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ADVISORY OPINION NO. 2006-04

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Conflict Of Interest/Member Of City Council Contracting With City-Owned Health Care Facility When Council Makes Appointments To That Health Care Authority.

A member of the Enterprise City Council, who owns a health care related business, may contract with the city-owned health care facility to provide health care services and products; provided, that the business is done through some type of bid process; and, that the council member does not vote to appoint, or otherwise participate in the appointment of Health Care Authority Board members, when he has a contract pending between his business and the Health Care Authority, should appointments arise during the contract negotiation period.

It should be pointed out that, in situations such as this where the competitive bid laws do not strictly apply, for a public official/public employee to do business with the entity on which he or she serves or by whom he or she is employed, it must be done through some type of bid process, if the public official/public employee is to do the work. And, in no way should it be interpreted to require the public entity to bid the matter.

Dear Mr. Stinson:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTIONS PRESENTED

- 1) May a member of a city council, who is also a business owner, contract with a city-owned health care facility when the council appoints the board of directors for the Health Care Authority?
- 2) If such a business relationship is allowable, what, if any, disclosures are required?
- 3) If this business relationship is prohibited, how would the council member's situation be affected if he were not the majority owner in the company contracting with the health care facility?

FACTS AND ANALYSIS

The facts as have been provided to this Commission are as follows:

Charles Bradford Stinson represents Paul Russell, a member of the Enterprise City Council. The council member owns and practices in a health care related business, and would like to contract with the city-owned health care facility to provide health care services and products.

Specifically, Paul Russell is a pharmacist and would like to provide services to the health care facility. Reimbursement for any contract would be made through Medicare/Medicaid, with all reimbursement amounts determined by the federal government. There are no reimbursement amounts determined by the health care facility or its board of directors. In effect, Mr. Russell would like to place his name in the group of other pharmacists interested in providing service to the health care facility.

The health care facility is governed by a nine-member board of directors, and is organized as a Health Care Authority. The nine members on the board are appointed for five year terms, and the terms are staggered so that there are no more than two new members at any given time.

Vacancies to the board are filled through the board of directors making nominations to the city council, and the city council confirms the official appointment. Members may be reappointed for an unlimited number of terms.

The council makes one or two appointments a year, but never more than two. The last appointments were made in the spring and fall of 2005. Mr. Russell has been involved as one of the six members of the city council in confirming appointments to the board of directors.

Mr. Russell has done business with the Health Care Authority in the past, however, at that time he was not a city council member.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24), defines a public official as:

“(24) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2.”

Section 36-25-1(2) defines a business with which the person is associated as:

“(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business.”

Section 36-25-1(12) defines a family member of the public official as:

“(12) FAMILY MEMBER OF THE PUBLIC OFFICIAL. The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official.”

Section 36-25-2(b) in pertinent part states:

“(b) An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the

opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided.”

Section 36-25-1(8) defines a conflict of interest as:

“(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs.”

Section 36-25-5(a) states:

“(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain.”

Section 36-25-9(c) states:

“(c) No member of any county or municipal agency, board, or commission shall vote or participate in any matter in which the member or family member of the member has any financial gain or interest.”

Section 36-25-11 states:

“Unless exempt pursuant to Alabama competitive bid laws or otherwise permitted by law, no public official or public employee, or a member of the household of the public employee or the public official, and no business with which the person is associated shall enter into any contract to provide goods or services which is to be paid in whole or in part out of state, county, or municipal funds unless the contract has been awarded through a process of competitive bidding and a copy of the

contract is filed with the commission. All such contract awards shall be made as a result of original bid takings, and no awards from negotiations after bidding shall be allowed. A copy of each contract, regardless of the amount, entered into by a public official, public employee, a member of the household of the public employee or the public official, and any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into.”

The Ethics Law is designed to prevent public officials and public employees from using their official positions in any manner which would provide a personal benefit to themselves, a member of their family, or a business with which they are associated. At the same time, however, public officials and public employees are not to be denied the same business opportunities as members of the public at-large, provided, a conflict of interest does not exist.

The Commission has long held that it does not violate the Ethics Law, nor is it a use of office for personal gain for a public official or public employee to do business with the entity on which they serve or by whom they are employed; provided, that the business is done through some type of bid process, and where the public official/public employee has no involvement in any aspect of the bid process, including but not limited to the drafting of specifications, the review of bids, or the enforcement of the contract. In the facts before the Commission, it would not violate the Ethics Law for the council member to do business with the city-owned health care facility; provided, that it is done through some type of bid process; and, that he does not vote or otherwise participate in any appointments to be made to the Health Care Authority, while a contract may be pending between his business and the Health Care Authority.

As relates to question number two, Health Care Authorities are established by the Health Care Authorities Act of 1982, and are codified at Section 22-21-3(a), et seq. The Health Care Authorities Act specifically states in Section 22-21-34 that:

“The provisions of Chapter 25 of Title 36 shall, any provision thereof to the contrary notwithstanding, not apply to any authority, the members of its board or any of its officers or employees.”

As Health Care Authorities are exempt from the Ethics Law, monies paid from the Health Care Authority to the council member’s business would not be paid with public monies and, therefore, the filing requirements of Section 36-25-11 would not come into play.

As relates to question number three, the analysis and outcome is the same as that of question number one, in that, the law prohibits the use of office for the benefit of oneself, a business with which one is associated or a member of one’s family. So long as the council

member or a member of his family has a financial interest in the business, the same prohibitions would apply, regardless of whether the financial interest is that of the council member or a member of his family, as a family member is defined by the Alabama Ethics Law.

Based on the facts and the above law, a member of the Enterprise City Council, who owns a health care related business, may contract with the city-owned health care facility to provide health care services and products; provided,

- 1) that the business is done through some type of bid process; and,
- 2) that he does not vote or otherwise participate in any appointments to be made to the Health Care Authority, while a contract may be pending between his business and the Health Care Authority.

It should be pointed out that, in situations such as this where the competitive bid laws do not strictly apply, for a public official/public employee to do business with the entity on which he or she serves or by whom he or she is employed, it must be done through some type of bid process, if the public official/public employee is to do the work. And, in no way should it be interpreted to require the public entity to bid the matter.

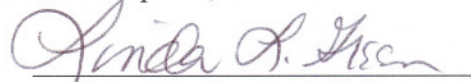
CONCLUSION

A member of the Enterprise City Council, who owns a health care related business, may contract with the city-owned health care facility to provide health care services and products; provided, that the business is done through some type of bid process; and, that the council member does not vote to appoint or otherwise participate in the appointment of Health Care Authority Board members, when he has a contract pending between his business and the Health Care Authority, should appointments arise during the contract negotiation period.

It should be pointed out that, in situations such as this where the competitive bid laws do not strictly apply, for a public official/public employee to do business with the entity on which he or she serves or by whom he or she is employed, it must be done through some type of bid process, if the public official/public employee is to do the work. And, in no way should it be interpreted to require the public entity to bid the matter.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on April 5, 2006.



Linda L. Green

Chair

Alabama Ethics Commission