

APPENDIX  
DR. PANCOAST'S TESTIMONY

STATE ETHICS COMMISSION'S  
RECOMMENDED AMENDMENTS  
TO ACT 170, 1978,  
65 P.S. §401 et. seq.

INTRODUCTION

On March 11, 1987, the members of the State Ethics Commission agreed to propose to the General Assembly of Pennsylvania the implementation of certain amendments to the Conflicts of Interests/Public Officials Act, Act 170, of 1978, 65 P.S. §401 et. seq. These proposed changes to the law, which are being presented as part of the Sunset review of the Commission are based upon an examination of the nine (9) year operational history of the agency. The members of the Commission believe that the proposals and concepts set forth below are not only justified as a matter of practical experience but are necessary in order to insure that the effective administration and intent of the law are fulfilled.

I. SECTION 2 - DEFINITIONS

A. Recommendation: That the definition of public official be amended so as to eliminate therefrom the last sentence. (See underlined section of definition below). This change would bring the Ethics Act in accord with the prevailing judicial precedent.

Background: The State Ethics Act contains the following definition of public official:

Section 2. Definitions.

"Public official." Any elected or appointed official in the Executive, Legislative or Judicial Branch of the State or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense, or to otherwise exercise the power of the State or any political subdivision thereof.

"Public official" shall not include any appointed official who receives no compensation other than reimbursement for actual expenses. 65 P.S. 402.

In 1982, the Supreme Court of Pennsylvania ruled, as unconstitutional, the last sentence of the above definition. See Snider V. Thornburgh, 469 Pa. 159, 436 A.2d 593, (1981). The remedy reached by the Supreme Court upon ruling that the above phrase was unconstitutional was to excise the unconstitutional language from the definition of public official as set forth in the State Ethics Act. The unconstitutional phrase has remained in the body of the State Ethics Act even though it has been declared invalid. This is so because the Act, to date, has not been amended. The State Ethics Commission has recently promulgated rules and regulations implementing this provision, however, much confusion is still occurring because the statute has not been amended. (See, 16 Pa. Bulletin P. 4653). The Legislative Budget and Finance Committee Report recommended legislative correction of this matter.

B. Recommendation: The definition of immediate family should be amended as follows:

A parent, spouse, child, brother, sister or like relative-in-law.

Background: The definition of immediate family as currently contained in the Act provides as follows:

Section 2. Definitions.

"Immediate family." A spouse residing in the person's household and minor dependent children. 65 P.S. 402.

As a result of this particular definition, the State Ethics Commission has been obligated to issue a number of orders and opinions that have permitted public officials to take direct action as governmental officials in relation to members of their family such as adult children, brothers, sisters, and other closely related individuals. See, Phillips, 451; Todaro, 434; Panza, 492. Clearly, it is very unlikely that a public official would award a contract from his governmental body to his minor dependent child. It is more likely that such a contract would be awarded to his adult child or another adult relative who has submitted a bid. This type of activity seems to be in direct conflict with the intent and purpose of the law as set forth in the Preamble of the State Ethics Act.

Additionally, more recent legislative enactments have provided expanded definitions of this term. Specifically the Convention Center Authority Act, Act 1987-70 provides:

"Immediate family." A parent, spouse, child, brother, sister or like relative-in-law.

Adoption of this definition as part of the Ethics Act would thus be consistent with the currently existing law.

## II. SECTION 3 - RESTRICTED ACTIVITIES

A. Recommendation: Section 403(c) of the State Ethics Act should be amended to provide as follows:

(c) No public official or public employee or a member of his immediate family or any business in which the person or a member of the person's immediate family is a director, officer, owner or holder of stock exceeding 5% of the equity at fair market value of the business shall enter into any contract valued at \$500 or more with [a] the official's or employee's governmental body unless the contract has been awarded through an open and public process, including prior public notice and subsequent public disclosure of all proposals considered and contracts awarded. Any contract made in violation of this subsection shall be voidable by a court of competent jurisdiction if the suit is commenced within 90 days of making of the contract. The foregoing requirements constitute a procedure to be employed where contracting is otherwise authorized by law.

Background: The State Ethics Commission has traditionally applied Section 3(c) to require that it is applicable only when a public official attempts to contract with his own governmental body. A strict reading of Section 3(c) of the Ethics Act, however, as outlined above, clearly indicates that it can be applied in a broader fashion, thereby prohibiting a public official from contracting with any governmental body. This broad prohibition would seem to be unduly burdensome and as a result, it is recommended that section 403(c) of the State Ethics Act be amended in accordance with the way it has been interpreted by the State Ethics Commission. See Bryan, 80-014; Lynch, 79-047.

