N.C. BOARD OF ETHICS

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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. ONE

Letter from the Director

This issue of our newsletter once again focuses on recent advisory opinions issued by the Board. The two opinions reported in this issue were approved by the Board at its November 16, 2005, meeting in Raleigh. Until reviewed and approved by the full Board, opinions are "preliminary." They may, however, be relied upon until finally resolved.

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.

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.

Perry Y. Newson, Executive Director

ETHICS EDUCATION
"Have Order, Will Travel"

We are once again able to travel outside of the Raleigh area to make basic ethics education and awareness presentations. If your board or agency would like such a presentation, please call the Board's offices to make the necessary arrangements.

In addition, Board staff is always available for telephone consultations on conflict of interest questions.

"But if you ask what is the good of education in general, the answer is easy: that education makes good men, and good men act nobly." *Plato*

"Advisory Opinions" on the Web

In order to make the Board's advisory opinions more accessible to Public Officials and other interested parties, all opinions from January 1998 forward, select older opinions, and other related information are now available on the Board's web site.

In addition to all "recent" and other select opinions, a *"Comprehensive Index"* of most advisory opinions issued by the Board since its inception in 1977 is now available. This index is arranged alphabetically by general topic, issue, or organization/entity, as appropriate. Related topics are cross-referenced as much as possible. Researchers can identify and examine opinions addressing a particular issue or relating to a covered board or commission.

A *"Topical Index"* is also available. It is organized according to common issues or recurring ethical themes (for example, "Conflict of Interest," "Gifts," and "Employer-Employee Relationships"), and includes summaries of select opinions.

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

Statements of Economic Interest Due

Covered Public Officials must update their disclosure statements ("Statements of Economic Interest") annually by **May 15**. If you have not yet filed your Long, Short, or Supplemental form, please do so *immediately*. Feel free to call the Board's offices with any filing-related questions you might have.

Board News

The legislative "Short Session" is in full swing, and the Board is anxiously following several "ethics" bills introduced in both the House and Senate of the North Carolina General Assembly. As a direct result of extensive work by the House Select Committee on Ethics and Governmental Reform, House Bill 1843 (Legislative Ethics Act) and House Bill 1844 (Executive Branch Ethics Act) were both filed on May 9. Both passed the House overwhelmingly and have been referred to appropriate committees in the Senate. Senate Bill 1694 (State Government Ethics Act) was filed May 18 and referred to committee.

The Board of Ethics will meet on **Wednesday, June 7, 2006, beginning at approximately 9:30 a.m.**, in **Room 3106T (Office of State Personnel Conference Room)** on the **third floor** of the **Administration Building,** located at **116 West Jones Street, Raleigh, NC.**

The general purpose of the meeting is to address all outstanding matters pending before the Board, including the review and disposition of all pending complaints, review and approval of all outstanding preliminary advisory opinions, resolution of coverage questions under Executive Order Number One, and such other business as may come before the Board.

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.

ADVISORY OPINION SUMMARIES

AO-05-004: Department of Transportation

- The Department of Transportation ("DOT" or "the Department") requested an independent review of a Board of Transportation ("BOT") member's involvement with a road-widening project adjacent to the member's church.

Facts:

- An at-large BOT member's church is located in his transportation division.
- New development in the member's division included a road-widening project in front of the member's Church.
- The BOT member sits on the Church personnel committee and serves on the board of directors for the Church's K-12 school which is operated on Church property.
- Because of his connection to the Church, the BOT member recused himself from any and all board votes relating to the road widening project.
- The final DOT contract for the road-widening project included a standard "police" provision that allowed a small amount of money to be used for traffic control during road construction. While such provisions are not needed, and therefore not included, in all DOT contracts, they are quite common.
- During construction, a detour was provided along state system streets which basically made a "C" around the Church property. However, drivers quickly discovered that they could cut through the Church parking lots to save time and distance.
- Serious problems arose immediately because of the high volume of traffic going through the parking lot, often speeding. Church administrators and staff felt this was endangering the lives of Church employees and they were also very concerned about the nearly 1000 students who were about to begin school in a few weeks. Church members were also concerned about the issue of parking lot degradation due to the increased vehicle volume and heavier vehicles going through the Church lots.
- A Church official asked the BOT member to tell him who he should contact regarding these issues. In response, the BOT member arranged a meeting at the Church of all interested parties to discuss the issues at hand.
- To eliminate safety concerns, DOT officials decided to invoke the "police" provision in the construction contract to provide for off-duty sheriffs deputies to monitor and direct traffic around the Church.

