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ETHICS ADVISORY OPINION NO. 25-005-E

April 4, 2025

Question Presented: May a city continue to do business with a company which employs an alderman's spouse when all payments from the city constitute less than 1% of the company's annual revenues?

Brief Answer: Yes. Any indirect interest the alderman may have in the transactions is *de minimis* and would not violate Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972. Additionally, the alderman's recusal from any action which would benefit the company will comply with Section 25-4-105(1) and 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.

(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.

(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.

(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.

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 the attorney for the City [...]. The wife of one of the Aldermen became employed in May of 2024 by [a local petroleum company]. [The company] has supplied gas and diesel products to the [City] since at least 2008. The Alderman's wife is employed as a receptionist/cashier/bookkeeper and is one of several employees who answers the phone, waits on customers and takes payments from

those who purchase directly at their facility. Her pay is based on an annual salary and she does not receive a commission of sales.

Once every two (2) weeks, the [City] Street Department takes a measurement of the fuel tanks and reports that to [the company]. [The company] then delivers sufficient fuel to the Street Department to last it until the next delivery. [The company] owns and maintains the fuel tanks and pump at the Street Department. The Alderman's wife may or may not be the employee at [the company] who takes the call from the Street Department. [The company] submits its invoice for the Street Department fuel deliveries monthly to the City Clerk for payment. Since the Alderman's wife has become employed at [the company], the Alderman has fully recused himself from any vote associated with the payment of the invoice, including removing himself from the boardroom during discussions and votes.

In 2024 fiscal year, the [City] purchased just under \$125,000 of fuel from [the company] for the Street Department. [The company] has annual gross sales over \$14,000,000.00. The [City] is approximately .89 % of the gross sales of [the company]; less than one (1) percent. The City Fire and Police Departments purchase their fuel through the Fuelman state contract.

The City just learned that best practices require that the Street Department fuel supply be bid out according to the purchasing laws. The City has begun the process of bidding out that supply. If [the company] submits a bid, the Alderman whose wife is employed there, will fully recuse himself from consideration of the bids.

Is it an ethical conflict for the [City] to purchase gas and diesel for the Street Department from [the company] where an Alderman's wife is employed as receptionist/cashier/bookkeeper? Does the Alderman's full recusal from any vote associated with the payment of the [the company] fuel deliveries to the Street Department cure any potential ethics issue. If [the company] is the low bidder for the fuel supply to the Street Department, does that change the determination of any ethical infringement?

Please let me know if you have any questions. As always, thank you for your assistance.

III. ANALYSIS

The Ethics Commission does not opine on past action. This opinion is prospective in nature, provides no immunity for past actions and should not be construed to condone any past conduct.

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 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). An alderman is

prohibited from having an interest in a contract which is funded by the board of aldermen, whether directly or indirectly through the alderman's spouse. Smith v. Dorsey, 530 So.2d 5, 7 (Miss. 1988).

Additionally, 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 at 9. Recusal by the board member will not prevent or ameliorate a violation of Section 109 or Section 25-4-105(2), as these sections do not require any affirmative act by an individual member but merely action by the board. Towner at 1100.

Frequently, the most problematic issue encountered when interpreting Section 109 and Section 25-4-105(2) is whether a particular financial interest falls within that proscription. Our Supreme Court has described the prohibition as a target having a defined edge, yet the Court has never clearly defined that edge. Jones v. Howell, 827 So.2d 691, 697-698 (Miss. 2002), and Frazier at 695, citing Cassibry v. State, 404 So. 2d 1360, 1368 (Miss. 1981).

The Court has also hinted that a minimal pecuniary interest could fall outside the scope of the prohibition. "The term *de minimis non curat lex* means the law cares not for small things. ... For here again, it would insult the common sense of the 1890 Constitutional Convention that they intended any interpretation of § 109 to trickle down to triviality." Frazier at 697. Yet the Court has not defined a *de minimis* interest.

In considering whether an interest is in fact *de minimis*, several factors must be considered. The financial condition of the business is relevant, as well as the market value of the asset and the financial risk associated with its ownership. These factors and others must be scrutinized in each separate instance to determine the value of the interest to the individual public servant and the effect, if any, on matters of public concern. Historically, this Commission has followed such analysis in advisory opinions and has renewed that analysis in recent years.

As noted above, the city's purchases from the company in the last fiscal year represent less than 1% of the company's annual revenues. Based on these factors, any interest the alderman might have in those sales would be remote and minimal, or *de minimis*. See Advisory Opinions No. 24-037-E, 24-015-E, 17-052-E, 16-035-E, 15-014-E, 13-071-E, 13-013-E, 13-008-E, 12-013-E, 11-066-E, 10-099-E and 07-007-E. Therefore, the Ethics Commission concludes that no violation of Section 109 or Section 25-4-105(2) will result if the city continues to purchase fuel from the company under the facts provided above.

As set forth in Section 25-4-105(1), the alderman cannot use his position as a member of the board to obtain or attempt to obtain any pecuniary benefit for himself or a "business with which he is associated." The company, as the alderman's spouse's employer, is a business with which the alderman is associated. See Section 25-4-103(d). To prevent a violation of Section 25-4-105(1), the alderman must fully recuse himself from any matter coming before the board concerning the company, including but not limited to approving the payment of claims to the company.

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 anyone. 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, 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.

The alderman is also subject to the provisions of Section 25-4-105(3)(a), which prohibits the alderman from having a “material financial interest” in a business which is a contractor, subcontractor or vendor to the board. Section 25-4-103(k)(iv) provides a “spousal exclusion” to the broad definition of “material financial interest.” The spouse’s employer may do business with the public body when “the public servant exercises no control, direct or indirect, over the contract.” If the alderman fully recuses himself as described above, then the alderman will not exercise any control, directly or indirectly, over any contract between the board and the company. Under those circumstances, no violation of Section 25-4-105(1) or (3)(a) should result.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
Chief Counsel