

SEC AO2009-002

July 16, 2008

SUBJECT: BUSINESS WITH WHICH ASSOCIATED

SUMMARY: A governmental entity is not a business as defined in Section 8-13-100(3); therefore, for purposes of Section 8-13-700(B) a public institution of higher learning is not a business with which three members of the Horry County Board of Education are associated due to their employment or a spouse's employment with the institution.

QUESTION: The Horry County Board of Education asks two questions related to its actions on a future referendum. Firstly, whether the public institution of higher learning, which is a governmental entity and not a corporation of record with the Office of the Secretary of State, is a business as the term is defined under the Ethics Act? Secondly, whether, in light of the presentation of a memorandum of agreement incorporated into the referendum to general electors, any interest would be too attenuated to create a conflict of interest for the three board members with significant connections to the public institution of higher learning?

DISCUSSION:

This opinion is rendered in response to a letter dated July 9, 2008 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the State Ethics Act, S.C. Code §2-17-10; 8-13-100 (Supp. 1996). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

Section 8-13-700(B) provides in part as follows:

No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a

decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

(1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;

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(3) if he is a public employee, he shall furnish a copy of the statement to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;

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(4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;

Economic Interest is defined in Section 8-13-100(11) as:

(a) "Economic interest" means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

The Education Capital Improvements Sales and Use Tax Act (hereinafter "the Act") allows the Horry County Board of Education (hereinafter "the Board") to adopt an approving resolution and the subsequent approval of the imposition of the tax by referendum open to all qualified electors residing in Horry County. Specific capital improvements must be listed in the referendum question.

In addition, the referendum question can also include a memorandum of agreement by which a portion of the revenue of the tax may be shared with and distributed to the area commission governing the technical school in the county, the higher education board of trustees governing the public institution of higher learning in the county, or both, for specific education capital improvements on the campuses. This memorandum of agreement must be ratified by a recorded vote of at least two-thirds of the membership of the Board and of the area commission or higher education board, or both, as applicable. Two Board members are employed by the public institution of higher learning involved and a third member's spouse is employed by the same.

The Board's concern is related mainly to the three Board members' positions on the Board and as employees of the public institution of higher learning in the county, or the spouse of an employee. If the three Board members vote on the resolution for the referendum, which would include the memorandum of understanding, their vote could result in an economic benefit to the public

institution of higher learning which is their employer or spouse's employer.

Section 8-13-700(B) requires a recusal by a public official on a matter in which the official has an economic interest, an immediate family member has an economic interest, an individual with whom you are associated or a business with which you are associated has an economic interest. The question is whether the public institution of higher learning is a business pursuant to Section 8-13-100(3).

The Ethics Reform Act provides three separate sets of definitions for lobbying, rules of conduct and campaign finance. See Section 2-17-10, Section 8-13-100 and Section 8-13-1300. Business, as defined in Section 8-13-100(3), "means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual." Of those terms listed corporation is also defined in Section 8-13-100(10) to "mean an entity organized in the corporate form under federal law or the laws of any state." Neither the term business nor corporation includes the term governmental entity. Clearly, the public institution of higher learning at issue is a governmental entity.

In interpreting Section 8-13-100 (3) (Supp. 2007), our primary concern is to ascertain and effectuate legislative intent if it reasonably can be discovered in the language of the statute when construed in light of its intended purpose. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court [and this Commission] has no right to look for or impose another meaning. *Lester v. S.C. Workers' Compensation Commission, 334SC 557, 514 SE2d 751 (1999)*. Had the General Assembly intended governmental entities to be businesses with which public officials, public members or public employees would be associated for purposes of a Section 8-13-700(B) recusal, then it would have included the term governmental entity in the definition of business.

CONCLUSION:

A governmental entity is not a business as defined in Section 8-13-100(3); therefore, for purposes of Section 8-13-700(B) a public institution of higher learning is not a business with which three members of the Horry County Board of Education are associated due to their employment or a spouse's employment with the institution. In answering the first question in the negative, the second question is moot.

KEY WORDS:	business, business with which associated, economic interest, governmental entity
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ANNOTATIONS:	8-13-700(B), 8-13-100(3), (4), (11) and (17)
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