

State of Colorado



Matt Smith, *Chairperson*
Roy Wood, *Vice-Chairperson*
Dan Grossman, *Commissioner*
Sally H. Hopper, *Commissioner*
Larry R. Lasha, *Commissioner*

Jane T. Feldman, *Executive Director*

INDEPENDENT ETHICS COMMISSION

633 17th St., Ste. 1300, Denver, CO 80202

Ph.: 303/866-5727

Fax: 303/866-3777

E-mail: jane.feldman@state.co.us

www.colorado.gov/ethicscommission

Position Statement No. 09-03 (Clarification of “promises or negotiations of future employment”)

I. Introduction

The Colorado Constitution authorizes the Independent Ethics Commission (“IEC” or “Commission”) to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and any other standards of conduct and reporting requirements as provided by law. The IEC issues this Position Statement for the purpose of clarifying the provisions of Section 3(2) of Article XXIX of the Colorado Constitution. This section imposes a ban on gifts greater than fifty dollars (\$50) unless it falls under specified exception. It is the Commission’s hope that this Position Statement will increase the awareness of public officials and employees and the public at large. The Commission encourages public employees and officials to request further clarification if needed, through a request for advisory opinion.

II. Guiding Principles

The Commission reaffirms its Guiding Principles as set forth in Position Statement 08-01 (Gifts). The Commission continues to apply applicable constitutional guidelines, and to interpret Colorado Constitution 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.” The Commission also references Section 6, which provides that those who breach the public trust for private gain or induce such breach shall be liable for monetary penalties.

III. Applicable Law

Section 3 of Article XXIX sets forth the constitutional restrictions on gifts to public officials and government employees. Section 3(2) restricts the ability of public employees and officials to solicit accept or receive “promises or negotiations of future employment.” Section 3(2) states in pertinent 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 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, **...promises or negotiations of future employment ...from a person without such 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 added).

IV. Discussion

The question raised by this provision is as follows: Are covered individuals barred from seeking other employment or entertaining offers from prospective employees during the entire time that they are covered by Article XXIX? The plain language of Section 3(2) as well as the legislative history of Article XXIX lead to the conclusion that most employment related offers and negotiations are not prohibited by Section 3(2).

On its face, Article XXIX, Section 3(2) only prohibits negotiations or promises of future employment for public officials and employees that are not supported by

lawful consideration of equal or greater value. However, 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. Indeed, it would be the rare case where an employer's offer of employment is not supported by sufficient consideration from the employee.

It is this rare case to which the plain language of Section 3(2) is directed. If a public official or government employee solicits or accepts an offer of employment at a rate of compensation that is reasonable given the value of the service to be provided, there is no violation of Section 3(2). However, if the offer of employment is at a rate that is patently excessive given the services provided or if such offer is made or solicited in a factual context suggestive of a conflict of interest or an attempt to influence an official act, then the possibility of the appearance of impropriety becomes more likely, and Section 3(2) may preclude such solicitation or acceptance.

Nothing in the transcript of the Review and Comment hearing conducted by the Office of Legislative Legal Services, or the *Summary and Analysis in the 2006 State Ballot Information Book* ("Blue Book") published by the legislature and distributed to voters prior to the 2006 General Election indicates any intent to deprive covered individuals of the ability to seek or negotiate future employment during their government service.¹ Indeed, to interpret Section 3(2) so strictly would lead to the absurd result that government employees would be forced to resign from their jobs and surrender their compensation and benefits prior to even contacting prospective

¹ The Blue Book merely repeats the statement in the Amendment itself that "promises of future employment" would be prohibited gifts. See, Blue Book, page 9.

employers or sending out resumes. The Commission finds that such a result would be unduly punitive to the state's public servants and simply could not have been the intent of the drafters or the voters who approved Amendment XXIX.

The Commission therefore holds that this section should not be so strictly construed.

In order to determine if negotiations for future employment are barred under this section for want of lawful consideration of equal or greater value, the Commission has determined that the totality of the circumstances should be considered with particular focus on the following two factors:

1. Whether the remuneration that is being offered to the public official or employee is appropriate or patently excessive.

The Commission believes that if the salary and/or benefits offered are appropriate to the position, then there is a presumption that the new employment was negotiated in good faith and not based on the public employment of the job seeker. However, if the salary and/or benefits are clearly and substantially in excess of the market rate for the position, then soliciting, negotiating or offering such employment may run afoul of Section 3(2).

2. Whether the Offer or Solicitation is Made in Circumstances Indicative of a Conflict of Interest.

If a public official or employee who is negotiating for future employment is not currently, was not in the recent past, and will not in the reasonably foreseeable future, be in a position to take direct official action with respect to the prospective employer, then there will be a presumption that Section 3(2) is not violated.

However, those individuals who are in a position to take direct official action, either currently or in the reasonably foreseeable future should not be placed in situations where their judgment might be perceived to be influenced one way or another. The inclusion of this factor is to 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. See, Position Statement 08-02 (Travel). Clearly if there is any indication that the offer of employment was made to curry favor with the public official or employee, such as the situation in which it is stated or implied that employment could result if a public official or employee acted in a specific manner, then the offer would lack lawful consideration and Section 3(2) would be prohibitive. In addition, such an offer may implicate the bribery provisions of the Colorado Criminal Code.

V. Conclusion

In sum, Section 3(2) of Amendment XXIX does not preclude covered individuals from seeking and obtaining offers of future employment and the Commission will not scrutinize such offers unless they are patently excessive relative to market demands or the totality of the circumstances of the offer indicate a conflict of interest for the covered individual.

This, as all Position Statements, is intended to give broad advice to government officials and employees and the public. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinion or letter ruling.

The Independent Ethics Commission

Matt Smith, Chairperson

Roy Wood, Vice Chairperson

Dan Grossman, Commissioner

Sally H. Hopper, Commissioner

Larry R. Lasha, Commissioner

September 21, 2009