

LETTER OPINION
2020-L-09

December 23, 2020

Mr. Ron Goodman
Chairman
Ethics Commission
101 Slate Dr Ste 4
Bismarck, ND 58503-6171

Dear Mr. Goodman,

Thank you for your question regarding whether the Ethics Commission may promulgate rules defining “lobby” and “lobbyist” within the context of lobbyist gifting restrictions, which conflict with the statutory definitions adopted by the Legislature in North Dakota Century Code ch. 54-66. It is my opinion that the Ethics Commission has the constitutional authority to promulgate rules defining “lobby” and “lobbyist” within the context of the lobbyist gifting restrictions even if those definitions are broader than what has been passed by the Legislature.

ANALYSIS

North Dakota voters approved a constitutional amendment in November 2018 creating Article XIV and the North Dakota Ethics Commission (Ethics Commission) “[i]n order to strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government”¹ Article XIV, § 2, provides: “A lobbyist may not knowingly give, offer, solicit, initiate, or facilitate a gift to a public official. A public official may not knowingly accept a gift from a lobbyist.”² Although the Constitution defines “public office” and “public official” as “any elected or appointed office or official of the state’s executive or legislative branch, including members of the ethics commission, or members of the governor’s cabinet, or employees of the legislative branch,” it does not define “lobbying” or “lobbyist.”³

¹ N.D. Const. art. XIV, § 3(1).

² N.D. Const. art. XIV, § 2(1).

³ N.D. Const. art. XIV, § 4(2).

During the 2019 66th Legislative Session, the Legislature enacted H.B. 1521 which created N.D.C.C. ch. 54-66, “State Government Ethics.” Section 54-66-03, N.D.C.C., prohibits gifts from lobbyists.⁴ Section 54-66-01(7), N.D.C.C., defines “lobby” as an activity listed in subsection 1 of § 54-05.1-02, and N.D.C.C. § 54-66-01(8) defines “lobbyist” as an individual required to register under § 54-05.1-03. Chapter 54-05.1, N.D.C.C., regulates legislative lobbying, and limits lobbying to “any person who . . . [a]ttempts to secure the passage, amendment, or defeat of any legislation by the legislative assembly or the approval or veto of any legislation by the governor of the state. . . . [or who] [a]ttempts to influence decisions made by the legislative management or by an interim committee of the legislative management.”⁵

On October 6, 2020, the Ethics Commission adopted rules regarding gifts between lobbyists and public officials.⁶ Section 115-03-01-01(3), N.D.A.C., defines “lobby” as:

- a. Attempt[ing] to secure the passage, amendment, or defeat of any legislation by the legislative assembly or the approval or veto of any legislation by the governor of the state.
- b. Attempt[ing] to influence decisions made by the legislative management or by an interim committee of the legislative management.
- c. Attempt[ing] to secure passage, amendment, or defeat of any administrative rule or regulation by any department, agency, or body of the state's executive branch.
- d. Attempt[ing] to otherwise influence public official action or decision.

Section 115-03-01-01(4), N.D.A.C., defines “lobbyist” as “a person who engages in activity that falls within the definition of the term “lobby” as defined in this rule.”

The Ethics Commission’s rules defining “lobby” and “lobbyist” in the context of lobbyist gifting restrictions adopts the definitions set forth in N.D.C.C. § 54-66-01(7) and (8), but

⁴ “Lobbyist” is defined by N.D.C.C. § 54-66-01(8) as any person required to register under N.D.C.C. § 54-05.1-03. Section 54-05.1-03, N.D.C.C., requires any person engaging in “lobbying,” as defined by N.D.C.C. § 54-05.1-02, to register.

⁵ N.D.C.C. § 54-05.1-02(1).

