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MISSISSIPPI ETHICS COMMISSION

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

TOM HOOD
Executive Director and Chief Counsel

ETHICS ADVISORY OPINION NO. 21-009-E

May 7, 2021

Question Presented: May a community hospital make recruitment payments to a physician when the new physician might join a practice group which includes a member of the hospital board of trustees?

Brief Answer: If the hospital trustee fully and completely recuses himself from the recruitment of the new physician, then no violation of Section 25-4-105(1), Miss. Code of 1972, will result. Moreover, there are no facts presented in the request to indicate the trustee would obtain any interest in any contract between the hospital and the new physician in violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2). However, if the trustee's group practice becomes a party to any proposed recruitment (or ancillary) agreement with the community hospital, then a violation may occur, necessitating the trustee request a supplemental opinion.

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.

(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.

(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.

(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.

(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.

II. FACTS

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

I represent a Mississippi community hospital established and operated pursuant to Miss. Code Ann. §§41-13-10, et seq. (the "Community Hospital"), and respectfully submit the following request for an Advisory Opinion from the Mississippi Ethics Commission.

Statement of Facts

The Community Hospital is located in a medically underserved area of the State that is currently in need of an additional orthopedic physician. The Community Hospital intends to recruit such a physician, in accordance with applicable State and federal laws, to relocate his or her medical practice into the hospital's service area, either by establishing a new practice or joining an existing group. The recruitment arrangement will be directly between the Community Hospital and the

new physician, with the Community Hospital making recruitment payments directly to the new physician.

One of the Community Hospital's trustees (the "Trustee") is an orthopedic physician on the Hospital's medical staff and is a member of an orthopedic group practice (the "Practice") located in the Hospital's service area. It is possible that the recruited physician may choose to join the Practice. Assuming this would occur, in order to ensure there is no conflict or other issue for the Trustee, the Community Hospital would require a total and complete recusal of the Trustee from all matters relating to the recruitment of the new physician. Specifically, the Trustee would recuse himself from debating, discussing, or taking action on the Community Hospital's intended recruitment arrangement with the new orthopedic physician. Such recusal would cover official Board meetings and all discussions and deliberations and would extend to prohibit casual comments to the Trustee by other Board members or Hospital personnel, whether in-person or otherwise. The Community Hospital would also ensure that the meeting minutes of the Board of Trustees specify that the Trustee recused himself and left the room until after the vote on the recruitment arrangement.

Nothing in the Community Hospital statutes prohibits this action by the Hospital. However, community hospital trustees are considered "public servants" (as defined in Miss. Code Ann. §25-4-103(p)), and Miss. Code Ann. §25-4-105(1) prohibits a public servant from "us[ing] his official position to obtain, or attempt to obtain, pecuniary benefit for himself ... or ... for any relative or any business with which he is associated." In addition, §25-4-105(2) prohibits a public servant from being "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." Because there could be circumstances involved in a recruitment arrangement that could potentially be considered to create indirect pecuniary benefit to the Trustee, out of an abundance of caution, we are seeking this opinion.

Based on the total and complete elimination of the Trustee from the recruitment process, there would be no "use" of the Trustee's official position in any regard related to the proposed arrangement. Therefore, the arrangement does not violate any of the provisions of the Code and should be permitted as proposed.

Opinion Request

Based on the above statement of facts and discussion, we respectfully request an Advisory Opinion from the Mississippi Ethics Commission on the following questions:

1. May a community hospital directly recruit a physician into its service area when the recruited physician could join the group practice of a trustee of the community hospital?

2. If so, would it be a violation of the Ethics in Government Laws if the recruited physician joins the group practice of a community hospital trustee who totally and completely recused himself from involvement in the recruitment arrangement?

III. ANALYSIS

The requestor reports the hospital trustee is “on the Hospital's medical staff.” The Ethics Commission understands this phrase to mean the trustee is a physician who has been granted admitting privileges at the community hospital but who is neither employed by the hospital nor has any contract with the hospital. See Mississippi Ethics Commission v. Aseme, 583 So.2d 955 (Miss. 1991). This opinion is predicated upon that understanding of the facts.

Section 25-4-105(1), Miss. Code of 1972, prohibits the hospital trustee from using his position on the hospital board to obtain any monetary benefit for himself or a “business with which he is associated,” such as his practice group. See Section 25-4-103(d). While the facts provided do not set out a specific scenario in which the trustee’s practice would receive a pecuniary benefit from the recruitment, the trustee should fully recuse himself from all board actions and discussions regarding the recruitment based on the possibility that the new physician could join the trustee’s practice group.

A total and complete recusal requires that the trustee not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations, but he must also avoid discussing the subject matter with other hospital officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention can be considered a vote with the majority and is not a recusal. Furthermore, the minutes of the meeting should state the recusing trustee left the room before the matter came before the board and did not return until after the vote.

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). 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 v. Moore, ex rel. Quitman County School District, 604 So.2d 1093, 1100 (Miss. 1992).

Here the requestor states, “[t]he recruitment arrangement will be directly between the Community Hospital and the new physician, with the Community Hospital making recruitment payments directly to the new physician.” Consequently, the trustee is unlikely to obtain any interest in any contract between the new physician and the hospital, even if the new physician joins the trustee’s practice group. However, the Trustee may be in violation of Section 109 and Section 25-4-105(2) if his practice group enters into a contract with the community hospital in conjunction with, or otherwise becomes a party to, the contemplated recruitment contract (or any other ancillary agreement). If such an arrangement is contemplated, or if the facts evolve differently from what has been submitted by the requestor, then the trustee should immediately seek another opinion from the commission.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel