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ADVISORY OPINION NO. 14-017-E

May 9, 2014

Question Presented: May a city council member vote on an appointment to the city utilities commission when the council member's spouse is an employee of a temporary employment agency assigned to work at the city utilities commission and may later become an employee of the commission?

Brief Answer: Due to the potential for a violation of Section 25-4-105(1), Miss. Code of 1972, and the appearance of impropriety which could arise under Section 25-4-101, the council member should not vote on appointments to the city utilities commission while his or her spouse is working at the commission, whether as a contractor or employee.

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 25-4-101, Miss. Code of 1972.

The legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment or position, is a

violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.

Section 25-4-103, Miss. Code of 1972.

(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 Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(i) "Income" means money or thing of value received, or to be received, from any source derived, including but not limited to, any salary, wage, advance, payment, dividend, interest, rent, forgiveness of debt, fee, royalty, commission or any combination thereof.

(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.

(p) "Public servant" means:

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

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of 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.

(q) "Relative" means:

(i) The spouse of the public servant;

(ii) The child of the public servant;

(iii) The parent of the public servant;

(iv) The sibling of the public servant; and

(v) The spouse of any of the relatives of the public servant specified in

subparagraphs (ii) through (iv).

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

I am writing this letter as City Attorney for the City at the request of a City Council Member regarding the propriety of his voting on an upcoming Utilities Commission Board Appointment. Several years ago, pursuant to Section 21-27-13 of the Mississippi Code of 1972, the Mayor and City Council created the City Utilities Commission having the power, authority and duty to manage and control said system or "systems" and the supply of facilities and services thereof. Once the Utilities Commission was created, it engaged separate counsel, adopted its own bylaws, managed its own affairs through its Board of Commissioners without oversight of control by the Mayor and City Council. In fact, pursuant to Section 21-27-15, the Mayor and City Council may not even abolish the Commission without having a Referendum and a special election with a majority vote of the qualified electors of the Municipality voting to abolish same. See e.g. Ethics Commission Opinion No. 97-014-E.

In the near future, the City will entertain a Board Appointment and the question has arisen as to whether a Council Member would have to recuse himself or herself from voting because of the fact that his or her spouse is employed at the Utilities Commission. In actuality, the spouse is employed by a Temporary Agency, but the Temporary Agency supplies the council member's spouse to the Utilities Commission as a temporary employee. It is anticipated, however, that within the next few weeks, the Utilities Commission may elect to hire the Council Member's spouse as a permanent employee. At the present time, the spouse receives all of his or her compensation directly from his or her employer, the Temporary Agency, and not directly from the Utilities Commission. However, if he or she is employed by the Utilities Commission as a full time employee of the Commission, the Utilities Commission would pay his or her salary.

The Mayor and City Council do not have oversight over hiring, firing or other Board Policies and Procedures except that the Utilities Commission can only borrow money through the Mayor and City Council, and not on their own accord. Regardless, the Utilities Commission does not have a budget to be approved by the Council, provides its own separate insurance coverage for its property, including liability insurance, and manages all of its books and accounts separate from any account of the City.

It would seem therefore that these facts are analogous to a Municipal School Board and that the spouse of a Council Member would not be prohibited from serving as an employee of this Commission. Nonetheless, we would appreciate your advisory opinion on this subject.

The second question is whether, on the upcoming Board appointment, the Council Member would be ethically prohibited from voting on the Board Appointment if his or her spouse is either:

- (a) Employed directly by the Utilities Commission as an employee of the Commission; or
- (b) Employed by a temporary agency doing work pursuant to a contract between the Utilities Commission and that Temporary Agency.

Of course, we would like to ensure that we have a clear answer as to whether the Council Member: (a) Is free to vote without committing an Ethics violation; (b) "should" recuse himself or herself; or (c) "must" recuse himself or herself to avoid an Ethics violation.

III. ANALYSIS

The city attorney's comparison between the municipal utilities commission and a municipal school board is persuasive and is consistent with Advisory Opinion No. 97-014-E, cited by the city attorney. See also Advisory Opinion No. 07-079-E, finding city housing authority and city are separate governmental entities. The two entities share many similarities in relation to the city council. The Ethics Commission has a longstanding application of the Ethics in Government Laws to a member of the municipal governing authorities who has an economic connection with the municipal school district and who has the opportunity to vote on appointments to the municipal school board.

A city council member who votes on an appointment to another board will violate Section 25-4-105(1), Miss. Code of 1972, quoted above, if he or she enters into an agreement which results in a monetary benefit for himself, his relative or his business. See also Section 25-4-103(q) and (d), above. For instance, if a council member agrees to support the appointment of an individual to the utilities commission in exchange for a pay raise or promotion for his or her spouse, who is an employee or contractor to the utilities commission, then that council member violates Section 25-4-105(1). The potential for such a violation exists whether the council member's spouse is an employee of the utilities commission or an employee of a temporary employment agency contracting with the utilities commission.

The Ethics Commission has advised council members and other public servants similarly situated to recuse themselves from voting on appointments to such other boards to avoid any appearance of impropriety which might arise from the potential for a violation. See Op. Miss. Ethics

Commn. No. 10-100-E, 09-037-E and 04-022-E. Pursuant to Section 25-4-101, Miss. Code of 1972, quoted above, public servants should conduct themselves in a manner which enhances the public trust in government and avoid actions which may tend to create public suspicion regarding the honesty and integrity of those in government.

The commission has also opined that members of the municipal governing authorities whose spouses are employed by a municipal separate school district should vote on appointments to the school board *only* when their recusal would result in the loss of a quorum. See Op. Miss. Ethics Commn. No. 10-100-E, 08-008-E and 07-071-E. Under normal circumstances, the recusal of one council member will not result in the loss of a quorum. As discussed above, the municipal utilities commission is analogous to a municipal school board. Therefore, the commission advises the council member whose spouse works at the municipal utilities commission to fully recuse himself or herself from making appointments to the municipal utilities commission, whether the spouse remains an employee of the temporary employment agency or becomes an employee of the municipal utilities commission.

A total and complete recusal requires the council member leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The council member must not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter with anyone in municipal government. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is *not* a recusal. Furthermore, any minutes or other record of the meeting should state the recusing council member left the room before the matter came before the council and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel