

State of Colorado



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Advisory Opinion 10-15

(Acceptance of Expenses for Travel while seeking Future Employment)

SUMMARY: As stated in the Commission's Position statement 09-03 (Future Employment) nothing in Colorado Constitution Article XXIX precludes covered individuals from seeking future employment in ordinary circumstances. And while it would not be a violation of Article XXIX for covered individuals to accept the payment of reasonable travel and related expenses in the ordinary course of a *bona fide* employment recruitment process, the Commission urges the Governor and his staff to seek fact-specific advisory opinions in instances in which a real or perceived conflict of interest arise.

I. BACKGROUND

The Independent Ethics Commission ("IEC" or "Commission") has received a request for advisory opinion by the Governor of Colorado¹ on behalf of himself and his staff asking for guidance regarding the payment of expenses incurred in the process of seeking of future employment. The Governor's term expires on January 11, 2011, and the Governor, along with members of his staff, have requested clarification regarding whether they may accept travel expenses from a prospective employer while they are

¹ The Governor and his staff have waived confidentiality related to this request. For ease, the opinion will refer to the Governor, rather than to the Governor and his staff.

still government officials and employees without violating Article XXIX. The Governor's request asserts that acceptance of expenses related to travel for future employment would be permissible under Article XXIX if it meets the following criteria:

1. The travel is for the purpose of discussing future employment opportunities with a prospective employer.
2. The future employment under consideration is at a rate or range of pay that is commensurate with the employee's skills and experience and the service that the employee would be providing to the prospective future employer.
3. The travel arrangements are appropriate to that purpose and are similar to the arrangements that the prospective employer makes for others it is considering for similar positions.
4. The trip is no longer than reasonably necessary to accomplish the purpose of meeting with the prospective employer.
5. The employee who will be traveling is not currently and will not in the reasonably foreseeable future be in a position to take direct official action with respect to the prospective employer.

II. JURISDICTION

The IEC finds that the Governor is a "public officer" subject to the jurisdiction of the Commission. CO Const. Art. XXIX (2)(6). Members of the Governor's staff are "government employees" also subject to the jurisdiction of the Commission pursuant to CO Const. Art. XXIX (2)(1).

III. APPLICABLE LAW AND PRECEDENT

Section 3 of Article XXIX (Gift ban) reads in relevant 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 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. (Emphasis supplied)

IV. DISCUSSION

Specifically, the Governor asks the following question:

In the course of seeking non-government employment, may a prospective employer cover the reasonable costs of travel, lodging, and meals associated with meeting with prospective employers to discuss future employment, as long as the costs and accommodations are reasonable and the individual is not currently nor in the reasonably foreseeable future is in a position to take action that will benefit the prospective employer?

The language of Article XXIX specifically lists “promises or negotiations of future employment” as a prohibited gift unless there is “lawful consideration of equal or greater value” received in return. In Position Statement 09-03, the Commission recognized that it would be an absurd result if Amendment XXIX were construed to prohibit government employees and officials once hired by a public entity under the jurisdiction of the IEC ever engaging in any negotiations for future employment. The Commission stated, at page 3, that “... it is axiomatic that most negotiations and offers of 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.” The Commission went on to

state, at page 5, however, that a government employee or official should...”avoid any perception that that individual is being rewarded for a previous official act or decision or that the public employee or official has a conflict of interest.”

Similarly, expenses paid by prospective employers in the ordinary course of recruiting covered individuals for employment are supported by consideration and would, in most instances, not violate the gift ban contained in Section 3 of Article XXIX. And while the Commission is mindful of the needs of the Governor and members of his staff to find gainful employment upon the conclusion of the Governor’s term in office, we are also unwilling to give blanket sanction to expense-paid trips for covered individuals.

As the Commission held in our opinion in Position Statement 09-03, the individual circumstances of the payment of expenses will control the determination as to whether or not such payments violate Article XXIX. Applying the reasoning of Position Statement 09-03 to questions posited by the requestor in this case, we hold that the payment of travel and related expenses that are reasonable and not patently excessive, are for bona fide recruiting and interviewing purposes, and do not arise in a context suggestive of a conflict of interest, would be permissible under Article XXIX. However, given the fact-specific nature of this inquiry, we caution the Governor and his staff to seek approval from the Commission in specific instances in which travel and related expenses are being paid by prospective employers and there is a question as to the reasonableness of such expenses and/or the potential for a real or perceived conflict of interest. Obviously, the Governor and his staff should not accept payments from potential employers when there is a real possibility that the Governor or his administration was or will be faced with a policy decision involving the potential

employer or when the Governor may actually be legally precluded from accepting employment, i.e., a lobbying job.

V. CONCLUSION

In general, if the payment of expenses are reasonable and are offered in the course of *bona fide* recruitment process and the expenses do not create either a conflict of interest or a perception of a conflict of interest, then it would not be a violation of Article XXIX for the Governor to accept travel expenses related to the seeking of future employment. However, the Commission urges the Governor, if possible, to seek an Advisory Opinion relating to specific options before accepting such expenses.

The Independent Ethics Commission

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Larry R. Lasha, Commissioner
Roy Wood, Commissioner

Dated September 1, 2010