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MISSISSIPPI ETHICS COMMISSION

Post Office Box 22746
Jackson, Mississippi 39225-2746
Telephone: 601-359-1285
Telecopier: 601-359-1292
www.ethics.ms.gov

TOM HOOD
Executive Director and Chief Counsel

ADVISORY OPINION NO. 18-039-E

September 7, 2018

Question Presented: May a state employee perform services for municipalities on his or her personal time?

Brief Answer: Yes. When a government employee uses general knowledge accumulated through government employment to receive a pecuniary benefit by “moonlighting” while on personal leave or outside business hours, normally, the government employee is not deemed to have used his or her official position and does not violate Section 25-4-105(1), Miss. Code of 1972. Moreover, a state employee is not necessarily prohibited by Section 25-4-105(3)(a) from contracting with a separate governmental entity such as a municipality.

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 25-4-103, 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.

(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.

(k) “Material financial interest” means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(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.

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.

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

II. FACTS

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

I would like to provide engineering services to various municipalities that will be funded through the Community Development Block Grant Program. I am a full time employee of [a state agency]. Is there a conflict of interest if no financial support or project oversight is being provided by [the state agency I am employed with]? No resources of the [state agency] will be used in the development of the project, and work will not be performed during the [state agency] work day. Personal leave will be utilized as needed to keep a separation between the jobs.

III. ANALYSIS

Pursuant to Section 25-4-105(1), Miss. Code of 1972, no public servant may use his or her position in government to obtain or attempt to obtain any pecuniary benefit for himself or herself, his or her relative, or any “business with which he [or she] is associated.” See Section 25-4-103(d). It appears the state employee will simply be engaging in outside employment in addition to his or her employment with the state agency, otherwise known as “moonlighting.” Notably, the state agency which employs the state employee is not the agency awarding the

grants or supervising the projects, and the state employee will have no opportunity to influence those awards.

When a government employee uses general knowledge accumulated through government employment to receive a pecuniary benefit by “moonlighting” while on personal leave or outside business hours, normally, the government employee is not deemed to have used his or her official position. See Advisory Opinions No. 16-069-E, 10-093-E and 05-034-E. Obviously, the state employee must not use any state agency equipment or resources in furtherance of the outside work, and all outside work must be performed after hours, on weekends or holidays or while on personal leave from the state agency. Under the facts presented above, no violation of Section 25-4-105(1) will occur if the state employee undertakes the above described outside employment in his or her individual capacity while remaining employed by the state agency.

Pursuant to Section 25-4-105(3)(a), no public servant may be a contractor, subcontractor or vendor or have a “material financial interest” in a business which is a contractor, subcontractor or vendor to the same “governmental entity” he or she serves, subject to some very limited statutory exceptions contained in Section 25-4-105(4). The state and a municipality are separate governmental entities, as that term is defined in Section 25-4-103(h). Therefore, Section 25-4-105(3)(a) does not prohibit a state employee from serving as a contractor, subcontractor or vendor to municipalities.

Finally, this advisory opinion does not address any federal grant requirements, nor does this opinion address any outside employment restrictions implemented by the state agency. The requestor is advised to notify the state agency of the outside employment and to consult with the agency about possible restrictions.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel