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ETHICS BOARD OF THE GENERAL ASSEMBLY

Advisory Opinion 2006 - No. 2

Conflict of Interest: Non-profit Organizations

REDACTED

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QUESTION

What advice would the Ethics Board of the General Assembly give to a legislator faced with the question of whether serving in an unpaid fiduciary position on the board of a non-profit organization creates a conflict of interest for purposes of House Rule 21 (c) or Senate Rule 17 (c) in voting for or advocating legislation that may directly impact the finances of non-profit entities generally or a specific non-profit organization, if the legislator does not receive any direct and unique financial benefit from the non-profit entity or entities?

ADVISORY OPINION

A legislator faced with the situation similar to the one described in the inquiry submitted to the Ethics Board of the General Assembly ("Board") would not be violating any rules or statutes warranting discipline if he or she advocated or voted on a measure that might directly impact the financial interests of non-profit entities, in general, or of a specific non-profit organization, on the board of which the legislator serves as an unpaid fiduciary. However, the Board recommends that a legislator disclose such facts prior to advocating or voting on such a measure.

A strict reading of Senate Rule 17 (c) or House Rule 21 (c) limits the scope of the conflict-of-interest rule set forth therein to legislators with a personal, financial, or private interest in a pending question or bill. In a prior opinion,¹ this Board concluded that the term "personal or private interest" has been interpreted historically to mean "economic or financial interest" and, as such, focuses the attention of the inquiry on what *economic* or *pecuniary* benefit the legislator stands to gain, whether directly or indirectly, as a result of his or her vote on a measure. As an unpaid director on the board of directors of a non-profit organization, the inquiring legislator presumably would not realize any economic or pecuniary benefit from legislation appropriating moneys to an endeavor of that organization. Logically, the legislator would therefore not violate any ethics responsibilities by voting for or advocating legislation that would benefit, in general, similarly situated non-profit organizations with which the legislator has no affiliation. In fact, section 24-18-107 (3), C.R.S., Senate Rule 41 (b) (2) (A), and newly adopted Joint Rule 42 indicate that even if a legislator does have some personal or private interest in a bill, the legislator would not be required to recuse himself or herself from voting on the bill if that interest were shared by a class of similarly situated persons of which the legislator was a member. Accordingly, a conflict-of-interest situation does not arise in either of the circumstances described in the inquiry.

Furthermore, the Board recognizes the benefit of public servants such as legislators volunteering their time to serve on boards of organizations the purposes of which are to promote the public good. This Board does not wish to promote a policy that would discourage legislators from volunteering their time to non-profit or not-for-profit entities or other similar organizations that serve the community and the common good. Accordingly, the Board intends the scope of this opinion to apply not only to the type of non-profit organization specifically addressed in this opinion, but to any non-profit organization including boards and commissions of the state or other political subdivisions to which the legislator may be appointed and for which the legislator receives no compensation and has no other pecuniary interest.

Notwithstanding the fact that this Board finds no actual conflict of interest arises in the situation described in the inquiry, the Board recommends that similarly situated legislators consider whether the *appearance* of a conflict of interest nevertheless warrants disclosure of the facts prior to that legislator's action on a bill. As this Board has observed before, a prudent course of action when a legislator is faced with even the possibility that a conflict situation may exist, is to disclose his or her particular situation, interest, or affiliation

¹ See Ethics Board of the General Assembly Opinion 2006-1.

relative to a particular piece of legislation prior to voting and to explain the basis for voting or abstaining from a vote on the legislation.

