# EXECUTIVE COMMISSION ON ETHICAL STANDARDS,
Petitioner,
v.
# ROBERT W. SCHNABEL,
Respondent.

Decided April 11, 1980

**Initial Decision**

SYNOPSIS

The Executive Commission on Ethical Standards charged Robert W. Schnabel, a member of the Atlantic Coast Section of the Shell Fisheries Council of the Department of Environmental Protection and a "special State officer", as defined by the New Jersey Conflicts of the Interest Law, with a violation of the Conflicts of Interest Law in that he voted to approve his own application for lease transfers and "relay" leases and thus transacted business with himself in violation of *N.J.S.A.* 52:13D-20.

The administrative law judge found that testimony supported a finding that respondent did vote to approve the transfer of leases owned by himself, or his wife, to other individuals and that this undeniably constituted a conflict of interest under the common law since the respondent voted in matters in which he had a direct and personal interest.

The judge did, however, conclude that the respondent had failed to violate *N.J.S.A.* 52:13D-16(a) in that he had not represented, appeared for or negotiated on behalf of any person other than the State. The judge reached this conclusion based on a determination that the respondent had not acted in the stead of, or as agent for, someone else, an element he considered necessary for a violation of the statute to have occurred. The judge determined that the Legislature had not intended this section of the act to prohibit a special State officer or employee from voting on his own application.

Nevertheless, the judge concluded that by voting in favor or the transfer of leases to and from himself, the respondent had acted as an officer or agent for a State agency for the transaction of business with himself and thus had violated *N.J.S.A.* 52:13D-20.

**Janice C. Mironov,** Deputy Attorney General, for petitioner (John J. Degnan, Attorney General of New Jersey, attorney)
**Howard Butensky,** Esq., for respondent

---

**MILLER,** ALJ:

This matter is based on a complaint made by Elaine B. Goldsmith, Director of the Executive Commission on Ethical Standards (petitioner) charging Robert W. Schnabel (respondent) with violations of the New Jersey Conflicts of Interest Law, *viz.*, *N.J.S.A.* 52:13D-16(a) and *N.J.S.A.* 52:13D-20, and seeking to assess civil penalties against him as provided for by *N.J.S.A.* 52:13d-21(i).

*N.J.S.A.* 13:d-16(a) reads as follows:

> No special State officer or employee, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before the particular office, bureau, board, council, commission, authority, agency, fund or system in which such special State officer or employee holds office or employment.

*N.J.S.A.* 52:13D-20 provides:

> No member of the Legislature or State officer or employee or special State officer or employee shall act as officer or agent for a State agency for the transaction of any business with himself or with a corporation, company, association or firm in the pecuniary profits of which he has an interest (except that ownership or control of 10% or less of the stock of a corporation shall not be deemed an interest within the meaning of this section).

The complaint, in four counts, alleges that respondent, a member of the Atlantic Coast Section of the Shell Fisheries Council of the Department of Environmental Protection and a "Special State Officer" as defined in *N.J.S.A.* 52:13D-13(e), violated *N.J.S.A.* 52:13D16(a) in that he: (1) voted on December 20, 1976 to approve the transfer of leases held in his own name (Count I); made a motion on April 18, 1977 to approve the Tuckerton Relay Leases, included in which was a lease in his own name (Count II); and voted in July 1977 to approve the transfer of a lease from his wife (Sophia Austin)

to one Kirk Conover (Count III). It is also alleged that on the aforesaid occasions, by voting on his own application for lease transfers and relay he transacted business with himself, in violation of *N.J.S.A.* 52:13D-20 (Count IV).

Respondent filed a formal answer denying the critical allegations of the Complaint.

The matter was filed with the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* Prior to the taking of testimony the following stipulations were made by and between counsel:

1. Respondent served as a member of the Atlantic Coast Section of the Shell Fisheries Council from August 12, 1976 until March 24, 1979.
2. Respondent qualifies as a "Special State Officer or Employee," within the meaning of the Conflicts of Interest Law, by reason of his position on the Shell Fisheries Council.

The only person to testify on behalf of petitioner was Gail Critchlow, Administrative Assistant to the Atlantic Coast Section of the Shell Fisheries Council (hereinafter "Council" or "Section") since July 6, 1976. The Council falls within the jurisdiction of the Division of Fish, Game and Shell Fisheries of the Department of Environmental Protection. Included among Mrs. Critchlow's duties is attendance of all of the monthly meetings of the Council and the signing of minutes of Council meetings.

According to Mrs. Critchlow, at its monthly meetings the Council, among other things, considers the leasing of riparian lands for the cultivating and harvesting of clams and oysters and votes upon applications to transfer leases and "relays." (A "relay" is the moving of clams from polluted waters to clean waters.) A relay lease is "approved the same way a regular lease would be approved. . . ." In other words, a person who wishes to lease land in a relay makes application to the Council for a relay lease and the Council then votes to approve or disapprove the application. To Mrs. Critchlow's knowledge, no application for a relay has ever been denied by the Council.

