

Report To The Mississippi Legislature



A Policy Analysis of Mississippi's Ethics Laws Regulating Former Public Servants' Working for Private Contractors

December 9, 1997

"Revolving door" issues arise when former state employees or officers leave state service to work for contractors of their former agencies. At present, state ethics laws do not regulate several instances in which officers or employees go to work for contractors. When considering whether to regulate these instances, the state must balance the public's interest in guarding against impropriety with the former employee's interest in employment and the government's interest in hiring knowledgeable contractors. PEER offers several options for changing the state's current ethics laws as they deal with revolving door issues.

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The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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Public Servants' Working for Private Contractors**

December 9, 1997

**The PEER Committee
Mississippi Legislature**

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Joint Committee on Performance Evaluation and Expenditure Review

PEER Committee

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December 9, 1997

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Members of the Mississippi State Legislature

At its meeting of December 9, 1997, the PEER Committee authorized release of the report entitled **A Policy Analysis of Mississippi's Ethics Laws Regulating Former Public Servants' Working for Private Contractors.**

A handwritten signature in cursive script, reading "Billy Bowles", written over a horizontal line.

Representative Billy Bowles, Chairman

**This report does not recommend increased
funding or additional staff.**

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A Policy Analysis of Mississippi's Ethics Laws Regulating Former Public Servants' Working for Private Contractors

Executive Summary

December 9, 1997

PEER reviewed state ethics laws as they relate to the "revolving door" issue. The policy question arises when an employee leaves public service to work for a company that contracts with his former employer. The ethical concern that immediately arises when such occurs is whether the former public servant had in some way established a personal opportunity while in public service.

Current state ethics law addresses instances wherein former public servants actually make decisions regarding selection of contractors and further would bar persons closely involved in cases, proceedings, or applications which were considered at the government level from accepting compensation from others concerning these activities. Actual instances of use of office to obtain pecuniary benefit, if provable, are also barred by current law. Current law does not address persons who have lesser involvement in decisionmaking.

PEER offers options by which the Legislature could address the revolving door issue. These options include:

- prohibiting all public servants from taking employment with their former public employers for two years;
- including in the two-year prohibition all former employees who conduct research or make suggestions relative to matters ultimately decided by their superiors;
- prohibiting former agency heads from benefiting directly or indirectly from contracts with their former employers for two years;
- expanding the current ban on subsequent employment due to involvement in cases to include any transaction in which the public servant was involved.

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A Policy Analysis of Mississippi's Ethics Laws Regulating Former Public Servants' Working for Private Contractors

Introduction

Authority

The PEER Committee authorized its staff to conduct a policy analysis of Mississippi's ethics laws as they relate to former public servants' working for private contractors. The Committee acted in accordance with MISS. CODE ANN. Section 5-3-51 et seq.

Scope

This report addresses what is customarily referred to as the "revolving door problem." The revolving door problem involves employees or officers of state agencies who become closely involved with the operations of their agency and, upon gaining considerable knowledge of their agency's operations, leave public service to become employees or agents of contractors who work for the agencies the former employees or officers had left.

This report discusses what state law covers concerning this issue and how it could be strengthened. Similar problems not covered by this report include the matter of employees who retire from state or local government service and then return to service as part-time employees or independent contractors. While this is a matter of concern for public policy makers, it does not involve the same ethical issues customarily falling within the revolving door problem.

Purpose

In this report, PEER:

- describes the nature of the revolving door problem;
- explains why this is a public policy concern of considerable magnitude;
- explains what related conduct is proscribed and not proscribed by state ethics laws; and,
- presents legal options for legislative consideration.

Method

In preparing this report, PEER:

- reviewed state law regarding the revolving door issue;
- reviewed what actions other states have taken to prohibit similar conduct; and,
- reviewed comparative information from other states' laws compiled by the Mississippi Ethics Commission.

Overview

PEER reviewed state ethics laws as they relate to the “revolving door” problem. Revolving door matters arise when former public servants leave public service and work for contractors who are contractually involved with the same agency for which the former public servant worked. The ethical concern that immediately arises when such occurs is whether the former public servant had in some way established an opportunity for himself or herself while in public service.

Present state law contains a broad range of protections which would keep many public servants from obtaining employment with agency contractors. Blatant cases wherein the Ethics Commission could prove that a person used his or her office to obtain pecuniary benefit could be barred by present law. Further, instances in which former public servants become involved in cases, decisions, proceedings, or applications with which they were involved during their public service would also be barred under present law. It could be possible for public servants to have some peripheral involvement in decision making, such as assisting in the making of recommendations or conducting analysis related to a decision, and not be sufficiently involved in a decision to be barred under current law.