⁶ N.D.A.C. art. 115-03.

expands those definitions to add two additional subsections to include all “public officials” as defined in Article XIV of the Constitution.⁷

The Constitution grants jurisdiction to regulate lobbyists to both the Ethics Commission and the Legislature.⁸ The Ethics Commission is constitutionally authorized to promulgate ethics rules relating to transparency, corruption, elections, and lobbying, to be followed by all lobbyists, public officials, and candidates for public office.⁹ The Legislature is also granted authority to enact laws to “facilitate, safeguard, or expand, but not to hamper, restrict, or impair, this article.”¹⁰

This concurrent jurisdiction is analogous to the interplay between the Legislature and the North Dakota Supreme Court enacting procedural rules for the judicial system. “Th[e] Court is constitutionally authorized to promulgate rules of procedure to be followed by all courts of this state.”¹¹ The Court has explained the interplay between statutory procedures and rules promulgated by the Court:

That we possess the rule-making power does not imply that we will never recognize a statutory rule. We will recognize “statutory arrangements which seem reasonable and workable” and which supplement the rules we have promulgated.... However, when a conflict arises, or a statutory rule tends to engulf a general rule of admissibility, we must draw the line. The legislature cannot repeal the Rules of Evidence or the Rules of Civil Procedure made pursuant to the power provided us in [the Constitution]. . . . This constitutional provision places “final authority over procedural rules” with our court. Although statutorily-enacted rules of procedure which supplement the rules we have promulgated may remain in effect until superseded or amended by this court ..., Article VI, Section 3, mandates that a court-promulgated procedural rule prevails in a conflict with a legislatively-enacted rule of procedure. ¹²

⁷ See N.D.A.C. § 115-03-01-01(3)(c) and (d).

⁸ Article XIV, § 3(2), N.D. Const., grants the Ethics Commission the constitutional authority to promulgate rules regarding the lobbying of public officials and N.D. Const. art. XIV, § 4(1) grants the Legislature the authority to enact laws to facilitate, but not restrict or hamper.

⁹ N.D. Const. art. XIV, § 3(2).

¹⁰ N.D. Const. art. XIV, § 4(1).

¹¹ *City of Fargo v. Ruether*, 490 N.W.2d 481, 483 (N.D. 1992); see also N.D. Const. art. VI, § 3.

¹² *City of Fargo v. Ruether*, 490 N.W.2d 481, 483 (N.D. 1992) (citations omitted).

Because the Ethics Commission has constitutional authorization to promulgate rules similar to that granted to the Court, it seems a similar analysis would guide the interplay between statutory provisions and rules promulgated by the Ethics Commission. Thus, if the rules passed by the Ethics Commission conflict with a statute, the Constitution mandates that the rule promulgated by the Commission prevails.

“[W]hen viewing a procedural statute and rule which may or may not conflict, [the Court has] demonstrated a preference for harmonizing the two when possible.”¹³ The Court previously outlined several principles for construing constitutional provisions:

When interpreting the state constitution, our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement. The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself. We give words in a constitutional provision their plain, ordinary, and commonly understood meaning. When interpreting constitutional provisions, we apply general principles of statutory construction. We must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions.¹⁴

In its request for an opinion, the Ethics Commission indicates that:

[T]he statute is too narrow in defining “lobby” and “lobbyist” as it does not cover situations involving attempts to influence public officials other than the Governor and Legislators. The Commission has jurisdiction over “any elected or appointed office or official of the state’s executive or legislative branch, including members of the ethics commission, or members of the governor’s cabinet, or employees of the legislative branch.” The definition of “lobby” and “lobbyist” fails to cover actions by public officials other than legislature and Governor, thereby limiting the ability of the Commission to fulfill its constitutional mandate. The Commission believes that, for the sole purpose of defining acceptable or prohibited gifts under N.D.C.C. ch. 54-66, the Commission needs to be able to adopt an expanded definition of

¹³ *State v. Knudson*, 499 N.W.2d 872, 874 (N.D. 1993).

¹⁴ *Kelsh v. Jaeger*, 641 N.W.2d 100, 104 (N.D. 2002) (citations omitted).

lobby to address attempts to otherwise influence public official action or decision.¹⁵

Article XIV, N.D. Const., clearly provides that a “public official” may not accept gifts from a lobbyist, and defines “public official” to include “any elected or appointed office or official of the state’s executive or legislative branch, including members of the ethics commission, or members of the governor’s cabinet, or employees of the legislative branch.”¹⁶ By indicating that a “public official” may not accept a gift from a lobbyist, and not just a legislator or the Governor as originally provided by statutory law, it can be determined that those who drafted the language of N.D. Const. art. XIV intended for “lobbyist” and “lobby” to be defined in a manner that encompassed those attempting to influence the official action of all “public officials.” The Ethics Commission must be able to fulfill its constitutional directive. By limiting the definitions of “lobby” and “lobbyist” to only those persons attempting to influence the legislators or the Governor, the Ethics Commission cannot give effect to the entirety of N.D. Const. art. XIV, § 2.

It is my opinion that the definitions of “lobby” and “lobbyist” in N.D.C.C. § 54-66-01(7) and (8) limit the reach of the Ethics Commission’s rules regarding gifting to legislative lobbying by not including lobbying of any public official of the state’s executive or legislative branch. This is inconsistent with the Ethics Commission’s constitutional directive and authority.¹⁷ The Court has held that “Article VI, Section 3, mandates that a court-promulgated procedural rule prevails in a conflict with a legislatively-enacted rule of procedure.”¹⁸ Similarly, in this circumstance, the Ethics Commission’s lobbyist gifting rules defining “lobby” and “lobbyist” must prevail.¹⁹

¹⁵ Letter from Ron Goodman, Chair, N.D. Ethics Comm’n, to Att’y Gen. Wayne Stenehjem (July 23, 2020).

¹⁶ N.D. Const. art. XIV, §§ 2, 4.

¹⁷ Because it was not requested, this opinion does not address the constitutionality of the definitions of lobby and lobbyist contained in N.D.C.C. ch. 54-66. It is limited to the question of whether the Ethics Commission has the authority to create rules defining lobby and lobbyist within the context of lobbyist gifting restrictions. This opinion should not be construed as addressing the constitutionality of any portion of N.D.C.C. ch. 54-66.

¹⁸ *City of Fargo v. Ruether*, 490 N.W.2d 481, 483 (N.D. 1992) (quoting *City of Fargo v. Dawson*, 466 N.W.2d 584, 586 n. 1 (N.D. 1991)).

¹⁹ Oklahoma, while applying a different analysis, reached the same conclusion in resolving a dispute between the Oklahoma Ethics Commission and Oklahoma State Legislature over jurisdiction to promulgate ethics rules. *See Ethics Comm’n v. Cullison*, 850 P.2d 1069 (Okla. 1993).

The Ethics Commission has attempted to harmonize the conflicting statute with N.D. Const. art. XIV, § 2 by adopting the definition of “lobby” as provided in N.D.C.C. § 54-66-01(7), the plain language definition of “lobby” at the time of passage of the initiated measure in November 2018,²⁰ but then expanding that definition by adding two additional subsections to expand the definition of “lobbying” to include the state’s executive branch in order to comport with the constitutional directive. This is consistent with the current interpretive guidance regarding interpretation and enactment of constitutional provisions.²¹

It is my opinion that the Ethics Commission is constitutionally authorized to promulgate a rule defining “lobby” and “lobbyist” as set forth in the proposed rule in a manner which expands the statutory definition of “lobby” and “lobbyist” in order to fulfill its constitutional mandate in N.D. Const. art. XIV.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²²

²⁰ The only definition of “lobby” within the North Dakota Century Code in November 2018 is N.D.C.C. § 54-05.1-02(1).

²¹ See *Kelsh v. Jaeger*, 641 N.W.2d 100, 104 (N.D. 2002) and *City of Fargo v. Ruether*, 490 N.W.2d 481, 483 (N.D. 1992).

²² See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).