



SECRETARY OF STATE
STATE OF NORTH DAKOTA
600 EAST BOULEVARD AVENUE DEPT 108
BISMARCK ND 58505-0500

January 5, 2021

TO: Representative Klemin and Dave Thiele

FR: Al Jaeger Secretary of State

RE: Ethics Commission Chapter 54-66

For the past few months, I have been concerned about certain provisions of the Ethics bill passed last session, now known as Chapter 54-66 of the Century Code, and its relationship to the Secretary of State.

Specifically, I am concerned about the last sentence in 54-66-09(2), plus sections 54-66-03 and 54-66-15.

The last sentence in 54-66-09(2), which can be found in HB 1043, page 4, lines 22, 23, and 24, reads as follows:

"If the commission determined a violation occurred, the commission may impose a penalty authorized by law for the violation or refer the matter to the agency with enforcement authority over the violation" (underlined emphasis added)

Maybe it was not intended, but if the "or" referral option is chosen, it seems to imply that the Secretary of State "shall" make a few determinations as to the penalty imposed in 54-66-03 and 54-66-15. After you review the underlined portions of the following two sections, I will explain my concerns.

54-66-03. Lobbyist gifts - Penalty. (Effective after January 4, 2021)

1. A lobbyist may not give, offer, solicit, initiate, or facilitate a gift knowingly to a public official, and a public official may not accept a gift from a lobbyist knowingly.
2. The prohibition in subsection 1 does not apply when a lobbyist gives, offers, solicits, initiates, or facilitates, or a public official accepts a gift to or from a family member.
3. The secretary of state shall assess a civil penalty upon any individual who violates this section.
 - a. If the gift has a value of five hundred dollars or more, the civil penalty must be two times the value of the gift.
 - b. If the gift has a value of less than five hundred dollars, the civil penalty must be no less than two times the value of the gift and may be up to one thousand dollars.

54-66-15. Prohibition on delivering campaign contributions - Penalty.

A lobbyist may not deliver knowingly a campaign contribution made by another person in violation of subsection 3 of section 2 of article XIV of the Constitution of North Dakota. For a first violation, the secretary of state shall assess a civil penalty of five hundred dollars upon any individual who knowingly violates this section. For a second and subsequent knowing violation of this section, the person is guilty of a class B misdemeanor, and, if the lobbyist is a registered lobbyist, the secretary of state may revoke the lobbyist's registration. For purposes of this section, "deliver" means to transport, transfer, or otherwise transmit, either physically or electronically. This prohibition does not apply to an individual who delivers a campaign contribution to the individual's own campaign or to the campaign of the individual's immediate family member. This prohibition may not be interpreted to prohibit any person from making a campaign contribution, encouraging others to make a campaign contribution, or otherwise supporting or opposing a candidate.

For example, in 54-66-15, the word *knowingly* is used. If the "or" option is selected, is it the Secretary of State, having the *enforcement authority* in 54-66-09(2), who is to decide whether it was *knowingly* given or accepted? Is it the Secretary of State who decides the *value* of the gift in order to determine the civil penalty?

Likewise, in 54-66-15, is it the Secretary of State who decides whether it was *knowingly* violated?

If the answers to the above questions are yes, the Secretary of State, as an administrative agency, has to follow a certain process, provide notice, collect information, etc. in order to make determinations as to whether the violations were *knowingly* made and to make a judgement as to *value*.

Then, if the lobbyist disagrees with the determination of the Secretary of State, there has to be an appeal process similar to what the Secretary of State has to follow with certain decisions the SOS makes related to contractors, notaries, combative sports, etc. That process is not in Chapter 54-66.

My guess is that is not what was intended when the law was passed, but that is not what the law implies. Consider this, the first part of the sentence in 54-66-09(2) reads, "If the commission determined a violation occurred, the commission may impose a penalty authorized by law for the violation"

To me, that means the Commission determined if it were *knowingly* made and determined the *value* of the gift. Then, it could impose a penalty.

But the "or" gives the Commission an option to refer it to the SOS. Why would the Commission do that unless they expected the SOS, with the enforcement authority, to make the decisions? And to do that, the SOS needs the process included in the law.

I have been told the referral to the SOS would only be for the purpose of assessing the fine and collect the penalty. But that is not what the law says. In addition, if the Commission can impose a penalty, why does the SOS need to be the assessing and collection agent for the Commission?

Therefore, I recommend the following amendments.

In the bill, strike over "~~or refer the matter to the agency with enforcement authority over the violation.~~"

Amend Section 54-66-03(3) and strike over Secretary of State and then replace with the Commission.

Amend Section 54-66-15, and in the second sentence strike over Secretary of State and replace with Commission. Then, change the sentence with the words, ".....and, if the lobbyist is a registered lobbyist, the commission may require the secretary of state may to revoke the lobbyist's registration. That removes the SOS from any determinations.

If the SOS is to be the assessing and collection agent for the Commission, then the law must make it clear that is the sole function for the SOS and that the Commission will reimburse the SOS for any costs related to programming, staff time, etc. and for any collection fees that might be necessary if payment is not received.