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ADVISORY OPINION NO. 17-023-E

May 12, 2017

Question Presented: May a county election commissioner participate in administering and certifying a special election for constable in which his or her son is a candidate on the ballot?

Brief Answer: No. Section 25-4-105(1), Miss. Code of 1972, prohibits the election commissioner from using his or her position to obtain any monetary benefit for his or her son, and Section 25-4-101 will require the election commissioner to fully recuse himself or herself from participating in the special election for constable so long as his or her son remains a candidate.

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 25-4-101, Miss. Code of 1972.

The legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment or position, is a

violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.

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

(l) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(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.

(q) "Relative" means:

(i) The spouse of the public servant;

(ii) The child of the public servant;

(iii) The parent of the public servant;

(iv) The sibling of the public servant; and

(v) The spouse of any of the relatives of the public servant specified in subparagraphs (ii) through (iv).

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

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

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 [an] Election Commissioner for [a] District in a County. Due to the current constable in [the same district in which I serve] retiring, a special election will be held November 7th to replace him. My son has qualified to run for that position and will be on the ballot.

I, along with the 4 other commissioners, are involved with the preparation of the election in reference to paperwork, poll workers and training. Our IT Department uploads the ballot to the V-drives where they are locked in the Verity system. Our managers pick up [their] equipment and the transporters distribute the machines. On Election Day I am on the road checking in with my precincts, at least twice, throughout the day. When the polls close at 7:00 p.m. I am at Election Central. I, along with another commissioner, check in the precinct managers as they bring their equipment to Election Central. Our IT Department receives the V-drives that were in the Verity system and uploads the info. Our transporters verify that the hard copy ballots are secured at each precinct, then transported and unloaded at our vault that is across the street from Election Central. The days following the election include processing the affidavits and poll books. Because I have a full time job, when it's time for the election to be certified, the commissioners that don't have full time jobs or work closer to the courthouse sign off on it.

I'd also like to add that even though my son will be on the ballot, I have not nor will I campaign for him in a public manner and will uphold my oath as an Election Commissioner.

III. ANALYSIS

Section 25-4-105(1), Miss. Code of 1972, prohibits the election commissioner from using his or her position to obtain any monetary benefit for his or her son, the candidate. See also Section 25-4-103(q). Taking office as constable would result in a pecuniary benefit to the candidate in the form of fees and other compensation. Therefore, the election commissioner cannot participate in any action which could advance the candidacy of his or her son.

Additionally, the election commissioner must pursue a course of conduct which does not raise suspicion among the public that he or she is violating the public trust, as outlined in Section 25-4-101. That section admonishes public servants such as the election commissioner to avoid any actions which would reflect unfavorably upon county government. Any involvement by an election commissioner in an election in which his or her son is a candidate on the ballot would rightfully discredit the election commission and the results of the election.

Due to the restrictions in Section 25-4-105(1) and the public policy set forth in Section 25-4-101, the election commissioner should fully recuse himself or herself from any matter concerning his or her son's election. Such actions include, but are not limited to, qualifying candidates for constable in that district (Section 23-15-359(9)), counting and reviewing affidavit

ballots (Section 23-15-573(3)(b)), overseeing the counting and scanning of paper ballots (Section 23-15-523), canvassing, ascertaining and declaring the result of the special election or certifying the election of the constable in that district (Section 23-15-601(1)), certifying election results to be sent to the Secretary of State (Section 23-15-603), certifying residual votes to be sent to the Secretary of State (Section 23-15-613), participating in any potential election contest procedures or hearing (Sections 23-15-931 and 23-15-951), printing ballots (Section 23-15-351), distributing ballot boxes (Section 23-15-247), appointment of poll managers (Section 23-15-231), training poll managers (Section 23-15-239(1)), instructing poll managers on voting devices (Section 23-15-417), appointment and training of the resolution board (Section 23-15-523), exhibiting voting machines with sample ballot for education of voters (Sections 23-15-419, 23-15-475 and 23-15-531.7), preparation and testing of voting machines prior to election (Sections 23-15-531.4 and 23-15-531.6), downloading electronic votes at election central (Section 23-15-531.10(7)), and testing of tabulating equipment (Section 23-15-481).

A total and complete recusal requires the election commissioner leave the room before the matter comes up for discussion or action and remain absent until the vote or other action is concluded. The election commissioner must not only avoid debating, discussing or taking action involving this special election during official meetings or deliberations but must also avoid discussing the subject matter with any other commission members, county election officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is *not* a recusal. Furthermore, any minutes or other record of the meeting or other proceeding should state the election commissioner left the room before the matter came before the commission and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel