

GUIDELINES

The Newsletter of the New Jersey Executive Commission on Ethical Standards

28 W. State Street
Room 1407

(609) 292-1892

P.O. Box 082
Trenton, New Jersey 08625

Web Site: <http://www.state.nj.us/lps/ethics>

Vol. 10, No. 1

Email: ethics@eces.state.nj.us

Summer 2000

THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

Chairwoman Janice Mitchell Mintz, Vice Chair Michael J. Hogan, Commissioner Maureen Adams, Commissioner Gregory Adkins, Commissioner Alisha Griffin, Commissioner Laurie Gutshaw, and Commissioner Deborah Jones; 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. 46-98

SUBJECT: Unwarranted Privilege/
Appearance of Impropriety/
Post-Employment.

FACTS: The State employee solicited a job from a company that he was involved with in his official capacity. The State employee learned of the job opening from company employees with whom he dealt in his official capacity. He then contacted the company owner who was receptive to his interest in the position. The State employee requested advice from the Commission staff regarding post-employment implications after he was offered the position.

In his official capacity, the State employee conducted financial reviews of operating budgets, financial statements and monthly operating reports; conducted physical inspections and wrote comprehensive reports on the findings; reviewed proposals and expenditure requests; reviewed requests for rent increases and return on equity; and responded to inquiries from tenants, manager/owners and concerned parties.

With respect to the company which he solicited, the State employee was responsible for monitoring two properties managed by the company. In that capacity, he had responsibility for

monitoring financial arrangements and performing physical inspections of the properties to ensure that appropriate management procedures existed and that the properties were maintained efficiently and properly.

RULING: The Commission determined that the State employee violated section 23(e)(7) of the Conflicts Law, appearance of impropriety, and authorized the drafting of a complaint.

The Commission did not find any evidence of a violation of section 23(e)(3) of the Conflicts Law, unwarranted privilege.

REASONING: With respect to section 23(e)(7), the State employee contacted the company owner while he still had responsibility for monitoring and inspecting the company's properties. The State employee was aware that ethics rules affected his situation; nevertheless, he made the contact with the owner prior to advising his supervisor and without recusing himself from company matters. Under the Commission's precedent, his actions created an appearance of a violation of the public trust.

There was no indication of any *quid pro quo* with respect to the State employee's handling of complaints or inspections in regard to the company's two properties; thus, the Commission did not find a violation of section 23(e)(3).

The State employee entered into a Consent Order with the Commission and paid a civil penalty of \$500.

As to the application of the post-employment restriction to the position in question, the staff advised the State

employee that because he was substantially and directly involved in the oversight of two of the company's properties, he was prohibited, under section 17 of the Conflicts Law, from representing, appearing for, negotiating on behalf of or providing "insider" information or services to the company with respect to those two properties.

COMMISSION CASE NO. 6-99

SUBJECT: Post-Employment.

FACTS: The Commission was asked to review the post-employment activities of a former State employee under section 17 of the Conflicts Law. The former State employee worked for the Department from 1981 until 1989. During his tenure, he held various supervisory positions in connection with the regulation of the generation, treatment, storage, disposal, and transportation of solid and hazardous wastes.

In 1984, one of the companies for which the State employee had responsibility decided to close four on-site treatment facilities. State regulations required that the company submit a closure plan. The State employee attended meetings with facility managers and Department officials and corresponded with facility officials on numerous occasions prior to and after the company submitted its first two closure plans. The employee left his State position prior to the submission of the company's final closure plan. He then went to work for a firm that was providing consulting services to the company with which he was involved during his State employment.

RULING: The Commission is without authority to adjudicate a violation of sections 17 or to impose sanctions for such a violation. The Commission's authority is limited to conducting an initial inquiry into a particular situation to determine whether the facts presented should be referred to the Division of Criminal Justice.

In this situation, the Commission exercised its prosecutorial discretion and declined to refer this matter to the Division of Criminal Justice, but advised the former State employee that he was prohibited, under section 17 of the Conflicts Law, from representing any party other than the State in regard to the closure because he was substantially and directly involved in the "matter" during his State employment.

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?

With regard to the first prong, the former State employee's activities on behalf of his new employer were representational in nature.

As to the second prong of the test, the Commission determined that the "matter" in question was the closure of the facility with which he was involved during his State employment. From 1984

until he left the Department in 1989, the former State employee was substantially and directly involved in the closure. The Commission determined that the closure was the same "matter" in 1999 as in 1989, regardless of technological and regulatory changes, which are to be expected in long-term projects of this nature. In addition, the company consistently reserved the right to modify its closure plan and referred to submittals as revisions, indicating that closure plan submissions and reviews were an ongoing process.

COMMISSION CASE NO. 7-99

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

FACTS: The State employee's Department referred this matter to the Commission for review. The State employee was engaged in outside employment as Executive Director of a non-profit company that provides mental health services for criminal justice personnel, their families, criminal justice agencies and individuals in the custodial care of criminal justice agencies.

In his official capacity, the State employee supervised and coordinated staff engaged in health services programs and facility evaluations. The State employee requested approval to respond to a request for proposal ("RFP") released by his own Department for health services. The State employee had written a letter to Department officials requesting a meeting to discuss the pending RFP. The State employee had oversight responsibilities in connection with the existing health services contract.

RULING: The Commission advised the Department that the State employee was prohibited under sections 16(b), 19, 23(e)(3), (7), and 25 of the Conflicts Law from contracting with his Department in regard to the health services contract.

REASONING: Under section 16(b) of the Conflicts Law, the State employee's letter to the Department in his role as Executive Director of the private non-profit constituted prohibited representational activity.

As to section 19, under Commission precedent, State employees are prohibited from contracting with their own agencies under any circumstances because of appearance and unwarranted privilege issues.

The Commission determined that the State employee's letter to Department officials on behalf of the non-profit and his involvement in his official capacity with the existing contract were also problematic under sections 23(e)(3) and (7). In addition, because the State employee was involved with the oversight of the existing contract, he had access to information not available to other bidders, an issue under section 25.

COMMISSION CASE NO. 12-99

SUBJECT: Outside Activity.

FACTS: The Commission considered whether the State employee's role as a member of a local environmental commission was permitted under the Commission's Guidelines for Secondary Employment and/or sections 23(e)(5) and (7) of the Conflicts Law. The employee's Department had conditionally approved

his service on the environmental commission.

The Department advised the employee that he may not use State time or resources to pursue matters related to his membership on the environmental commission; he may not divulge or use any information obtained through his employment at the Department that may be considered confidential or otherwise not available to the public; he must recuse himself from any matters which come before the Department from the environmental commission or third parties involving activities in the township on which the environmental commission provided advice or recommendation; and pursuant to section 16(b), he may not represent, appear for, or negotiate on behalf of any person or party other than the State before any State agency.

RULING: The Commission concurred with the Department's conditional approval of the employee's appointment to the environmental commission, subject to broadening one of the conditions imposed by the Department. The Commission noted that the employee had instituted a recusal policy in his office whereby all matters that come to the Department from the township for which he served on the environmental commission were handled by another Department employee.

REASONING: There are many State employees who serve on municipal boards and committees. The Commission reviewed the responsibilities of both positions under the Secondary Employment Guidelines and the Conflicts Law and determined that the conditions imposed by the Department and the Commission should eliminate any conflict

between the two positions. While there was a possibility of some interaction between the township and the State employee's Department, as a practical matter, interaction was unlikely to occur.

COMMISSION CASE NO. 16-99

SUBJECT: Unwarranted Advantage, Impairment of Objectivity and Appearance of Impropriety.

FACTS: The State employee developed a dating relationship with a vendor to the Division. The vendor initially contracted with another State agency and later contracted with the State employee's Division to develop a software program.

