

GUIDELINES

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The Newsletter of the New Jersey Executive Commission on Ethical Standards

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THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

Chairwoman Janice Mitchell Mintz, Vice Chair Jaynee LaVecchia, Commissioner Gregory Adkins, Commissioner Alisha Griffin, Commissioner Deborah Jones, Commissioner Fred Lopez and Commissioner Mark Musser; Executive Director Rita L. Strmensky.

The cases presented in "Guidelines" are designed to provide State employees with examples of conflicts issues that have been addressed by the Executive Commission. Specific questions regarding a particular situation should be addressed directly to the Commission.

COMMISSION CASE NO. 15-98

SUBJECT: Post Employment.

FACTS: A State vendor wished to hire a former State employee and requested an opinion from the Commission as to whether the former employee was permitted, under the post-employment restriction, to accept the position of State Project Manager for a contract with which the former employee was involved during his State employment.

The contract in question was negotiated while the former employee served as Executive Director of the Division with which the vendor contracted. The Request For Proposal was drafted during 1994 and early 1995 and was issued in August 1995. The

contract was awarded in January 1996. The former employee retired in July 1996.

The former employee was a member of the Contract Evaluation Committee, approved the final report of the Committee, and functioned as Contract Officer with responsibility for acceptance of deliverables and payment for such deliverables from the awarding of the contract until his retirement. In March 1998, the vendor submitted a contract change request for the addition of a State Project Manager in order to ensure that the original contract's milestones and deliverables were successfully completed.

RULING: The Commission advised the vendor that because the former employee was substantially and directly involved in the contract in question during his State

employment, he was prohibited from accepting the Project Manager position.

REASONING: When reviewing a post-employment matter, the Commission uses a two-pronged analysis:

1. Is the former employee representing, appearing for, negotiating on behalf of, or providing information or services not generally available to a party other than the State?
2. Was the former employee substantially and directly involved in the matter in question?

In this situation, the first prong of the Commission's two pronged analysis was satisfied because the former State employee's activities on behalf of the vendor would be representational in nature. The former employee advanced the position that he would not be representing the vendor, but would be representing the interests of the State. The Commission has accepted this argument in previous cases where the individual in question was independently contracting with the State. However, the Commission noted that, in his role as State Project Manager, the former employee would be representing the vendor or, at the very least, appearing on behalf of the vendor when he was on site at the Department.

As to the second prong of the test, the Commission determined that the matter in question was the original contract. The vendor argued that the contract change request was a new "matter" for the purposes of the post-employment restriction. Under Commission precedent, an addendum or renegotiation of one or more terms of an

existing contract does not constitute a new matter. Only when the entire contract has expired and been renegotiated has the Commission viewed the contract as a new matter. The Commission noted that the State Project Manager was being hired pursuant to the original contract.

The remaining issue was whether the former employee was substantially and directly involved in the contract during his State employment. According to the former employee's job description, he worked with subordinates regarding the items that should be included in the RFP, was involved when the bidders participated in site visits, was a member of the Contract Evaluation Committee, approved the final report of the Evaluation Committee, was responsible for monitoring and evaluating contractor performance, and functioned as the Contract Officer until his retirement.

COMMISSION CASE NO. 17-98

SUBJECT: Outside employment, contracting with the State, compensation for published works.

FACTS: The State employee's Department requested an opinion from the Commission as to whether the employee would be permitted to author a book on a subject related to his official duties to be published by a State university.

The State employee's proposed outside activity raised a number of issues: the use of departmental reports prepared by him or consultants supervised by him, the receipt of compensation for a published work based on these reports, and contracting with a State agency.

RULING: The Commission advised that the use of departmental reports in connection with the proposed published work was approvable under the Commission's rules regarding published works and section 25 of the Conflicts Law, disclosure or use of information not available to the public for personal gain.

However, the Commission determined that the employee was prohibited, under section 19 of the Conflicts Law, from undertaking or executing a contract or agreement for \$25 or more with the State university. The employee was advised that he was permitted to undertake the project if he did not accept compensation of any kind.

REASONING: *N.J.A.C. 19:61-6.7(a)* provides:

(a) A State official shall not accept compensation for published works created as part of his/her official duties on State time utilizing State resources, but may accept compensation for published works not created as part of his/her official duties.

(b) A State official shall secure the permission of the Department head to accept compensation for published works not created as part of his/her official duties. In determining whether such approval can be granted, the Department head shall consider the provisions of the Conflicts of Interest Law, departmental code of ethics, any applicable executive orders, the Commission's Guidelines for Secondary Employment, any other applicable guidelines or rules of the Commission, any applicable departmental administrative policies, and the following conditions: (1) whether compensation is being paid by an interested party; (2)

whether the published work(s) uses or discloses information not generally available to the public.

(c) The State official shall prepare the published work(s) on his/her own time, without using the services of other State officials or resources owned by the State.

(d) The State official shall not use his/her official title in any way in soliciting compensation and shall indicate that his/her views do not represent those of the State.

The Commission found the State employee's proposed activity approvable under *N.J.A.C. 19:61-6.7*. He would be utilizing reports prepared by him in his official capacity or prepared by consultants under his direction; however, he would not be publishing the reports in their original technical format. Rather, he would be using the reports as a resource and creating a new, substantially different document for publication. Thus, the published work would not be one created as part of his official duties, the activity prohibited under the rule. The final departmental reports are of a technical nature; the publication would be a non-technical educational one aimed at the general public.

The State university is not an interested party because, while it is a supplier to the Department, it is not a private sector supplier in accordance with the definition. The Department confirmed that the published work would not use or disclose information not generally available to the public. Finally, the State employee would prepare the work on his own time, would not use the services of other State officials or resources owned by the State, and would not use his official

title in connection with the publication. The State employee was advised that he must indicate that his views do not represent those of the State.

The Commission noted that, under precedent, the Commission has permitted State employees to accept compensation for published works on subject matters related to their official duties.

Section 19 prohibits a State officer or employee from entering into a contract, valued at \$25 or more, with any State agency. This prohibition also extends to partners or any corporation which the State officer or employee controls or in which he owns or controls more than 1% of the stock. Section 19(b) exempts only three categories of contracts from this general prohibition.

1. Contracts made after public notice and competitive bidding.
2. Contracts that may be awarded without public advertising and competitive bidding pursuant to *N.J.S.A. 52:34-10* or similar provisions; and
3. Any contract of insurance entered into by the Director of the Division of Purchase and Property, Department of the Treasury, pursuant to *N.J.S.A. 52:27(b)-62*.

The Commission determined that the State employee's contract with the State university was problematic. It was a personal service contract of the type prohibited under Commission precedent. The Commission allows State employees to teach at State colleges and universities but has not permitted the type of personal service contract proposed in this situation.

COMMISSION CASE NO. 23-98

SUBJECT: Family members.

FACTS: The State employee requested an opinion regarding her official involvement on projects that directly or indirectly involve her husband. Her husband had been retained as a subcontractor to conduct an analysis required for a project under review by her agency. The State employee was scheduled to perform work on another aspect of the same project.

RULING: The Commission advised the State employee that she cannot have any official involvement with projects that directly or indirectly involve her husband or her husband's employer.

REASONING: The Commission has addressed various family member issues over the years, primarily under the application of sections 23(e)(3), unwarranted privilege, 23(e)(4), direct or indirect personal financial interest that might reasonably be expected to impair objectivity and independence of judgment, and 23(e)(7), the appearance of impropriety. As to interactions with family members or their private sector employers, the Commission recommends recusal from matters involving the relative's employer in order to eliminate any appearance of impropriety.

The State employee's agency has a long-standing policy that if employees' spouses are employed by companies involved in projects overseen by the agency, the employees may not participate in any phase of the project, even if their spouses are not directly involved in that particular project.

COMMISSION CASE NO. 34-98

SUBJECT: Outside employment, published works.

FACTS: The State employee requested an opinion from the Commission as to whether his outside employment, co-authoring and marketing a study guide for students preparing to take the professional actuarial examination is permitted under the Conflicts Law and/or the Department's Code of Ethics.

Prior to his current employment with the Department, the employee was a faculty member at an out-of-state university. During that time, he co-authored the study guide. The guide previously identified the employee as a faculty member of the University, but new copies identify him only by name and give no indication of his State employment. The authors distribute approximately one third of the books themselves through direct mail; they purchase an advertisement which is distributed with materials sent to all exam registrants. The remaining two thirds of the books are sold through mail order bookstores that specialize in actuarial books.

The study guide is used by student actuaries; some of these students are still in college, but the majority of them are employees of companies regulated by the Department or actuarial consulting firms. It is impossible to identify sales ultimately paid for by companies regulated by the Department rather than employees, students, consulting firms, or companies not licensed in New Jersey.

RULING: The Commission advised the employee that his co-authoring and marketing of the study guide is permitted

under the Commission's rules and precedent, the Conflicts of Interest Law, and the Department's Code of Ethics.

REASONING: With respect to sections 23(e)(1) and (5) of the Conflicts Law, the Commission determined that the employee's outside activity does not appear to be in substantial conflict with the proper discharge of his duties nor do his official duties appear to be compromised or impaired by his work on the study guide. With respect to section 23(e)(7), any appearance problem seems to be mitigated by the following factors: the study guide is sold nationally and not just to New Jersey exam registrants, the employee co-authored the publication while employed at an out-of-state university, uses only his name and not his official title in connection with the study guide, and does not directly solicit regulated entities.

The State employee's outside activity was approvable under precedent. The Commission has permitted State employees to accept compensation for published works on subject matters related to their official duties.

With respect to the Commission's rules on compensation for published works, the majority of study guide sales are not to interested parties and the study guide does not use or disclose information not generally available to the public. The State employee does not nor does he plan to use State time or resources in pursuit of his outside activities and his official title does not appear on the study guide. Given the above facts, the outside activity was approvable under the Commission's rules.

The Attorney General's Office advised that the State employee's outside

activity was approvable under the Department's Code of Ethics. Questions arising under specific sections of the Code are required to be referred to and resolved in consultation with the Attorney General's Office.

FINANCIAL DISCLOSURE FORMS AND INSTRUCTIONS

Financial Disclosure Statements ("FDS") and Instructions will be mailed out shortly to all required filers. If you misplace your form or the instructions, both are now available on our web site, www.state.nj.us/lps/ethics.

If an FDS filer feels that he/she is not a required filer under Executive Order No. 2, that individual may request a determination from the Commission. The Commission considers such requests at its monthly public meeting. The requester may attend the meeting but attendance is not required. Requests should be made in writing and should be accompanied by a copy of the individual's job description and relevant organization chart.

If the Commission determines that an individual is required to file an FDS under Executive Order No. 2 ("Order"), that person is subject to the section 17.2(c) two-year casino post-employment restriction.

Section 17.2(c) provides in pertinent part:

c. No person or any member of his immediate family, nor any partnership, firm or corporation with which such person is associated or in which he has an interest, nor any partner, officer, director or employee while he is associated with such partnership, firm or corporation, shall, within two years next subsequent to

the termination of the office or employment of such person, hold, directly or indirectly, an interest in, or hold employment with, or represent, appear for or negotiate on behalf of, any holder of, or applicant for, a casino license in connection with any cause, application or matter, or any holding or intermediary company with respect to such holder of, or applicant for, a casino license in connection with any phase of casino development, permitting, licensure or any other matter whatsoever related to casino activity, except that:

(1) a member of the immediate family of a person may hold employment with the holder of, or applicant for, a casino license if, in the judgment of the Executive Commission on Ethical Standards, ... such employment will not interfere with the responsibilities of the person and will not create a conflict of interest, or reasonable risk of the public perception of a conflict of interest, on the part of the person.

If the Commission determines that the individual is not covered by the Order, the individual must continue to file for informational purposes but is not subject to the casino post-employment ban.

Regarding "Guidelines"

Please direct any comments or questions about "Guidelines" to Jeanne A. Mayer, Esq., Deputy Director, Executive Commission on Ethical Standards, P.O. Box 082, Trenton, NJ 08625, (609)292-1892.

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