

## **N.D.A.G. Letter to Chapman (March 3, 199)**

March 3, 1999

Kevin J. Chapman  
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PO Box 1366  
Williston, ND 58802-1366

Dear Mr. Chapman:

Thank you for your February 2, 1999, letter asking about a possible conflict of interest of a Watford City council member. The city council member is an employee of McKenzie Electric Cooperative. You state that Montana Dakota Utilities is currently providing electricity to the residents of Watford City pursuant to a franchise that is due to expire in 2001. McKenzie Electric would like to provide electricity to the residents of Watford City beginning in the year 2001, or perhaps sooner. When this matter comes up for discussion by the Watford City council, you ask whether a conflict of interest would affect the city council member's authority to participate and vote on the matter.

You ask specifically about North Dakota Century Code (N.D.C.C.) § 48-02-12, which prohibits members of governing boards from being "pecuniarily interested or concerned directly or indirectly in any public contract. . . ." The Attorney General has previously concluded that N.D.C.C. § 48-02-12 applies only to public contracts for the altering, repairing, or constructing of buildings. See letter from Attorney General Robert Wefald to David Wheelihan (April 13, 1983), letter from Attorney General Nicholas Spaeth to Robert Alexander (July 29, 1985), letter from Attorney General Nicholas Spaeth to Hugh Seaworth (April 7, 1987), letter from Attorney General Nicholas Spaeth to Lawrence Kropp (June 26, 1990), and letter from Attorney General Nicholas Spaeth to John Mahoney (December 30, 1992). Thus, N. D. C. C. § 48-02-12 is not relevant to the matter at issue.

There are two statutes that may be relevant in this situation. First, N.D.C.C. § 40-13-05.1 provides:

No municipal officer shall refuse or fail to disclose to the governing board to which he or she is a member, any personal interest, direct or indirect, in any contract requiring the expenditure of municipal funds. Any person who shall violate any provision of this section shall be guilty of an infraction and shall, in addition, be subject to removal from office.

N.D.C.C. § 40-13-05.1 may be relevant if the contract at issue requires the expenditure of municipal funds.

The other section that is relevant is N.D.C.C. § 44-04-22, which provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

The Attorney General has previously determined what "direct", "substantial", "personal", and "pecuniary" mean as used in this section. See 1995 N.D. Op. Att'y Gen. 21, 24-25 (September 8 opinion to Rep. Rick Berg). That opinion also provides:

Whether a member of a governing body has a "direct and substantial personal or pecuniary interest" is very fact specific . . . . Most questions of this type can be answered with the assistance of the city attorney. However, if the issue is still in doubt, I suggest that whether a member may participate on a matter be decided by a majority of the rest of the body under N.D.C.C. § 44-04-22.

Id. at 25.

I trust the enclosed information will be helpful in determining whether the city council member may participate in and vote on the matter at issue.

Sincerely,

Heidi Heitkamp  
Attorney General

las/vjk