The development and implementation of the software program was a multi-phase project. Phase I involved a feasibility study and some initial software development. At the conclusion of Phase I, the other State agency and the State employee's Division entered into a Memorandum of Understanding to implement the project, Phases II and III. During this period, the State employee began a social and personal relationship with the vendor and worked on and signed licensing and maintenance agreements on behalf of the Division, with the vendor.

Shortly thereafter, the State employee sought additional funding for the vendor to supply additional services.

RULING: The Commission determined that there were indications that the State employee violated sections 23(e)(3), (4) and (7) of the Conflicts Law.

REASONING: The Commission determined that, under sections 23(e)(3),

(4), and (7) of the Conflicts Law and the Commission's precedent, the State employee should have recused herself from any official involvement with the vendor after her social and personal relationship with the vendor began.

The Commission entered into a Consent Order with the employee. The employee agreed to a civil payment of \$450.

COMMISSION CASE NO. 19-99

SUBJECT: Contracting with the State.

FACTS: The State employee appealed the Department's disapproval of his secondary employment providing services to clients referred to him by another State agency.

The State agency referred clients to the State employee and other providers to assess their situations and provide evaluations to be used in determining the appropriate handling of claims. Under the referral system in place, the appropriate Division would make an appointment for an individual with the provider who would perform the required services and submit a written report. After the provider returned the proper paperwork, payment was processed and a State check was issued.

RULING: The Commission upheld the Department's disapproval of the outside employment.

REASONING: Section 19(a) of the Conflicts Law prohibits a State employee from entering into any contract, agreement, sale or purchase of the value of \$25 or more made, entered into,

awarded or granted by any State agency except as provided in section 19(b).

None of the exceptions in section 19(b) applied to the contract in question. The contract was not subject to public notice and competitive bidding. The agreement did not fall within *N.J.S.A. 52:34-10*, which permits State contracts without public advertising and competitive bidding under a limited number of circumstances. Likewise, the agreement did not qualify under the final exception of section 19(b) since it was not a contract of insurance.

ETHICS LIAISON OFFICER **MEETING**

The annual meeting of the Ethics Liaison Officers (“ELO”) and Commission members and staff is scheduled for Thursday, September 28, 2000. The meeting will begin at 9:30 a.m. and will be held on the second floor of the Roebling Building, 20 West State Street, Trenton.

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 22, 2000. 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 agency.

INVESTIGATIVE PROCESS

Allegations come to the Executive Commission from various sources and can be made orally or in writing. The complainant may remain anonymous. If the complainant does identify him/herself, that information remains confidential.

Allegations may also be filed with the State agency employing the State officer or employee in accordance with procedures established by the agency. Upon receipt of an allegation, the State agency is required to file a copy of same with the Commission. It is within the discretion of the Commission to direct the State agency to transfer the allegation to it. (*N.J.A.C. 19:61-3.4*) Notice of all determinations made by State agencies in connection with hearings conducted pursuant to *N.J.A.C. 19:61-3.1* must be filed with the Commission. All determinations with respect to the Conflicts of Interest Law which involve the removal of a State officer or employee or any other disciplinary actions are effective only when approved by the Commission.

When an allegation is received by the Commission, the staff first reviews it for an initial determination as to whether the alleged conduct falls within the jurisdiction of the Commission. Once it has been determined that the Commission has jurisdiction, the staff initiates a preliminary investigation which may include interviews of the complainant, the State officer or employee involved, and any other individuals who possess knowledge of the circumstances surround-

ing the alleged conduct. Interviews are conducted under oath and are tape-recorded. The interviewee, if he/she so desires, may be accompanied by an attorney or union representative, but such representation is not required. A copy of the taped interview will be provided to the interviewee upon his/her request. Interviews are occasionally conducted via telephone. Investigations also frequently involve the review of documents.

