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ETHICS ADVISORY OPINION NO. 19-068-E

January 10, 2020

Question Presented: May a school board and a member of the board approve mandatory payments to a charter school when a school board member's employer has a business relationship with the charter school operator?

Brief Answer: Yes. The school board's act of providing the charter school funding is a mandatory action and not a discretionary one. Therefore, no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, will occur under these facts when the school board approves payments to the charter school.

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.

(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.

(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.

(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.

II. FACTS

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

I am the board attorney for the [school district]. We have a board member who is currently employed as the chief policy and communications officer for [a private corporation] and [a related credit union]. [The board member's] position is in the senior leadership of [the] entities. [The private corporation] is the primary sponsoring entity of [the credit union]. As such, the entities have in place an operating agreement that requires [the private corporation] to ensure the [credit union] ends each fiscal year with positive income. This means that under certain defined circumstances, [the private corporation] may be called upon to contribute or pay obligations of [the credit union].

In March 2019, [the credit union] made a loan to a charter school located in the district. [The board member] was not involved in the loan process. [The board member] was not on the loan committee, nor does he work in or manage any of the commercial loan staff who handled the loan transaction. [The board member] has no specific knowledge of the intended use of the loan proceeds by the charter school, but it is conceivable that some of the loan proceeds may be used, or have been used, to pay debt service on the loan from [the credit union].

Pursuant to Miss. Code Ann. Section 37-28-55, prior to January 16 of each school year, the District must pay directly to this charter school (as well as to the other charter schools located in the District) "an amount for each student enrolled in the charter school equal to the ad valorem tax receipts and in-lieu payments received per pupil for the support of the local district in which the student resides." The District must pay this amount multiplied by the number of students enrolled in each charter school, based on each charter school's end of first month enrollment for the current school year. The obligation of the District to make these payments to the charter schools is mandatory inasmuch as Section 37-28-55 further provides that, "If the local school district does not pay the required amount to the charter school before January 16, the State Department of Education shall reduce the local school district's January transfer of Mississippi Adequate Education Program funds by the amount owed to the charter school."

In compliance with its obligations under Section 37-28-55, the claims docket presented to the District's board of trustees for approval in January will include

the payments to the charter schools located in the District, including the charter school to which [the credit union] made a loan check back in March of this year. Other than as established and required by the Mississippi Charter Schools Act of 2013, there is no contractual or other legal arrangement between this charter school and the District.

With that, I am requesting on [the board member's] behalf, an advisory opinion as to whether (1) his employment by [the private corporation and the credit union], or (2) his voting on the January claims docket that will include a payment to the charter school to which [the credit union] made a loan, creates either a conflict of interest prohibited by Section 109 of Mississippi Constitution or Miss. Code Section 25-4-105(2), or that otherwise violates the prohibitions set forth in Section 25-4-105.

Given that the board of trustees must act on this matter prior to January 16, 2020, an expedited response would be greatly appreciated.

III. ANALYSIS

This question, involving the public funding of a charter school, is a case of first impression for the Ethics Commission, yet it is, in some ways, analogous to a board of supervisors approving taxes to fund a county school district, which the commission has addressed numerous times. Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract which is funded or otherwise 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). While boards of supervisors do approve funding for the county school districts, the board of supervisors would not in any way be authorizing a contract between the school board and the supervisor's employer. Since the passage of the Uniform School Law of 1986, the levying authority of the board of supervisors for school purposes is a mandatory action and not a discretionary one. Thus, a supervisor is not prohibited from having an interest in a contract with the county school district. See Frazier at 701.

Like a board of supervisors approving taxes requested by the county school district, this school board is required by law to provide public funding to charter schools within the district. As noted by the requestor, even if the school board fails to provide the required funding, the funds will be diverted by the state. Therefore, the school board's act of providing the charter school funding is a mandatory action and not a discretionary one. Consequently, the commission need not determine whether the school board member in question has a prohibited interest in the loan agreement or whether it will have been authorized by the school board. Those questions are made moot by the mandatory nature of the action. No violation of Section 109 or Section 25-4-105(2) will occur under these facts when the school board approves payments to the charter school.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel