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## ***Advisory Opinion 11-11***

(Conflict of Interest in Hiring)

**SUMMARY:** It would not be a violation of Colorado Constitution Art. XXIX for the Department of Local Affairs to hire an individual who has an existing contract with the Division of Housing at that agency under the circumstances described in the request.

### ***I. BACKGROUND***

The Independent Ethics Commission (“IEC” or “Commission”) has received a request for advisory opinion, asking whether it would be permissible for the Colorado Department of Local Affairs Housing Division (“Division”) to hire an individual who has existing loan contracts with the Division to provide low income housing.

According to the request, the individual went through the process required for hiring a state employee under the classified personnel system and was ranked the highest at each stage of the process. The Division would like to offer him a position as a “Housing Development Specialist” in the Division’s Pueblo Office<sup>1</sup>. The Division has informed the Commission that the individual is also a 50% owner, with his wife, of a limited liability corporation which has “developed projects using funds granted to their

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<sup>1</sup> This individual would be the only employee in the Pueblo Office. **This position was a supervisory position previously. Due to a recent reorganization, this position was downgraded in February 2011, prior to the posting of this position.**

corporation from the Department of Local Affairs, Division of Housing. This corporation currently has a project approaching closeout and a project going to contract.” The total value of these two loans is approximately \$700,000. The Division is asking whether hiring this individual would present either a conflict of interest or an appearance of impropriety under state law.

According to the request, the individual would not be employed in a position that has any oversight of the contracts in which he and his family have an interest. The Division maintains a separate and independent compliance section with different staff and supervision.” The Division has provided the Commission with documentation demonstrating that this individual will be “walled off” from any involvement with staff overseeing his contract. The Commission has also been assured that failure to comply with this separation would result in disciplinary actions. The individual has also completed the required potential conflict of interest notifications. Moreover, the individual would be based in a satellite office, and the supervision of the existing contracts are, and would continue to be, handled by a separate unit in the Denver office, so the potential for inadvertent conversations about the contract would be minimized. The Division has also provided the Commission with a position description questionnaire (“PDQ”) which shows that the position has no managerial or independent decision-making authority. In addition, the award and supervision of loan contracts are subject to the oversight of both the State Housing Board and the United States Department of Housing and Urban Development (“HUD”). The individual has stated that he does not intend to seek any future contracts with the Division, which has assured the IEC that he would not be permitted to do so in any event.

## **II. JURISDICTION**

The IEC finds that employees of the Department of Local Affairs are “government employees” subject to the jurisdiction of the Commission. CO Const. Art. XXIX (2)(1). Although the individual involved in this case is not yet a “government employee”, he would be subject to the Commission’s jurisdiction were he to be hired. 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. DISCUSSION**

### **A. Constitution Art. XXIX**

There is no provision in Article XXIX that directly addresses this question. While there are provisions in Article XXIX and other statutes which provide guidance on post-government employment by public employees, this request presents the opposite situation; *i.e.*, what restrictions should be placed on a private individual who seeks government employment. The Commission believes, however, 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 potential conflicts of interest from both perspectives. 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(gifts), p. 4, and Advisory Opinion 09-06 (Service on the Board of a Nonprofit Entity). Under the circumstances presented in this request, the Commission determines that no violation of the public trust would occur should the Division hire this individual.

#### *B. Statutes*

Colorado Revised Statutes sections 24-18-101 *et seq.* contain “standards of conduct” and “ethical principles” relating to public officials and employees.<sup>2</sup> 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

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<sup>2</sup> It is unclear to what extent 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 which are less strict and that the General Assembly would enact legislation to make conforming amendments. *Id.* pp. 20-21.

authority.” See, §24-18-105(2). The Commission believes that given the assurance by the Division that the individual would not have oversight or authority over his own contracts, and that his position is not a “decision-making” or managerial position pursuant to his PDQ, he would not have “substantive authority” over the agency.

C.R.S. §24-18-108(2)(a) provides that a state employee shall not “[e]ngage in a substantial financial transaction for his private business purposes with a person whom he inspects, regulates, or supervises in the course of his official duties.” The Division has assured the Commission that this individual would not inspect, regulate or supervise the contract in question, and that his current contracts would be monitored by personnel in a different administrative unit in the Denver office

C.R.S. §24-18-108(2)(d) provides that a state employee shall not “[p]erform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent.” The Division has assured the Commission that this individual would not have the ability to take an official act relating to the current contracts. Neither would he have access to computer files or data regarding his contracts, nor would he be able to inspect or manipulate agency data relating to his contracts. Moreover, the Commission has been informed that this individual would not have access to any “inside information” unavailable to others in the general public such as new interest rates that could affect his current business interests.<sup>3</sup>

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<sup>3</sup> The request also cites State Personnel Rule 1-13 which provides that “[n]o employee is allowed to engage in any outside employment or other activity that is directly incompatible with the duties and

### *C. Appearance of Impropriety*

Although hiring of the individual appears to be lawful, there are potential issues of “appearance of impropriety” in this case. 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.

The individual in question has two current contracts with the Division worth a substantial amount of money. There does not appear to be appearance of impropriety issues with the awarding of those contracts, and the parties have stated that no further loans would be requested or granted.

The Commission is concerned about potential social contact between the individual involved and those employees who monitor and supervise his loans. Although this individual would be based in Pueblo, and therefore the opportunity for inadvertent social contact is minimized, the Commission directs the Division to inform all of the employees that there should no discussions between anyone in the Denver office and this individual relating to his loans even in a social setting.

Moreover, the Commission encourages the Division to construct a durable method to ensure that the protections against a conflict of interest survive the employee’s career changes, both within the Division and in the event he chooses to leave. For example, the existence of the contract and the potential for conflict of interest, as well as the measures taken by the Division to ensure the employee is not in a position to affect an economic benefit to his business, needs to be referenced in his

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responsibilities of the employee’s state position.” The Commission defers consideration of the applicability of this Rule to the Division which is more familiar with the employee’s prospective duties and responsibilities.

personnel file. Moreover, the employee should be informed of his post-employment obligations to refrain from contracting with a state or local agency involving matters with which he was directly involved during his state employment for a period of six months as required by C.R.S. 24-18-201(1)].

If those requirements are observed, given the nature of the individual's duties, the physical separation, and the fact that all loans must be approved by the State Housing Board, the Commission is satisfied that there are sufficient protections in place to ensure that no undue pressure may be applied.

The IEC is aware that in a specialized area such as loans for low income housing, there are few individuals who meet the minimum qualifications and in order to hire an experienced and knowledgeable individual a balance must be struck between finding a qualified individual and someone without potential conflicts. Given the process required for hiring within the state personnel system, and the sensitivity the Division has shown regarding potential conflicts, the Commission is satisfied that the balance has been met in this case.

#### ***IV. CONCLUSION***

It would not be a violation of Colorado Constitution Art. XXIX or Colorado statute, for the Department of Local Affairs, Division of Housing to hire the individual concerned under the circumstances described in the request and subject to the recommendations contained in this opinion. 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 opinion and letter ruling.

### **The Independent Ethics Commission**

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