

Marty J. Jackley
ATTORNEY GENERAL



Mark W. Barnett
CHIEF DEPUTY

Office of the Attorney General
STATE OF SOUTH DAKOTA

July 26, 2023

Senator Jessica Castleberry
1010 9th St. #14
Rapid City, SD 57701

Re: Little Nest Preschool and S.D. Const. Article III, Section 12

Dear Senator Castleberry:

I enclose a letter from S.D. Governor Kristi Noem, directing our office to investigate Constitutional and possibly statutory violations by yourself, doing business as Little Nest Preschool. The Governor alleges that you own the business and that the business has illegally collected over \$603,000 in Covid funds, during your terms in office. The Supreme Court has expressly forbidden such payments to legislators, in its Advisory Opinion issued in 2020. A copy of that opinion is also enclosed. From the Supreme Court's ruling, your contract is "wholly illegal, void, and against public policy, and cannot be enforced in whole or in part on any theory of any kind."

The State of South Dakota respectfully requests that you repay all of such payments, taken in violation of the Constitution and the Advisory Opinion. We are further requesting documents from the Department of Social Services in support of the positions set forth by the Governor.

If you or your attorney wish to discuss this further, you may contact either myself or Chief Deputy Attorney General Mark Barnett. Please understand the Constitution does not permit us to negotiate the amount; all amounts paid in violation of the Constitution must be returned.


Senator Castleberry

July 26, 2023

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If payment in full, \$603,219.79, is not returned or an agreement is not reached by Monday, August 7 at 1:00 pm CST, we do intend to pursue this matter in court. Thank you for your attention to this significant matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Marty J. Jackley". The signature is fluid and cursive, with the first name "Marty" being the most prominent.

Marty J. Jackley
ATTORNEY GENERAL

MJJ/dd

cc: Governor Kristi Noem

Enclosure



STATE OF SOUTH DAKOTA
OFFICE OF THE GOVERNOR

KRISTI NOEM | GOVERNOR

July 25, 2023

Honorable Marty Jackley
Attorney General's Office
1302 E Hwy 14
Pierre, SD 57501

RE: Senator Jessica Castleberry and S.D. Const. Art. III, § 12

Dear General Jackley,

The Department of Social Services recently discovered apparent violations of S.D. Const. Art. III, § 12 involving Senator Jessica Castleberry's receipt of COVID-19 federal stimulus funds. This letter is a formal request for your investigation and enforcement of this constitutional provision, which may include disgorgement and other penalties.

Based on public records filed with the Secretary of State, the Senator is the owner of Little Nest Preschool, LLC in Rapid City, SD since its organization in 2010. Beginning in 2020, Little Nest Preschool applied for and received COVID-19 federal stimulus funds totaling, what is believed to be, over \$603,000.

Payments were found by Department fiscal staff who recognized the Senator's name on a recent grant application for Little Nest Preschool to receive another \$4,000.¹ At that point, further review into Little Nest Preschool turned up over a dozen payments since 2020.

The Senator was appointed to a vacant seat in the Senate of the state legislature in 2019 and continues to serve today. These federal stimulus funds were appropriated by various General Appropriations Acts that Senator Castleberry voted on in 2020 Special Session (HB 1001 and SCR 601), 2021 Regular Session (SB 64 and SB 195), 2022 Regular Session (HB 1340 and SB 60), and 2023 Regular Session (SB 210).

The South Dakota Constitution prohibits a state legislator from having a direct or indirect interest in a contract authorized during their time in office and up to one year thereafter. See, S.D. Const. Art. III, § 12. The South Dakota Supreme Court strictly

¹ That application has been denied by the Department, and Senator Castleberry has been informed of the denial.

construes this prohibition and said that this provision "precludes a current state legislator from contracting directly or indirectly with the State to receive funds from [COVID-19] grant programs." *In re Noem*, 950 N.W. 2d 678 (2020). The Supreme Court could not have spoken more clearly or on point to this issue. The Senator has a personal and ethical obligation to avoid conflict of interests. The Senator also swore an oath to support the state Constitution. While the ethics of this malfeasance may be resolved by the Senate body itself, the multiple alleged constitutional violations are within your jurisdiction to determine and your duty to enforce. For a century, the Supreme Court has declared that such contracts are null and void. Supporting documentation will be forthcoming separately for the Department.

In addition, while SDCL 5-18A-17 through 5-18A-17.6 does not ordinarily apply to members of the Legislature because members are already bound by the state Constitution to not self-deal, the subrecipient grant agreements include a provision that references these conflicts of interest statutes. Please review the content of this provision in your investigation as the State may have a breach of contract claim which it is your duty to prosecute as well.

Thank you for your honorable service to the people of this State and acting in the State's best interest in accordance with the oaths we have taken to uphold the state Constitution.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristi Noem". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

Kristi Noem
Governor

950 N.W.2d 678
Supreme Court of South Dakota.

IN RE: the Request of Governor Kristi NOEM for
an Advisory Opinion in the Matter of the
Interpretation of South Dakota Constitution and
State Laws Regarding Eligibility for CRF Grant
Programs

#29441

REQUEST RECEIVED OCTOBER 13, 2020

OPINION FILED 10/22/2020

Synopsis

Background: Governor requested advisory opinion on whether the State Constitution or any state law prohibited a current state legislator from receiving federal funds under corona virus relief fund (CRF) grant programs to cover necessary expenditures due to COVID-19 pandemic.

[Holding:] The Supreme Court held that state constitutional provision on prohibited interest of legislators in state contracts precludes a current state legislator from contracting with State to receive federal COVID-19 relief funds.

So ordered.

Procedural Posture(s): Original Jurisdiction.

West Headnotes (5)

- [1] **Public Contracts**—Individual interest of contracting officer or body; conflict of interest
States—Individual interest of officer in contract

Meaning of state constitutional provision prohibiting a legislator from having interest in state contract if authorized by any law during legislator's term is unambiguous; therefore, the language must be applied as it reads. *S.D. Const. art. 3, § 12.*

- [2] **Public Contracts**—Individual interest of contracting officer or body; conflict of interest
States—Individual interest of officer in contract

Supreme Court strictly construes state constitutional provision prohibiting a legislator from having interest in state contract if authorized by any law during legislator's term. *S.D. Const. art. 3, § 12.*

- [3] **Public Contracts**—Individual interest of contracting officer or body; conflict of interest
States—Individual interest of officer in contract

State constitutional prohibitions on a legislator having interest in state contract if authorized by any law during legislator's term are broad in scope and extend to any contract between a legislator and the State, including a general appropriations bill. *S.D. Const. art. 3, § 12.*

- [4] **Public Contracts**—Unauthorized or Illegal Contracts
States—Unauthorized or illegal contracts

When a contract violates the state constitutional provision prohibiting a legislator from having interest in state contract if authorized by any law during legislator's term, the contract is wholly illegal, void, and against public policy, and cannot be enforced in whole or in part on any theory of any kind. *S.D. Const. art. 3, § 12.*

- [5] **Public Contracts**—Individual interest of

contracting officer or body; conflict of interest
States—Individual interest of officer in contract
United States—Public works and economic
development

State constitutional provision prohibiting a legislator from having interest in state contract if authorized by any law during legislator's term precludes a current state legislator from contracting directly or indirectly with the State to receive federal funds under corona virus relief fund (CRF) grant programs to cover necessary expenditures due to COVID-19 pandemic. S.D. Const. art. 3, § 12.

*679 ORIGINAL PROCEEDING

ADVISORY OPINION

TO HER EXCELLENCY, KRISTI NOEM, THE GOVERNOR OF THE STATE OF SOUTH DAKOTA.

[¶1.] Pursuant to [Article V, § 5 of the South Dakota Constitution](#),¹ you have requested an advisory opinion from this Court on whether the South Dakota Constitution or any state law prohibits a current state legislator from being eligible to receive funds from corona virus relief fund (CRF) Grant Programs.

A.

[¶2.] Pursuant to § 5001 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), South Dakota received \$1,250,000,000 in federal funds (CRF funds) to cover necessary expenditures due to the COVID-19 public health emergency. During a special session on October 5, 2020, the South Dakota Legislature passed

House Bill 1001 (HB 1001) and adopted Senate Concurrent Resolution 601 (SCR 601) to address the expenditure of these funds.

[¶3.] HB 1001 revised the general appropriations act to include federal expenditure *680 authority for the CRF funds. SCR 601 authorized expenditures made prior to October 5, 2020, and for the unspent and unobligated CRF funds provided recommended uses through grant programs administered by the Governor for: businesses, health care providers, non-profits, and qualified individuals that have been impacted by COVID-19.

[¶4.] [SDCL 4-8-17](#) provides:

The Governor is authorized and empowered to accept on behalf of the state any appropriations made or moneys allotted to the state by the United States of America, as well as the provisions of any act of Congress appropriating or allotting such funds to the state to be used in cooperation with departments of the federal government and appropriations and acts of Congress.

The funds received for the State of South Dakota pursuant to the provisions of this section shall be administered and expended under the immediate supervision of the Governor through such state departments as he [sic] shall designate for that purpose, and shall be deposited in the state treasury to be paid out by warrants drawn by the state auditor on vouchers approved by the Governor.

[¶5.] Your request to this Court states that in administering the grant programs described in SCR 601, an application agreeing to the terms of the program is required. You further state that “A contract will be required in which the recipient agrees, among other terms and conditions, to expend its grant in accordance with the CARES Act and other restrictions provided for in federal law.” According to SCR 601, “Applications [are] proposed to open October 12, 2020, and close on October 23, 2020.”

[¶6.] You have received inquiries from current state legislators as to their eligibility to receive funds from one or more of the grant programs. You ask:

Assuming all other criteria is met to qualify, does the South Dakota State Constitution or any state law prohibit a current state legislator from being eligible to receive funds

from a CRF Grant Program.

B.

[¶7.] The Court must first determine whether it is appropriate to issue an advisory opinion. You contend that this is an important issue of law involved in the exercise of your executive power pursuant to [SDCL 4-8-17](#). You also contend that this is a solemn occasion because:

Both the current pandemic and the large allocation of federal funds are unprecedented. Considering the proper expenditure of public funds, the potential conflict of interest, and the doctrine of separation of powers, this is a matter of great public importance and of significant impact on state government.

[¶8.] While South Dakota [Article V, § 5](#) is disjunctive and presents two situations in which the Court can give an advisory opinion,³ the Court agrees that the question you pose raises both an important question of law involved in the exercise of your executive power and a solemn occasion.

[¶9.] Pursuant to [SDCL 4-8-17](#), you, as Governor, have accepted \$1,250,000,000 in federal CRF funds and must administer and expend those funds within certain time constraints. Whether current legislators who passed HB 1001 and adopted SCR 601 are eligible to receive a part of these funds is a question that will “result in immediate consequences having an impact on the institutions *681 of state government” and involve a question “that cannot be answered expeditiously through usual adversary proceedings.” *In re Opinion of the Supreme Court Relative to the Constitutionality of Chapter 239, Session Law of 1977*, 257 N.W.2d 442, 447 (1977) (Wollman, J., concurring specially).

[¶10.] In addition, the query you have posed presents a solemn occasion.

In determining whether a request for an advisory opinion presents a solemn occasion, the Court weighs whether an important question of law is presented, whether the question presents issues pending before the Court, whether the matter involves private rights or issues of general application, whether alternative remedies exist, whether the facts and questions are final or ripe for an advisory opinion, the urgency of the question, whether the issue will have a significant impact on state government or the public in general, and whether the Court has been provided with an adequate amount of time to consider the issue.

In re Daugaard, 2016 S.D. 27, ¶ 13, 884 N.W.2d 163, 167 (citing *In re Janklow*, 530 N.W.2d 367, 369 (S.D. 1995)). The Court has determined that you have presented an important question of law. *Id.* ¶ 8-9, *supra*. The issue is not pending before the Court. While the issue does involve private rights, it also raises a broader conflict of interest question involving a legislator’s entitlement to appropriated funds, which is an issue with significant impact on State government and public perceptions associated with the distribution of such an extraordinarily large sum of money. Because of the unprecedented COVID-19 pandemic, the timeframe for administering and expending the funds, the inadequate time to pursue alternative remedies, and the Court’s timely ability to consider the request, a solemn occasion exists and the Court will answer the question you pose.

C.

[¶11.] Article III, § 12 of South Dakota’s Constitution provides:

No member of the Legislature shall, during the term for which he [sic] 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 [sic] 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 [sic] 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 [sic] 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 [sic] shall have been elected.* (Emphasis added).

¹[¶12.] In *Pitts v. Larson*, 2001 S.D. 151, ¶ 13, 638 N.W.2d 254, 257, this Court explicitly stated, “The meaning of this provision, however, is unambiguous.”

The language of the constitution is plain. Its meaning cannot be mistaken. The purpose of [Article III, § 12] is apparent. It is intended to preclude the possibility of any member deriving, *directly or indirectly*, any pecuniary benefit from legislation enacted by the legislature of which he [sic] is a member..... It is intended to remove any suspicion which might otherwise attach to the motives of the members who advocate the creation of new offices or the expenditure of public funds. 🚩 *682 *Palmer v. State*, 11 S.D. 78, 80-81, 75 N.W. 818, 819 (1898). Therefore, “the language in the constitution must be applied as it reads.” *In re Janklow*, 530 N.W.2d 367, 370 (S.D. 1995).

Id. (Emphasis added).³

² ³ ⁴[¶13.] This Court strictly interprets the language of South Dakota Article III, § 12. *Asphalt Surfacing Co. v. South Dakota Dep’t of Transp.*, 385 N.W.2d 115, 117 (S.D. 1986). Its prohibitions are broad in scope and extend to any contract between a legislator and the State, including the General Appropriations Bill. *Id.* at 118. “When Article III § 12 is violated, the ‘contract is wholly illegal, void, and against public policy, and cannot be enforced in whole or in part on any theory of any kind.’ ” *Pitts*, 2001 S.D. 151, ¶ 14, 638 N.W.2d at 258 (quoting *Norbeck & Nicholson Co. v. State*, 32 S.D. 189, 203, 142 N.W. 847, 848 (1913)).

⁵[¶14.] Therefore, South Dakota Article III, § 12 precludes a current state legislator from contracting directly or indirectly with the State to receive funds from CRF Grant Programs.

/s/ David Gilbertson
David Gilbertson, Chief Justice

/s/ Janine M. Kern
Janine M. Kern, Supreme Court Justice

/s/ Steven R. Jensen
Steven R. Jensen, Supreme Court Justice

/s/ Patricia J. De Vaney
Patricia J. De Vaney, Supreme Court Justice

Justice Mark E. Salter deeming himself disqualified did not participate.

All Citations

950 N.W.2d 678, 2020 S.D. 58

Footnotes

¹ South Dakota Article V, § 5 reads in part:

The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his [sic] executive power and upon solemn occasions.

² *In re Daugaard*, 2011 S.D. 44, ¶ 4, 801 N.W.2d 438, 439.

³ In *Pitts*, the plurality and the dissent agreed that it is a violation of South Dakota Article III, § 12 for a state legislator to enter into a contract with the State during the same session in which s/he sat. 2001 S.D. 151, 638 N.W.2d 254.