

May 21, 1998

William Greer
2640 Bolton Terrace, S
Salem, Oregon 97302-0026

Dear Mr. Greer:

This letter is in response to your correspondence dated May 14, 1998 concerning an attorney employed by the Employment Relations Board as an administrative law judge performing work as an arbitrator on the attorney's own time.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION
98S-016**

STATED FACTS: An attorney, admitted to the Oregon State Bar, is employed by the State of Oregon Employment Relations Board (ERB) as an administrative law judge. The attorney conducts hearings regarding legal issues presented under three sets of statutes:

1. ORS 243.650 - 243.782, the Public Employee Collective Bargaining Act.
2. ORS Chapter 240, the State Personnel Relations Law.
3. ORS Chapter 663, the Oregon Private Sector Labor-Management Relations Law.

After conducting an ERB hearing, the attorney reviews the evidence, applicable statutes and relevant case precedents and then prepares and issues a recommended order. The attorney's recommended orders are reviewed by the three member ERB. The ERB's decisions are subject to judicial review.

The ERB members, who are appointed by the governor, are subject to ORS 240.060(2), which provides:

A member of the board shall not hold any other office or position of profit or pursue any other business or vocation or serve on or under any committee of any political party, but shall devote the entire time to duties of the office of the member.

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Separate from the attorney's ERB employment, the attorney has accepted appointment and has served as a labor arbitrator for cases arising outside the state of Oregon. The attorney is a member of the labor arbitration panels of the American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), and the State of Washington Public Employment Relations Commission (PERC).

In the attorney's role as a labor arbitrator, representatives of labor and management have selected the attorney and contracted with the attorney to hear and decide disputes arising under their collective bargaining agreements. The attorney charges them a daily fee and travel expense reimbursement. When working as an arbitrator, the attorney is on leave status from the attorney's ERB employment.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (8)(a) to (c) of this section.

ORS 244.020(7): Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

ORS 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.

ORS 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

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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.

ORS 244.120: Methods of handling conflicts; generally; application to elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

(c) If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority.

QUESTION #1: Does ORS 244.040, or any other provision of ORS Chapter 244, prohibit the attorney from accepting appointment as an arbitrator for parties located inside the State of Oregon that are not subject to ERB's PECBA, SPRL or Private Sector jurisdiction?

OPINION: No. The GSPC has historically determined that the use of non-confidential knowledge and information gained as a result of public employment does not constitute a violation of ORS Chapter 244. To avoid violating Oregon Government Standards and Practices laws, an individual who maintains both public and private employment at the same time must maintain their duties and tasks as a public employee separate and apart from the duties and tasks associated with their private employment. The GSPC has previously issued advisory opinions related to outside employment or professional activity of public officials. Those opinions have established a set of specific guidelines which, if carefully followed, will assist public officials in conforming with Oregon Government Standards and Practices laws. The guidelines are as follows:

1. That private business not be conducted on public time.
2. That public supplies, facilities, equipment, personnel, records or any other public resources not be used to carry out private business.

3. That no official action toward a third party be conditioned on a private business relationship with that third party.

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4. That no confidential information be used to obtain financial benefit for the employee.
5. That employees will notify their appointing authority in writing of a potential or actual conflict of interest if private endeavors could or would be affected by public employment.

While it is permissible for a public official to engage in private employment on their own time, state law does not permit a public official to use anything that a person who is not also a public official is not entitled to use. The law also prohibits the promotion of outside business pursuits while engaged in the performance of official public duties. Private employment must always be kept separate from public employment in order to avoid a violation of ORS 244.040(1)(a).

Whether the parties to arbitration are or are not subject to ERB s PECBA, SPRL, or Private Sector jurisdiction has no bearing on whether or not a violation of ORS Chapter 244 occurs.

QUESTION #2: Does ORS 244.040, or any other provision of ORS Chapter 244, prohibit the attorney from accepting appointment as an arbitrator for parties located inside the State of Oregon that are subject to ERB s PECBA, SPRL, or Private Sector jurisdiction?

OPINION: No. See opinion to question #1.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Do not hesitate to call or write again if you have questions or would like additional clarification.

Sincerely,

L. Patrick Hearn
Executive Director

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