

SEC AO98-005

November 19, 1997

SUBJECT: EMPLOYEE OF INCORPORATED WATER DISTRICT SERVING ON COUNTY WATER AUTHORITY

SUMMARY: The Ethics Reform Act does not prohibit holding more than one public office and/or employment; however, the Ethics Reform Act requires disqualification on matters affecting the economic interests of both entities and the employee/public member.

QUESTION: What is the effect of the Ethics Reform Act on the proposed appointment of a person to a County Water Authority who is employed by a corporation comprised of several water districts.

DISCUSSION:

This opinion is rendered in response to a request for an opinion dated November 5, 1997, by an attorney representing Pickens County. The Commission's jurisdiction is limited to the applicability of the State Ethics Act, S.C. Code §2-17-10 *et seq.*; 8-13-100 *et seq.* (Supp. 1996). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

The Pickens County Water Authority, created in 1971 by Act of the General Assembly, is composed of five members. Serving staggered terms, they are appointed by the Governor upon recommendation of the majority of the members of county council. Pursuant to the Act, the Authority has the function of acquiring and distributing water for industrial and domestic purposes within the county. Included in its designated powers is the right to construct, maintain, and operate water distribution systems; to sell water for industrial and domestic use; to prescribe rates and regulations under which the water shall be sold; to do "other acts and things necessary or convenient to carry out any function or power"; and, to be the final authority in establishing territorial lines or boundaries and control the expansion of existing systems.

The Authority has recently entered into a contract with the Greenville Water System to purchase water for distribution to portions of the county, including the Town of Liberty. That municipality has likewise contracted with the Authority to purchase the water coming from the Greenville Water System. In addition, the Authority is in the process of obtaining a loan and grant from the Rural Utilities Services of the Department of Agriculture to pay for the installation of the water line.

Seven rural water districts exist within the county. Four of those districts formed a corporation to assist them in construction, processing payments, meter reading, and maintenance of the lines. An individual who is employed as general manager of the corporation has been recommended for nomination to serve on the Water Authority. He is not involved in policy making for the four districts, but performs the operations for all four districts.

The County asks whether the nominee's service on the Authority would present a conflict of interest. Their concern relates to the nominee's recommended appointment as a member of the Authority since the nominee plans to continue in his employment with the corporation. The County framed the question as whether the nominee's association with the corporation, while serving on the Authority, would create a conflict because of the nominee's participation in making the decisions that would directly or indirectly affect his economic interest. If service on the Authority is permissible, the county asks, would his ability to vote on issues be compromised through recusals on issues that arise such that his service would be ineffective?

The applicable provision in the Ethics Reform Act 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;

* * *

(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;

* * *

(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.

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. 1995).

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.

Assuming the nominee is appointed to the County Water Authority, it is impossible to predict whether a conflict of interest will arise inasmuch as each situation is judged on its own merits, the facts involved, and the specific official action and/or employment functions to be undertaken. While the nominee's service on the County Water Authority is not prohibited under the Ethics Act, we cannot say how the nominee's efficacy in office would be affected because of his employment. But, in order to clearly delineate the issues, we offer the following commentary and advice.

Assuming the nominee is appointed to the County Water Authority, both the water service corporation and the County Water Authority will be businesses with which the nominee is associated. Under these facts, any action the nominee is asked to take which would affect either the water service corporation or the County Water Authority will present a conflict requiring disqualification as provided in S. C. Code §8-13-700(B)(Supp. 1996). Thus, the employee/ public member will be required to disqualify himself from participation in any matter affecting the economic interests of the corporation, the County Water Authority, his employment with the

corporation and his appointment to the County Water Authority.

The Commission has had the occasion to express concern over an individual's ability to carry out the essential functions of a position because of frequent and continuing conflicts of interest and advised the affected individual to resign one of the positions. However, this Commission does not have the jurisdiction to reliably predict how the nominee's ability to perform the essential functions of the governmental duties owed to the County Water Authority will be affected.

