

## Advisory Opinion No. 75-21

### QUESTION:

Is it a conflict of interest for a member of a local legislative body to vote on a matter which affects the interest of a person who is the brother of a high official of the local legislator's employer?

### RESPONSE:

In April 1975, you, as a member of the local legislative body, voted against a zone change permitting the construction of a shopping center on the basis that the shopping center would increase traffic congestion in the affected area. The vote was 3-3 and the zone change was defeated. During this time you were engaged in negotiations with a certain company to become their agent. The company paid for your examination fee for the May 14, 1975 examination before the state agency which regulates that industry. You failed this examination and a subsequent examination on June 11, 1975. Although the State regulatory agency requires a six month waiting period before taking the next examination, the company put you on their payroll, stating it would ask for a waiver of the six month rule. Such waivers have apparently been given in the past. You received a \$300 per week salary starting in July, 1975.

The general counsel for the company admits that, while the \$300 per week payment was not necessarily excessive, it was "unusual". Three weeks after being put on the payroll, the question of a zoning change for the same shopping center defeated earlier came before your local legislative body. This time the zone change was passed by a 7-0 vote. You have stated that this time you voted in favor of the proposal because facts indicated that traffic congestion in that area would increase regardless of whether a shopping center was constructed there or not. Then, five weeks after being put on the payroll, the company informed you it could not get the six month rule waived and you were placed on leave without pay until you could be licensed.

The possible conflict involves the fact that the company's division manager for your local area, who was involved in obtaining employment for you with the company, is a brother of one of the principals in the proposed shopping center. Neither the company nor its division manager for the area has any economic interest in the proposed shopping center. Both the company and the division manager deny having attempted to influence your vote in favor of the shopping center.

At the outset it should be stated that the State Ethics Commission is not an adjudicatory body, nor is it a finder of fact. The authority of the Commission is limited to rendering advisory opinions regarding possible conflicts of interest based on given facts and circumstances presented to the Commission.

As a general rule applicable to all public officials, it should be pointed out also that conflicts or interest legislation, such as the Ethics in Government Law, go beyond the traditional concepts of legislation relating to the conduct of public officials, such as misfeasance, non-feasance or bribery statutes. In those instances, such statutes require an active solicitation by the public official for the performance or non-performance of a public duty. Conflict of interest legislation, on the other hand, contemplates something beyond the active solicitation of valuable consideration. It contemplates the public official placing himself in a situation where, regardless of the existence of the solicitation for valuable consideration, he stands to benefit from his official position, in whatever form the benefit may take.

In the present instance, it is the opinion of the State Ethics Commission that, without more, the bare fact, that a local legislator voted in favor of a matter that affects the interest of a brother of a high official of the local legislator's employer does not constitute a conflict of interest. Whether in fact the

company's division manager did exert an influence, economic or otherwise on you on behalf of his brother's shopping center proposal is a determination that is beyond the competence and the authority of this Commission to make. A determination of this kind is within the proper sphere of the law enforcement authorities. Suffice it to say that no facts were presented to the Commission which demonstrate that the company for which you are employed, or its local division manager, exerted an influence on you, economic or otherwise, to vote in favor of the division manager's brother's shopping center proposal. Indeed, all the facts which were presented to this Commission indicate the opposite.

Nevertheless, the Commission must point out that Section 21(5) of the Ethics in Government Law provides that the Commission's advisory opinions shall include guidance on whether or not a public official's participation in an official action would, under the circumstances, "adversely affect the confidence of the people in the impartiality of their public officers and employees." Therefore, although the Commission concludes that the bare fact that you voted in favor of a matter that affects the interest of the brother of a high official of your employer does not constitute a conflict of interest, the circumstances of your employment, the time sequence involved and the admitted "unusual" amount of your salary could give rise to the appearance of impropriety if not the fact of impropriety.

This is not to say that the appearance of impropriety is created every time a public official is employed by someone who is, in turn, related to another individual who presents a matter to be acted upon by the public official. The normal relationships between an employer and employee cannot give rise to such an appearance. However, the facts of your employment with the company, however innocent the facts may be, are sufficiently unusual, particularly with regard to timing and to the amount of the salary, to give rise to this appearance, as the current furor over your situation must surely reveal. In the future it might be wise, if not necessarily required by law, for you to reveal such unusual relationships before voting on such matters or to abstain from voting altogether.

January 12, 1976.