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ETHICS ADVISORY OPINION NO. 24-004-E

March 1, 2024

Question Presented: May a former mayor, within one year of leaving office, be employed by an insurance agency which is affiliated with but separate from the city's insurance agency?

Brief Answer: Yes. A violation of Section 109, Miss. Const. of 1890, and Section 25-4-105(2), Miss. Code of 1972, will not occur if the former mayor is employed by an affiliated but separate insurance agency which has no contract with the city and if he is paid with segregated funds.

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.

(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.

(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.

(m) “Person” means any individual, firm, business, corporation, association, partnership, union or other legal entity, and where appropriate a governmental entity.

(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.

(3) No public servant shall:

(e) Perform any service for any compensation for any person or business after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was directly concerned or in which he personally participated during the period of his service or employment.

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 currently the Human Resource Director for the [...] School District and also serve as the Mayor of the City of [a city within the same county], a part-time position. I am about to retire from the position with the [...] School District and will begin receiving retirement benefits from the Public Employees Retirement System of Mississippi. As such, it is my understanding that I will have to resign as Mayor.

The branch manager of the local insurance agency is retiring and I am under consideration as the agency manager upon my full retirement. However, the City [...] purchases its property insurance coverage from the agency, which it has done continuously since before 2015. The City Clerk has handled the City's insurance policy and all policy changes and billing questions come to her. At annual renewal, the Clerk presents the policy to the Board of Alderman for approval. As branch manager, I will be paid a salary although, eventually, once I secure an insurance license, I will be paid a commission on new business brought to the agency. I will not be compensated based on the [city's] insurance account since it is preexisting. Thus, my compensation will be completely unrelated to the City's contract for insurance. Further, I own no interest in the insurance agency.

I hereby request confirmation that in the opinion of the Commission, I will not be in violation of any of the conflict of interest laws and statutes under the facts and circumstances set out hereinabove if I become employed by the City's insurance agency and compensated under the terms and conditions described.

Alternatively, if employment by the City's insurance agency presents a problem under the Constitution and statutes, would employment by an affiliated but separate insurance agency which has no contract with the City [...] be permissible if no compensation or benefits, directly or indirectly, are received from the contracting insurance agency?

III. ANALYSIS

Section 25-4-105(3)(e), Miss. Code of 1972, addresses successive governmental service and private sector employment. Section 25-4-105(3)(e) will not necessarily prohibit a former public servant from being employed by an entity which contracts with his or her former governmental entity. The law merely prohibits the former public servant from working for pay in the private sector on any *matter* in which he or she was directly or personally involved while working for the government.

Therefore, if the former public servant was *not* directly concerned with and did *not* personally participate in the matter in question, then the former public servant may legally accept payment from the private entity to work on that matter. Elec. Data Sys. Corp. v. Miss. Div. of Medicaid, 853 So.2d 1192, 1204, 1205 (¶¶ 35, 39) (Miss. 2003). If the former public servant *was* directly concerned with and *did* personally participate in the matter in question, then the private entity may still contract with the government, but the former public servant may not be paid in relation to that matter. Id.

Here, the matter in question will be a potential future contract for insurance authorized by the next board of aldermen. Since any such contract would be approved after the requestor leaves office as mayor, he will have had no personal or direct involvement in that contract, and he will not violate Section 25-4-105(3)(e) if he is compensated by the contractor in relation to that contract.

However, Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, present a much more difficult question. Those statutes prohibit a former mayor from having any direct or indirect interest in a contract with the municipality which was funded or otherwise authorized by the board during his or her term of office or within one year after leaving office. 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 contract. See Id., citing Cassibry v. State, 404 So. 2d 1360, 1366-67 (Miss. 1981). Any contract entered into in violation of Section 109 or Section 25-4-105(2) is null and void. Towner v. Moore, ex rel. Quitman County School District, 604 So.2d 1093, 1096 (Miss. 1992), quoting Smith v. Dorsey, 530 So.2d 5, 9 (Miss. 1988).

Yet no violation of Section 109 or Section 25-4-105(2) will arise if the former mayor is employed by an affiliated but separate insurance agency which has no contract with the city and if he is paid with funds segregated from funds paid by the city. See Advisory Opinions No. 23-022-E and 08-124-E. Under these circumstances, the former mayor can work for an affiliated but separate insurance agency within one year of leaving office.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
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