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ETHICS ADVISORY OPINION NO. 20-039-E

October 2, 2020

Question Presented: May a charter school governing board do business with a board member's employer?

Brief Answer: No. The board member is presumed to have an interest in transactions between the school and the employer, which is prohibited by Section 109, Miss. Const. of 1890, and Section 25-4-105(2) and (3)(a), Miss. Code of 1972. While a recusal can prevent a violation of Section 25-4-105(1), it will not prevent a violation of any other prohibitions.

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 109, Miss. Const. of 1890.

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.

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

- (a) "Authority" means any component unit of a governmental entity.
- (b) "Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.
- (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 nonprofit 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 Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.
- (e) "Compensation" means money or thing of value received, or to be received, from any person for services rendered.
- (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) "Government" means the state and all political entities thereof, both collectively and separately, including but not limited to:
 - (i) Counties;
 - (ii) Municipalities;
 - (iii) All school districts;
 - (iv) All courts; and
 - (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.

(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.

(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.

(o) “Public funds” means money belonging to the government.

(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.

(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.

(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.

Please be advised that I serve as Board Attorney for [a State Board]. I am writing to request an official Advisory Opinion from your Commission.

The Board is aware of the Commission's Opinion No. 20-028-E in which the Commission determined that a member of a charter school governing board is a "public servant" and is "prohibited from engaging in all the actions and conflicts of interest which are proscribed in Section 25-4-105 and Section 109, Miss. Const. of 1890." Additionally, the Commission opined that "[g]overning board members are generally prohibited from having any interest in or official connection, whether directly or through a relative, with any non-profit or for-profit business entity which contracts with or otherwise does business with the charter school, as set forth in Section 109 and Section 25-4-105(1), (2) and (3)(a)."

The State Board has been made aware of two factual scenarios regarding members of the governing boards of two charter schools which require the necessity of an Advisory Opinion. It has come to the attention of the State Board and its staff that a member of the governing board of [a Charter School], is employed by an insurance company doing business within the state. (See Attachment 1). [The Board Member] is a shareholder/producer of [the Insurance Company] and listed as a member of the Education and Public Entities Team. The Governing Board Meeting Minutes reflect that after [the] Board Member excused himself and exited the room, the Governing Board approved the use of services with [the Insurance Company]. (See Attachment 2). Upon receiving claims from [the Charter School] for reimbursement of insurance payments, staff of the State Board noted that several claims were paid directly to either [the Insurance Company], or [separate companies/sub-contractors] listed as a sub agent on the claim. See Attachment 3. As part of the State Board's claims procedure, the staff reviewed the monthly expenditure reports and found [the Insurance Company] listed as paid line items of the expenditure reports. (See Attachment 4). It is unclear as to whether [the Insurance Company] is paid directly for services or whether it simply receives compensation as a sub agent for both [separate companies / subcontractors].

The second factual scenario concerns a member of the governing board of [a different Charter School]. [The Board Member] is employed by and serves as [an employee of another business]. [The Charter School] submitted a claim for professional development from [the business], but withdrew the claim at the request of the State Board staff pending receiving an Advisory Opinion due to a possible ethical violation. (See Attachment 5).

The questions posed by the State Board are:

1. Whether it is an ethical violation for an individual to serve as a member of the governing board of a charter school while simultaneously employed by a business entity which contracts or otherwise does business with the charter school?
2. Whether the governing board of a charter school may contract with or approve payments to a business entity that employs a member of the governing board of a charter school?

3. If it is an ethical violation for an individual to contract with or approve a payment to a business entity that employs the individual serving as a member of the governing board of a charter school, is the violation cured if the member recuses himself/herself from voting on the contract or payment?
4. Whether the [State Board] may reimburse a claim submitted by a charter school, if the claim is related to a payment made by the charter school to a business entity that employs a member of the governing board of the charter school?

An expedited opinion would be greatly appreciated. Thank you in advance for your consideration and guidance on this matter.

III. ANALYSIS

The Ethics Commission does not opine on past action. This opinion is prospective in nature, provides no immunity for past actions and should not be construed to condone any past conduct.

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract which is funded or otherwise authorized by that board during his or her term of office or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). A member of a public board is presumed to have an interest in his or her spouse's and own employer's income. This presumption can be overcome by facts to the contrary. See Advisory Opinions No. 17-083-E (alderman's spouse as teller at depository bank) and 09-076-E (mayor/realtor was only compensated for own sales).

In both proposed transactions described above, there are no facts to overcome the presumption that both board members have a prohibited interest in transactions between their employers and the charter school boards of which they are members. To the contrary, with regard to the insurance company, the school board member is reportedly a shareholder who may have an even greater interest in the company's income than would a mere employee. Therefore, both school board members are presumed to have a prohibited interest in the above described transactions with their employers which, if approved, would result in violations of Section 109 and Section 25-4-105(2).

Any contract which violates Section 109 or Section 25-4-105(2) is null and void, and the contractor has no right to payment and can be liable to repay all money received. Towner v. Moore, ex rel. Quitman County School District, 604 So.2d 1093, 1096 (Miss. 1992), quoting Smith v. Dorsey, 530 So.2d 5, 9 (Miss. 1988). Consequently, the Ethics Commission advises the State Board to refuse to approve or reimburse transactions between a charter school board and a board member's employer, unless the board member receives an advisory opinion from the Ethics Commission finding the transaction would not violate the law. Likewise, the governing boards of charter schools should not approve any transaction with a board member's employer unless first receiving an opinion from the Ethics Commission specifically permitting that particular transaction.

Additionally, every member of every charter school governing board is prohibited from using his or her position on the board to obtain or attempt to obtain any monetary benefit for any “business with which he [or she] is associated,” specifically including his or her employer, as proscribed in Section 25-4-105(1). See also Section 25-4-103(d) and (q). To avoid violating this particular subsection, a public servant may fully recuse himself or herself from the problematic action. However, recusal does not prevent or ameliorate violations of Section 109 or Section 25-4-105(2), as these sections do not require any affirmative act by an individual member but merely action by the board. Towner at 1100. In other words, a board member who has a prohibited interest in an action and recuses from that action will still violate Section 109 and Section 25-4-105(2) when the action is taken by the other board members.

Section 25-4-105(3)(a) also prohibits a member of a charter school board from being a contractor, subcontractor or vendor to the charter school or from having a “material financial interest” in a business which is a contractor, subcontractor or vendor to the school. An employee who receives more than \$5,000.00 annual income has a material financial interest in their employer, even where they own no part of the business. See Section 25-4-103(k). In most instances, this subsection will prohibit a board member’s employer from doing business with the charter school. While there are several narrow exceptions codified in Section 25-4-105(4), most of the exceptions do not apply to schools. See Advisory Opinions No. 20-016-E and 18-059-E. Moreover, the exceptions do not apply to the prohibitions in Section 109 or Section 25-4-105(1) or (2).

MISSISSIPPI ETHICS COMMISSION

BY: _____
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