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Advisory Opinion 13-13

(Negotiations for Future Employment)

SUMMARY: A state employee should be careful to avoid potential conflicts of interest and the appearance of impropriety in seeking employment with a corporation currently doing business with Colorado state government.

I. BACKGROUND

An employee in the Colorado Department of Revenue (“DOR”) has submitted a request to the Independent Ethics Commission (“IEC” or “Commission”) asking for guidance on seeking employment with a private corporation which provides computer software services to DOR. The requestor states that she has not formally applied for a job with the corporation or discussed potential employment with the company with her current state employer.

According to the request, the corporation involved has an ongoing contract to provide computer software services for DOR. Although the initial development and start-up phase of the project associated with the contract has concluded, the company still provides software support to DOR on the project. The employee currently does not have any direct authority over the project and was not involved in the initial contract negotiation or approval. According to the request, and information provided by the

requestor, for two and a half years, the requestor worked directly on the contract, “proactively providing insight as to the needs of DOR, testing of the initial product for compliance with DOR needs and reactively making recommendations for modification to (the company’s)...product when initial submissions failed to meet DOR’s needs.” The company’s product is in use at DOR, and her current involvement with the company is solely as a user of the product.

The company involved is based in Colorado, but has offices in other cities in the United States and Canada. The requestor hopes to stay in Colorado if employment is offered. She understands that she may not work on the specific project on which she has worked as a State employee, but would like additional guidance on other restrictions and limitations affecting her seeking employment with this vendor. She further clarifies that she desires to pursue “a liaison position to help other states and municipalities transition into... (the software product).

II. JURISDICTION

The IEC finds that the requestor is a “government employee” subject to the Commission’s jurisdiction. CO 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 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 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, **...promises or negotiations of future employment ...from a person without such 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....**(emphasis added).

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

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. 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

Issues relating to a public employee seeking new employment may be impacted by the gift ban provisions of Article XXIX as well as statutory restrictions on seeking employment after leaving state service. The requestor cites both laws in her request.

A. Article XXIX, section 3(2)

Article XXIX, section 3(2) specifically lists “negotiations for future employment” as a prohibited gift. Recognizing that public employees cannot and should not be prevented from seeking other employment, the Commission clarified the meaning of that phrase in Position Statement 09-03. In that opinion, the IEC stated that most negotiations for future employment are supported by lawful consideration, and are therefore not prohibited gifts. However, the Commission also recognized that there may be some negotiations of future employment that because of conflicts of interest and appearances of impropriety would be barred. In Position Statement 09-03 the IEC established a two-part test to employ to determine if the negotiations are in violation of Article XXIX. That test is:

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 Position Statement 09-03, on page 3, the IEC explained that “if the offer of employment is at a rate that is patently excessive given the services provided or if such offer is made or solicited in a factual context suggestive of a conflict of interest or an attempt to influence an official act, then the possibility of the appearance of impropriety becomes more likely, and Section 3(2) may preclude such solicitation or acceptance.” The requestor has not submitted an application to the company, and no employment has been offered or discussed. Without information relating to the salary or the circumstances of the offer and acceptance of employment, the IEC is unable to evaluate those two factors at this time. However, in evaluating an offer of employment the requestor should consider the totality of the circumstances of the offer and evaluate whether it fits under that test and whether it was made to curry favor.

B. C.R.S. §24-18-201

Colorado Revised Statutes prohibit a state employee, for a six month period after leaving state service, from working for an employer who contracts with the State of Colorado involving matters in which he or she was involved as a state employee. The Commission twice has considered requests asking whether a specific job would pose a problem under this statute. See, Advisory Opinion 10-08 (an accounting professor at Red Rocks Community College may contract with a branch of the college to provide

accounting services) and Letter Ruling 10-02 (a former employee of Health Care Policy and Finance (“HCPF”) may provide consulting services to a HCPF contractor).¹

In this case, the requestor has already stated that she will not seek or accept employment with the company on the specific project on which she worked for DOR. Absent more specific facts about her future employment, however, it is difficult for the IEC to give more definitive advice. If the requestor successfully obtains employment from this vendor, the Commission would look to the opinion of DOR regarding whether the employment posed a conflict of interest. DOR would be in a far better position to analyze potential conflicts of interest and the duties of loyalty owed by the employee than is the Commission. As the IEC stated in Letter Ruling 10-02, pages 4-5, “[i]n 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.” See also, Advisory Opinion 13-05 (Conflict of Interest). The Commission therefore encourages the requestor to discuss these issues with DOR prior to accepting a position with the company. The Commission also reminds the requestor that in the course of seeking employment she should be mindful of C.R.S. section 24-18-105 which specifically prevent her from revealing information, unavailable to others that she has acquired through her employment with the State of Colorado. She should exercise care in preserving loyalty to her state employer at every stage of the employment- seeking process.

¹ The requestor in Letter Ruling 10-02 initially requested permission to enter into another contract with related to the work she did with HCPF and the agency objected. Although the Commission did not issue an opinion on that request due to timing issues, Commission told the requestor that it was not inclined to overrule a decision of a state agency.

IV. CONCLUSION

The Commission believes that the requestor may seek employment with a company which does business with the State of Colorado under the circumstances of this request. However, the requestor should protect the interests of her current employer during the application and interview process. The requestor has sought no guidance from her current state employer regarding potential employment from this company, and absent input from the state agency, the Commission offers no opinion as to whether the requestor can ethically accept such a position. The Commission 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. The IEC therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings.

The Independent Ethics Commission

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