

SUBJECT: COMMUNITY APPEARANCE BOARD MEMBER PARTICIPATING IN MATTER INVOLVING ECONOMIC INTERESTS OF A CLIENT.

SUMMARY: A public member should disqualify himself from all matters in which a business with which he has an ongoing client relationship has an economic interest.

QUESTION: This opinion is issued in response to the ongoing concern the State Ethics Commission has regarding violations of Section 8-13-700(A) and (B) of the Ethics Reform Act of 1991, by public members who participate in, and vote on matters before their board or commission involving the economic interest of a business with which the public member has an ongoing client relationship.

DISCUSSION:

The State Ethics Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act Number 248 of 1991; Section 2-17-5 et. seq. and Section 8-13-100 et. seq.). This opinion does not supersede any other statutory or regulatory restriction or procedure which may apply to this situation.

Section 8-13-700(A) provides 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.

Section 8-13-700(B) provides 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;

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(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(3) defines business as:

(3) 'Business' means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

Section 8-13-100(4) defines business with which he is associated as:

(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. [Emphasis Added]
Also, the Ethics Reform Act, in its Preamble states:

Whereas, the trust of the public is essential for government to function effectively. Public policy developed by elected officials affects every citizen of the State, and it must be based on honest and fair deliberations and decisions. This process must be free from all threats, favoritism, undue influence, and all forms of impropriety so that the confidence of the public is not eroded; and

* * *

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;...

Many local boards and commissions are created by statute and require that a certain number of their members be professionals in the field of the area of review. These public members/professionals often must avail themselves of the recusal procedures of Section 8-13-700(B) when a project or plan that they contributed to in some way appears before their board. What the Commission finds troublesome is when there is an ongoing relationship between the public member and a party before the board. The question becomes how can the public member be associated with a business on some projects before the public member's board but not with other projects of the business that come before the public member's board. Additionally, an agent is under a duty to report information he/she receives pertaining to matters the principal needs to be aware of. This runs head long into Section 8-13-725 which prohibits the disclosure of confidential information.

Agents also have a duty not to adversely affect the interest of their principal. If there is an ongoing relationship, the public member must not vote on the matter affecting the principal. He should recuse herself. He is caught between a duty not to act adversely with regard to the principal and a duty to the public to act in its best interest. Even should he be able to clear himself of any actual bias, the appearance of the relationship would serve to taint his vote and cause his actions to be held in question. This would obviously handicap his effectiveness as a member of the public body.

In complaint advisory opinion C89-017, with regard to a procurement matter, the Commission opined that "potential vendors by state policy and regulation are to remain at arms-length in transactions with public agencies. This policy is amply illustrated in open bid procedures and limitations on ex parte communications with procurement officials. Any provision of service or goods to either individual agency officials or employees or to groups of such officials or employees does not obliterate the need to maintain this arms-length arrangement".

The reverse, as in this matter, should also be true. A public member who maintains an ongoing business relationship should maintain an arms-length arrangement with any client. The Preamble to the Ethics Reform Act provides that "it is inevitable that conflicts of interests 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 interest of the people, and not their own, that are being served."

The awarding of contracts, as in the procurement process, charges public officials and public members to objectively and impartially consider and determine contractual matters. The prohibitions contained in Section 8-13-700(A) and (B) serve the public interest in objective, impartial, and effective government by preventing the creation of situations which would tend to impair the objectivity and impartiality, and therefore, the effectiveness of a public member.

CONCLUSION: The Ethics Commission is mindful that the Ethics Act does not define the

term "compensated agent", nor has the Commission specifically defined the term in its prior opinions or decisions. Accordingly, the State Ethics Commission hereby defines "compensated agent" as "any ongoing client relationship in which the public official, public member, or public employee, receives compensation for services rendered".

Further, it is the opinion of the State Ethics Commission that a public official's, public member's, or public employee's participation in a matter involving a business with which the public official, public member or public employee is a "compensated agent", gives rise to a rebuttable presumption that to take an action or make a decision which affects the economic interest of the business with which associated would therefore be a violation of Section 8-13-700(A) and (B), South Carolina Code of Laws, 1976, as amended.

KEYWORDS: Compensated Agent, Economic Interest

ANNOTATIONS: 8-13-100 (3) and (4), 8-13-700 (A) and (B), Preamble