



STATE ETHICS COMMISSION
309 FINANCE BUILDING
P.O. BOX 11470
HARRISBURG, PA 17108-1470
(717) 783-1610
1-800-932-0936

ADVICE OF COUNSEL

March 10, 2008

Michael J. Savona, Esquire
Friedman Schuman Applebaum
Nemeroff & McCaffery
Suite 200
7848 Old York Road
Elkins Park, PA 19027-2541

08-524

Dear Mr. Savona:

This responds to your letter of February 4, 2008, and your faxed transmission received February 7, 2008, by which you requested advice from the State Ethics Commission.

Issue: Whether the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 *et seq.*, would present any prohibitions or restrictions upon a township supervisor, whose two sons and son-in-law are employed by the township as police officers, with regard to voting as to the execution of a collective bargaining agreement between the township and the collective bargaining unit for the township's police officers.

Facts: As Solicitor for Middletown Township ("Township"), located in Bucks County, Pennsylvania, you have been authorized by Township Supervisor George Leonhouser ("Leonhouser") to request an advisory from the State Ethics Commission on his behalf. You have submitted facts that may be fairly summarized as follows.

The Township is a second class township that is governed by a five-member Board of Supervisors ("Board"). Leonhouser was elected as a Supervisor in November 2007 and was sworn into office in January 2008.

Leonhouser has two sons and a son-in-law who are employed as police officers with the Township Police Department ("Police Department"). The Police Department is comprised of 53 full-time employees. Fifty of the Police Department's full-time employees, including Leonhouser's sons and son-in-law, are members of the Police Benevolent Association (hereinafter referred to as "the PBA"), which is the bargaining unit for the Township's police officers.

Prior to Leonhouser taking office, the Board approved the general terms of a proposed collective bargaining agreement ("the Agreement") between the Township and

the PBA. You state that the Agreement was negotiated by Township staff and labor counsel without Leonhouser's participation. The Agreement would provide for salary increases and other pecuniary benefits for all members of the PBA, including Leonhouser's sons and son-in-law.

At the time of your inquiry, you stated that the Agreement was being finalized, and that it was likely the Supervisors would vote within a few weeks to finalize the Agreement. You further stated that Leonhouser would not receive a direct pecuniary benefit if he would vote to approve the Agreement. You additionally stated that Leonhouser's sons and son-in-law do not reside in the same household as Leonhouser.

Based upon the above submitted facts, you have asked whether Leonhouser would have a conflict of interest in voting as to the execution of the finalized Agreement.

Discussion: It is initially noted that pursuant to Sections 1107(10) and 1107(11) of the Ethics Act, 65 Pa.C.S. §§ 1107(10), (11), advisories are issued to the requester based upon the facts that the requester has submitted. In issuing the advisory based upon the facts that the requester has submitted, the Commission does not engage in an independent investigation of the facts, nor does it speculate as to facts that have not been submitted. It is the burden of the requester to truthfully disclose all of the material facts relevant to the inquiry. 65 Pa.C.S. §§ 1107(10), (11). An advisory only affords a defense to the extent the requester has truthfully disclosed all of the material facts.

As a Township Supervisor, Leonhouser is a public official subject to the Ethics Act.

Sections 1103(a) and 1103(j) of the Ethics Act provide:

§ 1103. Restricted activities

(a) **Conflict of interest.**--No public official or public employee shall engage in conduct that constitutes a conflict of interest.

(j) **Voting conflict.**--Where voting conflicts are not otherwise addressed by the Constitution of Pennsylvania or by any law, rule, regulation, order or ordinance, the following procedure shall be employed. Any public official or public employee who in the discharge of his official duties would be required to vote on a matter that would result in a conflict of interest shall abstain from voting and, prior to the vote being taken, publicly announce and disclose the nature of his interest as a public record in a written memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken, provided that whenever a governing body would be unable to take any action on a matter before it because the number of members of the body required to abstain from voting under the provisions of this section makes the majority or other legally required vote of approval unattainable, then such members shall be permitted to vote if disclosures are made as otherwise provided herein. In the case of a three-member governing body of a political subdivision, where one member has abstained from voting as a result of a conflict of interest and the remaining two members of the governing body have cast opposing votes, the member who has abstained shall be permitted to vote to break the tie vote if disclosure is made as otherwise provided herein.

