

GUIDELINES

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The Newsletter of the New Jersey Executive Commission on Ethical Standards

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REINTRODUCING "GUIDELINES"

The Executive Commission on Ethical Standards is reintroducing "Guidelines," a quarterly newsletter intended to keep you informed of the requirements of the Conflicts of Interest Law (N.J.S.A. 52:13D-12 et seq.), decisions rendered by the Commission and general rules and guidelines applicable to State employees. The staff welcomes suggestions regarding any topic you would like to see included in future issues. Please direct any comments or questions about "Guidelines" to Jeanne A. Mayer, Deputy Director.

COMMISSION CASE NO. 32-91

SUBJECT: Representing a party other than the State. Contracts with the State.

FACTS: Two State employees involved in non-profit corporations signed lease agreements, as representatives of these non-profits, with their own agency. The two employees characterized their roles with these corporations as volunteer public service.

RULING: The Executive Commission ruled that the representation by the two

employees was not permitted under N.J.S.A. 52:13D-16 and advised the employees that such representation should be undertaken by a corporate trustee who is not a State officer or employee or special State officer or employee.

The section 19 contract restriction has been interpreted as applying to those situations where the State contracts for goods and services but not to every contractual arrangement with a State agency. Since the lease in question was not covered under Section 19, and was handled in accordance with the adopted policy of the agency, no Section 19 violation was found.

REASONING: Section 16 of the Conflicts Law provides in pertinent part: "no State officer or employee ... shall represent, appear for, or negotiate on behalf of ... any person or party other than the State ... before any State agency...." The term "negotiate" generally refers to participation in conferences or discussions involving two or more parties for the purpose of reaching an agreement as to a particular issue. Thus, the two employees did at least "negotiate" on behalf of their

respective non-profit corporations in that there were discussions involving the corporations and the agency for the purpose of reaching lease agreements.

COMMISSION CASE NO. 36-91

SUBJECT: Secondary Employment.

FACTS: Prior to joining the State agency in 1987, the employee worked as a nurse at a hospital which is inspected by her agency. After joining the State, she retained a position in the hospital's emergency room on weekends.

The employee's department is organized into four sections, two of which license health care facilities, specifically long-term care facilities and hospitals. The State employee worked in the section that inspected long-term care facilities; however, she was cross-trained, as are all her co-workers, to be able to work in the hospital inspection section.

RULING: The Executive Commission confirmed the Department's ruling that the employee's secondary employment as an emergency room nurse constituted a conflict of interest with her departmental employment.

REASONING: The Commission supported the Department's policy prohibiting outside employment in facilities licensed by the Department; the policy was established to keep the inspections and licensing operations free of criticisms of nonobjectivity or preferential treatment due to the outside employment of a departmental employee. The Department also wished to maintain the flexibility of assigning inspectors to either type of facility; such flexibility and the purpose of the Department's cross training of employees would be lost if this type of employment was permitted. The Department was further concerned about the employee's potential access to insider information; the appearance of a conflict and the appearance

of the use of insider information would exist since the field staff are in close proximity when they are in the office and exchanges of information, even inadvertent, are possible.

COMMISSION CASE NO. 40-91

SUBJECT: Secondary Employment.

FACTS: A State employee was interested in part-time private employment providing counseling and resource information for competent elderly adults and their families with the goal of maintaining the elderly person in his/her own home.

In her official position, the employee functions as an Administrator and is responsible for the supervision of field social workers who monitor the care of incompetent elderly clients. The majority of these clients are institutionalized.

RULING: The Executive Commission confirmed the Department's Ethics Committee ruling that the proposed outside employment would be incompatible with the employee's State position and therefore would be violative of the Department's Code of Ethics which provides "outside employment must be limited in scope to avoid the potential for having any dealings with entities, individuals, subsidiaries or affiliates who have business dealings with the Department or who are likely to have business dealings with the Department."

REASONING: The Department's decision was based on the perception that the two positions dealt with the same general area, the duties and responsibilities of the two positions were similar, and the possibility existed that there were individuals, organizations, and entities that the employee might deal with in both positions. The

Departmental Ethics Committee was also concerned that the employee would receive client referrals from contacts in her official position.

COMMISSION CASE NO. 45-91

SUBJECT: Secondary Employment.

FACTS: The State employee holds a clerical position and was working part-time as a counselor in a program designed to assist mentally/emotionally disturbed children and their families. The program is partially funded by the State employee's department.

RULING: No conflict existed between the employee's State position and her outside employment.

REASONING: In previous cases, the Commission had determined that when a Department provides funds directly or indirectly to a program, and an employee of that Department accepts a compensated position created as a result of that funding, a conflict of interest exists. Reviewing the situation currently before them, the Commissioners noted that the State employee had no policy-making role in her State position nor could she influence the funding of this program.

The Commissioners distinguished the case before them from prior Commission determinations because the State employee's role in this instance did not overlap, influence, or interact with her outside employment. Commission members noted that dual employment situations such as this one should be subject to close scrutiny and disclosure. The Commission further noted that outside employment situations must be reviewed on a case-by-case basis.

COMMISSION CASE NO. 2-92

SUBJECT: Contracts with State Agencies.

FACTS: A special State officer requested an opinion from the Commission regarding the application of section 19 of the Conflicts Law to his situation. The special State officer wished to enter into a lease agreement with a State agency other than his own for a property owned by a partnership of which he was a member. Special State officers were not subject to section 19 of the Conflicts Law until the 1987 amendment to the statute. The Executive Commission had not had an opportunity to interpret the application of section 19 to special State officers since that amendment.

RULING: The Commission found that, based on the language of section 19 and the legislative history of its amendment, the special State officer was not prohibited from entering into a contract with an agency other than his own.

REASONING: The language of section 19 indicates that a special State officer or employee is prohibited from contracting with his or her own agency only when the individual has duties or responsibilities in connection with the purchase or acquisition of goods or property. The language further implies that there is no prohibition against a special State officer contracting with his own agency if he does not have any purchasing responsibilities. There is no prohibition against the special State officer contracting with an agency other than his own.

The legislative history of the section 19 amendment indicates the intent of the Legislature to specifically address special State officers who are "purchasers." The Commission noted that special State officers

continue to be subject to the provisions of section 23(e) of the Conflicts Law in contracting arrangements, particularly the restrictions regarding unwarranted privileges and appearance of conflict situations.

COMMISSION CASE NO. 5-92

SUBJECT: Post-employment.

FACTS: A former Casino Control Commission employee requested an opinion from the Executive Commission regarding the application of the casino post-employment restriction, N.J.S.A. 52:13D-17.2(c) to her situation. The former employee established a private practice in the Philadelphia area and was interested in providing legal services to law firms on an independent contractor basis. Because the possibility existed that she would offer her services to an Atlantic City law firm representing casino licensees, she inquired as to the effect of section 17.2(c) on the arrangements that she would make.

RULING: The Executive Commission determined that section 17.2(c) of the Conflicts Law did not preclude the former State employee from establishing the proposed independent contractor relationship with a law firm that represents holders of casino licenses. This ruling was limited to the circumstances of this case.

REASONING: The operation of section 17.2(c) prohibits certain individuals from holding employment with, representing, appearing for, or negotiating on behalf of any holder of or applicant for a casino license in connection with any matter for two years after leaving State service. The prohibition extends to any partnership, firm or corporation with which a person is associated and to any partner, officer,

director or employee of the partnership, firm or corporation. The crucial question in this case was whether the services that the former employee proposed to provide for a law firm created an "association" with that law firm; such an association would subject the law firm as well as the former employee to the section 17.2(c) restriction.

The Commission had considered the application of section 17.2(c) to an "independent contractor" relationship on a prior occasion and issued Advisory Opinion No. 40. The Commission considered the factors used by the courts to distinguish services by an independent contractor from services incident to an employment relationship. In Advisory Opinion No. 40, the Executive Commission determined that the specific relationship at issue would constitute an "association" under the statute because the parties would share common letterhead, common office facilities, common secretarial assistance, common telephone lines, common conference rooms and common library facilities. In addition, in that case, the former State employee would be subject to the supervision of the law firm with regard to ethical standards and quality control.

