



"WHEREAS, THE PEOPLE OF NORTH CAROLINA ENTRUST PUBLIC POWER TO ELECTED AND APPOINTED OFFICIALS FOR THE PURPOSE OF FURTHERING THE PUBLIC, NOT PRIVATE OR PERSONAL, INTEREST..."
EXECUTIVE ORDER NO. 127

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Welcome to the latest edition of the *North Carolina Board of Ethics* newsletter. We hope that this publication will provide you with worthwhile information regarding ethics in North Carolina and will help to serve as a guide as you perform your duties as a public official. As always, the *Board of Ethics* wants to hear from you as well. Your comments, criticisms, ideas for articles and any other improvements are welcomed and appreciated.

Letter from the Chairman

The Board of Ethics' staff is working hard to fulfill the education mandate of the Governor's Executive Order 127. Since May 1999, our Executive Director, Mr. Perry Newson, has visited with over 50 boards, commissions, and councils to discuss issues of ethics in public service, to offer an opportunity for officials to ask questions and express concerns regarding ethics in government, and to explain the Board of Ethics' role in this process.

Mr. Newson's efforts have met with great success and we look forward to meeting with more of you over the next year. In the meantime, I urge you to continue utilizing the services offered by the Board of Ethics.

George F. Bason 

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"Public trust is merely a state of mind. In cynical times, it is difficult to create and easy to destroy." Michael Josephson 1998

Bias in Public Decision-Making

Beginning in March 1999, the Board of Ethics was asked a series of questions involving the degree to which "Public Officials" should participate in decision-making given their positions in or involvement with other organizations that may have an interest in those official decisions. The result was one of the most comprehensive decisions in the Board's history dealing with conflict of interest, bias, and recusal.

The following is a short summary of advisory opinion 99-014 (July 7, 1999) which deals with these issues. If this decision could apply to your agency, board, or commission, we will be happy to provide you with a copy of the full opinion upon request.

"The Facts"

Members are appointed pursuant to a statute which states that "[a]ppointments to the Commission shall be made to provide knowledge and experience in a diverse range of ... interests." Inherent in the appointment of interested persons to a public board is the potential for conflict of interest. These potential conflicts, however, are to be expected and can easily be avoided in most cases by requiring appointees to exercise the proper caution when performing their public duties.

In the case at hand, the Board was asked to specifically address whether a conflict or potential conflict of interest exists and, if so, to recommend how it should be handled for persons occupying seats on the commission who are required by statute to be "associated with a State or national conservation organization," as well as those commissioners serving as employees or elected officials of local governments. At the time the opinion was requested, two commission members were active board members of conservation and/or environmental advocacy groups that appeared regularly before this commission and often took positions in matters under consideration by the commission. In addition, one commissioner was a member of the national board of a public interest law firm that represents conservation advocacy groups, both in contested cases and in rulemaking before the commission.

"The Opinion"

In the past, conflict of interest rules focused primarily on prohibiting the receipt of undue financial gain as a result of one's official public position. Executive Order 127, as amended by 131, addresses this type of financial conflict in Section 7(a)(1). This provision prohibits public officials from knowingly using their positions in any manner that would result in a direct or indirect financial benefit to themselves, their family, or an individual with whom or business with which they are associated.

Under the Order, however, the scope of conflict of interest is broadened to encompass matters of familial and personal interest as well as financial interest. Section 7(b)(1) of the Order states that public officials must make every effort to avoid even the appearance of conflict of interest. The appearance of conflict of interest exists when a reasonable person would conclude from the circumstances that the public official's ability to protect the public interest or perform public duties is compromised by personal interests. Section 7(b)(2) adds that a public official must recuse himself from any proceeding in which his impartiality might reasonably be questioned due to his familial, personal, or financial relationship with a participant in a proceeding.

Thus, the Board determined for the purposes of this opinion that the Order was intended to address MORE than just financial conflict of interest—that, in certain contexts, its proscriptions may also extend to matters of personal bias. It was therefore necessary that guidelines for identifying, evaluating, and dealing with non-financial conflicts of interest be developed.

What Constitutes a "Personal Interest"?

A public official has a personal interest in an organization when, for example, he holds a policy-making position in the organization or group. This includes membership in the governing body of the group, such as serving as an officer or director of the organization. Mere membership in an advocacy group, however, would normally not constitute such an interest.

When Will a "Personal Interest" Give Rise to the Need for Exercising Caution?

A public official must take appropriate steps to avoid a conflict of interest or the appearance thereof when the organization or group

ETHICS EDUCATION:



"HAVE ORDER, WILL TRAVEL"

If your agency or organization would like training for a particular group of officials, employees or the public, please contact the Board at (919) 733-2780 to arrange a convenient time and place.