If the Commission determines that the testimony of any person is required, and that person refuses to appear, a subpoena may be issued. The subpoena may also contain a direction that such person bring with him/her any books, papers or documents designated therein. If the person subpoenaed fails to appear, the Commission may apply to the Superior Court to compel the person to comply.

During the course of the preliminary investigation, no information regarding the allegation is made public. Upon the conclusion of the preliminary investigation, the written report of the investigation is presented to the entire Commission. The Commission meeting is not a formal hearing. No witnesses appear. A full due process hearing is held at the Office of Administrative Law if and when the Commission determines that indications of a violation exist. The Commission currently meets on the fourth Thursday of each month at 9:30 a.m. Meetings are open to the public. Reports of preliminary investigations are privileged communications between the staff and Commission members and are

considered in closed session. The subject of an investigation is notified in writing of the date that the matter will be considered. The subject and his/her representative may attend the meeting and will be afforded five minutes to address the Commission. Commission members may ask questions of the subject or his/her representative. The Departmental Ethics Liaison Officer is also notified and normally attends the meeting.

If the Commission finds that there has been no violation of the Conflicts Law or the Department's Code of Ethics, as alleged, it will dismiss the allegation. This occurs in the open public session. If the Commission determines that there are indications of a violation meriting further proceedings, a complaint shall be set down for a hearing at the Office of Administrative Law ("OAL") pursuant to the requirements of the Administrative Procedure Act, *N.J.S.A. 52:14B-1 et seq.*, and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*. The Commission is also authorized to hold a hearing itself. Because of time constraints, this is normally not done. Prior to an OAL hearing, witnesses may be interviewed by the investigative staff. After the OAL hearing is concluded, a decision is issued in accordance with the time frame set forth in the Administrative Procedure Act.

In the past, the Commission has permitted an individual to enter into a consent agreement with the Commission either prior to or after the issuance of a complaint. Consent orders are included in the individual's personnel file. Consent orders and complaints are public records.

If the Commission determines that the State officer or employee has violated the Conflicts Law or any Departmental code of ethics, it may fine the State officer or employee in accordance with the provisions of *N.J.S.A. 52:13D-21(i)*. The Commission may further order or direct the State agency employing the State officer or employee to suspend the State officer or employee for a period not in excess of one year. Should the Commission find that the conduct of the State officer or employee constitutes a willful and continuous disregard of the provisions of the Conflicts Law or any code of ethics, it may order or direct the State agency employing the State officer or employee to remove the State officer or employee from his/her office or employment and may further direct that the State agency bar such person from holding any public office or employment in the State in any capacity for a period not exceeding five years from the date on which he/she was found guilty by the Commission.

In the case of the post-employment restriction, *N.J.S.A. 52:13D-17*, the Commission is without authority to adjudicate a violation of this section or to impose sanctions for such a violation. The Commission's power is limited to conducting an initial inquiry to determine whether the facts of a particular situation should be referred to the Division of Criminal Justice as a possible violation of section 17. Any person who willfully violates this section is a disorderly person and is subject to a fine not to exceed \$500 or imprisonment not to exceed six months, or both.

Minutes of all meetings at which a matter is discussed and the opinion issued by the Commission are public records;

minutes of executive session discussions are made available on a case-by-case basis after the particular matter is concluded.

REQUESTS FOR ADVICE

Requests for advice as to whether a specific set of facts and circumstances constitute a violation of the Conflicts Law, or any code, rules or regulations promulgated pursuant thereto, should be made in writing to the Executive Director of the Commission. The individual requesting an opinion should provide as much information as possible regarding the request and include any relevant documentation. In the event that additional information is required, a Commission investigator will contact the appropriate individuals or organizations.

Advisory opinions are commonly requested in connection with a State employee's outside employment or post-employment activities. Requests for advisory opinions and replies to requests for advisory opinions may be made available to the public after consideration by the Commission.

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.

summer2000.doc