

1980 WL 120670 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 12, 1980

*1 G. P. Callison, Esquire
Greenwood County Attorney
Post Office Box 1115
Greenwood, South Carolina 29646

Dear Mr. Callison:

In response to your request for an opinion from this Office concerning the propriety of a Greenwood County Council member participating in a Council hearing to review the dismissal of a county employee by a county official related by marriage to the Council member, I can advise you as follows:

1. The authorities state that:

Certain agencies, officers, or bodies come within the term 'administrative agencies' to some extent in regard to particular functions or for particular purposes although for most purposes they are not administrative agencies but are legislative, executive, or judicial officers or bodies. When such bodies or officers act in an administrative capacity they suffer the limitations of administrative agencies. This is true in regard to particular powers exercised by local governing bodies, such as . . . county commissioners, . . . 1AM.JUR.2d Administrative Law § 58 at 856.

Although an administrative agency cannot possibly be under stronger constitutional compulsions in respect to disqualification than a court, the common-law rule of disqualification applicable to judges extends to every tribunal exercising judicial or quasi-judicial functions. The rule has been applied or recognized in cases of . . . removal of officers, . . . An express statutory requirement of disinterestedness is not necessary to the application of the rule, for such statutes are mainly declaratory of the common law, and where the statute does prescribe certain qualifications of disinterestedness, it is not necessarily inconsistent with, and may be held not to exclude, the broader qualifications of the common-law rule. Id., § 63 at 860.

An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to sit in a proceeding . . . where he is related to an interested person within the degree prohibited by statute, . . . An interest to disqualify an administrative officer acting in a judicial capacity may be small, but it must be an interest direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical There is some indication that bias must be such as to render a tribunal incapable of fair judgment. Id., § 64 at 860-61.

2. Canon 3 of the South Carolina Code of Judicial Conduct provides in part as follows:

A judge should perform the duties of his office impartially and diligently . . . In the performance of these duties, the following standards apply:

C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

*2 (i) is a party to the proceeding, . . . Rule 33 Code of Judicial Conduct, Vol. 22, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, (Cum.Supp.).

Inasmuch as a relationship by marriage to a party in a proceeding before him is a disqualifying ground for any judge of this State, it may very well be that the same relationship would disqualify a public official sitting in a quasi-judicial capacity such as reviewing an employee dismissal.

3. If the Council member concerned does not disqualify himself, then the authorities state:

Disqualification of an administrative officer can have no effect if he was not present and did not take part in the determination assailed, but the disqualification furnishes ground for compelling the officer to recuse himself from sitting in the proceeding if he does not voluntarily retire, or for prohibition against proceeding by a board one member of which is disqualified.

Participation in a determination by one disqualified member of a tribunal of three affects the action of the whole body. It is generally held that if a disqualified member of an administrative agency participates in the hearing and determination it makes the decision void or voidable at the instance of a party aggrieved who has made timely protest, even though his presence was not required to constitute a quorum, or a majority of the board could have acted legally without him.

A determination made or participated in by a disqualified officer is merely voidable where only the common-law rule as to disqualification is violated and the proceeding is reviewable, but if participation by a disqualified officer is prohibited by statute, the determination is void.

Where a determination is only voidable by reason of disqualification, the irregularity may be waived by failure to object, or by taking part in the proceedings with knowledge of the fact. 1AM. JUR.2d Administrative Law § 68 at 863.

With kind regards,

Karen LeCraft Henderson
Senior Assistant Attorney General

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