Additionally, Section 3(c) should contain a clarification indicating that this particular provision of the State Ethics Act is not in and of itself a broad based authority for public officials to have interests in contracts with governmental bodies. For example, a number of municipal codes and other governmental agency enabling statutes provide specifically that their members and employees may not have a direct interest in any contract that is let by that agency or that they may not have interest in excess of a certain dollar amount. This particular provision of the State Ethics Act, it has been argued, supersedes all of the previously existing prohibitions relating to this issue and is a general authorization for all public officials to contract with their own governmental body. The traditional interpretation of this provision by the Ethics Commission, however, has been that it is not an authorization for individuals to contract with their governmental bodies, but is rather a procedure to be employed where such contracting is otherwise authorized by law.

III. SECTION 4 - STATEMENTS OF FINANCIAL INTEREST REQUIRED TO BE FILED.

A. Recommendation: Section 404(a) of the State Ethics Act should be amended to provide as follows:

(a) Each public employee [employed by] and public official of the Commonwealth shall file a statement of financial interests for the preceding calendar year with the department, agency or bureau in which he is employed no later than May 1 of each year that he holds such a position and of the year after he leaves such a position. Any other public employee and public official shall file a statement of financial interests with the governing authority of the political subdivision by which he is employed no later than May 1 of each year that he holds such a position and of the year after he leaves such a position. 65 P.S. 404(a).

Background: Section 404(a) of the State Ethics Act provides for the filing of Statements of Financial Interests on an annual basis. While Section 404(a) the State Ethics Act has an affirmative requirement that all public employees file by May 1 of each year, strikingly omitted from the State Ethics Act is a similar requirement for public officials. As a result, it has been argued that the filing requirement on an annual basis only applies to public employees, thereby exempting public officials from filing on a yearly basis. At least one court case has been dismissed on this specific basis. See Commonwealth v. Crooks. In at least one other case, Kremer v. State Ethics Commission, 56 Pa. C. 160, 424 A.2d 968, (1981), the Commonwealth Court of Pennsylvania has held that the filing requirement is equally applicable to public employees and public officials. As long as this particular provision, however, is not expressly stated in the Ethics Act it is always subject to further modification by future judicial decisions.

B. Recommendation: Section 404(d) of the State Ethics Act should provide for a specific per diem penalty or other appropriate sanction for the late filing of a statement of financial interests. The State Ethics Commission should be specifically authorized to levy and enforce said sanctions.

Background: Section 404(d) of the Act provides as follows:

Section 4. Statement of financial interests required to be filed.

(d) No public official shall be allowed to take the oath of office or enter or continue upon his duties, nor shall he receive compensation from public funds, unless he has filed a statement of financial interests with the commission as required by this act. 65 P.S. 404(d).

Other than set forth above, there is no provision in the law for late filing. Additionally, while the above provision may be considered a penalty such would appear to be applicable only to public officials and not public employees. Late filing has historically been a problem area and as such the act should be amended in relation thereto.

C. Recommendation: Section 404(b) and (e) of the State Ethics Act should be amended to provide as follows:

(b) Each candidate for public office shall file a statement of financial interests for the preceding calendar year [with the commission prior to filing a petition to appear on the ballot for election as a public official. A petition to appear on the ballot shall not be accepted by an election official unless the petition includes an affidavit that the candidate has filed the required statement of financial interests with the commission.] as provided for in sub-section 404(e).

(e)(1) Any candidate for State-wide public office shall file a statement of financial interests with the Commission on or before the last day for filing a petition to appear on the ballot for election. A copy of said statement of financial interests shall also be appended to such petition.

(2) Any candidate for County-wide or local office shall file a statement of financial interests with the governing authority of the political subdivision in which he is a candidate on or before the last day for filing a petition to appear on the ballot for election. A copy of said statement of financial interests shall also be appended to such petition.

(3) No petition to appear on the ballot for election shall be accepted by the respective state or local election officials unless said petition has appended thereto a statement of financial interests as set forth above. Failure to file said statement in accordance with the provisions of the Act shall in addition to any other penalties provided, be a fatal defect to the nomination petition.