The minutes of the Council meetings are taken by one Madelyn G. Meuller, Head Clerk of the Nacote Creek Shellfish office. Miss Meuller's draft of the minutes are sent to Mrs. Critchlow's office in Trenton for corrections and are then delivered to the typing pool for final typing. The minutes are then sent to Council members for their approval "at the next meeting or the next time it's practical at a meeting. . . ." After approval, the minutes are signed by Mrs.

Critchlow and by Mr. Cookingham, the Director of the Division of Fish, Game and Shell Fisheries.

Referring to the Council minutes of August 23, 1976, Mrs. Critchlow noted a transfer of a relay lease of 1.5 acres in the Great Bay to one Harry Alba. She declared that there was a waiting list for these leases and that they were "at a premium." Mrs. Critchlow then pointed out that the minutes of the Council meeting of December 20, 1976 included approval of an assignment of the same lease (1.5 acres, Great Bay) from Harry Alba to Sophia Austin. (It was stipulated by counsel at the time that Sophia Austin is the wife of respondent.) Respondent abstained from voting on this matter. At the same meeting (December 20, 1976), however, the minutes reflect that respondent himself was involved in two transactions: (1) As an assignee from Elmer Johnson of a lease of 6.67 acres in the Great Bay; and (2) as a lessee-assignor to Donald C. Maxwell of a lease of 2,655 feet in the Great Bay. According to the minutes, these applications "were approved unanimously on a motion by Mr. Smith." Mrs. Critchlow's recollection on the vote for the latter two transactions was also to theeffect that "they were approved unanimously, that all members voted to approve."

Turning to the minutes of the Council meeting of April 23, 1977, Mrs. Critchlow pointed out that among dozens of lessees participating in the Tuckerton Creek Relay project, which she described as a four month, "one-shot" operation, was respondent (Lease No. 23). The minutes show that the aforesaid leases "were approved on a motion by Mr. Schnabel, seconded by Mr. Cramer." Mrs. Critchlow also recalled that the motion was made by Mr. Schnabel, that it carried unaminously, and that there were no abstentions.

With respect to the Council meeting of July 18, 1977, the minutes indicate that respondent himself was involved in two of seven transfer applications, one in which he was the transferor, and the other in which he was the trasnferee. According to the minutes: "Mr. Schnable said he would abstain from voting on the transfer of his acreage." When a separate vote was taken on each application respondent abstained from voting on those two. According to both the minutes and to Mrs. Critchlow, however, he voted "Yea" on a relay transfer from his wife (Sophia Austin) to an individual named Kirk Conover. Later in that meeting, according to Mrs. Critchlow, Respondent—after arguing in favor of an extension—voted to extend the term of the Tuckerton Relay leases (of which his was one) from August 1, 1977 to December 31, 1977.

As her final testimony on direct examination, Mrs. Critchlow noted that the minutes of the Council meetings of March 21, 1977, April 18, 1977, July 18, 1977, and August 15, 1977. There were no objections to any of the aforesaid minutes, no negative votes, and no abstentions.

On cross-examination, Mrs. Critchlow conceded that through the year 1977 there was no verbatim transcript taken of the proceedings at the various Council meetings; that the secretary did not take the minutes in shorthand; and that although the secretary takes notes during the meeting she does not "take down everything that occurs at the meeting." Furthermore, in either late 1977 or 1978, at one of the Council mettings, respondent questioned the method of the taking of minutes of meetings. He brought him to that meeting and "elaborate" recording device and recorded the proceedings of the meeting. The present procedure for minute-taking at Council meetings is the same as it was in 1976-1977, said Mrs. Critchlow, except that she brings with her to the meetings a small tape recording device and records the proceedings.

By way of further cross-examination, Mrs. Critchlow was referred to the minutes of August 23, 1976, wherein there appears a statement that "the Council has been told time after time by Mr. Neil Magnus that the Council is only an advisory body." In the early spring of 1979, according to Mrs. Critchlow, a Council member (Mr. Erlin Perkins) requested that she ask Deputy Attorney General Magnus to give an "informal opinion" with respect to Council authority to approve and disapprove these transfers (including relay leases). Magnus allegedly told her—orally—that "Council voted on the transfers and that they had to be approved by the Commission(er)." Mrs. Critchlow also agreed that the statement that under existing Council policy, transfer of leases "should not be denied," was a fair statement of Council policy.

Mrs. Critchlow also noted that: the minutes of the Council meeting of December 20, 1976 were approved by the Council on February 22, 1977; that on December 20, 1976, when Respondent abstained from voting on the relay transfer to his wife, he remarked "that since Sophia Austin is my wife, that he would abstain on that vote"; that on April 18, 1977 another Council member (Richard Crema) was one of the approximately 85 persons who obtained approval of a relay lease in the Tuckerton Creek Relay program; that the Division Director was present at the meeting of April 18, 1977; that at the meeting of September 20, 1976 respondent abstained from voting on five lease transfer applications, on one of which he was the transferor; that at

respondent's first meeting as a Council member on August 23, 1976 he publicly declared that he was a lease holder; and that although at one meeting Respondent stated he would abstain from voting on all matters in which he was affected; "From time to time he has abstained. From time to time he has voted."

