

GUIDELINES

The Newsletter of the New Jersey Executive Commission on Ethical Standards

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Vol. 9, No. 3

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Summer/Fall 1999

THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

Chairwoman Janice Mitchell Mintz, Vice Chair Jaynee LaVecchia, Commissioner Gregory Adkins, Commissioner Alisha Griffin, Commissioner Deborah Jones, 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.

PUBLISHED WORKS

The Executive Commission staff frequently receives inquiries regarding State employees' activities in connection with authoring and publishing research papers, articles and books. The Commission has addressed these situations over the years, primarily under the application of sections 23(e)(1), direct or indirect financial or other interest; 23(e)(5), impairment of objectivity and independence of judgment; 23(e)(7), the appearance of impropriety; 24, receipt of compensation for a matter related to official duties; and 25, disclosure or use for personal gain of information not available to the public. Subsequent to March 1997, the Commission has also considered such inquiries under *N.J.A.C. 19:61-6.7(b)*, compensation for published works.

Section 23(e)(1) of the Conflicts Law provides:

No State officer or employee or special State officer or employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

Section 23(e)(5) of the Conflicts Law provides:

No State officer or employee or special State officer or employee should undertake any employment or service, whether compensated or not, which might reasonably be expected to impair his

objectivity and independence of judgment in the exercise of his official duties.

Section 23(e)(7) of the Conflicts Law provides:

No State officer or employee or special State officer or employee should knowingly act in any way that might reasonably be expected to create an impression or suspicion among the public having knowledge of his acts that he may be engaged in conduct violative of his trust as a State officer or employee or special State officer or employee.

Section 24 of the Conflicts Law provides:

No State officer or employee, special State officer or employee, or member of the Legislature shall solicit, receive or agree to receive, whether directly or indirectly, any compensation, reward, employment, gift or other thing of value from any source other than the State of New Jersey, for any service, advice, assistance or other matter related to his official duties, except reasonable fees for speeches or published works on matters within his official duties and except, in connection therewith, reimbursement of actual expenditures for travel and reasonable subsistence for which no payment or reimbursement is made by the State of New Jersey. This section shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office.

Section 25 of the Conflicts Law provides:

No State officer or employee, special State officer or employee, or member of

the Legislature shall willfully disclose to any person, whether or not for pecuniary gain, any information not generally available to members of the public which he receives or acquires in the course of and by reason of his official duties. No State officer or employee, special State officer or employee, or member of the Legislature shall use for the purpose of pecuniary gain, whether directly or indirectly, any information not generally available to members of the public which he receives or acquires in the course of and by reason of his official duties.

N.J.A.C. 19:61-6.7, Compensation for Published Works, provides:

(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, the 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 on his/her own time, without using the services of other State

officials or resources owned by the State; and

(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.

Summarized below are Commission cases dealing with published works.

In Case No. 255-75, the Commission considered whether employees of the Public Broadcasting Authority ("PBA") could receive a compensation fee for journalistic work used on a commercial station. Various journalists employed full-time by the PBA were approached for the use of news items that they wrote during the hours that they were employed by the State. These scripts, films or tapes were being used on commercial TV channels. The commercial stations wished to compensate the journalists for the use of their work.

The Commission determined that it would be a violation of section 24 of the Conflicts Law for State employees to receive compensation from any source other than the State for news items created as part of their official duties.

In Case No. 402-76, the Commission considered whether a professor at a State college was permitted, under the Conflicts Law, to receive payment of royalties for a book he published prior to his State employment and for an instructional manual to be used in conjunction with the book. The instructional manual was authored by him during his State employment.

Prior to his State position, while employed at a New York university, the professor devised a method to teach philosophy to elementary school children and authored a book on the topic. Two years after the professor joined the State college, the Board of Trustees formed the Institute for the Advancement of Philosophy for Children ("IAPC") as a means of further research and curriculum development for the purpose of training elementary school teachers to teach philosophical thinking to children. The professor was appointed Director of the IAPC.

The Commission determined that it would not be a violation of the Conflicts Law for the professor to receive royalties from the original book, written materials related to the original book or future materials authored on the subject of the development of philosophy in the elementary grades. This decision was based on the fact that the State college did not have a specific policy governing receipt of royalties for published works written by faculty members during their employment with the college. The agreement between the professor and the State college to act as Director of the IAPC did not provide that he author any publications in connection with this topic. The Commission thus determined that writing the instructional manual and any future curriculum materials related to this issue could not be said to be related to his official duties. The professor was advised that, in his official capacity, he could not encourage the purchase of any materials that he authored.

In Case No. 427-76, the Commission considered whether the Deputy Director, Division of Field

Services, Department of Education, could collect royalties from a book which he co-authored, with his wife, on the subject of communicating with hearing impaired and autistic individuals. Prior to his employment with the State, the Deputy Director had been associated with a school for the deaf in another state.

The Commission determined that the State employee was permitted to collect royalties from the sale of the book because the subject matter was unrelated to his official duties and he had no authority or control over the education of hearing impaired or autistic children. The State employee was advised that he could not promote the sale of the book to entities in New Jersey.

