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### ETHICS ADVISORY OPINION NO. 24-028-E

November 1, 2024

**Question Presented:** May an employee of a nonprofit corporation engaged in local economic development which receives funding from the county board of supervisors pursuant to legislation also serve as a member of the county port commission?

**Brief Answer:** Yes, but the port commission could be prohibited from coordinating with the nonprofit corporation in joint economic development efforts, pursuant to Section 109, Miss. Const. of 1890, and Section 25-4-105(1) and (2), Miss. Code of 1972.

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

#### I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-103, Miss. Code of 1972.

(c) “Business” means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(d) “Business with which he is associated” means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(f) “Contract” means:

(i) Any agreement to which the government is a party; or

(ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) “Government” means the state and all political entities thereof, both collectively and separately, including but not limited to:

(i) Counties;

(ii) Municipalities;

(iii) All school districts;

(iv) All courts; and

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(h) “Governmental entity” means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(k) “Material financial interest” means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(l) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(o) "Public funds" means money belonging to the government.

(p) "Public servant" means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds;  
or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

## II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

I represent the Board of Supervisors ..., and Supervisor District 1 requested that I request an opinion for the following scenario:

[The] County Port Commission is the governing authority for the port owned [by the] County pursuant to Miss. Code Ann. § .... The port does not receive funds from [the] County but pays [the] County on a lease-purchase that covers debt service for [the] County issued to purchase the port. The county was a pass-through so the port authority could acquire the port. The funds paid by the port are a contractual obligation and directly related to debt service that was originally issued in 2013.

[A local corporation] is a non-profit organization with the purpose of economic development for the county. [The] County is authorized to contribute at least \$165,000 per year to [the corporation] pursuant to a local and private bill.<sup>1</sup> The funds are not given contractually but a straight appropriation.

Supervisor District 1 would like to know if the director of [the economic development corporation] may serve as a member of the Port Commission?

<sup>1</sup>[The local and private bill] § 2 reads, "The Board of Supervisors of [the] County, Mississippi, is authorized and empowered, in its discretion, to contribute an amount not less than One Hundred Sixty-five Thousand Dollars (\$165,000.00) each fiscal year to [the corporation], a Mississippi nonprofit corporation organized for economic development purposes."

The requestor clarified that the individual in question is an employee of the nonprofit corporation.

### III. ANALYSIS

The nonprofit economic development corporation is a “business,” as defined in Section 25-4-103(c), Miss. Code of 1972, because it is a “nonprofit corporation ... receiving public funds.” Because the individual in question is an employee of the nonprofit corporation, it is a “business with which he [or she] is associated,” as defined in Section 25-4-103(d). Therefore, if the individual becomes a member of the port commission, he or she will be a “public servant,” as defined in Section 25-4-103(p) and will be prohibited from using his or her position on the port commission to obtain or attempt to obtain any pecuniary benefit for the nonprofit economic development corporation. Ports often engage in economic development activities, and it is certainly foreseeable that the port commission might take some action which would benefit the nonprofit corporation, such as contracting with the corporation and paying it for some service. At the very least, the individual would be required to fully recuse from any action by the port commission which would benefit the corporation. See, for example, Opinion No. 22-031-E.

A total and complete recusal requires that the port commission member not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations, but he should also avoid discussing the subject matter with other port officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is not a recusal. Furthermore, the minutes of the meeting should state the recusing member left the room before the matter came before the commission and did not return until after the vote.

Yet even a full recusal is not enough to prevent violations of other statutes. Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, both prohibit a member of a public board from having any direct or indirect interest in a contract which was authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). Consequently, the port commission cannot fund or authorize any contract in which the individual commission member has an interest, such as paying money to the nonprofit corporation which it would then use to compensate that individual employee. This prohibition cannot be removed if the individual resigns from the port commission since it remains in effect for one year after the commission member leaves office. While certain situations could indicate the nonprofit employee would have no prohibited interest in certain types of activities between the corporation and the port commission, there are no facts here to show that would be the case. See, for example, Opinion No. 22-031-E.

Recusal will *not* prevent or ameliorate a violation of Section 109 and Section 25-4-105(2), as they do *not* require any affirmative act by an individual board member but merely action by the board. A contract which violates Section 109 and Section 25-4-105(2) is null and void. Towner v. Moore ex rel. Quitman County School Dist., 604 So.2d 1093, 1100 (Miss. 1992). Thus, any contracts involving the port commission and the economic development nonprofit corporation could be completely void by operation of law.

Pursuant to Section 25-4-105(3)(a), an appointed official of the county may not also have a “material financial interest” in a “business” which is a contractor to the county, unless an exception applies. However, the economic development nonprofit corporation is not a “contractor” to the county because the funding is provided by the board of supervisors pursuant to legislation

and not by contract. See Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000).

MISSISSIPPI ETHICS COMMISSION

BY: \_\_\_\_\_  
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