On redirect examination, Mrs. Critchlow stated that although not every detail is included in the minutes of the Council meetings, the voting and the action of the Council are included and that she (Mrs. Critchlow) certifies the minutes *after* they have been approved by Council.

The next person to testify was respondent himself. He stated that he resides at 30 Demaret Court, in Tuckerton, New Jersey. His occupation is that of a commercial shell fisherman. He stated that he was a member of the Council from August of 1976 until May of 1977. At the time of his appointment he was the holder of leases totalling between 120 and 140 acres of bay bottom. He is a member of a number of associations and organizations which lobby for the protection and preservation of the shellfish industry. He has personally lobbied for a number of bills, including one to transfer jurisdiction of the Shellfish Council from the Department of Environmental Protection to the Department of Agriculture.

Respondent stated that the only requirements for participation in the Relay program are: (1) To obtain a clamming license, which can be done upon the payment of a fee, and (2) to obtain a permit from the Department of Environmental Protection upon payment of a fee of $25.00. Respondent described in some detail the events leading to the Tuckerton Relay project (which commenced around March or April of 1977). He stated that the Council itself encouraged participation in the program by members of the public and that anyone who was a resident of New Jersey was allowed to participate. He declared that his participation in that relay project did not prevent or preclude anyone else from obtaining a relay lease.

According to respondent, sometime in 1978 he requested of both Mr. Pyle (Chief of the Bureau of Fisheries Management) and Mrs. Critchlow that they obtain an opinion from Deputy Attorney General Magnus with respect to the right of a lease holder to transfer his lease. He also stated that on many occasions he did not receive copies of minutes of prior meetings before he voted to approve them. In fact, this was the case with respect to his vote to approve (at the meeting of October 17, 1977) the minutes of the meetings of March 21, 1977, April 18, 1977, July 18, 1977, and August 15, 1977. According to

respondent, moreover, there *were* times when he questioned the accuracy of the minutes of prior meetings. In the Spring of 1977 the Baymen's Association hired an independent party to record and transcribe the minutes or approximately five meetings; this practice was terminated, however, because it had become too expensive.

With respect to the Council meeting of December 20, 1976, according to respondent, he abstained on all motions pertaining to both his property and that of his wife. If the minutes indicate otherwise, he declared, the are incorrect. He also stated that anyone, even Attila the Hun, can obtain approval of a transfer if he is a New Jersey resident. Respondent continued to insist that the minutes were inaccurate and in error regarding his alleged affirmative vote on all matters affecting both him and his wife. He asserted that on all such matters he abstained, although he voted in favor of all other transfers. Concerning the Tuckerton Relay project, respondent maintained that the Department of Environmental Protection issued licenses for the relay out of its Absecon office on a first come-first served basis, with a limit of one lease per person. He noted that only some 80, more or less, of the available 152 relay leases were applied for.

With respect to the minutes of meetings—for example September 20, 1976 and April 16, 1979—which show that respondent abstained from voting on transfers involving himself or his wife, they were correct. Respondent further maintained that in 1976 and again in April of 1978, a letter, allegedly written by Deputy Attorney General Magnus, had been read to the Council could *not* impede the transfers of leases. He declared that from the very beginning of his term on the Council he was informed that the Council had no right to block transfers of leases, and, further, that lease holders had an absolute right to transfer their leasholds.

In addition, respondent referred to minute of meetings of the Maurice River Cove Council and stated that they indicated that members of the Council recommended to the Department of Environmental Protection certain proposals which would beneficially affect three of the members of that Council, that a Council member voted in favor of a transfer involving a company of which he was the plant manager, that on October 12, 1978 a councilman voted in favor of a new lease even though that lease involved one of his relatives and that on December 14, 1978 a councilman voted on a lease transfer involving his relatives.

Respondent's position on all lease transfers and applications for new leases is contained in the minutes of the meeting of the Council

of October 17, 1977 wherein he was quoted as "saying he would not vote against anyone's ground." By that statement, according to respondent, he expressed his philosophy that he would not vote against the approval for anyone who was trying to make a living on the bay. On cross-examination, respondent did not dispute the statement in the minutes of the meeting of April 18, 1977, that he made the motion to approve all of the relays leases (including his own). He declared that as far as he was concerned the function of the Council with respect to relays was very limited, *viz.*, to select a relay site, and to issue a blanket lease which makes it possible to issue individual licenses to be granted upon the payment of the necessary fees and the obtaining of the required permits. Finally, with respect to the approval of the minutes of December 20, 1976, April 18, 1977, and July 18, 1977 respondent could not recall whether he voted to approve or not.

