

State of Nebraska

Accountability and Disclosure Commission

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ADVISORY OPINION #204

SUBJECT: Conflicts of Interest/ County Officials/ Adoption of Budgets/ Meaning and Consequences of Business Association

Requested by: Larry J. Dix, Executive Director of Nebraska Association of County Officials ("NACO")

Questions Presented: "1. Can a county board member who serves on the Board of Directors of the Nebraska Association of County Officials ("NACO") vote to approve the annual county budget if the budget includes a general appropriation for dues and subscriptions that could include payment for NACO's membership dues?"

"2. Can a county board member who serves on the Board of the Nebraska Association of County Officials vote on a claim to approve payment for the annual dues for NACO?"

Conclusion: 1. The answer to the first question is "Yes." Where a county budget generally describes an appropriation for dues and subscriptions without identification or ear-marking for specific organizations, a county board member who serves on the Board of Directors of the Nebraska Association of County Officials may vote to approve such a general appropriation, even though later action by the Board could include use the appropriation to pay NACO membership dues.

2. The answer to the second question is "No." A county board member who also serves on the Board of the Nebraska Association of County Officials may not vote on a claim to approve payment for dues where the specific recipient is identified as NACO.

Scope of this Opinion: This opinion is limited in scope to the precise questions presented by the Requester, as stated above.

Analysis Concerning Question 1: Question 1 asks whether a member of a county board who is also on the Board of Directors of NACO can act to approve the annual county budget which includes general appropriations for dues and subscriptions, without identifying a specific recipient, which might at a later date be utilized to pay membership dues to NACO.

The applicable section of the Nebraska Political Accountability and Disclosure Act ("NPADA") which applies to this question is Section 49-1499.03(1)(a) R.R.S. 2010, which states as follows:

"An official of a political subdivision designated in section 49-1493 [which includes "(10) An elected county official"] who would be required to take any action in the discharge of his or her official duties that may cause financial benefit or detriment to him or her, a member of his or her immediate family, or a business with which he or she is associated, which is distinguishable from the effects of such action on the public generally or a broad segment of the public, shall take the following action as soon as he or she is aware of such potential conflict or should reasonably be aware of such potential conflict, whichever is sooner..."

In resolving the question of whether there is a conflict of interest presented by the Requester's first question, we turn to the statutory language. Nothing presented in the question suggests that there is any personal financial benefit to, "him or her" or a "member of his or her immediate family." This leaves the question of whether there is a "financial benefit or detriment", to a "business with which he or she is associated."

In order to resolve that question, we turn to a definition of what constitutes a "business" as well as what constitutes a "business with which the individual is associated." Both of these terms are defined by the NPADA.

The NPADA defines the term "business" in broad terms which includes non-profit corporations, such as NACO. Section 49-1407, R.R.S. 2010 defines "business" to mean:

"...any corporation, partnership, limited liability company, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint-stock company, receivership, trust activity or entity."

The NPADA further defines the term "business with which the individual is associated" in Section 49-1408, R.R.S. 2010, as follows:

Business with which the individual is associated or business association shall mean a business: (1) in which the individual is a partner, limited liability company member, director, or officer..."

From the foregoing Statutes, as applied to the first question, we conclude the following:
(1) NACO is a "business" as currently defined in Section 49-1407, R.R.S. 2010; and
(2) A county official who is also a Board Member of NACO would, under the foregoing definitions, have a "business association" with NACO.

Thus, a county official, who is also a Board Member of NACO, would have a conflict of interest in a situation in which the official would be tasked with making a decision which

would constitute a direct financial benefit or detriment to NACO. Concededly this is not a situation in which there is personal financial benefit, but one in which there could be conflicting loyalties between the county board and NACO.

However, in the situation described in the first question, the county board member is not required to make a decision which would cause financial benefit or detriment to NACO because the appropriation in question does not specify how funds appropriated for “dues and subscriptions” are to be spent. NACO is not specifically identified in the “general appropriation.”

In the absence of a specific reference or “ear-marking” of the appropriation to a specific organization the county official is not confronted with a conflict and may vote on the general appropriation—even though it is possible that later action of the county board may determine that the funds should go, in whole or in part, to NACO. Nor is it possible to assume from the general language of the budget, the future intentions of the county board with respect to disposition of general proceeds allocated to “dues and subscriptions.”

