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ADVISORY OPINION NO. 95-112

M. Roland Nachman, Jr.
2 Dexter Avenue
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Conflict Of Interests/
Director Of Tax Exempt
Group Home Licensed By
DHR Serving As Board
Member For DHR.

A Director of a non-profit tax exempt organization licensed by the Department of Human Resources may serve as a member of the State Board of Human Resources; provided, that the State Board in no way directly regulates the non-profit organization, and that no confidential information be used to the benefit of the tax exempt organization.

Further provided the following conditions are met:

1. That Ms. Nachman not vote on a matter that would have the effect of benefiting

Group Homes, Inc., in a way different from other similar organizations,

2. That there be no use of the State Board position to benefit Group Homes, Inc., in a manner different from other businesses in the industry,

3. That no confidential information gained as a result of State Board membership be used for the benefit of Group Homes, Inc.

Dear Mr. Nachman:

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.

QUESTION PRESENTED

May a person employed as Director of a non-profit tax exempt organization that is licensed by the Department of Human Resources and the State Department of Youth Services serve as a member of the State Board of Human Resources?

FACTS AND ANALYSIS

Martha S. Nachman was appointed to the State Board of Human Resources by Governor Fob James. The enabling legislation establishing the State Board of Human Resources recommends appointment "on the basis of recognized interest in welfare work." Members of the State Board receive no compensation other than expenses that are incurred while in attendance at the meeting of the State Board or when on business of the State Board.

The State Board approves an annual budget of funds appropriated by the State

Legislature, and a budget of federal funds allocated to the State by the federal government. The State Board formulates policies, rules, and regulations, and approves the creation of bureaus within the State Department of Human Resources.

Section 38-2-5 provides in part "The State Department subject to the approval of the State Board shall allocate such federal and State funds for public assistance, administration, and services as are available, in a manner that ensures equitable treatment of needy individuals in similar circumstances throughout the State."

Martha Nachman is currently Executive Director of Group Homes For Children, Inc. Group Homes is a private not-for-profit corporation, and a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code. Group Homes compensates her by annual salary fixed by its Board of Directors.

Group Homes maintains and operates four residential facilities in Montgomery, Alabama. These facilities house and supervise neglected, abused, and runaway children. They are licensed by DHR and the State Department of Youth Services, with licenses renewed annually or bi-annually and Group Homes has won numerous awards and is recognized as a model program.

Children are referred to Group Homes from numerous sources. For example, from DYS, local and county law enforcement authorities, courts, and parents. Group Homes receives federal and state funds administered through DHR and relevant federal agencies as public assistance for the performance of its services. The funds are allocated under federal mandate in accordance with state and federal statutes.

The Alabama Ethics law, Code of Alabama, 1975, Section 36-25-1(2) states:

" 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(8) states

"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. A conflict of interest shall not include any of the following:

a. A loan or financial transaction made or conducted in the ordinary course of business.

b. An occasional nonpecuniary award publicly presented by an organization for performance of public service.

c. Payment of or reimbursement for actual and necessary expenditures for travel and subsistence for the personal attendance of a public official or public employee at a convention or other meeting at which he or she is scheduled to meaningfully participate in connection with his or her official duties and for which attendance no reimbursement is made by the state.

d. Any campaign contribution, including the purchase of tickets to, or advertisements in journals, for political or testimonial dinners, if the contribution is actually used for political purposes and is not given under circumstances from which it could reasonably be inferred that the purpose of the contribution is to substantially influence a public official in the performance of his or her official duties."

Section 36-25-1(25) states:

"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 36-25-2(3) states:

"No public office should be used for private gain other than the remuneration provided by law".

Section 36-25-2(b) states:

" It is also essential to the proper operation of government that those best qualified be encouraged to serve in government. Accordingly, legal safeguards against conflicts of interest shall be so designed as not to unnecessarily or unreasonably impede the service of those men and women who are elected or appointed to do so. 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 36-25-5(a)(c) & (e) 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".

"(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy."

"(e) No public official or public employee shall, other than in the ordinary course of business, solicit a thing of value from a subordinate or person or business with whom he or she directly inspects, regulates, or supervises in his or her official capacity".

Section 36-25-7(a) states:

" No person shall offer or give to a public official or public employee or a member of the household of a public employee or a member of the household of the public official and none of the aforementioned shall solicit or receive a thing of value for the purpose of influencing official action."

Section 36-25-8 states:

"No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter, shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business."

Based on the facts provided in the request for an opinion as well as through follow-up conversations, while the State statute does use the word "regulate", it would appear that in reality, the State Board of Human Resources is merely an advisory board, and that any regulating would have been limited to promulgating rules at the inception of the department.

The salary that Ms. Nachman receives from Group Homes, Inc. is set by the Board of Directors of Group Homes, Inc., and the State Board of Human Resources has no involvement whatsoever in any matters concerning her salary.

From the facts provided it would appear that Group Homes, Inc. is funded on a per-unit or per-diem basis under Title 20. The funds are federal funds distributed through the State.

Day to day operating expenses are funded by the Montgomery County Commission and the Montgomery City Council as line items in their respective budgets. There is no funding between the State Board and Group Homes, Inc., and the State Board has no dealings with the day to day operations of Group Homes, Inc.

In the facts provided through subsequent conversations with the requestor of the opinion, any promulgation of rules or regulations would be directed towards the State Department of Human Resources and its county offices, and would not directly deal with Group Homes, Inc.

The enabling legislation makes it clear that it is important that persons serving on the State Board of Human Resources have experience in dealing with welfare matters. This clearly can only be done by someone who has worked in the field.

The Commission must point out that its rationale in reaching this opinion is based on the fact that there is no direct contact between the State Board of Human Resources and Group Homes, Inc.; and therefore, there is not an issue of a person serving on a board that regulates the business that employs them.

The above facts considered, the Ethics Commission is of the opinion that it would not be a conflict of interests or a use of office for personal gain for a person who is employed as a director of a non-profit organization that is licensed by DHR and DYS to serve as a member of the State Board of Human Resources; provided, the following conditions are met:


1. That Ms. Nachman not vote on a matter that would have the effect of benefiting Group Homes, Inc., in a way different from other similar organizations,
2. That there be no use of the State Board position to benefit Group Homes, Inc., in a manner different from other businesses in the industry,
3. That no confidential information gained as a result of State Board membership be used for the benefit of Group Homes, Inc.

CONCLUSION

Based on the facts as provided, the Ethics Commission is of the opinion that it would not be a conflict of interest for a director of a non-profit organization licensed by the Department of Human Resources to serve as a member of the State Board of Human Resources provided there is no direct regulation of the tax exempt organization by the State Board, and that no confidential information be used to benefit the tax exempt organization.

AUTHORITY

By 4 - 0 vote of the Alabama Ethics Commission on December 6, 1995.



H. Dean Buttram, Jr.
Chair
Alabama Ethics Commission