Also testifying on behalf of respondent was Gordon L. McCourt, whose occupation is that of a hard clammer. Mr. McCourt knows respondent and on a prior occasion transferred a lease to him. He is president of the Baymen's Association for Environmental Protection, an organization devoted to improving the environment and benefiting bay clammers. Mr. McCourt stated that he has attended many, if not most, of the Council meetings from 1971-1972 until approximately August of 1979. Mr. McCourt stated that the minutes of the Council meetings were often in error and that attempts to correct them were fruitless. According to him, minutes were taken by a secretary who often did not write down motions which were made as well as other relevant information. He stated that the minutes of July 18, 1977 were inaccurate in reflecting that respondent voted "yea" and that councilman Mathis voted "Nay" on the transfer from Sophia Austin to Kirk Conover; in fact, according to McCourt, Respondent abstained and councilman Mathis voted "yea".

The final witness to testify at the hearing was Raymond Pfeuffer, a commercial bayman since 1965. He knows respondent but is not involved with him in any commercial ventures. Mr. Pfeuffer stated that he attended between 20 percent and 30 percent of the meetings of the Council from December 20, 1976 through July 18, 1977. He confirmed the prior testimony of Mr. McCourt to the effect that there was a marked lack of decorum and order at the meetings of the Council which he attended. The witness referred to his participation in the Council meeting of September 1977 and declared that the minutes of that meeting were incorrect in stating that his challenge

of a salinity reading was directed at a person named Eisele; in fact, they were directed at Bruce Pyle, the head biologist of the Bureau of Fisheries.

*I. Resolution of Factual Dispute*

The first issue to be determined in this matter is a factual one, *viz.*, whether, as alleged in the complaint, respondent voted in the manner stated in the Minutes of the Atlantic Coast Section of the Shell Fisheries Council of December 20, 1976, April 18, 1977 and July 18, 1977. In other words, did respondent vote: (1) on December 20, 1976 to approve the transfer of a lease from Elmer Johnson to himself and to approve the transfer of another lease from himself to Donald C. Maxwell; on April 18, 1977 to approve the Tuckerton Relay leases, included in which was one of his own; and on July 18, 1977 to approve the transfer of a lease from his wife (Sophia Austin) to one Kirk Conover? For the reasons to be expressed hereafter, I find that respondent *did* vote in accordance with the aforementioned minutes of the respective meetings.

Of prime importance in reaching the above determination is a comparison of the testimonial candor of Mrs. Critchlow (who testified for petitioner), on the one hand, and respondent and Mr. McCourt, on the other. Mrs. Critchlow was entirely credible: she was direct, sincere, forthright, and responsive; she answered the questions put to her, whether on direct examination or on crossexamination, honestly and with little, if any, hesitation, even when her testimony was favorable to respondent. I found respondent's testimonial candor, on the other hand, to be deficient: he was frequently evaisve, unresponsive, ambiguous and inconsistent. Mr. McCourt was also unconvincing: he often rambled, digressed and was unresponsive; on some occasions, he paused for an unusally long period of time before giving his answer.

Also of significance is the fact that the minutes of the meetings of December 20, 1976, April 18, 1977 and July 18, 1977 were approved by the Council, including the vote of respondent, without dissent. Respondent's testimony that he didn't remember whether he voted to approve the aforementioned minutes was not persuasive, especially in light of the fact that he had specific recollection as to other votes. Additionally, there was nothing preventing him from expressing on the record at the time of the voting his objection to the accuracy of the minutes of any prior meeting.

Finally, the testimony of Councilman Mathis with respect to his vote on July 18, 1977 might have been very important. Respondent testified that Mathis actually voted yes on the transfer from Austin to Conover whereas, in fact, the minutes showed him voting "Nay". By Respondent's failure to call Mathis as a witness or to explain why he was not called, I can and do infer that the testimony of Mr. Mathis would not have been helpful to respondent contentions about the inaccuracy of the Minutes.

*II. The Common Law*

That respondent's actions at the meetings of December 20, 1976, April 18, 1977 and July 18, 1977 constituted a conflict of interest under the common law is undeniable.

It has been long established that a public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive. He holds a position of pulic trust and is under an inescapable obligation to serve the public with the highest fidelity, good faith and integrity. *Tp. Committee of Hazlet v. Morales*, 119 *N.J. Super.* 29, 33 (L. Div. 1972). The law tolerates no mingling of self-interest; it demands exclusive loyalty. *Driscoll v. Burlington-Briston Bridge Comm.*, 8 *N.J.* 433, 474-475 (1952), *cert. den . Burlington County Bridge Comm. v. Driscoll*, 244 *U.S.* 838 (1952). The citizens have the right to expect that in everything that pertains to their business and welfare, the public official will exercise his best judgment, unaffected and undiluted by anything which might inure to his own interest as an individual. *Aldom v. Borough of Roseland,* 42 *N.J. Super.*, 495, 501 (App. Div. 1956)