PEER offers options for legislative action detailed at the close of this report. These call for either expanding definitions used in current law to close revolving door possibilities or making a blanket prohibition against former public servants who are employees from directly or indirectly benefiting from contracts for a period of two years after conclusion of public service.

Policy Analysis

Background

What is the Revolving Door Issue?

The revolving door issue potentially involves public servants at all levels of government who attain a high level of responsibility in their agencies and have authority over a significant portion of the decision making processes. They may often make suggestions, recommendations, or decisions on actions the agency should take with respect to program administration. Sometimes these may include the selection of contractors who assist the agency in delivering services or who provide assistance to the staff in reviewing the need for or quality of services rendered.

When a public servant so closely involved with the decision making process leaves government to work for an agency contractor, this person is said to have “stepped through the revolving door”—i.e., the public servant has returned to the payroll of his or her old agency, often at a higher salary. In some cases, the employee may have had a role in selecting the contractor for which he or she later became an employee or agent.

Why is This a Problem?

State ethics laws are intended to help insure integrity in the administration of government. Mississippi’s conflict of interest laws (MISS. CODE ANN. Section 25-4-101 et seq.) provide that the purpose of such legislation is:

. . .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.

In so providing, the state has announced a general policy against public servants using their offices, employment, or the knowledge gained therefrom to enhance their careers or financial position.

Certain paths of conduct which often occur in revolving door situations may raise the issue of public servants’ use of knowledge gained through employment or the power of their public positions to obtain future benefits from government through private contracts. Even in those cases in which actual misconduct cannot be established, the practice of leaving a state agency to work for one of its contractors creates an appearance of impropriety. Consequently, it is important that state laws address the forms of conduct which may constitute a use of position to enhance a public

servant's financial or career position. This report will evaluate the adequacy of Mississippi's laws in light of the laws' substantive restraints on such practices or activities.

How Can Such Problems Arise?

In recent years, some members of the Legislature have voiced concern over the so-called "revolving door" problem in state government. The following are hypothetical instances wherein revolving door issues could arise in state and local government settings and could cause members of the public or the Legislature to question the propriety of the acts described:

- AB, the Executive Director of the Department of XYZ, is responsible for overseeing contracts administered by his agency. AB's agency has no governing board, thus making AB the ultimate legal authority over the affairs of his agency. During AB's administration several contracts are executed, renewed, and amended materially. AB closely oversees the activities of several of the contracts and abruptly announces in the middle of a fiscal year that he intends to leave government service. One year later, AB becomes an employee of one of the firms whose contract has been renewed since the conclusion of AB's tenure.
- CD, a division director of the Department of XYZ, has responsibility for a broad set of activities within the department. During CD's tenure, he is actively involved in soliciting firms interested in rendering technical services to the department. During CD's tenure, he also reviews many proposals for technical services and chairs a committee which evaluates the proposals. CD is not, however, responsible for selecting a contractor; that responsibility rests with the agency director and the two deputy directors. CD does oversee the contract during his tenure at XYZ. This oversight includes monitoring contractor performance and making recommendations on whether corrective action should be taken respecting the contractor's performance. At the beginning of a fiscal year, CD leaves the agency. Six months later, CD becomes an employee of a firm whose proposals he evaluated and ranked as best in contract evaluations. By the time the firm hires CD, its contract had been materially amended, and CD had no involvement in the amendment.
- EF, the Executive Director of XYZ agency, personally takes responsibility for selecting XYZ's contractors. In the middle of a fiscal year, EF leaves his agency and takes a vacation for two months and then a twelve-month fellowship at a major

university. Fourteen months after leaving government service with XYZ, EF returns to Mississippi and takes a position with a contractor who works for XYZ and who first became a contractor of XYZ during EF's tenure with the agency.

- GH, an employee of an agency of county government, is responsible for overseeing security policy for the agency. This includes being responsible for oversight of a private security firm on contract with the agency. GH did not select the security agency or make any decisions regarding its compensation, although GH prepared evaluations on the security firm and monitored the contract. GH subsequently resigns his county employment and goes to work for the security firm.

