

Recusal Guidelines for Public Servants-Avoiding Conflicts of Interest

“The purpose of this Chapter is to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence.”

-State Government Ethics Act, January 1, 2007

I. Introduction

Members of State boards and State employees (“public servants”) who are subject to the State Government Ethics Act (“Ethics Act”) are obligated to constantly monitor situations in which their personal or business interests may conflict with their official duty to represent the interests of the general public (“conflict of interest”). Ensuring that those public servants’ official decisions are impartial and not influenced by personal or business interests is central to representational democracy, constitutional due process principles, and to their solemn obligation to represent interests of the citizens of North Carolina.

Because public servants are often active members of their community, they may encounter situations where matters being considered by their board or agency would impact their financial interests or those of their family members. Or there may be circumstances where no financial interests are at stake, but where there is a possibility the public servant would be influenced by a personal, civic, or professional relationship with someone who has an interest in the outcome of a proceeding. Although such conflicts of interest will usually not prevent the public servant’s continued service, they may restrict the public servant’s official participation in a particular matter and require recusal.

What follows is an overview of the conflict of interest standards established in the Ethics Act and a discussion of what public servants should do when they have a conflict between their official activities and their personal or financial interests.

II. Conflicts of Interest According to the Ethics Act

Although we each may have our own concept of what a conflict of interest is or read reports of public officials who are deemed to have conflicts of interest, the Ethics Act has established well-defined standards that a public servant must follow when taking an official action as a State employee or member of a State board. Those

standards list particular interests that may interfere with the public servant's ability to impartially represent the public's interests. These established standards are critical to a public servant's ability to identify and respond appropriately to conflicts of interest.

A. Any Official Action That May Provide a Reasonably Foreseeable Financial Benefit to the Public Servant, the Public Servant's Family, or a Business or Nonprofit With Which the Public Servant Has a Financial Relationship or Serves in a Leadership Role-G.S. 138A-36(a).

The Ethics Act restricts a public servant from taking an official action if that action may result in a reasonably foreseeable financial benefit to the following individuals and entities:

1. The public servant or a member of the public servant's extended family;
2. The public servant's client;
3. The public servant or immediate family member's employer;
4. A business or nonprofit organization for which the public servant or immediate family member is an employee lobbyist, governing board member, partner, or officer;
5. A business in which the public servant or immediate family member owns an interest of \$10,000 or more, or 5% of the business, whichever is less.

Most of the relationships described above have a financial component. But others do not require a financial connection with an organization, such as where the public servant serves on the board of directors of a community or trade organization.

It is important to understand that this conflict-of-interest standard is triggered only if the financial benefit resulting from a public servant's official action would result in a reasonably foreseeable financial benefit to the various interests listed above. "Financial benefit" is defined as a:

1. Direct pecuniary gain or loss to those interests, or a
2. Direct pecuniary loss to a business competitor or those interests.

Thus, it does not apply where any financial benefit which may result from the official action is remote, tenuous, or speculative.

Once it is determined that a public servant's proposed action could result in a reasonably foreseeable financial benefit, recusal should be considered if:

1. That financial benefit would impair the public servant's judgment or
2. It could be reasonably inferred that the public servant's judgment would be impaired.

Since these are highly subjective standards, a public servant should seek guidance from the Ethics Commission or its staff before taking official action.

B. Declining to Take Official Actions in Formal Proceedings Where the Public Servant has a Personal, Financial, or Familial Relationship with a Participant-G.S. 138A-36(c).

There are also special circumstances in which a broader conflict of interest standard applies. This standard is steeped in constitutional due process principles and applies when a public servant is called upon to take official action in quasi-legislative and quasi-judicial proceedings. This includes rulemaking activities. It also applies to proceedings in which the official is making a determination about the rights of an individual or entity who is alleged to have violated a law or has claims to property. It would include hearings to impose fines or revoke professional licenses.

In such proceedings, public servants are restricted from taking certain official actions if the public servant's impartiality could reasonably be questioned due to his/her familial, personal, or financial relationship with a participant. This conflict of interest standard is much broader than the "financial benefit" standard established by G.S. 138A-36(a) (see II.A. discussion above) as it can apply to any actions, not just those which may result in a financial benefit. It can extend to individuals and entities with whom the public servant has a "personal" relationship, which includes membership on a board of directors or leadership position with any organization, regardless of whether the public servant is being compensated for that service.

This special proceeding standard may require that the public servant recuse themselves, for example if they serve on a board of directors of a community or trade organization which is participating in a proceeding. So public servants serving on the boards of such organizations should take special care to consider whether their impartiality could be reasonably questioned.

C. Conflicts Safe Harbors: Particular Situations Where a Public Servant May Take Official Action Even Where a Conflict Exists-[G.S. 138A-38\(a\)](#).

In the following circumstances a public servant with a conflict of interest may still take [official action](#) even if they have a conflict of interest:

1. Where an official action by the public servant would impact a large group of similarly situated individuals or entities (the so-called “class exception”). This would be the case, for example, if a board is considering the increase of a fee that would impact a multitude of individuals or a building standard which would apply to all residential housing projects.
2. Where the public servant’s action is “ministerial,” generally an action that the law requires an official to implement and the official has no discretion in the matter.
3. Where the public servant provides written notice to the State Ethics Commission (“the Commission”) that the public servant is the only person with legal authority to take the particular action and describes the nature of the conflict of interest.

III. Help with Identifying Conflicts of Interest

Because the conflict of interest standards of the Ethics Act are technical, public servants should seek clarification if they are unsure if they have a conflict of interest or it is unclear whether an exception applies. The Ethics Act offers the following options to obtaining that guidance.

A. Seeking a Formal or Informal Advisory Opinion from the State Ethics Commission or Commission Staff.

The Ethics Act provides that a public servant may participate in an official action if, prior to the action, the public servant received a [formal advisory opinion](#) from the Commission authorizing the public servant to take the action in question. That opinion provides the public servant with immunity against investigation by the Commission, adverse action by the public servant’s State employer (if applicable), and investigation by the Secretary of State.

A public servant may also request an advisory opinion from the Commission’s staff prior to taking the action in question. Although staff opinions do not provide formal

immunity, they can be helpful in resolving a question and can often be obtained quickly.

B. Seeking a Determination by the Public Servant's Board or Employing Entity

In the event the public servant was unable to obtain an opinion from the Commission or Commission staff in advance of taking the official action, the public servant may request that the agency or board issue a [written determination](#) that the interest in question would not influence the public servant's participation in the official action. A copy of that written determination must be filed with the State Board.

IV. What to Do Once a Conflict of Interest is Identified - Recusal

Once a public servant decides that he/she has a conflict of interest and none of the exceptions outlined above would allow the public servant to participate, the Ethics Act requires that the public servant [“abstain from taking any verbal or written action in furtherance of the official action.”](#) This is often referred to “recusal,” where a public official does not participate in a particular matter due to a conflict of interest. The Ethics Act requires that a public servant who decides not to participate in a matter submit written reasons for the “abstention” to the agency or board. In addition, if the public servant serves on a State board, the “abstention” must be recorded in the board's minutes. Although the actions that the public servant should avoid will vary according to the circumstances, the public servant should also do the following:

A. Decline to Vote or Make a Decision on the Matter

The public servant serving on a board shall not vote on the matter. A public servant who is a State employee shall not make a determination on the matter and shall identify another official to make that determination in his or her place.

Even in those cases in which the public servant is disqualified from taking official action because of a conflict of interest, [the covered person may be counted for the purposes of a quorum](#). This circumstance should be recorded in the minutes of the board meeting.

B. Decline to Participate in Discussions of the Matter

Whether the public servant is acting as a member of the State board or as a State agency employee, the public servant should avoid participating in verbal or written discussions about the matter with staff, fellow board members, interested parties, and members of the media or the public. This includes both formal discussions of the full board or a board committee or informal conversations concerning the matter.

C. Do Not Seek or Accept Information Concerning the Matter

Whether the public servant is acting as a member of the State board or as an agency employee, the public servant should not be provided with or accept non-public information related to the matter or request such information. This would include information accepted or requested from fellow board members, interested parties, or the staff of the board or agency. Because the Ethics Act restricts a public servant with a conflict of interest from taking “verbal or written action in furtherance of” an official action, it does not require that the public servant leave the room or a meeting where the matter is being discussed. However, the Ethics Commission recommends that public servants consider leaving the room to ensure that those present at the meeting are not influenced by the public servant’s presence or interest in the matter.

V. Penalties for Violating Conflict of Interest Standards

A public servant’s willful failure to ignore the Ethics Act’s conflict of interest standards may result in the public servant’s removal from his/her board or position at a State agency. The Ethics Commission has authority to investigate alleged violations of those standards. Constitutional due process principles may also require that the action of a board or a State agency be set aside where an official with a conflict of interest participated in the board or agency’s consideration of the matter.

VI. Additional Conflict of Interest Standards

Each State board and agency may have additional conflict of interest provisions established by agency-specific laws, rules, or guidelines. In addition, [State law](#) places particular restrictions on State and local officials involved in public contracting with private companies in which the official has a particular financial interest. Those restrictions may prohibit an entire board from taking action on a contract even where the interested board member does not participate in the decision. Therefore, public servants are advised to consult with agency legal counsel for guidance on these additional restrictions