

# ARKANSAS ETHICS COMMISSION

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## ADVISORY OPINION NO. 2011-EC-001 Issued January 21, 2011

The Arkansas Ethics Commission has received a written advisory opinion request from Mr. Mac Dodson, President of the Arkansas Development Finance Authority (“ADFA”). ADFA was created by Act 1062 of 1985, which abolished the former Arkansas Housing Development Agency and transferred all records, funds, property, obligations, debts, functions, powers and duties to ADFA. ADFA administers funding in the form of tax exempt bonds and other debt instruments through its series of program activities and employs a permanent full-time staff of professionals who, together, provide expertise in all areas of banking, finance, mortgage lending and accounting. Its stated mission is to provide capital for qualified activities that enhance the quality of life for Arkansans.

In his request, Mr. Dodson seeks guidance regarding the continued participation of a newly elected state senator in federal housing programs administered by ADFA. Specifically, Mr. Dodson asks whether or not the senator, who has a housing development business, may continue to participate in federal housing programs administered by ADFA during his tenure as a public official. Mr. Dodson has also requested that the Commission opinion include advice regarding any and all disclosures and other actions which may be required in connection with such participation.

As outlined in Mr. Dodson’s request, the newly elected state senator has a housing development business and was awarded low-income housing tax credits and HOME<sup>1</sup> funds by ADFA in 2007 for construction of two multi-family developments. The referenced housing development business is also the general contractor of another company’s housing development, which was awarded low-income housing tax credits, ARRA<sup>2</sup> and HOME funds by ADFA in 2009, and is currently under construction. The

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<sup>1</sup> HOME is a federally funded program with housing grant funds targeted to assist low and very low income Arkansans.

<sup>2</sup> ARRA is the American Recovery and Reinvestment Act. Its projects include competitive grants to address home foreclosure and abandonment and HOME Investment Partnerships Program funds to be used in conjunction with the Low Income Housing Tax Credit Program.

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senator is currently serving as a consultant on a housing development that was awarded low-income housing tax credits by ADFA in November 2010.

ADFA has requested an advisory opinion regarding whether there is a prohibited conflict of interest for the senator under Ark. Code Ann. § 21-8-304, § 21-1-401, Executive Order 98-04 or any other applicable statute.

Pursuant to Ark. Code Ann. § 21-8-304, a public official or state employee is prohibited from using his or her position to secure special privileges or exemptions to which he or she otherwise would not be entitled. Legislators are public officials and, as such, must guarantee that their position of trust is not compromised by outside influences. As a public official, the senator may not use his or her position to gain "special privileges or exemptions" to which he or she is not entitled.

The term "special privileges or exemptions" is defined in section 400 (p) of the Commission's Rules on Conflicts to mean:

a particular benefit or advantage unfairly extended to a person beyond the common advantages of others or the unjustified release of a person from a duty or obligation required of others.

The participation of the senator and his housing development business in federal housing programs pre-existed his election to office and is unrelated to his position as an elected state senator. Therefore, it is the Commission's opinion that his continued participation in ADFA's competitive housing programs, would not create a prohibited conflict of interest under Ark. Code Ann. § 21-8-304.

However, Governor's Executive Order 98-04, Ark. Code Ann. § 21-1-401 *et seq.*, and Ark. Code Ann. § 21-8-901 also contain prohibitions and/or required disclosures related to contracts or agreements between state agencies and certain public officials.

Executive Order 98-04 established "mandatory guidelines and procedures to be followed by the executive department in areas of employment, grants, contracts and purchasing to prevent waste, abuse or the appearance of impropriety and to create a clearinghouse for grants and contracts." The Order gave rule-making authority to the Department of Finance and Administration ("DF&A"). This Commission does not have enforcement authority over the provisions of Executive Order 98-04 or the Rule implementing that Order. Additionally, as stated in Section 14 B of the Rule, only agencies within the control of the Governor are affected by the Order. Other persons, including members of the legislature, are not subject to the control of the Governor but are "encouraged to voluntarily comply with Executive Order 98-04 and this Rule." (Emphasis added.)

