



BEN H. STONE, Chairman
Gulfport

SEAN A. MILNER, Vice-Chairman
Clinton

RON CROWE, Secretary
Brandon

STEPHEN W. BURROW
Pascagoula

MISSISSIPPI ETHICS COMMISSION

Post Office Box 22746

Jackson, Mississippi 39225-2746

Telephone: 601-359-1285

www.ethics.ms.gov

TOM HOOD
Executive Director and Chief Counsel

BOBBY WAITES
Brandon

MAXWELL J. LUTER
Tylertown

ERIN P. LANE
Ridgeland

SAMUEL C. KELLY
Madison

ETHICS ADVISORY OPINION NO. 23-019-E

November 3, 2023

Question Presented: May an alderman be employed by the city's depository bank?

Brief Answer: Yes. If the city utilizes the procedure in Section 27-105-305, Miss. Code of 1972, the depository contract will not be authorized by the board of aldermen, and no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, should occur. Nevertheless, the alderman must recuse himself or herself from any board action which would benefit the bank, in compliance with Section 25-4-105(1), Miss. Code of 1972. Additionally, the exception provided in Section 25-4-105(4)(a) will apply under these facts to prevent a violation of Section 25-4-105(3)(a).

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.

(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.

(e) “Compensation” means money or thing of value received, or to be received, from any person for services rendered.

(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.

(i) “Income” means money or thing of value received, or to be received, from any source derived, including but not limited to, any salary, wage, advance, payment, dividend, interest, rent, forgiveness of debt, fee, royalty, commission or any combination thereof.

(k) “Material financial interest” means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(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.

(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.

(4) Notwithstanding the provisions of subsection (3) of this section, a public servant or his relative:

(a) May be an officer or stockholder of banks or savings and loan associations or other such financial institutions bidding for bonds, notes or other evidences of debt or for the privilege of keeping as depositories the public funds of a governmental entity thereof or the editor or employee of any newspaper in which legal notices are required to be published in respect to the publication of said legal notices.

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 on behalf of [a city]. The city has a two year depository bid coming due in December of this year pursuant to M.C.A. 27-105-5, 27-105-6 and 27-105-353. One of our Alderpersons is an employee for [a Bank] which is a qualified banking institution under the statutes above. The Alderperson works in a wealth management position and does not work at the [the Bank] location in [this city].

The city is interested in requesting a bid from [the Bank] and is requesting an opinion as to any conflict of interest in this regard. Also, if there is a conflict of interest, is recusal by the individual from voting on the issue sufficient to avoid the conflict? Thank you.

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 with the government funded or otherwise 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). As an employee of the bank in a wealth management position, the alderman is presumed to have a prohibited interest in any future contracts between the bank and the municipality.

Pursuant to Section 27-105-353, municipalities are required to select a depository in the manner provided by law for the selection of county depositories. Section 27-105-303, et seq., sets out the requirements for counties in selecting depositories. The alderman's interest will prohibit the board of aldermen from authorizing any contract with the bank. However, Mississippi law provides another method for approval of municipal depository contracts whereby such contracts are approved by the State Treasurer rather than the board of aldermen. The municipality must utilize the procedure outlined in Section 27-105-305, Miss. Code of 1972, which requires the board of aldermen to submit the selection of a depository to the State Treasurer, thereby avoiding any potential violation of Section 109 and Section 25-4-105(2).

As set forth in Section 25-4-105(1), the alderman cannot use his or her position as a member of the board of aldermen to obtain or attempt to obtain any pecuniary benefit for himself or herself or a "business with which he [or she] is associated." The bank, as the alderman's employer, is a business with which the alderman is associated. See Section 25-4-103(d). The board will not act on the depository contract when using the procedure outlined above. Nevertheless, if the State Treasurer were to select the bank in question as the municipal depository, it is possible the board could take action on some other matter which would benefit the bank. To prevent a violation of Section 25-4-105(1), the alderman should fully recuse himself or herself from any matter coming before the board of aldermen concerning the bank.

A total and complete recusal requires the alderman leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The alderman must not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter with other city officials and employees. This restriction includes casual comments, as well as detailed discussions, held in person, by telephone or by any other means. An abstention is considered a vote with the majority and is *not* a recusal. Furthermore, any minutes or other record of the meeting or other proceeding should state the alderman left the room before the matter came before the board and did not return until after the vote.

Additionally, Section 25-4-105(3)(a) prohibits an alderman from having a "material financial interest" in a business which is a contractor with the municipality. The alderman has a material financial interest in the bank based on the definition found in Section 25-4-103(k), above.

The bank will be a contractor to the municipality if it provides depository services to the municipality. However, Section 25-4-105(4)(a) provides for an exception when the alderman is an officer or stockholder of a depository bank. The exception may not apply to a bank providing other services, such as investment broker, paying agent, bond registrar, trustee or financial advisor. Furthermore, this exception only applies to the provisions of Subsection (3) and not to any other prohibitions or restrictions in Section 25-4-105 or Section 109.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel