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“Actual” vs. “Potential” Conflicts Edition

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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

After covered Public Officials fill out and submit their annual disclosure forms, they receive an evaluation letter from the Board of Ethics. A large number of Officials are told that they have a “potential” conflict of interest. In many cases, this causes undue concern. This annual issue of our newsletter explains why that should not necessarily be the case.

The difference between “actual” and “potential” conflicts of interest is one of the most misunderstood, and therefore problematic, concepts in public service “ethics.” Public Officials often ignore the descriptive adjectives “actual” and “potential” and focus solely on the words “conflict of interest.” They often do not differentiate between actually having a conflict of interest that must be dealt with immediately and having a situation where they must take care (sometimes extreme care) not to let the *possibility* of an impermissible conflict become a reality.

Hopefully covered Public Officials and those who appoint, advise, or oversee them will have a better understanding of these commonly-misunderstood concepts after reading this newsletter. We first addressed this subject independently in June 2001, but this discussion is now intended to be an annual compliment to the financial disclosure (SEI) edition (February of this year). As always, feel free to call with any specific comments, questions, or concerns you might have.

Perry Y. Newson

Quotable Wisdom

“Justice is not a rule or set of rules; it is a moral principle. By a moral principle, we mean a mode of choosing which is universal, a rule of choosing which we want all people to adopt always in all situations.... There are exceptions to rules....but no exceptions to principles.”

-- Lawrence Kohlberg, Psychologist (1927-1988)

“Ethics,” “Morality,” & EO One

Why do many Public Officials get so upset when the Board of Ethics tells them they have a “conflict of interest,” the appearance of conflict, or a potential conflict of interest? At least partially because of the perfectly understandable equation in most people’s minds of the terms “moral” and “ethical” and the application of the common understanding of those terms to situations covered by Executive Order Number One.

Many sources list them as synonyms (along with “virtuous” and “righteous”) and define them in terms of “right and wrong,” “good and bad.” For example, *The American Heritage Dictionary* defines “ethic” as a principle of right or good conduct; a system of moral principles or values; and “ethics” as the study of the general nature of morals and of the specific moral choices to be made by the individual in his relationship with others. “Moral” is defined as concerned with the judgment principles of right and wrong in relation to human action and character.

Since no one wants to be called immoral, it is no wonder people take offense at being told they have an “ethical” problem or potential problem. To do otherwise might reveal an attitude too cavalier for serious public service. However, Public Officials must view any ethical findings or warnings in the proper context – that of Executive Order One and its overall goal of promoting public service in the best interest of the public by avoiding not only obvious conflicts of interest (primarily of a *financial* nature) but also appearances of conflict of interest, whether or not such appearances are true. In the vast majority of situations, there is absolutely no “moral” (good vs. bad) connotation attached to the findings of actual or potential conflict of interest – rather, just a well-meaning warning that the Public Official must be aware of and sensitive to these often unique aspects of public service.

Perhaps the better definition of “ethics” in this context is that contained in *Black’s Law Dictionary*: “**professionally** right or befitting; conforming to **professional** standards of conduct.” Here the “profession” involved is that of public servants and the “standards of conduct” are set out in the Governor’s ethics Order.

MEANING OF “ACTUAL” AND “POTENTIAL” CONFLICT OF INTEREST

Pursuant to section 5 (b) of Executive Order Number One dated January 12, 2001, the Board of Ethics (“the Board”) evaluates Statements of Economic Interest (“Statements”) filed by covered Public Officials in order to determine whether “the financial, familial, and personal interests and other information reported reveals an actual or potential conflict of interest.” In making this determination, the Board considers the information provided in the Statement along with the statutory duties and responsibilities of the particular public body on which the Public Official is serving or being asked to serve. The Board reports its findings to, among others, the filing Public Official and his or her appointing authority (for example, the Governor for his appointees). This is done in the form of an evaluation letter.

Many Public Officials misunderstand the concepts of “actual” and “potential” conflict of interest as they apply to public service in general and the evaluation of their Statements in particular. Specifically, many Public Officials attribute the same “ethical” (really “conflict of interest”) significance to both. That is not the case, and it is hoped that this brief explanation of the difference between the two will serve to not only help Public Officials properly deal with actual and potential conflicts but also feel more at ease with the evaluation process.

ACTUAL CONFLICT OF INTEREST

An actual conflict describes a very narrow and rare situation in which a Public Official has a significant and pervasive financial, familial, or personal interest the very existence of which poses an impermissible conflict with the relevant public interest that he or she has a duty to protect. An actual conflict exists now, in the present. It does not depend upon any action or inaction to bring it into being. An example would be an employee serving on the same public body (board or commission) as his or her employer.

Most Public Officials do *NOT* have actual conflicts. Actual conflicts are inconsistent with public service, and if one exists, something has to “give” -- either the cause of the actual conflict or the public service. Thus, the finding of an actual conflict of interest requires immediate action.

