

MISSISSIPPI ETHICS COMMISSION ADVISORY OPINION NO. 95-042-E May 5, 1995

Article 4 Section 109

This Advisory Opinion concerns the following issue as formulated from facts and/or circumstances furnished by a requestor. The opinion is based solely on the facts and circumstances as stated below and was approved by the Commission on May 5, 1995.

Are the Mississippi Ethics in Government laws violated if certain member(s) of a state commission that is required by state laws to be composed in part by representatives of the industries or other interest groups the state commission regulates should:

Issue 1. vote on regulations before the state commission that generally affect their particular industry or user group;

Issue 2. vote on regulations before the state commission that specifically affect or restrict their personal company or business;

Issue 3. vote on licensing restrictions and other regulations that affect their particular industry or user group; and

Issue 4. vote on permits for certain projects in close proximity to commission members' residences but which they have no financial interest?

The Mississippi Ethics Commission is restricted to interpreting and issuing opinions on Sections 25-4-101 through 25-4-119, 1972 Mississippi Code Annotated and Article IV, Section 109, Mississippi Constitution of 1890. Therefore, Mississippi laws outside the jurisdiction of the Commission and internal rules and regulations of the state governmental entity are not addressed by this opinion.

The pertinent conflict of interest laws to be considered here are:

Constitutional Section 109 states:

"No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term."

Code Section 25-4-103(c), (d), (f)(i)(ii), (g)(v), (h), (l), (m) and (p)(i)(ii)(iii) states:

"(c) 'Business' means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a non-profit corporation or other such entity, association or organization receiving public funds.

(d) 'Business with which he is associated' means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than One Thousand Dollars (\$1,000.00) in annual income or over which such public servant or his relative exercises control.

(f) 'Contract' means:

(i) Any agreement to which the government is a party; or

(ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) 'Governmental' means the state and all political entities thereof, both collectively and separately, including but not limited to:

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(h) 'Governmental entity' means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(l) 'Pecuniary benefit' means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(m) 'Person' means any individual, firm, business, corporation, association, partnership, union or other legal entity, and where appropriate a governmental entity.

(p) 'Public servant' means:

(i) Any elected or appointed official of the government;

(ii) Any officer, direct or indirect, commissioner, supervisor, chief head, agent or employee of the government or any agency thereof or of any public entity created by or under the Jaws of the State of Mississippi or created by an agency or governmental entity thereof any of which is funded by public funds; or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government."

Code Section 25-4-105(1), (2) and (5) states:

"(1) No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any relative

or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof authorized by any law passed or order made by any board of which he may be or may have been a member

(5) No person may intentionally use or disclose information gained in the course of or by reason of his official position or employment as a public servant in any way that could result in pecuniary benefit for himself any relative, or any other person, if the information has not been communicated to the public or is not public information." Pertinent facts and circumstances provided by the requestor, absent identifying data, are set forth as follows and considered part of this opinion. The Mississippi Legislature established a seven (7) person State Commission on a certain resource industry. The enabling legislation provides that the commission shall be composed as follows:

(i) One (1) member shall be a processor in the resource industry.

(ii) One (1) member shall be a commercial provider in the resource industry.

(iii) One (1) member shall be a recreational provider in the resource industry.

(iv) One (1) member shall be an operator of recreational equipment in the resource industry.

(v) One (1) member shall be a member of an incorporated nonprofit environmental organization.

(vi) One (1) member shall be from outside the resource industry.

(vii) The member of the state commission related to the resource industry.

The enabling legislation provides for the representation of various user groups that are financially interested in the collecting and regulation of this resource industry.

Several commissioners have pondered the ethics of commissioners voting on regulations that may affect their particular user groups. For instance, can the commissioner who is a processor vote on issues affecting the commercial collection of the resources? Can he do so even when it involves the collection of a particular resource that his company processes or restricts the area or manner in which his company collects resources?

Can the commissioner who is our operator of recreational equipment vote on matters affecting such operations? Can he vote on licensing restrictions or other proposed regulations that may affect his industry?

Can the commissioner who is a commercial provider vote on regulations that affect the commercial collection of these resources? The current commissioner that is a commercial provider holds commercial licenses for two particular resources. A recent matter before the state commission would have restricted commercial operations in an area where this commissioner

commercially collects these resources. Was he faced with a conflict of interest that should have prevented him from participating in the state commission's vote on this matter? Is he ethically prohibited from voting on all proposals that would affect his ability to collect these two particular resources?

Several months ago the state commission considered the issuance of a permit for a project that was located near the homes of some of the commissioners. The commissioners had no financial interest in the project but the applicant requested that they not participate in the vote on the matter because of the proximity of their residences to the proposed project. Is there any ethical restriction that would require the commissioners to recuse themselves from participating in the permitting decision?

At what point are these commissioners confronted with a conflict of interest?

The state commission's enabling legislation gives it broad powers and duties to adopt, amend and repeal rules and regulations for operation of the commission and its related state department, as well as, formulating and implementing the state's policy related to the subject resource industry. Therefore, the state commission clearly does not serve in an advisory function but instead carries out a policy making function.

The Commission formally adopts Advisory Opinion No. 92-093-E in response to this request and by attachment incorporates it into this opinion.

The primary consideration when considering a policy making board is whether a member(s) voting on any one of the four issues presented above would result in an application of the above cited Constitutional Section 109 and Code Section 25-4-105(2). Neither of these laws apply without an authorization of a contract by the member's board.

Based solely on the facts and circumstances presented by the requestor, the Commission finds that a member(s) voting on any one of the four issues presented above does not result in an authorization of a contract.

The requestor is cautioned to advise the state commission members that it is foreseeable considering the broad authority given the state commission that an issue may at some point come before them that directly or indirectly authorizes a governmental contract that a member(s) may have an interest. In such a case, that member' s(s') recusal will not prevent a violation of Constitutional Section 109 or Code Section 25-4-105(2).

In other words, simply being a commission member constitutes a violation regardless of voting or not voting if the interest being voted on is in a contract prohibited by Constitutional Section 109.

Notwithstanding the above, the state commission members because of the legally required composition of their commission should be keenly aware of Code Section 25-4-105(1) and (5), set forth above.

The requestor should advise the state commission members to not use their official positions to obtain a pecuniary benefit for themselves, their relatives or any business with which they are associated in violation of Code Section 25-4-105(1).

Public servants must keep the performance of their official duties entirely separate and distinct from any private interests. In order for the private interests to remain separate and distinct, public servants must recuse themselves from discussing or acting on any subject matter in which they have a pecuniary interest.

A proper recusal occurs when the public servant totally removes himself or herself from the pertinent matter by not officially or unofficially taking part or action regarding the subject matter and leaves the room or area where such discussions, considerations or actions take place. The minutes of the state commission should state that the member left the meeting by showing him or her absent for that matter.

A commission member(s) should not vote on or take part in a matter concerning regulations or licencing restrictions that would affect the pecuniary interest and/or benefit of the commission member, a relative or a business in which he or she is associated.

However, a member voting on regulations and licensing restrictions that are general in nature and that, in fact, equally affect, both theoretically and practically, everyone within the member's industry or user group would not be construed as a use of official position to obtain a pecuniary benefit.

Code Section 25-4-105(5) prohibits the intentional use or disclosure of nonpublic information gained by reason of one's official position that could result in a pecuniary benefit for the public servant, a relative or any other person. Person in this instance includes any individual, firm, business, corporation, association, partnership, union or other legal entity.

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