Board of Ethics' Findings & Conclusions:

- The BOT member merely facilitated the informal meeting of interested parties. No one at the meeting felt pressure to take any particular action.
- The member did not improperly lobby or attempt to influence any official action he was otherwise barred from taking directly.
- The BOT member did not financially benefit himself or his Church through the arranged meeting. The provision of off-duty deputies was provided for in the initial project approval with which the BOT member had no involvement.
- The informal meeting of interested parties at the Church is not the type of "proceeding" contemplated by section 7 (b) of the Order involving Appearances of Conflict. However, if a Public Official has to recuse himself from the underlying or preceding *official* action, he should pay special attention and be particularly sensitive to the appearance ramifications of related *unofficial* actions.

For a more detailed discussion of this opinion, please see page 5, Recent Advisory Opinions.

ADVISORY OPINION SUMMARIES (continued)

AO-05-005: Environmental Management Commission

- A member of the Environmental Management Commission ("EMC" or "the Commission") asked whether he could participate in rulemaking given his current and former financial relationship with a regulated utility company.

Facts:

- The member is the industrial manufacturing representative on the EMC who, by law, must "be actively employed by, or recently retired from, an industrial manufacturing facility and knowledgeable in the field of industrial air and water pollution control."
- He is a former employee of a regulated company and is under an employment agreement that requires that the company provide fixed payments for 18 months after employment is terminated. The only obligation in return for these severance payments is that the former employee not compete with the company or hire its employees during that time.
- The EMC member also owns certain stock options which he obtained over the course of employment. These options generally have been of minimal value, but that could change either way over time.
- The EMC is considering two separate rules which will apply to the member's former employer and all other similarly-situated companies or facilities. Both rules are necessary because of final rules promulgated by the US Environmental Protection Agency (EPA).
- In neither situation is the former employer the petitioner for rulemaking, and at this point the company has had no formal involvement in the early stages of the rulemaking process.

Board of Ethics' Findings & Conclusions:

- The proposed rulemaking will not impact the member's specific, substantial, and readily identifiable financial interest.
- The only arguable personal financial interest would be the potential impact on the member's stock options which are not substantial and in fact fall under the *de minimis* exception of section 7 (a) (c) of the Rules of Conduct for Public Officials.
- A reasonable Public Official would not allow such stock options to factor into their public decision-making in this context.
- Even though the member is receiving severance payments under a former employment agreement, he is not an actual or implied "employee" with the company at this time. The key component of an employer-employee relationship – control -- is missing in this situation.
- In this case, the company's interest in EMC rulemaking is shared equally by the entire affected group and is therefore not unique as contemplated by the applicable conflict standards.
- The rather unique statutory requirements of the member's position on the EMC is a significant factor in favor of his participation absent a clear and convincing case of some specific, unique, and substantial financial interest in the rulemaking.
- The General Assembly intentionally built a significant potential for conflict into the requirements for this position, and even allowed for the possibility that the member could simultaneously serve on the Commission and work for an industrial manufacturing facility that would surely be impacted by the Commission's work.
- For the reasons set forth above, the member may take part in the referenced rulemaking.

For a more detailed discussion of this opinion, please see page 7, Recent Advisory Opinions.

RECENT ADVISORY OPINIONS

AO-05-004 (September 23, 2005): The Department of Transportation ("DOT" or "the Department") requested an independent review of a Board of Transportation ("BOT") member's involvement with a road-widening project in general and its impact on the member's church in particular. The investigation and review of the situation revealed the following pertinent facts. The member in question is an at-large BOT member. His church is located in the same transportation "division" in which the member resides. In 2001 or 2002, a developer submitted plans to build a new development on the road just above (northeast of) the member's church. As part of this development, the developer rebuilt the section of the road in front of the church property from a two-lane road into a three-lane road. The road is currently a three-lane road at the intersection just below the subject church. The road directly in front of the church remained two lanes. This created an "hourglass" effect in front of the church (three lanes narrowing into two and then widening back to three again just past the church). In order to eliminate this "hourglass" effect, division staff recommended that the short section of two-lane road in front of the church be widened to three lanes. According to all witnesses, the member had no involvement with this decision.

The BOT member sits on his church's personnel committee, which is an advisory body to the pastor and Board of Deacons. He is not a deacon. However, he serves on the board of directors of a K-12 school which is run by the church and operates on church property.

Because of his connection with the church and its school, when this particular road project came before the BOT for official action, the member recused himself from any and all votes relating to that project. There is no evidence or indication that the member influenced or attempted to influence either the BOT's votes on this project or staff's decisions regarding the same. In this member's absence, this local project was reviewed and supported by another Board member.

After BOT approval, the project went to contract in August 2004. After revision due to utility and additional work, performance dates were August 8 to December 2, 2005 (approximately four months). The contract contained a "Traffic Control" and "Police Officer(s)" provision. The "Police Officer(s)" clause provided for "furnishing Police Officer(s) or marked vehicles simultaneously, or separately to direct traffic in accordance with the plans and specifications." The line-item entry for "Police" listed the total estimated cost for this service to be approximately $900. The original bid for the contract was $650,040, but after additions and supplemental appropriations, the total contract price approached $900,000. Thus, the "police" provision constituted about 0.1% of the entire contract.

According to the local division engineer, many DOT contracts have similar provisions. They are included on a case-by-case basis where needed, depending upon the complexity of the area, traffic volume and pattern, and other factors. An unofficial review of contracts entered into over the past year revealed that 70% to 75% of the contracts had what DOT staff call a "police" provision. Thus, while they are not needed and therefore not included in all DOT contracts, they are quite common. They are often utilized in projects at or near schools for obvious safety reasons.

Due to right of way and other issues, actual construction on this road project did not begin until August 8, 2005. As it was necessary to close the road during construction, an offsite detour was required. The DOT detour was provided along state system streets which basically made a "C" around the church property. Access to the church was provided through city streets. However, rather than take the longer detour route, drivers quickly discovered that they could use the city streets and cut through the church parking lots to save time and distance.

Serious problems arose immediately. High volumes of traffic from vehicles of all sizes were going through the parking lot, often speeding. Motorists were even getting out of their cars and moving DOT barricades in order to enter the church property. Church administrators and staff felt this was endangering the lives of church employees. Several church employees were almost hit by speeding motorists. They were also very concerned about the nearly 1000 students who were about to begin school at their K-12 school in a few weeks. Even tractor-trailer and other large trucks were taking the unofficial shortcut through the church parking lots. In addition to safety concerns, DOT and church officials became concerned about potential damage to the parking lots themselves, as they were not constructed to withstand a high volume of heavy truck traffic.

After two days of what the church viewed as a worsening situation, one of their staff members called the BOT member (who was also a member of the church) and asked if he could direct him to the appropriate people to discuss the problem. As a result, the BOT member arranged a meeting on August 10 at the church of all interested parties, including local law enforcement personnel and local division DOT staff members. They met in the church parking lot and observed the traffic condition described by church staff and others. They discussed what might be done, and one option was to provide off-duty Sheriff's deputies to monitor and direct traffic around the church. As mentioned, a provision in the 2004 contract anticipated this contingency. This was the only meeting the member attended regarding this issue.

Every person interviewed in this matter (including several law enforcement officials totally unconnected with either the DOT or the church) unequivocally stated that the member merely facilitated the August 10 meeting at the church. He brought the parties together, introduced them, and then stepped back to see if a solution could be achieved. Most witnesses said that the member actually said very little at the meeting. There is no evidence or indication that the member pressured anyone to take any particular action. To the contrary, senior staff members expressed a willingness and ability to freely express any limitations or difficulties that might exist on the project should that be necessary. They did not feel threatened or afraid. There was also unanimous agreement that the situation at the church involved a serious health and safety risk that needed immediate attention.

OPINION: The basic rule of conduct for all covered Public Officials is that they "perform their official duties in a manner to promote the best interests of the public." This general statement is followed by rules governing both conflicts of interest and appearances of conflict. The first and most fundamental question is whether anything the BOT member did worked to his personal financial benefit. It did not. There is no reasonable or realistic interpretation of either the road widening project in general or the triggering of a pre-existing contractual provision for the use of law enforcement personnel for traffic control in particular that would even arguably inure to his personal or familial benefit.

The second related inquiry is whether the member used his official position in a manner which resulted in a financial benefit to an organization or group (here, the church) with which he is sufficiently "associated." The Board of Ethics has found in the past that "mere membership" in an organization does not require that a Public Official remove himself from the official decision-making process. However, service in a leadership or policy-making position in an organization or group does. This would include service as an officer or on the board of directors. Here, the member does not serve on the leadership body of the church (he is not on the Board of Deacons or a senior administrative staff member). However, he does serve on the personnel committee of the church and, more importantly, he is on the board of the church's school, which is considered a part of the church and is located on church grounds. Therefore, it was concluded that the member did have a sufficient "association" with the Church to trigger applicable conflict and appearance of conflict provisions of the Order.

However, it was not found that either the road widening project in general or the provision of off-duty law enforcement personnel for traffic control provided a financial benefit to the church over and above that which would normally be provided on a project of this nature. The road-widening project benefited the entire traveling public in the area. Likewise, enforcing a lawful and necessary detour to prevent injury to private citizens and damage to private property seems not only a legitimate but also an expected function of road construction for the public benefit. Indeed, it can be argued that providing several off-duty Sheriff's deputies over the course of a four-month project costing approximately $900,000 falls within the "remote, tenuous, insignificant, or speculative" exception to section 7 (a) (1) of the Order. Even if providing off-duty Sheriff's deputies under these circumstances provided some financial benefit to the church, this was decided and actually "provided for" in the initial approval of the project and drafting of the contract, actions with which the member had no involvement. Therefore, it was concluded that the member did not violate the conflict provision of section 7 (a) of the Order.

The next question was whether he violated section 7 (b) on appearances of conflict. Appearances of conflict cover a broader spectrum of conduct. A Public Official must make every effort to avoid even the appearance of a conflict of interest. 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 familial, personal, of financial interests. An appearance of conflict could exist even in the absence of a true conflict of interest.

The usual cure for an appearance of conflict is recusal: having the Public Official remove himself or herself from the official decision-making process. "Proceeding" includes both quasi-judicial proceedings (like contested case hearings) and quasi-legislative proceedings (like most rulemaking).

Again, it was emphasized that the member totally and completely recused himself from all official BOT votes on this particular road project. DOT staff recognized his association or connection with the church and brought it to his attention *before* any official action was taken. The member concurred and stayed out of the official decision-making. The system worked as it was intended to.

Long after all BOT official actions had been taken, the member responded to an inquiry about solving a serious problem in his division. Unfortunately, it involved his church and its school. He openly and admittedly arranged a meeting of the people and parties who could possibly solve the problem. He attended the meeting and, according to all of those in attendance, merely introduced everyone and acted as a "facilitator." There is no evidence that he pressured or lobbied anyone, least of all DOT employees, to take particular action regarding the situation.

Therefore, the conclusion was that an informal meeting of interested parties was *not* the type of "proceeding" contemplated by section 7 (b) of the Order, and thus the member's facilitation of and attendance at such meeting did not violate this provision. Nor was it determined that the member improperly lobbied or attempted to influence any official action he was otherwise barred from taking directly.

By way of prospective guidance and advice to the member and other similarly situated Public Officials, it was pointed out that in situations like this where there is a known, acknowledged, and acted-upon connection between the Public Official and the subject of some official action, even though it is not required by the Order, Public Officials should consider avoiding related unofficial actions or situations which could lead to the perception that some sort of non-public interest is coming into play. If a Public Official has to recuse himself from the underlying or preceding *official* action, he should pay special attention and be particularly sensitive to the appearance ramifications of related *unofficial* actions.

AO-05-005 (October 26, 2005): A member of the Environmental Management Commission ("EMC" or "the Commission") asked whether he could participate in rulemaking given his current and former financial relationship with a regulated utility company. The member was the new industrial manufacturing representative on the EMC who, by law, must "be actively employed by, or recently retired from, an industrial manufacturing facility and knowledgeable in the field of industrial air and water pollution control."

The member worked for the regulated company from May 1997 through January 2005 under an employment agreement. That agreement required the company to provide fixed payments for 18 months (February, 2005 through July, 2006) after employment was terminated. The only obligation in return for these severance payments was that the member not compete with the company or hire its employees during that time. Otherwise, the company has no control over his actions or activities. As long as he does not compete with them, he will receive the payments as scheduled. There is absolutely no connection, either express or implied, between the severance payments and the member's service on the EMC. Indeed, his employment was terminated in January 2005, and he was not appointed to the EMC until September 2005.

The EMC member also owns certain company stock options which were obtained over the course of his employment. These options generally have been of minimal value. According to the closing stock price on Friday, October 14, these stock options have no value, but that could change either way over time. Because these stock options have no current value, and certainly do not exceed the $10,000 disclosure threshold, there was no obvious place to list them on his Statement of Economic Interest form.