Ark. Code Ann. § 21-1-401 *et seq.* (Act 34 of 1999) limits state employment of constitutional officers and their spouses and establishes procedures regarding how they may enter into grants, contracts or leases with a state agency. While rule-making authority under Act 34 was given to DF&A, enforcement authority rests with the Ethics Commission.

“Constitutional officers” are defined by Ark. Code Ann. § 21-1-401 to include members of the Arkansas House of Representatives and members of the Arkansas Senate. The term “state agency” is defined to include every board, commission, department, division, institution, and other office of state government whether located within the legislative, executive, or judicial branch of government, including state-supported colleges and universities.

Based on the referenced definitions, it appears that the limits referenced and procedures established in § 21-1-401 *et seq.* (Act 34 of 1999) are applicable to the senator as a “constitutional officer” and to ADFA as a “state agency.” Within the parameters as described in the opinion request, the continued relationship of the senator with the ADFA appears to be permissible under the Act because “grants, contracts, and leases entered into prior to the person’s becoming a constitutional officer are not subject to the provisions of this section.” See Ark. Code Ann. § 21-1-403 (f).

However, if the relationship changes, i.e., if the senator and/or his business were to seek renewal or extension of the grant, then pursuant to § 21-1-403(f), such renewals and extensions are subject to Act 34, and the senator should follow the disclosure rules of DF&A and the provisions of § 21-1-403 to be in compliance with the law.

As set forth in § 21-1-403, no constitutional officer may enter into any lease agreement, contract, or grant with any state agency unless:

(1) The lease agreement, contract, or grant is awarded as a result of competitive bidding or a request for proposal and the constitutional officer played no role, directly or indirectly, in the administrative:

(A) Determination of specifications for the bid or request for proposal;

(B) Evaluation or consideration of bid or request for proposal; or

(C) Decision to accept the bid or request for proposal; or

(2) If competitive bidding or a request for proposal was not required by law, the lease agreement, contract, or grant has received the prior approval of:

(A) The Joint Budget Committee during legislative sessions or the

Legislative Council between legislative sessions; and

**(B) The Governor.**

Pursuant to Ark. Code Ann. § 21-8-901, a member or a member-elect of the General Assembly is also required to report any goods or services sold during the previous calendar year having a total annual value in excess of one thousand dollars (\$1,000) to an agency or other establishment of the State of Arkansas by the member or by any business in which he or his spouse is an officer director, or stockholder owning more than ten percent (10%) of the stock. While the specific business relationship described in the opinion request may not trigger the reporting referenced in § 21-8-901, the Commission notes that a member or member-elect of the General Assembly should be aware of the disclosure requirements provided therein.

Finally, in addition to the filing of a Statement of Financial Interest under Ark. Code Ann. § 21-8-701, Ark. Code Ann. § 21-8-803 sets forth reporting requirements applicable to a legislator who is required to take an action in the discharge of his or her official duties that may affect his or her financial interest. This statute requires the reporting of potential conflicts in the event action may affect the legislator's "financial interest or cause financial benefit or detriment to him, or a business in which he or she is an officer, director, stockholder owning more than ten percent (10%) of the stock of the company, owner, trustee, partner, or employee, which is distinguishable from the effects of the action on the public generally or a broad segment of the public."

In such situations, the legislator is required to:

- (1) Prepare a written statement describing the matter requiring action and stating the potential conflict; and
- (2) (A) Deliver a copy of the statement to the appropriate official to be filed with the statement of financial interest;  
  
(B) The copy of the statement may be delivered in person by the public official, by mail, or by a person authorized by the public official to deliver the copy.

The obligation to report a potential conflict of interest under this section arises as soon as the legislator becomes aware of the conflict. If the statement of financial interest filed by the legislator makes the conflict readily apparent, then no report need be filed.

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This advisory opinion is issued by the Ethics Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

**ARKANSAS ETHICS COMMISSION**

By:

  
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