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ETHICS ADVISORY OPINION NO. 24-025-E

October 4, 2024

Question Presented: May one spouse serve as alderman in a ward while the other spouse simultaneously serves as alderman at large in the same municipality?

Brief Answer: Yes. While the spouse of an alderman may not be employed by the municipality, aldermen are not employees and do not have a contract but instead hold a public office. Therefore, no violation of Section 109, Miss. Const. of 1890 or Section 25-4-105(2), Miss. Code of 1972, will result if spouses simultaneously serve on the board of aldermen. Yet neither alderman may participate in any action which results in a monetary benefit to their spouse, as proscribed in Section 25-4-105(1).

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.

(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.

(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.

(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.

My [spouse] is a current individual Ward Alderman in [the city] with aspirations of reelection in 2025. I am considering a run for the At-Large Alderman position in [the city] in 2025. We found the following Opinion but do not know if it encompasses serving on the same Municipal Board.

The Opinion states, "A husband and wife may serve simultaneously on the Board of Alderman and the Municipal School Board. Both positions are public offices and no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(1), Miss. Code of 1972, will arise."

We humbly request a formal written opinion to determine the eligibility of spouses serving at the same time as an Individual Ward Alderman and an At-Large Alderman in the same Municipality.

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 which is 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). A member of a public board has an indirect interest in his or her spouse's income. Smith v. Dorsey, 530 So.2d 5, 7 (Miss. 1988). Consequently, the spouse of an alderman may not be employed by the municipality or have any other type of contract with the municipality. Frazier at 693.

However, aldermen are not employees of the municipality and do not serve by contract. All elected officials hold a "public office," for which there is no contract. Johnston v. Reeves & Co., 72 So. 925, 927 (Miss. 1916). A position is a "public office" when created by law with duties cast upon the incumbent involving the exercise of some portion of the sovereign power of the state in the performance of which the public is concerned and which are continuing, or enduring and permanent, in their nature. State v. McLaurin, 131 So. 89 (Miss. 1930). By contrast "public employment" is a position lacking one or more of the foregoing elements. Id. No violation of Section 109 or Section 25-4-105(2) will result from the husband serving as alderman in a ward while his wife simultaneously serves as alderman at large in the same municipality since neither of them will have a contract with the municipality.

Yet, if both are elected, these two aldermen must also strictly observe Section 25-4-105(1), which prohibits them from using their position to obtain or attempt to obtain any pecuniary benefit for any "relative." That term is defined in Section 25-4-103(q) and includes spouses. Therefore, neither alderman can participate in any action by the board which would result in a monetary benefit to the other aldermen because such action would benefit their spouse. Actions in which these two aldermen may not participate would include, but would not be limited to, raising the salary for the board of aldermen or approving benefits, travel reimbursement or any other payment to the alderman who is the spouse of another alderman. These two aldermen may participate in discussion and voting on any matters which do not result in a monetary benefit to either of them. Each may also participate in actions regarding his or her own salary, benefits, reimbursement or other "compensation provided for by law." See Section 25-4-105(1). But neither may participate in any action which will result in a monetary benefit to the other. These two aldermen must fully recuse themselves from such actions by the board.

A total and complete recusal requires that these two aldermen not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations, but also avoid discussing the subject matter with other city officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is not a recusal. Furthermore, the minutes of the meeting should state the recusing aldermen left the room before the matter came before the board and did not return until after the vote. If these two aldermen fully recuse from any matter benefiting their spouse, then no violation of Section 25-4-105(1) should result.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
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