The EMC is considering two separate rules which will apply to the member's former company and all other similarly-situated regulated companies or facilities. Both rules are necessary because of final rules promulgated by the US Environmental Protection Agency (EPA). In neither situation is the member's past employer the petitioner for rulemaking, and at this point the company has had no formal involvement in the early stages of the rulemaking

process.

The first set of rules is called the Clean Air Interstate Rule (CAIR). The EPA has established caps on emissions of certain air pollutants (nitrogen oxides and sulfur dioxide) and an emissions allowance trading program from certain power plant sources. The EMC must adopt rules which are at least as stringent as the EPA rules or else EPA will impose their rules on those sources. The EMC may impose more stringent rules if it determines there is a need. At this point in the rulemaking process, the EMC's Air Quality Committee has recommended that the full EMC hold public hearings on a draft rule which is virtually the same as the EPA rule. These rules would apply to eleven (11) companies or facilities, most notably including Progress Energy and Duke Energy. These 11 companies are *all* of the companies which use fossil-fuel to generate electricity for sale at power plants of a certain size.

While all of the companies will be impacted on some proportional basis, the overwhelming emissions reductions and expenses will come from Progress Energy and Duke Energy. The companies have not provided an estimate of the added cost to comply with the proposed EMC rules, but it will be substantial (tens to hundreds of millions of dollars).

The second rule being considered by the EMC is a mercury emissions reduction rule. EPA promulgated rules which establish emission caps and an emissions trading program on mercury from the same sources applicable to the CAIR. Mercury is removed from certain power plant exhaust gasses by the same emissions control technologies which remove nitrogen oxides and sulfur dioxide as well as other, mercury specific, technologies. Therefore mercury emissions in North Carolina will be reduced as a result of NC's Clean Smokestacks Act, and may be reduced further by the CAIR, and may be reduced even further by EMC's adoption of the EPA's mercury rule.

At this point in the EMC's rulemaking process, the Air Quality Committee is considering a mercury emissions reduction rule which would be more stringent than the EPA's rule (and therefore acceptable to EPA), but no specific rule language has as yet been developed. Again, at this point the member's previous employer has neither petitioned for this rule nor been involved in the rulemaking process. The potential more stringent requirements being debated include having some mercury emission control technology on all applicable power plants and/or not allowing applicable power plants the option of purchasing emission allowances in the federal trading program. The member's previous employer has not developed specific cost estimates to comply with these proposed rules (beyond Clean Smokestacks), but under the most stringent conditions being discussed, tens to perhaps hundreds of million dollars in additional costs would be incurred. Even though the member acknowledges that the rules under consideration could impact the company "in substantial dollar amounts," he does not believe these costs will have a significant impact on the company in terms of its stock price, annual earnings, dividend payout, or debt level.

OPINION: The question presented was to what extent the member could participate in classic quasi-legislative rulemaking. According to a 1999 advisory opinion, he "should not participate in quasi-legislative matters involving [his] own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others" (AO-99-014). Read literally, this was a fairly straightforward question. It was not believed that the proposed rulemaking would impact the member's specific, substantial, and readily identifiable financial interest. The only arguable personal financial interest would be the potential impact on his stock options. While they were currently worthless, that could change in the future depending upon the fluctuations of the utility company's stock value. Nevertheless, they were not deemed substantial and in fact fell under the *de minimis* exception of section 7 (a) (c) of the Rules of Conduct for Public Officials.

Particularly considering the member's belief that the rules under consideration would not significantly impact the company's stock price, annual earnings, dividend payout, or debt level, it was not believed that a reasonable Public Official would allow such stock options to factor into their public decision-making in this context. If the member feels that they would, he has an obligation to take appropriate action to protect the public interest.

Nor will the member's decisions on any proposed rules impact his severance payments under the former employment contract. Those payments are for a set amount for a set period of time, and his only obligation to the company is not to compete with it. Thus the company has no discretion in making the payments and no control over the member's actions, in the context of EMC rulemaking or otherwise.

However, the Board looked beyond the strictly personal financial interest to the regulated company's as well. The

Board has stated numerous times that the interests of employers and employees are generally equated for conflict of interest analysis. Even though the member was receiving severance payments under a former employment agreement, it was not believed that he was an actual or implied "employee" with the company at the relevant time. As long as he does not compete with them, the company has no discretion in the amount or timing of his severance payments. They cannot be decreased or suspended without violating the contract. Thus, the key component of an employer-employee relationship was missing in this situation – control. Moreover, while he *may* have some general "sense of loyalty," he has no reasonable fear of retaliation or expectation of reward from the company. In addition, he could just as easily harbor hostility toward the company for terminating his employment. There is no evidence or indication, however, that he tends toward either extreme.

