

November 19, 2004

John P. McCullough  
Presiding Administrative Law Judge  
Workers' Compensation Board  
2601 25th St SE Ste 150  
Salem, Oregon 97302-1282

Dear Mr. McCullough:

At its November 19, 2004 meeting, the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion:

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION  
ADVISORY OPINION NO. 04A-1005**

**STATED FACTS:** The Workers' Compensation Board (WCB) has been providing mediation services to parties who come before the board for approximately eight years. Two WCB Administrative Law Judges (ALJs) conduct mediations on a full-time basis and four ALJs combine mediations with a partial hearings workload. Mediation is voluntary and both parties to a case must agree to participate. The demand for mediation is high. ALJ-mediators are often not able to schedule mediations on their calendar sooner than 2 to 3 months away.

An attorney involved in a pending case has asked one of the ALJs if he might be available to conduct a mediation on a private basis in order to meet the parties' needs for a quick resolution to the case. The ALJ discussed the request with the Presiding ALJ and they agreed that such a private mediation would have to be done with the following terms and conditions:

- The ALJ would be able to conduct private mediations only during hours when the ALJ was not working for the WCB.
- The ALJ would not use any state resources in conjunction with the private mediation.
- The ALJ would be contacted about conducting a private mediation by one of the attorneys representing a party to a workers' compensation case.

- The ALJ would be contacted only at home and only during WCB non-business hours.

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

244.020(15) “ ‘Public official’ means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.”

244.030 “Nothing in this chapter is intended to affect:

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(2) “Any statute prohibiting or authorizing specific conduct on the part of any public official or public employee.”<sup>1</sup>

**244.040 Code of ethics; prohibited actions; honoraria.** The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120:

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official’s holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official’s relative, or for any business with which the public official or a relative of the public official is associated.

**656.716 “Board members not to engage in political or business activity that interfered with duties as board member; oath and bond required:”**

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(2) “Before entering on the duties of office, each member shall take and subscribe to an oath or affirmation:”

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(b) “That the member does not hold any other office or position of profit that will interfere with the ability of the member to fully the perform the duties of the member’s position with the board.”

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<sup>1</sup> The identical language was added to ORS 244.010 as subsection (3) in 1987. 1987 Or Laws, Ch 566, Sec 7.

(c) "That the member is not pursuing and will not pursue, while a member, any other calling or vocation that will interfere with the ability of the member to fully perform the duties of the member's position with the board."

**656.724 Administrative Law Judges appointment; qualifications; term; performance survey; removal procedure."**

(1) "...Administrative Law Judges shall qualify in the same manner as members of the board under ORS 656.716(2)..."

QUESTION NO. 1: Would it violate Oregon Government Standards and Practices law for a Workers' Compensation Board Administrative Law Judge to privately mediate cases pending before the board under the terms and conditions described in the stated facts?

OPINION: Yes. ALJs are public officials as defined in ORS 244.020(15). ORS 244.040(1)(a) prohibits public officials from using their official position for personal financial gain that would not otherwise be available **but for** the public official's holding of the official position or office other than **official salary, honoraria, reimbursement of expenses or an unsolicited award for professional achievement.**

According to the stated facts, an ALJ performing a private mediation on his or her own time would be doing work identical to that which the ALJ performs as part of official duties for the State of Oregon. The stated facts show that the work is, in fact, part of the pending caseload of the Workers' Compensation Board. The stated facts also indicate that an ALJ would not have the opportunity to perform a private mediation for additional compensation were it not for the fact that the ALJ would be known to attorneys involved in pending cases because the ALJ performs mediations for the WCB. The additional compensation (financial gain) that the ALJ would receive would not otherwise be available **but for** the holding of the position of an ALJ. It is also clear from the stated facts that the additional compensation an ALJ would be paid would not be **official salary.** Accordingly, the additional compensation would be financial gain that is prohibited by ORS 244.040(1)(a).

QUESTION NO. 2: Do the provisions of ORS 656.716, relating to members of the Workers' Compensation Board, and ORS 656.724, relating to Administrative Law Judges, "trigger" 244.030(2), which states that nothing in Chapter 244 is intended to affect any statute that prohibits or authorizes specific conduct on the part of a public official or public employee?

OPINION: No. The GSPC is authorized to issue opinions only as to the application of ORS 171.725 to 171.785 (Lobbying Regulation) and ORS Chapter 244. Nonetheless, it appears that ORS 656.716 does not authorize any specific conduct. Rather, it appears

that the provision is intended to prohibit the pursuit of other activities by board members or administrative law judges that would interfere with the performance of their official duties. The public officials subject to ORS 656.716 and 858.724 have greater restrictions on their private activities than do other public officials. To the extent that ORS 244.030(2) may be applicable, we view ORS 656.716 and 656.724 to prohibit specific conduct that would otherwise not be prohibited by ORS Chapter 244.

**THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE GSPC MAY ALSO APPLY.**

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the 19th day of November 2004.

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John Kopetski, Chairperson

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Lynn Rosik, Assistant Attorney General