The key question in determining whether a conflict of interest situation exists is whether there is a *potential* for conflict, not whether the public servant succumbs to the temptation or is even aware of it. *Griggs v. Princeton Borough*, 33 *N.J.* 207, 219 (1960). If the circumstances had the likely *capacity to tempt* the official to depart from his public duty, there is a conflict. *Paitakis v. New Brunswick*, 126 *N.J. Super.*, 233, 237 (App. Div. 1974). The interest which disqualifies is a personal or private one, not an interest which the public officer has in common with all other citizens. *Kramer v. Bd. of Adjust., Sea Girt*, 45 *N.J.* 268 (1965)

If it is determined that a conflict of interest exists, under the common law the official involved should not only disqualify himself from

voting upon the matter, *Aldom v. Borough of Roseland, supra*, and *Griggs v. Princeton Borough, supra*, but also refrain from even *participating* in the discussion of the matter *Zell v. Borough of Roseland*, 42 *N.J. Super.* 75, 83 (App. Div. 1956). It makes no difference that the matter had sufficient affirmative votes to pass without his participation. *Aldom v. Borough of Roseland, supra.*, at 507.

If, despite a conflict of interest, the public official participates in the discussion or votes upon the measure, the resolution, ordinance, election or action is *voidable* and subject to being invalidated. *Griggs v. Princeton Borough, supra.* (invalidating Borough Council resolution approving blight determination); *Paitakis v. New Brunswick, supra.* (reversal of determination of Division of Alcoholic Beverage Control); *Tp. Committee of Hazlet v. Morales, supra* (invalidating appointment of township committeeman to sewerage authority); *Aldom v. Borough of Roseland, supra*; and *Zell v. Borough of Roseland, supra* (both of the latter cases invalidating an ordinance amending a zoning ordinance). Nevertheless, under the common law, the public official who is guilty of such a conflict of interest is ordinarily not subject to criminal or quasi-criminal penalties. The only effect of that official's conduct, as noted above, is the voidability of the official action taken.

In short, under the facts of the instant case, and applying only the common law, Respondent's voting on matters in which he had a direct personal and pecuniary interest constituted a conflict of interest and rendered the action taken voidable, but it did not subject him to penal sanctions.

### *III. N.J.S.A. 52:13D-16(a)*

The first question of law presented by the instant case may be phrased as follows: By voting in favor of the transfer of leases to and from himself and to and from his wife, and by voting in favor of the relay leases (of which his was one), did respondent "represent, appear for or negotiate on behalf of any person other than the State," in violation of *N.J.S.A.* 52:13D-16(a)? For the reasons which follow, I conclude that this question must be answered in the negative.

The Legislature has specifically declared that in enacting statues "words and phrases shall, unless inconsistent with the manifest intent of the legislation or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." *N.J.S.A.* 1:1-1. Effect must be given to the language employed by the legislature. *Dixon v. Gassert*, 26 *N.J.*

1 (1958). In the absence of ambiguity permitting extrinsic aids, the legislative intent is to be found in the language of the statute itself. *Gangemi v. Berry*, 25 *N.J.* 1 (1957).

The words "represent," "appear for," and "negotiate on behalf of," all imply a person *other than* the special State officer or employee whose conduct is proscribed by *N.J.S.A.* 52:13D-16(a). The aforesaid words are defined by *Black's Law Dictionary* (Fifth Edition 1979) as follows:

> *Represent*: to represent a person is to stand in his place; to speak or act with authority on behalf of such person; to supply his place; to act as his substitute or agent.
>
> *Representative*: one who represents or stands in the place of another. One who represents others or another in a special capacity, as an agent,. . . .
>
> *Negotiate*: to transact business; to bargain with another respecting a purchase and sale; to conduct communications or conferences with a veiw to reaching a settlement or agreement.
>
> *Appearance*: A coming into court as party to a suit, either in person or by attorney, whether as plaintiff or defendant. . . . In civil actions the parties do not normally actually appear in person, but rather through their attorney.

The terms "appear for" and "negotiate on behalf of" give color and substance to the word "represent". All three used together indicate strongly that the proscribed conduct involves the engaging in business or some other transaction for *another* person. *See also, Irwin v. Young*, 90 *S.E.* 2d 22, 25 (Georgia 1955), where the word "represent" was said to mean "to stand in the place of another, act his part, or speak with authority on behalf of another."

There are several other principles of statutory construction which are helpful in resolving the issue noted above. The purpose of statutory construction is to bring the operation of the statute within the apparent intent of the Legislature and to effectuate such intent. *Hill Homeowners Assn. v. Zoning Bd. of Adjustment of City of Passaic*, 129 *N.J. Super.* 170 (Law. Div. 1974), affd., 134 *N.J. Super.* 107 (App. Div. 1975): *Freedon Financial Co., v. Fleckenstein*, 116 *N.J. Super.* 428, 431 ( Dist. Ct. 1971). In interpreting a statute, primary regard must be given to the purpose for which the legislation was enacted. *N.J. Builders etc. Assn. v. Blair*, 60 *N.J.* 330, 338-39 (1972). A cardinal rule in construction of constitutional and statutory enactments is that provisions made by way of remedy shall be studied in the light of

the evil against which the remedy was erected. *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 5 *N.J.* 435, 453 (1950), appeal dism., 342 *U.S.* 429 (1952).

