

NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Peter Lewandowski, Assistant General Counsel

RE: RAO 4070

DATE: February 27, 2007

INTRODUCTION

The Citizen's Ethics Advisory Board (Board) issues this advisory opinion in response to a request by an employee of the Department of Transportation (DOT). In that request, the DOT employee presented several outside employment questions involving the maintenance staff of DOT's Office of Maintenance and Highway Operations (Office of Maintenance) and asked whether their participation in outside employment in any way violates the Code of Ethics for Public Officials (Code of Ethics).

BACKGROUND

The following facts, presented in the request, are relevant to this opinion. The DOT's Maintenance personnel involved in field operations are required to possess a current, valid Commercial Drivers License (CDL), which is not supplied by or paid for by the DOT. Some Office of Maintenance employees utilize the CDL license for outside, non-state, jobs. Generally, the Office of Maintenance employees are permitted to pursue outside employment, so long as such employment does not interfere or conflict with their primary state job. Determinations of whether outside employment does not interfere or conflict with an employee's state job are made by the appropriate DOT staff member under applicable Code of Ethics provisions and the DOT's own internal Code of Ethics Policy (Policy).

Nevertheless, the Office of State Ethics received three factual cases (incorporated into the analysis below) that reflect real situations involving outside employment issues faced by the Office of Maintenance employees. These three cases are representative of many similar situations particularly in the winter months during which the Office of Maintenance employees, who are in some way responsible in their state jobs for highway maintenance, engage in outside employment performing snow and ice removal. These employees work either on their own or with private plowing contractors that contract with the DOT to supplement the DOT's plowing fleet. The factual cases presented to the Office of State Ethics by the DOT have been purportedly reviewed by the Office of Maintenance employees' bargaining unit union council (Union). According to the DOT, the Union's position is that no conflict of interest exists under the factual cases presented

and that Office of Maintenance employees have the right to pursue outside employment, because the DOT does not reimburse the employees for their CDLs and renewals.

QUESTIONS

The Board has been presented with three factual cases involving DOT's Office of Maintenance employees. The Board is being asked to determine whether under the cases presented, it is permissible for the Office of Maintenance employees to pursue outside employment without violating applicable Code of Ethics provisions and regulations. The three cases have been incorporated into the analysis below.

ANALYSIS

The Code of Ethics does not contain a blanket prohibition against outside employment, but it does impose significant restrictions on that employment. First, of course, a state employee may not use state time, materials, or personnel to further his outside employment. See, e.g., Advisory Opinion No. 99-1. Second, a state employee may not accept outside employment that would impair his independence of judgment as to his official duties, or that would induce disclosure of confidential information acquired in the course of those duties. General Statutes § 1-84 (b). Finally, a state employee may not use his state office or position, or confidential information garnered from such office or position, for financial gain. General Statutes § 1-84 (c). Generally, these provisions prohibit outside employment in a situation in which an outside employer can benefit from the state employee's official actions—for example, the state employee, in his state job, has supervisory, contractual or regulatory authority over the outside employer. Regs., Conn. State Agencies § 1-81-17.

It is important to note that the Code of Ethics provides the outer bounds for permissible ethical behavior and that individual state agencies are permitted to be more restrictive in implementing their internal ethics policies. The DOT has a published Code of Ethics Policy that in most instances mirrors the statewide Code of Ethics administered by the Office of State Ethics, however, the DOT is legally permitted to be more restrictive in its policies so long as other laws are not violated.

With the above general framework in mind, the DOT cases presented for the Board's consideration are as follows:

- Case 1: A DOT employee, utilizing his/her CDL, drives a truck for a trucking company on nights and weekends, outside of core work hours. The employee has an established work history with the trucking company. The trucking company is subsequently hired by a VIP [(v)endor in place)] contractor to haul materials to and from a DOT project. The primary contractor was awarded the project through the competitive bidding process. Even though this is a state contract, the DOT employee has no input in the contract development, contract award or contract administration process. This employee is in a non-supervisory role at the

DOT. The trucking portion of the contract is minor or incidental to the primary work function such as milling or paving. This same situation should be reviewed if the DOT employee is in a supervisory/inspector capacity.

