

ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 2015-EC-005

Issued October 16, 2015

The Arkansas Ethics Commission ("AEC") has received a written request for an advisory opinion from Mike Pickens of the Mike Pickens Law Firm. In his advisory opinion request, Mr. Pickens raises five questions:

QUESTION #1:

Pursuant to the laws under the AEC's jurisdiction, is it a conflict of interest for the state insurance commissioner, appointed by the Governor pursuant to statute, to own an interest, directly or indirectly (for example, through his wife, a family member, or via any contractual arrangement, whether written or oral, and whether or not the regulator is an actual signatory or party to the agreement) in a business over which the commissioner has direct or ultimate regulatory authority by statute over the business and all its competitor businesses?

ANSWER:

There are several different conflict of interest or self-dealing provisions found in the laws under the AEC's jurisdiction. The first one to be discussed is Ark. Code Ann. § 21-8-304, which provides, in pertinent part, as follows:

- (a) No public servant¹ shall use or attempt to use his or her official position to secure special privileges or exemptions² for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, or for those with whom he or she has a substantial financial

¹ As used in the above-referenced statute, Ark. Code Ann. § 21-8-301(3) (A) defines the term "Public employee" to mean an individual who is employed by a governmental body or who is appointed to serve a governmental body. In turn, the term "public servant" as set forth in Ark. Code Ann. § 21-8-301(5) and used in Ark. Code Ann. § 21-8-304(a) includes a "public employee".

² The term "special privileges or exemptions" is defined in § 400(p) of the Ethics 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."

relationship that are not available to others except as may be otherwise provided by law

- (b) No public servant shall accept employment or engage in any public or professional activity while serving as a public official which he or she might reasonably expect would require or induce him or her to disclose any information acquired by him or her by reason of his or her official position that is declared by law or regulation to be confidential.
- (c) No public servant shall disclose any such information gained by reason of his or her position, nor shall he or she otherwise use such information for his or her personal gain or benefit.

Under Ark. Code Ann. § 21-8-304(a), it is not automatically a conflict of interest for the state insurance commissioner to own an interest, directly or indirectly, in a business over which the he or she has direct or ultimate regulatory authority by statute over the business and all its competitor businesses. However, that particular statutory provision would serve to prohibit a state insurance commissioner, as a public servant, from using or attempting to use his or her...official position to secure special privileges or exemptions for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, or for those with whom he...has a substantial financial relationship that are not available to others except as may be otherwise provided by law. In that regard, it is noted that a public servant would need to take some action (i.e., "use or attempt to use") involving his official position for there to be a potential violation of Ark. Code Ann. § 21-8-304 (a). Standing alone, the mere existence of such an interest while also holding the position of state insurance commissioner is insufficient to constitute a violation of Ark. Code Ann. § 21-8-304(a). Likewise, there must be a specific privilege or exemption (not available to others except as may be otherwise provided by law) that is sought or obtained in order for there to be a potential violation.

Another conflict of interest or self-dealing provision is found in Ark. Code Ann. § 21-8-1001 which provides as follows:

(a) (1) No member of a state board or commission or board member of an entity receiving state funds shall participate in, vote on, influence, or attempt to influence an official decision if the member has a pecuniary interest in the matter under consideration by the board, commission, or entity.

(2) A member of a state board or commission or board member of an entity receiving state funds may participate in, vote on, influence, or attempt to influence an official decision if the only pecuniary interest that may accrue to the member is incidental to his or her position or accrues to him or her as a member of a profession, occupation, or large class to no greater extent than the pecuniary interest could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

(b) No member of a state board or commission or board member of an entity

receiving state funds shall participate in any discussion or vote on a rule or regulation that exclusively benefits the member.

On its face, this provision applies to “members” of state boards or commissions or board members of an entity receiving state funds. It does not appear that this particular provision would apply to the Commissioner of the Insurance Department, who functions more as an agency head. Assuming, *arguendo*, the insurance commissioner were considered a “member” of a state board or commission or board member of an entity receiving state funds, then Ark. Code Ann. § 21-8-1001 would serve to prohibit him or her from participating, voting on, influencing, or attempting to influence an official decision if he or she had a pecuniary interest in the matter under consideration by the board, commission, or entity; or participate in any discussion or vote on a rule or regulation that exclusively benefits the member. Under this scenario, there is no conflict unless there is a pending matter before the Department in which the commissioner has a pecuniary interest. Even in that situation, he or she is required to refrain from participating in, voting on, influencing, or attempting to influence an official decision. Likewise, while Ark. Code Ann. § 21-8-1002 applies only to “members” of state boards or commissions or board members of an entity receiving state funds and therefor does not apply to the Commissioner of the Insurance Department. If it did apply, it would simply prevent him or her from using or attempting to use his or her...official position to secure unwarranted privileges or exemptions for himself or herself...or others. It would not prevent him or her from serving as the insurance commissioner or holding some sort of interest in a business in the regulated community.

QUESTION #2:

Pursuant to the laws under the AEC’s jurisdiction, is it a conflict of interest for the state insurance commissioner, appointed by the Governor pursuant to statute, to derive income or compensation, either directly or indirectly (for example, through his wife, a family member, or via any contractual arrangement, whether written or oral, and whether or not the regulator is an actual signatory or party to the agreement) in or from a business over which the commissioner has director or ultimate regulatory authority by statute over the business and all its competitor businesses?

ANSWER:

The laws under the AEC’s jurisdiction do not contain a blanket prohibition against the state insurance commissioner, appointed by the Governor pursuant to statute, deriving income or compensation, either directly or indirectly (for example, through his wife, a family member, or via any contractual arrangement, whether written or oral, and whether or not the regulator is an actual signatory or party to the agreement) in or from a business over which the commissioner has director or ultimate regulatory authority by statute over the business and all its competitor businesses?

Pursuant to the laws under the AEC’s jurisdiction, it is not an automatic conflict of interest for the state insurance commissioner to derive income or compensation, either directly or indirectly, in or from a business over which the he or she has direct or ultimate regulatory authority by statute over the business and all its competitor businesses.

Ark. Code Ann. § 21-8-304(b) and (c) apply to all public servants, including the state insurance commissioner, and provides that no public servant shall accept employment or engage in any public or professional activity while serving as a public official which he or she might reasonably expect would require or induce him or her to disclose any information acquired by him or her by reason of his or her official position that is declared by law or regulation to be confidential. Essentially, the insurance commissioner is prohibited from utilizing information that law or regulation has deemed to be confidential for any public or professional activity. Likewise, the insurance commissioner, as a public servant, is prohibited from disclosing any such information gained by reason of his or her position, nor shall he or she otherwise use such information for his or her personal gain or benefit. Both of these prohibitions require elements or action by the commissioner above and beyond a mere potential presence in or source of income from the regulated community. Moreover, confidential information must be involved.

QUESTION #3:

If the answer to either or both of question Numbers 1 or 2 above is “YES,” or “YES” with any qualification(s); and if such a conflict existed at the time of the gubernatorial appointment, would the state insurance commissioner in question, therefore, have been ineligible for appointment at the time of the original appointment due to the conflict of interest?

ANSWER:

The laws under the jurisdiction of the AEC do not address eligibility for appointment or eligibility for appointment (due to possible conflicts of interest) with regard to the Insurance Department or any state agency or commission except the Ethics Commission itself.

QUESTION #4:

If the answer to either or both of question Numbers 1 or 2 above is “YES,” or “YES” with any qualification(s); and if the conflict of interest(s) exist(s) at this time, is the state insurance commissioner’s appointment void or voidable; or is the commissioner rendered ineligible to serve if such a conflict of interest(s) exists?

ANSWER:

Nothing under the jurisdiction of the AEC addresses what, if anything, might make an appointment necessarily void or voidable. While a violation of Ark. Code Ann. § 19-11-718 (discussed below) is grounds for discipline or removal of a special state employee by the Ethics Commission under Ark. Code Ann. § 19-11-718, a violation would not make his appointment void or voidable, nor would it make him or her automatically “ineligible.”

QUESTION #5:

Do the laws under the AEC’s jurisdiction address whether the state insurance commissioner may hold himself out, or intervene or attempt to intervene, or act in any way, as a representative of a

business which employs his wife or a close family member; or from which he derives income or compensation either directly or indirectly, and over which he has direct or ultimate regulatory authority by statute, over the business and all its competitor businesses?

ANSWER:

Regarding Question 5, Act 1287 of the 2015 Regular Session established Ark. Code Ann. § 19-11-718, which addresses “special state employees” and “conflicts of interest”. As used in Ark. Code Ann. § 19-11-718 “Conflict of interest”, means a special state employee's direct or indirect pecuniary or other interest in a matter before a covered board. Assuming the insurance commissioner was a “special state employee”, there is nothing in Ark. Code Ann. § 19-11-718 which would disqualify someone from serving as insurance commissioner.

Ark. Code Ann. § 19-11-718 deals largely with procurement and, if applicable, would require the insurance commissioner to disclose a conflict of interest in a procurement matter before the Insurance Department and prohibit him or her from voting on, receiving or reading confidential materials related to, participate in discussion of, or attempt to influence the covered board's decision on a procurement matter if the special state employee has a conflict of interest in the procurement matter. If the insurance commissioner were considered a special state employee, Ark. Code Ann. § 19-11-718 would also require him or her to recuse himself or herself in a procurement matter if he or she is also a lobbyist. Beyond procurement, the remainder of Ark. Code Ann. § 19-11-718 deals with essentially outside employment and, if considered a special state employee, prohibits the insurance commissioner from representing an entity other than the state in a matter in which he is making a decision, rendering approval or disapproval; prohibits him or her from making a recommendation, or rendering advice on behalf of the covered board; and prohibits him or her from assisting or representing a party for contingent compensation in a matter involving a covered board other than in a judicial, administrative, or quasi-judicial proceeding.

Ark. Code Ann. § 21-8-304 could also be applicable and it has already been discussed in this opinion. A person holding the position of insurance commissioner, could not use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself...his or her...spouse, child, parents, or other persons standing in the first degree of relationship, or for those with whom he or she...has a substantial financial relationship that are not available to others except as may be otherwise provided by law. Based on the premise of the question, the insurance commissioner would be prohibited from using his or her position to intervene or attempt to intervene, or act in any way, as a representative of a business which employs his or her spouse or a close family member; or from which he or she derives income or compensation either directly or indirectly, to obtain special privileges or exemptions for himself or herself or any of the listed prohibited beneficiaries including a business in which he has an interest.

Likewise, as a public servant, he or she cannot accept employment or engage in any public or professional activity while serving as a public official which he or she might reasonably expect would require or induce him or her to disclose any information acquired by him or her by reason of his or her official position that is declared by law or regulation to be confidential. This prohibition would only apply to information that that has been declared by law or regulation to be *confidential*.

CONCLUDING REMARKS:

It should be noted that there are conflicts of interest laws not under the AEC's jurisdiction that are potentially applicable to the questions raised in this advisory opinion request. An example of one such law is Ark. Code Ann. § 23-61-106.

Finally, it should be noted that the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission refrains from opining about the permissibility of a specific past event.

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

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By: 