

State of South Carolina

State Ethics Commission

BRIAN M. BARNWELL, CHAIR
VICTOR K. LI, VICE CHAIR
DONALD GIST
DON JACKSON



BRANDOLYN THOMAS PINKSTON
RICK REAMES III
CHILDS CANTEY THRASHER
ASHLEIGH R. WILSON

5000 THURMOND MALL, SUITE 250
COLUMBIA, S.C. 29201

STEVEN W. HAMM
INTERIM EXECUTIVE DIRECTOR

SEC AO2018-002

September 21, 2017

SUBJECT: Whether Workers' Compensation Commissioners Are "Associated" Under the Ethics Reform Act With Non-Profit Organizations in Which They Serve in Their Official Capacity

SUMMARY: Workers' Compensation Commissioners currently serve as officers or board members on two 501(C)(3) non-profit associations, the South Carolina Workers' Compensation Educational Association ("SCWCEA") and Kids' Chance of South Carolina ("Kids' Chance"). According to information provided from Workers' Compensation Commission staff, this service is ex-officio and in their official capacities. Attorneys who regularly appear before the Commissioners may also serve as officers or board members for the same non-profit associations.

The Workers' Compensation Commissioners seek to ensure that if they serve as an officer or board member for these non-profit associations, then attorneys who also serve in these roles would be not be considered individuals with whom the Commissioners are associated under Section 8-13-100(21) of the Ethics Reform Act, thereby triggering the recusal requirements of Section 8-13-700(B) when those attorneys appear before the Workers' Compensation Commission.

Here, the Ethics Commission concluded that when a Workers' Compensation Commissioner serves as a board member or officer in a non-profit in his official capacity, the non-profit would not be a "business with which he is associated" under Section 8-13-100(4) and its board members or officers would not be "individual[s] with whom he is associated" under Section 8-13-100(21).

APPLICABLE LAW:

Section 8-13-700 states in part:

(A) No public official [or] public member... may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated, or a business with which he is associated....

(B) No public official [or] public member... 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 family member, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official [or] public member ... 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 family member, 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;

...

(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 an agency, commission, board, or of a 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;

(5) if he is a public member, he shall furnish a copy to the presiding officer of an agency, commission, board, or of a county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and shall 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 such disqualification and the reasons for it to be noted in the minutes

Section 8-13-100 states in part:

(4) "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.

...

(11)(a) "Economic interest" means 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... may gain an economic benefit of fifty dollars or more.

...

(b) This definition does not prohibit a public official...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...is incidental to the public official's... position or which accrues to the public official...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.

...

(21) "Individual with whom he is associated" means an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, 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.

...

(23) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action.

...

(27) "Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office....

...

(30) "Official capacity" means activities which:

(a) arise because of the position held by the public official, public member, or public employee;

(b) involve matters which fall within the official responsibility of the agency, the public official, the public member, or the public employee; and

(c) are services the agency would normally provide and for which the public official, public member, or public employee would be subject to expense reimbursement by the agency with which the public official, public member, or public employee is associated.

DISCUSSION:

Section 8-13-700(B) prohibits a public official from participating in a governmental decision in which he, a family member, a business with which associated, or an individual with whom associated has an economic interest. On numerous occasions, the Ethics Commission has ruled that when two individuals serve on a board of directors together, they are "individual[s]"

with whom associated” under Section 8-13-100(21). See Residents for Planned Development v. Raines (C1999-025, Mar. 15, 2000). More recently, the Ethics Commission ruled that individuals who serve together on a board are “individual[s] with whom associated” under Section 8-13-700(B), even if that board service is for a non-profit corporation in which no party has an economic interest. Griswold v. Loftis (C2014-156, Oct. 26, 2016). The definition of “individual with whom associated” requires an “interest in any business.” The Respondent in the Loftis matter argued to the Ethics Commission that an *economic* interest in the business is required for the association to apply, but the Commission ruled that “interest in any business” was not required to be economic in nature. In light of this decision, the Workers’ Compensation Commissioners have asked whether the same strictures of the Ethics Reform Act are applicable if a Commissioner is serving as an officer or board member on a non-profit corporation, but (unlike the situation in Loftis) the service is ex-officio and solely in the Commissioners’ official capacity.

