

SUBJECT: APPLICABILITY OF ETHICS REFORM ACT TO DHEC FUNCTIONS

SUMMARY:

(1) An employee is prohibited from accepting employment for one year from a business which the department regulates on a matter in which the employee personally and substantially participated. (2) Employees may be reimbursed by their agency for participating in speeches or conference activities. (3) Employees who witness violations of the Ethics Reform Act are not liable for failure to report the violation, however, the Commission may initiate complaints upon receipt of sufficient information to determine probable cause.

QUESTION:

An employee of the Office of Environmental Quality Control at DHEC raises a number of questions:

- (1) Can emergency response personnel of DHEC participate in a training program conducted by DuPont?
- (2) What does "directly and substantially participated" mean in Section 8-13-755(2)(B)? What are examples of substantially participates? Who will decide each case? What criteria have been used in the determination?
- (3) Is this Ethics Bill in direct conflict with the South Carolina Right to Work Law?
- (4) Can an employee go to work for an industry at an out-of-state facility if the industry has DHEC regulated facilities in South Carolina?
- (5) Since DHEC regulates everyone and hundreds of DHEC employees are directly and substantially involved in a wide range of regulatory matters, can DHEC employees ever legally work for anyone other than DHEC?
- (6) Suppose there is a RIF at DHEC and I no longer have a job. If I cannot take an available job at a regulated industry for one year, will the state pay my salary for that year?
- (7) Could an employee leave the Department while employed as a member of the Emergency Response staff in the Bureau of Solid and Hazardous Waste and seek employment with a company as their wastewater treatment plant supervisor?
- (8) As a district employee, do the restrictions apply to one working for other governmental entities? Would I be able to teach school? Would I even be able to pick up garbage for the county?

(9) If a state employee who worked on UST sites leaves state employment to work for a consulting firm, can that person work on all UST sites or are they just to avoid site specific projects?

(10) Some DHEC employees are paid by Federal monies- not State funds. Are these employees subject to the same state ethics rules as state funded employees? Federal employees do not receive raises as with state monies and are subject to layoffs if federal monies are cut. Must they refrain from working for state industries?

(11) Can former DHEC clerical staff work for a facility regulated by DHEC in the one year period?

(12) A person has been working in the EQC laboratory and retires with 30 years service. This is a non-regulatory position. Does the one-year apply if one starts a consulting business?

(13) Does the Ethics Reform Act apply to a person who has completed 30 years of state service (DHEC) after retirement? Or 25 years of state service (DHEC) and buys the remaining five years? Or if the final 5 years is paid by the new employer?

(14) If I am asked to speak at a conference with a registration fee, do I need to have DHEC pay the registration fee? Also, does it matter what type of group organizes the conference, i.e., Clemson University vs. Textile Association?

(15) If DHEC regulates a particular industry and that industry employs a lobbyist and the industry also employs the spouse of a DHEC employee, under what circumstances would there be a problem?

(16) The Southern Environmental Network offers to pay my expenses for a training course in Basic Environmental Investigations. Is this legal and ethical? I am involved with both civil and criminal environmental law enforcement for DHEC.

(17) The SC Society of Professional Engineers holds an annual legislative reception. As a member of the Society, can I attend this function or am I prohibited from doing so under the ethics bill? The membership is comprised of employees of various companies some of which are regulated or serve as consultants to companies regulated by the Department. The reception is planned under the direction of a registered lobbyist employed by the Society.

(18) Employees from the Division of Emergency Response and Waste Assessment are frequently sponsored by EPA and FEMA to attend training courses and semi-annual workshops/meetings. Is there any impropriety or illegal activity associated with this funding arrangement? Since many of these activities take place outside South Carolina, are we to follow the approval process described in Section 8-13-715?

(19) The receipt of "anything of value" clause would seem to eliminate any trade organization or environmental interest groups from sponsoring an employee to a meeting in which the employee was

"to represent DHEC or the State" in any presentation or information exchanges. Therefore travel offers or other sponsorships that may be offered to enable a DHEC official to attend and participate in conferences held by professional organizations will be held as an illegal offering of an "article of value". Should this situation be reported to the Ethics Commission?

(20) Is it ethical for a tax-paid employee of DHEC or any other state agency to speak at functions where the participants paid to enter?

(21) Ability as state employee to serve on advisory committee for the SC Environmental Training Center; to serve on State and tribal government working group.

(22) Can we accept: (a) coffee/refreshments at spill sites provided by the spiller? (b) literature, samples, promotional items at trade shows?, and (3) transportation to/from inaccessible sites?

(23) Articles received in mail, i.e., post cards, Christmas cards. Can they just be disposed of or must they be returned?

(24) How should DHEC staff respond to a SC legislator who calls asking for information about a regulated facility? Should staff ask if the legislator has interest in the facility? Should staff ask for a written request?

(25) What is the liability of a state employee who witnesses another state employee violating the Ethics Reform Act? To whom would the state employee report this incident?

DISCUSSION:

This opinion is rendered in response to a letter dated January 30, 1992 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act No. 248 of 1991; Section 8-13-100 et. seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

As to the first question, the State Ethics Commission issued Advisory Opinion AO92-095 wherein the Commission advised that emergency responders would not be prohibited from attending a hazardous materials training program conducted by DuPont, however, those persons required to file a Statement of Economic Interests must report such training thereon.

As to the following group of questions, the State Ethics Commission calls attention to Section 8-13-755 which provides:

A former public official, former public member, or former public employee holding public office, membership, or employment on or after January 1, 1992, may not for a period of one year after terminating his public service or employment:

- (1) serve as a lobbyist or represent clients before the agency or department on which he formerly served in a matter which he directly and substantially participated during his public service or employment; or
- (2) accept employment if the employment:
 - (a) is from a person who is regulated by the agency or department on which the former public official, former public member, or former public employee served or was employed; and
 - (b) involves a matter in which the former public official, former public member, or former public employee directly and substantially participated during his public service or public employment.

Section 8-13-755(2) was intended to prohibit the "revolving door" whereby a regulator leaves public service and begins work with a regulated person on matters in which he had participated as a regulator. Employment, for the purposes of this section, would include the provision of legal representation. Therefore, employment or representation could not be entered into with a regulatee with responsibilities including those specific matters with which the person was engaged while with the regulatory agency. Absent responsibilities on those specific matters, there would not be a prohibition against such "employment".

As to the second question, the State Ethics Commission advised in Advisory Opinion SEC AO92-062 that "direct and substantial participation" involves specific work on a matter which is of material value to the outcome of any resolution to the matter. Examples of substantially participates would encompass inspection and issuance of a permit or license, representation of the agency in legal action, preparing documents for agency action, etc. Each situation must be determined on a case by case basis since there are no legal precedents or definitions concerning the application of the post-employment provisions.

As to the third question, no legal determination has been made concerning whether there is any conflict with the Right to Work law. The Attorney General's Office may be contacted concerning that question.

As to the fourth question, an employee would be prohibited from going to work for an industry at an out-of-state facility if the industry was regulated by the employee's department and if the employee personally and substantially participated in a matter involving that employer during the preceding twelve month period.

As to the fifth and seventh questions, DHEC employees may seek a wide range of employment positions since the restrictions provided in Section 8-13-755 involve a business regulated by the employee's department and also involve a matter on which the employee personally and substantially participated.

As to the sixth question, the response to that question is obviously no.

As to the eighth question, no distinction is made concerning the type of regulated business which is precluded from hiring. The response to this question is the same as that to the fifth and seventh questions. As to the ninth question, the restriction contained in Section 8-13-755 refers to employment with a regulated business and a specific matter on which the employee personally and substantially participated. It appears from the facts as submitted that a consulting firm would not be regulated, consequently, the restrictions in Section 8-13-755 would not apply.

As to the tenth question, the restrictions in Section 8-13-755 apply to all state and local employees. While funding for some positions comes from Federal funds, if the employees are state employees subject to management and control of DHEC and the state personnel system, the provisions of the referenced section would apply.

As to the eleventh and twelfth questions, no distinction is made concerning clerical staff or non-regulatory personnel. They are subject to the same restrictions of Section 8-13-755, i.e., that the business is regulated by the employee's department and involves a matter in which the employee directly and substantially participated.

As to the thirteenth question, the provisions of the Ethics Reform Act apply to all public employees who were employed as of January 1, 1992.

As to the fourteenth question, the State Ethics Commission advised in Advisory Opinions SEC AO92-023 and SEC AO92-061 that State employees who serve on national councils or task forces may have travel expenses paid by such organizations. Payment of expenses, including registration fees, for providing speeches or service to other organizations should be reimbursed to the employee's agency for reimbursement to the employee.

As to the fifteenth question, the State Ethics Commission issued Advisory Opinion SEC AO92-087 wherein the Commission advised that a state employee who is married to a lobbyist would not be prohibited from attending functions sponsored by or paid by the spouse's employer since the employee's work is not involved with the spouse's employer's activities. The Commission does call attention to the provisions of Section 8-13-710 which provides:

(A) Unless provided by subsection (B) and in addition to the requirements of Chapter 17 of Title 2, a public official or public employee required to file a statement of economic interests under Section 8-13-1110 who accepts anything of value from a lobbyist's principal must report the value of anything received on his statement of economic interests pursuant to Section 8-13-1120(a)(9).