The fact that he is no longer a utility employee did not end the relevant inquiry, however. The Board of Ethics has previously found that covered "personal interests" can 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 of course the type of proceeding being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative).

Here, the nature of the former association or relationship is that of employer and employee, just as it was in two previous EMC opinions (AO-00-007B and AO-03-001). In these opinions, despite what the Board had described as "a significant, and perhaps even extreme, financial interest," the EMC member was *allowed* to participate in rulemaking except where his employer or former employer is the *petitioner*. Since the employment relationship was ongoing when the Public Official was allowed to participate in most rulemaking proceedings in AO-00-007B, the most significant factor must be the *type of proceeding* being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative). Even in contemporaneous employment situations (like AO-00-007B), Public Officials have tremendous leeway to participate in rulemaking proceedings absent a specific, unique, substantial, and readily identifiable financial interest that is not shared equally by others.

In addition, the company would not be deemed a "participant" in the rulemaking proceedings unless they had "some specific, unique, and substantial interest in the proceeding." In absolute terms, the company's cost to comply with the proposed EMC CAIR rule certainly appears to be "substantial." Indeed, it is hard to imagine a "reasonable person" concluding that tens and perhaps even hundreds of millions of dollars is not "significant," even to a Fortune 500 company. However, this company has approximately $9 billion in annual revenues, and $100 million is but 1.11% of that $9 billion. Viewed in context, even hundreds of millions of dollars might not be "significant" in this case, but the Board did not need to make that ultimate determination here.

In this case, it was not believed that the company's interest was "unique" – not shared equally by others. The interest was shared equally by the entire affected group and was therefore not unique as contemplated by the applicable conflict standards. The proposed and contemplated rules will apply to 11 companies or facilities. These 11 constitute *all* of the similarly-situated companies or facilities – those that use fossil-fuel to generate electricity for sale at plants of a threshold size. Thus the rules apply to the entire relevant segment of the regulated community, much like a tax, even if the impacted community is relatively small. This was precisely the type of decision-making situation contemplated by the CRC exception and section 7 (b) (2) of the Order, and the utility company's interest *is* shared equally by others and therefore not unique.

In addition, the rather unique statutory requirements of the member's position on the EMC was deemed a significant factor in favor of his participation absent a clear and convincing case of some specific, unique, and substantial financial interest in the rulemaking. He fills the industrial manufacturing representative position. According to the statutory requirement, he must be "*actively employed by*, or recently retired from, an industrial manufacturing facility and knowledgeable in the field of industrial air and water pollution control." Thus the General Assembly intentionally built a significant potential for conflict into the requirements for this position, and even allowed for the possibility that the member could simultaneously serve on the Commission and work for an industrial manufacturing facility that would surely be impacted by the Commission's work. Of the 13 designated positions in the enabling law, this is the *only one* that allows for active employment while serving.

The Board of Ethics addressed a similar situation in AO-01-001 involving a designated representative on the State Building Commission. While the Board found that "at a minimum, it would create a significant appearance of conflict

of interest for a Commissioner to vote on a request from his or her employer" (a quasi-judicial decision), Executive Order One did not prevent the designated representative from continuing to do his or her job and participate in preparing the very applications for approval which would ultimately be presented to the Commission. The same was true in the present case. While not an ethical "free pass," the relatively rare and quite specific statutory requirements of the member's position must be given significant weight, particularly in the context of quasi-legislative rulemaking. Again, while it neither allows nor excuses otherwise prohibited conflicts of interest in public decision-making, the industrial manufacturing position is one of 19 votes on the Commission and represents one of many voices the legislature wants heard, particularly in rulemaking.

The Board of Ethics thus concluded that the Public Official could take part in the referenced rulemaking. However, the member should disclose relevant potential conflicts at appropriate times. This goes for all similarly-situated Commissioners. Moreover, the member is always free to remove himself from *any* decision-making process if he feels that personal, financial, or professional interests or associations could improperly influence his objectivity in a given situation. The Order states the minimum that must be done, not the maximum which can be done.

Character cannot be developed in ease and quiet. Only through experience of trial and suffering can the soul be strengthened, vision cleared, ambition inspired, and success achieved.

-- Helen Keller, American social activist and author (1880-1968)

Don't Be A Delinquent Filer

Did you forget to file your Statement of Economic Interest form by *May 15*? If so, please return the appropriate form to the Board as soon as possible. Thank you!