 151 (1996) (a proceeding is quasi-judicial when the agency has the power to exercise judgment and discretion, hear and determine or ascertain facts, make binding orders and judgments affecting personal or property rights, examine witnesses, and enforce decisions or impose penalties), *cert. denied*, 239 Conn. 942, 684 A.2d 711 (1996).

Kouba v. State, 2004 ND 186, ¶ 9, 687 N.W.2d 466, 470.

Because there is a consistent definition of “quasi-judicial” throughout the Century Code and within the body of case law, the Commission should strongly consider adopting the same definition within the context of N.D. Const. art. XIV, § 2(5) and N.D.C.C. ch. 54-66.

FINANCIAL INTEREST

Black’s Law Dictionary defines “financial interest” as “an interest involving money or its equivalent.”² Section 2(5), N.D. Const., art. XIV, utilizes the phrase “financial interest not shared by the general public as defined by the ethics commission.” Because monetary or in-kind support to an individual’s election to any office is distinguished from this “financial interest,” I believe that the Ethics Commission will need to craft the definition of this phrase. While financial interest is utilized in other areas of the Century Code, it is not clearly defined, so there is not a clear preexisting definition that the Ethics Commission may adopt.

EXTENT OF “SHALL DISQUALIFY”

“Public officials,” as defined by N.D. Const. art. XIV, § 4(2), are mandated by N.D. Const. art. XIV, § 2(5) to disqualify themselves from 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.” This has raised some concern by the Commission in instances where there is no other individual or tribunal that may adjudicate the issue from which the public official is required to disqualify themselves.

The North Dakota Supreme Court, quoting from 1 Am.Jur. 2d, *Administrative Law*, § 66, p. 862, has stated the following:

Disqualification will not be permitted to destroy the only tribunal with power in the premises. An officer, otherwise disqualified may still act, if his failure to act would necessarily result in a failure of justice.

² *Black’s Law Dictionary* (11th ed. 2019).

Thus, an officer exercising judicial or quasi-judicial functions may act in a proceeding wherein he is disqualified by interest, relationship or the like if his jurisdiction is exclusive and there is no legal provision for calling in a substitute so that his refusal to act would absolutely prevent a determination of the proceeding.

Larson v. Wells, 385 N.W.2d 480, 484 (N.D. 1986).

“Where a statute does not provide for the disqualification and temporary replacement of board members or for a substitute tribunal, the court has adopted the “rule of necessity, to require otherwise disqualified officers to serve when no provision has been made for a substitute tribunal in order to prevent the lack of a forum from preventing the hearing from taking place.”

N.D.A.G. 96-F-11, quoting *First Am. Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509, 514-15 (N.D. 1974).

Whether or not an individual will be required to continue participating in the quasi-judicial hearing will require a case by case assessment dependent on whether there is delegation authority for that public official in the enabling statutes.

For example, the North Dakota Industrial Commission consists of the Governor, the Attorney General, and the Agriculture Commissioner.³ There is no constitutional or statutory provision for the appointment of an alternate person to serve in place of a member of the Industrial Commission.⁴ Therefore, if one or more of the members is mandated by N.D. Const. art. XIV, § 2(5) to disqualify themselves from a quasi-judicial proceeding, the Rule of Necessity would require at least one official, if not all of them, to vote even with the possible conflict.

Similarly, the Attorney General has opined that the “Rule of Necessity” does not apply to the Public Service Commission because there is a procedure to appoint a substitute where a Commissioner has a conflict in a quasi-judicial proceeding.⁵ Section 49-05-03, N.D.C.C., mandates that the Public Service Commission shall hear complaints, and that “proceedings shall be conducted as provided by chapter 28-32.”⁶ Chapter 28-32, N.D.C.C., is also known as the Administrative Agencies Practices Act. Section 28-32-01(6), N.D.C.C., defines a hearing officer to include any agency head or one or more members of the agency head when presiding in an administrative proceeding.⁷ “Any person or persons presiding for the agency in an

³ N.D.C.C. § 54-17-02.

⁴ Unlike the analysis for the Public Service Comm’n herein, there is no statutory provision adopting the entirety of N.D.C.C. ch. 28-32 for the Industrial Comm’n. Instead the Industrial Comm’n has the authority to adopt rules governing practice and procedure before the Commission in N.D.C.C. § 38-08-11.

⁵ N.D.A.G. 96-F-11.

⁶ N.D.C.C. § 49-05-03.

⁷ N.D.C.C. § 28-32-01(6).

administrative proceeding must be referred to individually or collectively as hearing officer.”⁸ Any hearing officer is subject to disqualification for good cause shown, and any party may petition for the disqualification of any person presiding as a hearing officer.⁹ A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.¹⁰

If the disqualification is granted, N.D.C.C. § 28-32-27(5) provides the method by which a substitute may be appointed. If the disqualified person is one or more members of the agency head, the agency head may appoint a substitute for the disqualified person.¹¹ If the disqualified person is an assistant attorney general, the attorney general may appoint the substitute.¹² If the disqualified person is a hearing officer, the supervising hearing officer may appoint the substitute.¹³ In all other cases of disqualification, the governor shall appoint the substitute.¹⁴

For the above reasons, it is my opinion that hearing officers in quasi-judicial proceedings may disqualify themselves where a conflict under N.D. Const. art. XIV, § 2(5) exists if statutory or constitutional authority exists for the appointment of a substitute, however, if no statutory or constitutional authority to appoint a substitute is present, the Rule of Necessity would operate so as not to require the public official to disqualify him or herself from the quasi-judicial proceeding.

⁸ N.D.C.C. § 28-32-27(1).

⁹ N.D.C.C. § 28-32-27(3).

¹⁰ N.D.C.C. § 28-32-27(4).

¹¹ N.D.C.C. § 28-32-27(5)(b).

¹² N.D.C.C. § 28-32-27(5)(a).

¹³ N.D.C.C. § 28-32-27(5)(c).

¹⁴ N.D.C.C. § 28-32-(5)(d).