Training sessions will provide basic information about ethical obligations under Executive Order 127 and can be tailored to address particular issues or situations faced by your agency or group. All materials will be provided, and there is no cost to participants.

-----BOARD NEWS

Maureen Atta, Research Assistant to the Board, was recently invited to become a member of the North Carolina Central School of Law Journal. Ms. Atta is currently enrolled in her third year at the NCCU evening law program. She intends to write her casenote on issues of bias in governmental decision-making.

in which he has a personal interest has petitioned the Commission regarding a particular matter or has some specific, unique, and substantial interest, financial or otherwise, in the matter before the Commission.

How Can an Appointee Avoid a Personal Conflict of Interest?

There are generally two main categories of proceedings in which public officials commonly face issues of conflict of interest and bias — quasi-judicial proceedings and quasi-legislative proceedings.

Generally, in quasi-judicial proceedings (like contested cases) impartiality due to financial conflict of interest or personal interest is impermissible because an unbiased, impartial decisionmaker is essential to due process. However, in quasi-legislative proceedings (like your typical rulemaking) ethical guidelines for personal or even financial bias may be less strict depending upon the particular facts and circumstances involved.

"Quasi-Judicial Proceedings"

Examples of quasi-judicial proceedings include licensing decisions, disciplinary hearings, individual appeals from administrative decisions, and most grant awards. In such cases, no "legal bias" or personal, financial or familial interest is allowed. To avoid these types of conflicts, generally a member of a board or commission must refrain from participating in discussion or voting on the matter.

Although financial conflicts of interest are addressed in Section 7 of the Order and the Board helps define personal and familial conflicts, what constitutes "legal bias" is a matter of law and is more appropriately determined on a fact-specific, case-by-case basis by the Public Official's own board or commission. According to court decisions, however, legal bias may include preconceptions about facts, policy, law, or a person, group or object.

"Quasi-Legislative Proceedings"

In quasi-legislative matters (like most rulemaking) Public Officials should not participate in voting or discussion of matters that involve their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Moreover,

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they should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding. In such circumstances, general personal affiliations with organizations or groups will normally not preclude a public official from participating in discussion or voting unless the organization itself is petitioning the Commission directly regarding the matter. Depending upon the particular facts of (1) the relationship between the organization and the public official and (2) the role the organization is playing in relation to issues before the commission, ethical requirements may vary greatly — from requiring that the public official need only disclose his relationship to the full commission, to requiring that the public official remove himself entirely from the proceeding.

Summary

Applying these general guidelines to the specific questions asked, the Board of Ethics found that Public Officials who are board members of advocacy groups or public interest law firms, elected local government officials, or employees of local governments:

- should fully disclose their relationship with any and all such organizations or groups both on their annual Statement of Economic Interest filed with the Board of Ethics and when matters involving those entities come before the commission;
- should avoid participating in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others;
- should not participate in rulemaking when the organization in which they have a personal interest is the petitioner for the rule in question; and
- should not participate in contested cases or other quasi-judicial proceedings involving the organization with which they are personally interested or where their impartiality might reasonably be questioned as a result of their association with such group or organization.

Whenever a public official is in doubt as to how he should proceed, he should always seek direction from the chair or legal counsel for the commission or consult the Board of Ethics before taking any action.

Do you have an ethics question or situation? Contact the Board of Ethics to request an ethics advisory opinion at (919) 733-2780

****Lets Talk About Recusal****

What is recusal?

"Recusal" is technically a legal term which refers to the process by which a judge is disqualified (or disqualifies himself) from hearing a lawsuit because of some interest or prejudice. In common terms, it refers to a public official or employee declining to participate in a matter because of an actual or perceived conflict of interest. Generally, recusal involves a total and complete disassociation with the matter at hand -- the public official does not participate in deliberations, make recommendations, give advice, consider findings, or in any other way assume responsibility for or attempt to influence the decision-making process. This is sometimes contrasted with the situation where an official participates in discussion but "abstains" from voting.

What should a public official do to properly recuse himself?

There is no "right" or "wrong" way to remove oneself from the decision-making process. In order to instill confidence in both the process and the public officials involved, whenever possible it should be done publicly and "on the record." In extreme situations it may be advisable (even if not required) for the official to actually leave the meeting. In others, disclosure followed by appropriate inaction is enough. If a public official is uncertain whether a situation warrants recusal or, if it does, the extent to which he should remove himself from the process, he is obligated to seek advice and assistance from the presiding officer. Like so much in the field of ethics, the mechanics of recusal must be determined on an individual, case-by-case basis, but we cannot overemphasize the importance of asking for help in situations where a public official has any doubt.