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### ADVISORY OPINION NO. 16-044-E

July 8, 2016

**Question Presented:** May a city councilman resign from the city council and accept paid employment as the city's chief administrative officer?

**Brief Answer:** No. Section 109, Miss. Const. of 1890, and Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having a direct or indirect interest in a contract funded or otherwise authorized during his or her term or for one year thereafter. However, the councilman may resign and serve as chief administrative officer without any compensation for one year.

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

#### I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he

may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-103, Miss. Code of 1972.

(f) "Contract" means:

(i) Any agreement to which the government is a party; or

(ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) "Government" means the state and all political entities thereof, both collectively and separately, including but not limited to:

(i) Counties;

(ii) Municipalities;

(iii) All school districts;

(iv) All courts; and

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(o) "Public funds" means money belonging to the government.

(p) "Public servant" means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

Section 25-4-105, Miss. Code of 1972.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

## II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

I am the Mayor of a City and request an advisory opinion from the Mississippi Ethics Commission on behalf of the City pursuant to Miss. Code Ann. § 25-4-17. This letter provides the pertinent facts and presents three questions based upon different factual scenarios. I ask that the Commission provide an opinion on each of the three questions proposed.

The facts are as follows. There will soon be an opening for the position of Chief Administrative Officer for the City. This position is statutorily authorized under Miss. Code Ann. § 21-8-25. The Chief Administrative Officer's duties are to coordinate and direct the operations of the various city departments and functions of the city government. The City maintains a mayor-council form of government and previously adopted an ordinance providing that the mayor shall appoint a chief administrative officer consistent with § 21-8-25. I have appended a copy of the ordinance to this letter. This ordinance authorizes the mayor's appointment of a Chief Administrative Officer.

The Mayor wishes to appoint as CAO a current member of the City Council who was not a member of the City Council when the position of Chief Administrative Officer was authorized by ordinance. The Councilman was a member of the City Council that confirmed the current Chief Administrator's appointment in 2013 and approved his salary. The Councilman would resign his seat on the City Council, and the Mayor would appoint him to the position of Chief Administrative Officer for the City with a proposed salary (if permitted) substantially less than the current Chief Administrative Officer's salary of \$105,000.00 annually, plus some ancillary benefits such, a car and a cell phone, but not medical insurance and retirement benefits, since the prospective appointee is already retired under PERS. Currently, there is one year left in the term of office of the Mayor and Council, and they are all up for reelection in 2017. The Chief Administrative Officer's term is limited to the term of the Mayor.

I propose the following questions as to whether the resignation of the Councilmember and his subsequent appointment to the position of Chief Administrative Officer ("CAO") would be in compliance with Section 109 of the

Mississippi Constitution and Miss. Code Ann. § 25-4-105(2) under anyone or more of these three scenarios:

**Question # 1:** Would the Councilman, after resigning from the City Council and taking his new position as Chief Administrative Officer, be a "public officer," thus removing him from coverage under Section 109 of the Mississippi Constitution and § 25-4-105(2) of the Mississippi Code? It is my understanding that if the Chief Administrative Officer position is determined to be a position of public office, then the Councilman will *not* have an interest in a "contract" under either Section 109 or § 25-4-105(2). *See* Advisory Op. No. 04-100-E (citing *Johnston v. Reeves & Co.*, 72 So. 925, 927 (Miss. 1916)). Under the mayor-council form of government, the CAO serves at the pleasure only of the mayor; the council merely confirms the appointment and cannot thereafter fire the CAO. Under Miss. Code Ann., § 21-8-25, which authorizes the position of CAO for the mayor-council form, the CAO is cloaked with numerous elements of the sovereign, executive power of the Mayor. The duties of the CAO specified in Miss. Code Ann. § 21-8-25 are official, statutory duties of the CAO as a distinct public office.

**Question # 2:** Would Section 109 and § 25-4-105(2) permit the Councilman to resign from the City Council and accept the Chief Administrative Officer position at the same annual salary he made as a member of the City Council? Under this scenario[,] he would be paid the exact same salary of \$29,648.37 he makes as a member of the City Council, with no added benefits or pecuniary gain, but he would have use of a city vehicle for city business. Therefore, the Councilman would realize no net benefit by accepting this new position, since his salary would equal that of his former position as a member of the City Council. Accordingly, he would gain nothing of pecuniary value by changing positions and have no material or financial "interest" in the new position, even if the position were considered a "contract" for purposes of Section 109 and Section 25-4-105(2).

**Question # 3:** Would Section 109 and § 25-4-105(2) permit the Councilman to resign from the City Council, accept a position as Chief Administrative Officer, and work in this position without any compensation? It is my understanding that prior Advisory Opinions state that a public servant's service in an uncompensated position means he does not have an interest in a "contract" within Section 109 and § 25-4-105(2)'s proscription. *See* Advisory Op. No. 09-059-E; Advisory Op. 12-110-E; Advisory Op. 13-018-E; Advisory Op. 12-113-E. In other words, because the Councilman gains nothing of value by serving without pay (his position would be equivalent to a volunteer), he does not have an interest in a "contract."

### III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract funded or otherwise authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). Pursuant to Section 21-8-25, Miss. Code of 1972, the chief administrator is appointed by the mayor, confirmed by the city council, and serves at the will and pleasure of the mayor. Thus, the chief administrative officer is a city employee who serves pursuant to an oral or written employment contract.

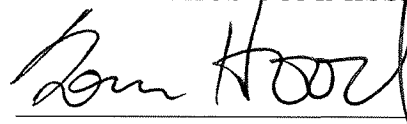
By contrast, where a person holds a position which is a "public office," there is no contract. Johnston v. Reeves & Co., 72 So. 925, 927 (Miss. 1916). A position is a "public office" when created by law with duties cast upon the incumbent involving the exercise of some portion of the sovereign power of the state in the performance of which the public is concerned and which are continuing, or enduring and permanent, in their nature. State v. McLaurin, 131 So. 89, 90 (Miss. 1930). "Public employment" is a position lacking one or more of the foregoing elements. Id. Advisory Opinion No. 04-100-E cited by the requestor involved the appointment of a circuit court judge by the governor due to a vacancy which had occurred. The position of circuit court judge meets all of the elements of a public office. However, the position at issue here does not meet the elements of a public office. Thus, the chief administrative officer holds a position of public employment and serves pursuant to an employment contract.

A city councilman is strictly prohibited by Section 109 and Section 25-4-105(2) from resigning and accepting employment with the city within one year of his or her resignation. This restriction would apply regardless of the amount of compensation the former councilman is paid. Likewise, if the councilman were to resign and serve as chief administrative officer without compensation for one year with the understanding or expectation that such employment would thereafter continue with compensation, then the city council would still be authorizing a contract with a former council member in violation of Section 109 and Section 25-4-105(2). See Advisory Opinion No. 09-059-E.

However, under these circumstances such an understanding or expectation cannot exist since the terms of all elected officials and the CAO will end in one year. Therefore, the council member may resign and serve as CAO without compensation for one year without violating Section 109 or Section 25-4-105(2). Nevertheless, the city should consult with the Office of the Attorney General on whether the city can effectively employ a CAO without compensation.

MISSISSIPPI ETHICS COMMISSION

BY:



Tom Hood, Executive Director and  
Chief Counsel