

SUBJECT: COUNTY COUNCIL MEMBERS VOTING ON SALARY INCREASE

SUMMARY: County Council members who are also school district employees may abstain from acting on a personnel matter involving a county employee who is an elected member of the Board of the same school district that employs them, but under the facts as presented, are not required to do so. The county employee who is an elected member of a school board which employs elected members of county council should disqualify himself from acting on matters pertaining to the school district employees/council members in his capacity as a school board member.

QUESTION:

The Colleton County Attorney requested an opinion on behalf of the Colleton County Council concerning the following matter. After the Commission provided its informal opinion suggesting that the affected Colleton County Council members should consider disqualifying themselves from a particular matter in order to avoid the appearance of impropriety, they did so. Subsequently, the affected employee requested this formal opinion. For purposes of clarity, we must point out that this opinion is directed to the Colleton County Council.

The issue concerns the Colleton County Public Works Director who is also an elected member of the Colleton County Board of Education. The Colleton County Administrator prepared a recommended budget including an appropriation for an increase in salary for the Colleton County Public Works Director. The Colleton County Public Works Director sought further increase in salary for the 1997-98 fiscal year than that recommended to County Council by the County Administrator in his budget presentation. Apparently, the Colleton County Public Works Director was successful in appealing his request for increase directly to the Colleton County Council inasmuch as he stated by letter that he was given a raise in July 1997 and it was rescinded in August [1997] because all five members of the County Council had voted and were subsequently advised that the members of Council who are school district employees should disqualify themselves from voting on an individual raise for the Public Works Director who is on the School Board.

The Colleton County Attorney asked "whether the County Council members who are Colleton County School District employees *may ethically* participate in deciding the issue of whether the County Public Works Director (a member of the Colleton County Board of Education) should be given an increase in salary above that recommended by the Colleton County Administrator". [emphasis added] By informal opinion, the Colleton County attorney was advised that "as to the School District employees who serve on Council, the fact that a person who is in effect their boss petitions them for a pay raise creates a remote economic interest to the extent that the School District employees may be the subject of economic or job related retaliation. However remote that seems, it underscores the existence of the appearance of impropriety in asking the School District employees to rule on their superior's request for a pay raise. Thus, if asked, I would advise all the parties involved that, in order to avoid the appearance, if not the effect, of impropriety, they should recuse themselves on such an issue."

## DISCUSSION:

This opinion is rendered in response to a request for an informal opinion by the County Attorney for Colleton County, South Carolina; the Commission's reply; and a request for formal opinion by the Colleton County Public Works Director. The Commission's jurisdiction is limited to the applicability of the State Ethics Act, S. C. Code §2-17-10; 8-13-100 (Supp. 1996). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation

S. C. Code §8-13-700(B) (Supp. 1995) states:

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;

(4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;

An economic interest means (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. S.C. Code §8-13-100(11) (Supp. 1996).

A business with which he is associated means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class. S.C. Code § 8-13-100(4) (Supp. 1996).

In interpreting S.C. Code § 8-13-700 (B) (Supp. 1996), our primary concern is to ascertain and effectuate legislative intent if it reasonably can be discovered in the language of the statute when construed in light of its intended purpose. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court [and this Commission] has no right to look for or impose another meaning. *Lester v. S.C. Worker's Compensation Commission, Op. No. 2733 S.C Ct. App. filed Oct. 6, 1997) Davis Adv. Sh. No. 29 at 18).*

Nothing can be farther from doubt than the intent of the legislation in regard to this statute, to wit:

Whereas, one of the most important functions of any law aimed at making public servants more accountable is that of complete and effective disclosure. Since many public officials serve on a part-time basis, it is inevitable that conflicts of interest and appearances of impropriety will occur. Often these conflicts are unintentional and slight, but at every turn those who represent the people of this State must be certain that it is the interests of the people, and not their own, that are being served. Officials should be prepared to remove themselves immediately from a decision, vote, or process that even appears to be a conflict of interest; Preamble to the Ethics Reform Act of 1991.

To achieve the intent of the legislature, we have consistently approved a cautious approach when advising public members in the performance of their official capacity. Here, we find that public members were called upon to take an action in their official capacity as members of the Colleton County Council which affected a person in a supervisory capacity to each of them as employees of the Colleton County School System. While the final decision of whether to follow the Commission's advice is theirs alone, we cannot say that the decision of the County Council members made to disqualify themselves was less than that expected by the General Assembly in adopting the Ethics Reform Act of 1991. Whether, as a matter of law, the County Council members were prohibited from voting is, however, an entirely different matter and one which we decline to address inasmuch as the conduct is one of a retrospective, rather than prospective, nature.

Clearly, a public employee and public official, i.e., the Public Works Director/School District Board member, may not use either office in an attempt to influence a governmental decision (County Council's decision on his salary request) to benefit his personal economic gain. It is equally as clear that the Public Works Director is entitled to enjoy all personnel privileges that are equally available to any other similarly situated county employee including petitioning Council to review a personnel matter. It is unassailable that neither a member of County Council nor the Public Works Director is permitted to receive any different treatment or consideration because of their respective positions. To the extent that the Ethics Reform Act operates to insulate public members and public employees from being forced to make a decision in which their impartiality may be called into question and an issue of the appearance of impropriety created, we find that S.C. Code § 8-13-700(B) (Supp. 1996) is a shield appropriately raised to protect those involved.

The Public Works Director suggests that if three members of County Council are disqualified from voting there would not be a quorum. We take this opportunity to comment on this issue as it arises frequently in a discussion of the subject statute's application. Assuming a public body's quorum was affected by a disqualification of a member under the Ethics Reform Act, perhaps the failure of a quorum could convince us here to decline the application of the statute. However, the Freedom of Information Act, S.C. Code § 30-4-20 (1991) does not bear out the proposition that the Ethics Reform Act's disqualification provision has any bearing on whether a quorum exists in a public meeting.

The Freedom of Information Act (FOIA) states that a quorum is, unless otherwise defined by applicable law, a simple majority of the constituent membership of a public body. S.C. Code § 30-4-20(e) (1991). FOIA also defines a "meeting" to mean "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." Thus, we would find that disqualification under the Ethics Reform Act does not affect the existence of a quorum.

Based on the facts submitted, we find that the members of Council employed by the School District have no *per se* legal impediment to voting on their supervisor's salary increase.

As a public member of the school board which employs members of county council, the Public Works Director must disqualify himself from taking any action as a school board member relative to specific members of county council who are employed by the school district. The Public Works Director has notified the Ethics Commission that he will do so. That being the case, we would find the county council members/school district employees would be permitted to participate in decisions concerning the Public Works Director including his salary and application to the County for other positions.

The legislature intended S. C. Code § 8-13-700(B) (Supp. 1996) to shield public members from the appearance of impropriety. It appears that the Commission was provided with insufficient facts

when it rendered its informal opinion. Under the facts stated herein, the County Council members were not required to disqualify themselves, but were free to choose to do so.