

November 10, 1999

Melvin D. Ferguson
Attorney at Law
514 Walnut Avenue
Klamath Falls, Oregon 97601

Dear Mr. Ferguson:

This letter is in response to your correspondence dated November 5, 1999 regarding conflicts of interest between Klamath Community College employees and board members and their private employment.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION
NO. 99S-028**

STATED FACTS: Klamath Community College (KCC) recently acquired property for the purpose of building a college campus. Current improvements on the property are being remodeled for administrative offices and onsite classrooms.

KCC is acting as its own general contractor for the current phase of remodeling and construction. KCC solicited RFP s (Requests for Proposals) from various contractors for work to be completed.

Problem A

For a portion of the project a contract has been awarded to Powley Plumbing. Powley Plumbing s proposal was not the lowest bid, but the proposal was the most complete given the proposal specifications. Powley Plumbing has asked Bellet Construction if they are interested in assisting in completion of the contract. Jim Bellet, the principal of Bellet Construction is an elected member of the KCC Board of Education. Bellet Construction did not however, assist Powley Plumbing in the submission of their proposal or the negotiations which followed between KCC and Powley Plumbing to arrive at a final contract. Powley Plumbing contacted Bellet Construction only after Powley Plumbing had been awarded the contract. In addition, Mike Griffith, an employee of Bellet Construction also serves as a part time hourly employee of KCC. Mr. Griffith has had responsibility for assisting with KCC s RFP process and negotiating with contractors. In fact, Mr. Griffith was involved with negotiating with Powley Plumbing prior to a final agreement being reached, and was involved in the selection of Powley Plumbing over other competing contractors. Melvin D. Ferguson

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A representative of Powley Plumbing asked Mike Griffith if Bellet Construction could perform some of the work. Griffith indicated initially Jim Bellet did not wish to be involved.

Powley Plumbing then indicated they would talk directly with Jim Bellet. That contact was made. Mike Griffith later told a Powley Plumbing representative that Jim Bellet would consider doing some work if ethics allowed. Powley Plumbing has not signed a written contract as yet, but Powley Plumbing has been notified verbally of their selection with the specific terms of the contract being as negotiated from their original proposal.

The work that Powley Plumbing is requesting Bellet Construction or some other contractor perform involves some excavation, demolition, replacement of concrete, etc.

There is nothing unique about the work that would necessitate that it be performed by Bellet Construction.

Problem B

It is anticipated that a contract will be awarded to contractor Jack Markgraf for another part of the current remodeling/construction project. Jack Margraf served on the budget committee of KCC from 1996 to 1998. The only proposal submitted for this part of the project was by Jack Markgraf. At some point KCC will negotiate further with Mr. Markgraf but he has no other competitors for the part of the project he will complete. Mike Griffith will also be involved in those negotiations. It is also anticipated that Mr. Margraf will need to subcontract with Bellet Construction to complete some concrete pumping given that Bellet Construction is the only contractor in the area with the equipment necessary to do concrete pumping. Bellet Construction did not discuss a possible contract with Jack Markgraf at the time Jack Markgraf submitted his proposal. In fact, Mr. Markgraf has had no contact with Bellet Construction to date.

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 (7) of this section.

ORS 244.020(2): Business means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-

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producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

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 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.

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
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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.

ORS 244.120(2): An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

QUESTION A: Would it be a violation of Oregon Government Standards and Practices laws for Bellet Construction to perform subcontract work for Powley Plumbing?

OPINION: Oregon Government Standards and Practices laws define actual conflict of interest ORS 244.020(1) and potential conflict of interest ORS 244.020(7). The difference between an actual conflict of interest and a potential conflict of interest is determined by the words would and could.

An actual conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by a public official would directly and specifically affect the financial interest of the official, the official's relative or a business with which the official or a relative of the official is associated.

A potential conflict of interest exists when an official takes action that could possibly have a financial impact on the official, a relative of the official or a business with which the official

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or a relative of the official is associated. Such possible financial impact is not certain.

If a potential conflict of interest arises, an elected official or an appointed official of a board or commission may participate in the action, once a public disclosure has been made. If the official is an appointed official the official must notify in writing the official's appointing authority of the nature of the conflict and request the appointing authority to dispose of the matter giving rise to the conflict. In the case of an actual conflict of interest, the elected official must publicly declare the actual conflict and refrain from taking any official action on the issue. If the official's vote is necessary for the public body to take action on the matter, the official may vote but may not discuss, debate or otherwise participate in the matter. An appointed public official deals with an actual conflict of interest in the same manner as with a potential conflict of interest.

It appears from the stated facts that Mr. Griffith had a potential conflict of interest when he negotiated with Powley Plumbing on behalf of KCC. He should have submitted a written disclosure to his appointing authority. The fact that Bellet Construction has been asked by Powley Plumbing to do subcontracting with Powley Plumbing seems to verify this.

Mr. Bellet will have an actual conflict of interest on any issue coming before the KCC Board of Education with regard to the specific project on which Bellet Construction has been asked to subcontract with Powley Plumbing. Mr. Bellet will have a potential conflict of interest with regard to any future projects on which Powley Plumbing may bid because of the possibility that Bellet Construction would be asked by Powley Plumbing to perform subcontract work.

QUESTION B: Would it be a violation of Oregon Government Standards and Practices laws for Bellet Construction to perform subcontract work for Jack Markgraf?

OPINION: ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or a business with which the official or a relative of the official is associated, regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

It appears from the stated facts that, if during Mr. Markgraf's tenure on the budget committee, the KCC budget committee recommended any money be expended on the project that Mr. Markgraf bid on, Mr. Markgraf would have not only had a potential conflict of interest but, Mr. Markgraf could be in violation of ORS 244.040(1)(a) by official action Mr. Markgraf took with regard to the project which could financially impact Mr. Markgraf personally.

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Mr. Griffith will have an actual conflict of interest and an ORS 244.040(1)(a) violation in negotiating on this project with Mr. Markgraf on behalf of KCC because Mr. Griffith is an employee of Bellet Construction and Bellet Construction is the only possible subcontractor for this project.

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.

Sincerely,

L. Patrick Hearn
Executive Director

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