

June 27, 2011

Cindy Hunt  
Government and Legal Affairs Manager  
Oregon Department of Education  
255 Capitol Street NE  
Salem, OR 97310

Dear Ms. Hunt,

This is in response to your correspondence dated May 17, 2011 and emails received between May 17 and June 17, 2011, regarding whether an employee of the Oregon Department of Education could accept a specific offer of employment while still complying with Oregon Government Ethics law.

**OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 11S-002**

**STATED FACTS:** The State of Oregon is part of an interstate educational consortium. Oregon's affiliation with the interstate consortium was authorized by the Governor of Oregon, the Superintendent of Public Instruction, and the chairperson of the State Board of Education. The interstate consortium is governed by a voting board of governing states. The interstate consortium has an executive director. Some of the members of the voting board of governing states also comprise the executive committee of the interstate consortium. The executive committee directs and approves the actions of the executive director.

The Council of Chief State School Officers (CCSSO), a national organization, is a separate and independent organization from the interstate consortium. The CCSSO received private grant funds on behalf of the interstate consortium until the federal grant was obtained by the interstate consortium. The CCSSO also provides non-contractual support and advice to the interstate consortium, as part of its mission to serve state educational agencies.

The Oregon Department of Education (ODE) is part of the educational interstate consortium. ODE contracts for services from the CCSSO. An employee of ODE writes grants as part of his official duties, and assisted in writing a federal grant that funds the interstate consortium. The information indicated that the employee did not authorize, did

not otherwise participate in any contract selection process, and is not the contract administrator for any of the contracts between the State of Oregon and the CCSSO. The ODE employee serves on the voting board of governing states and on the executive committee of the interstate consortium, as part of his official duties at the Oregon Department of Education.

After the ODE employee was appointed to the voting board of governing states and the executive committee of the interstate consortium, the executive committee opened up a nationwide search to fill the executive director position. The executive committee wrote the job description. The nationwide recruitment was conducted by the Human Resources Office of the State of Washington, Office the Superintendent of Public Instruction. The open position was advertised on the State of Washington's public website. Notice of the position was emailed to the contact person of each state that is a member of the interstate consortium. The open position was also advertised in *Ed Week*, a national publication related to education. Information indicated that the ODE employee did not participate in official actions to initiate the nationwide search for the executive director position.

After the nationwide search was initiated, the ODE employee who is also on the executive committee submitted a job application to the interstate consortium. Information indicated that he then "recused" himself and did not participate in any activities connected with hiring for the executive director position. The other members of the executive committee reviewed the applications, and interviewed him and two other candidates. The ODE employee was not selected as the most qualified candidate and was not offered the executive director position.

Later, the newly appointed executive director of the interstate consortium saw a need for an additional position. The executive director obtained a grant from a private foundation to fund the new position. Information indicated that the ODE employee did not seek funding for this new position, and did not direct the executive director to seek funding for this new position.

While participating in actions of the executive committee, the ODE employee reviewed the proposal to create and fund this new position with a grant from a private foundation. Further, the ODE employee participated in the vote to authorize the executive director to present the proposed position and funding to the voting board of governing states of the interstate consortium. Information indicated that the ODE employee had no intention of applying for this new position.

The executive director presented the proposed new position and funding to the voting board of governing states. The voting board of governing states voted to approve funding the new position with a grant from a private foundation. The executive director also proposed that new position be a position with the Council of Chief State School

Officers, not of the interstate consortium which the executive director serves. The voting board of governing states then voted to recommend that the CCSSO create the new position. Information indicates that the ODE employee was not present at this meeting and did not participate in the discussion and vote to fund the position with a grant or to have the position belong to the CCSSO.

The executive director of the interstate consortium made a request to the CCSSO that they accept the newly created position. The Council of Chief State School Officers agreed to accept the private grant funds and to be the primary supervisor of the new position.

Information indicated that once this new position was approved, the job opening was not advertised in any way. Two people were considered eligible for the new position. Both of those people had interviewed for the executive director position seven months earlier, but were not chosen for that position. Based in part on the interviews conducted previously for the executive director position, the executive committee recommended to the executive director that the ODE employee was a highly qualified candidate for the new position. Information indicates that the ODE employee did not participate in the recommendation of the executive committee to the executive director, and that he did not know he would be recruited for the position until he was approached by the executive director.

The information indicated that the executive director found this recommendation consistent with his own personal observation of the ODE employee's skills and abilities. He determined that the ODE employee was a highly qualified candidate and extended an informal job offer to the ODE employee. The interstate consortium executive director then requested the CCSSO to formally offer the new position to the ODE employee.

If the ODE employee accepts the new position at the CCSSO, that employee would no longer be employed by the Oregon Department of Education, or be the ODE representative on the executive committee of the interstate consortium. If the ODE employee accepts the new position at the CCSSO, he would not have a direct beneficial financial interest in any contracts between the Oregon Department of Education and CCSSO.

QUESTION #1: Would OGEC recommend any actions to help the employee who was offered the new position and Oregon Department of Education act in accordance with Oregon Government Ethics law?

ANSWER #1: Oregon Government Ethics law applies individually to each public official in the State of Oregon. The provisions do not limit the activities or policies of public

bodies. Because of this, these statutes do not restrict any actions of the Oregon Department of Education.

QUESTION #2: Would the employee of the Oregon Department of Education violate Oregon Government Ethics law by accepting the new position at the Council of Chief State School Officers?

ANSWER #2: ORS 244.047(2) and (3) prohibit a former public official from having a direct beneficial interest in a public contract for two years after the contract was authorized, if the contract was authorized by the former public official in their capacity as a public official, or if the contract was authorized by the governing body of a public body, such as a board, commission, council, bureau, or committee, and the former public official was a member of that governing body when the contract was authorized.

The stated facts do not indicate that there is a contract relating to the new position. Further, the stated facts indicate that the ODE employee did not authorize or participate in any contract selection process or administer any contracts between the Oregon Department of Education and the CCSSO. Based on the stated facts, it does not appear that accepting the new position would cause the ODE employee to violate the provisions of prohibited financial interest in a public contract found in ORS 244.047.

ORS 244.040 prohibits every public official from using or attempting to use his official position to obtain a financial gain for himself, if that financial gain would not otherwise be available but for the official position which that public official holds. The information provided for this opinion does not indicate that the employee used his public position to obtain the opportunity to be offered this new position. Unless there are additional facts not provided that indicate that the employee used his position on the executive committee to promote his own employment for the position, or took other steps as a public official to gain this private position, it would appear that his involvement would not be considered a prohibited use of office if the employee were to accept the new position.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL**

Cindy Hunt  
Commission Staff Advisory Opinion 11S-002  
June 27, 2011  
Page 5

**ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT  
ETHICS COMMISSION.**

Please contact this office again if you would like this opinion submitted to the Oregon Government Ethics Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

Ronald A. Bersin  
Executive Director

RAB/br 11S-002

### ADDENDUM

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

ORS 244.020(14) "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 as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

244.040 Prohibited use of official position or office; exceptions; other prohibited actions. (1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

244.040 (3) A public official may not solicit or receive, either directly or indirectly, and a person may not offer or give to any public official any pledge or promise of future employment, based on any understanding that the vote, official action or judgment of the public official would be influenced by the pledge or promise.

ORS 244.047 Financial interest in public contract. (1) As used in this section:

- (a) "Public body" has the meaning given that term in ORS 174.109.
- (b) "Public contract" has the meaning given that term in ORS 279A.010.

(2) Except as provided in subsection (4) of this section, a person who ceases to hold a position as a public official may not have a direct beneficial financial interest in a public contract described in subsection (3) of this section for two years after the date the contract was authorized.

(3) Subsection (2) of this section applies to a public contract that was authorized by:

- (a) The person acting in the capacity of a public official; or
- (b) A board, commission, council, bureau, committee or other governing body of a public body of which the person was a member when the contract was authorized.

(4) Subsection (2) of this section does not apply to a person who was a member of a board, commission, council, bureau, committee or other governing body of a public body when the contract was authorized, but who did not participate in the authorization of the contract.

Cindy Hunt  
Commission Staff Advisory Opinion 11S-002  
June 27, 2011  
Page 7