

SEC AO2003-002

September 18, 2002

SUBJECT: PUBLIC EMPLOYEE AND THE REGULATORY PROCESS

SUMMARY: Based on the information provided regarding the DHEC regulatory process, the DHEC Board is ultimately responsible for setting agency policy with substantial input from many factions and thus the public employee's ability to use her employment to obtain an economic interest for herself or her spouse appears remote. However, notwithstanding the apparent remoteness, a public employee must not knowingly use her employment to obtain an economic interest for herself or her spouse. A public employee is required to follow the procedures of Section 8-13-700(B) if a matter comes before her which would affect her or her spouse's economic interests.

QUESTION: Would it violate the state Ethics Act for a DHEC employee, whose spouse represents clients seeking permits, to assist the agency in the process of drafting and coordination within the agency, presenting the consensus of the senior staff to the Board and representing the agency in the approval process in the General Assembly? Several other agency staff serve in this capacity. The employee will not take an independent position on regulations before the Board. The employee has no independent decision-making authority, but rather facilitates developing consensus if stakeholders raise concerns with members of the General Assembly by serving as a liaison among senior staff, agency executive management, the DHEC Board and the General Assembly.

DISCUSSION: The State Ethics Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act no. 248 of 1991; Section 2-17-5 et seq. and Section 8-13-100 et seq., as amended, 1976 Code of

Laws of South Carolina). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Failure to disclose relevant information may void the opinion.

A public employee works for the S.C. Department of Health and Environmental Control ("DHEC"). The public employee's spouse is a consultant who represents clients who seek permits from DHEC for various projects. The public employee's spouse is paid for his representation. The public employee plays no role in the decision to grant, reject, or modify any individual permit application.

The question is whether it would violate the Ethics Reform Act for the public employee to assist DHEC in the process of drafting and coordination within the agency, presenting the consensus of the senior staff to the DHEC Board and representing the agency in the approval process in the General Assembly, notwithstanding the public employee's spouse's employment? The public employee's spouse is a member of the employee's immediate family and thus governed by both Sections 8-13-700(A) and 700(B).

Section 8-13-700(A) provides as follows:

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.

Section 8-13-700(B) provides in part as follows:

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;

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(3) if he is a public employee, he shall furnish a copy of the statement to

his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;

Immediate family member is defined in Section 8-13-100(18) as:

- (a) a child residing in a candidate's, public official's, public member's, or public employee's household;
- (b) a spouse of a candidate, public official, public member, or public employee; or
- (c) an individual claimed by the candidate, public official, public member, or public employee or the candidate's, public official's, public member's, or public employee's spouse as a dependent for income tax purposes.

Economic interest is defined in Section 8-13-100(11) as:

(a) ...an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

In promulgating regulations, DHEC and other similar agencies must follow the dictates of the Administrative Procedures Act (APA). The process is a lengthy one and provides for public comment and legislative review. After initial drafting by staff, DHEC's proposed regulations are subjected to internal agency review and comment by appropriate staff throughout the agency. Following that review, the proposed regulations are forwarded to the deputy commissioner for the division where they originated. Following the deputy commissioner's review and approval, the regulations are submitted to DHEC's Board (the "Board") for initial approval to publish the regulation in the State Register and solicit public comment. Changes may be made as a result of public comments received. As required by the APA, the Board then conducts a public hearing following notice and approves the regulation in the form in which it is submitted to the General Assembly.

The DHEC Board has sole authority over the content of any DHEC regulation submitted to the General Assembly for approval. The General Assembly can then approve

the regulation, disapprove it, request the agency to modify the regulation in a specific way in order to gain approval, or take no action. After an agency submits a regulation to the General Assembly, the agency cannot withdraw or amend the regulation unless an appropriate legislative committee so directs in writing. If the legislative committee states that it cannot approve a regulation unless certain specified changes are made, the agency, after consultation with the Board, can make the specified changes. The agency cannot make changes other than as directed by the legislative committee.

A public employee is prohibited by Section 8-13-700(B) from participating in any action in which he or a member of his immediate family has an economic interest. The public employee is required to follow the procedures of Section 8-13-700(B)(1) and (3) if an issue arises in her employment which would affect the economic interests of her spouse. It does not appear that the regulatory procedure previously outlined would permit the public employee an opportunity to affect the economic interest of her spouse to any greater extent than anyone else affected by the regulation. In providing the staffing function within DHEC and the liaison function with the General Assembly, the public employee would not make agency decisions regarding the content, modification, or adoption of any regulation. The public employee is not a permit manager and does not work in a regulatory section. The public employee does not vote on proposed regulations. As a staff member, the public employee would, along with others, serve as liaison with the General Assembly and support agency policy as formulated by senior staff, the deputy commissioner and commissioner, and the Board, which is ultimately responsible for setting agency policy.

CONCLUSION: Based on the information provided regarding the DHEC regulatory process, the DHEC Board is ultimately responsible for setting agency policy with substantial input from many factions and thus the public employee's ability to use her employment to obtain an economic interest for herself or her spouse appears remote. However, notwithstanding the apparent remoteness, a public employee must not knowingly use her employment to obtain an economic interest for herself or her spouse. A public employee is required to follow the procedures of Section 8-13-700(B) if a matter comes before her which would affect her or her spouse's economic interests.

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| KEY WORDS: economic interest, immediate family member |
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| ANNOTATIONS: 8-13-100(11), 8-13-700(A) and 8-13-700(B) |
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