In all of these hypothetical cases, top-level administrators have some responsibility for reviewing contract proposals and in some cases, actually help in selecting contractors. In all of these cases, the administrators accept post-governmental employment with contractors whose services the employees had a hand in reviewing, selecting, or overseeing.

These matters exhibit a policy concern state legislatures must consider when crafting ethics legislation. In the cases discussed above, private contractors hired former public servants with knowledge of state programs and administration. When government contracts out services, the state generally wants contractors who have knowledge of how government works so that they can better serve the interests of the state. This must be balanced against the state's need to be protected against the appearance, and in some cases the actual occurrence, of contracting which has as its principal interest the enrichment of former public servants.

Mississippi Law and the Revolving Door Issue

Overview of the State Conflict of Interest Law

MISS. CODE ANN. Section 25-4-101 et seq. proscribes certain conduct for public servants and creates a civil remedy for the state whenever a public servant violates provisions of the act.

Public servants include elected and appointed officers as well as persons who are employees of government. The act reaches public servants at all levels of state and local government. (See CODE Section 25-4-103 for a definition of "public servant.") Several provisions of the law relate to such matters as use of office for pecuniary benefits or bar current public servants from entering into contracts with their agency or governing authorities. These provisions do not relate to the problems of the revolving door and governmental ethics.

What Types of Revolving Door Transactions are Explicitly Prohibited?

CODE Section 25-4-105, which defines actionable violations of state ethics laws, contains some provisions which would, in some instances, bar certain public servants from taking private sector employment following their service in government. The following describe these limitations:

- *Prohibitions against certain officers accepting employment during and after their term of office is complete*—Section 25-4-105 (2) provides:

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.

This provision would prohibit certain public servants from leaving government, moving to the private sector (including the not-for-profit sector), and contracting with the government agency or board which they had served as public servants for a period of one year after the conclusion of their public service. The use of the language “term” and “board” restrict the application of this provision to persons who are appointed or elected for a set term under law, and who serve on boards or other policy making bodies. Consequently, employees who have no set term of office and who serve at the will and pleasure of their appointing authorities or who are in state service would not fall within the scope of this prohibition. This prohibition covers legislators and most gubernatorial appointees. The limitation in this section only covers the period during which a person is in office and for one year thereafter.

- *Service and compensation in association with decisions made as a public servant*—Section 25-4-105 (3) (e) provides:

(3) No public servant shall. . . .

(e) Perform any service for any compensation for any person or business after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was directly concerned or in which he personally participated during the period of his service or employment.

This provision prohibits both employees and officers from joining any business or taking business from any person associated with several types of activity which occur in state agencies, including:

Cases: This would bar officers and employees, particularly attorneys and conceivably rate experts or other professionals who participate in the preparation of lawsuits, from changing sides during the course of litigation. Professionals such as those described above are directly concerned in preparing litigation strategy and likewise personally participate in such. Provisions such as these are necessary to keep professionals from taking valuable knowledge away to the opposing side.

Decisions: This would bar employees or officers from taking employment with businesses or other persons who are carrying out any activity related to decisions that the officer or employee made during the course and scope of his employment or service. Consequently, agency heads who go to work for contractors performing services for which the agency head had decided to contract would not be able to receive compensation for any services related to any contract the former officer or employee had decided to approve. While this clearly bars persons who actually made decisions relative to contracting, it may also apply to persons who were directly concerned with, or personally participated in giving advice supportive of, the decision making process but were not actually personally involved in making the decision to select a contractor.

Proceeding: What falls within the scope of this provision that would not fall within the scope of the case prohibition is not clear. Generally, cases are proceedings. But presumably, this term means something distinct from the term "case." Because the term "proceeding" is sometimes used in connection with administrative actions, it may have been inserted to cover action before administrative agencies relative to penalties, fines, or cease and desist orders. The policy reasons for having such a provision are identical to those discussed above under "cases."

Application: Regulatory agencies usually require firms to participate in an application process for such services as approval of waste dumps, drilling sites, and utility services. This provision would bar employees and officers from leaving government and receiving compensation from anyone in association with an application before an agency.

Conduct-Based Prohibitions Which Might Bar Future Employment

- *Non-disclosure of insider information*—Section 25-4-105 (5), while not barring public servants from obtaining employment with private employers doing business with government, might have the effect of such a prohibition in some cases. This provision states:

No person may intentionally use or disclose information gained in the course of or by reason of his official position or employment as a public servant in any way that could result in pecuniary benefit for himself, any relative, or any other person, if the information has not been communicated to the public or is not public information.

