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Advisory Opinion No. 2-2023

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SUMMARY

A current State of Vermont employee may engage in paid self-employment activities related to the subject matter of their employment, where (1) the business activities are conducted solely on personal time and no state resources are used to develop or conduct business; (2) the employee's relationship with the State is not used in any way to market or promote the business; (3) the services provided by the employee do not overlap with the employee's State job duties; (4) the employee does not engage in private business relationships with entities the employee has worked with while employed by the State, or any entity that has, or is seeking, business with his State agency; and (5) the business activities do not undermine or contradict State policies or positions.

ISSUE

Whether a current State employee can engage in paid outside self-employment activities where the subject matter of the self-employment is related to the subject matter of their employment, and the services provided by the employee do not overlap with those provided by the employee in their State employment; the employee does not engage in business relationships with entities the employee has more than de minimis contact with while employed by the State; the employee does not use or highlight their relationship to the State in any way to market the business; no State resources are used in any way to develop or conduct the business; and the private business activities take place solely on personal time.

BACKGROUND and FACTS

The Requester, a classified State of Vermont Employee in the Executive Branch, has asked for an Advisory Opinion regarding whether any provisions of the Code of Ethics or Section 11.5 of the State of Vermont Personnel Policies and Procedures Manual, "Income from Outside Sources (Moonlighting)," prohibit him from engaging in part-time private business activities providing professional guide services related to outdoor recreation activities.

The Requester works in a management role at the Vermont Fish and Wildlife Department, Agency of Natural Resources (ANR), where he provides technical assistance to private land-owners, land use planners, and organizations involved in conservation work on private lands, and has responsibilities related to federal grant reporting and communications with the federal government on standards and practices. He also serves on multiple teams within ANR, the responsibilities of which include reviewing proposals for private land acquisition by the State, reviewing proposals from recreation organizations for events or infrastructure; preparing and implementing management plans for State lands; and reviewing requests for Special Use Permits.

The Requester has worked in his professional field for approximately 39 years, and for the State of Vermont for approximately 28 years. He holds a bachelor's degree and a master's degree related to his field of work in addition to relevant professional certifications unconnected to his work for the State of Vermont, including nature guide certifications.

The Requester proposes to start a part-time business providing professional guide services in four areas: interpretive and natural history; mindful outdoor experiences; community science activities; and fireside "campfire" programs. The business will be conducted solely on personal time, during weekends, evenings, and holidays. The Requester's goal is to turn this into a full-time business upon his retirement from State service in a few years.

In describing the proposed private business activities, the Requester attests that he will solicit clients in two ways: (1) direct marketing to target demographic groups who would register for the Requester's services directly, and (2) collaboration with local outdoor recreation tourism businesses, or "host-partners," who would promote the Requester's guide services as host-sponsored activities. In those cases, the host-partner would be the client, and the host-partner would market the experiences, register participants, and remit payment to the Requester for services rendered.

In rendering this opinion, we have relied on the facts presented in the Advisory Opinion request received on April 10, 2023, and subsequent follow-up communication with the Requester. We have not made any independent investigation of those facts.¹

ANALYSIS

When asked to consider whether income received from outside employment violates the Code of Ethics, each case must be analyzed on its own merits in conjunction with the applicable provisions of the State

¹ If the presented facts are incomplete, or if the presented facts otherwise do not fully and substantively represent the Requester's circumstances, this advisory opinion should not be relied upon, and a revised set of facts should be resubmitted to the Commission for further consideration.

Code of Ethics. The mere fact that the source of outside income is related to the subject matter of the Requester's State employment does not mean the conduct violates of the Code of Ethics.

In this case, we consider whether the Requester has or will: (1) use his official position for personal or financial gain (3 V.S.A § 1203d); (2) use nonpublic government information, or confidential information acquired during the course of State service, for personal or financial gain (3 V.S.A §1203e); (3) use State materials, funds, property, personnel, facilities, or equipment, or permitted another person to do so, for any purpose other than for official State business, unless the use is expressly permitted or required by law (3 V.S.A § 1203f); (4) engage in outside employment or activities that are inconsistent, incompatible, or in conflict with his official duties (3 V.S.A § 1203i); (5) comply with applicable State and federal laws and regulations, including applicable governmental codes of conduct, rules or policies established by executive order, agency rules, or policies (3 V.S.A § 1203j); and, (6) engage in conduct that will create a conflict of interest, or the appearance of a conflict of interest (3 V.S.A. §1203(a)).

§ 1203d. MISUSE OF POSITION

("A public servant shall not use the public servant's official position for personal or financial gain.")

When determining whether the conduct in question violates § 1203d of the Code of Ethics, we consider what, if any, role the Requester's State employment played, or may play, in obtaining or maintaining the opportunity for personal or financial gain. In this case, we look at whether the Requester is offering paid services he would be required to provide as part of his State employment; whether the Requester's government position will be used or highlighted in sales or marketing activities; whether any State connections have been or will be used to further the Requester's private business interests (i.e., based on the Requester's marketing, could someone reasonably believe they are hiring a government expert, in their role as a government employee, or could they be motivated to purchase the Requester's services under the belief they are being provided by a government expert).

In this instance, the Requester has provided the Ethics Commission with a detailed description of the services he proposes to provide in a private capacity, as well as a detailed description of the services he currently provides to the public as a State of Vermont employee. Upon review, there appears to be no meaningful overlap between the two as identified by the Requester.

The Requester has also provided the Ethics Commission with a detailed plan on how he plans to market his business, including his plan to ensure that no public association is made between his private business and his employment with the State of Vermont. The Requester attests that, as the sole employee of his business, he will retain exclusive control over marketing activities and will not promote or proactively communicate his State of Vermont employment in any way. The Requester further attests that he will contractually require his host-partners to use only promotional and marketing materials provided by the Requester, and to not communicate or infer to clients or prospective clients that the services or credentials of the Requester are associated with the State of Vermont.

The Requester further attests that he will only establish business relationships with entities with which he has no, or de minimis, contact with in his State of Vermont position. This issue is further analyzed below under § 1203i, "Employment Restrictions."

Under these circumstances, the Ethics Commission finds the conduct in question does not violate § 1203d of the Code of Ethics.

§ 1203e. MISUSE OF INFORMATION

("A public servant shall not use nonpublic government information or confidential information acquired during the course of State service for personal or financial gain or for the personal or financial gain of any other person.")

When determining whether the conduct in question violates § 1203e of the Code of Ethics, we consider whether the proposed activity involves the use of any non-public State information (i.e., information that would not otherwise be available to the public) and, if so, the nature and extent of the use of such information. This includes information such as survey results, statistical information, data collection and any information that has not actually been disseminated to the public, and that is not authorized to be made available to the public upon request. It does not include general knowledge, experience, or expertise the employee may have gained while carrying out their job functions.

In this case, the Requester attests that no non-public information will be used to plan or implement the proposed private business activities. Under these circumstances, the Ethics Commission finds the conduct in question does not violate § 1203e of the Code of Ethics.

§ 1203f. MISUSE OF GOVERNMENT RESOURCES

("A public servant shall not make use of state materials, funds, property, personnel, facilities, or equipment, or permit another person to do so, for any purpose other than for official state business unless the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule. A public servant shall not engage in or direct another person to engage in work other than the performance of official duties during working hours, except as permitted or required by law or by written agency, departmental, or institutional policy or rule.")

When determining whether the conduct in question violates § 1203f of the Code of Ethics, we consider whether a public servant has used state materials, funds, property, personnel, facilities, or equipment, or permitted another person to do so on his behalf, in planning or implementing private business activities. This includes any activities that may have taken place on state time or using state property, such as a state computer.

In this case, the Requester attests that no government resources, except those available to the public, such as maps, brochures, or publicly available wildlife data, will be used to plan, implement, or otherwise support private business activities, which will be conducted entirely on personal time. Under these circumstances, the Ethics Commission finds the conduct in question does not violate § 1203f of the Code of Ethics.

§ 1203i. EMPLOYMENT RESTRICTIONS

("(a) Outside employment. A public servant shall not seek or engage in outside employment or activities that are inconsistent, incompatible, or in conflict with the public servant's official duties.")

When determining whether outside activities violate § 1203i of the Code of Ethics, we consider whether the outside activities are incompatible or in conflict with the public servant's official duties. In doing so, we look at whether the outside employment will create conflicts of interest at the rate of frequency that impairs the employee's ability to perform their State job functions (i.e., would the employee have to recuse themselves from taking official action to the extent it interferes with their job), whether the time

commitment required to perform the outside activities interferes with the employee's ability to perform their job functions, and whether the employee's outside activities in any way undermine or contradict their agency's or the State's policies or positions.

The Ethics Commission takes this opportunity to note that the Requester's State role comes with extensive responsibilities over the management of both State and privately-owned land and requires him to engage with a range of public and private entities. This includes, but is not limited to, the provision of detailed expertise and technical assistance to private individuals and organizations; reviewing proposals for the acquisition of private land by the state; reviewing large-scale proposals from recreation organizations for events or infrastructure; and, permit requests. This creates the potential for conflicts of interest, preferential treatment, or the appearance of conflicts of interest, to arise in the ordinary course of the Requester's proposed business activities.

In this case, the Requester has self-identified situations in which he believes conflicts of interest, the appearance of conflicts of interest, or opportunities to give or receive preferential treatment are most likely to arise and has provided the Ethics Commission with a detailed plan to avoid those conflicts. The Requester attests that he will only work with businesses and organizations with which he has had no, or de minimis, contact in his role with the State. He further attests that he will not conduct business activities on State land; his business activities will only take place on private, municipal, or federal land with which he has no pre-existing relationships.