In the present case, the former employee stated that she anticipated that she would provide general legal services on civil matters, such as preparing memos or briefs or drafting complaints, and would not make court appearances on behalf of the law firm or its clients. She also would work in her own office and not in the offices of the Atlantic City firm, and would not use the law firm's letterhead, secretarial services, library facilities, telephone lines, or conference rooms. The former employee also stated that the services that she performs will not be subject to the direction, control or review of

the law firm. She would not have access to the firm's clients or its files, and would not perform any service for the firm which would involve the holder of or applicant for a casino license. The Commission's ruling was predicated upon verification that the former employee had other clients and that the independent contractor service could survive as a business operation without this particular law firm as a client.

GUIDELINES GOVERNING THE USE OF OFFICIAL STATIONERY

State officers and employees and special State officers and employees frequently write letters for various purposes which are not always related to their official duties. Questions about the propriety of letters written on State stationery to further the personal interest of the officer or employee or another individual or entity have been addressed to the Executive Commission. To help resolve these questions, the Executive Commission on Ethical Standards has established the following Guidelines to clarify the use of official stationery for purposes other than the conduct of a State agency's business.

Permissible Uses of Official Stationery

The Executive Commission has determined that the following uses of State stationery are generally permissible:

1. To recommend a current or former employee or colleague for another position, admission to a school or program, etc.

Example: Recommending a subordinate for admission to graduate school.

2. To respond to inquiries from a private entity about a current or former employee or colleague.

Example: Providing a character reference for an employee to an adoption agency during the course of the employee's application to adopt a child.

Note: These permissible uses are only acceptable so long as the use of official stationery does not create an impression that the State officer or employee is engaged in an unwarranted use of his or her position. For example, it would not be appropriate for a State employee to recommend an individual for inclusion in a program over which the State employee has supervisory or regulatory authority. In addition, there must be a reasonable connection between the officer's or employee's official duties and the use and purpose of the letter.

Impermissible Uses of Official Stationery

The Executive Commission has determined that the following examples represent clearly impermissible uses of State stationery:

1. To promote a candidate for elective office.

Example: Writing an endorsement of a candidate for the legislature for inclusion in a campaign pamphlet.

2. To endorse a State vendor or contractor.

Example: Writing a letter of general recommendation for a State vendor for dissemination by the vendor. Note, however, that a letter complimenting the vendor for a job well done may be acceptable

even though the vendor may later display the letter.

3. To express a personal opinion on a matter that is not related to one's official duties.

Example: Sending a letter to the editor of a newspaper commenting on a matter that is not related to the duties of the State officer or employee or his or her agency.

4. To secure a personal financial gain or pursue a vested interest for one's self.

Example: Writing to a private contractor (plumber, electrician) demanding a refund or a reduction in a quoted price.

Personal Stationery Imprinted with Agency, Office or Title

The Executive Commission has determined that use of personal stationery imprinted with the agency office or title of a State officer or employee, even though paid for personally, is impermissible. Such stationery may create the appearance of official stationery or may create an impression that the State officer or employee is acting in an official capacity.

The Executive Commission acknowledges that there are occasions when it may be appropriate for a State officer or employee to identify himself or herself by position or title in correspondence on personal stationery (i.e., stationery bearing the individual's name and home address).

Agency Use of Official Stationery for Solicitations

1. State agencies shall not solicit contributions of any kind from vendors to

the agency or from entities regulated by the agency.

2. Solicitation of any other entities is subject to review and approval by the agency's Ethics Liaison Officer prior to any contact by the agency. The Ethics Liaison Officer must be advised of the purpose of the solicitation, the expected result, the identities of the entities to be solicited, whether there is any personal connection between the agency

employees and the solicited entity, and must be provided with a sample of the solicitation letter.

3. The Ethics Liaison Officer should determine whether the solicitation could be problematic under the agency's

code of ethics, the Conflicts of Interest law, any Guidelines promulgated by the Executive Commission on Ethical Standards, and/or any statutory provisions dealing with charitable contributions. The Ethics Liaison Officer should consider such factors as whether the agency has any business contacts with the recipients of the solicitation, whether any solicited products or services will directly benefit any agency employees, whether the solicitation is of such magnitude that it could be burdensome to the recipient, and whether the language of the solicitation is coercive.

4. The Ethics Liaison Officer shall copy the Executive Commission on Ethical Standards on all determinations regarding solicitations.

Circumstances that do not fall within the permissible or impermissible examples above require an individual determination by the Executive Commission. Questions and inquiries should be addressed to: Executive Commission on Ethical Standards, CN 082,

Trenton, New Jersey 08625-0082; (609) 292-1892.