The legislative history of the present New Jersey Conflicts of Interest Law (L. 1971, c. 182, eff. January 11, 1972; *N.J.S.A.* 52:13D-12 to *N.J.S.A.* 52:13D-27) is, unfortunately, rather sparse. On March 20, 1969, a hearing was held before the Joint Legilsative Conflict of Interest and Code of Ethics Study Commission. Among those testifying before the Commission were Elmer J. Bennett (Chairman of the Conflicts of Interest Committee of the New Jersey State Bar Association), Martin L. Haines (Vice-chairman of the Conflicts of Interest Committee of the New Jersey State Bar Association), Deputy Attorney General Stephen Skillman, and a representative for the League of Women Voters. A substantial, if not the major, concern of those testifying was the ethical and moral propriety of attorney-legislators and attorney-office holders in dealing with the State of New Jersey and its various agencies. Great importance was attached to the appearance of impropriety when attorneys who held positions of prestige and influence in State government represented private clients before various State agencies. There was no discussion with respect to a person representing *himself*.

On April 22, 1969 the Conflicts of Interest and Code of Ethics Study Commission issued its Report. Appended to its Report was a proposed statute which, in substantially the same form, became the present New Jersey Conflicts of Interest Law. The Report of the Commission provides significant clues as to the mischief or problems sought to be corrected and the proposed remedies therefor. The Report declares:

> This Commission was established under Assembly Concurrent Resolution No. 44 of 1969, which directed it to examine the need and desirability for revising the 'New Jersey Conflicts of Interest Law' and the rules and regulations promulgated thereunder, including the need and desirability for including therein a code of ethics or a code of conduct for State officers and employees, including legislators and members of the executive branch of government.
>
> . . . .
>
> In following this directive, the Commission has come to the conclusion that the existing 'New Jersey Conflicts of Interest Law' (P.L. 1967, c. 229) is fundamentally inadequate because it provides no definite and objective standards to guide the conduct

> of public officials and employees and—as a necessary consequence—no effective machinery for the uniform and equitable maintenance and enforcement of such standards.
>
> . . . .
>
> Thus under the present law a legislator or official may do as he will, provided his superior (if any) agrees, and provided he is willing to have it appear on the public record. Whether such willingness results from a clear conscience, or merely from confidence that his continuance in office will be adversely affected, it is not, in the Commission's view, a sufficiently objective standard, especially in view of the fact that such situations affect not only the fortunes of the individual official or employee but also, by implication, the reputations of his colleagues and general public confidence in the integrity of State government.
>
> . . . .
>
> Foremost among those activites which require a statutory prohibition is any involvement by legislators or State officers or employees in proceedings or negotiations incident to the acquisition of land by the State. History amply justifies the conclusion that whenever State officials have engaged their services *on behalf of private parties* from whom the State sought to acquire land, suspicion and sometimes scandal have resulted. The Commission recommend an absolute bar on all such services. It is felt that this prohibition, though stringent in its terms, is sufficiently limited in scope that it cannot be fairly claimed to cripple or seriously undermine any legitimate professional practice by a member of the Legislature or other State officer or employee.
>
> . . . .
>
> With regard to proceedings before State agencies, the Commission recommends generally that legislators and State officers and employees be prohibited from *serving private parties* only when those parties have an interest adverse to that of the State. (emphasis supplied)

At the signing of the Conflicts of Interest Law on June 2, 1971, the Governor noted:

> State officers and employees and members of the Legislature are prohibited from the following areas:
>
> They cannot represented *others* in the sale or purchase of real or personal property to or from the State.
>
> . . . .

Simply by voting in favor of the transfer of leases to and from himself and in favor of the transfer of lease from his wife to Mr. Conover, respondent did not "represent, appear for or negotiate on behalf of" any other person. There was no evidence that he acted in the stead of, or as agent for, someone else.

In other circumstances, when the Legislature has desired to proscribe voting or other official action because of actual or potential conflict of interest, it has clearly done so.[1] For reasons not entirely clear, however, the Legislature did not see fit in this section of the act to prohibit a special State office or employee from voting on his own application. Nevertheless, the wisdom, good sense, policy and prudence of a statute are matters within the province of the Legislature and not of the courts. *White v. Tp. of North Bergen*, 77 *N.J.* 538 554 (1978).

Needless to say, the decision of a public official to vote on matters in which he has a personal or financial interest cannot be condoned. At the very least, respondent exercised poor judgment. But he did not violate *N.J.S.A.* 52:13D-16(a).

