

TO: Erin Oban
North Dakota State Director, Rural Development
United States Department of Agriculture

THROUGH: Farah Ahmad
Chief of Staff
Rural Development
United States Department of Agriculture

FROM: Andrew Tobin
Alternate Designated Agency Ethics Official and Deputy Director
Office of Ethics
United States Department of Agriculture

ANDREW TOBIN Digitally signed by ANDREW TOBIN
Date: 2022.05.10 09:14:56 -04'00'

SUBJECT: Authorization for Participation in Particular Matters involving the State of North Dakota

Introduction:

This memo provides formal authorization for you to participate, as the Rural Development State Director for the State of North Dakota, in specific matters involving your most recent previous employer, the State of North Dakota (ND)¹ pursuant to the Standards of Ethical Conduct at 5 C.F.R. Section 2635.502(d). The impartiality rules impose a one-year cooling off period on all incoming new employees regarding particular matters involving their former employer. 5 C.F.R Section 2635.502(b)(1)(iv). However, the rules also provide a common-sense method for allowing employees to participate in such matters where the potential risk of an appearance of losing impartiality on balance is determined to be minimal and outweighed by the benefit to the public. In such situation, a neutral Ethics Official must issue a written authorization, in accordance with the Standards of Ethical Conduct (at 5 C.F.R. Section 2635.502(d)), which permits an employee to work with his or her former employer. Pursuant to the authority provided to me in Section 2635.502(d), and for the reasons detailed below, this memorandum constitutes formal authorization permitting you to work collaboratively, in your USDA position, with your former employer the State of North Dakota (North Dakota Legislative Assembly, Senate).

Factual Background:

You were elected and served as State Senator with the North Dakota Legislative Assembly (Senate) From December 2014 through March 27, 2022. In that role, you:

- Communicated with constituents, stakeholders, the media, and other public officials regarding proposed and pending legislation and the state legislative process.
- Served on the Senate’s Education, Energy and Natural Resources, Agriculture, Government and Veterans Affairs, and Political Subdivisions Committees.
- Chaired the Legislature’s interim Education Policy Committee.

You were appointed the State Director for USDA Rural Development (RD) in North Dakota as of March 28, 2022. In this position you are expected to meet with state officials, advocating RD’s positions on issues of intergovernmental cooperation and mutual interest or involvement; as well as, create and maintain meaningful partnerships with the state. Given that these positional expectations involve your former employer and that you are currently under a one-year cooling off period (effective until March 28, 2023, based upon your separation date from the State of North Dakota) your current situation may cause a

¹ Erin Oban was a duly elected State Senator representing legislative District 35 (center of the capital city of Bismarck, ND). As a “citizen legislator” working within the North Dakota Legislative Assembly (Senate) she is considered an employee of the State of North Dakota.

reasonable person with access to the relevant facts to question your impartiality in the conduct of your official duties in which ND is or represents a party.

The imposition of a cooling off period on interactions between you, as RD State Director, and your former employer, ND, would effectively render you unavailable for the position to which you were appointed and would present an unreasonable burden on North Dakota RD staffing. This outcome is not in the best interests of the RD, the State of North Dakota, or its citizenry.

Ethics Analysis: The Standards of Ethical Conduct impose a six-factor test for determining whether an authorization to participate is justified. Your situation meets all six factors.

An authorization to participate despite having a covered relationship² is appropriate only when the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. The Office of Ethics makes this determination in writing by weighing six factors, as established in the Standards of Ethical Conduct:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Below is my analysis, based upon the information you have provided to the Office of Ethics:

