

State of Colorado



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Advisory Opinion No. 09-06 (Service on the Board of a Nonprofit Entity)

SUMMARY: It would not be a violation of Colorado Constitution Art. XXIX for the Colorado Secretary of State to serve on the Board of Directors of a nonprofit entity that is regulated by the Secretary of State's Office. Further, the Commission has not been made aware of any Colorado statute that would prohibit such service. However, the IEC believes that an appearance of impropriety may be created due to the uniqueness of the role of the Secretary of State and his office.

I. BACKGROUND

The Independent Ethics Commission ("IEC" or "Commission") has received a request for advisory opinion from the Colorado Secretary of State,¹ asking whether he may serve on the Board of Directors of a nonprofit organization in Colorado. The Secretary of State's Office has broad authority over charitable organizations. It registers charitable organizations and their professional fundraisers, and has the authority to deny, suspend or revoke the registration of these entities. The Department of State has enforcement power related to violations by charitable organizations. The Department accepts some trade name and trademark filings of unincorporated nonprofit

¹ The subject of this opinion has consented to the use of his name and other identifying information.

associations, as well as corporate filings of nonprofit corporations, and for licensing nonprofits under specified conditions for bingo games and raffles. The Department is charged with preventing fraud in charitable gaming activities. The Secretary of State's Office, in its role as a reporting agency, has the authority to refer cases to the Attorney General, the District Attorneys, or various federal agencies, including the Internal Revenue Service, the U.S. Postal Service, and the Federal Trade Commission.²

II. JURISDICTION

The IEC finds that the Colorado Secretary of State is a "public officer" subject to the jurisdiction of the Commission. CO Const. Art. XXIX (2)(6) defines "public officer" to include "any elected officer, including all statewide elected officeholders ..."

Pursuant to Constitution Art. XXIX, the Independent Ethics Commission is charged with issuing advice on ethics issues "arising under this article and under any other standards of conduct ... as provided by law."

III. IEC PRECEDENT

In Position Statement 08-01 (Gifts), as in all subsequent position statements and opinions rendered by the Commission, the Commission has interpreted Article XXIX in a manner that preserves what it believes was the intent of the electorate - "to improve and promote honesty and integrity in government and to assure the public that those in government are held to standards that place the public interest above their private interests."

² The nonprofit involved also retains a professional lobbyist who is regulated by the Secretary of State.

IV. DISCUSSION

A. Constitution Art. XXIX

There is no provision in Article XXIX that addresses this question. However, the Commission believes that the statements contained in Section 1, Purposes and Findings, reflect the intent of the voters and can be used as guidance in addressing this question. See Position Statement 08-01 (Gifts), p. 3-4. That section provides:

- (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 Colorado. See, e.g., § 24-18-103, C.R.S., “The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, members of the general assembly, local government officials, and employees.” See also, Position Statement 08-01, p. 4.

B. Statutes

Colorado Revised Statutes sections 24-18-101 et seq. contain “standards of conduct” and “ethical principles” relating to public officials and employees.³ These statutes address financial conflicts of interest, and prohibit public officials and employees from acquiring or holding “an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by an agency over which he has substantive authority.” See, §24-18-105(2). The Commission does not believe that under the circumstances presented, the nonprofit in question would be “directly and substantially affected to its economic benefit” by the service on its Board of Directors by the Secretary of State. The nonprofit entity is an established organization with distinguished board members. Although the Secretary of State regulates nonprofit entities, the Commission does not believe that he would be in a position to directly financially benefit the nonprofit.

The Commission, furthermore, does not believe that service on the Board of the nonprofit would trigger any of the prohibitions contained in C.R.S. §§24-18-104, or 24-18-108.

The Commission notes that C.R.S. §24-6-202(2)(d) requires certain elected officials to file financial disclosures as well as disclosure of “all offices, directorships, and fiduciary relationships held by the person making disclosure, his spouse, and minor

³ It is unclear whether these statutes and others cited in this opinion have been superseded by the passage of Amendment 41 (Constitution Art. XXIX). The Commission notes that the drafters intended that the IEC preempt similar bodies charged with rendering advice on ethics-related issues. Proposed Initiative Measure 2005-2006 #118, Concerning Ethics in Government Transcript of May 4, 2006 Review and Comment Hearing, p. 24. Further, the drafters intended that Art. XXIX would preempt conflicting statutory provisions where less strict and that the General Assembly would enact legislation to make conforming amendments. Id. pp. 20-21.

children residing with him.” These disclosures are filed with the Secretary of State’s Office. The Commission is unaware of any statutes in Colorado which address situations in which a public official or employee is required to recuse.

C. Ethics Opinions of the General Assembly:

General Assembly Board of Ethics Opinions are not binding on the Commission, but are illustrative of how these issues have been addressed in the past. Board of Ethics Opinions 2006-No. 2 and 2008-No. 1 discuss whether a member may vote on legislation which affects businesses in which the legislator has an interest. In the 2006 opinion, the requesting member was an unpaid Board member of a non-profit which could benefit from proposed legislation. The Board of Ethics Opinion permitted the member to vote on the legislation, but urged the member to disclose the potential conflict. In the 2008 case, the requesting member had a financial interest in a company that had a contractual relationship with the State. The member requested an opinion on whether he could vote on legislation which affected the budget for that State agency. The Board of Ethics responded that the member could vote, as long as the money in question was not tied in any way to the member’s contract. Again, the Board cautioned that disclosure was appropriate.⁴

D. Other Jurisdictions

The Commission then turned to other jurisdictions to determine how they handle similar situations.

⁴ Some jurisdictions have specific provisions relating to disclosure to the appropriate ethics commission. The Commission takes no position on how such a disclosure should be made, or to whom.

1. *New York State*

The New York State Ethics Commission, in 2006, considered a request from the Attorney General, asking whether he could continue to serve as one of four trustees of a family charitable trust. Although this case is distinguishable from the question before the Commission, since the Attorney General had been a trustee of the trust prior to his election, and the charity involved was a family foundation which did not solicit funds from the public, some of the discussion in the opinion is relevant. The New York State Ethics Commission noted several factors: the Attorney General was one of four trustees, there were other enforcement mechanisms, there was public accountability since there were public filings, and the Attorney General was not being paid for his service. The Commission advised that continued service as a trustee was permissible, although it did require the Attorney General to adhere to strict recusal guidelines, including delegating all responsibility regarding the trust to the First Deputy Attorney General. Advisory Opinion 06-06, page 3.

2. *Philadelphia*

The General Counsel to the Philadelphia Board of Ethics, in a nonpublic advice of counsel opinion⁵, similarly stated that there is no conflict of interest between City employment and sitting on the Board of a nonprofit, provided that there is full disclosure, that the employee did not take any “official action” regarding the nonprofit, and that the official recuses himself from any decision affecting the nonprofit. See GC-2009-501.

⁵ The Philadelphia Board of Ethics permits staff to issue informal advice to requestors in the form of advice of counsel opinions.

3. *Arkansas*

The Arkansas Ethics Commission similarly stated that it would not be a conflict of interest for a member of the Arkansas legislature to serve on the Board of Directors of a homeowners association, provided there was full disclosure and recusal if appropriate. 2004-EC-005.

4. *Florida*

The Florida Ethics Commission stated that it would not be a conflict of interest for a county commissioner to serve on the board of a mental health facility which did business with the county, since the commissioner's involvement in the organization was not for his personal benefit, but to benefit the county and the nonprofit. CEO 96-30.

E. Role of the Secretary of State as Head of the Department

The Commission notes that the issue of recusal is somewhat problematic for the head of a principal department such as the Department of State. Even if the Secretary fully recused himself from any decisions regarding this nonprofit, the others in the agency would be acutely aware of the Secretary's interest and involvement in the nonprofit. Unlike employees and middle level supervisors who can disqualify themselves and expect that the department head will assign another person to handle a particular matter, the department head himself cannot decide who is to handle matters upon his disqualification without raising the appearance that the department head is still directing the result thus not avoiding the conflict at all. Therefore, the Commission recommends that before the Secretary of State joins the board of this nonprofit, he should appoint another person, such as the Deputy Secretary of State, to handle all issues

relating to the nonprofit, and should announce that decision to the department staff.

Although there is no information before the Commission that the nonprofit in question has ever faced an enforcement action by the Department of State or other state agency, the Commission is concerned that there could be an appearance of impropriety if the Secretary of State served on the board of directors of an entity over which he has regulatory and/or enforcement authority. Appearances of impropriety are generally referred to as “perception issues” or “violating the smell test.” They can weaken public confidence in government and create a perception of dishonesty, even among government officials who are in technical compliance with the law. Such conduct has the potential to damage an official’s reputation just as much as illegal conduct. This is further reason for the Secretary to assign someone else in the Department to handle all issues relating to this nonprofit.

V. CONCLUSION

It would not be a violation of Colorado Constitution Art. XXIX or Colorado statute for the Secretary of State to serve as a member of the Board of Directors of a nonprofit entity registered with and regulated by the Secretary of State’s Office, provided there were full disclosure and recusal where appropriate. However, due to the fact that the Secretary of State is a state constitutional officer, and any delegation could be questionable; it is the Commission’s strong belief that an appearance of impropriety could be created. The Commission is concerned moreover, that the presence of a state

constitutional officer on the board of a nonprofit may appear to be an endorsement of that nonprofit by the state.

The Independent Ethics Commission

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Dated: July 21, 2009