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ETHICS ADVISORY OPINION NO. 23-015-E

August 4, 2023

Question Presented: May the commissioners of a municipal housing authority appoint themselves as directors of a nonprofit corporation established and operated by the housing authority and vote on matters which benefit the nonprofit?

Brief Answer: Yes. A nonprofit corporation established and operated by a housing authority pursuant to Section 43-33-11(i), Miss. Code of 1972, is not a separate business but is actually a governmental authority, and voting to benefit the nonprofit will not violate Section 25-4-105(1). However, the commissioners may not have an interest in any contract authorized by the housing authority or the nonprofit corporation, as prohibited in Section 109, Miss. Const. of 1890, and Section 25-4-105(2).

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.
- (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.

(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.

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 am requesting an official opinion from the Mississippi Ethics Commission. I am a Commissioner on the [City] Housing Authority [...] Board of Commissioners and

would appreciate your presenting this letter to the Ethics Commission for their consideration and response. The question is as follows: May Members of the [City Housing Authority] board of commissioners also serve on the board of directors of a nonprofit corporation created by it to perform housing and community development services if the nonprofit corporation receives funding from the [City Housing Authority]?

Recently, the General Counsel of the [City Housing Authority] pointed out to us Ethics Commission Opinion 22-033-E issued in January of 2023. In that Opinion the Ethics Commission opined that members of a Convention and Visitor's Bureau Board could not serve on a non-profit corporation which receives funding from the CVB Board. We would like an official opinion on that same question, understanding that the legal background is different than the CVB/non-profit scenario discussed in Op. No. 22-033-E.

The [City] Housing Authority is a "body corporate and politic, exercising public and essential governmental functions and having all the powers necessary to carry out and effectuate the purposes and provisions" of Title 43, Chapter 33, Article 1, "including the following powers in addition to others [t]herein granted: ... (i) *To establish and operate a nonprofit corporation for housing and community development purposes.*" Miss. Code Ann. § 43-33-11.

Municipal Housing Authorities are limited by HUD in the number of units they may operate. At 482 rental units, the [City Housing Authority] is at its maximum capacity. Sadly, there are over 500 people on a waiting list to reside in [the City Housing Authority] housing units, so there is far more demand than there is space to accommodate low to moderate income renters in [the city]. Several years ago the [City Housing Authority], pursuant to Section 43-33-11(i) established a non-profit corporation and named it the [City] Community Housing Development Organization [...]. I and other [City Housing Authority] Board Members have been Directors and Officers of both the [City Housing Authority] and the [Community Housing Development Organization], serving without compensation from the [Community Housing Development Organization] and only receiving per diem for service as commissioners on the [City Housing Authority] Board.

We believe the reason the Legislature included paragraph (i) of Section 43-33-11 in the list of powers possessed by Public Housing Authorities is to allow them to expand their offerings through non-profit corporations. We have studied Section 109 of the Mississippi Constitution as well as Section 25-4-103(5) of the Mississippi Code and are uncertain if this should prohibit the [City Housing Authority] Board from creation of a non-profit that it is supposed to "establish and operate." If the [City Housing Authority] Board could not be on the Board of the nonprofit corporation, then how can the [City Housing Authority] "operate" the non-profit?

The [Community Housing Development Organization] is in fact established as a 501(c)(3) nonprofit corporation. So, even though it appears to be a "business" as

that term is defined in 25-4-103(5), of the Code, it seems akin to a subsidiary or an affiliate corporation or in other words, if it is to be created by and operated by the [City Housing Authority] is it really the [City Housing Authority] or a part of the [City Housing Authority] itself?

The nonprofit does from time to time need the services of the [City Housing Authority] and in such instances, the [City Housing Authority] charges the nonprofit for the labor of its employees and the nonprofit reimburses the [City Housing Authority] for any labor and material provided to the nonprofit by the [City Housing Authority]. However, the [City Housing Authority] does fund the [Community Housing Development Organization] from time to time as the [City Housing Authority]'s de-federalized funds are available and does not expect reimbursement. The two entities meet separately and keep separate minutes and bank accounts, so they are not simply one and the same.

If you need further information about this issue in order to make a recommendation to the Ethics Commission, please feel free to reach out to me or [...], our general counsel.

III. ANALYSIS

Pursuant to Section 25-4-105(1), no public servant shall use his or her position in government to obtain or attempt to obtain a monetary benefit for any “business with which he [or she] is associated.” The statutory definition of that term found in Section 25-4-103(d) includes any business in which the public servant is an officer, director or employee. As defined in Section 25-4-103(c), the term “business” includes any nonprofit entity receiving public funds. See also Section 25-4-103(o). Therefore, when a public servant is a member of the board of directors of a nonprofit corporation receiving public funds, the nonprofit is a business with which the public servant is associated. As a consequence, the public servant, when a member of a public board, must fully recuse from any board action which would result in a monetary benefit to the nonprofit entity. See Advisory Ethics Opinions No. 10-008-E and 10-006-E (school board and PTO board).

However, statutes which are more specific than the Ethics in Government Law and contradict its general prohibitions can operate as exceptions. See Section 19-23-15 (county prosecutor may also be attorney for supervisors) and Section 19-4-1 (chancery clerk may also be employed as county administrator, etc.) as discussed in Advisory Ethics Opinion No. 17-026-E. The statute cited above, Section 43-33-11(i), is another such exception. The statute empowers housing authorities to “establish and operate a nonprofit corporation for housing and community development purposes.” These are the same purposes for which the housing authorities were created. See Sections 43-33-3, 43-33-5 and 43-33-11. The statutes make no explicit distinction between the housing authority and the nonprofit entity it establishes and operates.

Therefore, it appears the Legislature intended to treat the housing authority and the nonprofit as two components of the same governmental entity fulfilling the same governmental purposes and did not intend for a nonprofit created by a housing authority to be a “business,” as defined in Section 25-4-103(c). In recognition of this legislative intent, the commission finds that no violation of Section 25-4-105(1) will result if commissioners of a housing authority appoint

themselves as directors and/or officers of a nonprofit corporation established and operated by the housing authority pursuant to Section 43-33-11(i) and vote as commissioners of the housing authority to take actions which result in a pecuniary benefit to that nonprofit corporation since the corporation is, in reality, an authority of a governmental entity, the housing authority.

Of course, the housing authority commissioners, as members of a public board, are also bound by the provisions of Section 109, Miss. Constitution of 1890, and Section 25-4-105(2), which strictly prohibit the commissioners from having a direct or indirect interest in any contract authorized by the housing authority during their term as commissioners or within one year of leaving office. These restrictions will certainly include any transactions between the housing authority and the nonprofit entity it established and will prohibit the commissioners from receiving payments from the nonprofit for any reason whatsoever and from having any prohibited interest in transactions with the nonprofit since it is merely an extension of the housing authority.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
Chief Counsel