- (1) Nature of your Relationship with the State of North Dakota: As a State Senator for over 7 years your relationship with the state of North Dakota is best described as substantial. However, since neither the Legislative Assembly nor members of the community you represented³ are, to your knowledge, Rural Development program participants or direct funding recipients the result is a reduction in the potential appearance risks to the USDA. In addition, were another North Dakota state agency to become a RD program or direct funding participant any appearance risks would be further reduced by RD's co-reporting structure, which includes review and decision-making on significant party matters by RD leadership in Washington, D.C., and by the fact that your primary role is to be the liaison for coordination between various levels of North Dakota state government and RD.
- (2) Effect of RD matters upon the Financial Interests of ND: To your knowledge, there are no readily identifiable large scale Rural Development projects in which the State is involved. While it is possible that there may be future projects where the state is an applicant or direct program participant the national Rural Development offices, headquartered in Washington, DC, would also be involved in the review and

² An employee is deemed to have a "covered relationship" with, among others, "any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee. 5 C.F.R. § 2635.502(b)(1)(iv) (underlining supplied).

³ Senator Oban represented District 35 which is geographically located within the heart of the capital city (Bismarck, ND). This urban community does not qualify for any of the opportunities available through USDA Rural Development.

approval process for those projects, as each Rural Development program (RUS, RHS, RBS) has specific protocols and procedural safeguards in place.

- (3) & (4) The Role of the State Director and the sensitivity of the matters (factors three and four): Your role as State Director is largely to facilitate communications between all relevant parties and to lead RD's efforts in North Dakota to engage external stakeholders, both in the private sector as well as on all levels of state and local government. While these efforts are integral to your position, they are not, however, particularly "sensitive" as characterized by these regulations. You will not be leading any confidential investigations or audits of ND as a RD program participant. In addition, while you are the RD State Director, you report directly to RD senior leadership in Washington, D.C. and would be required to discuss any such "sensitive" matters with RD's senior leadership seeking their concurrence and direction before being able to act. This should assuage concerns regarding unilateral action that appears biased in favor of your former employer.

- (5) Difficulty of reassignment of all matters involving the State of North Dakota: It would be unnecessarily burdensome to USDA RD to reassign all communications regarding potential, current, and future projects involving RD and ND. Your role as the State Director is one with a high level of public visibility. It is not reasonably possible to simply assign a neighboring state's RD State Director to the many matters in North Dakota that involve the state. It is similarly not possible (and not a prudent use of taxpayer money) to send a senior official on official travel from RD headquarters in Washington, DC to replace you in the many various meetings and projects where the state is also involved.

- (6) Adjustments to your duties to ensure public trust: The existing co-reporting structure of RD programs provides a sufficient safeguard such that no adjustments to your duties are required. As a long-standing structural safeguard, any significant "specific party matters" for RUS, RBS, or RHS programs will be conducted by RD (North Dakota) employees who also must report these matters to RD leadership in Washington, DC. This means that RFUS, RBS, or RHS officials will be reviewing these matters. As a result of RD's co-reporting structure, you as State Director, do not need to have final approval authority for RD projects where ND receives substantial financial benefit as a direct recipient. Your participation as the main point of contact for coordination between the various levels of government in North Dakota is key to the success of many economic development projects in ND, while the risk of public perception issues due to your prior employment relationship with ND are minimal and outweighed by the fact that the other party here is a state government acting as USDA's partner for the betterment of its citizens.

Conclusion

As USDA's Alternate Designated Agency Ethics Official, I have determined that your participation in those government matters where ND is involved as a stakeholder will not impose a significant appearance risk, because the State government is obligated to act for the benefit of its citizenry. As a result, a member of the public with knowledge of all the relevant factors would not question RD's ability to be impartial in the administration of RD programs. Although you have not participated in any matters involving ND as a State Director for North Dakota's Rural Development Office thus far, your years of North Dakota-specific expertise means that your future participation will be of substantial benefit for the State of North Dakota and for successfully implementing Rural Development's agenda throughout the state.

For the reasons detailed above, this memorandum constitutes the required written determination by me, as USDA's Alternate Designated Agency Ethics Official, authorizing your participation in those RD matters involving ND. This authorization is effective immediately and means that you may properly communicate with ND including former colleagues in your official role as RD State Director to North Dakota.

If you have any questions, please do not hesitate to contact me at Andrew.tobin@usda.gov or via telephone at (202) 720-2251.