



## STATE ETHICS COMMISSION

1324 MAIL SERVICE CENTER  
RALEIGH, NC 27699-1324  
WWW.ETHICSCOMMISSION.NC.GOV

ROBERT L. FARMER  
CHAIRMAN

PERRY Y. NEWSON  
EXECUTIVE DIRECTOR

### **FORMAL ADVISORY OPINION-EDITED FOR PUBLICATION**

May 14, 2010

Re: Conflicts of Interest Associated With Spouse's Independent Contractor  
Relationship with Company  
G.S. 138A-31(a), 138A-36(a), and 138A-36(c)  
AO-E-10-002

---

Dear Requester:

This formal advisory opinion addresses the question of whether the State Government Ethics Act ("Ethics Act") would restrict your official actions as a public servant with respect to a company with which your spouse has an independent contractor relationship. This formal advisory opinion was adopted by the State Ethics Commission at its May 14, 2010, meeting.<sup>1</sup>

#### **I. Brief Conclusion.**

The Commission has concluded that a company with which your spouse has an independent contractor relationship is not a "person with which the public servant is associated," and therefore the Ethics Act's primary conflict of interest provisions, G.S. 138A-31(a) and G.S. 138A-36(a), are inapplicable to any official actions that you may take with respect to that company. However, G.S. 138A-36(c) would apply to restrict your participation in any "quasi-judicial" or "quasi-legislative" proceedings involving that company to the extent your "impartiality might reasonably be questioned." However, you have instituted measures that will ensure that you will not participate in such proceedings or in any other matters concerning that company.

---

<sup>1</sup> 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.

## **II. The Facts.**

You are a public servant. Your employing entity periodically contracts with private businesses to provide a variety of services.

Your spouse works as an independent contractor for a company that provides services to your employing entity. However, your spouse will not work on any current or prospective contracts between that company and your employing entity. Moreover, such contract services are overseen by a separate business unit within your employing entity. You have also stated your intention to recuse yourself from any official actions with respect to that company.

## **III. The Ethics Act's Conflict of Interest Provisions.**

### **A. G.S. 138A-31(a) and 36(a).**

G.S. 138A-36(a) generally prohibits a public servant from participating in an official action if the 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 an official action. G.S. 138A-31(a) similarly prohibits a public servant from taking an official action that would result in a financial benefit to the public servant or a "business with which the public servant is associated." "Financial benefit" includes a direct pecuniary gain or loss to a person with which the public servant is associated or a pecuniary loss to a business competitor.

"Person with which the public servant is associated" includes the public servant's "client," but not clients of the public servant's immediate family. G.S. 138A-3(27d). Person with which associated also includes a business with which the public servant or a member of his or her immediate family is associated. "Business with which associated" is defined to include a business which employs a public servant or his or her immediate family (including his or her spouse), for which the public servant provides lobbying services or serves as a director, officer, etc., or in which the public servant or his or her immediate family own "a legal, equitable, or beneficial interest" of \$10,000 or 5%, whichever is less. G.S. 138A-3(3). However, the definition of business with which associated does not specifically include businesses with which the public servant or his or her immediate family has an "independent contractor" relationship.

Although neither term is defined in the Ethics Act, it appears that the General Assembly used the terms "independent contractor" and "employee" to refer to distinct business relationships. This conclusion is based upon the fact that G.S. 138A-3(24) defines "non-profit with which associated" to include an "independent contractor" and an "employee" of a non-profit corporation. In contrast, G.S. 138A-3(3) defines "business with which associated" to include those businesses with which a public servant or his or her immediate family "is an employee."

In addition, the North Carolina Employment Security Act provides that “the term employee ... does not include ... any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor ....” G.S. 96-8(6)a.

In the event a public servant has a conflict of interest with respect to an official action, the public servant “shall abstain from taking any verbal or written action in furtherance of the official action ....” In addition, the public servant must submit a written explanation of the reasons for the abstention to the “employing entity.” G.S. 138A-36(b).

**B. G.S. 138A-36(c).**

G.S. 138A-36(c) also restricts a public servant’s participation in a “proceeding,” defined to include a “quasi-judicial proceeding or a quasi-legislative proceeding,” if the public servant’s “familial, personal, or financial relationship” with a participant may call the public servant’s impartiality into question. “Participants” generally include any company, organization, or individual “involved in the proceeding,” which has petitioned for rule making, or has some “specific, unique, and substantial interest in the proceeding.” “Personal relationship” is defined to include a “leadership or policy-making position in a business, organization, or group.” “Familial” and “financial” relationship are undefined.

G.S. 138A-36(c) requires that if a public servant’s impartiality might reasonably be questioned, the public servant must “take appropriate steps” to “remove” himself or herself from the proceeding.

**C. G.S. 138A-38(a).**

G.S. 138A-38(a) lists circumstances under which a public servant may take official action notwithstanding a conflict of interest or the appearance of a conflict of interest under G.S. 138A-36. 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. In the latter situation, the public servant must provide the Commission with a written summary of those circumstances requiring that he or she take action and describing the conflict of interest. G.S. 138A-38(a)(7).

**IV. Discussion.**

Applying the statutory criteria outlined above, the company with which your spouse has an independent contractor relationship would not be a "business with which associated." Thus, neither G.S. 138A-31(a) nor 138A-36(a) would apply to restrict any official actions taken with respect to that company. However, G.S. 138A-36(c) would restrict you from participating in “proceedings” concerning that company to the extent

your impartiality might “reasonably be questioned” due to a “familial, personal, or financial relationship” with a participant.

In order to avoid any potential conflicts of interest or the appearance of such conflicts, you have indicated that you will not take any official action or participate in any proceedings concerning the company in question.

Thus, even if G.S. 138A-31(a), 138A-36(a), or 138A-36(c) apply, the measures you have implemented are in accordance with the recusal requirements of G.S. 138A-36(b) and G.S. 138A-36(c). However, in addition to declining to take the official actions referenced above, the G.S. 138A-36(b) recusal provision also requires that public servants abstain from taking any other verbal or written action with respect to those matters. That would include actions intended to influence decisions made by others. In addition, the public servant should summarize those recusal measures in writing.

You have stated that you may become involved in establishing general goals for utilization of outside services by your employing entity, including services provided by the company with which your spouse has an independent contractor relationship. However, it does not appear that such actions will be taken in the context of “proceedings,” in which case G.S. 138A-36(c) would not apply. However, if those goals are established in a proceeding, the more specialized those goals become, such as goals that target contractors that provide services in which that company and relatively few companies specialize, it is more likely that your impartiality would be questioned. In those limited circumstances, the Commission recommends that you refrain from participating in those matters.

In the event you are considering taking official action that would otherwise be restricted by the conflict of interest restrictions noted above, those actions may be permitted if they are ministerial only or if you are the only person having legal authority to take that official action. In the latter case, you must notify the Ethics Commission of the fact that you are the only individual having legal authority to take that action and disclose the circumstances underlying the conflict of interest.

**V. Closing.**

Thank you for contacting the State Ethics Commission. Please do not hesitate to contact the Commission’s staff if you have any questions about the foregoing formal advisory opinion. Pursuant to G.S. 138A-13(d) an edited version of this formal advisory opinion will be published within 30 days of issuance.

State Ethics Commission

By: \_\_\_\_\_  
Robert L. Farmer  
Chairman

**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).