2008 GAB 09
DISQUALIFICATION; IMPROPER USE OF OFFICE

The Government Accountability Board advises:

1) A member of an agency governing body who would receive an allocation of business opportunities regulated by the agency should not participate, in an official capacity, to increase those opportunities while the official is one of only a handful of licensees eligible for such increase.

2) The official may not shield himself or herself from application of the Ethics Code by transferring the member's allocation to a sibling unless the official can demonstrate that the transaction is not a mere sham and that neither the official nor the official's company will profit from the increase.

Facts

You are a member of a state agency that regulates a commercial field and that allocates business opportunities in that field among licensees. By statute, the agency is composed of members, some of whom must be licensees active in the regulated field.

You are one of only a handful of licensees. Currently, the agency is considering increasing the number of business opportunities that are available.

Questions

You ask the following questions:

1. May you vote to increase the available number of business opportunities available to licensees?

2. May you vote to increase the number if you transfer your license to your sibling who you currently employ as a salesperson for your company?

Discussion

Question 1. May a commercial licensee who is a member of a state board regulating a commercial activity vote to increase the number of business opportunities available to licensees when it would directly benefit the official?

Two provisions of the Ethics Code for State Public Officials are applicable to your question. Section 19.45 (2), *Wisconsin Statutes*, provides, in relevant part, that no state public official may use his or her public position or office to obtain financial gain or anything of substantial value for private benefit.[1] Section 19.46 (1) (a), *Wisconsin Statutes*, provides, in relevant part, that a state public official may take no official action substantially affecting a matter in which the official or an organization with which an official is associated has a substantial financial interest.[2] You are "associated," within the meaning of the statute, with any business in which you have a10% or greater ownership interest.[3]

You are a state public official by virtue of your appointment to the state agency governing board. Participating in a decision to increase regulated business opportunities is an official action and a use of office. The allocation of business opportunities has substantial value – it determines how much business a licensee may undertake. You and your business would obtain a significant private benefit from the proposed increase. As the Ethics Board said in a prior opinion addressing a similar question from a state board, the application of the statute to the circumstances about which you have asked is straightforward – you may not participate in the quota decision.[4]

In your letter, you state that the reason you are on the state board is to help other individuals engaged in the business and yourself. That should not be your goal.

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1 Section 19.45 (2), *Wisconsin Statutes*, provides:

> **19.45 (2)** No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

2 Section 19.46 (1) (a), *Wisconsin Statutes*, provides:

> **19.46 Conflict of interest prohibited; exception. (1)** Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:
>
> (a) Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

3 Section 19.42 (2), *Wisconsin Statutes*, provides:

> **19.42 (2)** "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

4 1995 Wis Eth Bd 01.

A public officer owes a duty of undivided loyalty to the public whom he or she serves.[5] As one legal treatise has put it:

Public confidence in the performance of government officials is of paramount importance. A public office is a public trust, and the holder thereof may not use it directly or indirectly for a personal profit, or to further his or her own interests, since it is the policy of the law to keep an official so far from temptation as to insure his or her unselfish devotion to the public interest. Officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Where a conflict of interest arises, the office holder is disqualified to act in the particular matter and must withdraw.

67 *Corpus Juris Secundum*, Officers §244, p.477, 479 (footnotes omitted). The primary purpose of the Ethics Code is to "help [state officials] avoid conflicts between their personal interests and their public responsibilities [to] promote and strengthen the faith and confidence of the people of this state in their state public officials and employees."[6]

We recognize that increasing the number of business opportunities in the regulated field may well be in the public interest. At the same time, there may be competing interests that would benefit from another approach. It is difficult to see how individuals with a direct interest in the allocations can make a decision based purely on public policy considerations, without regard to their personal financial stake in the outcome. Certainly, the public's confidence that a governmental decision will be based solely on its own merits is lessened if public officials with a direct financial stake in the outcome of a decision are making those decisions, perhaps to the detriment of competing interests. Other members of the board, without a direct personal stake in the allocations, should be the ones participating in the decision.

Question 2. May a commercial licensee who is a member of a state board regulating a commercial activity vote to increase the number of business opportunities available to licensees if the member transfers his quota to his brother?

If a transfer of your license to your sibling means that neither you nor your company would any longer have a financial interest in the regulated activity, then the Ethics Code would not be an obstacle to your participating in a decision to increase the allocation of business opportunities. That hardly seems to be the

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5 1994 Wis Eth Bd 3, ¶8; 1993 Wis Eth Bd 4, ¶5; 1992 Wis Eth Bd 33, ¶4; 1992 Wis Eth Bd 32, ¶3; 8 Op. Eth. Bd. 33, 37 (1985); 63A Am. Jur. 2d, Public Officials and Employees §§321, 322.

6 Section 19.41, *Wisconsin Statutes*. *See, e.g.,* 1995 Wis Eth Bd 1, ¶7.

case. At the very least, it appears that your company would have more product to sell and, thus, would make greater profits. Moreover, the transaction would be a mere sham if, for example, you would continue to profit from the sale of the regulated product to your company. Simply shielding your continued financial interest in the business through a purported transfer of your license is not enough to relieve you from the Ethics Code's restrictions.

Advice

The Government Accountability Board advises:

1) You may not vote to increase the regulated business opportunities while you are one of only a handful of licensees eligible for such increase.

2) You may not shield yourself from application of the Ethics Code by transferring your license to your sibling unless you can demonstrate that the transaction is not a mere sham and that neither you nor your company will profit from an increased quota.