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## MISSISSIPPI ETHICS COMMISSION

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### ADVISORY OPINION NO. 10-038-E

June 11, 2010

**Question Presented:** May an individual who holds a hangar lease with an airport authority be appointed to the airport authority board?

**Brief Answer:** Appointing a lease holder to the airport board will not automatically result in a violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, but it is inadvisable for a number of reasons. Among other concerns, the mayor should carefully consider whether appointing an individual to the same airport board with which he holds a hangar lease is consistent with the public policy set forth in Section 25-4-101, Miss. Code of 1972.

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 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or

may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

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.

(f) "Contract" means:

- (i) Any agreement to which the government is a party; or
- (ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) "Government" means the state and all political entities thereof, both collectively and separately, including but not limited to:

- (i) Counties;
- (ii) Municipalities;
- (iii) All school districts;
- (iv) All courts; and
- (v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(o) "Public funds" means money belonging to the government.

(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.

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

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

## II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

This is a request for a confidential advisory opinion pertaining to standards of conduct. This firm is legal counsel to the City. The mayor, with the advice and consent of the city council, will be appointing someone to serve as a commissioner of the City Airport Authority. A potential candidate for the position currently leases from the Authority a hangar in which he keeps his airplane. The mayor would like an advisory opinion on the ethical implications of that hangar lease with respect to the person's potential service as a commissioner.

The leasing arrangement started out as a one-year written lease. However, the parties have not since executed any new written lease agreements, and the lease arrangement has continued over several years as an oral contract, which would likely be construed as a lease for an indefinite term, terminable annually.

The question is whether, given those facts, the prospective appointee could serve on the Authority and maintain his hangar lease without violating the ethics laws. I call your attention to Advisory Opinion 99-126-E, which opined that a public official could continue with a pre-existing lease arrangement with the public body of which he became a member, because the public body did not authorize the lease during the member's term or within one year thereafter. I also call your attention to an unofficial opinion letter dated February 13, 2009 to the counsel for the Mississippi Airports Association (a copy of which is enclosed, along with a copy of his letter to you), which appears to take the same position with respect to a hangar lease from an airport authority ("scenario 1"). These opinions appear to validate the continuation of the lease in question. However, the mayor would prefer to have an official advisory opinion on the question.

An additional question would be what constitutes a "reauthorization" of the lease. The unofficial opinion to the MAA referred to above suggests that action by the

Authority increasing the rental rate for the hangar lease would be a reauthorization that would require the member to terminate the lease. I see the logic of that position in a situation where a lease is handled on an individual basis and an adjustment of a lease rate upon renewal is a product of negotiations. However, the situation with this hangar lease is different. There are a number of hangars of the type in question, and there is a uniform rental rate for them. The Authority board does not vote on the approval of the commencement of a lease or the terms and conditions thereof on a case-by-case basis. A tenant simply signs the standard lease agreement and begins paying the uniform rent. The board does not have to specifically authorize the renewal of a lease. Therefore, the situation arguably would be analogous to a situation addressed by § 25-4-105(3)(b) of the Mississippi Code - a sale of services offered to the general public on a uniform price schedule. Thus, an across-the-board adjustment of rental rates arguably would not be a reauthorization of the individual leases but rather an adjustment of the uniform price. It seems likely that a city councilman would not be forbidden to park for a daily fee in a city-owned parking lot simply because uniform parking rates were increased during his term, or to purchase electricity from the municipal utility because of an increase in electric rates. Would not the same principle apply to an increase in uniform rates for hangars?

The mayor is cognizant of the supreme court's reasoning, reflected in cases such as *Jones v. Howell*, 827 So. 2d 691 (Miss. 2002) and acknowledged by the Ethics Commission in Advisory Opinion 04-113-E, that the ethics statutes should not be construed in a hyper-literal manner so as to disqualify from service the persons most qualified by knowledge and experience to serve on the public body. The mayor believes that persons who own airplanes would be, by virtue of their interest in and knowledge of aviation issues, among the most qualified and willing to serve as members of the Airport Authority, and that if it were impossible for a commissioner to keep his airplane at the airport on the same terms available to any other member of the public, that could effectively foreclose access to a pool of highly qualified and motivated persons for service on the Authority. On the other hand, a more practical construction, permitting a commissioner to maintain a lease after an across-the-board increase in rates, would pose no genuine material risk to the public interests served by the ethics laws.

### III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract with the government funded or otherwise authorized by that board during his or her term or for one year thereafter. *Frazier v. State, ex rel. Pittman*, 504 So.2d 675, 693 (Miss. 1987). Where the lease contract is authorized by the board before the lessee becomes a member of the board, the lease will not violate Section 109 and Section 25-4-105(2) unless it is somehow reauthorized during the board member's term or within one year thereafter.

If the board takes some action during the member's term or within one year thereafter which has the effect of reauthorizing the lease, such as a change in hangar lease rates, a violation of Section

109 and Section 25-4-105(2) will occur. However, it is conceivable that lease rates could be automatically adjusted from time to time pursuant to a preexisting schedule or regular reappraisal. If the rate adjustment is not approved by the airport board, then no violation would result where the lease was in effect before the board member took office. The facts provided do not indicate whether board approval would be required for such a lease rate adjustment.

If a rate adjustment does require board approval, then a board member would be forced to terminate his lease prior to the reauthorization in order to avoid a violation. A board member's resignation from the board will not prevent a violation of Section 109 and Section 25-4-105(2) in that situation, unless the resignation occurs more than one year before the board action.

In any event, a lease may not be reauthorized during a board member's tenure or within one year after his departure from the board. Eventually, a board member who holds a lease authorized prior to his appointment will have to choose between his position on the airport board and his hangar lease. Appointing a lease holder to the airport board will not automatically result in a violation of Section 109 and Section 25-4-105(2), but it is inadvisable for a number of reasons.

The lease is a long-term contract which requires a continual, prolonged relationship between the airport board and the board member. The obligations of the parties increase the possibility that disputes could arise between the board and the individual board member. The obligations of the parties along with continued contact between them concerning these services would likely create considerable suspicion among the public concerning the relationship between the board member and the airport board. In the commission's opinion, the relatively small group of people who lease hangars at public airports is readily distinguishable from the large classes of persons who park in city-owned parking spaces or purchase public utility services from local governments.

Pursuant to the public policy set forth in Section 25-4-101, public servants should "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 [the public] trust and which will not reflect unfavorably upon the state and local governments." While the mayor is correct in concluding those who own airplanes may be among the most capable airport board members, that conclusion must be weighed against the potential for a real conflict of interest and damage to the public trust. The mayor should carefully consider whether appointing an individual to the same airport board with which he holds a hangar lease is consistent with the public policy set forth above.

MISSISSIPPI ETHICS COMMISSION

BY: \_\_\_\_\_

Tom Hood, Executive Director and  
Chief Counsel