BACKGROUND

The Board received a request for an advisory opinion concerning whether a legislator is presented with a conflict-of-interest situation requiring the legislator to abstain from voting for or advocating legislation that may directly impact the finances of non-profit entities generally or a specific non-profit organization, if such action does not bring direct and unique personal financial benefit to the lawmaker. The inquiring legislator actually sponsored legislation to appropriate money to a non-profit entity. At the time of the legislation, the legislator served on the board of directors of the non-profit entity. However, the legislator was neither paid in this position nor possessed any financial interest in the organization. As a result, the legislator would not have realized any financial benefit from the legislation.²

ANALYSIS

A. Relevant Constitutional Provisions, Legislative Rules, and Statutes

As detailed in a prior Board opinion on conflict of interest,³ we observed that the Colorado constitution, legislative rules, and pertinent Colorado statutes describe when a member of the General Assembly shall not vote on legislation in which the member has an interest. Section 43 of article V of the Colorado constitution provides as follows:

Section 43. Member interested shall not vote. A member who has a personal or private interest in any measure or bill proposed or pending before the general assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon.

In addition to the constitutional provision, certain legislative rules and statutory provisions govern when a member must recuse himself or herself from voting on a particular bill because of a personal or private interest. House Rule 21 (c) requires a member who has an immediate personal or financial interest in a bill to disclose that interest to the House and prohibits

² The General Assembly passed House Bill 06-1317; however, the bill was ultimately vetoed by the Governor on June 2, 2006.

³ See Ethics Board of the General Assembly Opinion 2006-1.

the member from voting on the bill.⁴ Senate Rule 17 (c) directs a Senator having a personal or private interest in any question or bill to disclose such fact to the Senate and not vote on the measure.⁵ Furthermore, Joint Rule 42, adopted during the 2006 regular legislative session, states that a member of the General Assembly shall be considered to have a personal, private, or financial interest in a pending bill, measure, or question if the passage or failure of such bill, measure, or question will result in the member deriving a direct financial or pecuniary benefit that is greater than any such benefit derived by or shared by other persons in the member's profession, occupation, industry, or region.

It is reasonable to conclude that the legislator had an interest in the passage of the legislation that the legislator was sponsoring since the legislator served on the board of directors of the non-profit entity that stood to benefit from it. However, the issue for this Board to determine is whether the interest of the legislator amounted to a "personal or private" or "financial" interest as described in the constitution and by rule and as historically interpreted. Although House Rule 21 (c) does not define "financial interest", it has historically been construed to exist if there is a possibility that the member has a financial or economic interest in particular legislation or the member has a personal relationship with an individual who has an economic or financial interest in the bill. Senate Rule 41 (b) states that a Senator is disqualified from voting upon a question if his or her personal interest conflicts with the public interest, impacting the Senator's independence of judgment. That rule describes personal or private interests as economic or financial interests, whether held directly or indirectly by the member.

Under the plain meaning of "personal or private interest", it is possible to conclude that a member should abstain from voting on a bill if the member possesses a legal right to share in the subject matter of the legislation or has some other interest in or connection with the matter or if the member has an exclusive personal interest in a business, profession, or occupation affected by the legislation that is not shared by other members of that business, profession, or occupation.

⁴ House Rule 21 (c) states that "A member who has an immediate personal or financial interest in any bill or measure proposed or pending before the General Assembly shall disclose the fact to the House, and shall not vote upon such bill or measure."

⁵ Senate Rule 17 (c) states "Any Senator having a personal or private interest in any question or bill pending, shall disclose such fact to the Senate and shall not vote thereon, and if the vote be by ayes and noes, such fact shall be entered in the journal."

The unique facts of the inquiry presented to the Board, however, specify that the legislator was not compensated in the legislator's position as a member of the board of directors nor do the facts indicate that the member had any interest in or legal right to share in any benefit derived from the funding authorized by the legislation. Because the legislator did not have a financial interest in the organization and was not entitled to receive any income from it or other pecuniary benefit, it is difficult to conclude that the legislator had a financial or economic interest in the outcome of the legislation as contemplated by the rules. Therefore, it appears that the legislator did not have a personal or private interest in the legislation at issue.