(B) A public official, public member, or public employee required to file a statement of economic interests under Section 8-13-1110 who receives, accepts, or takes, directly or indirectly, from a person, anything of value worth twenty-five dollars or more in a day and anything of value worth two hundred dollars or more in the aggregate in a calendar year must report on his statement of economic interests pursuant to Section 8-13-1120 the thing

of value from:

(1) a person, if there is reason to believe the donor would not give the thing of value but for the public official's, public member's, or public employee's office or position;

(2) a person, or from an officer or director of a person, if the public official, public member, or public employee has reason to believe the person:

(a) has or is seeking to obtain contractual or other business or financial relationships with the public official's, public member's, or public employee's governmental entity.

(b) conducts operations or activities which are regulated by the public official's, public member's or public employee's governmental entity.

(C) Nothing in this section requires a public official, public member, or public employee to report a gift from a parent, grandparent, or relative to a child, grandchild, or other immediate family member for love and affection.

Further, the State Ethics Commission advises that the Secretary of State's Office be contacted concerning such a relationship with a lobbyist/lobbyist principal.

As to the sixteenth, eighteenth, and nineteenth questions, the State Ethics Commission advised in Advisory Opinions SEC AO92-061 and SEC AO92-058 that employees may receive travel and training provided by the Federal government, national associations, national councils or task forces, or sister states provided such expenses incurred are in accordance with state travel reimbursement policies. Travel expenses incurred in participating in conferences held by professional associations should be reimbursed to the employee's agency by the sponsoring organization and reimbursed to the employee by the agency in accordance with state travel policies.

As to the seventeenth question, the Commission advises that the Secretary of State's Office be contacted concerning the question which involves a relationship with a lobbyist. The response to the fifteenth question quoted the ethics rules contained in the Ethics Reform Act as they apply to the receipt of anything of value.

As to the twentieth question, there are no restrictions prohibiting a tax-paid employee speaking at a function where the participants paid to enter. Such employees are prohibited by Section 8-13-715 from accepting anything of value for speaking in an official capacity.

As to the twenty-first question, the State Ethics Commission knows of no restriction on state employees serving on advisory committees or tribal working groups.

As to the twenty-second question, the Commission advised in Advisory Opinion SEC AO92-084 that meals provided by relief organizations to all volunteer workers in an extraordinary event, such as a hurricane, flood, etc., would not be prohibited. Events such as those may be in remote locations where traditional meals may not be accessible or available. The Commission would advise that meals given in such extraordinary circumstances are not given to influence official action but are part of the overall relief effort to affected parties as well as the relief workers.

Similarly, in Advisory Opinion SEC AO92-039, the Commission advised that state employees would not be prohibited from accepting a meal or coffee break from vendors at vendor-sponsored shows or seminars, so long as they are provided to all program participants. Anything of value is defined in Section 8-13-100(1) and excepts from that definition "items of nominal value, not to exceed ten dollars, containing or displaying promotional material" and "educational material of a nominal value directly related to the public official's, public member's, or public employee's official responsibilities.

As to transportation to inaccessible sites, the State Ethics Commission advises that specialized transportation or transportation needed to get to inaccessible sites for the purpose of performing position responsibilities would not be prohibited.

As to the twenty-third question, the State Ethics Commission does not believe the intent of the Ethics Reform Act was intended to exclude Christmas cards or other letters or notes of goodwill or appreciation.

As to the twenty-fourth question, legislators are not prohibited from calling agencies to obtain information about the activities of those agencies. A legislator who is representing a constituent without compensation may communicate with a public agency in writing concerning delays in obtaining a hearing, discourteous treatment, scheduling, or other matters not affecting the outcome of pending matters. A legislator would not be prohibited from calling concerning his own business interests. The Commission advises that the House and Senate Ethics Committees be contacted concerning their advice involving such agency contacts.

As to the last question, there is no liability which attaches to a state employee who witnesses another state employee violating the Ethics Reform Act. Violations of the Ethics Reform Act may be reported to the State Ethics Commission through complaint procedures outlined in the Ethics Reform Act and the Commission's Complaint Manual. Where the filing of a complaint is not feasible, the State Ethics Commission may determine to investigate a violation upon receipt of sufficient information to make a determination of probable cause.