Given the nature of the private business activities the Requester plans to engage in (i.e., educational activities and leading small groups in immersive nature experiences) that do not involve taking policy positions or making policy recommendations, and the fact that the Requester has pro-actively self-identified potential sources of conflicts and offered a well-thought out plan to avoid those situations, the Ethics Commission finds the conduct in question does not violate § 1203i of the Code of Ethics.

However, we take this opportunity to strongly advise the Requester to treat compliance with the State Code of Ethics as an ongoing endeavor, and to seek additional advice from the Ethics Commission or the Agency of Natural Resources if situations arise in the future that require additional guidance.

§ 1203j. COMPLIANCE WITH LAWS, RULES, AND POLICIES ("A public servant shall comply with applicable State and federal laws and regulations, including anti-discrimination and equal opportunity laws, and comply with applicable governmental codes of conduct. A public servant shall comply with any other applicable rules or policies established by executive order, agency rule, or policy.")

Section 1203j of the Code of Ethics requires State of Vermont employees and public servants to comply not only with the Code's specific provisions, but to also comply with other applicable rules or policies. In this instance, the Requester has identified Section 11.5 of the State of Vermont Personnel Policies and Procedures Manual ("Manual"), "Income from Outside Sources (Moonlighting)," as one such "rule or policy" that may be implicated by his actions.² Per 3 V.S.A. § 1202(2), branches of State government, agencies, or departments may adopt additional personnel policies to address ethical conduct that is not covered by the statutory Code of Ethics, as well as policies that "exceed the requirements" of the State

² The provisions of the Manual are applicable to all classified state employees, including Requester. (3 V.S.A. § 315). Section 11.5 of the Manual regards an issue "related to governmental ethics" as set forth by 3 V.S.A. § 1225(b)(1)-(3).

Code of Ethics. The Ethics Commission notes that Section 11.5 of the Manual and the Code of Ethics take substantially similar approaches to regulating the conduct at issue here. However, the Commission makes no determination as to whether the Manual's provisions "exceed the requirements" of the State Code of Ethics. We suggest the Requester seek a determination from the Executive Branch on this point. Should a determination be made that provisions in Section 11.5 of the Manual are more stringent than the requirements of the Code of Ethics, the Requester is required to abide by those additional requirements.

Section 11.5 of the Manual further states that Executive Branch employees considering outside employment should consult with the DHR Human Resources Manager assigned to provide service to their employing agency or department. If the Requester has not yet done so, we suggest he also consult with his relevant HR Manager.

ADDITIONAL CONSIDERATIONS

Like Vermont, most other states also have ethics rules that govern the outside employment of state workers. See, e.g., [Conn. Gen. Stat. § 1-84 \(b\)](#); [New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-23 \(e\) \(5\)](#); [MD Code Ann. Ethics § 5-502 \(b\) \(2\)](#); see also [5 CFR §§ 2635-2636](#) (relating to outside income for federal employees). In issuing this opinion, the Commission is mindful of these similar rules in other states, and the interpretations thereof. In interpreting the Rhode Island statute, for example, the State Ethics Commission held that a state employee could engage in outside training of private individuals of general subjects within his state expertise, "provided that all training is provided on his own time and without the use of public resources, and that he does not use his position at the [state agency] to solicit clients for his private employment venture. Given that the proposed training is outside the scope of his official [state] duties, and he will be teaching the course on his own time, no inherent conflicts of interest are present under the Code." [RI Advisory Opinion 2001-13](#). Similarly, the former New York State Ethics Commission³ held that a state agency's marketing director could engage in outside employment for private parties as a freelance photographer and copy writer (both of which duties he also had in his role for the state), "so long as the subject matter of his [outside] work does not conflict with and is completely unconnected to his State position, does not require the use of State equipment, and is not performed on State time." [NY Advisory Opinion 90-05](#).

CONCLUSION

Based on the facts received from the Requester, the Commission finds that the Requester's proposed course of conduct would not violate the State Code of Ethics. However, the Requester is advised to seek a determination from the Executive Branch as to whether his proposed course of conduct would violate any Executive Branch or agency rules or policies that require a more stringent standard of ethical conduct. The Requester is also encouraged to seek further advice or guidance from the Ethics Commission if any changes are made to his proposed course of conduct.

Disclaimer

This Advisory Opinion is strictly limited to the facts stated herein and relates only to the application of the State of Vermont Code of Ethics and Section 11.5 of the State of Vermont Personnel Policies and

³ Now, the New York State Commission on Ethics and Lobbying in Government.

Procedures Manual, “Income from Outside Sources (Moonlighting).” Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a State of Vermont public servant and are not adversarial or investigative proceedings. The Ethics Commission offers no opinion on the effect any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics, other than the ones referenced above, may have on this situation.

Code Citations

3 V.S.A. § 1203d
3 V.S.A. § 1203e
3 V.S.A. § 1203f
3 V.S.A. § 1203i
3 V.S.A. § 1203j
3 V.S.A. § 1202(2)

Related Advisory Opinions

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Keywords

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