## *IV. N.J.S.A. 52:13D-20*

The other issue to be decided is the applicability of *N.J.S.A.* 52:13D-20. By voting in favor of the transfer of leases to and from himself, and by voting in favor of the relay leases, did respondent act as an officer or agent for a State agency "for the transaction of any business with himself," contrary to *N.J.S.A.* 52:13D-20?

The question posed is particularly difficult because nowhere in the Conflicts of Interest Law is there a definition of the word "business" or the phrase "transaction of any business."[2] The answer to the question depends largely on whether the quoted phrase is to be given a narrow or a broad interpretation. I conclude that the Legislature intended the latter.

---

[1]See, for example, *N.J.S.A.* 40:55D-23(b) and *N.J.S.A.* 40:55D-69 which declare that the official shall not "be permitted to *act* on any matter in which he has, either directly or indirectly, any personal or financial interest." (emphasis supplied)

[2]*Cf. N.J.S.A.* 52:13D-11 (section 11 of the former New Jersey Conflicts of Interest Law, repealed by L. 1971, c. 182) which has a specific, although relatively restrictive, definition of the term "business activity."

When the term "business" is used in a statute, its meaning depends upon its context or upon the legislative purpose. *Grand Forks Herald, Inc. v. Lyons*, 101 *N.W.* 2d 543, 547 (N. D. 1960). The meaning is also determined by the individual facts of each case. *Olmstead v. American Gramby Co.*, 565 *P.* 2d 108, 112 (Wyo. 1977). Examples of cases employing a narrow or restrictive definition are: *Newark Building Assoicates v. Director, Division of Taxation*, 128 *N.J. Super.* 535 (App. Div. 1974) ("business" given a restrictive definition for purposes of Capital Stock Tax); *Hildreth Branite Co. v. Freeholders of Hudson,* 87 *N.J.* Eq. 316 (E. & A. 1917) ("transacting business" given narrow interpretation for purposes of statute requiring foreign corporations to file with New Jersey Secretary of State before transacting business in New Jersey); and *Westor Theaters v. Warner Brothers Pictures*, 41 *F. Supp.* 757, 761 (D.C.N.J. 1941) ("transacting business" narrowly construed for purposes of Clayton Act). A comprehensive a broad definition of the word "business" or the phrase "transacting business" is found in: *Zahn v. Newark Board of Adjustment*, 45 *N.J. Super.* 516, 521 (App. Div. 1957) ("business" in the context of a zoning ordinance given a comprehensive meaning); *Learning Systems Inc. v. Levin*, 351 *F. Supp.* 532, 533 (D.C. Mo. 1972) (phrase "transacting business": is to be liberally construed under Sherman Anti-Trust Act, having in mind the congressional purpose of enabling injured person to have redress in his home district); *People Ex Rel Nauss v. Graves*, 283 *N.Y.* 383, 23 *N.E.* 2d 881, 882 (Ct. App. 1940) (declaring the term "business" is of very broad significance and has a great variety of meanings); *City and County of Denver v. Gushurst*, 120 *Colo.* 465, 210 *P.* 2d 616, 618 (1949) (any activity which occupies the time, labor and attention of men for purpose of earning a livelihood is a "business"); and *Smith v. Duracraft Products Co.*, 75 *Ohio App.* 556, 62 *N.E.* 2d 731, 734 (1945) (word "business" has a very broad meaning and may be used in many different connatations; it means anything that engages time, attention or labor.).

Initially, it should be noted that the Conflicts of Interest and Code of Ethics Study Commission recommends that there be an "absolute" bar against any dealings with the State where the legislator, officer or employee acts as an agent for the State in the same transaction. According to the Commission, "in such cases it is felt that the relation between private and public capacities becomes much too close to be tolerable." See *Report of the Conflicts of Interest and Code of Ethics Study Commission*, April 1, 1969, pp. 6 and 7. The Commission's proposal of an *absolute* bar is indicative of an intention to give the

phrase in question a broad meaning.

Likewise, the phrase itself, *i.e.*, "transaction of *any* business," could hardly be couched more broadly. By way of contrast, see the rather limited definition of "business activity" found in the old (repealed) Conflicts of Interest Law (*N.J.S.A.* 52:13D-11).

When considering the question of interpretation, moreover, notice must be taken of the distinction between the government's *proprietary* function and its *governmental* function. In the former case, one who buys, sells or leases property from the government is, in the usual sense of the word, transacting "business" with it. If respondent himself had applied to the section for a *new* lease of land and had voted to approve his own application, can there be any doubt that he would have been transacting "business" with the Council? The result should not change simply because he—along with others—received a "relay" lease. Nor should it be different because the transaction involved the approval of a lease assignment.

In addition, the Conflicts of Interest and Code of Ethics Study Commission pointed out in its Report that much of the corruption and scandal associated in the public's mind with State government has arisen over the years in the area of purchases and sales of property, particularly land, by the government. Clearly, one of the evils that the Legislature wanted to cure was self-dealing in property by officials and employees of the State government. *N.J.S.A.* 52:13D-20 is an important part of the remedy. Accordingly, it should be given a comprehensive, liberal and remedial interpretation.

