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"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

Letter from the Director

Public Officials are seldom asked to perform a more difficult task than removing themselves from the decision-making process even though they *know* they do not have an "ethical" problem, but that is exactly what the Order demands in the context of appearances of conflict of interest. Section 7 (b) requires Public Officials to step aside when their impartiality might reasonably be questioned due to an appearance of conflict in a given situation. Further complicating matters is the fact that you can have an appearance of conflict "even in the absence of a true conflict of interest."

Nowhere is the adage "appearance is reality" more true than here. It does not matter that whatever is causing the apparent conflict would in reality have absolutely no impact on the decision-maker. What matters is that there is a *reasonable perception* that a Public Official's judgment is or could be unduly influenced by personal, familial, or financial interests.

In this context, the integrity of the process is just as important as the ultimate decision made. Public Officials need to be particularly sensitive to potential "appearance" issues in their public service.

Perry Y. Newson

"When it comes to public trust, perception is reality. It is not enough that we *do* no wrong, we must also try to assure that others *believe* we have done no wrong."

Michael Josephson

"Videri Etiam Esse?"

As every school child learns, our State motto is *esse quam videri*: "To be, rather than to seem." In most walks of life, that is an excellent standard to live by. We want to actually **have** character, honesty, and integrity, rather than merely **seem** like we do.

In the world of ethics, however, it is often not enough just to "be" ethical – we must also "seem" ethical. Appearance truly can become reality if we are not careful.

Executive Order One is replete with admonitions to "seem" (appear) ethical. For example, "Officials should be prepared to remove themselves immediately from decisions, votes, or processes where even the appearance of a conflict of interest exists," and "A Public Official shall make every effort to avoid even the appearance of a conflict of interest.... An appearance of conflict could exist even in the absence of a true conflict of interest."

This is often one of the most difficult things for a Public Official to do. We **know** that whatever external factor is creating the appearance of a conflict will absolutely not have any impact on our decisionmaking in the public interest. That is not enough. We must put ourselves in others' shoes and think what it reasonably **looks** like from the perspective of the unsuccessful applicant, business competitors, or the public at large. Only then can we ensure public confidence in the decisionmaking process.

If you have any doubts about whether your proposed conduct will create an unacceptable appearance of a conflict of interest, seek advice – from your fellow members, your legal counsel, or the Board of Ethics.

So, for covered Public Officials, the better motto is ***Videri Etiam Esse***: "To seem as well as to be."

BOARD NEWS

George F. Bason, Chairman of the Board of Ethics, retired as Chairman of the North Carolina Alcoholic Beverage Control (ABC) Commission on June 30, 2001. He served in that position since 1996. He can now devote his full “retirement” attention to himself, his family, and the Board of Ethics! We wish him all the best.

“Topical” Issues – Appearance of Conflict

The dual purpose of this newsletter is to both “advertise” our newest weapon in the constant battle to identify, address, and avoid ethical problems and to educate Public Officials and other interested parties about one of the most difficult concepts in public service ethics – appearances of conflict of interest. As to the first task, we are working on a “**TOPICAL**” index of selected opinions addressing common issues or recurring ethical themes. It is *not* a comprehensive index of *all* advisory opinions issued by the Board. For that level of detail, you need to see the Board’s “**INDEX OF ADVISORY OPINIONS**” (arranged alphabetically by general topic, issue, or organization/entity). Both will be available on the Board’s web site. (See page 4 of this newsletter.)

The “Topical Index” combines a list of advisory opinions dealing with some of the most common ethical issues or questions with brief summaries of the most significant or illustrative opinions. For example, the following is the entry under “**Conflict of Interest, Appearance**”:

- AO 81-002 (“revolving door” situation)
- AO 83-004 (potential opportunity to deal with Official’s own projects or those in the same area)
- AO 90-004 (outside board membership can hurt public perception [cause appearance of conflict])
- AO 91-002 (perception of conflict b/c of service on Board of Trustees of private institution)
- AO 98-001 (having clients who are regulated by the Official’s public body creates appearance)
- AO 98-005 (accepting or advocating Official’s employer’s position would create appearance)
- AO 98-010 (Parks & Recreation grants: public perception of favoring Official’s local board; see AO 01-004)
- AO 98-011 (acceptance of expense-paid trip from vendor creates an appearance of impropriety)
- AO 98-015 (Official’s participation in hiring process for job he later applied for)
- AO 98-026 (involvement with professional organizations can cause an appearance of conflict)
- AO 99-002 (rental of ski condo to vendor could cause appearance of conflict of interest)
- AO 99-011 (awarding contract to Official’s spouse would create an appearance of conflict)
- AO 99-012 (performing outside work for company doing business with State creates appearance)
- AO 99-013 (acceptance of gift from prior grant recipient could create appearance of conflict)
- AO 99-014 (general discussion: flexible standard; “personal interests”; “personal relationship”)
- AO 99-018 (appearing before public body as representative of other organization; recusal)
- AO 01-001 (appearance of conflict for Official to participate in decision that impacts his/her private interest)
- AO 01-003 (conflict/appearance of conflict due to public body co-sponsoring continuing education course)
- AO 01-004 (spouse is mayor of town applying for grant from spouse’s public body)

AO-01-003 (March 22, 2001): A public body’s co-sponsoring of its legally-required continuing education program with trade associations whose members are licensed and regulated by the public body could create the appearance of a conflict of interest or some undue connection between the public body and the trade associations. The Mortuary Science Board (“MSB”) is required by statute to offer continuing education courses to its licensees. While the primary goal is not to make a “profit,” the MSB has made a relatively small amount of money on these courses in the past. Recently, one of the two relevant North Carolina trade associations approached the MSB about co-sponsoring the continuing education program. The MSB agreed after inviting the other trade association to also take part in the program. As a result, the MSB and the two trade associations have co-sponsored two such programs, splitting expenses and any resulting profits. The MSB licenses and regulates members of the two trade associations, but otherwise has no direct regulatory contact with the associations themselves.