With regard to continuing or frequent conflicts, we offer the following to address the County's concerns. S C Code §8-13-730 provides:

Unless otherwise provided by law, no person may serve as a member of a governmental regulatory agency that regulates any business with which that person is associated. An employee of the regulatory agency which regulates a business with which he is associated annually shall file a statement of economic interests notwithstanding the provisions of Section 8-13-1110. No person may be an employee of the regulatory agency which regulates a business with which he is associated if this relationship creates a continuing or frequent conflict with the performance of his official responsibilities.[emphasis added].

The nominee's service is not required by statute or ordinance and therefore is not provided by law. Whether the County Water Authority is a "regulatory agency that regulates a business with which the employee is associated" [e.g., the corporation] is doubtful. The test is stated in *S.C. Coastal Council vs. State Ethics Commission* 410 S.C. 2d 245 (SC. 1991). There, the Ethics Commission argued that Coastal Council regulated a variety of businesses and that anyone associated with any of these businesses was prohibited from being a member of Coastal Council. Coastal Council argued that it does not regulate any business but regulates the environment and that it is not prohibited from having members who may be associated with a business affected by Coastal Council's regulation of the environment.

In order to determine whether Coastal Council regulates any business, the Court examined the regulatory duties of Coastal Council and held that Section 8-13-450 [the predecessor to Section 8-13-730 with identical language] is inapplicable to Coastal Council to the extent that it prohibits a person from serving as a member of Coastal Council when the person is associated with one of the many businesses affected by Coastal Council's regulation of the environment. The Court found that Coastal Council was created to protect the coastal environment and was empowered to provide a regulatory system for critical areas. Coastal Council was empowered to promulgate regulations to establish a permitting process for projects and by regulating activities that take place in the critical areas. Coastal Council affects innumerable businesses. The Court remarked "In fact, Coastal Council's regulatory authority affects almost every industry or business that operates in the coastal zone." 410 S.E. 2d at 246.

The Court disagreed with the Ethics Commission's assertion that "any business which is affected by

Coastal Council's regulation of the coastal zone is, in fact, regulated by Coastal Council, and that any person associated with such a business cannot serve as a member of Coastal Council under Section 8-13-450." Noting that the Ethics Act did not [and still does not] define the term "governmental agency that regulates any business" the Court cited and relied on prior Ethics Commission decisions which determined an agency regulates a business if it "has authority to promulgate rules or regulations or administer legislatively enacted rules and regulations that govern or direct entry into a business, conditions for remaining in that business, and the manner in which the business may be conducted." Ethics Op. No. 79-018, Oct. 5, 1978.

The Court concluded that Coastal Council regulates the preservation and utilization of coastal resources; its regulations aim at mitigating environmental loss; and that it regulates the use of critical areas by businesses, not the way in which a business is operated.

Finding that the Commission's own definition did not support its cause, the Court went on to state that:

The object of Section 8-13-540 [and 8-13-730] is to prevent a person connected with a specific business from serving as a member of an agency which regulates that business. However, since Coastal Council does not regulate any specific business, but merely regulates the coastal environment, which incidentally affects innumerable businesses, it would be absurd to interpret Section 8-13-450 as prohibiting any person from serving on Coastal Council who is associated with a business affected by Coastal Council. Such an interpretation would needlessly prohibit many qualified persons from serving on Coastal Council, when in actuality these persons might only occasionally have a conflict of interest with a business affected by the activity of Coastal Council.

The Pickens County Water Authority's function is to acquire supplies of fresh water for industrial and domestic use and distribute it for sale. To do so, the Authority is empowered to construct all things necessary for its function. The Authority may not sell water within the corporate limits of municipalities or areas being served by municipalities, unless as provided by statute, and is restricted to selling water within Pickens County only. While the enabling Act provides an enormous amount of detail concerning the power and authority of the Authority, it is clear that the Authority is a vendor of potable water, not a regulatory agency for water. Therefore, S.C. Code § 8-13-730 is inapplicable.

However, just as the Supreme Court in *Coastal Council* noted that the disqualification provisions of the former Ethics Reform Act safeguarded the public from inappropriate action of a member, so to does S.C. Code § 8-13-700(B) (Supp. 1996). Therefore, we advise the Authority and its public members to strictly comply with the disqualification provisions cited herein and properly abstain from participating in any matter which, in this case, would affect the economic interests of the corporation with whom the public member is employed.