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TOM HOOD
Executive Director and Chief Counsel

ETHICS ADVISORY OPINION NO. 21-020-E

August 6, 2021

Question Presented: May a former member of the board of trustees for a county economic development authority be employed by the board as its executive director within one year of leaving office?

Brief Answer: No. Pursuant to Section 109, Miss. Const. of 1890, and Section 25-4-105(2), Miss. Code of 1972, the former board member cannot be hired by the board until he or she has been out of office for at least one year.

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.

(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.

(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.

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

(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 am the attorney for [a] County Economic Development Authority (the "Authority"). The Authority is a political subdivision of the State of Mississippi duly constituted by HB 1687 passed during the 2010 regular session of the Mississippi Legislature. Pursuant to Section 2 of HB 1687, the Authority is governed by a twelve (12) member board of trustees appointed by the County board of supervisors. Each trustee serves for a term of four (4) years, or until a successor is appointed and qualified. Trustees may be reappointed without limitation.

The Authority is currently conducting a search for an executive director. The prior executive director was employed by the Authority by virtue of an annual employment contract between him and the Authority approved by the Authority's board of trustees each year. One of our trustees has applied for the position. [The individual's] term on the board of trustees ended in January, 2020, and he has not been reappointed by the County board of supervisors. However, since January, 2020 [the individual] has continued to attend trustee and committee meetings at which he has participated as a trustee and at which he has voted on matters coming before the board or committee.

With that, the Authority has directed me to request an advisory opinion as to whether or not it may hire [the individual] either pursuant to an employment contract or on an at will basis, without violating the conflict of interest prohibited of Section 109 of Mississippi Constitution or Miss. Code Section 25-4-105(2), or other provisions of Miss. Code Section 25-4-105.

The Authority is in urgent need of retaining a permanent executive director and an expedited response would be greatly appreciated.

The requestor subsequently informed the commission's staff that the trustee in question resigned from the board on July 19, 2021, and provided a copy of the written resignation.

III. ANALYSIS

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 was 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). An appropriation of public money which funds a contract is an action which authorizes that contract. See Id., citing Cassibry v. State, 404 So. 2d 1360, 1366-67 (Miss. 1981). Every public employee has a contract of employment, many of which are oral, at-will contracts rather than written contracts. Any employment contract which violates Section 109 or Section 25-4-105(2) is null and

void, and the employee can be liable to repay all money he receives. 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).

The board of trustees will select the next executive director of the authority and will, therefore, authorize his or her employment contract. The former board member cannot be hired by the board until he or she has been out of office for at least one year. The fact that the former trustee was not reappointed does not matter. As stated above, trustees on this board continue in office “until a successor is appointed and qualified.” Therefore, the former trustee in question is ineligible to serve as executive director of the authority until one year after his resignation from the board. Any employment contract which violates Section 109 or Section 25-4-105(2) is null and void, and the employee 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).

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BY: _____
Tom Hood, Executive Director and
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