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Advisory Opinion 15-04 (Conflict of Interest)

Summary: A current state employee may obtain a patent where the agency for which he works does not have a policy barring it, the agency has consented to his doing so, and there is no apparent conflict of interest.

I. Background

An employee of the Department of Corrections (DOC or “the Department”) requests that the Independent Ethics Commission issue an advisory opinion regarding the permissibility of his proposed conduct.

The requester, who oversees maintenance operations at a specific DOC facility, was responsible for working with non-lethal electrical fence engineers from a specific electric company regarding improvements to the facility fence. While working with the engineers, the requester developed an idea for a non-lethal electric fence anti-climb design.

Following the creation and implementation of his design at the DOC facility, the requester conducted research and discovered the idea he created is unique and is considered a breakthrough in non-lethal electric fence design. Because the fence is now operational, requester grew concerned someone else might patent it. He approached his supervisors at DOC who indicated they did not have concerns about his doing so. Due to the time sensitive nature inherent in the need to patent the idea before someone else did, requester has now done so.

Requester has agreed that DOC may continue to use the design at no cost. He has obtained

written consent from the Deputy Director of Prisons, which states that the DOC does not have a patent policy, that the agency understands requester will be patenting his idea as a business enterprise, and that requester has agreed DOC will continue to use the design at no cost, now or in the future.

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 5 states in pertinent part:

The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article *and any other standards of conduct and reporting requirements as provided by law.* (*Italics added.*)

It is under this section that the IEC reviews this request.

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 issues relating to conflicts of interest and the appearance of impropriety, a request regarding obtaining a patent for an idea 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 there has been no directly analogous scenario previously considered, the issues implicated by this request do involve topics which the Commission has previously weighed, and they will be analyzed using the same considerations including the legal authority cited above. It is recognized that this situation is unique because the

request deals with a current, as well as future, benefit and will be fulfilled while the requester remains a government employee, utilizing an idea he created in the course of his government employment.

It is noted above that requester has already obtained a patent for this idea; because the fence has been constructed and therefore his invention is now “public,” he believed it was necessary for him to file quickly before someone else did so. The Commission has previously stated that past conduct does not fall within its purview in the context of an advisory opinion. In Advisory Opinion 12-01 the Commission stated “such opinions are generally issued as prospective guidance for decisions and actions yet to occur rather than as sanction for past decisions and actions. Therefore, the Commission limits this advisory opinion to prospective advice and declines to opine as to the ethical propriety of the past conduct of the requestor.” Thus, in this circumstance, the focus of the Commission is on the propriety of the requester’s earning, and keeping, the profits from his idea, rather than on the appropriateness of his decision to patent it.

A. Colorado Constitution, Article XXIX

There is no provision in Article XXIX that directly addresses the circumstances reflected in this request. This request poses the unique question of what, if any, restrictions there are on State employees who develop ideas or inventions, while being compensated by the State and as part of their State employment. The Commission believes the statements contained in Article XXIX, Section 1, Purposes and Findings, reflect the intent of the voters and may be used as guidance in addressing issues such as this, where potential conflicts of interest may arise. Specifically, that section states that:

- (a) The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;
- (b) They shall carry out their duties for the benefit of the people of the state;

- (c) They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;
- (d) Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust; and
- (e) To ensure propriety and to preserve public confidence, they must have the benefit of specific standards to guide their conduct, and of a penalty mechanism to enforce those standards.

The Commission interprets the term “public trust” to mean that government employees and officials shall carry out their duties for the benefit of the people of the State of Colorado. In this instance, requester developed an idea while employed by the Department of Corrections, in furtherance of the goals of the Department to enhance and modernize inmate containment options. After developing the idea, and observing its implementation in the facility where he works, he approached his supervisor and asked whether the Department had an objection to his obtaining a patent. When he was informed they did not, he proceeded to do so. The Commission notes requester did not create the design for the purpose of obtaining a patent and thus profiting from it, and he did not intentionally utilize his position for private gain. Rather, he created the design pursuant to his employment and, after realizing there was no preexisting design of this type in the marketplace, he then sought to obtain the patent after obtaining the consent of his employer, which effectively waived any State interest in the idea he created.

Thus, under the circumstances presented in this request, the Commission determines that no violation of the public trust would occur should the requester receive profits from his idea, in the event others wish to utilize it following his obtaining of a patent.

Although the Commission declines to weigh the merits of the past conduct, it does take note of the fact that, as discussed above, requester has obtained a letter from the Colorado Department of Corrections voicing no objection to his obtaining a patent and stating the Department has no

patent policy. This is persuasive in that it appears to reflect the Department's view that requester's obtaining a patent in this circumstance is appropriate; and it would sensibly follow that he would also obtain profits from that patent, if it does prove profitable. By voicing no objection to the obtaining of a patent, the Department also would appear to voice no objection to requester's reaping the profits therefrom, if indeed there are any.

Additionally, it does appear requester maintained his loyalty to his employer and the people of the State by agreeing not to charge the Department of Corrections for any current or future use of the design idea.

B. Colorado Revised Statutes

Colorado Revised Statutes, sections 24-18-101 *et seq.* states a recognition on the part of the general assembly that "some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances." In this instance, it does not appear a per se conflict exists. Further, the circumstances of this request – namely that requester developed the fence design at the request of his employer, patented it after obtaining permission from the agency, and has agreed to put the needs of the people of the State first in not charging the Department of Corrections for present or future use of the design – would appear to indicate that no conflict exists, despite the fact that requester may profit from the invention at some future time.

The Commission does recognize the issue of appearance of impropriety in this circumstance given that requester developed this idea pursuant to his duties as a State employee, while being compensated by a State agency. However, as has been stated previously in this opinion, the fact that the agency for which requester works consented to his obtaining the patent, and by extension the profits therefrom if any, is persuasive to the Commission's analysis on this issue. Requester

is reminded, though, that he owes a duty of loyalty to the State of Colorado in his dealings related to his design and invention. As the Commission stated in Advisory Opinion 13-13, and restated again in Advisory Opinion 14-20, under circumstances which, although not analogous to this situation, are nevertheless instructive, in conducting negotiations for future or concurrent employment, an individual must be mindful of “preserving her duty to her employer at every stage of the employment seeking process.” This is a factor in the situation presented here, although that matter dealt with subsequent employment and this focuses on earning profits from an idea developed while employed by a State entity. Requester is encouraged to ensure that his duty of loyalty to the State of Colorado is paramount in her dealings with State entities, as well as other entities on issues related to the utilization of his idea.

V. Conclusion

For the reasons noted above, the Commission believes that under the circumstances of this request there is no ethical violation in the scenario presented by the Requester. 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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