

Title 115

ETHICS COMMISSION

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**115-05-01-01. Applicability**

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.

**115-05-01-02. Definitions**

1. "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.
2. "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.

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. "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 the director, officer, commissioner, head, or other executive with a Potential Conflict of Interest or Campaign Monetary or In-Kind Support 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 which the matter is before shall be considered as the Neutral Reviewer;
- b. If the director, officer, commissioner, head, or other executive with a Potential Conflict of Interest or Campaign Monetary or In-Kind Support is an employee of the legislature, the director, officer, commissioner, head, or other executive's supervisor may be considered as the Neutral Reviewer;
- c. If the director, officer, commissioner, head, or other executive with a Potential Conflict of Interest or Campaign Monetary or In-Kind Support is a member of the Governor's

cabinet, the Governor's designated ethics officer shall be considered as the Neutral Reviewer;

- d. If the director, officer, commissioner, head, or other executive with a Potential Conflict of Interest or Campaign Monetary or In-Kind Support is an appointed public official, the appointing official shall be considered as the Neutral Reviewer; or
  - e. If none of the above apply, the director, officer, commissioner, head, or other executive shall make the determination but must report the disclosure and decision in the manner set forth in 115-05-01-06 within 7 calendar days.
5. "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.
6. "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 the portion of a public hearing where:
- a. There are not pre-identified parties;
  - b. Only public input or comment is being received; or
  - c. The hearing is for quasi-legislative purposes, such as administrative rulemaking.

7. "Relationship in a Private Capacity" means 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.
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.

**115-05-01-03. Disclosure**

1. 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 Potential Conflict of Interest and Campaign Monetary or In-Kind Support.
  - a. The disclosure must:
    - i. Be made in the manner set forth in 115-05-01-06;
    - 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.

#### **115-05-01-04. Review, Decision, and Action**

1. As provided in Section 115-04-01-02(6), the director, officer, commissioner, head, or other executive 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.
2. 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. Whether the Potential Conflict of Interest or Campaign Monetary or In-Kind Support involves a party to the proceeding;
  - b. The issues involved in the Quasi-Judicial proceeding;
  - c. Other factors known to the director, officer, commissioner, head, or other executive that create an appearance of bias to a reasonable person; and
  - d. For Campaign Monetary or In-Kind Support, the following factors should also be considered:
    - i. The size of the Potential Conflict of Interest or Campaign Monetary or In-Kind Support;
    - ii. The degree of involvement in the campaign; and
    - iii. Whether the Campaign Monetary or In-Kind Support is within the current or immediately preceding election cycle.
3. 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.
4. 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.
5. 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.

**115-05-01-05. Substitution**

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 director, officer, commissioner, head, or other executive's recusal or abstention in any Quasi-Judicial proceeding.

#### **115-05-01-06 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 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 director, officer, commissioner, head, or other executive; 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 director, officer, commissioner, head, or other executive has been recused from any further involvement in the matter.