



DATE: November 3, 2023

TO: Executive Board Members, Legislative Research Council

FROM: Justin Goetz, Code Counsel

RE: Legislator Conflicts of Interest Under S.D. Const. Art. III, § 12.

1. Constitutional Language

The conflict provisions in S.D. Const., Art. III, § 12, are incorporated into, and separate from, the broader prohibitions on conflict of interest in Rule 1B-2 of the Rules of the South Dakota Legislature (Redbook).¹ Article III, § 12, is comprised of two distinct conflict prohibitions that read as two clauses separated by a semicolon. The first regards certain offices held (Office or Appointment Clause), and the second involves contracts with state agencies or any South Dakota county (Interested Contracts Clause):

No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased during the term for which he was elected, nor shall any member receive any civil appointment from the Governor, the Governor and senate, or from the Legislature during the term for which he shall have been elected, and all such appointments and all votes given for any such members for any such office or appointment shall be void; nor shall any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.

Office or Appointment Clause

Interested Contracts Clause

Both provisions:

- Apply regardless of whether the legislator is absent or is excused from the vote that created the office, increased the pay of the office holder, or authorized the payment of moneys;
- Result in the election, appointment, or contract being immediately negated without needing to enforce the negation in court, if found unconstitutional; and
- Expressly apply to elected members, although it is unclear whether appointed legislators are exempt from its provisions.²

The purpose behind both clauses is "to remove any suspicion which might otherwise attach to the motives of members who advocate the creation of new offices or the expenditure of public funds."³

¹ In addition to constitutional and statutory conflict of interest provisions, members are required to "avoid any conflict of interest which would interfere with their duties and responsibilities as legislators, interfere with the exercise of their best judgment in support of the State of South Dakota or create an improper personal benefit." Joint Rule 1B-2.

² The question of whether "there [is] any difference between election and appointment, or are they synonymous" regarding Article III, § 12, was posed by a member of the 1885 Constitutional Convention. There was no answer. 1 *Debates of the Constitution Conventions of 1885 and 1889* at 226 (1907) (hereinafter, *Debates*).

³ *Palmer v. State*, 11 S.D. 78, 75 N.W. 818, 819 (S.D. 1898).

1a. Office or Appointment Clause

This prohibition applies to:

- The entirety of a member's term of office, extending from the moment when a member takes the oath until the member or their successor is sworn in two years later.⁴ Once two years run, the prohibition resets to cover offices, elections, or appointments during the new term; and
- Offices of the state and its political subdivisions⁵ that were newly created or had the office holder's salary increased by state law passed during the member's term, or civil appointment of a member by the Governor or Legislature during the member's term.

This prohibition must be read with S.D. Const., Art. III, § 3's prohibition that members cannot serve in the Legislature while also "holding any lucrative office under the United States, or this state," with limited, listed exceptions.⁶ It also does not apply to members increasing legislator or constitutional officer salaries for a subsequent session.⁷

There has been no South Dakota Supreme Court case that has interpreted the Office or Appointment Clause. All Article III, § 12-invoking controversies appear to involve alleged violations of the Interested Contracts Clause.⁸ With no authority construing the Office or Appointment Clause beyond what has just been stated, further analysis would be speculative. The framer's intent behind this clause, however, may be informative:

[W]e all understand that the object of that section was simply intended to put the Legislature under such limitation of power that they could not provide themselves with offices. The Legislature is not authorized to make new offices, and could not accommodate each one with an office, and could not create new offices and entail expenses upon the state for the purpose of accommodating individual members of the Legislature.⁹

1b. Interested Contracts Clause

Unlike the Office or Appointment Clause, the Interested Contracts Clause applies to contracts entered during the member's term and a year after the term ends. This provision likely captures appropriations enacted in a member's final regular session, as the appropriation may authorize expenditures for the next fiscal year, extending over six months beyond the end of the member's term. Additionally, this prohibition applies to a contract:

- In which a member has an interest, directly or indirectly;
- With a state agency or county government entity; and
- That is authorized by a law passed while the member served in the Legislature.

⁴ S.D. Const., Arts. [III, § 8](#) & [XXI, § 3](#). See also [S.D. Const., Art. XXVI, § 19](#) (specifying the terms of the first legislators as ending on the first Tuesday, after the first Monday, in January 1891).

⁵ See *1 Debates* at 223.

