



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

May 22, 2008

Re: Application of the G.S. 138A-38(a)(1) “Class Exception” to Public Servant
Conflicts of Interest
AO-E-08-0002

Dear Requester:

You requested a formal advisory opinion on the question of whether it is permissible for members of a State board (“the Board”) subject to the State Government Ethics Act (“the Ethics Act”) to participate in official actions that could directly affect compensation received in their private capacity. Specifically, you ask whether G.S. 138A-38(a)(1) of the Ethics Act, which allows a “covered person” to participate in an official action in circumstances where all members of a profession, occupation, or general class would benefit to the same extent as the covered person, is applicable to the Board’s rate-setting activities.

I. Formal Advisory Opinions of the State Ethics Commission.

The State Ethics Commission (“Ethics Commission”) is authorized to issue formal written advisory opinions pursuant to G.S. 138A-13 upon the receipt of a proper request. All opinions are limited to the particular facts provided by the requester and as further noted in the opinion, and confer limited civil immunity upon a requester who follows the advice given. Good faith reliance upon a formal advisory opinion on a specific matter immunizes the requester from investigations by the Ethics Commission, any adverse action by the requester’s employing entity, and investigation by the North Carolina Secretary of State. Opinions do not confer immunity from any criminal investigation or prosecution. Requests for advisory opinions, the opinions themselves, and all materials related to those opinions are confidential and not a matter of public record. G.S. 138A-13(e).

II. The Board.

The Board is a “State board” subject to the Ethics Act. *See* G.S. 138A-3(1c). Therefore, all voting members of the Board are subject to the provisions of the Act. *See* G.S. 138A-3(30)i. The Board’s primary purpose is to develop and oversee the provision of certain publicly funded services. All individuals appointed to the Board have significant experience in the field regulated by the Board. During the time period immediately preceding the issuance of this opinion, you stated that six of the Board members performed services in that field.

The Board’s authorizing legislation specifically states that all members of the Board may vote on any matters coming before the Board, unless otherwise restricted by Board rules that pertain to members voting on matters in which a member has, or appears to have, a financial or other personal interest. However, the Board has not adopted rules authorized by this provision, which was implemented prior to the effective date of the Ethics Act.

III. The Ethics Act’s Conflicts Provisions and the G.S 138A-38(a)(1) Safe Harbor.

G.S. 138A-31 and G.S. 138A-36 are the primary conflict of interest provisions applicable to public servants. G.S. 138A-31(a) prohibits covered persons (a term which includes public servants) from taking an “official action” that will result in a “financial benefit” to a covered person, a member of his or her extended family, or a business with which the covered person is associated. G.S. 138A-36(a) prohibits public servants from knowingly participating in an “official action” if the:

public servant, a member of the public servant’s extended family, a business with which the public servant is associated, or a nonprofit corporation or organization with which the public servant is associated, has an economic interest in, or a reasonably foreseeable benefit from, the matter under consideration, would impair the public servant’s independence of judgment or from which it could reasonably be inferred that the interest or benefit would influence the public servant’s participation in the official action.¹

Both provisions reference G.S 138A-38(a)(1) as a safe harbor to actions that would otherwise represent a conflict of interest.

In applying the above-referenced conflicts provisions to the activities in question, it is clear that the Board’s official rate-setting actions could financially benefit those Board members who provide services regulated by the Board. Thus, it can be reasonably concluded that such a financial interest could influence those Board members and potentially pose a conflict of interest between their private interests and their public duty as members of the Board.

As noted, however, G.S. 138A-38 sets forth several circumstances under which a covered person may participate in an “official action or legislative action,” notwithstanding the existence of

¹ Effective August 15, 2008, Section 84 of S.L. 2008-213 amended G.S. 138A-36(a) to restrict a public servant from taking an official action if he or she may incur a reasonably foreseeable “financial” benefit. Other relationships that could create a conflict of interest were also modified by S.L. 2008-213.

a financial interest in the action. The specific safe harbor that you reference in your request is G.S. 138A-38(a)(1), which provides that a covered person may participate in an official action if:

The only interest or reasonably foreseeable benefit or detriment that accrues to the covered person, the covered person's extended family, business with which the covered person is associated, or nonprofit corporation or organization with which the covered person is associated as a member of a profession, occupation, or general class is no greater than that which could reasonably be foreseen to accrue to all members of that profession, occupation, or general class.

The Act does not define "profession, occupation, or general class" or provide any guidelines as to the interpretation of those terms. However, this determination is critical to applying the (a)(1) safe harbor. The broader those terms are defined, the more likely it is that the (a)(1) safe harbor will be inapplicable, as discrete subgroups could benefit disproportionately within a larger profession or class. Moreover, regardless of how the class or profession is defined, individual members will likely benefit to a varying degree.

For example, if a State entity were to require attorney participation in all real estate closings, the group included within the term "profession" must be identified. If the profession is defined as **all** attorneys, real estate attorneys would benefit disproportionately to all members of the class (i.e., attorneys) and therefore (a)(1) would not provide a safe harbor to a real estate attorney taking official action with respect to that rule. If, on the other hand, "profession" is interpreted to include only real estate attorneys, the rule would not disproportionately benefit the class, and thereby would allow a real estate attorney who would benefit from that action to participate in the decision.

Under established rules of statutory construction, where a statute is ambiguous, it should be interpreted to effect the legislative purpose behind the statute. State v. Parlow, 91 N.C. 550 (1884); Carolina Truck & Body Co. v. GMC, 102 N.C. App. 262, cert. denied, 329 N.C. 266 (1991).

The purpose behind the Ethics Act, as stated in its preamble, is to "ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence." G.S. 138A-2. The two conflicts provisions, G.S. 138A-31(a) and G.S. 138A-36(a), clearly were intended to guard against public officials taking actions that may be influenced by their personal or business interests. However, the G.S. 138A-38(a)(1) safe harbor recognizes that there are certain circumstances where a public servant's direct financial interest, and any resulting influence, would be diminished as the number of individuals who would similarly benefit increase.

Moreover, in allowing public officials to act on matters that may impact their personal interests along with the interests of the class, the G.S. 138A-38 safe harbor provisions recognize the role of a public official and the need for individuals with familiarity with particular issues to utilize the full range of their experience in taking official actions. Thus, in defining the class, the official responsibilities and expertise of the public official should be considered. If the official serves on a board specifically because of his or her expertise in the field regulated by the board, the class should be narrowly defined to encompass those individuals benefited or regulated by the board. Finally, each authorizing statute should be examined to determine whether, in establishing the board, the legislature intended that individuals with personal or financial interests participate in the decision.

IV. Application of the G.S. 138A-38 Safe Harbor to the Activities of the Covered Board.

As previously noted, the Board's authorizing statute specifically requires that a select group of members serve on the Board and that individuals appointed to the Board have significant experience in or a commitment to the public services regulated by the Board. Thus, the legislature clearly intended that individuals with experience in such matters make decisions as to the regulation of those matters. Moreover, the authorizing statute specifically authorizes all members of the Board to vote on **any** matters coming before the Board, except as specifically restricted by the Board's rules. Though this provision would not give Board members full reign to participate in all matters in which they have individual interests, the legislative intent underlying the Ethics Act must be balanced with the need for the member's expertise.

Applying these principals to the G.S. 138A-38(a)(1) safe harbor, the class is the specific group of individuals or entities to which the official action would apply or who would benefit. Since those activities of the Board do not particularly benefit individual members over others, the safe harbor would apply to permit individuals who may work in that area to participate in the discussion of activities in question and otherwise take official action with respect to that issue.