Background: Sections 404(b), (e) of the State Ethics Act requires a filing of a Statement of Financial Interests by candidates for public office with the Commission prior to filing a petition to appear on the ballot for election as a public official. Pursuant to 404(e), candidates are also required to file Statements of Financial Interests at the local level. During the course of a municipal election, as many as 26,000 Financial Interests Statements have been filed with the State Ethics Commission. The monitoring of such statements and the enforcing of the filing requirement, has proven to be an extremely burdensome and expensive task. In addition, court decisions have tended to restrict the Ethics Commission ability to enforce the filing

deadline. See State Ethics Commission v. Baldwin, 497 Pa. 609, 443 A.2d 1141, and State Ethics Commission v. Landauer, \_\_\_ Pa. Commw. \_\_\_; 496 A.2d 862 (1985). Generally the filing requirement for candidates should be amended in the State Ethics Act so as to insure a better administrative enforcement mechanism and for more appropriate remedies and penalties for failure to file as required.

#### IV. SECTION 5 - STATEMENTS OF FINANCIAL INTERESTS

A. Recommendation: Section 405(b) of the State Ethics Act should be amended to provide as follows:

##### Section 5. Statement of financial interests.

(b) The statement shall include the following information for the prior calendar year with regard to the person required to file the statement: [and the members of his immediate family:]

Background: Section 405 of the State Ethics Act provides for the specific information to be included on the Statement of Financial Interests. Section 405(b) of this particular provision provides that the statement shall include information regarding the filer and members of his immediate family. The Supreme Court of Pennsylvania has ruled that the filing requirement as applied to spouses of public officials and minor dependent children, is unconstitutional in so far as it violated the Pennsylvania Constitutional right to privacy. As a result, these provisions of Section 405(a) are no longer legally applicable. See Denoncourt v. State Ethics Commission, 504 Pa. 191, 470 A.2d 945, (1983). In light of the fact that this decision was rendered on constitutional grounds there would appear to be no way absent a constitutional amendment to address this issue. The Legislative Budget and Finance Committee audit report also recommended this amendment.

B. Recommendation: Sections 405 (5); 405(6) of the Act should be amended to provide as follows:

(5) The name and address of any [person who is the] direct or indirect source of income totalling in the aggregate of \$500 or more. However, this provision shall not be construed to require the divulgence of confidential information protected by statute or existing professional codes of ethics.

(6) The name and address of any [person from whom] source of a gift or gifts valued in the aggregate at \$200 or more were received, and the value and the circumstances of each gift. However, this provision shall not be applicable to gifts received from the individual's spouse, parents, parents by marriage, siblings, children or grandchildren.

Background: Sections 405 (5); (6) of the State Ethics Act provides as follows:

Section 5. Statement of financial interests.

(5) The name and address of any person who is the direct or indirect source of income totalling in the aggregate of \$500 or more. However, this provision shall not be construed to require the divulgence of confidential information protected by statute or existing professional codes of ethics.

(6) The name and address of any person from whom a gift or gifts valued in the aggregate at \$200 or more were received, and the value and the circumstances of each gift. However, this provision shall not be applicable to gifts received from the individual's spouse, parents, parents by marriage, siblings, children or grandchildren.

As can be observed from above, public officials and employees must report on their Statements of Financial Interests any person who is the direct or indirect source of income totalling in the aggregate of \$500 or more or any person from whom a gift is received. The definitional section of the State Ethics Act provides the definition of person as:

Section 2. Definitions.

"Person." A business, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons. 65 P.S. 402.

A question has recently been raised, based upon the foregoing, regarding whether a person has to list, on a Statement of Financial Interests, income and gifts received from a governmental body. As can be clearly observed, the term person, as delineated above, does not make reference or include any governmental entity. The definitional sections of the State Ethics Act provides for governmental body as a separate definition. As such, individuals would apparently not have to report income received from governmental bodies. This, of course, would defeat the entire purpose of the State Ethics Act. One of the primary elements of the filing requirement is to determine whether public officials have received income other than the compensation that is provided for by law. The Financial Interests Statement was an attempt to determine if individuals had received income from other governmental bodies or from their own governmental body on other matters.

