

IMPROPER USE OF OFFICE; DISQUALIFICATION; EMPLOYMENT CONFLICTING WITH OFFICIAL RESPONSIBILITIES

The Ethics Code bars a public official from taking any official action likely to affect a business in which he or she has a 10% or greater interest unless:

- a. his or her action affects the whole class of similarly situated businesses,
- b. the business's presence in the class is insignificant when compared to the number of members of the class and
- c. his or her action's effect upon the business 1) is neither significantly greater nor less than upon other members of the class or 2) results from the regular process of competitive bids.

In addition the official may not intentionally use or disclose any information which could result in the receipt of anything of value for the business had the information not been communicated to the public.

The business may not enter into a contract or lease involving a payment or payments of more than \$3,000 within 12 months in whole or in part derived from the state's funds unless the official has disclosed in writing the nature and extent of his or her relationship or interest to the Ethics Board and to the department acting for the state with regard to the contract or lease. Eth. Bd. 235

September 10, 1981

Facts

This opinion is based upon these understandings:

- a. This opinion concerns a prospective appointee to a state public office.
- b. Until recently the person was a shareholder of a company and chairman of its board of directors and received income from the company apart from payments of interest or dividends.
- c. The person has entered into an agreement with the company whereby the company has redeemed all of his or her stock in the corporation. In exchange for stock, the corporation will pay the person a fixed sum over an established number of installments. The redemption price will be calculated after a financial audit of the company. The redemption price will be calculated by use of a formula to which the parties have agreed to approximate the stock's value at the time of the redemption.

- d. The person no longer holds an office or directorship or position of employment with the company or with any of its subsidiaries.
- e. The person owns stock in a second company but no other member of his or her immediate family owns stock in that corporation. The person will reduce his or her interest in that corporation to less than 10% of its shares by transferring shares in that company to an irrevocable trust established for the benefit of his or her children, none of whom is a legal dependent. The person is not a director of the second company nor does he or she hold an office or employment with that company.
- f. Neither the person nor any member of his or her immediate family holds an office, directorship, or employment in either corporation or in one of its subsidiaries.
- g. Neither the person nor any member of his or her immediate family has retained an option to acquire a financial stake in either corporation or its subsidiaries nor to become a director, officer, or employe of any of those companies.
- h. The person retains a substantial partnership interest in a partnership which owns a building part of which is rented by the first corporation and part of which is rented by a state agency.

Question

The Ethics Board understands your questions to be:

- a. In light of Wisconsin's Code of Ethics for Public Officials and Employees, what impediment, if any, is the foregoing information likely to pose to the prospective appointee's execution of the duties of the state public office to which his or her appointment is contemplated?
- b. Will the company with which the official had been associated be barred from entering into agreements to provide supplies or services to the State of Wisconsin?

Discussion

Jurisdiction

The Ethics Board usually directs its advisory opinions to people and organizations which seek advice about their own conduct and will not ordinarily advise one person on the conduct of another. However, Wisconsin's law makes special provision for an appointing authority, with the consent of a prospective appointee,

to obtain an advisory opinion concerning a matter to which the prospective appointee is or may become a party.¹

Standards of Conduct, Generally

The Ethics Code bars a state public official from using his or her public position to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family or for an organization with which he or she is associated.² Moreover, an appointed state public official may not act in regard to a matter in which the official or a member of his or her immediate family or an organization with which the official is associated has a substantial interest except in accordance with advice from the Ethics Board.³

Association with a Business; Immediate Family

"Associated" when used with reference to an organization includes an organization in which a person or a member of his or her immediate family (1) is a director, officer or trustee or (2) owns or controls, directly or indirectly, separately or together, at least 10% of the outstanding equity.⁴ The statute identifies only some of the circumstances by which a person may be associated with an organization.⁵

Because the person has relinquished his or her interest in the firm without right to reassert himself or herself in its affairs or to share in its profits or losses, we conclude that he or she is no longer associated with it. We understand that the person continues his or her association with the partnership that owns that company's building and that he or she remains associated with the second company in question, even though the person has announced the intention to reduce his or her interest in the latter firm to less than 10%.

"Immediate family" refers to: (1) a person's spouse and (2) a relative from whom the person receives more than one half of his or her financial support or for whom the person provides the majority of his or her financial support.⁶ We understand

¹ Sec. 19.46(2), *Wisconsin Statutes*, provides in part:

19.46(2). . . any appointing authority, with the consent of a prospective appointee, may request of the board an advisory opinion regarding the propriety of any matter to which the prospective appointee is or may become a party. * * * *

² Sec. 19.45(2), *Wisconsin Statutes*, provides:

19.45(2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

³ Sec. 19.46(1)(a)3 and (e), *Wisconsin Statutes*.

⁴ Sec. 19.42(2), *Wisconsin Statutes*.

⁵ 5 Op. Eth. Bd. 59 (1981); 4 Op. Eth. Bd. 97 (1981).

⁶ Sec. 19.42(7), *Wisconsin Statutes*.

that the person and the person's spouse are the only members of your immediate family.

Material and Unavoidable Conflicts Distinguished

The Ethics Code recognizes that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature, that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society and those conflicts which are substantial and material.⁷

Something may be adjudged substantial either in absolute terms or relative to other things. With respect to application of Wisconsin's Ethics Code, an action does not confer a substantial benefit upon an organization if (1) the action affects an entire class of similarly situated organizations, (2) the organization's presence in the class is insignificant when compared to the number of members of the class, and (3) the actions' effects upon the organization are neither significantly greater nor less than upon other members of the class.

Entrance Into Contract Paid From State's Funds

No state public official, member of a state public official's immediate family, nor an organization with which the state public official or a member of the official's immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into a contract or lease involving a payment or payments of more than \$3,000 within a 12 month period in whole or in part derived from the state's funds unless the state public official has first made written disclosure of the nature and extent of the relationship or interest to the Ethics Board and to the department acting for the state in regard to the contract or lease.⁸

⁷ Sec. 19.45(1), *Wisconsin Statutes*.

⁸ Sec. 19.45(6), *Wisconsin Statutes*, provides:

19.45(6) No state public official, member of a state public official's immediate family, nor any organization with which the state public official or a member of the official's immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into any contract or lease involving a payment or payments of more than \$3,000 within a 12-month period, in whole or in part derived from state funds unless the state public official has first made written disclosure of the nature and extent of such relationship or interest to the board and to the department acting for the state in regard to such contract or lease. Any contract or lease entered into in violation of this subsection may be voided by the state in an action commenced within 3 years of the date on which the ethics board, or the department or officer acting for the state in regard to the allocation of state funds from which such payment is derived, knew or should have known that a violation of this subsection had occurred. This subsection does not affect the application of s.946.13.

Determination of Sale Price

We understand that the formula whereby the price per share at which the company agreed to redeem the person's stock was agreed upon to approximate the company's value at the time of the redemption without incurring the expense of an independent appraisal at that time. Under this method of evaluation the person's fortunes are linked in the remainder of this year, though perhaps only modestly, to the fortunes of the firm. Nevertheless, we are persuaded that the method of evaluation agreed upon is a satisfactory solution of a problem.

We consider the person's ties to the company nearly if not completely severed. Although he or she should not as a state public official act in a way to increase significantly the price at which the firm redeems his or her stock, we suspect the likelihood of that opportunity to be small. In the absence of the official's generating a significant increase in the value of this sale price of stock, the Ethics Code does not foreclose the person, if named to a state public office, from exercising his or her duties even if they might affect, directly or indirectly, the well-being of the company with which he was formerly associated. Should that circumstance present itself the person should consult us for guidance with respect to that situation.

Advice

As long as a state public official retains a 10% or greater interest in a business:

1. The official may not use his or her position as a state official to obtain financial gain or anything of substantial value for that business. In other words, the official should not take official action likely to affect a business in which he or she has a 10% or greater interest except to the extent that:
 - a. his or her action affects the whole class of similarly situated businesses,
 - b. the business's presence in the class is insignificant when compared to the number of members of the class and
 - c. his or her action's effect upon the business 1) is neither significantly greater nor less than upon other members of the class or 2) results from the regular process of competitive bids.
 2. The official may not intentionally use or disclose information gained in the course of or by reason of his or her public position in a way that could result in the receipt of anything of value for the business if the information has not been communicated to the public and is not public information.
 3. The business may not enter into a contract or lease involving a payment or payments of more than \$3,000 within 12 months in whole or in part
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derived from the state's funds unless the official has disclosed in writing the nature and extent of his or her relationship or interest to the Ethics Board and to the department acting for the state with regard to the contract or lease.

In view of the state official's having relinquished his or her interest in the company with which he or she was formerly associated, Wisconsin's Ethics Code does not bar the entrance of this company into agreements to provide supplies or services to the State of Wisconsin and places no limitation upon the official with respect to actions he or she may take that affect this company directly or indirectly.