65 Pa.C.S. §§ 1103(a), (j).

The following terms related to Section 1103(a) are defined in the Ethics Act as follows:

§ 1102. Definitions

"Conflict" or "conflict of interest." Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. The term does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

"Authority of office or employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

"Immediate family." A parent, spouse, child, brother or sister.

65 Pa.C.S. § 1102.

Pursuant to Section 1103(a) of the Ethics Act, a public official/public employee is prohibited from using the authority of public office/employment or confidential information received by holding such a public position for the private pecuniary benefit of the public official/public employee himself, any member of his immediate family, or a business with which he or a member of his immediate family is associated.

The above statutory definition of "conflict" or "conflict of interest" contains two exclusions, referred to herein as the "de minimis" exclusion and the "class/subclass exclusion."

The de minimis exclusion precludes a finding of conflict of interest as to an action having a de minimis (insignificant) economic impact. Thus, when a matter that would otherwise constitute a conflict of interest under the Ethics Act would have an insignificant economic impact, a conflict would not exist and Section 1103(a) of the Ethics Act would not be implicated. See, Kolb, Order 1322; Schweinsburg, Order 900.

In order for the class/subclass exclusion to apply, two criteria must be met: (1) the affected public official/public employee, immediate family member, or business with which the public official/public employee or immediate family member is associated must be a member of a class consisting of the general public or a true subclass consisting of more than one member; and (2) the public official/public employee, immediate family member, or business with which the public official/public employee or immediate family member is associated must be affected "to the same degree" (in no way differently) than the other members of the class/subclass. 65 Pa.C.S. § 1102; see, Kablack, Opinion 02-003; Graham, Opinion 95-002 (citing Van Rensler, Opinion 90-

017); Rubenstein, Opinion 01-007. The first criterion of the exclusion is satisfied where the members of the proposed subclass are similarly situated as the result of relevant shared characteristics. The second criterion of the exclusion is satisfied where the individual/business in question and the other members of the class/subclass are reasonably affected to the same degree by the proposed action. Kablack, supra.

In each instance of a voting conflict, Section 1103(j) of the Ethics Act requires the public official/public employee to abstain and to publicly disclose the abstention and reasons for same, both orally and by filing a written memorandum to that effect with the person recording the minutes. In the event that the required abstention results in the inability of the governmental body to take action because a majority is unattainable due to the abstention(s) from conflict under the Ethics Act, then voting is permissible provided the disclosure requirements noted above are followed. Pavlovic, Opinion 02-005.

In applying the above provisions of the Ethics Act to the instant matter, you are advised as follows.

Leonhouser's sons, but not his son-in-law, are members of his "immediate family" as that term is defined in the Ethics Act. Pursuant to Section 1103(a) of the Ethics Act, in his public capacity as a Supervisor, Leonhouser would generally have a conflict of interest in matters that would financially impact him, his son(s), or a business with which he or his son(s) is/are associated. In each instance of a conflict of interest, Leonhouser would be required to abstain fully from participation. The abstention requirement would not be limited to voting, but rather, would extend to any use of authority of office, such as discussing, conferring with others, or lobbying for a particular result. See, Juliante, Order 809. In the event of a voting conflict, Leonhouser would be required to abstain fully and to satisfy the disclosure requirements of Section 1103(j) of the Ethics Act.

The seminal Commission decision that applies Section 1103(a) of the Ethics Act under facts similar to those that you have submitted is Van Rensler, supra. The issue in Van Rensler was whether the Ethics Act prohibited school directors from participating on a negotiating team and voting on a collective bargaining agreement where members of their immediate families were school district employees who were represented by the bargaining units. The Commission held that the school directors could vote on the finalized agreement as long as the prerequisites for applying the class/subclass exclusion were met. However, the Commission held that the Ethics Act would preclude the participation of such school directors in the negotiation process. In so holding, the Commission noted that the negotiation process would be free of any influence of such a school director and that the potential for the use of confidential information would be "minimized if not eliminated." Id. at 4-5. Thus, a fundamental focus of the Van Rensler Opinion was precluding the use of confidential information obtained through the public office as school director to defeat the bargaining process.