In Case No. 601-77, the Commission determined that it would not be a conflict of interest for the Chief Engineer, Operations and Local Aid, DOT, in his private capacity, to write an article on transportation systems to be contained in a book entitled "Focus on New Jersey: Problems and Prospects," to be published by a private publisher. In his official capacity, the employee functioned as a traffic engineer designing roads for counties and municipalities. The employee was well known in his field and as a result had given lectures in approximately 50 universities throughout the country on the topics of highway safety and highway traffic.

In Case No. 1028-82, the Department of Education requested that the Commission review the outside activities of three Department employees. The three employees were approached by an entity that received funding from the Department to assist in the production of a multi-cultural handbook to be used in

teacher training. The Department was responsible for appointing the Board of Directors of the outside entity and provided funding for administrative purposes. The State employees' Division used the facilities of the private entity for training workshops. The project in question was being funded by a federal grant. All three employees' official responsibilities included the development of instructional programs for students not proficient in English.

The Commission found that a potential for an appearance of a conflict existed because the State employees dealt with the private entity in their official capacity and were involved with essentially the same subject matter in both positions. The Commission also advised the Department that the private entity should have solicited assistance from the Department rather than directly approaching the State employees.

In Case No. 1160-83, the Commission considered whether a Teacher, Adult Basic Education Program, New Lisbon State School, Department of Human Services, was permitted to publish a cookbook written on her own time. In her official capacity, the State employee was responsible for teaching home economics and nutrition programs to the adult developmentally disabled population at New Lisbon State School. The cookbook was a pictorial cookbook/teachers guide for non-readers and the handicapped. The development of the cookbook was not part of the employee's official duties and responsibilities. She was advised not to make use of the cookbook in her classes after it appeared in published form.

In Case No. 1186-83, the Commission considered whether Coordinator III, Office of Equal Educational Opportunity, Department of Education, was permitted to publish a book entitled "Analogies and Black History," developed and financed by him for the purpose of assisting minority students in taking college entrance exams. The publication was not developed as part of his official duties, although part of his official function was to conduct black history in-service courses. At the meeting where this matter was considered, the Commission's Counsel at the time indicated that State employees may receive reasonable compensation for published works so long as they are not directly compensated by the State for those same works. Counsel explained that State employees would not be permitted to receive compensation if they were designated to prepare a book for the State as part of their official duties.

The Commission permitted the publication but placed the following restrictions on the employee. He could not conduct any field testing of his material within the area of his geographic assignment; he could not directly promote, advertise or solicit sales of his book to any State employee or any person with whom he had or may have official dealings; he could not contract to sell these materials to the State of New Jersey unless in compliance with section 19 of the Conflicts Law.

In Case No. 3-84, the Commission found that the Supervising Program Development Specialist, Bureau of Research, Division of Youth and Family Services ("DYFS"), Department of Human Services ("DHS"), could not accept a cash award from a gerontological

society for a paper prepared by him as a DYFS employee.

The DHS was awarded a grant to study abuse of the elderly. Because of his experience in the field of gerontology, the State employee was assigned the task of preparing a paper on the subject as part of his official duties. The paper was prepared entirely on State time with grant monies administered by the State. The State employee then submitted the paper for consideration for an annual research award and was the recipient of that award. The Departmental Ethics Review Board concluded that the acceptance of the cash award was violative of the Department's Code of Ethics. The Commission noted that the employee had solicited the award and affirmed the DHS' determination. The State employee appealed the Commission's decision to the Superior Court, Appellate Division, which upheld the Commission's determination.

In 1997, the Department of Law and Public Safety requested an opinion as to whether a Division of Law Deputy Attorney General ("DAG") was permitted to co-author a book about psychics and the paranormal, Case No. 3-97. The DAG wanted to write the book in her private capacity and use her married name (she is known by her maiden name in her employment with the Department). The Commission determined that the DAG was permitted to co-author the book under the following conditions: that she not refer to her status as a DAG or member of the Department; that she not permit the use of her title or employment in connection with publication or promotion of the book; that she not write about an active case or use information not generally available to the public; that she avoid any legal analysis that could be

interpreted as Division of Law work product; that she not use State time or resources in connection with her outside activity.

In Case No. 34-96, Assistant Director, Division of Administrative Rules ("DAR"), Office of Administrative Law ("OAL"), and Case No. 35-96, Assistant Director, Judicial Standards and Procedures ("JSP"), OAL, the employees requested an opinion regarding outside employment. They were co-authors of an annual update of the Administrative Law Volume of the New Jersey Practice Series published by West Publishing Company ("West"). The matter at issue was the pocket part which updates the main text. West paid royalties to the employees.

West was an "interested party" under the Commission's rules. West did business with the OAL in two ways: it was the sole supplier of law library materials and also had the exclusive license to publish the New Jersey Register and the New Jersey Administrative Code. The OAL formerly produced these materials. West had a 7-year contract with three 1-year extensions which could be exercised at the State's option. The JSP Assistant Director had no involvement with West in any of its OAL dealings. The DAR Assistant Director had official contact with West regarding the license agreement.