Also of importance in this regard are the specific legislative findings set forth in *N.J.S.A.* 52:13D12. The first such findings reads as follows:

> In our representative form of government, it is essential that the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

When even the *impression* of impropriety is to be avoided, *N.J.S.A.* 52:13D-20 must be construed so as to prohibit a special State officer or employee from voting on application or matters in which he has a personal or financial interest.

Respondent contends that at least with respect to lease transfers and relay leases, the Section was essentially a figure-head or "rubber-

stamp" body, without power to make meaningful decisions. Thus, he argues, one cannot really transact business with such a body. He relies on the testimony of Mrs. Critchlow and respondent himself to the effect that the Section, rarely, if ever, denied a lease transfer or approval of any participant in the relay program. He also relies on respondent's testimony that Deputy Attorney General Magnus had delivered an opinion that the Section had no power to stop any transfers.

Regardless of past administrative practice or informal opinion of a Deputy Attorney General, however, a perusal of the statutory scheme reveals that the Shell Fisheries Council has considerable powers.[3] Among other things, it can lease tidal lands and approve—and thus, impliedly, disapprove or deny—the assignment of leases from one party to another. Subject to the "approval of the Commissioner," the Section is required "to exercise all the powers and perform all the duties of the Council in matters relating to the Shell Fish Industry in all the tidal waters of the State. . . ." *N.J.S.A.* 50:1-18. Clearly, the section is more than just a figurehead. Its powers and duties, although not exclusive, are real and important.

In short, when respondent, as a member of the Atlantic Coast Section of the Shell Fisheries Council, voted in favor of lease assignments in which he was directly, personally and financially involved on December 20, 1976, and when he voted for approval of the relay lease on April 18, 1977, he was transacting business with himself, in violation of *N.J.S.A.* 52:13D-20.

### *V. Penalty*

*N.J.S.A.* 52:12D-21(i) provides as follows:

> Any State officer or employee or special State officer or employee found guilty by the commission of violating any provision of this act or of a code of ethics promulgated pursuant to the provisions of this act shall be fined not less than $100.00 nor more than $500.00, which penalty may be collected in a summary proceeding pursuant to the Penalty Enforcement Law (*N.J.S.A.* 2A:58-1), and may be suspended from his office or employment by order of the commission for a period of not in excess of 1 year.

[3] *See*, *N.J.S.A.* 50:1-23, *N.J.S.A.* 50:1-24, *N.J.S.A.* 50:1-26.

> If the commission finds that the conduct of such officer or employee constitutes a willful and continuous disregard of the provisions of this act or of a code of ethics promulgated pursuant to the provisions of this act, it may order such person removed from his office or employment and may further bar such person from holding any public office or employment in this State in any capacity whatsoever for a period of not exceeding 5 years from the date on which he was found guilty by the commission.

In considering an appropriate penalty under the foregoing section, the following factors are significant: (1) *N.J.S.A.* 52:13D-16(a) and *N.J.S.A.* 52:13D-20 have not yet been interpreted in any reported case; (2) respondent was probably laboring under the mistaken apprehension that the Atlantic Coast Section of the Shell Fisheries Council had no power to disapprove a lease assignment or to deny a relay lease; (3) respondent never attempted to hide the fact that he is a commercial fisherman and had a financial interest in many of the actions and decisions of the Council on which he served; (4) respondent did not knowingly violate the Conflicts of Interest Law; and (5) respondent is no longer a member of the aforesaid Council.

Accordingly, it is suggested that the maximum statutory penalty is not warranted. Rather, a penalty of $100.00 would be appropriate.

I make the following *FINDINGS OF FACT*:

1. Stipulations 1 and 2, previously noted, as though set forth in full.
2. On December 20, 1976, respondent voted to approve the assignment of a lease from Elmer Johnson to himself and the assignment of a lease from himself to Donald C. Maxwell.
3. On April 18, 1977 respondent voted to approve the relay lease program, included in which was a lease (No. 23) from the State of New Jersey, Department of Environmental Protection, Division of Fish, Game and Shell Fisheries to himself.
4. On July 18, 1977 respondent voted to approve the transfer of a lease from his wife, Sophia Austin, to Kirk Conover.
5. On all of the aforesaid dates respondent was a member of the Atlantic Coast Section of the Shell Fisheries Council.
6. On none of the aforesaid dates did respondent represent, appear for, or negotiate on behalf of another person.

On the basis of the aforementioned Findings of Fact and analysis of law, I **CONCLUDE** that: (1) respondent did *not* violate *N.J.S.A.* 52:13D-16(a); and (2) respondent did violate *N.J.S.A.* 52:13D-20.

Accordingly, **IT IS HEREBY ORDERED** that, pursuant to *N.J.S.A.* 52:13D21(i), respondent be required to pay a penalty of $100.00.

**ADOPTED BY SILENCE BY THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS PURSUANT TO *N.J.S.A.* 52:14B-10(c)**