Adopted at the Commission's public meeting on October 17, 1991; amended February 20, 1992

GUIDELINES REGARDING JOINT VENTURES AND PRIVATE FINANCING OF STATE ACTIVITIES

The propriety of joint ventures between private entities and State agencies as well as private financing of State activities has recently been considered by the Executive Commission on Ethical Standards. Such questions have arisen, in part, because of the current economic climate which has forced State agencies to find new and creative means of underwriting some functions. The Executive Commission has established the following guidelines as a structure under which joint ventures and private financing can be reviewed.

As a threshold matter, the Executive Commission has determined that the identities of all contributors to joint ventures or private financing must be disclosed in order to dispel any perception by the public that an agency is acting improperly.

Review Procedure

All proposals for joint ventures between private entities and State agencies or private financing of State activities must receive prior review and approval.

The review and approval procedure must be initiated at the departmental level; the individual making the inquiry must provide the following information to the departmental Ethics Liaison Officer.

The nature of the event or activity to be funded, including approximate date, time, duration, location, cost, and identities of participants and attendees.

The identities of joint sponsors or donors, including their relationship to the department (e.g., vendor, regulated entity, trade organization).

Identification of any amenities that could accrue to the personal benefit of a State officer or employee or special State officer or employee (e.g., overnight stay at a hotel, meals, transportation).

Identification of the role to be played by the State agency (e.g., providing speakers, lending the name of the agency to the invitation, funding half the cost).

Evaluation and Approval

The departmental Ethics Liaison Officer must make a determination as to whether the joint venture or private financing arrangements would be problematic under Executive Order No. 189, the departmental code of ethics, the Conflicts of Interest Law, any statutory provisions dealing with financing of an agency's activities and/or dealing with charitable activities, and the Commission's Guidelines, including the Guidelines on the Receipt of Gifts, the Guidelines on Attendance at Events and Functions, and the Guidelines Governing the Use of Official Stationery.

The Ethics Liaison Officer's evaluation should include, but not be limited to, the following considerations.

The activity or event should be related to the agency's mission. Events such

as award dinners or receptions may give rise to public perception problems.

The date, time, and duration of the event should be reviewed as to the appropriateness of scheduling for a business day versus evening or weekday versus weekend. The Ethics Liaison Officer should determine whether the length of time planned is excessive or whether a different arrangement could reduce any requirements for meals or overnight accommodations.

The suitability of the location should be reviewed. For example, meetings held at some locations are perceived differently than meetings held at State-owned facilities.

The cost of an event should be reasonable; annual events (e.g., training conferences) should not become more elaborate due to the infusion of private contributions or joint funding.

The identities of participants and attendees should be scrutinized so that the event does not create the appearance of a close relationship between, for example, State employees and employees of regulated entities. The review should also consider whether more State employees are attending than would be the case without private funding.

The identities of joint sponsors or donors should be reviewed to assure that the sponsor/donor has a legitimate interest in the event, that agency activities are not consistently underwritten by the same sponsor, and that improper relationships with vendors, regulated entities and entities doing business with the State agency are avoided. Other factors to be considered are whether the agency solicited the sponsorship or the agency was approached without solicitation

and whether additional sponsors should be sought to dispel any perception of improper influence.

The Ethics Liaison Officer should consider whether meals, receptions, overnight accommodations, and travel expenses can be eliminated so that State employees are not placed in situations where they could be seen to be accepting things of value from vendors, regulated entities, or entities doing business with the State agency.

The role of the State agency should be reviewed to safeguard against the mere lending of an agency name to an event to legitimize an activity that would not otherwise be permitted under the Commission's Guidelines for Attendance at Events and Functions.

Notification to the Executive Commission

The Executive Commission must be copied on all joint venture and private financing determinations and reserves its statutory authority to accept, modify or reject all such determinations.

Adopted at the Commission's public meeting on March 19, 1992.

THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

Chairman Jacob C. Toporek, Vice Chairman Scott A. Weiner, Commissioner David Applebaum, Commissioner Wilfredo Caraballo, Commissioner Melvin Primas, Commissioner Dr. Frances Dunston, and Commissioner Barbara McConnell; Acting Executive Director Rita L. Strmensky.

