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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

ETHICS ADVISORY OPINION NO. 23-026-E

January 12, 2024

Question Presented: May a county supervisor work for a nonprofit foundation which is led by the owner of a company that is a contractor to the county?

Brief Answer: Yes. The supervisor will have no interest in the contract between the county and the company, as prohibited in Section 109, Miss. Const. of 1890, and Section 25-4-105(2), Miss. Code of 1972. To avoid any appearance of impropriety, the supervisor should not participate in board actions which benefit the company, in compliance with Section 25-4-101.

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 25-4-101, 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.

(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.

(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.

(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.

A jail management company within our county named [...] is a vendor within our county. The company owner's family has a Foundation that gifts programs to Churches, Jails, and Prison in honor of their deceased daughter. I am a member of the county board [of supervisors, and I have past] experience and qualifications as a Program Manager, and the foundation wishes to employ me on a part-time basis. No funds generated by the Management Company's contract with the county will be used to pay the salary of the Program Manager. The Program Manager will be paid with funds generated by donations from the general public to the Foundation.

Would it be a conflict of interest for me, a supervisor, to accept the position with the private Foundation? And if not, should I recuse myself from voting on any action taken by the board regarding the jail management company?

III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a county supervisor from having any direct or indirect interest in a contract with the county which was 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). In this context "authorized" means more than just the obvious act of approving a contract. It also means appropriating money. An appropriation of public money which ultimately funds a contract is an action which authorizes that transaction. See Id., citing Cassibry v. State, 404 So. 2d 1360, 1366-67 (Miss. 1981). The requestor is prohibited from having an interest in the contract with the jail management company.

All employees of a company are presumed to have an interest in that company's income. Consequently, a county supervisor normally cannot be employed by a business which contracts with the county. Yet here the supervisor would not work for the contractor but for a nonprofit organization which is led by the owner of the contracting company. More importantly, the nonprofit foundation does not receive funds from the contracting company or funds from the county. Based upon these facts, the supervisor will have no prohibited interest in the contract between the county and the company, even if the supervisor receives income from the nonprofit foundation. Therefore, the supervisor may work for the nonprofit foundation, and no violation of Section 109 or Section 25-4-105(2) will result.

Section 25-4-105(1) also prohibits the supervisor from using his or her position to obtain or attempt to obtain any monetary benefit for a "business with which he is associated." See Section 25-4-103(d). The jail management company will not be a business with which the supervisor is associated, and the supervisor is not required to recuse from board actions which will benefit that company, such as the approval of payments or contract extensions.

Nevertheless, the supervisor must also comply with Section 25-4-101, which admonishes all public servants to avoid actions which create an appearance that the public servant is violating the public trust. Since the nonprofit foundation is controlled by the owner of the jail management company, the public might reasonably suspect the company could exert undue influence over the supervisor. For this reason, the supervisor should avoid participating in board actions which benefit the company.

A total and complete recusal requires the supervisor leave the meeting room before the matter comes up for discussion and remain absent until the vote is concluded. The supervisor 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 anyone in county government. 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 or other record of the meeting should state the recusing supervisor left the room before the matter came before the board and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel