

GUIDELINES

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The Newsletter of the New Jersey Executive Commission on
Ethical Standards

28 W. State Street
Room 1407

(609) 292-1892

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THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

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Vice Chair Elizabeth Randall,
Commissioner Arthur Eisdorfer,
Commissioner Alisha Griffin,
Commissioner Lonna Hooks,
Commissioner Fred Lopez,
Commissioner Alan Steinberg;
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. 2-94

SUBJECT: Impairment of objectivity, interests which conflict with official duties, appearance of violation of public trust.

FACTS: The special State officer is a member of a State board that regulates her profession. She is also president of a non-profit professional organization which provides continuing education to its members. The special State officer appealed the decision of the Department that she must re-

cuse herself from discussions and voting, as a board member, on proposed amendments governing continuing education requirements. The non-profit organization of which she is President submitted comments when the original regulations were proposed.

RULING: The Commission affirmed the decision of the Department that the special State officer must recuse herself from discussions and voting on the amendments to the regulations as long as she is an officer in the non-profit organization.

REASONING: The Commission reviewed the facts of the situation under section 23(e)(1), which addresses interests, financial or otherwise, which conflict with the State officer's official duties, section 23(e)(5), which addresses compensated or uncompensated employment or service that might impair objectivity and independence of judgment, section 23(e)(7), the appearance section of the statute and the section of the Department's Code of Ethics, which addresses volunteer activities.

The Commission advised the special State officer that under section 23(e)(1) the interest in question need not be direct or of a financial nature and extends to professional activity and under section 23(e)(5) uncompensated employment and services are covered. As to the appearance section, 23(e)(7), the Commission determined that a member of the public could question the special State officer's objectivity since she is president of an organization devoted to providing continuing education courses. In addition, the Commission noted that the Department's Code of Ethics has been interpreted by the Department to permit membership in professional organizations, but requires a review if the individual holds office in such an organization.

In the course of reviewing this case, the Commission also considered (1) whether board members who are affiliated with an institution but do not deal directly with continuing education functions at that institution, should be permitted to vote on continuing education regulations and (2) the situation of officers versus members of a professional organization with respect to voting on the regulations.

As to the issue of board members affiliated with an institution, the Commission expanded existing precedent which provided that an employee could vote on a regulation that affects the institution so long as he/she is not employed in the program in question to also include the requirement that the regulation cannot have a direct and substantial impact on the institution.

As to the situation of officers of a professional organization versus members with respect to voting on regulations, the Commission determined that membership in a professional organization does not automatically necessitate recusal from consideration of issues affecting that professional organization.

COMMISSION CASE NO. 23-94

SUBJECT: Outside employment.

FACTS: The State employee appealed the decision of the Departmental Ethics Committee which determined that his consulting work with an entity doing business with the Department conflicted with his State position.

RULING: The Executive Commission affirmed the decision of the Department's Ethics Committee that the State employee's secondary employment as a consultant to an organization affiliated with the Department conflicted with his State position.

REASONING: The Commission determined that the State employee's official duties and his consulting role overlapped. In his official capacity, he has contact with the organization and has an obligation to provide information to that organization as well as to other entities. The organization is also subject to the jurisdiction of another unit within the Department on a case-by-case basis. Even though the State employee is not involved in the administration of that particular unit, he nevertheless has supervisory responsibility for the division which encompasses that particular unit and there could be a perception problem. In addition, his consulting role involves interfacing with State agencies on behalf of

the organization, which is flatly prohibited by section 16 of the Conflicts Law.

The Commission acknowledged that it appeared that the employee genuinely wanted to assist the organization in getting started, but his consulting role was not approvable under the Commission's Guidelines on Secondary Employment.

COMMISSION CASE NO. 25-94

SUBJECT: Contracting with State agencies.

FACTS: The State employee requested an opinion from the Commission as to whether he is permitted, under section 19 of the Conflicts Law, to provide professional services to State agencies.

RULING: The Executive Commission advised the State employee that he could not perform the professional services in question.

REASONING: Section 19 prohibits a State employee from undertaking any contract with a value of \$25 or more with any State agency, except under limited circumstances. The services that the State employee wished to perform were not subject to public notice and competitive bidding. The contracts in question also did not fall within any of the permissible exceptions.

The Commission advised the State employee that he could contract with State agencies, other than his own, provided that the contracts are subject to public notice and competitive bidding. With few exceptions, the Commission prohibits an employee from entering into contracts with his/her own agency, even if such contracts are competitively bid, to avoid the appearance of impropriety or unwarranted privilege.

COMMISSION CASE NO. 26-94

SUBJECT: Privatization.

FACTS: Three State employees requested that the Commission review their situation and render a decision as to whether they are permitted to participate in the open competitive bidding process for the privatization of a program in their Department and whether, under the post-employment restriction, they are permitted to operate the program should they be successful in the bidding. This is the first time that the Commission was asked to consider how the Conflicts Law affects State employees who may want to take advantage of the State's plans to privatize services previously provided by State agencies.

RULING: The Commission determined that the three employees could participate in the open competitive bid

process for the privatization of the program in question subject to certain restrictions.

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 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 the Treasury, pursuant to *N.J.S.A. 52:27B-62*.

Each of these exceptions requires prior approval of the Executive Commission.

Because the contract for the privatization of the program at issue will be made after public notice and competitive bidding, the

Commission approved the employees' participation in the bid process. To deal with concerns expressed in past Commission cases regarding whether State employees could bid on contracts to be awarded by their own agencies, the Commission outlined several safeguards. These safeguards are intended to prevent perceptions of State employees gaining unwarranted advantages or using insider information.

In order to approve an employee's participation in an open competitive bid process for services being privatized by his/her agency, the Commission requires an affidavit to the Commission from the agency management specifying that the employee is not or has not been involved in the privatization decision and will have no future involvement in the privatization process, e.g., development of the RFP and winding down of the State-provided service. The affidavit must also specify that the employee will have no involvement in the evaluation of bids. The Commission also requires that the agency maintain records identifying all individuals involved in the privatization process. This requirement will facilitate investigation of any future complaints charging an employee with the use of insider information.

The Commission recommends that the RFP contain a notice to all bidders that agency employees or former employees may be submitting proposals. The Commission also recommends the "blind" review of the proposals to the maximum extent feasible. This would involve identifying bidders only by numbers or letters and not by personal or corporate identity.

Section 17, the post-employment restriction of the Conflicts Law, prohibits a former State employee from representing, appearing for, negotiating on behalf of or providing information or services not generally available to the public to any person or party other than the State in connection with any specific cause, proceeding, application or matter in which he/she had substantial and direct involvement during his/her State employment.

The Commission took the position that privatized services that are no longer pending, active or on-going in the State agency that formerly provided the services are not "matters" within the scope of section 17.

The Commission is concerned that individuals who expect to have involvement in the privatized services not participate, while State employees, in the privatization decision and process because of the Conflicts Law

provisions that prohibit employees from using their official positions to gain an unwarranted advantage (section 23(e)(3)), acting in their official capacities in matters where they have an interest that may impair their objectivity (section 23(e)(4)), acting in a way that might create the impression of a violation of the public trust (section 23(e)(7)) and using or disclosing information not generally available to the public (section 25). Thus, procedurally, the Commission requires that an employee express his/her intention to be involved in any private sector efforts in connection with the privatization to the agency's management and the Executive Commission as soon as it is feasible so that appropriate steps can be taken to screen the employee from the agency's privatization activities.

The Commission will require notice that the employee was not involved in the privatization decision or in the privatization process, e.g., preparation of the RFP, review of bids, evaluation of potential providers. The agency will be required to maintain records identifying all employees involved in the privatization process.

SUBJECT: Casino employment.

Prior to 1994, Section 17.2(b) prohibited all State officers and employees from

holding an interest in, holding employment with, representing, appearing for, or negotiating on behalf of the holder of or applicant for a casino license or any holding or intermediary company with respect thereto. In December 1994, the Legislature amended the statute adding the following language:

except that (1) a State officer or employee other than a State officer or employee included in the definition of 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 State officer or employee, or 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 State officer or employee, or person....

The amendment provides that most State officers or employees may hold employment with the holder of, or applicant for, a casino license, if, in the judgment of the Executive Commission, such employment will not interfere with the officer's or employee's responsibilities and will not create a conflict of interest, or reasonable risk of the public perception of a conflict of interest. All such

waiver requests should be forwarded to the Executive Commission for consideration.

Regarding "Guidelines"

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

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