We are mindful that the statute in question, Section 49-1499.03(1)(a) uses the term “may cause.” However, the Nebraska Accountability and Disclosure Commission (“Commission”) has repeatedly held that this means something more than a mere possibility. With specific respect to this Statute, the Commission has adopted the “reasonably foreseeable” test, which it has succinctly summarized in Advisory Opinion # 144 as follows:

“When considering the application of Section 49-1499, the Commission has used the ‘reasonably foreseeable’ test. That is, any potential benefit or detriment must be reasonably foreseeable. A financial benefit or detriment is not reasonably foreseeable if the benefit or detriment is remote, highly uncertain, contingent, or speculative. See Advisory Opinion #79.” See also, Advisory Opinion #77. .

Thus, the Commission has refused to find a conflict where the possibility of such a conflict is merely “speculative” or “contingent”. Where the language of the budgetary appropriation is general, there are no facts upon which to premise a finding that it is reasonably foreseeable that there is a conflict of interest. Whether NACO will be the beneficiary of an appropriation based upon the information as stated in the subject question is “speculative”, and it is also “contingent” upon subsequent action on the part of the county board.

This finding—that there is not a conflict of interest presented by the terms of the first question—is consistent with the Nebraska Supreme Court’s admonition to the Commission that the terms of the NPADA must be strictly construed. Nothing may be added to the language of statutes within the NPADA, and the language of the statute in question must be accepted without embellishment or addition or further assumptions. See generally, Nebraska Accountability and Disclosure Commission vs. Vokal, 276 Neb. 988, 759 N.W. 2d 751 (2009)

Conclusion with Respect to Question 1: Based upon the foregoing analysis, the answer to the first question must be "Yes." A county board member who is also a member of the Board of Directors of NACO is not confronted with a conflict where the budget only generally describes an appropriation for dues and subscriptions. The county official may vote on the general budgetary appropriation as described in the terms of the question.

Analysis Concerning Question 2: The second question asks whether a county board member, who is also on the Board of Directors of NACO, may vote to approve a specific measure which would approve the annual dues for NACO.

Based upon the analysis above, we conclude that the county board member in the second question is also a Board Member of NACO, and, hence, this person, by virtue of membership on the Board of Directors of NACO, has a business association with NACO.

When the county board takes action to vote to pay for dues of NACO, this would constitute financial gain to NACO. For the person who is a member of both the county board and the Board of Directors of NACO, this action would constitute a conflict of interest under the terms of Section 49-1499.03(1)(a). The conflict would exist because the Board member would have dual loyalties and fiduciary responsibilities both to the county board and to NACO. Consequently the said Board member would be required to take the actions prescribed in cases of potential conflict of interest, as found in NPADA, Section 49-1499.03(1)(a)(i),(ii), and (iii).. Those actions are as follows: The person should prepare a written statement describing the matter and the nature of the conflict; the statement should be filed with this Commission and the county clerk; the person should take such action as the Commission shall advise or prescribe to remove himself or herself from influence over the action or decision on the matter.

Conclusion with Respect to Question 2: Based upon the foregoing analysis, the answer to the second question must be "No." Where a county board member is also on the Board of Directors of NACO and is required to take action upon an expenditure specifically identified as NACO annual dues, the person has a conflict of interest.

Summary: With respect to the first question, a county board member who is also associated with NACO by serving on its Board of Directors may vote to approve the annual county budget where the budget includes a general appropriation for dues and subscriptions. The vote is cast with respect to the county budget where the budget does not specify the organization or organizations which may eventually receive funds from such an appropriation.

With respect to the second question, where the county board member who is also on the Board of Directors of NACO is required to take action or make a decision upon an annual dues payment which is specified as, or otherwise known to be, the annual dues for NACO, that person has a conflict. The person must prepare a written statement

describing the matter and the nature of the conflict, file same with this Commission and the county clerk, and abstain from such action until further advice from the Commission.

ADOPTED as an Advisory Opinion pursuant to Section 49-14,123(10) R.R.S 2010 and Title 4, Chapter 1, Rules of Practice and Procedure. As provided in Section 49-14,123(10), this Advisory Opinion shall be binding upon the Commission unless amended or revoked, concerning the person or public body who requested the opinion and acted in reliance thereon in good faith unless material facts were omitted or misstated by the person in the request for the opinion.

DATED this 9th day of March, 2018

NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION



Andrew Loudon, Acting Chairman