POTENTIAL CONFLICT OF INTEREST

Potential conflicts of interest are much more common. They are also *the* most misunderstood concept in public service ethics. Many Public Officials give “potential conflict” a negative connotation, when in fact it is neutral. “Potential” means “capable of being but not yet in existence” – *possible*. Thus, when a covered Public Official has a *potential* conflict of interest due to some financial, familial, or personal situation, that means that such Official must exercise appropriate caution (sometimes extreme caution) to ensure that the unrealized, possible conflict does not “ripen” into a forbidden actual conflict in violation of his or her public responsibility. This is usually done by the Official removing himself or herself from the situation to an appropriate degree (commonly in the form of “recusing” himself or herself from a particular vote). Rather than a source of embarrassment or anger, an evaluation that an Official has a potential conflict of interest should be viewed as an ethical “red flag,” a warning that he or she must be careful when whatever is causing the potential conflict comes before the Official for public action.

Many potential conflicts for Public Officials are legislatively mandated – the enabling acts of the public boards or agencies upon which the Official sits **require** that the Official have a potential conflict of interest, usually in the form of particular experience, expertise, or involvement in the affected industry or profession. Thus, the potential for a conflict between public and private interests is an acceptable part of public service. Indeed, the Order calls it “inevitable” in certain circumstances. The following are some common examples of potential conflicts faced by Public Officials in North Carolina:

- **Serving on occupational licensing boards for members of their own occupation or holding licenses issued and regulated by the board on which the Official sits.** Being in a position to issue, re-issue, revoke, or otherwise impact one's own license (or that of a family member or business associate) is one of the most common sources of potential conflict of interest in North Carolina public service. Many, if not most, licensing boards are required to have some members who are licensed by the very public body on which they sit. These members must recuse themselves from participating in matters before the Board that will specifically impact or affect their business or license (including the licenses of those they employ or are employed by). This potential for conflict of interest does not usually affect the board member's ability to participate in the licensing of other persons in the industry with whom the board member has no financial or personal relationship. Nor will it affect the board member's ability to participate in general regulatory decisions which will affect the industry as a whole. As the Board of Ethics has stated in recent advisory opinions:

The legislative intent appears to be that it is in the best interest of the public that ... regulatory boards be made up of persons with the appropriate experience and expertise and who represent the various aspects of the profession or industry being regulated.... For this reason, when statutes require that interested persons be appointed to regulatory or licensing boards, the Board of Ethics does not find that such persons have an impermissible conflict of interest due to their personal or financial interest. The Board of Ethics does, however, find that these appointees have the **potential** for conflict of interest and must recuse themselves from discussing or voting on matters before the Board that will specifically impact or effect their business or license (including the licenses of those they employ or are employed by). This potential for conflict of interest does not usually effect the board member's ability to participate in the licensing of other persons in the industry with whom the board member has no financial or personal relationship.... Nor will it effect the board member's ability to participate in general regulatory decisions which will affect the industry as a whole.

- **Having significant involvement or connection with outside groups or organizations (like trade associations or advocacy groups) that appear before or petition the public board on which the Official sits.** Appointees are often leaders in their respective fields and are therefore involved in various activities touching on their public service. Many Public Officials are not only members but also leaders of trade associations, advocacy groups, or other organizations which are intensely interested in the decisions of the public body on which the Official sits. Mere membership in such an organization does not usually give rise to an actual conflict of interest. However, significant involvement (such as serving as an officer or director) can. Individual Officials must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in multiple roles, even if they all strive to serve the "public interest." Again, the Board of Ethics has addressed this subject in recent advisory opinions:

[A] board member's membership in a professional organization does not automatically give rise to an actual conflict of interest. In [an earlier opinion], the Board stated that the ethics order did not intend to keep appointees from participating in professional activities. The Board noted that "it appears that most citizens expect appointees to be leaders in their professional endeavors and are therefore involved in various activities." The Board cautioned, however, that "the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties." Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles.

- **Being employed by or having some other significant connection to a grant applicant while serving on the public body that awards such grants.** This commonly includes elected local government officials or employees of local governments.
- **Having clients who have business or otherwise appear before the public body on which the Official sits.**
- **Owning property (real or personal) that can be affected by decisions made by the public body on which the Official sits.**
- **Being in a position to make rules or regulations that specifically and substantially impact the Official's personal financial interests rather than the industry as a whole.**

These are just a very few of the infinite number of situations causing potential conflicts of interest in public service. No order, no law, no policy could list them all. Every situation is different. That is why Public Officials must constantly remain vigilant to the situations that can raise conflict and appearance of conflict issues. Sometimes they are obvious, and sometimes they are extremely subtle. A thorough understanding of and keen sensitivity to not only the letter but also the "spirit" of the rules of conduct for covered Public Officials is the best defense against an inadvertent violation of the Order and the ethical principles it embodies.

The Board of Ethics and its staff stands ready and willing to assist Public Officials and those who appoint, advise, or supervise them in identifying and avoiding conflict situations in public service.

ETHICS EDUCATION

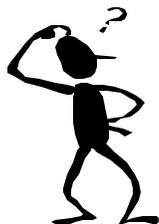
"Have Order, Will Travel"

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 any conflict of interest questions you might have.

"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



Don't forget: your Statement of Economic Interest or "No-Change" Form is due by May 15. Please return the appropriate form to the Board as soon as possible!