



Rosemary Marshall, *Chairperson*
COMMISSION

Matt Smith *Vice-Chairperson*

Bob Bacon, *Commissioner*

William Leone, *Commissioner*

Bill Pinkham, *Commissioner*

Amy C. DeVan, *Executive Director*

INDEPENDENT ETHICS

1300 Broadway, Suite 240

Denver, CO 80203

Ph: 720-625-5694

Fax: 720-625-5696

Email: amy.devan@state.co.us

www.colorado.gov/ethics commission

Advisory Opinion 14-20 (Conflict of Interest)

SUMMARY: A current state employee may enter into a contract for publication of a book related to her duties, where the remuneration is fair, there is consideration, and there is no apparent conflict of interest.

I. BACKGROUND

An employee currently working as a Senior Historian with the Colorado Department of Transportation (“CDOT”) has submitted a request to the Independent Ethics Commission (“IEC” or “the Commission”) asking whether it would be an ethical violation for her to enter into a contract with Arcadia Publishing to research and write a book focusing on the building and maintenance of Colorado’s interstate tunnels. The request proposes two scenarios: 1) in scenario one, the employee would enter into the contract with Arcadia as an individual, working on the project on her own time, with all royalties being paid to her as an individual; 2) in scenario two CDOT will enter into the contract with Arcadia and the employee will perform the work required for authorship in her capacity as an employee for CDOT, with royalties being paid to CDOT. In authoring the book, the requester will utilize CDOT resources including image archives. She states it is not possible to do the project without access to the CDOT resources; which are also available to the public upon request. Thus it does not appear the employee has special access as a result of her position, not available to others not employed by CDOT.

If the employee performs the work in her individual capacity, she and her supervisor state that no

state resources would be used without appropriate permission, clearance, citations or acknowledgements and all requests for access to resources would be routed through her supervisor for approval. All work would be performed on her personal time, either after hours or on weekends, and Requester is prepared to utilize personal time off (PTO) if needed. It appears evident Requester's position with CDOT is the reason the publisher seeks her authorship of the book. However, this would appear to be based on her knowledge of the subject matter; it does not appear that Arcadia Publishing has pending or existing contracts with the State of Colorado for which Requester is in a position to provide special access to, or exercise undue influence on behalf of, Arcadia.

The supervisors in Requester's reporting chain are supportive of her desire to work on a book as described herein with Arcadia. Additionally, a senior historian employed by the State of Colorado, researching and publishing about issues such as those included in the request is an important part of the requester's duties and is consistent with her role within the organization.

II. JURISDICTION

The IEC finds that the requester is a "government employee" subject to the Commission's jurisdiction. Colo. Const. Art. XXIX, sec. 2(1).

III. APPLICABLE LAW

Article XXIX, section 3(2) states in pertinent part:

(2) No public officer, member of the general assembly, local government official, or government employee either directly or indirectly...shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment...without the person receiving lawful consideration of equal or greater value in return."

Additionally, C.R.S. §24-18-201 states:

(1) Members of the general assembly, public officers, local government officials, or employees shall not be interested in any contract made by them in their official capacity or by any body,

agency, or board of which they are members or employees.

IV. DISCUSSION

Although the Commission has previously addressed the issue of subsequent employment, the question of concurrent employment or a concurrent contract under the circumstances presented here has not been the subject of a prior Advisory Opinion. Thus it is an issue of first impression for the Commission. While this scenario is analogous to the scenario in which a government employee is negotiating for future employment, and will be analyzed using the same considerations including the legal authority cited above, it is with a recognition that this situation is unique because the request deals with a current, not future benefit, and will be fulfilled while the requester remains a government employee.

In Position Statement 09-03, the IEC analyzed the issue of promises or negotiation of future employment. Specifically, the Commission set forth two questions to be used in an analysis about whether the employment is permissible: 1) whether the remuneration that is being offered to the public official or employee is appropriate or patently excessive; and 2) whether the offer or solicitation is made in circumstances indicative of a conflict of interest. In several Advisory Opinions issued after PS 09-03, the Commission has analyzed the question of future employment based on these two lines of inquiry. While the circumstances presented here may differ based on the timing of the event at issue, the same analysis is applicable.

1. Is the remuneration offered appropriate or patently excessive?

In this instance the contract specifies remuneration that is appropriate and not in any way excessive given the work to be performed. Requester will not be paid a specified amount for completing the work; rather she will receive a percentage based royalty for each copy of the book sold of 8%. The royalties are not excessive or unrelated to the work to be performed.

Additionally, there is consideration, in that Requester will write and compile the book materials in return for the royalty paid.

2. *Is the offer or solicitation made in circumstances indicative of a conflict of interest?*

In Position Statement 09-03 the Commission stated “[i]f a public official or employee who is negotiating for future employment is not currently, was not in the recent past, and will not in the reasonably foreseeable future, be in a position to take direct official action with respect to the prospective employer, then there will be a presumption that Section 3(2) is not violated.” In this instance Requester is not aware of any other contracts Arcadia has with the State of Colorado, and, if such contracts exist, Requester is not in a position to take official action on behalf of Arcadia, nor would she be able to provide Arcadia with any benefit relative to the State. Further, although Requester will perform the duties under the contract with Arcadia while remaining employed by CDOT, she will do so either as an individual on her own time, with no impact on her employment related duties; or she will do so as an employee of CDOT if CDOT enters into the contract with Arcadia as an entity. It is noted that the Colorado Department of Personnel does have State Personnel Board Rules which govern the activities of state employees. Board Rule 1-13 states, in part, “[n]o employee is allowed to engage in any outside employment or other activity that is directly incompatible with the duties and responsibilities of the employee’s state position, including any business transaction, private business relationship, or ownership. The employee is not allowed to accept outside compensation for performance of state duties.” This includes any compensation or gift that is indicative of preferential treatment or loss of independence or impartiality. Subpart (B) states that any employee pursuing outside employment must give notice to the appointing authority and take necessary steps to avoid any direct conflict “between the employee’s state position and outside employment.” Additionally

Board Rule 1-14 states “[e]mployees may engage in outside employment with advance written approval from the appointing authority.”

In this instance, since Requester will perform the work as an individual on her personal time, or as an employee under a CDOT contract, Requester does not appear to be in violation of the Personnel Board Rules. There appears to be no conflict of interest relative to the requester’s position with the State. The issues of preferential treatment for Arcadia, or loss of independence or impartiality also do not appear to be of concern. Finally, if the employment is deemed permissible within the ethics rules, Requester’s supervisors indicate written approval will be granted.

Requester is reminded that she owes a duty of loyalty to the State of Colorado in her dealings with the publisher. As the Commission stated in Advisory Opinion 13-13, which dealt with negotiations for future employment, in so doing an individual must be mindful of “preserving her duty to her employer at every stage of the employment seeking process.” This is analogous to the situation presented here and Requester is encouraged to ensure that her duty of loyalty to the State of Colorado is paramount in her dealings with Arcadia. Finally Requester is also encouraged to consider the appearance of impropriety that may result if she enters into and performs the contractual duties as an individual, rather than through CDOT. While the Commission does not find an ethics violation if Requester enters into the contract individually, as discussed above, there is an awareness that such a course of action may nevertheless bring with it the appearance of impropriety, which may be avoided by CDOT entering into the contract and Requester fulfilling the obligation in her capacity as a CDOT employee.

V. CONCLUSION

For the reasons noted above, the Commission believes that under the circumstances of this

request there is no ethical violation in either scenario presented by the Requester. Because neither scenario appears to implicate the ethics rules, the Requester may enter into the contract as an individual or CDOT may be the contracting party with the publisher. The Commission offers no opinion as to any related legal issues involving the contractual relationship between Arcadia and Requester or CDOT. The Commission also cautions public officials and employees that this opinion is based on the specific facts presented in this request and that different facts could produce a different result. In this instance, due to the nature of the facts presented, the Commission wishes to add an additional advisement that the result in this Opinion is very fact specific and the guidance offered herein is specifically related to this scenario. The IEC therefore encourages individuals with particular questions to request fact-specific advice through requests for advisory opinions and letter rulings.

The Independent Ethics Commission

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Matt Smith, *Vice-Chair*
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