

N.C. BOARD



OF ETHICS

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Volume 4, Issue 3

April 2001

"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. ONE

Letter from the Chairman

Once again, we focus on recent advisory opinions issued by the Board. Advisory opinions are one of the most useful tools available to Public Officials to help them understand and comply with Executive Order Number One as they perform their public duties.

We remain ready and willing to assist Public Officials with any specific ethical dilemma they face in the course of their public service, but we also hope that this publication will serve as a useful guide for Public Officials to reference should ethics questions of a general nature arise.

To request an advisory opinion from the Board, or to obtain a copy of the full text of an opinion included in this newsletter, please contact the Board's staff at (919) 733-2780.

George F. Bason 

ETHICS EDUCATION

Due to the current State budgetary situation, we are temporarily unable to travel outside of the Raleigh area to make basic ethics education and awareness presentations.

If your board or agency is meeting in the area and you would like such a presentation, please call the Board's offices to make the necessary arrangements.

In the meantime, Board staff is always available for telephone consultations and conflict of interest questions.

"Advisory Opinions" on the Web

In order to make the Board's advisory opinions more accessible to Public Officials and other interested parties, staff is in the process of putting all opinions from January 1998 forward, select older opinions, and other related information on the Board's web site.

This project will be completed in stages, with the first stage being a "*Comprehensive Index*" of most advisory opinions issued by the Board since its inception in 1977. This index will be arranged alphabetically by general topic, issue, or organization/entity, as appropriate. Related topics will be cross-referenced as much as possible. Researchers will be able to identify and examine all opinions addressing a particular issue or relating to a covered board or commission.

Later, a "*Topical Index*" will be available. It will be organized according to common issues or recurring ethical themes (for example, "Conflict of Interest," "Gifts," and "Employer-Employee Relationships").

These and other indices will be updated periodically as the Board issues new opinions.

Have you filed your Statement of Economic Interest under the new Order?

IMPORTANT:

The filing deadline for currently serving Public Officials is Tuesday,

May 15, 2001

BOARD NEWS

On March 5, 2001, Governor Easley appointed **S. Katherine Kelly Burnette** of Oxford to the Board of Ethics. Ms. Burnette was graduated from Wake Forest University in 1981 and from Wake Forest University School of Law in 1984. She has clerked for the Hon. Eugene H. Phillips, N.C. Court of Appeals, and the Hon. A. Thomas Small, U.S. Bankruptcy Judge for the Eastern District of North Carolina.

Since 1994, Ms. Burnette has been associated with the law firm of Edmunson & Burnette, L.L.P., in Oxford. Her primary practice is in the areas of civil and commercial litigation, including family law and bankruptcy.

Ms. Burnette is a former Secretary of the State Board of Elections and currently serves on the local board of Centura Bank and as a Trustee to Kerr-Vance Academy.

The Board and Board staff welcome Ms. Burnette!

What is an "Advisory Opinion"?

Since 1977, "advisory opinions" have been an integral part the Board of Ethics' effort to educate and assist covered "Public Officials" as they strive to conduct the public's business in the best interest of the public. The issuance of advisory opinions is mandated by executive order. The current version is Executive Order Number One, which was issued January 12, 2001 ("EO One" or "the Order"). Section 5(d) of the Order requires the Board to answer questions relating to "real or reasonably-anticipated fact settings or circumstances." The Board's "Rules & Regulations" establish procedures for the request and issuance of advisory opinions. Opinions are intended to have prospective application only.

Those entitled to request an advisory opinion are (1) "Public Officials" as that term is defined by section 3 of the Order, (2) those responsible for appointing or supervising a Public Official, (3) Agency heads (which term includes the chair of each covered board), and (4) legal counsel for covered Agencies or boards.

The Board's rules establish the procedure for issuing advisory opinions. First, the Board's Executive Director drafts a preliminary advisory opinion which is reviewed by the Board Chairman. After incorporating the Chairman's comments or suggestions, the preliminary opinion is sent to the requester and may be relied upon until the full Board meets and approves, disapproves, or modifies the opinion. All interested parties are notified of the final result.

The Board may decline to issue an opinion if (1) it determines that the request is frivolous, (2) the matter has already been considered and decided by the Board, or (3) the matter is not one with respect to which a ruling or determination would be appropriate.

All advisory opinions, both preliminary and final, are based upon the particular facts presented and issues raised in the specific request for an advisory opinion. As such, the scope of each opinion is limited to the request made and should only serve as a recommendation to the particular parties involved. They may, however, serve as a general guide to other individuals similarly situated.

