



STATE ETHICS COMMISSION
1324 MAIL SERVICE CENTER
RALEIGH, NC 27699-1324

George L. Wainwright, Jr., Chair
Jane F. Finch, Vice Chair

Perry Y. Newson, Executive Director

Commissioners:
Barbara K. Allen
Francis X. DeLuca
William P. Farthing, Jr.
Clarence G. Newsome
J. LeRoy Roberts

Phone: 919-715-2071
Fax: 919-715-1644
[Email: ethics.commission@doa.nc.gov](mailto:ethics.commission@doa.nc.gov)
www.ethicscommission.nc.gov

FORMAL ADVISORY OPINION—EDITED FOR PUBLICATION

August 20, 2014

Re: Conflicts of Interest Arising in Connection with the Establishment of Standards Applicable to Licensees Serving on a State Board
AO-E-14-003

Dear Requester:

This is in response to your request for a formal advisory opinion. You have asked whether a public servant serving on a State board may take official action in connection with the Board's consideration of certain standards applicable to board licensees under the conflict of interest provisions of the State Government Ethics Act ("Ethics Act"), North Carolina General Statutes ("G.S.") Chapter 138A; and what that public servant should do in light of any conflicts of interest identified.

This opinion was adopted by the State Ethics Commission at its August 20, 2014, meeting.¹

I. Brief Conclusion.

Although it is unclear whether the State board's adoption of the standards would result in a reasonably foreseeable financial benefit to the public servant's business, the public servant may participate in that official action since, if there is such a financial benefit, it will similarly affect many other businesses. Therefore, the public servant may participate in the Commission's deliberations and vote on those matters.

¹ Please see the enclosure entitled "Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

In addition, the Board's actions in adopting an appeals process and directing the development of rules incorporating these standards would not result in a discernable financial benefit to the public servant's business. The public servant may therefore participate in those official actions.

II. Facts.

There are multiple members of the Board representing various segments of the regulated community. The Board is responsible for adopting rules and standards for its licensees. The public servant's business is a licensee of the Board. The Board is considering a revision to particular standards applicable to licensees. You state that a licensee's inability to comply with those standards would result in a financial detriment to that licensee. However, the public servant states that the revision of those standards would not have a financial impact upon the public servant's business.

Recently, several businesses sought approval under those standards. Of those businesses, 18 percent received approval. Eighty-two percent did not receive approval, including the public servant's business. There may also be several additional businesses who have not sought approval that would also not meet those standards.

At its upcoming meeting the Board will consider revising the licensee standards in question.

III. Applicable Statutory Provisions.

A. G.S. 138A-36(a) Conflicts Standards.

G.S. 138A-36(a) prohibits a public servant "acting in that capacity" from participating in an "official action" if that public servant or a "person with which the public servant is associated" may incur:

- "A reasonably foreseeable financial benefit"
- Which would impair the public servant's "independence of judgment" or otherwise influence the public servant's participation in that official action.

"Financial benefit" includes a direct pecuniary gain or loss to a person with which the public servant is associated or a direct pecuniary loss to a business competitor. G.S. 138A-3(14c). "Person with which the public servant is associated" includes a "business with which associated," defined to include a business which employs a public servant or he or her spouse or a business with which the public servant holds a position as an officer. G.S. 138A-3(3).

G.S. 138A-36(b) requires that a public servant "described in subsection (a):"

- "Abstain from taking any verbal or written action"

- “[I]n furtherance of the official action.”²

The public servant is also required to submit written reasons for the abstention to the employing entity.

B. G.S. 138A-36(c) Conflicts Standards.

G.S. 138A-36(c) also requires that a public servant:

- “Remove himself or herself” from a “proceeding,”³
- “Considering the particular circumstances and type of proceeding involved,”
- “To the extent necessary to protect the public interest and comply with the Ethics Act,”
- If the public servant’s impartiality might reasonably be questioned due to a “familial, personal, or financial relationship” with a participant in the proceeding.

C. G.S. 138A-38(a)(1) Class Safe Harbor.

G.S. 138A-38(a) lists circumstances under which a public servant may take official action notwithstanding a conflict of interest. They include situations where the official action is ministerial only or where the public servant is the only person who has legal authority to take an official action.

G.S. 138A-38(a)(1) also allows a public servant to take an official action, notwithstanding a conflict of interest, if the financial benefit or detriment that would accrue to the public servant, a “person with which associated,” or a “participant” in a proceeding:

- As a member of “a profession, occupation, or general class”
- Is “no greater” than that which would accrue to “all members of that profession, occupation, or general class.”

Thus, in order for the subsection 38(a)(1) safe harbor to apply, the financial benefit (or detriment) resulting from the public servant’s official action would have to be equal to or less than that which would accrue to all members of the class.

² “Official action” includes “[a]ny decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.” G.S. 138A-3(25).

³ Defined to include a quasi-judicial or quasi-legislative proceeding.

IV. Analysis.

As with many State boards that are subject to the Ethics Act's conflict of interest standards, the Board includes representatives from licensees that have a specific interest in the Board's actions. The membership of the Board, and the requirement that those members represent individuals and organizations that are affected by the Board's decisions, is established by the Board's authorizing statute. That statute requires that several of the Board members be affiliated with licensed businesses. In order to fulfill the Board's statutory mission, those Board members must be permitted to participate in board decisions unless it can be "reasonably inferred" that their private financial interests would impair their independence of judgment.

The public servant's business would be a business with which associated for purposes of applying the G.S. 138A-36(a) conflict of interest standards. In addition, the Board's revision of the standards in question could have an impact upon the scope of opportunities available to the public servant's business.

However, it is less clear whether the revision of the standards would result in a "reasonably foreseeable financial impact" to the public servant's business. In your request you do not state what the specific impact of that business' failure to meet the standards would be. Indeed, the public servant has indicated that the public servant's business does not seek those opportunities you reference. Even in the event that the Board's revision of the standards could be foreseen to provide a financial benefit or detriment to the public servant's business, under the class safe-harbor the public servant would be permitted to take the official action in question since that action would have an equivalent impact upon other similarly-situated businesses.

In addition, the Board's actions in adopting an appeals process and directing the development of rules that include the standards would not result in a discernable financial benefit to the public servant's business.

There may, however, be official actions taken by the Board with respect to those standards that would have a more clear-cut impact upon the public servant's business. This would be the case, for example, if the standards stated that the public servant's business in particular met the standards or if the standards included a requirement that was unique to the business. In those circumstances the class exception may not be applicable. However, such matters would need to be considered on a case-by-case basis.

V. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission's staff if you have any questions about the foregoing formal advisory opinion.

Formal Advisory Opinions Issued by the State Ethics Commission
Pursuant to the Ethics Act

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).