RECEIVED
Aug 25 2026
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ETHICS COMMISSION

F. Xavier Starkes, Appellate Panel Chair

Complaint Nos.: C2021-078
C2023-129

Appellate Case No.: 2025-002308

South Carolina State Ethics Commission ..... Respondent

v.

Lancer Shull ..... Appellant.

FINAL BRIEF OF APPELLANT LANCER SHULL

Respectfully submitted,
DAVIS FRAWLEY, LLC

/s/ James Randall Davis
James Randall Davis, Esquire
SC Bar No.: 1580
Post Office Box 489
Lexington, SC 29071
Tel: 803-359-2512
ATTORNEY FOR APPELLANT

Other Counsel of Record:
Courtney M. Laster, Esquire
General Counsel
South Carolina Ethics Commission
201 Executive Center Drive, Suite 150
Columbia, SC 29210
Email: claster@ethics.sc.gov

Table of Contents

Table of Contents..... i

Table of Authorities..... iii

Statement of Issues on Appeal..... 1

Did the full commission err in finding that any excess reimbursement under a non-accountable *per diem* was not incidental and was therefore not excluded from the definition of "economic interest" under section 8-13-100(11)(b) of the South Carolina Code?

Did the Full Commission err in interpreting section 8-13-700(B) to be in derogation of common law?

Did the Full Commission err in finding that Appellant's voting to reappoint himself to the JMWSC with an unaccountable *per diem* plan was an ethical violation where no other state has found a two hundred fifty dollar nonaccountable *per diem* violates any ethical?

Did the Full Commission err in finding the JMWSC is "separate and distinct" from the governing bodies of the towns and county which appoint its commissioners?

Did the Full Commission err in drawing a false distinction between the receipt of a *per diem* under section 6-25-60(c) and its regulation of the behavior of public officials, where the *per diem* did not confer a taxable "economic benefit" or interest under either South Carolina or federal law?

Did the Full Commission err in ruling that the "profession, occupation or large class" exception of section 8-13-100(11)(b) did not apply where Appellant's "occupation" was being a Commissioner on the JMWSC?

Statement of the Case..... 1

Standard of Review..... 5

Argument.....

I. The Commission Erred In Finding That Any Excess Reimbursement Under A Non-Accountable *Per Diem* Was Not Incidental And Was Therefore Not Excluded From The Definition of "Economic Interest" Under Section 8-13-100(11)(b) of the South Carolina Code..... 6

II. The Full Commission Erred In Interpreting Section 8-13-700(B) To Be In Derogation of Common Law..... 10

III. The Full Commission Erred In Finding That Appellant's Voting To Reappoint Himself To The JMWSC With An Unaccountable *Per Diem* Plan Was A Criminally Sanctionable Ethical Violation Where No Other State Has Found A Two Hundred Fifty Dollar Nonaccountable Per Diem Violates Any Ethical Rule..... 11

IV. The Full Commission Erred In Finding That Even Though Lancer Shull Was Ex-Officio, He Was Still In Violation Of The Ethics Statute..... 14

V. The Full Commission Erred In Drawing A False Distinction Between The Receipt Of A *Per Diem* Under Section 6-25-60(C) And Its Regulation Of The Behavior of Public Officials, Where The *Per Diem* Did Not Confer A Taxable "Economic Benefit" Or Interest Under Either South Carolina Or Federal Law..... 16

VII. The Full Commission Erred In Ruling That The "Profession, Occupation or Large Class" Exception Of Section 8-13-100(11)(b) Did Not Apply Where Appellant's "Occupation" Was Being A Commissioner On JMWSC..... 19

Conclusion..... 20

Table of Authorities

Cases

Archambault v. Sprouse, 218 S.C. 500, 63 S.E.2d 459 (S.C. 1951)..... 7

Crosby v. Glasscock Trucking Co., 340 S.C. 626,
532 SE 2d 856 (S.C. 2000)..... 11

Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (S.C. 2004)..... 10

Grier v. AMISUB of South Carolina, 397 S.C. 532,
725 SE 2d 693 (S.C. 2012)..... 11

Horton v. Vaughn, 309 S.C. 383, 423 SE 2d 543 (S.C. Ct. App. 1992),
overruled on other grounds by Joiner v. Rivas, 342 S.C. 102,
536 S.E.2d 372 (S.C. 2000)..... 6, 7

Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (S.C. 2000)..... 7, 18

Lexin v. Superior Court, 47 Cal. 4th 1050, 222 P.3d 214,
103 Cal. Rptr. 3d 767 (Ca. 2010)..... 11

State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 354, (S.C. 1994)..... 11

Statutes

South Carolina

S.C. Code Ann. §1-23-380 (2025)..... 5

S.C. Code Ann. § 1-23-380(5) (2025)..... 6

S.C. Code Ann. § 6-25-60(C) (2025)..... 1, 3, 4, 16, 17, 18

S.C. Code Ann. § 8-13-100(4) (2025)..... 15

S.C. Code Ann. § 8-13-100(21) (2025)..... 15

S.C. Code Ann. § 8-13-100 (B) (2025)..... 4

S.C. Code Ann. § 8-13-100(11)(a) (2025)..... 6, 7, 16

S.C. Code Ann. § 8-13-100(11)(b) (2025)..... 1, 6, 19

S.C. Code Ann. § 8-13-100(11)(b) (2025)..... 1

S.C. Code Ann. §8-13-320(l)(i) (2025)..... 4, 5

S.C. Code Ann. § 8-13-320(9)(m) (2025)..... 6

S.C. Code Ann. § 8-13-700 (2025)..... 4, 15

S.C. Code Ann. § 8-13-700(A)..... 3, 9

S.C. Code Ann. § 8-13-700(B) (2025)..... 1, 3, 4, 5, 6, 8, 9, 10, 13, 14, 19

S.C. Code Ann. § 8-13-700(B)(4) (2025)..... 5

Other Jurisdictions

Ala. Code § 36-25-1 *et seq.* (West 2023)..... 11

Alaska Stat. Ann. § 24.60.010 *et seq.* (West 2023)..... 12

Colo. Rev. Stat. § 24-18-102 *et seq.* (West 2023)..... 12

Conn. Gen. Stat. § 1-79 *et seq.* (West 2023)..... 12

Del. Code Ann. Tit. 29 § 5901 *et seq.* (West 2023)..... 12

Fla. Stat. Ann. § 112.312 *et seq.* (West 2023)..... 12

Ga. Code Ann. § 45-10-1 *et seq.* (West 2023)..... 12

Haw. Rev. Stat. § 84-3 *et seq.* (West 2023)..... 12

Ind. Code Ann. § 4-2-6-1 (West 2023)..... 12

Iowa Code Ann. § 68B.2 *et seq.* (West 2023)..... 12

Kan. Stat. Ann. § 46-217 (West 2023)..... 12

Ky. Rev. Stat. Ann. § 6.611(11) (West 2023)..... 12

Me. Rev. Stat. Ann. Tit. 1 § 1012 *et seq.* (West 2023)..... 12

Md. Code Ann. General Provisions § 5-101 *et seq.* (West 2023)..... 12

Mass. Gen. Laws. Ann. ch. 268B § 1 *et seq.* (West 2023)..... 12

Minn. Stat. Ann. § 10A.09 *et seq.* (West 2023)..... 11

Miss. Code Ann. § 25-4-103 *et seq.* (2023)..... 12

Mo. Re. Stat. § 105.452 *et seq.* (2023)..... 12

N.M. Stat. Ann. § 10-16-2 *et seq.* (West 2023)..... 12

N.C. Gen. Stat. Ann. § 138A-3 *et seq.* (West 2023)..... 12

65 Pa. Stat. Ann. § 1102 *et seq.* (West 2023)..... 12

Va. Code Ann. § 2.2-3101 *et seq.* (West 2023)..... 12

Other Authorities

63C Am.Jur.2d Public Officers and Employees § 262 (2018)..... 10

BLACK'S LAW DICTIONARY 65 (2nd Pocket Ed. 2001)..... 7

BLACK'S LAW DICTIONARY 338 (2nd Pocket Ed. 2001)..... 6

BLACK'S LAW DICTIONARY 523 (2nd Pocket Ed. 2001)..... 7, 17

Noel, Jim; Leonard Sanchez; Stuart Bluestone; Kathy McCoy; Brad Winter; and John Carey. *"Subcommittee Report on the Establishment of a State Ethics Commission."* (N. M. Aug. 29, 2006) *https://digitalrepository.unm.edu/law_service_ethicsreform/28*..... 13, 18

Statement of Issues on Appeal

1. Did the full commission err in finding that any excess reimbursement under a non-accountable *per diem* was not incidental and was therefore not excluded from the definition of "economic interest" under section 8-13-100(11)(b) of the South Carolina Code?

2. Did the Full Commission err in interpreting section 8-13-700(B) to be in derogation of common law?

3. Did the Full Commission err in finding that Appellant's voting to reappoint himself to the JMWSC with an unaccountable *per diem* plan was an ethical violation where no other state has found a two hundred fifty dollar nonaccountable *per diem* violates any ethical rule?

4. Did the Full Commission err in finding that even though Lancer Shull was *ex-officio*, he was still in violation of the Ethical Statute?

5. Did the Full Commission err in drawing an erroneous distinction between the receipt of a *per diem* under section 6-25-60(c) and its regulation of the behavior of public officials, where the *per diem* did not confer a taxable "economic benefit" or interest under either South Carolina or federal law?

6. Did the Full Commission err in ruling that the "profession, occupation or large class" exception of section 8-13-100(11)(b) did not apply where Appellant's "occupation" was being a Commissioner on the JMWSC?

Statement of the Case

Joint Municipal Water and Sewer Commission (hereinafter "JMWSC") is comprised of representatives from the surrounding towns and Lexington County. The elected county and town governing bodies appoint their own representatives, overwhelmingly from among their own elected officials to the Joint Commission. (R. p. 85)

Appellant Lancer Shull is the mayor of the Town of Batesburg-Leesville, South Carolina. (R. p. 121). He was appointed to be the Commissioner for the Town of Batesburg-Leesville by vote of town council in 2018. (R. p. 122) He participated in the vote for his reappointment to the JMWSC on January 13. 2020 and again on January 21, 2020, when he was reappointed by a margin of 7 to 2. He again participated in voting for his reappointment in December of 2023, when he was reappointed by a margin of 6 to 2. (R. p. 76). Appellant Lancer Shull testified that he voted

for his reappointment to the JMWSC Commission because of the Commission's ability to assist the town of Batesburg-Leesville as to required actions by DHEC. (R. p. 124). The JMWSC was created pursuant to Statute 6-25-5, et seq.

The meetings of the JMWSC begin at 5:30 pm on the second Wednesday of the month in Lexington and require Commissioners to travel from different areas. (R. p. 87). In 2018, Appellant attended all regular meetings of the JMWSC. In 2019, Appellant attended 9 regular meetings; the meetings for March and July were not held and Appellant did not attend the April meeting. (R. 9 p. 188). In 2020, during COVID, six meetings were held, many virtually (R. p. 87); Appellant attended all meetings. (R. p. 188). In 2021, eight meetings were held; the April, June, July, and December meetings were not held and Appellant did not attend the August meeting. In 2022, the March, April, June, July, October, and December meetings were not held; Appellant attended all meetings that were held. In 2023, the April, June, August, and December meetings were not held; Appellant attended all meetings. (R. p. 189).

In addition to the monthly meetings of the JMWSC, Commissioners have other duties during the month that require travel, according to John "Jay" Nicholson, the General Manager and Chief Executive Officer of the JMWSC. These duties ***include*** traveling to the offices of attorneys and consulting firms. (R. p. 99).

Lancer Shull stated that when he first joined JMWSC, during the height of negotiations by Mayor Shull on the town of Batesburg-Leesville's water contract with Joint Municipal, he spent upwards of 15 hours per week meeting with architects, meeting with engineers, meeting with Mr. Nicholson, meeting with other mayors. He currently spends 3 to 4 hours per week in addition to the regular monthly meetings. (R. p. 129).

Pursuant to section 6-25-60 of the South Carolina Code, commissioners receive a *per diem* of $250 ***per month*** to reimburse them for all expenses incurred while serving on the JMWSC. (R. p. 88).

The ***monthly*** *per diem* of $250 was adopted before Appellant Lancer Shull was appointed as Commissioner for the Town of Batesburg-Leesville.

On September 8, 2021 a Complaint against the Appellant having Complaint No. C2021-078 (R. p. 41) was filed with the Commission and on October 19, 2023 a Complaint against the Appellant having Complaint No. C2023-129 (R. p. 50) was filed the Commission alleging six (6) counts against Lancer Shull alleging violations of section 8-13-700(B) of the South Carolina Code. Specifically, the counts allege that on January 13, 2020, January 21, 2020, and December 11, 2023 Appellant Lancer Shull voted to reappoint himself to the Joint Water and Sewer Commission and thereby received an "economic benefit" in the form of a *per diem.* The Appellant filed a Response to Respondent to Notice of Hearing and Complaint C2021-078 (R. p. 47) on July 5, 2023 in Complaint No. 2021-078 and an Amended Response to Respondent to Notice of Hearing of Complaint was filed. The Appellant also filed a Response to Respondent to Notice of Hearing and Complaint C2023-129 (R. p. 55) on February 19, 2025.

A hearing was held before a three-member panel on February 20, 2025. (R. p. 58). Appellant contended in its Brief and argument during the hearing: (1) a federally approved *per diem* does not provide an "economic benefit" to the recipient and is therefore not an "economic interest" under section 8-13-700(A); (2) no other state with similar ethics laws has found that receipt of federally approved *per diem* is an "economic interest" and other jurisdictions use flat rate nonaccountable *per diem* of $250; (3) the JMWSC is not an "affiliated business" in which Appellant had an "interest;" and (4) the JMWSC was not "separate and distinct" from the counties that created it, and therefore there could be no conflict of interest under section 8-13-700(B). On

March 7, 2025, the panel issued its decision indicating: "Lancer Shull is in violation of six (6) counts of Section 8-13-700(B) as outlined in the Notice of Hearing. (R. p. 1). Specifically, the Panel finds Respondent in violation of three (3) counts of Section 8-13-700(B) for his attempts to influence a governmental decision in which he had an economic interest in by participating in either discussions or votes related to his reappointment to the JMWSC during Council meetings held on January 13, 2020, January 21, 2020, and December 11, 2023. The Panel further finds written recusal statements regarding his reappointment to the JMWSC during January 13, 2020, January 21, 2020, and December 11, 2023 Council meetings. THEREFORE, pursuant to Section 8-13-320(l)(i) of the Ethics Act, the Panel hereby issues a Public Reprimand and orders Respondent to pay a reduced civil penalty of $300 ($50.00 for each count); AND Pursuant to Section 8-13-130 of the Ethics Act, and in addition to the reduced civil penalty, the Panel hereby orders Respondent to pay an administrative fee of $1,000.00 ($700.00 for C2021-078 and $300.00 for C2023-129), making Respondent's total amount owed to the Commission $1,300.00. (R. p. 1). Appellant filed a timely appeal of the decision.

A hearing was held before the full commission on July 17, 2025. (R. p. 145). Appellant contended in its Brief and argument during the hearing: (1) the Complainant failed to carry its burden of proof in the hearing before the three member panel; (2) Section 6-25-60(C) specifically allows the receipt of *per diem,* does not prohibit nonaccountable, IRS approved, flat rate *per diem* and therefore receipt of a nonaccountable flat rate *per diem* is not an "economic interest" under section 8-13-60(C); (3) Section 8-13-700 does not go beyond the common law, under which a conflict of interest only exists where the public official has a private interest in contracts with the government, which is not present in this case; (4) the *per diem* is not an "economic interest" under the exemptions of section 8-13-100(B);(5) no other state with similar ethics laws has found that receipt of federally approved *per diem* is an "economic interest" and other jurisdictions use flat

rate nonaccountable *per diem* of $250; and (6) section 8-13-700(B) of the South Carolina Code does not apply to the vote of a town council appointing a council member to serve on a water and sewer commission with a *per diem* where the sewer commission was not an affiliated business and barring council members from voting would produce an absurd result.

By Order dated October 1, 2025 the Full Commission affirmed the ruling of the three-member panel and stated "[T]he Commission finds Respondent was not permitted to participate in discussions and/or votes related to his appointment or removal from JMWSC. (R. p 29). In addition, the Commission finds that Respondent was required to recuse himself pursuant to Section 8-13-700(B)(4) when such matters came before him on Town Council. THEREFORE, pursuant to Section 8-13-320(l)(i) of the Ethics Act, the Commission hereby issues a Public Reprimand and order Respondent to pay a reduced civil penalty of $300.00 ($50.00 for each count); AND, pursuant to Section 8-13-130 of the Ethics Act, and in addition to the civil penalty, the Commission hereby order Respondent to pay an administrative fee of $1,000.00, making Respondent's total amount owed to the Commission $1,300.00". Appellant filed a timely appeal of the ruling of the Full Commission. (R. p. 29).

Standard of Review

Pursuant to section 1-23-380 of the South Carolina Code the Court of Appeals "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or

capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

S.C. Code Ann. § 1-23-380(5) (2025). *See* S.C. Code Ann. § 8-13-320(9)(m) (2025).

Argument

I. The Commission Erred In Finding That Any Excess Reimbursement Under A Non-Accountable *Per Diem* Was Not Incidental And Was Therefore Not Excluded From The Definition of "Economic Interest" Under Section 8-13-100(11)(b) of the South Carolina Code.

Section 8-13-700(B) of the South Carolina Code provides, in part:

> (B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has an ***economic interest.***
> S.C. Code Ann. § 8-13-700(B) (2025)(emphasis added)

Section 8-13-100(11)(a) defines "economic interest," providing:

> (a) "Economic interest" means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an ***economic benefit*** of fifty dollars or more. S.C. Code Ann. § 8-13-100(11)(a) (2025).

Excluded from the definition of "economic benefit" are benefits that are "incidental." Section 8-13-100(11)(b) of the South Carolina Code provides:

> (b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision *if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is* ***incidental*** *to the public official's, public member's, or public employee's position* or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class. S.C. Code Ann. § 8-13-100(11)(b) (2025).

The word "incidental" is not defined by the South Carolina Code. "The term "incidental" has been defined as "subordinate to something of greater importance; having a minor role." BLACK'S LAW DICTIONARY 338 (2nd Pocket Ed. 2001). *See also* Horton v. Vaughn, 309 S.C. 383,

387, 423 SE 2d 543, 545 (S.C. Ct. App. 1992), *overruled on other grounds by* Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (S.C. 2000)("The word 'incidental' generally means 'depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.'"); Archambault v. Sprouse, 218 S.C. 500, 507, 63 S.E.2d 459, 462 (S.C. 1951)(*quoted in* Horton – involving interpretation of what was "incidental" to use of main residence).

It is beyond question that a *per diem* which reimburses ***actual*** expenses incurred, supported by receipts, is ***NOT*** a "benefit," let alone the "economic benefit" required by the definition of "economic interest" in section 8-13-100(11)(a). A benefit is an "1. Advantage; privilege; 2. Profit or gain." BLACK'S LAW DICTIONARY 65 (2nd Pocket Ed. 2001). A *"per diem,"* according to BLACK'S LAW DICTIONARY, is: "1. A monetary daily allowance, usu. to cover expenses. 2. A daily fee." BLACK'S LAW DICTIONARY 523 (2nd Pocket Ed. 2001). A *per diem* is typically paid daily; the phrase literally means "per day.' Reimbursement of expenses does not provide an advantage, a profit, or a gain to a member of a Joint Municipal Water and Sewer Commission.

While it is undisputed that a *per diem* reimbursing actual expenses supported by submitted receipts is not an "economic interest," federal law recognizes ***two*** types of *per diem* plans: (1) an accountable plan under which an employee submits receipts to his employer and is reimbursed; and (2) an unaccountable or nonaccountable *per diem* plan, under which an employee is paid a small ***flat rate*** per day set by the IRS. The payment of this flat rate is considered ***proof that the expenses were incurred*** by the IRS. There is no factual dispute as to whether the JMWSC nonaccountable *per diem* was completely in compliance with federal law and IRS regulations. It was.

This Court should reverse the Commission and find: (1) the purpose of the *per diem* was for reimbursement and not as a "payment" for work done on the JMWSC; and (2) any "benefit"

received from excess reimbursements of mileage and expenses is purely "incidental" to the main purpose of the *per diem* - reimbursement of expenses.

Similarly, the payments received under a nonaccountable plan are also reimbursement and ***NOT*** payment for "services rendered" or "employment" as a member of the JMWSC. Due to the small size of the payment, in this case $250 per month, the payment ***itself*** is considered ***proof*** that the ***expenses were incurred*** under IRS regulations. The purpose of a nonaccountable plan is clearly for reimbursement.