Section 24-18-107 (2), C.R.S., also requires a member of the General Assembly who has a personal or private interest in any bill to disclose that interest and prohibits the member from voting on the bill. That provision directs a legislator to consider the following three things when deciding whether he or she has a personal or private interest in a bill or question:

1. Whether the interest impedes his independence of judgment;
2. The effect of his participation on public confidence in the integrity of the general assembly; and
3. Whether the participation is likely to have any significant effect on the disposition of the matter.

While the inquiring legislator clearly had an interest in serving the non-profit entity, it is unlikely that the legislator's interest actually impeded the legislator's independence of judgment, since the legislator was not in a position to personally benefit from the funding authorized in the legislation.

For the same reason, it is doubtful that the public's confidence in the integrity of the General Assembly was negatively impacted by the legislator's action on the measure. It should be expected that a legislator would sponsor legislation that might benefit interests in the legislator's district, but the fact that the legislator did not stand to gain personally from legislation diminishes concern that the legislator was motivated by personal interests at the expense of the common good. The Board observes that the rules and statutes should not be interpreted in a way that would have a chilling effect on the laudable goal of legislators serving the community through volunteering their time and energy to help non-profit organizations for fear that such participation may expose them to conflict-of-interest claims. Nor does the Board necessarily view such participation as a threat to the public's trust and confidence in the integrity of the legislative process. Serving on the board of a non-profit organization

without pay should not, in itself, create a conflict of interest for a legislator voting on a bill or measure that may affect that organization.

Nor did the legislator's participation in the legislation significantly effect the disposition of the matter. The records reflect that the bill passed on third reading in the House of Representatives 47-16 and in the Senate 24-11. There appeared to be sound support for the legislation regardless of the inquiring legislator's involvement in the matter.

However, when contemplating a possible conflict-of-interest situation and the appropriate course of action to take, a legislator should always consider the perspective of the public. At a minimum the best practice may be for a similarly situated legislator to consider full disclosure of the surrounding circumstances and his or her interest, even if remote, prior to voting on or abstaining from a vote.

Furthermore, we have previously recognized that both legislative rules and statute specify that a conflict-of-interest situation does not arise for a legislator, whether or not the legislator has a personal or private interest in pending legislation, if the legislator is a member of a class of similarly situated persons affected by the legislation on which the legislator is voting.⁶ Section 24-18-107 (3), C.R.S., Senate Rule 41 (b) (2) (A), and new Joint Rule 42⁷

⁶ See Ethics Board of the General Assembly Opinion 2006-1.

⁷ Section 24-18-107 (3), C.R.S., provides:

24-18-107. Ethical principles for members of the general assembly. (3) An interest situation does not arise from legislation affecting the entire membership of a class.

Senate Rule 41 (b) (2) (A) provides:

41. Ethics

(b) **Conflicts of interest - personal or private interests versus public interest - definition.** (1) Subject to article V, section 43, of the state constitution, a Senator has the right to vote upon all questions before the Senate and to participate in the business of the Senate and its committees, and, in so doing, is presumed to act in good faith and in the public interest. When a personal interest conflicts with the public interest and tends to affect the Senator's independence of judgment, legislative activities are subject to limitations. Where any such conflict exists, it disqualifies the Senator from voting upon any question and from attempting to influence any legislation to which it relates.

(2) A question arises as to whether a personal or private interest tends to affect a Senator's independence of judgment if the Senator:

(A) Has or acquires a substantial economic interest by reason of the Senator's personal situation, distinct from that held generally by members of the same occupation,

establish an exception in those circumstances in which a pending bill or measure affects the entire membership of a class or members of the same occupation, profession, or business. Accordingly, it is reasonable to conclude that a legislator's advocacy for or vote in support of legislation that may directly impact the finances of a class of non-profit entities generally would not amount to a conflict of interest for that member. The exception articulated in statute and legislative rule is equally applicable to the legislator voting on legislation that may impact a class of non-profit organizations generally rather than one uniquely qualified entity in which the member has a financial interest. Nevertheless, in order to avoid even the appearance of a conflict, the Board again suggests that the better practice may be for a legislator presented with a similar situation to disclose the circumstances before he or she votes or abstains from voting on the issue.

