

May 31, 2001

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Dear Ms. Cogswell:

This is in response to your correspondence dated May 24, 2001 concerning possible conflicts of interest between a fire district board member who is the mother of the president of the union for the district.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
STAFF OPINION 01S-014

STATED FACTS: A newly elected fire district board member is the mother of the president of the union for the fire district. Management and employment issues are frequently brought before the fire district board. The fire district union contract will expire during this new board member's term of office which means that a new pay schedule, all other union benefits, management reservations, etc., will be negotiated and a new contract entered into during this new board member's term of office.

The fire district has 23 union member employees and 32 employees total.

The district is also concerned that its negotiating powers will be seriously compromised. Prior experience indicates a likelihood that this new board member may breach the confidentiality between the negotiating parties and inform the new member's son of the board's position (or bottom line) on disputes or matters of contention. Contract negotiations constitute just one concrete example where management confidentiality could become a real problem were there to be communications between the new board member and the new member's son.

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

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.

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 arises out of the following:

244.020(7)(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller class that qualify under this exception.

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.

244.020(16) " Relative means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse.

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:

244.040(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.

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:

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:

244.120(2)(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

244.120(2)(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

244.120(2)(b)(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.

244.120(2)(b)(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 #1: Would the new board member violate conflict of interest laws if the new member took official action on the district's union contract when there may be a financial benefit to her son?

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 the 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 that official, a relative of that official or a business with which the official or the relative of that official is associated. Such financial impact is not certain.

ORS 244.020(7)(b) provides an exception to conflicts of interest when an official action affects all members of a class to the same degree. Sometimes a public official may take action that would have a financial effect on that official, a relative of that official or a business with which the official or a relative of that official is associated. If other persons or entities are also affected to the same degree by that action, the official would be exempt from conflict of interest requirements on the basis of a class exception.

Only the Oregon Government Standards and Practices Commission (GSPC) is authorized by law to determine the existence of a class or the size of a class for the purpose of compliance with ORS Chapter 244.

The stated facts indicate that there are 23 union member employees that would be impacted by the action of the board with regard to pay schedule, all other union benefits, management reservations, etc. Because the president of the union is the son of the new board member he would be financially impacted by the action taken by the new member as a member of the board. The stated facts do not indicate whether the 23 union member employees would be impacted to the same degree. If all union members are impacted equally, the class exception would apply and the new member would be exempt from conflict of interest disclosure requirements. If, however, the 23 union member employees were not affected to the same degree, the new member would have to publicly disclose a conflict of interest as required by ORS 244.120.

QUESTION #2: Would Government Standards and Practices laws permit the new board member to take official action if a class exception existed or after a conflict of interest was publicly disclosed?

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 the official's relative is associated. This prohibition exists regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

Whether the new member is exempt from conflict of interest disclosure requirements or is required to disclose the nature of the conflict of interest pursuant to ORS 244.120, GSPC staff believes that the new member would be in violation of ORS 244.040(1)(a) if the new member took any official action that financially benefited the member's son either individually or collectively with other employees. Accordingly, it appears that the new member would be prohibited from taking any official action on the pay schedule, union benefits or management reservations that would financially impact her son.

The possibility of the new member breaching the confidentiality between the negotiating parties and informing the son of the board's position on disputes or matters of contention is understood; however, this issue does not fall within the jurisdiction of the GSPC. It is a matter for the agency to resolve internally.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 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 ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Please don't hesitate to call or write again if you have further questions or desire additional information.

Sincerely,

L. Patrick Hearn
Executive Director