With regards to case 1 scenario, it is permissible under the Code of Ethics for a DOT non-supervisory employee to pursue such outside employment. It does not appear that such employee is in a position to influence his private employer's business relationship with the DOT – i.e., in his state position, he does not appear to have any regulatory, supervisory, or contractual oversight with respect to the private employer. Further, the DOT employee has had no input in the contract development, contract award or contract administration process. The issue of whether a DOT employee or the state pays for the employees CDL license is not germane to the analysis in this case, or any other case presented in this opinion. The focus is on whether the use of a license or a permit in one's outside employment creates an impermissible conflict with one's state duties. See Advisory Opinion No. 85-8 (Drug Control Agents were restricted in pursuing certain outside employment utilizing their pharmacist license because of their supervisory and/or regulatory responsibilities in their state jobs). Therefore, it is critical to remember that in any and all outside employment scenarios one's state position must always take precedence. In contrast, a DOT employee with supervisory/inspector responsibilities may be restricted from pursuing outside employment illustrated in the above case if his state supervisory and/or inspector duties extend to any oversight or regulation of the private employer contracted to do the state assignments.

Case 2: A contractor is awarded a VIP project through the competitive bidding process. The contractor hires a DOT employee to drive a dump truck. The DOT employee takes the day off on pre-approved vacation or personal leave. The DOT employee's role on the job is to haul materials to and from the work site. The DOT employee has no input in the contract development, contract award or contract administration process.

Again, the focus in case 2 is whether such an employee is in a position to influence his private employer's business relationship with the DOT, and/or whether the DOT employee has had any input in the contract development, contract award or contract administration process. Based on the facts presented, it appears that none of these concerns apply in this scenario. Therefore, it is permissible for a DOT non-supervisory employee to pursue outside employment with a contractor who has been awarded a VIP project through a competitive bidding. The fact that the DOT employee has taken a day off on pre-approved vacation or personal leave to work for the contractor on a state project falls beyond the scope of the outside employment provisions articulated in the Code of Ethics. Nevertheless, the use of personal time may be regulated by internal agency policies, or by the Governor's Executive Order, requiring certain state employees to be present on their state jobs during an emergency (e.g., natural disaster).

Case 3: The DOT contracts out 257 dump trucks to supplement its fleet during the winter season for snow and ice removal. The contracts are processed

through the Department of Administrative Services (DAS). A DOT employee, who owns a dump truck, successfully completes the bidding process and is awarded a contract. The DOT employee hires a truck driver to drive his truck during snow storms at another garage, while the DOT employee works driving a state truck at his assigned garage. The employee is in a non-supervisory role and has no input in the contract development, contract award or contract administration. Also, if the employee's spouse is the successful bidder, is there a conflict? If the DOT employee is in a supervisory role and the contract is administered by a supervisor from a different maintenance facility, is there a conflict?

According to General Statutes § 1-84 (i), no public official or state employee or member of the official or employee's immediate family or *a business with which he is associated* shall enter into any contract with the state, valued at one hundred dollars or more, other than a contract of employment as a state employee or pursuant to a court appointment, unless the contract has been awarded through an open and public process, including prior public offer and subsequent public disclosure of all proposals considered and the contract awarded.

In case 3, assuming that the DOT employee did not have any input in the contract development, contract award or contract administration process and/or such employee was not in a position to influence the relationship between the DOT and the business he is associated with, then it is permissible for such DOT non-supervisory employee to hire a truck driver to drive his truck during snow storms at another garage, while the DOT employee works driving a state truck at his assigned garage. Under the above delineated legal provisions and factual assumptions, a non-supervisory DOT employee's spouse may pursue a DOT snow removal contract without violating the Code of Ethics. With respect to the DOT employee with supervisory responsibilities, such an employee may contract with the DOT, so long as the contract is administered by another supervisor from a different maintenance facility and the DOT supervisory employee who obtained such contract has no regulatory and/or supervisory oversight over the award, execution, and administration of such contract.

CONCLUSION

The DOT's Office of Maintenance employees may engage in the outside employment activities described herein, without violating the Code of Ethics, but only if the above-stated restrictions are followed.