B. Citizen Legislature

As discussed at length in its prior opinion,⁸ the Board recognizes that the members of the General Assembly are citizen legislators. As such, they must balance their roles as legislators and as members of businesses, professions, and occupations as well as citizens of their community. It should be expected, therefore, that legislators will carry legislation and vote on issues that directly

profession, or business, in a measure proposed or pending before the General Assembly; or has a close relative or close economic associate with such an interest.

Joint Rule 42 provides:

42. Member Interest in Bills - Voting

(a) For purposes of section 43 of article V of the state constitution, House Rule No. 21 (c), and Senate Rule No. 17 (c):

- (1) A member of the General Assembly shall be considered to have a personal, private, or financial interest in a pending bill, measure, or question if the passage or failure of such bill, measure, or question will result in the member deriving a direct financial or pecuniary benefit that is greater than any such benefit derived by or shared by other persons in the member's profession, occupation, industry, or region.
- (2) A member shall not be deemed to have a personal, private, or financial interest in a pending bill, measure, or question where such interest arises from a bill, measure, or question that affects the entire membership of a class to which the member belongs; except that, where such an interest arises, nothing in this paragraph (2) shall be construed as prohibiting a member from disclosing such interest and not voting on the bill, measure, or question.

⁸ See Ethics Board of the General Assembly Opinion 2006-1.

or indirectly impact their business, financial, and community interests. In addition, many legislators, being of civic mind, volunteer their time with non-profit organizations that serve the interests of the community. The Board supports and encourages this type of activity by legislators. Therefore, to the extent that a legislator does not have any economic or pecuniary interest at stake or does not stand to receive any financial benefit, the Board extends the scope of this opinion more generally to include those legislators serving in a fiduciary capacity on the board of such an entity whose purpose is to promote the public good, whether the entity is a non-profit or not-for-profit organization and whether or not organized under the "Colorado Revised Nonprofit Corporation Act"⁹ (or a similar act of another jurisdiction), qualified under article 501 of the Internal Revenue Code, or established by the state or a political subdivision of the state or otherwise. The opinion of this Board applies equally to legislators serving on the board of any such entity, provided the legislator receives no economic or pecuniary benefit as a result thereof.

The Board further observes that the rules and statutes should not be interpreted in a way that would have a chilling effect on the laudable goal of legislators serving the community through volunteering their time and energy to help non-profit organizations for fear that such participation may expose them to conflict-of-interest claims. Nor does the Board necessarily view such participation as a threat to the public's trust and confidence in the integrity of the legislative process. Serving on the board of a non-profit organization without pay should not, in itself, create a conflict of interest for a legislator voting on a bill or measure that may affect that organization.

CONCLUSION

A legislator serving in an unpaid fiduciary capacity of a non-profit organization does not face a conflict-of-interest situation for purposes of House Rule 21 (c) or Senate Rule 17 (c) in voting for or advocating legislation that may directly impact the finances of non-profits generally or a specific non-profit organization, so long as it does not bring direct and unique economic or pecuniary benefit to the legislator. Furthermore, a legislator does not face a conflict-of-interest situation if the legislation the member is voting for or advocating will impact non-profit organizations in general, regardless of the legislator's personal or private interest in the legislation, provided the legislation is affecting a class of similarly situated individuals from organizations benefitting generally from the measure. This opinion applies to

⁹ Articles 121 to 137 of title 7, Colorado Revised Statutes.

all types of non-profit organizations that benefit the community, including boards and commissions of the state or its political subdivisions, if the legislator does not receive compensation and has no other pecuniary interest. However, if there is even a remote possibility of a perceived conflict of interest on an issue, the Board recommends that the legislator disclose his or her particular situation or interest relative to the measure at issue prior to voting or abstaining from voting.

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