⁶ The Attorney General, in a 1976 opinion, indicated that employment alone was not a lucrative office. [S.D.A.G. Op. No. 76-104, at pg. 3 \(Oct. 26, 1976\)](#). In a 1982 opinion the Attorney General further clarified that any officeholder is a person charged with exercising, individually or on a board, any sovereign power of the state, and the person need only be compensated for this service for the office to be "lucrative." [S.D.A.G. Op. No. 82-23](#), at pg. 3 (April 21, 1982). Note, however, that in analyzing S.D. Const. Art. III, § 12's Interested Contracts Clause, the Supreme Court clarified that a contract of employment with the state is a prohibited contract with the state, thereby prohibiting Legislative service and employment under a different provision of the Constitution. See [Palmer](#), 11 S.D. 78, 75 N.W. at 819 ("If the board was authorized to employ counsel at the expense of the state, and the statute cited clearly clothed it with such authority, such employment created a contract with the state.").

⁷ See [S.D. Const., Art. XXI, § 2](#); see also [State ex rel. Grigsby v. Ostroot](#), 75 S.D. 319, 325-26, 64 N.W.2d 62, 65-66 (1954).

⁸ The South Dakota Supreme Court is clear that the entirety of Article III, § 12, is to be "strictly interpreted" and its purpose is "apparent." See [Pitts v. Larson](#), 2001 S.D. 151, ¶¶ 13-14, 638 N.W.2d 254, 257-58. But it has not declared an election or appointment to be valid or void based on the Office or Appointment Clause.

⁹ *1 Debates* at 225.

The purpose of the Interested Contracts Clause was described by Supreme Court Presiding Judge Whiting:

In enacting this provision of the Constitution the framers thereof had in mind, not the time of entering into the contract nor the relation of the parties at that or any subsequent time, not even any danger that the legislator might obtain an unfair contract; but they had in mind solely the time and his relation to the state *when he should cast his vote*, and they sought to remove from his path an influence that might affect *his vote*. This constitutional provision was designed to prevent any legislator, while he should be serving the state in the enactment of laws, from being tempted and influenced, either consciously or unconsciously, by any selfish interests.¹⁰

2. South Dakota Supreme Court Case Law on Interested Contracts Clause

Five South Dakota Supreme Court cases have construed the Interested Contracts Clause and are summarized:

- A contract violates this provision if it is express (i.e., terms spelled out orally or in writing) or implied (e.g., formed through actions or behavior);¹¹
- Either a special appropriation or the general appropriations act may provide the authorization by law that triggers Article III, § 12's prohibition on any resulting contract with a member;¹²
- Statute that authorizes the ability to employ or to contract, without appropriation, is also sufficient to trigger Article III, § 12's prohibition on any resulting contract;¹³
- A contract that violates Article III, § 12 may exist when a member:
 - Receives a contract to provide legal services for a state agency;¹⁴
 - Is a stockholder in a corporation that obtains a state contract on bid;¹⁵
 - Is president of the company awarded a contract on state bid, despite being the lowest bid;¹⁶ and
 - Has non-legislative state employment that is authorized by state law.¹⁷
- An employment contract between a member and a state agency, the payment of which was authorized by legislation enacted during the member's term of service, created an "indirect interest in a contract."¹⁸

That cases must come to the Supreme Court generally through case and controversy--unless through an advisory opinion--means the dividing line between what contracts do and do not violate Article III, § 12 is not fully described by the Court. The Court only applies the law to a narrow set of facts. As a result, the distinction between a "direct" and an "indirect" interest is not delineated. Neither is the line drawn between all unconstitutional interests and all lawful interests. That an implied contract or simply being a stockholder of a company with a state contract, no matter how large, may void the contract, appears to be the result of the Court's "strict interpretation" of Article III, § 12's text, which the Court found the framer's intended to "be broad in scope."¹⁹ At the same time, the right case and controversy might invoke the Court's canon of constitutional construction that it "will not construe a constitutional provision to arrive at a strained, unpractical or absurd result."²⁰

¹⁰ Norbeck & Nicholson Co. v. State, 142 N.W. 847, 853 (S.D. 1913) (Whiting, P.J., concurring specially) (emphasis in original).

¹¹ *Id.* at 851.

¹² Asphalt Surfacing Co. v. S.D. Dep't of Transp., 385 N.W.2d 115, 118 (S.D. 1986).

¹³ Palmer, 11. S.D. 78, 75 N.W. at 819 (citing SL 1897, ch 110, § 41).

¹⁴ Id.

¹⁵ Norbeck, 32 S.D. 189, 142 N.W. at 850.

¹⁶ See Asphalt Surfacing, 385 N.W.2d at 117-18.

