STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	BEFORE THE STATE ETHICS COMMISSION
IN THE MATTER OF:	)	
COMPLAINT C2014-156	)	
J. Samuel Griswold, Ph.D. Complainant.	)	
v.	)	
Curtis M. Loftis, Jr. Respondent.	)	**DECISION AND ORDER**

This matter is before the Commission on the Complaint filed by Samuel Griswold, Ph.D. and was heard by a Commission panel on September 8, 2016. Members of the panel were Regina Hollins Lewis, Chair, Julie J. Moose, and Twana Burris-Alcide. Respondent was present and represented by counsel, Gregory B. Harris and Jonathan S. Gasser. The Commission was represented by Christian Stegmaier, who was retained as special counsel for the Commission to prosecute this matter due to conflicts possessed by both the Commission's general counsel and the Attorney General.

The Complaint arises out of the hiring of Michael Montgomery, Esquire ("Montgomery"), a close friend of State Treasurer Curtis Loftis ("Respondent"), to represent the State of South Carolina as co-counsel in litigation in which substantial claims by the State were pending against The Bank of New York Mellon in which millions of dollars were in dispute (the "Litigation"). The following sole charge is before the Commission:

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COUNT ONE

PARTICIPATION IN A GOVERNMENTAL DECISION AFFECTING AN INDIVIDUAL WITH WHOM ASSOCIATED SECTION 8-13-700(B), S.C. CODE ANN., 1976, AS AMENDED

That Respondent, Curtis M. Loftis, Jr., Treasurer for the State of South Carolina, did in Richland County, on or about January 20, 2011, unlawfully violated S.C. Code Ann. §8-13-700(B), by using his official position to affect the economic interest of Michael H. Montgomery, Esquire, an individual with whom he is associated, when he authorized and sought the approval of the Attorney General of South Carolina for the employment of Michael H. Montgomery, Esquire to pursue litigation against the Bank of New York Mellon on behalf of the State Treasurer.

For the reasons set forth below, we find that Respondent violated Section 8-13-700(B) by participating in a governmental decision affecting an individual with whom he was associated.

FINDINGS OF FACT

1. Converse Chellis ("Chellis") is Respondent's predecessor and served as South Carolina State Treasurer for many years. During his tenure, in or about 2009, it was determined that the State had a possible legal claim against The Bank of New York Mellon Corporation ("BNYM") arising out of a securities lending agreement and guaranty entered into by the State and BNYM.

2. Chellis retained attorney Mitchell Willoughby, Esquire ("Willoughby"), who had thirty years of experience practicing in the area of securities law, to represent the State in the Litigation pursuant to a June 18, 2010 Litigation Retention Agreement for Special Counsel Appointed by the South Carolina State Treasurer ("Retention Agreement"). The Retention Agreement was executed by Chellis and Willoughby with the consent and approval of Attorney General Henry McMaster. The Retention Agreement provided in part:

a. Special Counsel shall provide legal advice to the State Treasurer for this litigation;

b. In view of the personal nature of the services to be rendered under this appointment, the State Treasurer shall be the judge of the adequacy of those services, with the advice and consent of the Attorney General of South Carolina;

c. The State Treasurer has final authority over all aspects of the Litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the State Treasurer. The State Treasurer at his sole discretion has the right to appoint a designated assistant ("designated assistant") to oversee the litigation, which appointment the State Treasurer may modify at will.

d. The State Treasurer may provide attorneys and other staff members to assist special counsel with this Litigation; and

e. Special counsel shall coordinate the provision of legal services with the State Treasurer "and such others as the State Treasurer may appoint as Special Counsel."

Complainant's Exhibit 1.

3. While the State Treasurer executed the Retention Agreement, the protocol in the vast majority of cases in which special counsel is hired is that the Attorney General will retain the attorney and is a party to the litigation retention agreement. If a South Carolina state agency wants to retain outside counsel, they need permission from the Attorney General. The Attorney General generally defers to the state agency to select counsel. The state agency typically asks for the appointment by sending a request to retain counsel to the Attorney General, and the Attorney General considers the request. Here, according to Willoughby, Henry McMaster, who was Attorney General at the time Willoughby was hired, was campaigning, and the standard litigation retention agreement used by the Attorney General was changed to substitute the State Treasurer as the person with authority over the Litigation.

4. In November 2010, Respondent was elected State Treasurer, and he formed a transition team to facilitate the orderly transfer of duties to the new administration. Montgomery served as legal counsel to Respondent's transition team. Montgomery and

Respondent have maintained a close relationship for many years. They attended the University of South Carolina at the same time and were members of the same fraternity. Montgomery represented Respondent for a period of time during Respondent's divorce proceedings, and Respondent is the godfather to one of Montgomery's children.

5. Pertinent to the Commission's inquiry, Montgomery was a member of the Board of Trustees of the Saluda Charitable Foundation (the "Foundation"), a private non-profit organization for which Respondent is listed as the Founder and Chairman of the Board. Montgomery has served on the Board for a period of approximately ten (10) years. Montgomery was not paid for his service on the Board and provided approximately one hour of pro bono services to the Foundation each year. The Foundation, which does charitable work in various countries around the world, dedicated a building in Ukraine in Montgomery's honor. Several other buildings were dedicated in honor of other Board members of the Foundation.

6. After Respondent was elected, Willoughby, in his capacity as counsel to the State Treasurer, decided to seek approval for Montgomery to be associated in the Litigation. He did so without input from Respondent. However, Willoughby wanted to add someone to the legal team whom the Respondent trusted and made the decision to seek approval for Montgomery to join the Litigation team because the Respondent had confidence in Montgomery, he was capable co-counsel, he could share expenses, and the addition of Montgomery would give Willoughby credibility immediately. The Litigation was at a critical point, and they needed to advance the Litigation due to the statute of limitations. Respondent, as the client, was entitled to have a lawyer in which he had total trust, and Willoughby did not want Respondent to be concerned about having Willoughby as counsel. By associating Montgomery, Willoughby was able to get beyond the trust hurdle quickly. Willoughby has known Montgomery for a long time and has

worked on cases opposite Montgomery, and he was aware of the close relationship between Respondent and Montgomery.

7. Willoughby believed the consent and approval of the Attorney General was necessary to hire Montgomery, and he went directly to the Attorney General-Elect Alan Wilson to seek approval to hire Montgomery. Between November 2010 and January 12, 2011, Willoughby told the Attorney General-Elect Alan Wilson (who used to work for Willoughby's law firm) that when he took office, Willoughby wanted to associate Montgomery as counsel in the Litigation.

8. Attorney General Alan Wilson ("Attorney General") was legally required to authorize the retention of special counsel unless there was statutory authority authorizing the retention. Willoughby had no authority to hire or fire counsel, and the consent of the Attorney General and Respondent was needed. The Attorney General knew about the long term relationship between the Respondent and Montgomery.

9. In a series of e-mails exchanged on December 29, 2010 between the Treasurer's office and members of the Respondent's transition team, Frank Rainwater, Deputy State Treasurer and Counsel ("Rainwater"), sought a meeting with Respondent, Willoughby, and two other persons to discuss the Litigation. In response to the request, Bill Leidinger, Chairman of Loftis' transition team and Respondent's Chief of Staff ("Leidinger"), inquired as to the purpose of the meeting and asked who Willoughby was and why he would be included in the meeting. Rainwater responded that the purpose of the meeting was for Willoughby to brief Respondent as the Treasurer elect on the Litigation, which had not yet been made public. Leidinger then asked whether Montgomery should attend the meeting as legal counsel to Respondent's transition team. Rainwater responded that he did not believe Montgomery should be present at the meeting

due to the attorney client privilege and other potential conflicts. Thereafter, Chellis' team approved Montgomery's attendance at the meeting, which occurred on January 6, 2011, but Montgomery was unable to attend due to a scheduling conflict. Subsequently Willoughby met with Montgomery to inform him of what occurred at the meeting. Respondent was not involved in the exchange and was not copied on any of the emails. It is unclear whether Respondent attended the January 6, 2011 meeting, but it was on his calendar.

10. Daniel Brennan ("Brennan"), a former employee of Respondent's campaign and subsequently a member of his transition team, testified that once Respondent learned of the Litigation in late December 2010, his immediate response was to "get Montgomery on the phone." Thereafter, according to Brennan, Respondent discussed the litigation with Montgomery and Leidinger, and there was a subsequent meeting with Rainwater. According to Brennan, it was "made clear" that Respondent did not trust Willoughby and wanted Montgomery on the Litigation team. Brennan testified that Respondent said he was "going to have his guy on it," referring to Montgomery. Brennan also noted that once Respondent took office he directed that Willoughby withdraw the complaint that had been filed against BNYM and only allowed the Litigation to move forward once Montgomery had been added to the trial team.