While this does not bar employment subsequent to state employment, in some cases it could have such an effect if the future employer's work involved regular dealings with the person's agency. In theory, employees of the Tax Commission who have knowledge of non-public auditing plans and processes might not be able to work for a tax accounting firm or service without violating this provision.

- *Use of Office*—While Section 25-4-105 (1) is not commonly thought of as a revolving door provision, it could have the effect of barring certain revolving door transactions. Whenever any public employee or officer uses his or her office to arrange for future employment in exchange for favorable treatment, then the officer or employee would be in violation of the use of office provision:

No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any relative or any business with which he is associated.

This is under the assumption that pecuniary benefit also includes future pecuniary benefit rather than contemporaneous pecuniary benefit.

Other States' Approaches To the Revolving Door Issue

Most states approach the problem of the revolving door issue in a manner similar to that employed in Mississippi. Former public servants may not become involved in cases or proceedings in which they had been involved as public servants. A few states, such as New York, take a stronger view of what is prohibited by placing an outright bar for two years on all contracts between former public servants and their former employers.

Some states, such as Missouri and New Mexico, bar former officers from contracting with their former public bodies for a period of one year. This prohibition is similar to that adopted in Mississippi (see MISS. CODE ANN. Section 25-4-105 [2]). Missouri also bars former public servants from participating in cases or decisions in which they participated as public servants in terms identical to Mississippi's Section 25-4-105 (3) (e).

Weaknesses in Current Law

Substantive Defects

The following are revolving door situations not covered under current law:

- No general prohibition bars employees from working for firms which do business with their former employers. Under current law, persons who work in government are only prohibited from going to a firm and using specific knowledge acquired on the job which is not public knowledge, or working on cases, decisions, applications, or proceedings with which they were involved in their former public service.
- Current prohibitions for officers do not extend beyond one year (see CODE Section 25-4-105 [2] and MISSISSIPPI CONSTITUTION Section 109).
- Certain terms in CODE Section 25-4-105 (3) (e)—“case,” “decision,” “proceeding,” “application”—are not defined in the statute. Although the terms should be sufficient to describe what type of conduct is prohibited, the term “decision” could cause confusion. If an employee concludes that an advertising campaign should be conducted to promote tourism in an area, makes a recommendation, has his recommendation accepted by the agency head, but is not responsible for selecting the successful contractor, is the employee barred from going to work for the advertising agency, if he is compensated related to the particular campaign? The employee, as a public servant, is personally participating in, and directly concerned with, the

advertising campaign and therefore is involved in a “decision” for purposes of this section.

- Section 25-4-105 (3) (e) requires making difficult factual distinctions between those who are involved in decision making and those who are not. One could provide support on preparing the methods for analyzing a proposal but, strictly speaking, not be involved in the making of a decision. Nonetheless, one providing such support on preparing methods for analyzing a proposal related to a governmental “proceeding,” “case,” or “application,” is certainly personally participating and directly involved in such “proceeding,” “case,” or “application.”

*Substantive Defects Viewed in Light of the General State Policy
Against Use of Office*

As noted earlier, CODE Section 25-4-101 establishes a general statement of legislative purpose for the state’s conflict of interest laws. It condemns those activities of public servants who would obtain financial gain or career advancement through use of their offices as being a violation of the public trust given these public servants by the people of the state of Mississippi.

The first weakness, the narrowness of Section 25-4-105 (3) (e), would allow persons not specifically involved in making a formal decision to fall beyond the reach of the law, should “case,” “proceeding,” or “application” not apply. Also, certain public servants could, in theory, make recommendations or otherwise try to influence decisions but not be barred from taking employment with the employer for whom the former public servant recommended a contract. Under this scenario, a public servant could abuse his public trust and not be precluded from taking employment with the contractor.

As to the second weakness, the blanket prohibition against officers from contracting with their former public entities during their terms of office and for one year thereafter provides some protection against the immediate benefit from contracts made late in the officer’s term, but obviously does not extend as far as the two-year ban in New York.

The third and fourth weaknesses relate to the first. The lack of definition for the cited terms, especially the term “decision,” compels the reader to give them a narrow reading. This is appropriate in light of the fact that the provision in question imposes a penalty and should therefore be construed strictly against the state. Under these conditions, persons may provide technical assistance to the decision making process and not be involved directly in the decision for purposes of this prohibition. Consequently, some public servants could assist in the decision making

process with respect to a contract, perhaps even make arrangements to become the contractor's employee after the contract is granted, and be able to reap benefits from their breach of the public trust. The only protection against this would be under present CODE Section 25-4-105 (1) regarding use of office. This would be difficult to prove without the assistance of another party involved in the questionable activity who is willing to provide information.