The Full Commission, in its Order, did not ***directly*** address the issue of whether a nonaccountable IRS *per diem* is proper for purposes of section 8-13-700(B), nor could it; there is ***no law*** in South Carolina forbidding nonaccountable *per diem* plans which satisfy the requirements of federal law. Rather, the Full Commission found that it was an "economic interest" conferring an "economic benefit" of more than fifty dollars because Appellant was entitled to receive the *per diem* "without regard to meeting attendance."

This is exactly what happens, however, in a nonaccountable IRS approved *per diem*; the *per diem* received is modest and limited by IRS regulations with the understanding that on some months it may over reimburse and on other months it will under reimburse. The *effect* of the ruling is to ban IRS approved nonaccountable *per diem* plans whose purpose is to defray an employee's expenses.

The order focuses on the fact that Appellant received the *per diem* during COVID and on two other occasions when he did not attend monthly meetings in person, and that therefore there was an "economic interest" during these months. This argument completely ignores unconverted testimony by John "Jay" Nicholson, the General Manager and Chief Executive Officer of the JMWSC that Appellant's duties ***include*** traveling to the offices of attorneys and consulting firms. He stated that the ***monthly*** *per diem* was intended to cover all expenses – mileage, lodging, food

and incidentals. Appellant also testified that when he first joined the JMWSC, during the height of negotiations on the water contract with Joint Municipal, he spent upwards of 15 hours per week meeting with architects, meeting with engineers, meeting with Mr. Nicholson, meeting with other mayors. Appellant testified he currently spends 3 to 4 hours per week in addition to the regular monthly meetings. His testimony was also uncontroverted. The *per diem* applied to all of Appellant's duties; it did not only apply to once monthly meetings of the JMWSC.

The Order of the Full Commission is based on an erroneous factual premise; the undisputed testimony is that at least part of each month's *per diem* was for reimbursement of expenses related to duties other than attendance of meetings. It is also undisputed that, because of its small size, the *per diem* on some months over-reimbursed and on others under-reimbursed, but its purpose always remained the same: reimbursement of expenses.

It is worth noting that the benefit of "fifty dollars or more" requirement of section 8-13-700(A) is ***NOT*** a part of the exemption of section 8-13-700(B); an "incidental' benefit does not have to be less than fifty dollars. The incidental benefit of section 8-13-700(B) can fluctuate and be an indefinite amount, so long as the benefit is secondary to a primary permitted purpose. This Court should find that the primary purpose of an unaccountable, IRS approved *per diem* is to reimburse expenses incurred. The Court should further find that any over-reimbursement on a given month is merely "incidental" to a valid, legitimate purpose. This Court should find that any over-reimbursement up to the IRS approved non-accountable *per diem* of $250 per month falls under the "incidental" exception of section 8-13-700(B) of the South Carolina Code.

II. The Full Commission Erred In Interpreting Section 8-13-700(B) To Be In Derogation of Common Law.

"[A] statute is not to be construed in derogation of common law rights if another interpretation is reasonable." Doe v. Marion, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (S.C. 2004). A statute in derogation of common law must be strictly construed. Id.

In general, under the common law:

> A public official may not use his official power to further his own interest and is not permitted to place himself in a position that will subject him to conflicting duties -- that is in a position where the official's private interest conflicts with his public duty -- or cause the official to act, or expose the official to the temptation of acting, in any manner other than in the best interests of the public
> ********
> Under the principle prohibiting conflicts of interest, public officers may not contract with the public agency which they represent or have a private interest in its contracts. Also, an officer cannot lawfully act as the agent of one person where the private agency will come in conflict with his or her official duties; to act for one of the parties implies an interest adverse to the other. 63C Am.Jur.2d *Public Officers and Employees* § 262 (2018).

Section 8-13-700(B) codifies the common law rule. It provides that a public official may not contract with the public agency on which they serve to provide goods or services. Section 8-13-700(B) provides, in part that a public official may not have an interest ***"in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services"*** in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more." Section 8-13-700(B) codifies a long-standing common-law principle barring public officials from voting for contracts under which they provide goods or services to the agency, thereby providing a personal benefit to the official or his company.

Appellee has contended that the phrase ***"in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services"*** was intended to include "public service" on a state agency and thereby forbid a public official from voting to appoint himself to a subcommittee or alter ego agency which offers a *per diem* to reimburse expenses. The Appellee's

position is contrary to the common law, which only forbade conflicts between the public official's independent, private interests in contracts with the government for the provision of goods or services. The phrase ***"in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services"*** however, does not evince a "clear intent" to change the common law rule. *See e.g.* Grier v. AMISUB of South Carolina, 397 S.C. 532 , 536, 725 SE 2d 693, 696 (S.C. 2012); Crosby v. Glasscock Trucking Co., Inc., 340 S.C. 626, 628, 532 SE 2d 856, 856-57 (S.C. 2000). It does not, contrary to Appellee's position, dramatically expand the common law by providing that a public official, voting to reappoint himself to an "alter ego" agency with a *per diem* that reimburses him for expenses he has personally paid.1 This Court should reverse the ruling of the Full Commission.

III. The Full Commission Erred In Finding That Appellant's Voting To Reappoint Himself To The JMWSC With An Unaccountable *Per Diem* Plan Was AN Ethical Violation Where No Other State Has Found A Two Hundred Fifty Dollar Nonaccountable Per Diem Violates Any Ethical Rule.

