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FILE NO. 93-014

GOVERNMENTAL ETHICS AND
CONFLICT OF INTEREST:
Officer Voting on Contract
with Wife's Firm

Honorable Gary J. LaPaille
State Senator, 11th District
417 State Capitol
Springfield, Illinois 62706

Dear Senator LaPaille:

I have your letter wherein you inquire regarding the propriety of the actions of a commissioner of a home assurance equity commission in voting to award an advertising contract to his wife's firm, which in turn purchased advertisements in a newspaper which employs the commissioner. For the reasons hereinafter stated, it is my opinion that if, at the time the commissioner voted upon the award of the contract, it was anticipated that the recipient would purchase advertising in the newspaper which employs the commissioner, his action in voting upon the award was violative of section 3 of the Public Officer Prohibited Activities Act (Ill. Rev. Stat. 1991, ch. 102, par. 3; 50 ILCS 105/3 (West 1992)).

The facts which you have furnished with respect to this inquiry may be summarized as follows. A commissioner of a home equity assurance program, on more than one occasion, voted on proposals to award advertising contracts to a firm which is owned by his wife. In furtherance of that contract, the firm then placed paid advertisements on behalf of the commission in a newspaper which is published by a company which employs the commissioner as its comptroller.

Home assurance equity associations are organized under the provisions of the Home Equity Assurance Act (Ill. Rev. Stat. 1991, ch. 24, par. 1601 et seq.; 65 ILCS 95/1 et seq. (West 1992)). Section 4 of the Act (Ill. Rev. Stat. 1991, ch. 24, par. 1604; 65 ILCS 95/4 (West 1992)) provides for creation of home equity programs by referendum in municipalities with more than 1,000,000 inhabitants, and, once created, provides for the appointment of nine commissioners to serve as the governing body of the program. The position of commissioner is deemed to be an office by the Act (Ill. Rev. Stat. 1991, ch. 24, par. 1604; 65 ILCS 95/4 (West 1992)). The commissioners are elected for fixed terms of office, and have been granted the authority, inter alia, to raise funds for a guarantee fund by taxation. Further, the General Assembly has provided that the commission is subject to the Open Meetings Act. Therefore, there is no question but that a member of such a commission is a person who holds an office created by law.

Section 3 of the Public Officer Prohibited Activities Act provides, in part:

"(a) No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * * Any contract made and procured in violation hereof is void.

* * *

Further, a violation of section 3 constitutes a Class 4 felony. (Ill. Rev. Stat. 1991, ch. 102, par. 4; 50 ILCS 105/4 (West 1992).)

The facts which you have provided present two issues with respect to the quoted section. Firstly, did the commissioner have a prohibited interest in these contracts by reason of his wife's interest therein? Secondly, did the commissioner have a prohibited interest in these contracts by reason of his employment by a newspaper in which ads were purchased?

With respect to the first issue, the mere fact that a public body enters into a contract with the spouse of a member of the corporate authority does not constitute a per se violation of section 3 of the Public Officer Prohibited Activities Act. (People v. Simpkins (1977), 45 Ill. App. 3d 202; Hollister v. North (1977), 50 Ill. App. 3d 56.) These cases state that, as a matter of law, "[t]he wife's interest [in a contract]

is not necessarily the husband's interest, provided the contract is not a mere subterfuge for his own pecuniary interest." (People v. Simpkins (1977), 45 Ill. App. 3d 202, 208; see also Hollister v. North (1977), 50 Ill. App. 3d 56, 59.) From the information you have provided, it appears that the wife of the commissioner in question operates a bona fide business which provides the sort of services which are the subject of the contract. No facts have been presented which would indicate that the commissioner has an ownership interest in his spouse's firm, or that the business is a subterfuge to disguise a pecuniary interest of the commissioner. In the absence of such facts, his wife's interest in the contract, standing alone, does not constitute a per se violation of section 3 of the Act. An ownership interest or disguised pecuniary interest held by the commissioner in the firm would, of course, militate a different result.

With respect to the second issue, you have stated that under the contracts in question, the advertising firm purchased a significant amount of advertising in the newspaper by which the commissioner is employed as comptroller. From the information provided, it appears that, at least with respect to the most recent contract, it was awarded with the knowledge and intent that the funds would be used for the purchase of advertisements in this newspaper. In my opinion, this information indicates that the commissioner's employer is, in essence, a

subcontractor with respect to the commission's contract.

My predecessor, in opinion No. S-518, issued October 27, 1972 (1972 Ill. Att'y Gen. Op. 263), concluded that a violation of section 3 of the Act occurred when a county board member was a subcontractor under a general contract awarded by the county board. In that case, it was known, at the time of the letting of the contract, that the board member would be performing the work called for by the contract. This circumstance was contrasted with a case wherein, without prior arrangement and after the letting of the contract, materials were purchased from a board member's firm. See Henschen v. Board of School Inspectors (1932), 267 Ill. App. 296.

In this instance, the commissioner is an employee of the subcontractor. An employee is deemed to have at least an indirect pecuniary interest in the contracts of his or her employer. (1974 Ill. Att'y Gen. Op. 201, 203; Ill. Att'y Gen. Op. No. NP-901 at 4.) When a member of a governing body anticipates that he or his employer will benefit financially from a contract awarded by the body, that knowledge will naturally affect his judgment in determining to award the contract. (1972 Ill. Att'y Gen. Op. 266.) As was stated in People ex rel. Pearsall v. Sperry (1924), 314 Ill. 205, 207-08:

" * * *

'If we attach any significance to the words used by the statute, "directly or

indirectly interested in the contract," we think the conclusion cannot be escaped that the officers of the city who are also employees of the contractor must be considered as indirectly interested in the contract, without regard to the fact that they derived no direct benefits from the contract itself. They would be more than human if they could make the same fair and impartial contract with the contractor as they could with another party with whom they had no relation, by way of employment or otherwise. We have no doubt that the officers who signed and participated in making the contract did so without any intentional bad faith, and that the same is true of the contractor; still, we are clearly of the opinion that the court properly held that the contract was void within the provisions of the statute.

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Since it was apparently anticipated at the time that the contract was awarded that a part of the work would flow to the commissioner's employer, his indirect pecuniary interest is, in my opinion, no different from that which was present in People ex rel. Pearsall v. Sperry. Assuming that these facts are correct, it is therefore my opinion that the contract was entered into in violation of section 3 of the Public Officers Prohibited Activities Act because the commissioner in question possessed an indirect pecuniary interest in the contract which was awarded by the commission.

Respectfully yours,



ROLAND W. BURRIS
ATTORNEY GENERAL