Options

The following are actions the Legislature could take should it choose to expand the scope of the conflict of interest law.

Option One: Adopt a general prohibition barring all public servants from taking employment with their former employers.

The Legislature could amend MISS. CODE ANN. Section 25-4-105 (2) to cover all public servants from benefiting directly or indirectly from contracts with their former employers for a period of two years. This option would address concerns about recent former agency employees who have gone to work for firms which do business with their former employers.

Other states have taken this approach to closing the revolving door. New York bars public servants from contracting with their former employers for a period of two years after terminating public service. This bar extends to both officers and employees.

Such action would address directly or indirectly the concerns mentioned above. Providing for a two-year period for all public servants would bring both officers and employees within a blanket ban on contracts between the public servant and the former employing entity. By extending this to any contracts from which the public servant directly or indirectly benefits, the law precludes the necessity of proving that the public servant made a decision or participated in a case; it prohibits the individual from contracting if he or she was a public servant of the agency.

Option Two: Amend provisions of Section 25-4-105 (3) (e) to clarify the meaning and scope of the terms “case,” “application,” “proceeding,” or “decision.” Also include the term “transaction” within the scope of this provision.

The Legislature could amend this provision of the conflict of interest law by expanding the scope to include provision of any assistance, recommendations, or support relative to any case, decision, application, or proceeding. This would make clear that former employees who conduct research or make suggestions relative to matters which are ultimately decided by their superiors and not by them would be covered by this prohibition. The term “decision” could also be defined for purposes of this provision to mean any official act of the public entity.

Other states take this approach to the problem of the revolving door. Massachusetts bars former public servants from ever receiving direct or indirect compensation from decisions in which the public servant participated. This prohibition bars employees from benefiting from a

contract when the employee had participated in the administration of the contract as a state employee and to persons who represent parties who challenge the legality of regulations when the person representing the parties made recommendations to his or her former employer with respect to the regulations.

In addition to the prohibition mentioned above in Option 1, New York has a lifetime bar against former public servants from receiving compensation for participating in any case, proceeding, application, or transaction in which the public servant participated in public service. The term “transaction” has been construed by the New York Ethics Commission to include matters similar to those in which the former public servant participated. A similar provision in Mississippi law could protect against public servants whose work falls short of constituting a decision for purposes of Section 25-4-105 (3) (e). Because the current Mississippi provision Section 25-4-105 (3) (e) has no time limit either, a broadening of the terminology in the provisions would have the effect of enlarging a perpetual ban on certain forms of employment.

This option would address directly concerns three and four by providing a broad term “transaction” in the list of matters from which the public servant may not receive compensation. To avoid future difficulty, the term “transaction” would need to be defined to make clear its intended broad scope.

Option Three: Broaden the scope of Section 25-4-105 (2) for former heads of agencies.

Some states such as Louisiana bar former agency heads from engaging in any transactions with their former agencies for a period of two years. This would not affect the activities of former subordinate employees who were closely involved in decision making. Such an action would address in part matters dealing with weaknesses in current state ethics laws.

Option Four: Broaden the scope of Section 25-4-105 (3) (e) to include more than the current limits on cases, decisions, proceedings, or applications, but limit the duration of the ban.

Kentucky bars all public servants from any post-governmental employment which involves them with any transactions with which they were involved during the last thirty-six months of state employment. The bar extends to post-governmental employment for six months after leaving government service. This six-month period may not be of sufficient duration to meet many concerns regarding revolving door matters.

This option addresses the first weakness discussed, but would also establish a durational standard which would limit the duration on a contracting bar or other contact with the agency for a set period. Mississippi's present prohibition related to involvement in decisions and proceedings is perpetual.

Conclusion

Revolving door issues require policy makers to engage in balancing competing public interests. These interests include a public interest in ethical government without the appearance of impropriety versus a public interest in having contractors with detailed knowledge of the government programs and services they must assist in providing and the danger of imposing undue restrictions on former public employers. Ethics laws should protect against even the appearance of impropriety in contracting and PEER offers four options which address the problems with a varying scope. The variance in scope reflects the balancing of interests discussed above.

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