



GUIDELINES

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 Mark Boyd, Commissioner Maureen Adams, Commissioner Gregory Adkins, Commissioner Alisha Griffin, Commissioner Laurie Gutshaw, and Commissioner Deborah Jones; Executive Director Rita L. Strmensky.

COMMISSION CASE NO. 04-00

SUBJECT: Post-Employment

FACTS: The Commission received an allegation that a former State employee's activities in connection with his role as an expert witness were violative of the section 17 post-employment restriction. In his former position, the State employee testified as to the accuracy of the results of certain equipment utilized by the Division by which he was employed. Since leaving his State position, the former employee had testified with regard to the accuracy of the results of the same equipment. It was alleged that the former State employee's post-employment testimony involved a "matter" with which he was involved during his State employment.

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.

RULING: The Commission determined that the former State employee's activities were not violative of the post-employment restriction.

REASONING: The Commission uses a two-pronged analysis in section 17 cases: (1) Is the former State employee representing, appearing for, negotiating on behalf of, or providing information not generally available to members of the public to a party other than the State and (2) Was the former State employee substantially and directly involved in the "matter" in question? In this situation, the first prong was satisfied in that the former State employee appeared on behalf of parties other than the State in his role as an expert witness.

As to the second prong, the Commission historically has defined "matter" in a manner that has not prohibited a former State employee from utilizing his/her general expertise in connection with post-employment activities. Examples of specific "matters" which the Commission has considered are Department of Transportation highway projects, Housing and Mortgage Finance Agency housing projects, Department of Environmental Protection cleanup sites, agency contracts and programs, and Requests for Proposals.

Based on Commission precedent, each case in which the former State employee testified would be a "matter" for the purposes of section 17. The former State employee was not testifying about a specific case with which he had involvement as a State employee, but rather was utilizing his general expertise. The former State employee's testimony focused on the reliability and validity of the equipment reading, i.e., was the instrument operated properly by a certified technician and was it in proper working order.

COMMISSION CASE NO. 06-00

SUBJECT: Appearance of Impropriety, Post-Employment, Contracting with the State

FACTS: The Commission reviewed the outside business interests of a State employee who was a 51 % partner in a consulting firm. The consulting firm was pre-qualified by the Department of Treasury for a competitively bid contract to provide professional services to the State employee's Department. In her official capacity, the State employee reviewed projects to ensure compliance with standards set by the federal government.

The State employee also sought advice from the Commission as to whether she was permitted, under the section 17 post-employment restriction, to perform work on a contractual basis for another State agency should she resign from State service.

RULING: The Commission determined that technical violations of N.J.S.A. 52:1313-19 and 23 (e)(7) had occurred and exercised its discretion and declined to take any action. The Commission also advised the State employee that she was permitted, under the section 17 post-employment provision, to contract with a State agency, either personally or on behalf of her outside business, in connection with matters with which she had no involvement in her official capacity.

REASONING: 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 in 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 applicable provisions; and (3) Any contract of insurance entered into by the Director of the Division of Purchase and Property, Department of Treasury, pursuant to N.J.S.A. 52:2713-62.

These exceptions require prior approval of the Commission.

The Commission has permitted a State employee to contract with State agencies, other than his/her own, when such contracts are subject to public notice and competitive bidding, and the State employee receives prior approval of the Commission, with the understanding that he/she not use State time or resources or any information or services not generally available to the public in connection with the outside interest. Under Commission precedent, this State employee is prohibited from contracting to provide professional services because the contract is funded and overseen by the Division by which she is employed.

In deciding to take no action against this employee, the Commission considered the following circumstances. The State employee disclosed her partnership interest and the projects with which she was involved on behalf of her outside business prior to assuming her State position. She also completed a conflicts questionnaire in which she revealed the extent of her interest in the firm and the fact that the firm was planning to bid on State contracts. That form was approved by the Department's Ethics Liaison Officer. There was no indication that the State employee was involved in her official capacity in any matters in connection with her outside business.

With regard to the post-employment restriction, the Commission used a two-pronged analysis

detailed in Case No. 04-00.

Whether a former employee is representing a party other than the State depends on whether she contracts with the other State agency as an individual or on behalf of her outside business. If the State employee contracts as an individual, the first prong is not satisfied, and it is not necessary to consider whether she was substantially or directly involved in the matter during her State employment.

If the State employee contracts with another State agency on behalf of her outside business, her activities would be representational in nature. As to the second prong, the matter broadly construed would be the individual communities with which the employee was involved in her official capacity. The matter narrowly construed can be viewed as the separate community projects. The Commission determined that based on its precedent, segmentation was possible in this case.

COMMISSION CASE NO. 11-00

SUBJECT: Outside Activity

FACTS: The State employee was President of a business which interacted, on behalf of clients, with the Division by which she was employed. The State employee requested an opinion as to whether she was permitted, under section 16 of the Conflicts Law, to hire an independent contractor to interact with her Division on behalf of her customers.

RULING: The Commission determined that her engagement of an independent contractor to interact with her Division was permitted under Section 16(b) of the Conflicts Law.

REASONING: Section 16(b) prohibits a State employee from representing, appearing for, or negotiating on behalf of any party other than the State in connection with any matter pending before a State agency. However, in this situation, the required interaction appeared to be ministerial in nature and it was unlikely that the State employee would be required to interact with the Division in regard to the contents of any document. The service was provided by the state

employee's business as a convenience to its customers. Thus, the engagement of an independent contractor to perform the work did not appear to be problematic under section 16(b).

COMMISSION CASE NO. 13-00

SUBJECT: Business in Conflict with Proper Discharge of Duties, Impairment of Objectivity, Appearance of Impropriety

FACTS: The Commission considered an appeal by a special State officer of an ethics decision rendered by the Department's Ethics Liaison Officer regarding the acceptance of an award administered by a private entity but subject to the approval of the Board on which the special State officer sat. Also under review was an irrevocable trust that the special State officer created at the time of his appointment and into which he transferred his ownership interest in a business regulated by his Board. There were also allegations that he continued to be involved in his business after his appointment.

RULING: The Commission concurred with the Ethics Liaison Officer that the special State officer could not be a recipient of the award, determined that the irrevocable trust was not approvable under the standards set forth in Executive Order No. 2, and issued an Order setting forth the terms under which the special State officer must either divest all ownership interest in certain business activities or resign his position.

REASONING: The Commission determined that the special State officer could not accept the award, directly or indirectly because such acceptance would raise questions about his objectivity and independence of judgment with regard to the award program and the other activities of the private entity that administered the award.

The Commission determined that the irrevocable trust was not approvable under the standards set forth in Executive Order No. 2. The terms of section 11 of the Order, "Blind Trusts," specify that a "trust shall not contain assets in which the

holder's ownership right or interest is required to be recorded in a public office" and specify that the "trust shall not become effective until submitted and approved by the Executive Commission on Ethical Standards."

Section 11.2 of the Order requires that a copy of the executed blind trust agreement be filed with the Executive Commission and with the head of the department in which the State official holds his/her position. The copy is to be accompanied by a statement outlining the interests from which the official seeks to remove him/herself and the conflicts that he/she seeks to avoid.

Neither the special State officer nor the Trustee followed the procedural requirement of the Order. Thus, the trust was not in effect under the operation of the Order and the special State officer's conflicted situation was not cured.

COMMISSION CASE NO. 16-00

SUBJECT: Outside Activity, Appearance of Impropriety

FACTS: The State employee appealed the conditional approval issued by her the Division regarding her participation in a program operated by a Division provider.

The State employee and her spouse sought to participate in the provider's program. The Division approved the outside activity subject to certain restrictions, including that she not accept Division-supervised clients. The State employee indicated that her husband, who was not a Division employee, would be the primary caregiver; therefore, he should not be subject to the Division policy prohibiting employees from taking Division-supervised clients.

RULING: The Commission concurred with the agency's conditional approval.

REASONING: The Commission determined that the condition was reasonable to ensure against the appearance of impropriety. If the agency had to investigate the care being given to an agency client, the public could question the objectivity of

such an investigation since the State employee worked in the agency conducting the investigation.

COMMISSION CASE NO. 21-00

SUBJECT: Post-Employment

FACTS: The former State employee requested an opinion from the Commission regarding proposed post-employment activities. The former State employee worked as Director of the Division from 1994 until 1999. He was now the principal of a consulting firm that wished to enter into an agreement with a potential client, whose application was pending before a State agency. The former State employee was involved in an investigation of the potential client during his State employment.

RULING: The former State employee was prohibited from representing the potential client in connection with the application because he had been substantially and directly involved in the investigation associated with the application.

REASONING: The Commission used the post-employment two-pronged analysis (see Case No. 04-00) and determined that (1) the former Director would be acting on behalf of a party other than the State and (2) he had substantial involvement with the investigation of this client.

He had been responsible for directing all investigations regarding applicants; he was orally briefed, received status reports, and made decisions regarding investigations.

COMMISSION CASE NO. 22-00

SUBJECT: Unwarranted Privilege, Appearance of Impropriety, Information Not Generally Available to the Public

FACTS: The Commission received an allegation that a State employee supplied interview questions to a candidate for a position with her Division. The candidate previously worked for the State employee, and the two remained in contact. Over the years, the candidate had called

on the State employee for career advice. When the position became available, the candidate asked the State employee for advice, as he had done previously. The State employee gave the candidate general advice that she would have given any other candidate.

RULING: The Commission did not find evidence of any violations of sections 23(e)(3), unwarranted privilege, 23(e)(7), appearance of impropriety or 25, information not generally available to the public.

Pursuant to N.J.A.C. 19:61-3.1(g), the Commission dismissed the allegation against the State employee.

REASONING: The Commission reviewed the facts and circumstances and determined that as to section 23(e)(3), no unwarranted advantage appeared to have been secured for the candidate because he was not interviewed for the position. As to sections 23(e)(7) and 25, there was no evidence that the candidate received any information that was different from information provided to other candidates.

COMMISSION CASE NO. 22-99

SUBJECT: Secondary Employment

FACTS: The State employee was part owner of a limited liability company. As a State employee, she was required to file a financial disclosure statement under the application of Executive Order No. 2. The Order prohibits a State employee's company from doing business with any State agency. The State employee's company had entered into a contract with a State agency. It was also alleged that she used her position with the State to promote her business and requested price information from similar businesses to underbid them.

RULING: The Commission, in accordance with N.J.A.C. 19:61-3.1(h), found indications of violations of Section 19 of the Conflicts Law and authorized staff and counsel to draft a complaint.

The allegations concerning the use of her position were not substantiated.

REASONING: Section III.A of Executive Order No. 2 prohibits a financial disclosure filer from having any interest in a closely held corporation, partnership, sole proprietorship or similar business entity doing business with any federal, State, interstate or local government entity. The prohibition does not apply if the business entity contracts with a government entity, other than a State agency, after public notice and competitive bid and with prior approval of the Executive Commission.

Under Section 19 of the Conflicts Law, a State officer or employee or his/her partners of any corporation in which he/she owns or controls more than 1 % of the stock is prohibited from contracting with any State agency unless the contract is made after public notice and competitive bid or the contract falls within the scope of N.J.S.A. 52:34-10 or N.J.S.A. 52:2713-62, with the prior approval of the Executive Commission.

The State employee entered into a consent order with the Commission prior to the issuance of a complaint.

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.