Public Officials must make every effort to avoid even the appearance of a conflict of interest. This is a flexible, open-ended standard applicable on a case-by-case basis. An appearance of conflict exists when a reasonable person would conclude from the circumstances that the Official’s ability to protect the public interest, or perform public duties, is compromised by personal interests. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. An appearance of conflict may exist even in the absence of a true conflict of interest. The danger here lies in the possible perception that because the MSB and the trade associations are “partners” in the continuing education programs, association members will enjoy some advantages or benefits that non-members do not. Others may perceive a closer connection

between the public regulator and the private organization than there really is. Yet another potential appearance is that the MSB is somehow encouraging individuals to join an association. Any one of these perceptions, if reasonable, would undermine public confidence that the MSB is acting in the best interest of the public as a whole as required by Executive Order Number One. In addition, voting to share “profits” with a private organization with which a board member is closely associated could run afoul of section 7 (a) (1) of the Order.

AO-01-001 (February 15, 2001): At a minimum, there is a significant appearance of conflict when a Public Official participates in a decision that either impacts or could impact his or her private interest. Sensitivity is heightened where a business or financial interest is involved. The same reasoning applies where an Official intends to acquire an interest in a project under consideration.

AO-99-014 (July 7, 1999): Most Coastal Resources Commission members are required to have certain backgrounds or fields of expertise, including one member “who at the time of appointment [is] actively associated with a State or national conservation organization.” Two CRC members were members of conservation and/or environmental advocacy groups that appear regularly before the CRC. The Board noted that an appearance of conflict 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. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests and include a significant relationship or involvement with outside advocacy organizations. An example would be one serving in a policy-making position (an officer or director) in an organization or group. Mere membership in an advocacy group would normally not constitute the requisite “personal relationship.” A “participant” in a proceeding (like rulemaking) includes an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking.

The Board concluded that CRC members may participate fully in **quasi-legislative matters** absent a personal financial interest (this would include the financial interest of the particular advocacy group on whose board the CRC member sits) in the matter or a personal relationship with a participant in the matter which would cause a reasonable person to question the member's impartiality. They may not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Nor may they participate in rulemaking when the advocacy group of which they are a board member is the petitioner for a rule. The fact that the member's advocacy group has merely commented on a rule does not, in and of itself, disqualify the member from participation.

In **quasi-judicial proceedings**, legal impartiality is required, and the member must avoid both conflict of interest and bias. According to the North Carolina Supreme Court, **legal bias** may include preconceptions about facts, policy, or law; a person, group, or object; or a personal interest in the outcome of some determination. Likewise, a fixed opinion that is not susceptible to change, an undisclosed ex parte communication, or a close familial or business relationship with an applicant may constitute impermissible bias. These determinations will need to be made on a fact-specific, case-by-case basis. Consequently, members in policy-making positions (like board members) of advocacy groups may not participate in contested cases involving their advocacy group or where their impartiality might reasonably be questioned as a result of their association with such group.

The fact that a CRC member occupies the seat required to be filled by someone actively associated with a State or national conservation organization does not make a difference in either quasi-judicial or quasi-legislative situations. Moreover, the fact that an advocacy group is legally recognized under state and/or federal law as a nonprofit, public interest corporation does *not* eliminate conflict of interest or appearance of conflict of interest issues for members of the group who serve on State boards and commissions. The same guidelines discussed above would apply.

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Hopefully, the “Topical Index” will give Public Officials or other researchers quick access to those advisory opinions having a direct bearing on their particular situations or questions.

As to appearances of conflict, the best standard to apply might just be the old “newspaper test”: would you take the action, cast the vote, be involved in the decision if it would be reported in the next day’s newspaper? If not, then perhaps there is a legitimate “appearance” issue that needs further exploration or clarification. Nine times out of ten, just raising the question solves the problem.

The Board of Ethics and its staff are ready and willing to help Public Officials address just these types of questions. Do not hesitate to call on them for assistance. Remember, the only “dumb question” is the one not asked!

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.

As ethical as ... an inmate?

According to an article in the *Raleigh News & Observer*, a group of convicted felons scored better on an ethics test than a comparable group of M.B.A. students. Yes, you heard that right. Two university researchers posed hypothetical ethical questions to 300 incarcerated felons taking college courses at three minimum-security prisons in the Midwest and compared their responses to answers from an earlier survey of students in 11 Masters in Business Administration programs. The researchers discovered that the inmates displayed just as much integrity as – and sometimes more than – the business students.

We'll leave any conclusions (and possible suggestions) to the individual reader.

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, advisory opinion information, and all newsletters.