RECENT ADVISORY OPINIONS

AO-00-006 (July 13, 2000): A member of the Commission asked about conflict of interest rules in general and the application of those rules to his particular situation given his membership on the board of directors of an advocacy group that proposed quasi-legislative action (presumably in the form of rulemaking) by the public body on which he served. The Commission member is also on the board of directors of an advocacy group. The advocacy group is not a public body covered by the ethics Order. In January or February of this year, the advocacy group requested that the Commission consider a particular management plan. This was, either expressly or in effect, a request that the Commission take appropriate quasi-legislative action, like engage in rulemaking, to implement the proposed management plan. Prior to the Commission's decision on the proposed management plan, the member was advised by counsel for the Commission, general counsel for the Department, and/or the Chairman of the Commission that because of his position on the advocacy group's governing board, he should recuse himself from participating in the Commission's decision regarding the proposed plan. In addition, other Commission members have participated in Commission decisions which potentially impacted their financial interests, and the Director is a member of the board of directors of a different advocacy group.

OPINION: After noting the Board of Ethics' jurisdictional limitations in the present situation (among other things, a specific statute appears to govern the question), the Board noted that its prior "CRC" opinion (AO-99-014) had answered similar, if not identical, questions. In the CRC opinion, the Board concluded that in quasi-legislative situations such as this, Public Officials "should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding." A "personal relationship" includes one in a policy-making position in an organization or group. A "participant" includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking. So, under the ethics Order, as a board member of an advocacy group actively petitioning the Commission to take quasi-legislative action, the member was advised that he should **not** participate in the Commission's decision regarding the "management plan."

The Board was not given enough information to adequately address the requester's concerns about the inconsistent application of conflict of interest rules to perceived similar situations (nor does the Board generally issue advisory opinions dealing with past conduct), but upon closer examination such perceived inconsistencies may either not exist or be incorporated into the statutory framework creating the Commission. (Definitive interpretation of applicable statutes must be left to a particular agency's legal counsel.) Public Officials are not automatically disqualified from participating in agency decisions simply because of their involvement, financial or otherwise, in the industry or area being regulated. In fact, such industry or organization involvement is often legislatively mandated, as it is for the Commission. When statutes require that interested persons be appointed to regulatory or licensing boards, the Board of Ethics generally does not find that such persons have an impermissible conflict of interest due to their personal or financial interest. The Board of Ethics does, however, find that these appointees have the **potential** for conflict of interest and must recuse themselves from discussing or voting on matters before the Board that will specifically impact or effect their business, license, or special interest group with which they are significantly involved. Nor will it effect the board member's ability to participate in general regulatory decisions that will affect the industry as a whole. The degree of allowable participation, if any, must be determined on a case-by-case basis and varies depending upon the particular function being performed by the public body (e.g., quasi-legislative vs. quasi-judicial).

AO-00-007-B (October 9, 2000): Legal counsel for a covered Public Official posed nine separate but related questions dealing with conflict of interest and the appearance of conflict of interest in the context of the Official's membership on a public body and concurrent employment by an environmental advocacy organization which sometimes appears before the public body, as well as the organization's relationship to or involvement with other environmental advocacy organizations and individual members. The Public Official is employed as the political director of a private, non-profit corporation organized to provide education and advocacy on various environmental issues. The employer is a membership organization, consisting of both individual and organizational members. Members pay dues in varying amounts. Members are asked to and sometimes make donations to the organization, some of which are significant. The Public Official sometimes solicits donations and other forms of non-financial support from select members.

Recent Advisory Opinions (continued)

OPINION: The overall question was should the Public Official participate in (a) contested cases or (b) rulemaking proceedings involving (i) his employer or (ii) its members, given his financial and/or “personal” relationship with each? In order to avoid both conflict of interest and the appearance of conflict of interest, the Official should not participate in a **contested case** involving his employer. As a general rule, it would make no difference whether his employer was an individual party or one of several organizations jointly involved in the case. Because of the significant relationship, both financial and otherwise, between the Official, his employer, and its members, as a general rule the Official should not participate in contested cases involving his employer’s members. However, an exception could be made on a fact-specific, case-by-case basis where it is shown that there is an insufficient or illegitimate connection between the member and the employer-organization to justify recusal (such as a “bad faith” membership).

The **rulemaking** questions were more difficult. Drawing on the CRC opinion (AO-99-014) for support, the Board of Ethics determined that the Public Official should not participate in rulemaking when either his employer or its members **petition** for a particular rule. As with contested cases, the possibility exists for showing a “bad faith” membership or some other reason for creating an exception to the general rule on a fact-specific, case-by-case basis. The Official should normally be allowed to participate in rulemaking proceedings when either his employer or its members merely **comment** on proposed rules. However, given the strong financial and other connections between the Official, his employer, and its members in this case, the Official should carefully consider, on a case-by-case basis, the appearance ramifications of serving as a hearing officer, drafting reports or making recommendations to the public body, or otherwise acting as an “advocate” when either his employer or one of its major contributors or influential members formally and forcefully comments on proposed rules. Public Officials are always free to remove themselves from the decision-making process if they feel that personal, financial, or professional interests or associations could improperly influence their objectivity in a given situation. If doubts still exist, Officials should seek appropriate guidance from their presiding officer and legal counsel pursuant to section 7 (b) (2) of the Order.

In all cases, but particularly when either his employer or one of its members comments on a proposed rule, the Official should fully **disclose** the situation before participating in the process.

AO-00-008 (September 11, 2000): A covered Public Official, who is the former mayor of a municipality, inquired as to whether he had a conflict of interest when his former municipality was a party to a contested case proceeding before the public body on which he sits. From 1971 to 1981, the Public Official in question served as the mayor of a municipality which is now involved in a contested case proceeding. Since leaving office, the Official has not received any kind of benefit, financial or otherwise, from his former municipality, and he has not served as a member of any committees or groups connected with the local government. Consequently, the Public Official has not represented or been officially connected with the municipality for nearly nineteen (19) years.

OPINION: The Public Official was the subject of a previous advisory opinion (AO-98-014) dealing with the same general issue. In that opinion, the Board found that the member could participate in **rulemaking** proceedings involving his former municipality. The Board found that since his tenure as mayor had ended 17 years prior to the public decision-making at issue, the passage of that amount of time removed any realistic conflict of interest based upon the prior local government service.

Since that opinion, the Board has found that the “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests (AO-99-014). This could include, under appropriate circumstances, a **former** association or relationship with a participant in a covered proceeding. Determining factors would include the nature of the former association or relationship, the length of time separating it from the current public position or function, and the type of proceeding being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative).

Although the more recent situation involved a quasi-judicial **contested case** as opposed to quasi-legislative rulemaking, the Board found that the basic premise of AO-98-014 held true and the result was the same. Absent evidence of any current financial or other connection with the municipality, the member’s impartiality could not reasonably be questioned due to his position as mayor 19 years ago. The member should still disclose his previous association.

"Statements of Economic Interest" Due

All **new** employees or appointees who are covered by Executive Order Number One must file their Statement as soon as reasonably possible, the intent being to have a conflict evaluation prior to or contemporaneous with the commencement of public service where feasible.

All **currently serving** Public Officials who submitted a Statement under former Executive Order 127 must resubmit a **new Statement** on or before **May 15, 2001**. See section 9 (e).

Thereafter, all covered Officials must file an **updated Statement** between **April 15 and May 15** each year. See section 9 (b).

If you have any questions relating to the Statement, please call the Board's offices at 733-2780.

ATTENTION "AGENCY HEADS"

Help us help you.

We depend on **you** to let us know who the exempt employees, appointees to non-advisory "boards," and other "Public Officials" under section 3 of Executive Order One are so that we can make sure they receive the necessary financial disclosure forms and other important information.

We will be glad to help you comply with sections 4 and 6 of the Order, but we need to know whom to contact. We are only as good as our database in this respect.

IMPORTANT INFORMATION ON-LINE

The Board of Ethics' **newsletters** and other key information is available **on-line** at the Board's web site:

www.doa.state.nc.us/doa/ethics

Alternatively, you can access the Board's web site through the North Carolina home page. Just click on "NC Agencies" at the top of the page and "go" to the Department of Administration "Quick Link." Then select "Boards and Commissions" where you will find the Board of Ethics listed. The Board of Ethics' "home page" will give you access to Executive Order Number One, the Board's Rules and Regulations, Statement of Economic Interest forms, and all newsletters.

COMING SOON: *A comprehensive Advisory Opinion Index along with select Advisory Opinions will be available for viewing on-line in the near future.*

WE ARE ALWAYS AVAILABLE FOR TELEPHONE CONSULTATION IF NECESSARY.