State Ethics laws vary widely from state to state. Minnesota, for example, has a list of activities that must be reported. Minn. Stat. Ann. § 10A.09 *et seq.* (West 2023). Alabama's statute uses the term "economic interest," but does not define it. Ala. Code § 36-25-1 *et seq.* (West 2023). West Virginia's statute uses the term "thing of value." W.Va. Code Ann. § 6B-2-5 *et seq.* (West

1 Other states have similarly held that their version of the Ethics Act simply codifies common law, and is not in derogation of it. *See, e.g.* Lexin v. Superior Court, 47 Cal. 4th 1050, 1072, 222 P.3d 214, 228, 103 Cal. Rptr. 3d 767, 784 (Ca. 2010) (the statute "codifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities.") The California Act and the South Carolina Act have similar purposes. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 354 (S.C. 1994)("the purposes of the Act include the fostering of public trust and confidence in government, and the promotion of the integrity of government through openness."); Lexin, 222 P.3d at 229 ("The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality.")

2023). Alaska uses the term "financial interest." Alaska Stat. Ann. § 24.60.010 *et seq.* (West 2023). *See* Colo. Rev. Stat. § 24-18-102 *et seq.* (West 2023); Conn. Gen. Stat. § 1-79 *et seq.* (West 2023); Del. Code Ann. Tit. 29 § 5901 *et seq.* (West 2023); Fla. Stat. Ann. § 112.312 *et seq.* (West 2023); Ga. Code Ann. § 45-10-1 *et seq.* (West 2023); Haw. Rev. Stat. § 84-3 *et seq.* (West 2023); Iowa Code Ann. § 68B.2 *et seq.* (West 2023); Me. Rev. Stat. Ann. Tit. 1 § 1012 *et seq.* (West 2023); Md. Code Ann. General Provisions § 5-101 *et seq.* (West 2023); Mass. Gen. Laws. Ann. ch. 268B § 1 *et seq.* (West 2023); Miss. Code Ann. § 25-4-103 *et seq.* (2023); Mo. Re. Stat. § 105.452 *et seq.* (2023); N.M. Stat. Ann. § 10-16-2 *et seq.* (West 2023); N.C. Gen. Stat. Ann. § 138A-3 *et seq.* (West 2023); 65 Pa. Stat. Ann. § 1102 *et seq.* (West 2023); Va. Code Ann. § 2.2-3101 *et seq.* (West 2023).

Three states employ similar definitions the definition of "economic interest" in South Carolina's statute. Kentucky's statute uses the term "Economic Interest," which is defined as "an interest distinct from that of the general public in a state purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a legislator may gain an economic benefit of fifty dollars ($50) or more." Ky. Rev. Stat. Ann. § 6.611(11) (West 2023). Indiana's statute defines "Financial Interest" as "an interest: (A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or (B) involving property or services." Ind. Code Ann. § 4-2-6-1 (West 2023). Kansas' statute defines "Economic Opportunity" as "any purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services wherein a state officer or employee or candidate for state office may gain a personal economic benefit, but not including any gift." Kan. Stat. Ann. § 46-217 (West 2023).

No court in any of these states has found that a *per diem* is an "economic interest," a "financial interest," or an "economic opportunity" under their state's ethics law, or that participating in an election to a state board or commission that reimburses its members for travel

expenses through a *per diem* is an ethical violation. No Ethics Commission in any of these states has issued any Advisory Opinion or Order finding an ethical violation. Under these circumstances, it would be unfair and unjust to sanction Appellant for voting at a council meeting.

Other states have adopted a $250 *per diem* for the daily expenses of its officials. New Jersey, Delaware, Iowa, Mississippi, Missouri, Nevada Ohio, Pennsylvania, and Rhode Island all use a $250 *per diem* or per meeting. Noel, Jim; Leonard Sanchez; Stuart Bluestone; Kathy McCoy; Brad Winter; and John Carey. *"Subcommittee Report on the Establishment of a Commission."* at 8 (N. M. Aug. 29, 2006). *https://digitalrepository.unm.edu/law_service_ethicsreform/28.*

This Court should find that monthly *per diem* of $250 cannot serve as a basis for a violation of section 8-13-700(B). Many states have adopted either a per day or per meeting *per diem* of $250 in accordance with IRS regulations. The JMWSC has adopted a ***monthly*** per diem of $250 to cover meetings and other duties. Jay Nicholson stated at the hearing before the three Commissioner Ethics Panel that these other duties include going to the offices of attorneys and consulting firms. Compared to the $250 *per diem* of other states, awarded either on a per day or per meeting basis, the $250 ***monthly*** *per diem* of the JMWSC is modest and in line with the *per diem* of other states.

This Court should reverse the Full Commission and find that Appellant's voting to reappoint himself to the JMWSC with an IRS approved nonaccountable *per diem* does not violate section 8-13-700(B) of the South Carolina Code. The Court should find that section 8-13-700(B) cannot support sanctions where no other state has found a *per diem* to be an "economic interest".

IV. The Full Commission Erred In Finding That Even Though Lancer Shull Was Ex-Officio, He Was Still In Violation Of The Ethical Statute

The Commission's Order indicated as follows:

"Section 8-13-700(B) requires a public official to recuse himself from any matter in which he, a family member, a business with which he is associated, or an individual with whom he is associated has an economic interest. The Commission has long held that when a public official's service on a secondary board is ex-officio then the public official is "not required to recuse himself on matters that c[o]me before [him] which would affect the economic interest of the board" because the secondary board is not considered a "business with which [Respondent] is associated" for purposes of Section 8-13-700. SEC AO2002-009. For a public official's service on a secondary board to be considered *ex-officio*, the service must (1) arise because of the position held by the public official; (2) involve matters which fall within the official responsibility of the agency or public official; and (3) be service the agency would normally provide and for which the public official would be subject to expense reimbursement by the agency. See SEC AO2018-002.

On appeal, Appellant argues he was permitted to participate in matters related to his own appointment because JMWSC is not a "business with which he is associated" for purposes of Section 8-13-700. In that regard, the Commission agrees."

The Commission's position is that yes, the Appellant was *ex-officio* but the Commission is contending that it has never held that a public official serving *ex-officio* on a secondary board is permitted to participate in matters affecting his own personal interest – only that participation in matters affecting the economic interest of the secondary board is permissible.

The Appellant's position is twofold; How can you have an ethical violation if the two boards are not independent boards that are treated legally as one in the same? A decision of the Commission is one in the same as a decision of the Town and County Councils that created it. It takes two to have a conflict of interest.

Secondly, Appellant submits that the Commission's decision on this issue is inconsistent with the Commission's decision in SEC AO2018-002 wherein it states:

"While the relevant advisory opinions do not articulate the rationale for distinguishing service on a non-profit in one's official capacity from other service under the Ethics Reform Act, these decisions are premised on the notion that when service is undertaken in one's official capacity, the required "interest in any business" contained in the definitions to both "individual with whom associated" and "business with which associated" simply does not exist. Applying the principle that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature," we do not believe the Legislature intended that the restrictions of Section 8-13-700 apply to individual and business associations that exist only as a direct extension of the public position. Accordingly, in the cited as above, if a Workers' Compensation Commissioner serves as a board member or officer in a non-profit in his official capacity, the non-profit would not be a "business with which he is associated" under Section 8-13-100(4) and its board members or officers would not be "individual[s] with whom he is associated" under Section 8-13-100(21)." This case dealt with a commissioner serving on a non-profit board and they were concerned about attorneys appear before them who also served on the board falling within the exception of required recusal from voting. This case held, clearly, that the Legislature never intended that the restrictions of Section 8-13-700 apply to individual and business associations exist only as a direct extension of the public positions. Appellant's position is that the language "direct extension of the public position" is the same in his case as SEC AO2018-002 because his serving on the Joint Municipal

Water & Sewer Commission is no more than a direct extension of his public position which is a member of the Batesburg-Leesville Town Council and recusal is not required.

V. The Full Commission Erred In Drawing An Erroneous Distinction Between The Receipt Of A *Per Diem* Under Section 6-25-60(C) And Its Regulation Of The Behavior of Public Officials, Where The *Per Diem* Did Not Confer A Taxable "Economic Benefit" Or Interest Under Either South Carolina Or Federal Law

The Commission cited as its reasons that the per diem payment to the Appellant was economic interest is as follows:

"As defined in Section 8-13-100(11)(a) of the Act, "economic interest" means "an interest distinct from that of the general public in a purchase, sale, lease, contract, opinion, or other transaction or other arrangement involving property or services in which a [public official] may gain" more than $50.00.

Here, Appellant argues that his interest in the monthly JMWSC payments does not meet the statutory definition of economic interest because the payments are only for expense reimbursement. First, it is undisputed that the JMWSC pays its board members $250.00 each month. Second, Appellant admitted during his Panel testimony that the work he does on the JMWSC is a "service." Finally, because JMWSC pays its board members each month without regard to meeting attendance or the performance of JMWSC-related duties, the payments constitute an arrangement in which Respondent may *gain* more than $50.00. Accordingly, the Commission finds that Appellant's interest in the monthly payments meet the statutory definition of "economic interest" found in Section 8-13-100(11)(a)." The Commission's evidence that it is an economic interest in its Order is based on the fact that the commissioners were paid a *per diem* each month without regards to meeting attendance or performance of JMWSC related duties and the payment arrangement may gain more than $50.

For the following reasons, Appellant contends that the *per diem* is not an economic interest:

The evidence presented by the Appellant and the General Manager of the Commission, Jay Nicholson, indicate the following: "In addition to the monthly meetings of the JMWSC, Commissioners have other duties during the month that require travel. These duties ***include*** traveling to the offices of attorneys and consulting firms."

Appellant Lancer Shull stated that when he first joined JMWSC, during the height of negotiations by Mayor Shull on the town of Batesburg-Leesville's water contract with Joint Municipal, he spent upwards of 15 hours per week meeting with architects, meeting with engineers, meeting with Mr. Nicholson, meeting with other mayors. He currently spends 3 to 4 hours per week in addition to the regular monthly meetings.

Factually, the legal definition of *per diem* relates to reimbursement for expenses. BLACK'S LAW DICTIONARY 523 (2nd Pocket Ed. 2001).

Furthermore, the *per diem* payment was ***initially determined, intended, and operated*** to reimburse expenses incurred by an employee in compliance with IRS regulations which through JMWSC plan was as an expense reimbursement plan.

