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ETHICS ADVISORY OPINION NO. 22-009-E

May 6, 2022

Question Presented: May an employee of a school district also serve on the county election commission when the school board elections are administered by the election commission?

Brief Answer: Yes, but the school employee should fully recuse herself from any deliberation or other action by the election commission involving school board elections to fully comply with Section 25-4-105(1) and Section 25-4-101, Miss. Code of 1972. Additionally, the school district and county are separate governmental entities, and no violation of Section 25-4-105(3)(a) will occur.

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.

(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.

(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 am writing to request an official opinion from the Commission regarding whether an employee who works for the school district and also is elected as an Election Commissioner has a conflict in working for the school district.

Factual Background: The [...] School District's secretary is also a County Election Commissioner. As an Election Commissioner, [he/she] works closely with local county elections. The Board of Trustees for the [...] School District is concerned that [his/her] involvement in the county elections (and, particularly, the Board of Trustees' elections) could present a conflict of interest since [he/she] works for the school district.

I am aware of Advisory Opinion No. 16-073-E wherein the Ethics Commission has opined that a newly elected Election Commissioner may remain employed with the county's emergency department so long as:

The election commissioner totally and completely recuses themselves from all matters coming before the election commission concerning the board of supervisors' election.

The Ethics Commission opined in Advisory Opinion No. 16-073-E that:

A total and complete recusal requires that the recusing election commissioner not only avoid debating, discussing, or taking action on the subject matter during official meetings or deliberations, but also avoid discussing the subject matter with any other election officials. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone, or by 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 member left the room before the matter came before the election commission and did not return until after the vote.

It appears that the same result would apply in the [...] School District's circumstances. However, I am aware that the Board of Trustees must seek their own opinion in order to be protected.

Issues Presented: Can the District secretary remain employed with the District if [he/she] also serves as the County Election Commissioner?

If [he/she] may remain employed with the District, is the District secretary required to totally and completely recuse [himself/herself] from all matters coming before

the Election Commissioners concerning the Board of Trustees for the [...] School District?

Is the District secretary not only required to avoid debating, discussing, or taking action on the matters concerning the Board of Trustees during official meetings or deliberations, but also required to avoid discussing the Board of Trustees with any other election officials?

If the restriction applies to the District secretary, does [his/her] restriction also include casual comments regarding matters concerning the Board of Trustees, as well as detailed discussions, made in person, by telephone, or by other means?

Would the minutes of the Election Commissioners be required to state that the recusing member (i.e., the District's secretary in this instance) left the room before the matter came before the election commission and did not return until after the vote?

III. ANALYSIS

Pursuant to Section 25-4-105(3)(a), Miss. Code of 1972, above, no public servant may be a “contractor, subcontractor or vendor” to the governmental entity of which he is a member, officer, employee or agent, subject to some narrow exceptions found in Section 25-4-105(4). When a public servant simultaneously holds two separate positions with the same governmental entity and receives separate compensation for each position, the public servant becomes a contractor by virtue of the second position and therefore violates Section 25-4-105(3)(a). However, the county and the school district are separate “governmental entit[ies],” and no violation of Section 25-4-105(3)(a) will occur from serving in both positions. See Section 25-4-103(h).

Nevertheless, the Ethics Commission admonishes the election commissioner to avoid using her official position as election commissioner to obtain or attempt to obtain a monetary benefit for herself in violation of Section 25-4-105(1). An election commissioner should not participate in any decision by the election commission that could result in a pecuniary benefit to him or her as an employee of the school district. For instance, if an election commissioner uses his or her discretion to advance a candidate for school board in exchange for a pay raise or promotion in his or her job with the school district, then that commissioner violates Section 25-4-105(1), as well as other laws.

The Ethics Commission has also advised public servants similarly situated to recuse themselves from voting on comparable matters to avoid the appearance of impropriety. See Advisory Opinion Nos. 16-073-E, 13-085-E, 12-101-E, 08-044-E, 08-033-E, 04-022-E, 99-026-E, 98-023-E and 98-013-E. Pursuant to Section 25-4-101, 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.

Under these specific facts, the election commissioner should totally and completely recuse herself from all matters coming before the election commission concerning the school board election to be certain she complies with Section 25-4-105(1) and Section 25-4-101. A total and

complete recusal requires that the recusing election commissioner not only avoid debating, discussing or taking action on the school board election during official meetings or deliberations, but should also avoid discussing the matter with any other election officials. 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, any minutes of the election commission meeting should state the recusing member left the room before the matter came before the election commission and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
Chief Counsel