¹⁷ Pitts v. Larson, 2001 S.D. 151, ¶ 15, 638 N.W.2d at 258.

¹⁸ Id. It is unclear when a benefit is indirect instead of direct. Nearly all state contracts rely upon expenditure authority given to an agency by the Legislature. Pitts' employment contract was two degrees removed from legislation, as with bid contracts.

¹⁹ Id. at ¶ 14, 638 N.W.2d at 257, 258.

²⁰ In re Issuance of Summons Compelling Essential Witness, 2018 S.D. 16, ¶ 18, 908 N.W.2d 160, 167.

That case has not occurred, but the *Pitts* case appears to have come closest. The fact that a plurality decision was rendered in the *Pitts* Case to void the employment contract, rather than an outright majority, may suggest concern about the unworkable nature of a strict interpretation of Article III, § 12. That concern may have continued in the Court's latest case, *In re Noem*, regarding members' ineligibility for contracts deriving from coronavirus relief fund grants. The Court noted its ruling was supported by the *Pitts* plurality and dissent, not just the plurality.²¹

The dissent in *Pitts* is noteworthy in that it offers a possible alternative to strict interpretation. The dissent avowed an originalist perspective rather than the textual perspective adopted by the plurality. In other words, the dissent relied on the framer's intent expressed at the Constitutional Convention of 1885, that the purpose of Article III, § 12 was "to put the Legislature under such limitation of power that they could not provide themselves with offices."²² Therefore, the dissent would have ruled that Carol Pitts need only forfeit her employment contract if legislation during her term either created her office or precluded competition for her office. To be clear, the dissent's rationale rests in the framers' discussion of the Office or Appointment Clause, and not the Interested Contracts Clause. There does not appear to be any framers' discussion specifically on the Interested Contracts Clause.²³ Nevertheless, the dissent's position would avoid an impractical outcome that would permit members to serve while being a government employee if their employment could not reasonably be said to consciously impact the member's vote.

3. Conclusion

This leaves, then, the idea that the Interested Contracts Clause was written, as Presiding Judge Whiting suggested, to prevent members "from being tempted and influenced, either consciously or unconsciously, by any selfish interests." The line of cases, from *Palmer* to *In re Noem*, may be perceived as impractical by members,²⁴ but they plainly adhere to this principle. Accordingly, until the Court is given the opportunity to find a certain set of facts presents an impractical application of Article III, § 12, written or oral contracts, including contracts for employment, and implied contracts, are at risk of being found to be void if a member:

- Owns an entity, or serves as a principal or shareholder in an entity, that does business with the state or a county government (if the county is authorized to expend the funds or has a duty to provide the service by state law enacted during the member's term) during the member's term and one year thereafter;
- Is employed by state government; or
- Is employed by a county government entity, in a position authorized by an appropriation or other state statute enacted during the member's term. This prohibition applies to the member's term and a year after.

Limited Court decisions allow for the above points, but plain questions remain on the application of Article III, § 12:

- To what extent are family members' interests imputed to the member;
- At what point does a member, employed by a nongovernmental entity and not owning or controlling the entity, have an interest that voids a contract with the entity;
- When does a member owning publicly traded company shares--whether direct investing or not--void a contract with the company; and
- As implied contracts, are retail sales involving the state and a member or a member's business void, even if the terms are the same as offered to the general public?

²¹ 2020 S.D. 58, ¶¶ 12-14 & n. 3, 950 N.W.2d 678, 681-82 & n. 3.

²² *Pitts*, 2001 S.D. 151, ¶ 33, 638 N.W.2d at 263 (Gilbertson, C.J., dissenting) (quoting *1 Debates* at 226).

²³ See *1 Debates* at 140-41. The Interested Contracts Clause was included in the report of the Legislative Committee and not specifically debated or amended, as with the Office or Appointment Clause. Nevertheless, Gideon C. Moody, an attorney, former Territorial Supreme Court judge, and future U.S. Senator, did provide commentary that may be ascribable to both clauses of Article III, § 12: "The object of such a law is simply to prevent members of the Legislature from improperly exercising the functions of their office to their own ends[.]" *Id.* at 224.

²⁴ The Attorney General's briefs in *Pitts* indicate that three attempts to repeal this provision outright (in 1974, 1976, and 1990) were rejected by voters two-to-one on average, and an attempt in 1998 to limit the prohibition to direct legislator contracts was also rejected. Accordingly, it would appear public support has historically been against removing or eroding this provision.