

LETTER OPINION
2000-L-114

June 28, 2000

Honorable Rich Wardner
State Senator
1042 12th Avenue West
Dickinson, ND 58601-3654

Dear Senator Wardner:

Thank you for your letter regarding a potential conflict of interest if the owner and operator of Queen City Cab (hereafter "the owner"), had been elected to the position of president of the Dickinson board of city commissioners.

You indicate in your letter that the owner has received grants from the city of Dickinson for vehicles and equipment for use in his cab service. These funds are provided by the Federal Transit Administration's (hereafter, "FTA") Rural Transit Assistance Program under 49 U.S.C. § 5311, through the North Dakota Department of Transportation (hereafter, "DOT"). The city of Dickinson enters into a Lease-Purchase and Operating Agreement whereby the city leases vehicles and equipment to the owner for use in his cab service. The city of Dickinson owns the vehicles and equipment which are 80% paid for by the federal funds and 20% paid for by the owner. The owner, in turn, agrees to operate a cab service in the city of Dickinson. The owner also receives liability insurance coverage for the cabs through the North Dakota Insurance Reserve Fund (hereafter, "NDIRF"). Apparently in the past the owner has applied for but has not received from NDIRF comprehensive insurance coverage for the cabs. The Dickinson City Commission votes on the granting of the FTA grants. You ask the following questions:

1. Can a sitting city commissioner be a beneficiary of the FTA grant?
2. If elected, would it affect current purchases through FTA grants received by the owner, doing business as Queen City Cab?

Honorable Rich Wardner
June 28, 2000
Page 2

3. If elected, would it affect the owner's ability to purchase full coverage insurance through the city for his cab company from NDIRF?

<PAGE NAME="p.L-115">To specifically answer questions 1 and 2, it would be necessary to review federal law to determine whether federal law would limit the owner's receipt of these federal funds in the event he had been elected president of the Dickinson City Commission. In addition to any federal requirements, the owner would also have been subject to any state laws regarding conflicts of interest. Rather than review the federal laws, I will focus on the state laws regarding conflicts of interest since such review will respond to your questions.

The most relevant state laws are N.D.C.C. §§ 12.1-13-02 (making it a crime for a public servant to acquire a pecuniary interest in any property, transaction, or enterprise in contemplation of official action), 12.1-13-03 (making it a crime for a public servant who sells or leases property, or makes contracts in his official capacity, from becoming interested in such sale, lease, or contract, except as specifically authorized), 40-13-05 (prohibiting a city officer from being interested in any contract, work, or business of the city unless approved unanimously by the other members of the city governing body), 40-13-05.1 (making it a crime for a city officer to refuse or fail to disclose to the governing board any personal interest in any contract requiring the expenditure of city funds), and 44-04-22 (requiring a member of a city governing body who has a direct and substantial personal or pecuniary interest in a matter before that body to disclose such interest to the body and prohibiting that member from participating in or voting on that matter without the consent of a majority of the rest of the body).

The most limiting of these provisions in this case is N.D.C.C. § 12.1-13-03, which provides, in relevant part:

1. Every public servant authorized to sell or lease any property, or to make any contract in his official capacity, alone or in conjunction with other public servants, who voluntarily becomes interested individually in the sale, lease, or contract, directly or indirectly, is guilty of a class A misdemeanor.
2. Subsection 1 shall not apply to:
 - a. Contracts of purchase or employment between a political subdivision and an officer of that subdivision, if the contracts are first

Honorable Rich Wardner
June 28, 2000
Page 3

unanimously approved by the other members at a meeting of the governing body of the political subdivision, and a unanimous finding is entered in the official minutes of that body that the contract is necessary because the services or <PAGE NAME="p.L-116">property contracted for are not otherwise obtainable at equal cost.

. . . .

N.D.C.C. § 12.1-13-03 would make it a crime for the president of the Dickinson City Commission to sell or lease any property, alone or in conjunction with other city commissioners if the president voluntarily becomes interested individually in the sale or lease, directly or indirectly.

The interest prohibited by N.D.C.C. § 12.1-13-03 includes one where the officer is a substantial stockholder and officer in a corporation with which he makes the contract. *State v. Robinson*, 2 N.W.2d 183, 188 (N.D. 1942). The interest prohibited by N.D.C.C. § 12.1-13-03 is an interest that accrues to the officer personally and not in a representative capacity such as that of a receiver, trustee, or administrator. *Id.* at 189. "Also, the individual interest prohibited by N.D.C.C. § 12.1-13-03 refers to either a financial or a proprietary (in other words, ownership) interest." 1999 N.D. Op. Att'y Gen. L-38, L-41 (May 19 to Russell Hanson). A voluntary interest prohibited by subsection 1 of N.D.C.C. § 12.1-13-03 is one where the act is performed willingly or intentionally as distinguished from being done under compulsion or coercion. *State v. Pyle*, 71 N.W.2d 342, 344 (N.D. 1955).

The owner's interest in the Lease-Purchase and Operating Agreement is a personal, financial interest. It also appears the owner is voluntarily interested in the Agreement. Thus, it is my opinion that entering into the same type of Lease-Purchase and Operating Agreement that the owner currently has with the city if the owner had been president of the board of city commissioners would be prohibited by N.D.C.C. § 12.1-13-03 because it would involve the city's leasing of vehicles to the owner.

It is less clear whether N.D.C.C. § 12.1-13-03 would apply to the owner's current contract, which was formed when he was not a city official but which would extend several years into his term as president if he had been elected. There could be instances where it would be to the benefit of the governmental entity to continue a pre-existing contract with a current city official. In addition, since the contract existed before he would have been elected as

Honorable Rich Wardner
June 28, 2000
Page 4

president of the commission, there is no potential for undue influence. Accordingly, it is my opinion that it would not have been a violation of N.D.C.C. § 12.1-13-03 for the owner to continue fulfilling his pre-existing contractual obligations to the city after he was elected as the president of the city commission. However, the <PAGE NAME="p.L-117">owner could not have been involved in any future action of the commission involving the current contract and the commission could not have renewed the contract if the owner were serving as president of the commission.

Your third question relates to whether the owner would have been able to purchase full coverage insurance through the city for his cab company, from NDIRF. NDIRF has the authority to provide coverage to the city of Dickinson for the types of liabilities established in N.D.C.C. ch. 32-12.1 and may provide such additional coverage as the governing body of the city determines to be appropriate. N.D.C.C. § 32-12.1-05. Thus, whether NDIRF continues to provide liability coverage for the owner's cabs would be finally determined by both NDIRF and the city governing body.

Sincerely,

Heidi Heitkamp
Attorney General

las/vkk