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ETHICS ADVISORY OPINION NO. 23-004-E

March 3, 2023

Question Presented: May the spouse of a county supervisor work as a deputy chancery clerk if compensated only from the clerk's fees and not from funds authorized by the board of supervisors?

Brief Answer: Yes. If a clerk uses fees to pay the spouse of a supervisor, then the employment is not authorized by the board, and no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, would result.

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 would like to request an opinion on the following subject:

Can a deputy Chancery Clerk still continue to work if [his or her] [spouse] is elected to the position of County Board of Supervisors?

In a telephone conversation with the commission's staff, the requestor indicated that he or she would be retiring from county government at the end of the current calendar year, that candidates for chancery clerk had inquired about his or her willingness to work as a fee-paid deputy clerk after retiring, and that his or her spouse was considering becoming a candidate for county supervisor who, if elected, would take office after the requestor retires. The requestor also explained that, as a retiree, he or she would not be eligible to contribute to the Public Employees Retirement System and would not need the health insurance coverage provided by the county to full-time employees.

III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, both quoted above, prohibit a member of a public board from having any direct or indirect interest in a contract authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). A member of a public board has an indirect interest in his or her spouse's employment contract. Smith v. Dorsey, 530 So.2d 5, 7 (Miss. 1988).

An appropriation of public money which ultimately funds a contract is an action which authorizes that contract. See Frazier at 693, citing Cassibry v. State, 404 So. 2d 1360, 1366-67 (Miss. 1981). The violation occurs when the board of supervisors takes some action which funds or authorizes the employment of the supervisor's spouse, such as hiring, renewing a contract, providing a pay raise, or authorizing the payment of salary or employment benefits, including approval of a budget from which the spouse is paid.

A contract which violates Section 109 and Section 25-4-105(2) is null and void. Towner v. Moore ex rel. Quitman County School Dist., 604 So.2d 1093, 1096 (Miss. 1992), quoting Smith v. Dorsey, 530 So.2d 5, 9 (Miss. 1988). A recusal by the supervisor in question will not prevent or ameliorate a violation of Section 109 and 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. For these reasons, the spouse of a county supervisor may not be employed by the county in a position which

is funded or otherwise authorized by the board of supervisors. See Ethics Advisory Opinion No. 19-001-E.

However, where the spouse's employment is neither funded nor otherwise authorized by the board of supervisors, no violation will occur. Chancery and circuit clerks are compensated in part by fees which clerks may use at their discretion to fund their offices and legally convert to their own income, subject to certain statutory limitations. See Section 25-7-9 and Section 9-1-43. Clerks often use fees to pay employees in their office, and the expenditure of those fees is not appropriated or otherwise authorized by the board of supervisors. Id. If a clerk uses fees to pay the spouse of a supervisor, then the employment is not authorized by the board, and no violation of Section 109 or Section 25-4-105(2) would result. See Ethics Advisory Opinion No. 95-014-E. See also Ethics Advisory Opinions No. 98-025-E and 92-126-E in which clerks employed the minor children of supervisors.

Nevertheless, the spouse of a county supervisor working as a deputy chancery clerk would still be prohibited from receiving any sort of benefits or compensation funded by the board of supervisors, such as group health insurance or retirement for county employees. See Ethics Advisory Opinion No. 95-014-E. The requestor should also consult the Public Employees Retirement System regarding the limitations placed upon retirees who receive income from member entities, such as counties.

MISSISSIPPI ETHICS COMMISSION

BY: _____

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Chief Counsel