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INDEPENDENT ETHICS COMMISSION

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Advisory Opinion 13-05

(Conflict of Interest)

SUMMARY: It would not be an ethical violation for a state employee to have an interest in a contract under the circumstances of this request.

I. BACKGROUND

An employee in the Governor's Office of Information Technology ("OIT") has submitted a request to the Independent Ethics Commission ("IEC" or "Commission") asking whether it would be an ethical violation for him to continue to lease properties owned by a limited liability corporation ("LLC") controlled by his wife to the State of Colorado OIT. The requestor is the Northeast area maintenance manager for OIT. The properties in question are cell towers in Ramah, Colorado, within his geographic area of responsibility. A portion of one of the two towers is leased by the State of Colorado. The lease on those properties was signed by the previous owner in 1996, and amended in 2000. The properties had been for sale for some time prior to the requestor purchasing them.

The requestor initially submitted this request in February 2013. At that point the question presented was whether it would be a conflict of interest for the requestor and/or his wife to purchase the properties in question. At the time of the original

request, the requestor stated that although he supervised the maintenance personnel at these properties, he did not have any authority over the leases and had no role in negotiating the lease. The current lease runs through August 2016; the lease specifies the lease rates and adjustments through that date. The current rate is \$550 per month and will remain at that amount until September 1, 2014 when it is scheduled to increase. The requestor plans to retire from state service in May 2016.

The matter was discussed at the Commission's March 4, 2013 meeting. At that meeting, the requestor was present, as were representatives of the Attorney General's Office and the requestor's supervisors. The Commission deferred further consideration of this request. In April 2013 the requestor notified staff of the Commission that the issue was resolved and he withdrew the request. According to the requestor, his duties regarding these properties were reassigned. The requestor then received permission from his supervisors to proceed with the purchase. In October 2013 the requestor again contacted the Commission stating that the State Controller had concerns about conflict of interest issues, and would not approve the lease amendment (transferring ownership of the lease) absent an opinion from the Commission or a formal opinion of the Attorney General.

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

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.

(b) "Contract" does not include

(V) A contract with respect to which any...employee has disclosed a personal interest and has not voted thereon...

IV. DISCUSSION

Pursuant to Article XXIX, section 5(5) the IEC has jurisdiction to render advice on whether conduct "would constitute a violation of this article or any other standards of conduct or reporting requirements as provided by law." The Commission therefore has the authority to opine on whether certain conduct would constitute an "ethical violation."

In this situation, however, it appears from the information before the Commission that the state agency concerned, OIT, in conjunction with the requestor, has done what it can to distance the requestor from any potential conflicts of interest. The requestor's duties regarding that site have been reassigned, and he no longer has any responsibilities or duties over the site in question. See, Advisory Opinion 11-11, in which the Commission states that the construction of conflict walls can eliminate a potential conflict of interest. The lease rates, including increases, are based on a schedule negotiated by the prior owner in 1996; the requestor therefore cannot alter those amounts. The lease and previously scheduled increases will remain in effect until August 2016, past the date of his retirement. In addition, these towers are somewhat unique and there is a limited market for them. There is no information before the Commission that the requestor took advantage of information unavailable to others not in government employment either in learning of the availability of these properties or in negotiating the sale.

Moreover, the IEC believes that the requestor did not make this purchase in his official capacity and that he made a full disclosure to his supervisors. In completing this sale, the requestor reasonably relied on the statements made to him by his supervisors in effecting the sale of the properties.

IV. CONCLUSION

The Commission believes that under the circumstances of this request there is no ethical violation in transferring the lease from the previous owner to the LLC. The Commission is not rendering a legal opinion on these issues. 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

Matt Smith, *Chair, dissenting*
Rosemary Marshall, *Vice Chairperson*
Bob Bacon, *Commissioner*
William Leone, *Commissioner*
Bill Pinkham, *Commissioner*

Dated: October 22, 2013

Commissioner Smith dissenting:

The requestor has been most cooperative in providing information to the Commission. Even though he has never had “contractual authority” over the subject

lease and the subject lease payment is fixed for a term, an appearance of impropriety remains for this transaction because it appears that an impropriety has been set aside.

Advisory Opinion 11-11 addressed a situation where an applicant for employment with the state sought and received guidance from the Commission. That opinion not only looked at the proposed hiring but provided guidance to the agency and questioning employee should the hiring proceed and employment mature.

The majority reasons that the conflict disappears because this long-time state employee has been reassigned. I struggle with a conflict solution that requires modification of state employee's duties. Has another state employee with less seniority or favor with the department simply been reassigned to make the conflict go away, or is the state now paying someone else to travel farther at state expense to "exchange" official duties.

If allowed in the present case, there will always be a legitimate public question as to whether the state simply granted favor to a long-time employee for a property he used to maintain. I am not certain that blame for this appearance of impropriety should fall more harshly upon the employee who asked the question openly or upon the clever state agency that is complicit in the "job reassignment" that makes it possible. I respectfully dissent.