

SUBJECT: DHEC BOARD MEMBER CONTRACTING WITH COUNTY HEALTH DEPARTMENT

SUMMARY:

A DHEC Board Member is not prohibited from entering into a contract for the provision of medical services with a county health department, provided that the member is not authorized to perform an official function regarding the contract and that he complies with the requirements of Section 8-13-700.

QUESTION:

The Staff Counsel for the Department of Health and Environmental Control requests an advisory opinion regarding the ability of a DHEC Board Member to enter into a contract for the provision of medical services with a local DHEC health clinic. The Lee County Health Department has been unable to recruit any other local physician(s) to perform family planning services. Accordingly, a member of the DHEC Board, who is a physician, is willing to provide this needed public health service for health department patients in the Lee County area. The member is Medicaid certified and would be able to provide this service in his office and be reimbursed for doing so.

DISCUSSION:

This opinion is rendered in response to a letter dated December 1, 1992 requesting an opinion from the State Ethics Commission. The 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 8-13-100 et. seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

The State Ethics Commission calls attention to Section 8-13-700(A), which provides:

(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.

Based on the facts submitted, the DHEC Board Member did not agree to perform the needed services until after the Lee County Health Department had failed to recruit another physician who could perform these services. Therefore, the State Ethics Commission does not believe that the

member knowingly used his official office to obtain an economic interest in violation of Section 8-13-700(A).

The Commission also calls attention to Section 8-13-700(B), which 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;

* * *

(5) if he is a public member, he shall furnish a copy to the presiding officer 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 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(11) provides as follows:

(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, public member, or public employee may gain an economic benefit of fifty dollars or more.

Accordingly, the Commission advises that the DHEC Board Member may contract to perform family planning services for the Lee County Health Department; however, if the member is required to take action in his official capacity which affects his economic interests pursuant to the contract, he is advised to comply with disclosure and disqualification procedure of Section 8-13-700(B).

The State Ethics Commission also notes Section 8-13-775, which provides:

A public official, public member, or public employee may not have an economic interest in a contract with the State or its political subdivisions if the public official,

public member, or public employee is authorized to perform an official function relating to the contract. Official function means writing or preparing the contract specifications, acceptance of bids, award of the contract, or other action on the preparation or award of such contract. This section is not intended to infringe on or prohibit public employment contracts with this State or a political subdivision of this State.

Thus, the board member would be prohibited from contracting with a local DHEC health clinic if he is authorized to perform any official function on the contract through writing or preparing specifications, acceptance of bids, award of the contract, or other action on the preparation or award of such contract, regardless of whether he followed the provisions of Section 8-13-700(B). In the instant situation, however, it does not appear that the DHEC Board was authorized to perform any such official functions. Absent the authorization to perform an official function, the member is not prohibited from contracting with the local DHEC health clinic, provided he complies with the requirements of Section 8-13-700(B).

Finally, the State Ethics Commission notes that in Advisory Opinion AO92-091, it found "that DHEC's regulation upon the medical profession is de minimis. Since DHEC does not regulate the specific way these health care professionals operate, the Ethics Act does not preclude their service on the DHEC Board."