Also, the Commission has not presented any exhibits or evidence that the Ethics statute includes any specific language as to a *per diem* being an economic interest or economic benefit. However, the JMWSC, under Section 6-25-60 of the South Carolina Code, authorizes the payment of a *per diem* to members of a Joint Municipal Sewer and Water Commission, provides in part: "No commissioner of a joint system shall receive any compensation solely for the performance of duties as a commissioner, ***but each commissioner may be paid per diem, mileage, and subsistence expenses,*** as provided by law for state boards, committees, and commissions, incurred while engaged in the performance of such duties." S.C. Code Ann. §6-25-60(C) (2025). The South Carolina State Comptroller establishes *per diems* in South Carolina.

"The Commission notes that other states have adopted a $250 *per diem* for daily expenses of its officials. New Jersey, Delaware, Iowa, Mississippi, Missouri, Nevada Ohio, Pennsylvania, and Rhode Island all use a $250 *per diem* or per meeting reimbursement scheme. Noel, Jim; Leonard Sanchez; Stuart Bluestone; Kathy McCoy; Brad Winter; and John Carey. *"Subcommittee Report on the Establishment of a State Ethics Commission."* at 8 (N. M. Aug. 29, 2006). *https://digitalrepository.unm.edu/law_service_ethicsreform/28.* None of these states have found that receipt of a $250 *per diem* is an ethical violation."

There are several canons of construction which deal with the interplay of different statutes. For example, the Commission cannot interpret the Rules of Ethics in a way that would render another statute enacted by the legislature "nugatory;" the legislature could not have intended to enact a statute which eviscerates another statute it created. *See, e.g.* McMillen Feed Mills, Inc. of SC v. Mayer, 265 S.C. 500, 512, 220 SE 2d 221 (S.C. 1975) ("The position urged by McMillen would do violence to the expressed legislative intent and is so repugnant to the statute, that its adoption would, in effect, deprive the Act of its efficacy and render its provisions nugatory.") Further, "[s]tatutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372 (S.C. 2000).

The Ethics Commission Order indicates "Respondent argues that there can be no economic interest in the JMWSC monthly payment because such payments are permissible under Section 6-25-60(c). However, this provision of the Joint Water and Sewer Act only addresses types of payment the JMWSC may make to its board members. It does not address how Respondent must conduct himself as a member of Town Council when Council is considering his appointment to the JMWSC – this situation is governed by the Ethics Act. Contrary to Respondent's position, the

Joint Water and Sewer Act and the Ethics Act are not in conflict – they simply address different aspects of the same scenario."

Appellant's answer to this position of the Commission is that but for the Commission's position that the *per diem* is an economic interest, there would be no need for the Commission to address Appellant's conduct as a member of the Town Council of Batesburg-Leesville so the statute authorized *per diem* payment implicates more than just payment type, it goes back to the basic question that the per diem is an expense reimbursement and not an economic interest and Appellant's position is that it is not an economic interest based on the seven positions taken in this Motion.

VI. The Full Commission Erred In Ruling That The "Profession, Occupation or Large Class" Exception Of Section 8-13-100(11)(b) Did Not Apply Where Appellant's "Occupation" Was Being A Commissioner On JMWSC.

The Commission found as follows: "Section 8-13-700(B) requires a public official to recuse himself from any matter in which he, a family member, a business with which he is associated, or an individual with whom he is associated has an economic interest. However, there is an exception to the recusal requirement called the "large class exception" found in Section 8-13-100(11)(b). Under this exception, a public official may participate in a matter in which he has an economic interest if:

The only economic interest or reasonably foreseeable benefit that may accrue to the [public official] ... accrues to the [public official] as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation or large class.

In his appeal, Appellant argues he was permitted to participate in his own appointment because his economic interest was no greater than that of any other JMWSC board member and, therefore, the "large class exception" applies. However, Appellant's characterization of the

remaining JMWSC board members as the "large class" is flawed. The "large class" consists of the individuals or entities impacted by Appellant's conduct. See SEC AO92-155 (finding a public member could vote on matters affecting his own property as long as all owners of property in the affected area were similarly impacted by the public member's vote)."

Commission disagrees with the Appellant that "large class" is JMWSC board members. The Commission contends that "large class" consist of "the individuals and entities impacted by Appellant's conduct." The question is what individuals or entities are we talking about? The Commission's decision as to individuals and entities is not specific enough in identifying a "large class" unlike Appellant's position. The Appellant submits to you that the specific individuals that are affected by the vote of the Respondent are the other members of that Commission which is a class of 15 individuals. The power the Appellant has is the vote that he can take at that Commission meeting which can have an effect upon the decision of that Commission. The other members are directly impacted by the Appellant's vote at that Commission meeting. JMWSC board is the profession, occupation or "large class" that is referred to in the statute. The per diem is paid to all of the other members of the JMWSC board and his reimbursement is no greater than the per diem that is paid to the other JMWSC board members of $250 per month.

Conclusion

For the reasons stated above, Appellant Lancer Shull respectfully requests this Court to reverse the decision of the Full Commission and dismiss the charges against him.

Respectfully submitted,

By:/s/ *James Randall Davis*
James Randall Davis, SC Bar No.: 1580
DAVIS FRAWLEY, LLC
140 East Main Street, P.O. Box 489
Lexington, South Carolina 29071
ATTORNEY FOR APPELANT