11. Brennan acknowledged that he did not have a record of a telephone call to Respondent in late December while Respondent was in Panama. He further acknowledged that he did not leave the Respondent's employ on amicable terms and that he posted negative comments about Respondent on his Facebook page. Brennan noted, however, that he did not want to be a witness in this matter, but was subpoenaed to appear.

12. At some point before the inauguration of Respondent and the Attorney General, Willoughby met with Montgomery to discuss the Litigation and his potential involvement.

13. The Attorney General briefly spoke with Respondent regarding the consideration of Willoughby at the State House on January 12, 2011, the day of the inauguration. During that brief conversation the Attorney General mentioned the possible hiring of Montgomery.

14. Between January 12 and January 17, 2011, Willoughby met with the Attorney General, Chief Deputy Attorney General John McIntosh ("McIntosh"), and Deputy Attorney General Bob Cook ("Cook"), and explained that he wanted to add Montgomery as additional special counsel and requested the Attorney General's consent. According to Willoughby and the Attorney General, at that meeting the Attorney General made the decision to hire Montgomery, and Montgomery was considered by the Attorney General to have been retained as special counsel as of that time. The Attorney General knew Montgomery by reputation but did not know him personally and had no dealings with Montgomery's firm when the Attorney General was in private practice. Willoughby, with whom the Attorney General had previously been employed, told the Attorney General that he had worked with Montgomery in the past and that he wanted to hire someone with whom Respondent would be comfortable. During the meeting with Willoughby, the friendship between Respondent and Montgomery was discussed, although the Attorney General did not recall whether the affiliation of Montgomery and Respondent with the Foundation was discussed. The Attorney General, McIntosh and Cook were all comfortable with hiring Montgomery.

15. In determining whether to hire Montgomery, the Attorney General considered potential conflicts, that Montgomery was a good attorney in good standing who had worked with Willoughby in the past, and that the hiring of Montgomery would result in no additional cost to the State because any fees recovered would be divided between Willoughby and Montgomery. The Attorney General testified that his decision was not influenced by Respondent, but he would

not authorize the hiring of Special Counsel without the agreement of the Agency Head, in this case, Respondent. The Attorney General also testified initially that Willoughby needed both his permission and that of the Respondent as Agency Head to hire Montgomery. He later clarified that the decision to hire Special Counsel is a unilateral decision that can only be made by the Attorney General but acknowledged that Respondent's acquiescence played a role in the consideration of Montgomery, and that he would consider it to be "counter-intuitive" to hire an attorney that the Agency Head did not want. The Attorney General acknowledged that Willoughby was "technically" representing Respondent while at the meeting with the Attorney General.

16. After his meeting with the Attorney General, Willoughby drafted a letter to the Attorney General dated January 20, 2011,which Respondent executed, in which Respondent formally requested that the Attorney General approve the retention of Montgomery as associated counsel in the Litigation. The letter provides in part:

> Mr. Willoughby has asked that he be permitted to associate Michael H. Montgomery as additional special counsel representing the State in this important litigation. Mr. Montgomery is well known to Mr. Willoughby and to me and has an outstanding reputation for providing superb legal services in complex litigation matters. While I am confident that Mr. Willoughby and his firm have carefully and capably investigated this matter and are prepared to litigate effectively the claims on behalf of the State, I also believer, as does Mr. Willoughby, that Mr. Montgomery will bring valuable experience to the legal team representing the State.
>
> Therefore, based on Mr. Willoughby's recommendation and based on my own knowledge of Mr. Montgomery, I hereby recommend that you approve the enclosed addendum to the Litigation Retention Agreement that your office and mine have with Mr. Willoughby and his firm.

17. The Attorney General requested the letter, which, according to Willoughby and the Attorney General, was designed to communicate the merit of the decision that had already

been made. The Attorney General testified that given the unique circumstance of the Litigation Retention Agreement, which conferred authority to hire upon the State Treasurer, he made the decision and requested the letter from Respondent as a formality for his files.

18. On January 20, 2011, Respondent and Montgomery executed an Addendum to Litigation Retention Agreement for Special Counsel Appointed by the State of South Carolina Treasurer ("Addendum"), which provided in part:

> Special Counsel Michael H. Montgomery agrees to be fully bound by all of the terms, conditions, rights and privileges set forth in the attached Litigation Retention Agreement . . . the undersigned State Treasurer hereby appoints, subject to the advice and consent of the South Carolina Attorney General, Michael H. Montgomery and his firm as additional Special Counsel to be associated with Mitchell Willoughby and his firm as initial Special Counsel, to fully represent the State in connection with the legal matters contemplated by the Litigation Retention Agreement . . .

Complainant's Exhibit 18.

19. On May 2, 2013, Respondent sent a letter to Willoughby and Montgomery that stated "[w]ith the consent of the South Carolina Attorney General, the State Treasurer employed the law firms of Willoughby & Hoefer, P.A. and Montgomery Willard, LLC to pursue claims against the Bank of New York Mellon as set forth in the above-captioned litigation . . ." Complainant's Exhibit 3. The resolution of the Litigation resulted in Montgomery receiving approximately two million dollars ($2,000,000) in legal fees.[1]

ANALYSIS AND CONCLUSIONS OF LAW

As State Treasurer beginning in January 2011, Respondent was a public official as defined by S.C. Code Ann. § 8-13-100(27) (Supp. 2013). Accordingly, the State Ethics Commission has personal and subject matter jurisdiction over this matter. It is undisputed that the decision to hire Montgomery was a governmental decision, and Montgomery had an

[1] Willoughby's firm received approximately seven million dollars ($7,000,000) in legal fees as a result of the Litigation.

economic interest in his retention as special counsel for the State Treasurer. S.C. Code Ann. § 8-13-100(11)(a) (Supp. 2013).

Section 8-13-700(B) provides:

> 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. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a family member, an individual with whom he is associated, or a business with which he is associated shall:
>
> (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;
>
> (2) if the public official is a member of the General Assembly, he shall deliver a copy of the statement to the presiding officer of the appropriate house. The presiding officer shall have the statement printed in the appropriate journal and require that the member of the General Assembly be excused from votes, deliberations, and other action on the matter on which a potential conflict exists;
>
> (3) if he is a public employee, he shall furnish a copy of the statement to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;
>
> (4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of an agency, commission, board, or of a county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;

> (5) if he is a public member, he shall furnish a copy to the presiding officer of an agency, commission, board, or of a county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause such disqualification and the reasons for it to be noted in the minutes.

In determining if there has been a violation of Section 8-13-700(B) here, there are two questions before us:

a. Is Montgomery an individual with whom Respondent was associated for purposes of Section 8-13-700(B)?

b. Did Respondent make, participate in, or in any way attempt to use his office, to influence the decision to hire Montgomery as counsel for the State?

Association between Respondent and Montgomery

The Ethics Reform Act (the "Act") defines "individual with whom he is associated" as follows:

> "Individual with whom he is associated" means an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

Section 8-13-100(21).

Respondent argues that Montgomery is not "an individual with whom he is associated" because the non-profit Foundation does not constitute a business in which he and Respondent have a mutual interest. The Commission argues that Montgomery is an individual with whom Respondent was associated during the relevant time frame because Respondent was the founder and Chairman of the Board of the Foundation and Montgomery served on the Board with Respondent.

It is well established that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 82 (2013) (*citing Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "'Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Id.* (*quoting Hodges*, 341 S.C. at 85, 533 S.E.2d at 581).

It is undisputed that Respondent and Montgomery served on the Board of the Foundation, a non-profit charitable organization. It is also undisputed that Montgomery served on the Board of the Foundation at the time that he was hired as Special Counsel to work on the Litigation. Thus, the question before the Commission is whether Respondent and Montgomery's participation with the Foundation constitutes a mutual interest in a business. The definition of "individual with whom he is associated" is silent with regard to non-profit organizations. Accordingly, in assessing this question we must determine first whether or not a non-profit organization constitutes a "business," and second, whether both the Respondent and Montgomery had an "interest" in the Foundation.

The Act defines business" to mean "a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual." S.C. Code Ann. § 8-13-100(3) (Supp. 2013). Corporation is defined to mean "an entity organized in the corporate form under federal law or the laws of any state." S.C. Code Ann. § 8-13-100(10) (Supp. 2013). These definitions do not reference a "nonprofit," but the plain meaning of "nonprofit" compels the conclusion that a nonprofit is a "business" for purposes of this analysis.. "Nonprofit" is defined as "[a] corporation or an association that conducts business for the benefit of the general public without shareholders and without a profit motive." The description further

provides, "[n]onprofit corporations are created according to state law. Like for-profit corporations, nonprofit corporations must file a statement of corporate purpose with the Secretary of State and pay a fee, create articles of incorporation, conduct regular meetings, and fulfill other obligations to achieve and maintain corporate status." *See* http://legal-dictionary.thefreedictionary.com/non-profit+organization. As noted, the plain language of the definition of "individual with whom he is associated" does not exempt non-profit organizations and, presumably, if the legislature intended to exclude non-profit organizations from the definition, it would have done so.

Next, we must determine whether the Foundation is a business in which Respondent and Montgomery had a mutual interest. While "economic interest" is defined in the Act, "interest" is not. Therefore we look to the plain meaning of the word. The definition of "interest" includes "right, title, or legal share in something," and "participation in advantage and responsibility." *See* http://www.merriam-webster.com/dictionary/interest. Thus "interest" by its plain meaning is not limited to an economic interest.

The language of Section 8-13-100(21) refers to a "director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class." The terms "compensated agent" and "holder of stock" suggest that an economic interest may have been intended by the Legislature. However, the reference to "director" refers only to director, not a "compensated director." This suggests, as does the absence of an exemption for non-profit organizations, that Section 8-13-100(21) was intended to apply to any organization of which the public official is a director regardless of whether the business is a nonprofit organization. Notably, the reference in Section 8-13-100(21) merely lists "interest" and not "economic

interest." Here again, presumably if the Legislature meant to limit the definition to those with an economic interest, it would have expressly done so. Thus, if Respondent held any of the referenced positions and had a mutual interest in the Foundation with Montgomery, then Montgomery was a person with whom Respondent was associated.

The Commission relies on the decision of this Commission in *Residents for Planned Development v. Raines* (C99-015, March 2000) in support of its argument that Montgomery was a person with whom Respondent was associated as defined by Section 8-13-100(21). In *Residents for Planned Development*, the Commission concluded that an "individual with whom he is associated" includes an individual who has an interest in any business in which the public official is a director. In that case, Raines, who was a member of the Mauldin City Council, served as a Director of MSB Investments Corporation and the individual at issue was another director of the corporation. The opinion concluded that a position as director is one that falls within the statute in determining whether a person is an "individual with whom [a public official] is associated."

The alleged association here arises out of Respondent's and Montgomery's positions as directors of the Foundation. Because we have concluded that a non-profit organization is a "business" and the definition of "interest" is not limited to an economic interest, Respondent and Montgomery had a mutual interest in a business. As Montgomery's retention as special counsel to the State resulted in the recovery of a legal fee, the decision to hire him was one that provided economic benefit to Montgomery. To the extent the Legislature intended to limit the application of Section 8-13-700(B) to those instances where a for-profit business and an economic interest are required, we must leave it to the Legislature to express such an intention. Accordingly, based on the plain language of the Act, the Commission finds that Montgomery was an

individual with whom Respondent was associated as defined in Section 8-13-100(21) for purposes of evaluating an alleged violation of Section 8-13-700(B).

Respondent's Role in Hiring of Montgomery

Having concluded that Montgomery was an individual with whom Respondent was associated, we now turn to the issue of whether Respondent made, participated in making, or in any way attempted to use his office to influence the governmental decision to hire Montgomery as counsel for the State as set forth in Section 8-13-700(B). The Commission argues that Respondent participated in making the decision to hire Montgomery in violation of Section 8-13-700(B) based on the following:

1) The letter dated January 20, 2011, signed by Respondent, which requests approval of Montgomery as Special Counsel and indicates that the recommendation is based in part on Respondent's knowledge of Montgomery;

2) To the extent the decision was made by the Attorney General prior to the January 20, 2011 letter, Respondent ratified the decision and the ratification is sufficient to constitute participation in the decision for purposes of the statute;

3) Respondent is a signatory on the Addendum to the Litigation Retention Agreement in which Montgomery is hired as Special Counsel, and Respondent had the authority to terminate Montgomery pursuant to the Addendum;

4) The Attorney General would not have hired Montgomery absent Respondent's agreement, and the decision was premised upon Respondent's acquiescence and agreement. Accordingly, Respondent played a role in the decision because his approval was needed and "playing a role" satisfies the "participate in making" language of the statute; and

5) Willoughby had no authority to request that the Attorney General approve the retention of Montgomery absent his capacity as counsel to the State Treasurer and was effectively a "straw man" acting as Respondent's agent and therefore, Respondent participated in the decision to hire Montgomery.

Respondent asserts he had no conversations with anyone regarding the hiring of Montgomery, and that the decision to hire Montgomery was made by the Attorney General on the recommendation of Willoughby before Respondent was even aware of any discussions in

which the addition of Montgomery was discussed. Respondent also asserts that his January 20, 2011 letter to the Attorney General requesting approval to retain Montgomery does not constitute participation in the decision because the decision had already been made. According to Respondent, the January 20, 2011 letter was a formality requested by the Attorney General to document the hiring of Montgomery for his files and was drafted by Willoughby.

Respondent further argues that Section 8-13-700(B) requires this Commission to find that Respondent influenced the decision to hire Montgomery in order to find a violation. We disagree with Respondent's interpretation of Section 8-13-700(B). In our view, the language of the statute is disjunctive and a violation may be found if a public official: 1) makes a decision regarding an individual with whom he is associated **or** 2) participates in making a decision regarding an individual with whom he is associated; **or** 3) in any way attempts to use his office to influence a governmental decision involving an individual with whom [the public official] is associated. The Commission asserts that Respondent violated Section 8-13-700(B) by participating in the governmental decision to hire Montgomery, and our analysis focuses on this element of the statute.

Willoughby testified unequivocally that it was his decision to recommend that Montgomery be hired as special counsel, and that Respondent had no input in his decision to make the request or in the decision of the Attorney General to hire Montgomery. Willoughby acknowledged, however, that he knew of the close relationship between Montgomery and Respondent, and he recommended Montgomery in large part because he wanted to hire someone Respondent would trust.

The Attorney General testified that he made the decision to hire Montgomery based on the recommendation of Willoughby. He further testified that after the meeting in which he

decided to approve the hiring of Montgomery, he considered Montgomery to be counsel to the State and Montgomery was privy to information that would be subject to the attorney-client privilege as of that time and before receipt of Respondent's January 20, 2011 letter. Given the testimony of Willoughby and the Attorney General that Respondent did not recommend, suggest or encourage the hiring of Montgomery with either of them prior to the Attorney General's decision to hire Montgomery, the crux of the question before the Commission is whether any conduct by Respondent constituted participation in the decision to hire Montgomery pursuant to Section 8-13-700(B).

Participate means simply "to take part," and Section 8-13-700(B) prohibits a public official from taking part in making a governmental decision in which an individual with whom he is associated has an economic interest. Although the Attorney General confirmed that Respondent did not ask him to approve the hiring of Montgomery prior to the Attorney General's meeting with Willoughby, the overall circumstances surrounding the decision to hire Montgomery lead us to conclude that Respondent did participate in making the decision to hire Montgomery without disclosing his relationship with Montgomery in violation of Section 8-13-700(B).

The Attorney General testified initially that his approval as well as that of Respondent was required to hire Montgomery. Although he subsequently testified that he unilaterally has the authority to hire special counsel and he solely made the decision to hire Montgomery, he acknowledged that it would be "counter-intuitive" to hire Special Counsel if the Agency Head was not in favor of the hire and he would not be inclined to hire Montgomery absent Respondent's consent. Thus, the decision to retain Montgomery was made by the Attorney

General with the understanding that Respondent consented to the same, with deference to Respondent as agency head, and with Respondent's acquiescence.

Further, although Willoughby testified that he made the decision to seek approval of the retention of Montgomery without input from Respondent, Willoughby acknowledged that he considered Respondent's relationship with Montgomery and wanted Montgomery on the team because he knew Respondent trusted Montgomery. Willoughby, however, had no authority to retain additional counsel for the State or even recommend the same to the Attorney General absent his position as counsel to the Respondent. Indeed, the Attorney General testified that when Willoughby attended the meeting with the Attorney General to discuss the hiring of Montgomery he was "technically representing the State Treasurer."

In our view, Willoughby's request was made as an agent of Respondent, and Respondent's agreement, consent or acquiescence in the decision to hire Montgomery along with his letter of January 20, 2011 and his signature on the Addendum to the Litigation Retention Agreement constitute "participation" for purposes of Section 8-13-700(B). The Commission simply cannot ignore Respondent's January 20, 2011 letter to the Attorney General and the Addendum signed by Respondent. In the letter, Respondent stated that he had known Montgomery for a long period of time and that "based on Mr. Willoughby's recommendation and ***based on my own knowledge of Mr. Montgomery, I hereby recommend that you approve*** [the hiring of Montgomery]." Similarly, the Addendum to the Litigation Retention Agreement was signed by Respondent and Montgomery and provided, *inter alia:*

> the undersigned State Treasurer hereby appoints, subject to the advice and consent of the South Carolina Attorney General, Michael H. Montgomery and his firm as additional Special Counsel to be associated with Mitchell Willoughby and his firm as initial Special Counsel, to fully represent the State in connection with the legal matters contemplated by the Litigation Retention Agreement.

The Retention Agreement further provided that Respondent had the authority to appoint special counsel and had final authority over all aspects of the Litigation. Further, Respondent acknowledged in a letter to Willoughby and Montgomery dated May 2, 2013 that "[w]ith the consent of the South Carolina Attorney General, the State Treasurer employed the law firms of Willoughby and Hoefer, P.A. and Montgomery Willard, LLC to pursue claims...in the above-captioned litigation."

Thus, although the Attorney General testified that he had already made the decision to hire Montgomery and that he requested the letter from Respondent for his files, we find by a preponderance of the evidence that the totality of the circumstances as set forth herein, including the January 20, 2011 letter and the Addendum to the Litigation Retention Agreement in conjunction with the fact that Willoughby had no authority to seek approval of additional counsel absent agreement by the State Treasurer, compel the conclusion that Respondent participated in the decision to hire Montgomery.

Respondent should have simply disclosed his association with Montgomery as set forth in Section 8-13-700(B), which would have ended the inquiry. Given the facts, Respondent's failure to do so and his participation in the decision to retain and his retention of Montgomery violated Section 8-13-700(B). Respondent has indicated that to the extent he was required to disclose the relationship, his failure to do so was inadvertent and unintentional. The Commission does not take issue with Respondent's position in this regard. The Commission also recognizes that the circumstances here were unique given the fact that a Litigation Retention Agreement with is generally entered into between the Attorney General and the appointed special counsel. Section 8-13-700(B), however, does not require that a violation be intentional and thus inadvertence cannot form the basis for excusing a violation. Public officials and others who are subject to the

Act are cautioned that where, as here, an act may give rise to the appearance of impropriety that could give rise to a violation of the statute, the public official should err on the side of disclosure.

DECISION

The Commission finds that Respondent violated Section 8-13-700(B), which prohibits Respondent from participating in any way in the making a governmental decision in which an individual with whom he is associated has an economic interest.

NOW, THEREFORE, based on the foregoing Findings of Fact, Anaylsis, and Conclusions of Law, the State Ethics Commission has determined based on a preponderance of evidence that Respondent Curtis M. Loftis, Jr. is in violation of one count of Section 8-13-700(B) of the Ethics Reform Act and therefore Respondent is hereby Publicly Reprimanded and assessed an administrative fee of Five Hundred and 00/100 Dollars ($500.00).

IT IS FURTHER ORDERED that Respondent shall pay the Commission the assessed administrative fee of Five Hundred and 00/100 Dollars within ninety (90) days of receipt of this Order. If the full amount is not paid within ninety (90) days, an additional complaint fine of Fifteen Hundred and 00/100 Dollars ($1,500.00) shall be assessed and, pursuant to Section 8-13-320, a judgment in the amount of Two Thousand and 00/100 Dollars ($2,000.00) shall be entered against Respondent. In the event of a failure to pay, upon the Commission's filing of said Judgment with the Richland County Clerk of Court's Office, the Clerk of Court shall enter a judgment of Two Thousand and 00/100 ($2,000.00) in its Judgment Rolls, without cost to the Commission.

FINALLY, Respondent has ten (10) days from receipt of this Order to appeal this Decision and Order to the full Commission.

IT IS SO ORDERED THIS 20th DAY OF October 2016.

STATE ETHICS COMMISSION

Regina Hollins Lewis
Chair, Hearing Panel

Columbia, South Carolina