You are advised that pursuant to Section 1103(a) of the Ethics Act, Leonhouser would have a conflict of interest with regard to voting as to the execution of the finalized Agreement unless the class/subclass exclusion to the statutory definition of "conflict" or "conflict of interest" would be applicable. The submitted facts are insufficient to enable a conclusive determination as to whether such exclusion would be applicable to your inquiry. The submitted facts do not indicate whether Leonhouser's sons would be members of an appropriate subclass of PBA members or whether his sons would be affected by the Agreement "to the same degree" as other members of such a subclass.

Accordingly, you are generally advised that in order for the class/subclass exclusion to apply, Leonhouser's sons would have to: (1) be part of a subclass of PBA members that would include other individuals who would be similarly situated as the result of relevant shared characteristics; and (2) be reasonably affected to the same

degree as the other members of the subclass would be affected by Leonhouser's proposed action as to the Agreement.

In each instance of a conflict of interest, Leonhouser would be required to abstain fully from participation and in the instance of a voting conflict, to satisfy the disclosure requirements of Section 1103(j) of the Ethics Act.

Lastly, the propriety of the proposed conduct has only been addressed under the Ethics Act. Specifically not addressed herein is the applicability of the Second Class Township Code.

Conclusion: As a Supervisor for Middletown Township ("Township"), located in Bucks County, Pennsylvania, George Leonhouser ("Leonhouser") is a public official subject to the provisions of the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 *et seq.* Leonhouser's two sons, but not his son-in-law, are members of his "immediate family" as that term is defined in the Ethics Act. Pursuant to Section 1103(a) of the Ethics Act, in his public capacity as a Supervisor, Leonhouser would generally have a conflict of interest in matters that would financially impact him, his son(s), or a business with which he or his son(s) is/are associated. Based upon the submitted facts that: (1) Leonhouser's two sons are employed as police officers with the Township Police Department ("Police Department"); (2) fifty of the Police Department's full-time employees, including Leonhouser's sons, are members of the Police Benevolent Association ("the PBA"), which is the bargaining unit for the Township's police officers; (3) prior to Leonhouser taking office, the Board approved the general terms of a proposed collective bargaining agreement ("the Agreement") between the Township and the PBA; and (4) the Agreement would provide for salary increases and other pecuniary benefits for all members of the PBA, including Leonhouser's sons, you are advised as follows. Pursuant to Section 1103(a) of the Ethics Act, Leonhouser would have a conflict of interest with regard to voting as to the execution of the finalized Agreement unless the class/subclass exclusion to the statutory definition of "conflict" or "conflict of interest" would be applicable. Under the submitted facts, it cannot be conclusively determined whether the class/subclass exclusion would be applicable. In each instance of a conflict of interest, Leonhouser would be required to abstain fully from participation and in the instance of a voting conflict, to satisfy the disclosure requirements of Section 1103(j) of the Ethics Act.

Lastly, the propriety of the proposed conduct has only been addressed under the Ethics Act.

Pursuant to Section 1107(11), an Advice is a complete defense in any enforcement proceeding initiated by the Commission, and evidence of good faith conduct in any other civil or criminal proceeding, provided the requester has disclosed truthfully all the material facts and committed the acts complained of in reliance on the Advice given.

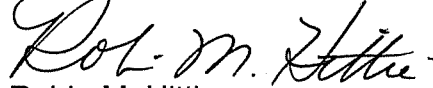
This letter is a public record and will be made available as such.

Finally, if you disagree with this Advice or if you have any reason to challenge same, you may appeal the Advice to the full Commission. A personal appearance before the Commission will be scheduled and a formal Opinion will be issued by the Commission.

Any such appeal must be in writing and must be actually received at the Commission within thirty (30) days of the date of this Advice pursuant to 51 Pa. Code § 13.2(h). The appeal may be received at the Commission by hand delivery, United States mail,

delivery service, or by FAX transmission (717-787-0806). Failure to file such an appeal at the Commission within thirty (30) days may result in the dismissal of the appeal.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rob. M. Hittie".

Robin M. Hittie
Chief Counsel