

## **N.D.A.G. Letter to Vogel (July 5, 1989)**

July 5, 1989

Honorable Sarah Vogel  
Commissioner  
North Dakota Department of Agriculture  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Commissioner Vogel:

Thank you for your May 31, 1989, letter concerning appointments to the Credit Review Board. You ask whether a person who has contracted to provide services to the state of North Dakota as an agricultural mediation negotiator is eligible for appointment to the Credit Review Board.

N.D.C.C. § 6-09.10-02 governs the membership of the Credit Review Board. That statute provides, in part, that "[n]o member of the board may hold state office or serve in state office or serve in state government in any capacity at any time of appointment or during service on the board." (Emphasis supplied.) The issue is whether a person who has contracted with the state as a negotiator for the Agricultural Mediation Service is "serv[ing] in state government in any capacity" and thereby prohibited from an appointment pursuant to N.D.C.C. § 6-09.10-02.

The relevant statutory language of N.D.C.C. § 6-09.10-02 does not clearly establish the scope of this prohibition. The statute could be interpreted two different ways. One interpretation could be that only elected or appointed state officials or persons employed in a state office may not be appointed to the board. If so, an independent contractor could be appointed. A second interpretation could be that a person who actually serves for the state government, even as an independent contractor, is serving in state government and may not be appointed. If so, an Agricultural Mediation Service negotiator, who has contracted to serve on a full-time basis for the Agriculture Department, may be serving in state government in such a capacity as to be disqualified from appointment to and membership on the Credit Review Board.

Because of the ambiguous language in this statute, evidence of legislative intent may be consulted. Hirsch v. Scherr, 295 N.W.2d 131 (N.D. 1980). Reviewing and analyzing a statute's legislative history may be used to resolve an ambiguous statute. N.D.C.C. § 1-02-39(3); North America Coal Corporation v. Haber, 268 N.W.2d 593 (N.D. 1978). The legislative history of N.D.C.C. § 6-09.10-02 contains no discussion concerning the scope of the prohibition contained within the statute. However, Representative Brokaw's initial request to the Legislative Council for a bill draft indicates that the purpose of the prohibition was to ensure that if a conflict of interest existed, an individual would be

disqualified from appointment. N.D. Legislative Council Work Request Form L.C. No. 50760 concerning H. 1494 (Jan. 16, 1985). This legislative history does not definitively resolve the statute's ambiguity.

I next look to the rule of statutory construction which states that words used in a statute must be understood in their ordinary sense. N.D.C.C. § 1-02-02; Knoff v. American Crystal Sugar Company, 380 N.W.2d 313, 316 (N.D. 1986). The dictionary defines the term "serve" as follows: "to do services or duties for; give service to; aid; assist; help." Websters New World Dictionary 1301 (2d ed. 1974). The definition of "capacity" is "a condition of being qualified or authorized; person, function, status." *Id.* at 209.

Applying the ordinary sense meaning of the words "serve" and "capacity," it is my conclusion that the prohibition found within N.D.C.C. § 6-09.10-02 applies to any person who performs services and duties for the state and serves in state government in any position, function, or status.

Whether a particular individual falls within this prohibition would be a question of fact. As you know, this office issues opinions only to resolve legal issues and not questions of fact. I, therefore, cannot give you a formal opinion.

I can tell you, however, that based upon the facts available to me, it appears that the statutory prohibition of N.D.C.C. § 6-09.10-02 could apply to the negotiator in question. The person at issue here may be performing the state's duties as a full-time negotiator. He could be considered an actor on behalf of state government. Therefore, the negotiator could be found to be serving and functioning in state government. His situation may differ from that of other independent contractors. An independent contractor like a construction company, for example, would not be considered as an actor for the state or as a part of the state government.

It should also be noted that a person who acts for the state in credit counseling matters could be found to have a conflict of interest in serving on the Credit Review Board and, thus, could be found to be prohibited from appointment to the Board, applying the statute's legislative intent.

However, this issue is not clearly resolved by the statute or its legislative history, and, as I stated above, it depends upon the resolution of questions of fact. If you believe this issue should be more clearly resolved, you may wish to seek an amendment to the statute during the next legislative session.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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