

ARKANSAS ETHICS COMMISSION

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Commissioners

910 West Second Street, Suite 100

Post Office Box 1917

Little Rock, Arkansas 72203-1917
(501) 324-9600 Fax (501) 324-9606
Toll Free (800) 422-7773

Graham F. Sloan
Director

Rita S. Looney
Chief Counsel

Todd Elder
Staff Attorney

Teresa Keathley
Kit Acklin
Directors of Compliance



ADVISORY OPINION NO. 2012-EC-001

Issued January 20, 2012

The Arkansas Ethics Commission has received a written advisory opinion request from C. Eric Hance, an attorney representing Independence County, Arkansas. The question asked is whether a county elected official may donate rock or other raw materials that he owns to that county, take that donation as a tax deduction,¹ and allow the county to use those raw materials for county purposes without violating any Arkansas Ethics provisions.

To acquire additional background, staff spoke with the official, County Judge Robert Griffin, and he provided the following information regarding the situation concerning this request. Judge Griffin has a 100 acre sand mine, the residual by-product of which is rock. He stated that the county currently is required to purchase rock for its needs. He advised that the rock is not something that requires disposal, and if he is unable to give it to the county, it simply will remain on the property of the mining operation until there is a buyer for it. County equipment and employees would be used to load and transport the material if it is permissible for him to donate the rock to the county.

According to Judge Griffin, the county's purchase of this type of product is within the sole discretion of the county judge and for that reason, he would seek the quorum court's approval prior to making the donation. Currently the county purchases rock elsewhere and is required to haul it as well. It is his belief that the proposed donation would be a benefit to the county. If anyone else wanted to give rock to the county, that would be great too, but no one else has offered.

A review of the statutes under the Ethics Commission's jurisdiction reflects that there is no statute which expressly addresses the sale of goods or services (much less the proposed donation of goods) by a county official to the county he serves. While there are statutes under the Commission's jurisdiction which address sales or contracts between members of certain governmental bodies to the governmental body or other establishment

¹ Whether such a donation would qualify for a tax deduction is a question which falls outside of the Commission's jurisdiction. For purposes of analysis, the Commission is assuming that it would so qualify.

of the State of Arkansas,² the Commission is not aware of a provision which relates specifically to the type of transaction described in the opinion request.

It is noted, however, that Ark. Code Ann. § 21-8-304 contains a general prohibition against a public servant using or attempting to use his or her official position to secure special privileges or exemptions for himself or herself or his or her spouse, child, parent, or other person standing in the first degree of relationship, or for those with whom he or she has a substantial financial relationship that is not available to others except as may be otherwise provided by law. The term "special privileges or exemption" is defined in § 400(p) of the Commission's Rules on Conflicts to mean: a particular benefit or advantage unfairly extended to a person beyond the common advantages of others or the unjustified release of a person from a duty or obligation required of others.

Whether or not it would violate Ark. Code Ann. § 21-8-304 for a county official to donate goods to the county he serves and take that donation as a tax deduction depends upon the facts of the particular situation. In the scenario at hand, the county's historical usage of rock would be a relevant factor to consider, e.g., does the county have a genuine need for this type of rock in this specific amount? Additionally, this question would likely need to be considered on a project by project basis, with quorum court approval for each project or transaction.

While the county of course would receive a benefit from the receipt of donated rock, the Commission is troubled by the fact that the donor is the very official who has the unilateral authority to make purchases of this type of product for the county. Could any person contact the county and have access to its employees and equipment to have rock removed from their private property? If not, it appears that the county judge may be receiving a special privilege by using the county equipment and employees to remove the rock and facilitate his receipt of a tax deduction. He is in a position to essentially create a need for the rock he wants to donate, and unless a likewise willing benefactor would have access to the county equipment and employees for his own benefit, the proposed donation raises a concern for the Commission.

Assuming that using county employees and equipment to remove the rock and obtain a tax deduction did constitute a "special privilege," the remaining question would be whether or not such an official has "used or attempted to use his or her position" to obtain it. The fact that the quorum court approval will be obtained first adds a layer of protection. However, because the proposed scenario is basically a unilateral transaction, it does create a troublesome perception that the official would, at a minimum, be "attempting to use his position" to gain a special privilege or exemption.

² See, e.g., Ark. Code Ann. § 21-8-901.

Ark. Code Ann. § 21-8-304 prohibits even the “attempt” to use one’s official position to secure a special privilege or exemption. Could any person gain access to the quorum court and acquire approval of making a donation of rock to the county? Or, is the easy access of the county judge to the quorum court such that even *seeking* approval of the transaction place him in the position “attempting” to use his official position to secure a special privilege of exemption?

The Commission notes that, at first blush, this appeared to be a “win/win” situation for the donor and the county as the recipient of the donation. However, upon further review, it is the Commission’s opinion that these specific facts, i.e., the donor is the very official who has the unilateral authority to make purchases of this type of product for the county—at a minimum—present a likely prohibited attempted use of position to secure a special privilege or exemption in connection with the transaction. Accordingly, the Commission concludes that the official should refrain from attempting to make such a donation to avoid any potentially questionable prohibited conflict of interest.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

ARKANSAS ETHICS COMMISSION

By: 

Rita S. Looney, Chief Counsel