

SUBJECT: OFF DUTY EMPLOYMENT OF PUBLIC EMPLOYEE

SUMMARY:

A former DHEC employee who is currently employed by the Budget and Control Board would not be prohibited from providing certain part time consulting and engineering services as long as such work is not part of the employee's official responsibilities and is performed in accordance with the off duty employment guidelines. With limited exceptions, however, Section 8-13-740(A)(6) would preclude the employee and any business with which he is associated from representing clients before other state agencies.

QUESTION:

An employee of the Budget and Control Board's Local Government Division inquires whether he can engage in certain part time, off duty employment activities. The employee's responsibilities for the Budget and Control Board involve assisting local governments in the development of water and wastewater utilities. Prior to August 17, 1992, the employee worked for the Department of Health and Environmental Control (DHEC) in various capacities involving drinking water, recreational water, wastewater, and both solid and hazardous wastes. The employee does not intend to begin any off duty employment until after August 17, 1993.

The employee inquires whether he may perform part time work for an engineering consultant in the following areas. No engineering submittals or other written documents would bear the employee's signature or seal.

- a. **Looking for new clients for the consultant so long as the public position is not utilized for this purpose;**
- b. **Gathering technical, project-specific information, including background information through formal or informal means, such as verbal or written requests, file searches, and other means such as seeking the compliance status of facilities;**
- c. **Keeping consultant up to date on government regulations, policies and statutes;**
- d. **Performing technical computations for the consultants;**
- e. **Meeting with clients on behalf of and as a representative of the consultant;**
- f. **Representing the consultant and its client before local or quasi-governmental bodies such as counties and councils of government, as well as before federal agencies;**
- g. **Representing the consultant and its client before out of state agencies and performing the above functions before out of state agencies;**
- h. **Working as an expert witness in legal matters and proceedings;**
- i. **Seeking routine information involving opinions or advice from state agencies regarding technical matters;**
- j. **Representing the consultant and its client in agency enforcement matters, seeking to establish violations and their nature, reasons behind the violations, and remedies; and**
- k. **Representing clients before DHEC on behalf of the consultant in other regulatory matters so long as I do not make written submittals under my professional engineering license**

to the agency.

DISCUSSION:

This opinion is rendered in response to a letter dated July 2, 1993 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.

In prior advisory opinions, the State Ethics Commission has advised that a public employee may engage in outside employment consistent with the following established guidelines: (1) that no public materials or equipment are utilized, except that which is incidental and does not result in additional public expense, (2) such work is engaged in on the employee's own time, (3) the work does not interfere with the needs of the agency, and (4) the public position is not utilized to obtain or continue the employment.

The State Ethics Commission also calls attention to Section 8-13-740(A), which provides in part as follows:

(6) A public employee, other than those specified in items (4) and (5) of this subsection, receiving compensation other than reimbursement or per diem payments for his official duties, an individual with whom he is associated, or a business with which he is associated may not knowingly represent a person before an entity on the same level of government except:

(a) as required by law;

(b) before a court under the unified judicial system; or

(c) in a contested case, as defined in Section 1-23-310, excluding a contested case for a rate or price fixing matter before the South Carolina Public Service Commission or South Carolina Insurance Commission, or in an agency's consideration of the drafting and promulgation of regulations under Chapter 23 of Title 1 in a public hearing.

(7) The restrictions set forth in items (1) through (6) of this subsection do not apply to:

(a) purely ministerial matters which do not require discretion on the part of the governmental entity before which the public official, public member, or public employee is appearing;

(b) representation by a public official, public member, or public employee in the course of the public official's, public member's, or public employee's official duties;

(c) representation by the public official, public member, or public employee in matters relating to the public official's, public member's, or public employee's immediate family.

"Business" is defined in Section 8-13-100(3) as "a corporation, partnership, proprietorship, firm, an

enterprise, a franchise, an association, organization, or self-employed individual." "Business with which he is associated" is defined in Section 8-13-100(4) as "a business of which the person or a member of his immediate family is a director, an officer, owner, employee, [or] a compensated agent...." Accordingly, the State Ethics Commission advises that any consultant engineering firm with whom the employee accepts part time employment would be a business with which he is associated.

Section 8-13-100(28) defines, "Represent" or "representation" as:

Making an appearance, whether gratuitous or for compensation, before a state agency, office, department, division, bureau, board, commission, or council, including the General Assembly, or before a local or regional government office, department, division, bureau, board, or commission.

In an earlier advisory opinion citing this definition, the State Ethics Commission concluded that "'representation' does not include purely ministerial matters requiring no discretion on the part of the agency. Therefore, [an] inquiry regarding such nondiscretionary matters as permit applications or hearing procedures would not violate the requirements of Section 8-13-740. SEC AO93-055 (December 16, 1992).

Based strictly on the information provided, items (a) - (i) on the employee's list of contemplated activities do not appear to involve prohibited representation before South Carolina state agencies. The issue of state employees serving as expert witnesses has previously been addressed by the State Ethics Commission. In Advisory Opinion 93-058, the Commission advised that State college and university faculty members are not prohibited from appearing as an expert witness and accepting compensation, provided that such appearances are on the faculty member's own time. In the present situation, the State Ethics Commission similarly advises that the employee would not be prohibited from appearing as an expert witness so long as his preparation and appearance are performed in accordance with the off duty employment guidelines. Items (j) and (k), however, do not appear to involve only ministerial matters, and unless the matter is a contested case as defined in the South Carolina Administrative Procedures Act, Section 8-13-740(A)(6) would preclude both the employee and any business with which he is associated from undertaking these specified activities.

In addition, the State Ethics Commission calls attention to Section 8-13-720, which prohibits the payment of extra compensation and provides as follows:

No person may offer or pay to a ... public employee and no ... public employee may solicit or receive money in addition to that received by the ... public employee in his official capacity for advice or assistance given in the course of his employment as a ... public employee.

Therefore, the employee must ensure that any off duty employment for which he shall be compensated was not performed in the course of his official responsibilities.

Finally, the State Ethics Commission also calls attention to Section 8-13-700, which provides in part 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.

(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;

* * * *

(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;

In accordance with Section 8-13-700, the employee is cautioned against using his official position to affect either the economic interests of himself or a business with which he is associated.