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Dino Ioannides, *Executive Director*

Advisory Opinion 17-05 (Negotiations for Future Employment)

Summary: It would not a violation of Article XXIX for an employee of the Colorado Department of Corrections to seek outside employment with a subcontractor of a private prison corporation under the facts and circumstances presented in the request.

I. Background

Requester is an employee of the Colorado Department of Corrections (CDOC). Requester is assigned to the Private Prison Monitoring Unit (PPMU). All her work for CDOC has been in food service and her current position is as a food service monitor. Requester's duties include checking for contract compliance by auditing private prison kitchens and reporting findings. Regulatory enforcement decisions resulting from audits are not determined by Requester.

Although PPMU is responsible for the monitoring and auditing of Colorado's private prison contracts, the Requester's work assignment does not include reviewing, writing, or negotiating contracts or intergovernmental agreements. Requester does not have the regulatory decision-making authority to influence the outcome of contracts.

Trinity Food Service Group (Trinity) approached the Requester to ask her to apply for a posted food service manager position. Requester is considering retiring from state service and desires to apply for the position, which serves in a supervisory capacity responsible for kitchen operations in the Crowley County Correctional Facility. Trinity is a subcontractor for CoreCivic, a private prison corporation providing full-service corrections and detention services at the Crowley County Correctional Facility. CoreCivic, in turn, is a contractor of Crowley County. And, finally, Crowley County has an intergovernmental agreement with the CDOC for the incarceration of offenders at the facility. CDOC is not a party to the contract between Trinity and CoreCivic.

The Requester's supervisor indicates that CDOC and the citizens of Colorado would benefit if Requester accepted the position with Trinity by supporting the partnership between the State and the private prisons; due to the multiple layers of subcontracting, there would be no conflict of interest; the Requester's PPMU experience does not make her more qualified for this position than other potential candidates nor does it give her any undue advantage in applying for the position; and the Requester would not be improperly influenced in her current assignment.

II. Jurisdiction

The requester is a “government employee” subject to the Commission’s jurisdiction. Colo. Const. Art. XXIX, § 2(1).

III. Applicable Law

The purposes and findings of Section 1 of Colo. Const. Art. XXIX state, in pertinent part:

- (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...

Section 3(2) of Colo. Const. Art. XXIX states as follows [emphasis added]:

No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, 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**, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

Section 24-18-201(1), C.R.S., states, in pertinent part:

...A former employee may not, within six months following the termination of his employment, contract or be employed by an employer who contracts with a state agency or any local government involving matters with which he was directly involved during his employment...

IV. Discussion

Promises or Negotiations of Future Employment

In Position Statement 09-03 the Commission clarified that most employment related offers and negotiations are not prohibited by § 3(2) of Article XXIX. Section 3(2) only prohibits negotiations or promises of future employment for public officials and employees that are not supported by lawful consideration of equal or greater value. Most negotiations and offers of

employment, such as the one in question in this case involving only compensated employment, are supported by mutual consideration in the form of the prospective employer's promise to provide compensation to the prospective employee and the prospective employee's promise to provide services to the prospective employer.

Position Statement 09-03 applied a two-prong test to determine if the employment arrangement would violate § 3(2) of Article XXIX: (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.

Because no offer has been made to the Requester, the Commission cannot fully evaluate the first prong. However, a breach of the first prong seems unlikely since the position has been publicly posted. The Requester is advised that the offer and acceptance of appropriate, non-excessive remuneration must be a criterion the Requester considers in moving forward.

As for the second prong, the CDOC indicated that Requester does not currently review, write, or negotiate contracts with private prison corporations. Nor does she have the authority to influence the outcome of contracts. Considering the multiple layers of subcontracting pertaining to this request, the CDOC believes there would be no conflict of interest, and the Commission finds there are no circumstances indicative of a conflict of interest. In evaluating conflicts of interest, we have repeatedly stated, "In general, absent clear facts to the contrary, the Commission is inclined to rely on the position of the state agency involved, given their superior understanding of the duties performed by the state employee involved."¹

The Public Trust

The purposes and findings of § 1 of Article XXIX highlight the importance of maintaining the public trust. 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, which includes an ongoing duty of loyalty to the State in seeking outside employment.

In this instance, Requester has been transparent with the CDOC about her plans to seek outside employment. The Commission reminds Requester that she must continue "preserving her duty to her employer at every stage of the employment seeking process."²

The Six-Month Prohibition of § 24-18-201, C.R.S.

Section 24-18-201, C.R.S., mandates that a former employee may not, within six months following the termination of her employment, be employed by an employer who contracts **with a state agency** [emphasis added] involving matters with which she was directly involved during her employment. If the Requester is ultimately hired by Trinity, the question is whether the six-month mandatory waiting period would apply.

¹ Letter Ruling 10-02. *See also* Letter Ruling 14-02 (citing Letter Ruling 10-02 in circumstances where the state agency expressed conflict of interest concerns).

² Advisory Opinions 13-13, 14-20, and 15-04.

The Requester is seeking to apply for a position with a subcontractor (Trinity) of a subcontractor (CoreCivic) of Crowley County, which, in turn, has an intergovernmental agreement with Requester's employer (CDOC) to provide offender incarceration services. Considering the numerous layers of subcontracting among the various entities, a potential violation of § 24-18-201, C.R.S., may not be possible. As such, the Commission finds that the six-month waiting period does not apply to the instant request.

V. Conclusion

It would not be a violation of Article XXIX or other standards of conduct for Requester to seek outside employment under the facts and circumstances presented in the request.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

The Independent Ethics Commission

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Dated: July 24, 2017