V. SECTION 7 - DUTIES OF THE COMMISSION

A. Recommendation: The State Ethics Act should be amended to include the following provision as part of the duties of the Commission:

7(9)(v) To issue orders relating to investigations initiated pursuant to section 8, outlining the alleged violation of the Act, findings of fact and conclusions of law. Said orders may include recommendations to law enforcement officials as provided in section 7(II). Any order finding that a public official has obtained a financial gain in violation of the Act may require the restitution of that gain with interest to the appropriate governmental body. The State Ethics Commission or the Office of Attorney General shall have jurisdiction to apply to the Commonwealth Court of Pennsylvania seeking enforcement of an order requiring such restitution. The restitution requirement as set forth above shall be in addition to any other penalties provided for in this act.

Background: The prohibition upon the receipt of an unwarranted financial gain by a public official/employee is the focal point of the Ethics Act. A governmental body that has suffered a loss as a result should be entitled to restitution. Additionally, a public official/employee should not be permitted to retain public funds received in violation of the law. Long standing judicial precedent supports this concept. Allegheny County v. Grier, 179 Pa. 639, 36 A.2d 353, (1897); Kestler Appeal, 66 Pa. Commw. Ct. 1, 444 A.2d 761, (1982); McCutcheon v. State Ethics Commission, 77 Pa. Commw. Ct. 529, 466 A.2d 283, (1983). The Act, however, while obviously intending to codify this principle fails to provide clear language so stating. Also, this provision in many cases would offer a public official/employee the opportunity to avoid the more severe criminal penalties of the Act where appropriate.

B. Recommendation: Section 7(9)(iii) of the Act should be amended to provide as follows:

(iii) Initiate an inquiry where an opinion has not been requested but where there is a reasonable belief that a conflict may exist. Such inquiry shall be conducted in privacy with full respect to the confidentiality of all the parties involved in the alleged conflict. If the commission finds that there is a conflict, the information shall be provided for criminal proceedings unless the alleged offender removes himself from the conflict without receiving financial gain.

Background: In relation to Section 407 (9)(iii), that provision of the Act provides as follows:



Section 7. Duties of the commission.

(iii) Initiate an inquiry where an opinion has not been requested but where there is a reasonable belief that a conflict may exist. Such inquiry shall be conducted in privacy with full respect to the confidentiality of all the parties involved in the alleged conflict. If the commission finds that there is a conflict, the information shall be provided for criminal proceedings unless the alleged offender removes himself from the conflict with receiving financial gain. 65 P.S. 407(iii).

It appears as though when originally enacted the word out was omitted from the last line of that definition. As it now reads the provision of law provides that unless the alleged offender removes himself from the conflict with receiving financial gain. It is believed that the General Assembly intended that word to be without and that the phrase should read "unless the alleged offender removes himself from the conflict without receiving financial gain".

VI. AMENDMENT TO CONFIDENTIAL ACCESS STATUTE

A. Recommendation: The Statute allowing certain agencies to petition the Commonwealth Court of Pennsylvania in order to obtain access to confidential information be amended so as to accord the State Ethics Commission authority to employ this procedure. See, 42 Pa. C.S.A. §8721. Specific language will not be set forth herein, however, the Commission will provide a recommended amendment at the appropriate time.

Background: The State Ethics Commission, in addition to being an administrative agency, performs an investigative function. In this respect the Commission has been given broad-braced investigative powers including the power to issue subpoenas and gather evidence. During the course of many Commission investigations, the Commission is called upon to obtain various documents and information from other governmental bodies. There are occasions when such information is withheld from the Commission on the basis that it is statutorily confidential or otherwise protected. The Commission, for example, has the requirement of monitoring Statements of Financial Interests and investigating alleged violations in relation to Statements of Financial Interests. It would be extremely beneficial to the Commission to have access, for example, to corporate tax returns in order to determine if individuals have received income in excess of \$500 from corporations in which they have listed a financial interests. Corporate tax returns, however, are confidentially protected by statute. Similarly, the Commission has on occasion been required to obtain information contained in personnel files regarding the conduct of public employees insofar as it may have violated the State Ethics Act. Once again, this type of information has been withheld from the Commission as confidential. One remedy to the above situation would be to issue subpoenas for said information. The subpoena, however, does not negate the confidentiality of said material which may still be used as a valid

defense to the dissemination thereof. It would appear, however, that another remedy is available to the State Ethics Commission but would require legislative amendments to the Pennsylvania Judiciary Code. Specifically, 42 Pa. C.S.A. Section 8721, (the Confidential Access Statute), allows certain investigative agencies access to information which is held by another governmental agency and which is confidential in nature. This statute provides for a complete procedure and further provides for the continued confidentiality of certain information.