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ETHICS ADVISORY OPINION NO. 23-027-E

January 12, 2024

Question Presented: May a county board of supervisors contract with a public university when the spouse of an attorney for the board is employed at the university?

Brief Answer: Yes. Under these particular circumstances, the attorney is not a “public servant” and is not subject to the Ethics in Government Law. Moreover, no violation of Section 25-4-105(1), Miss. Code of 1972, is even foreseeable under these facts.

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 25-4-103, 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.

(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.

(q) “Relative” means:

(i) The spouse of the public servant;

(ii) The child of the public servant;

(iii) The parent of the public servant;

(iv) The sibling of the public servant; and

(v) The spouse of any of the relatives of the public servant specified in subparagraphs (ii) through (iv).

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.

II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

I have searched for a prior opinion analogous to the situation for which I seek an opinion but did not see one.

Facts

- The requestor serves as special counsel for a Mississippi county board of supervisors.
- The county wants to spend federal grant funds to contract with a department of a university ... to manage a program that is an eligible expenditure of the federal grant.
- The county hired special counsel to establish and manage all programs the county selects to fund with this federal grant.
- The county board of supervisors decides whether to enter into and fund such contracts. The requestor is not a decision maker for the county concerning entering into or funding the specific contract in question.
- Special counsel's spouse is the president of the university.
- Special counsel's spouse is not paid by any funds channeled through said university department, nor will he receive any funds from the proposed contract. The salary of special counsel's spouse will not be increased or affected in any manner by the referenced program with the university department.
- Special counsel will receive no funds from the university or the university department that will run the program either directly or indirectly in association with the referenced contract.

Questions

May a county special counsel hired to work on federally funded programs participate in the presentation, establishment, implementation, and management of a contract for a federally funded program of the board of supervisors when the county will fund the program through a department of a university where special counsel's spouse is the university president? Are there any suggested restrictions on said participation?

See the relevant contract enclosed.

III. ANALYSIS

The first question is whether the requestor, as special counsel to a county board of supervisors, is subject to the Ethics in Government Law at all. Section 25-4-103(p)(ii), Miss. Code of 1972, defines “public servant” to include an “agent or employee of the government.” The commission has previously opined that an attorney for a governmental board with a general scope of representation who is not a government employee is an agent for the board and therefore a public servant. See Advisory Opinions No. 04-115-E and 96-055-E. This interpretation typically applies to the “regular attorney” for a board of supervisors selected pursuant to Section 19-3-47. The commission has also opined that an attorney for a governmental entity whose scope of representation is narrowly limited is not a public servant under the Ethics in Government Law. See Advisory Opinions No. 08-137-E and 05-063-E.

Whether an attorney who is not an employee of a governmental entity qualifies as a public servant is a determination that must be made on a case-by-case basis, relying on the specific facts of each situation. Here, the county board of supervisors has contracted with a law firm “to provide professional consulting services with respect to the American Rescue Plan Act (ARPA).” The requestor is an associate attorney with that law firm. The scope of the work to be performed by the law firm for the county, as outlined in the written contract, is limited solely to this one specific matter, as opposed to the more general scope of representation discussed in the above-cited opinions. Under these facts, and at this time, the attorneys of this law firm are not public servants of this particular county and are not subject to the Ethics in Government Laws in that limited role.

However, if the scope of the contract were to change, even to the extent that the requestor were to become a public servant of this county, no violation would necessarily occur. Public servants of state and local government are prohibited from using their position to obtain or attempt to obtain any monetary benefit for a “business with which he [or she] is associated,” as outlined in Section 25-4-105(1). See also Section 25-4-103(d). While the law firm is a business with which the university president is associated, the state university is not a business. Therefore, the university president may not participate in university actions which benefit the law firm. The law firm is not contracting with the university, and there are no facts to indicate such a scenario is even contemplated. Yet, even if the requestor were a public servant and participated in actions which benefit the university, no violation would result as long as there is no personal monetary benefit to the university president. Such a combination of events is virtually impossible under these facts. Consequently, no potential violation is even foreseeable under the present circumstances.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
Chief Counsel