As to the JSP employee, the Commission determined that she was permitted to engage in the outside employment. Under the Commission's rules governing compensation for published works in effect at the time, State employees were flatly prohibited from accepting compensation from an interested party. West was an interested

party, but after reviewing all of the facts and circumstances, the Commission determined that her arrangement with West did not do violence to the intent of the rule. The Commission noted that the intent of the interested party provision was to prevent any influence by a discretionary vendor. This did not appear to be the situation in her case. West was a sole-source provider, and she would not be able to influence any decision regarding West. The royalties were not subject to negotiation; there was a formula based on the sale of the books.

As to the DAR employee, the Commission determined that his co-authorship did not constitute a conflict with his official duties and permitted the outside employment, subject to the condition that he recuse himself from any actions in connection with contract renewals or re-bidding at the conclusion of the current 7-year contract.

The Commission determined that the interested party prohibition was overly broad. Subsequent to the two decisions, in March 1997, the Commission proposed and adopted the current provision regarding compensation for published works. Under the amended rule, *N.J.A.C.* 19:61-6.7, the fact that compensation is from an interested party does not automatically preclude acceptance of compensation, but is only one of a number of factors to be considered.

In Case No. 17-98, a Principal Environmental Specialist, Department of Transportation, requested an opinion from the Commission as to whether he was permitted to author a book on New Jersey archeological sites to be published by Rutgers University Press ("RUP"). Rutgers University is a State agency for

the purposes of the Conflicts Law, and RUP is fully integrated into the University. The employee's proposed outside activity raised a number of issues: the use of DOT archeological reports prepared by the employee or consultants supervised by him, the receipt of compensation for published works based on these reports, and contracting with Rutgers, a State agency.

The Commission determined that the use of DOT archeological reports in connection with the proposed published work appeared to be approvable under *N.J.A.C.* 19:61-6.7 and section 25 of the Conflicts Law. While there was no precedent directly on point, the Commission noted that State employees have been permitted to accept compensation for published works on subject matters related to their official duties. While the employee's activity was approvable under the rules governing published works and under section 25 of the Conflicts Law, the Commission determined that he was prohibited under section 19 of the Conflicts Law from undertaking or executing a contract or agreement for \$25 or more with RUP.

In Case No. 34-98, the Commission determined that the Managing Actuary, Division of Life and Health, Department of Banking and Insurance ("DOBI"), was permitted to co-author and market a study guide utilized by students preparing to take the Society of Actuaries ("SOA") professional examination under the Commission's rules, precedent, the Conflicts of Interest Law and the DOBI Code of Ethics.

The employee co-authored the study guide in 1995 while on the faculty of Temple University. The examination

contains ten segments; the study guide deals with only one particular segment of the exam. The book previously identified the employee as a faculty member at Temple, but new copies identify him only by name and give no indication of his current employment with the DOBI. The authors distribute approximately one third of the books themselves through direct mail; they purchased an advertisement which is distributed with materials sent by the SOA to all exam registrants. The remaining two thirds of the book are sold through several mail order books stores that specialize in actuarial books. The study guide is used by student actuaries; the majority of them are employees of insurance companies or actuarial consulting firms. Some students are employed by insurance companies and are reimbursed by their employers when they purchase books; insurance companies also purchase the study guide directly.

In approving the activity, the Commission took into account the following factors: the study guide is sold nationally and not just to New Jersey exam registrants, the employee co-authored the book while at Temple, uses only his name and not his official title in connection with the study guide and does not directly solicit regulated entities.

Summary. Under the rule addressing compensation for published works, *N.J.A.C.* 19:61-6.7(b), and under Commission precedent, a State employee may accept compensation for published works under the following conditions.

- There is no prohibition governing such activity in the Department's enabling legislation or Code of Ethics.

- The State employee must obtain prior approval from his/her Department head.
- The published work must not use or disclose information not generally available to the public.
- The State employee must not use State time or resources in connection with the published work.
- The State employee must not use his/her official title in connection with publication or promotion of the published work.
- The State employee must indicate that his/her views do not represent those of the State.
- The State employee cannot promote, advertise or solicit sales of the published work to co-workers or individuals with whom he/she has official dealings.
- The State employee may not contract to sell the published work to the State except in compliance with section 19 of the Conflicts Law.
- The published work must not have been prepared as part of the State employee's official duties.

Ethics Liaison Officer Meeting. The annual meeting of the Ethics Liaison Officers ("ELO") and Commission members and staff is scheduled for Thursday, September 22, 1999, 9:30 a.m. at the multipurpose room on the first floor of 225 W. State Street, Trenton. (This is the former Department of Education building at the corner of W. State Street and Calhoun Streets.) All ELOs who

have not already done so should contact Donna Schmitz at (609) 292-1892 to indicate whether they will be attending the meeting. If there are any questions or issues that you would like Commission members and staff to address, please forward this information to the staff by 3:00 p.m., Friday, September 10, 1999. Because this is the only opportunity for the Commission and staff to address specific issues in a group setting, you are encouraged to raise issues of concern to you and employees of your Departments.

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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