As a first point, the term “official capacity” is specifically defined in Section 8-13-100(30) of the Ethics Act. In order for the Commissioners’ service on the non-profits to be considered in their official capacity, all of the following elements of must apply:

- (1) The activity must “arise because of the position held by the public official”;
- (2) It must “involve matters which fall within the official responsibility of the agency [or] the public official”; AND
- (3) The activity must be “services the agency would normally provide and for which the public official... would be subject to expense reimbursement by the agency.”

Based on the information provided, it is apparent that the Commissioners’ service on these two boards arises solely because of their position and involves matters that fall within the official responsibility of the agency. The question of whether the Commissioners are entitled to expense reimbursement for their activities on these two boards is one that we cannot address based on the information provided, but it is one that the Workers’ Compensation Commission itself should be able to determine.

Assuming it is determined that the Workers’ Compensation Commissioners’ service is in their official capacity, further analysis is required of Ethics Commission Advisory Opinion 2002-009 (Jan. 16, 2002). In that opinion, the Ethics Commission ruled that when a City Council member sits on a non-profit board in his official capacity, then that non-profit was not a “business with which he [was] associated” and the recusal requirements of Section 8-13-700(B) were inapplicable to the Councilmember’s dealing with that business.¹ Although your inquiry relates to Commissioners’ association with attorneys who serve on the non-profits who may come before the Workers’ Compensation Commission, our view is that AO2002-009 applies

¹ In Advisory Opinion 2000-011 (May 17, 2000), the Ethics Commission ruled that a council member sitting on a non-profit board in his official capacity was not affiliated with that board for Ethics Reform Act purposes, while stating that the board must be council-created for the exception to apply. AO2002-009 modified that opinion by extending the exception to circumstances in which the board in question was not created by the public body.

equally to an “individual with whom associated” determination as it does to a “business with which associated.” While the relevant advisory opinions do not articulate the rationale for distinguishing service on a non-profit in one’s official capacity from other service under the Ethics Reform Act, these decisions are premised on the notion that when service is undertaken in one’s official capacity, the required “interest in any business” contained in the definitions to both “individual with whom associated” and “business with which associated” simply does not exist. Applying the principle that “[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature,”² we do not believe the Legislature intended that the restrictions of Section 8-13-700 apply to individual and business associations that exist only as a direct extension of the public position. Accordingly, if a Workers’ Compensation Commissioner serves as a board member or officer in a non-profit in his official capacity, the non-profit would not be a “business with which he is associated” under Section 8-13-100(4) and its board members or officers would not be “individual[s] with whom he is associated” under Section 8-13-100(21).

Finally, the Workers’ Compensation Commission is unusual in that the Ethics Commission is responsible for not only enforcing the Ethics Reform Act, but also the Code of Judicial Conduct for the Commissioners.³ In light of this, it bears noting that Commissioners’ service on these non-profits is not only permissible, but actually encouraged under the Code of Judicial Conduct.⁴

To be clear, the Ethics Commission is only making this decision based on the narrow circumstances of this situation. In issuing this opinion, the Ethics Commission is not weakening the general rule that public officials may not use their position to benefit individuals or businesses with whom they are associated, even if such an association only exists due to service on a non-profit organization. Even in circumstances similar to here, where a public official serves on a non-profit solely in his official capacity, we would discourage reliance on this opinion without first seeking advice from the Ethics Commission or its staff.

² Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

³ Section 42-3-250(A) (“The commissioners are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules, and the State Ethics Commission is responsible for enforcement and administration of Rule 501 pursuant to Section 8-13-320. Commissioners must also comply with the applicable requirements of Chapter 13, Title 8.”).

⁴ See Canon 4(C)(3), Rule 501, SCACR (“A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civil organization not conducted for profit.”).