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Letter Ruling 14-02

(Subsequent Employment or Contract)

SUMMARY: It would be a violation of Article XXIX for a former employee of the Colorado Department of Human Services to enter into either part-time employment or work as a consultant with refugee service providers that continue to contract with the Department of Human Services under the circumstances of this request.

I. BACKGROUND

Until August 29, 2014, the Requester worked with a division of the Colorado Department of Human Services (“CDHS”). The Requester was a high level employee within his division whose duties included the coordination of public and private resources to promote effective operation and fulfillment of the division’s mission. In addition, the Requester prepared organizational plans and policies for public review on behalf of the CDHS. This included the development and management of all contracts with vendors for the provision of services using federal funds awarded to the state, interactions with other divisions of the state and county government, and demonstrating program outcomes.

The division for which Requester worked is a very small division of state

government which provides supervision and leadership but no direct services. Rather, the division contracts for and supervises the performance of the organizations providing direct services, of which there are approximately twelve in Colorado. The contract and performance information is publicly available. The Requester would like to help the direct service providers by planning and potentially implementing a new model of private program administration and case management.

The Requester would like to seek employment or a contract to work with one or more of the direct services organizations that still contract with the state before the six month waiting period has elapsed pursuant to C.R.S. §24-18-105 (3) and C.R.S. §24-18-201 (1). Prior to leaving this position, the Requester did not seek and was not offered employment or a contract position with any organization that contracted to provide services to Colorado State government. The Requester has asked if working for the private contractors would violate Article XXIX or other standard of conduct under the jurisdiction of the Independent Ethics Commission (“IEC”).

II. JURISDICTION

The IEC finds that the Requestor was a “government employee” and therefore falls under the jurisdiction of the IEC. See Article XXIX §2(1) and the IEC Rules of Procedure Rule 5(B).

II. APPLICABLE LAW

Section 1 of Article XXIX (Purposes and Findings) provides that:

- (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;

C.R.S. §24-18-105 (3):

A public officer, a local government official, or an employees *should not, within six months following the termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he has been directly involved during the term of his employment.* These matters include rules, other than rules of general application, which he actively helped to formulate and applications, claims, or contested cases in consideration of which he was an active participant. *(Italics added.)*

C.R.S. 24-18-201(1):

Members if 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 anybody, agency, or board of which they are members or employees. *A former employee may not, within 6 months following the termination of his employment, contract or be an 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. (Italics added.)*

IV. DISCUSSION

A. It is determined there is the possibility of a conflict of interest.

There is no specific provision in Article XXIX that addresses subsequent employment except for members of the General Assembly and state-wide elected officials. However, the Commission has previously cited to Section 1 to assess whether a potential ethical violation or an appearance of impropriety exists. In Letter Ruling 10-02, the Commission deferred the determination of a conflict of interest to the state agency at which the person was previously employed. “In 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.” Page 5. Here, the Requester asked for a letter from CDHS stating that there is no conflict of interest if he works with outside direct service providers.

Due to difficulty in responding to the request for a letter within the time allotted, CDHS elected not to provide one. Instead staff for the IEC spoke with two representatives of CDHS – the Requester’s direct supervisor and the Director of Human Resources. It was the position of CDHS that Requester’s seeking employment with an entity that currently contracts with the Department to provide services is a conflict of interest. The Department believes the Requester’s immediate employment will give the employing entity an advantage over other, non-employing entities in the process of bidding for state contracts or other matters involving work with CDHS. Also due to the Requester’s high-level knowledge of the processes and procedures of the division, there is concern that he may provide other information to the employing entity that CDHS is not immediately prepared to implement or announce. While Requester is certainly free to discuss this information and is not subject to a confidentiality agreement, CDHS is concerned that his immediate employment with an entity that contracts with the Department will adversely impact future planning related to those internal policy related discussions of which Requester is aware. Based on the concerns expressed by the Requester’s prior employing agency, the Commission finds the

possibility of a conflict of interest exists if Requester accepts subsequent employment as described.

- B. Based on the information in front of the Commission, C.R.S. §24-18-105 (3) may be violated.

This statute prohibits a former employee from using information that is not available to others, based on his or her direct involvement as a result of state employment, in new employment. The Requester states that all of the information about the division is in the public domain. The Requester was the overseer of the contracts and the performance of the contracts, and that information is publicly available. Rather than using information unavailable to others, the Requester states he will be applying his own analysis and planning skills to help redesign the way refugee services work and help with the transition to privatization. He states he will not take advantage of insider information. However, CDHS believes Requester will have a distinct advantage in that, even where information relating to contracts is public, he will have knowledge of the selection process and contract review that others, not formerly employed by the Department, will not have. CDHS also believes Requester has knowledge in other areas, not specifically related to contracts, that will not only give his new employer or contracting entity an advantage, but it also may harm CDHS interests if they do not have the six month “cooling off period” during which to reevaluate their internal position and policies in light of Requester’s departure.

- C. Based on the information in front of the Commission, C.R.S. 24-18-201(1) may be violated.

In Advisory Opinion 10-08, the Commission determined that a retired accounting professor could contract to do accounting work for his previous state employer because, though he used to teach accounting, he was not directly involved in the institution’s accounting procedures. The situation in this Opinion differs. Where the Requestor was previously in charge of contracting with direct service providers, he now wishes to focus on options related to the transition to privatization. However, as CDHS is not yet ready

to implement privatization policies, and Requester was previously involved in all decision making for his division, his situation is not analogous to Advisory Opinion 10-08. This Requester was directly involved in the matters which will be impacted by the employment he seeks.

IV. CONCLUSION

The Commission believes that a contract or employment before six months after state employment would, in these circumstances, violate C.R.S. §24-18-105 (3) as the employee has information that is not readily available to others, and would violate C.R.S. §24-18-201(1) because the decisions relating to privatization are still under consideration and the Requester possesses knowledge not readily available to members of the public at large. 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. Pursuant to C.R.S. §24-18.5-101, the name of the person requesting the ruling and other identifying information has been redacted.

The Independent Ethics Commission

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Dated: October 6, 2014