

Vermont State Ethics Commission

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Advisory Opinion No. 5-2023

SUMMARY

The State Code of Ethics does not bar an Executive Branch appointee who serves as a full-time, paid member of a state regulatory board from running for state legislative office during the term of their appointment. However, the public servant must comply the Code of Ethics, which may restrict certain campaign activities.

ISSUE

Whether a State of Vermont public servant appointed to a state regulatory board can run for state legislative office during the term of their appointment and, if so, whether the State Code of Ethics restricts any campaign activities.

BACKGROUND and FACTS

The Requester is an Executive Branch appointee who serves on a state regulatory board that oversees individuals and businesses in a single industry. Members of the board are paid, full-time exempt State employees and are appointed by the Governor. The Requester is considering running for legislative office at some point during their appointment and has asked for an Advisory Opinion on whether the Code of Ethics places any restrictions on running for office while serving on the board, or on potential campaign activities. In particular, the Requester has asked about the Code's conflict of interest provisions as they relate to campaign contributions. The Requester further anticipates that members of the public will be interested in their current and past public service experience to help them evaluate the Requester's abilities and suitability for office and has asked whether their public service roles can be referenced in campaign materials.

The Requester has also expressed interest in the Commission's opinion on whether, should they be elected to office, anything in the Code of Ethics prevents them from serving in the legislature and maintaining their position on the board.

In asking for an Advisory Opinion, the Requester has identified several provisions of the Code of Ethics they believe could be implicated by the proposed course of action: §1203(a)(1) Conflict of Interest, Appearance of Conflict of Interest; §1203(d) Misuse of Position; §1203(g) Gifts; and, §1203(i)

Employment Restrictions. The Commission analyzes these provisions below, as well as §1203(f) Misuse of Government Resources.

ANALYSIS

When asked to consider whether a conflict of interest or the appearance of one exists under the State Code of Ethics, each case must be analyzed on its own merits in conjunction with the applicable provisions of the State Code of Ethics. In this case, we consider (1) whether a conflict of interest or the appearance of one exists, and, if so, (2) what course of action the Requester should take to comply with the Code's conflict of interest provisions.

I. Conflict of Interest or Appearance of Conflict of Interest

§ 1203(a)(1). CONFLICT OF INTEREST; APPEARANCE OF CONFLICT OF INTEREST

("In the public servant's official capacity, the public servant shall avoid any conflict of interest or the appearance of a conflict of interest. The appearance of a conflict shall be determined from the perspective of a reasonable individual with knowledge of the relevant facts.")

The Code of Ethics (3 V.S.A. § 1203(a)(1)) states that all public servants must avoid any conflict of interest or the appearance of a conflict of interest. A conflict of interest is defined as "a direct or indirect interest of a public servant or such an interest, known to the public servant, of a member of the public servant's immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant's public body, or that is in conflict with the proper discharge of the public servant's duties."

A. Seeking Elected Office while Serving on a Regulatory Board

The Requester has asked whether anything in the State Code of Ethics would bar them from running for legislative office while serving as an appointed member of a state regulatory board. The Commission sees no inherent conflict between the Code of Ethics and the Requester running for office, provided the Requester complies with the provisions of the Code of Ethics discussed below.¹ However, the Commission notes that in addition to the Code of Ethics, as a full-time state employee appointed by the Governor, the Requester is also subject to the conflict of interest rules found in the Executive Code of Ethics, Executive Order No. 04-22, and the Department of Human Resources, Personnel Policy and Procedure Manual. This Advisory Opinion does not opine on the applicability of these additional rules to the Requester's factual scenario, except as they relate to the Code of Ethics.

B. Conflicts of Interest and Campaign Activities

The Requester has identified the possibility of actual or apparent conflicts of interest arising in the context of campaign contributions under 3 V.S.A. § 1203(a)(1). The Commission agrees that campaign contributions or other forms of support for the candidate, such as volunteering on a campaign or providing free goods or services, when made by individuals or entities the Requester is involved in regulating, can give rise to actual or apparent conflicts. In order to avoid actual or apparent conflicts, the

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Requester should not solicit or accept campaign contributions from individuals or entities regulated by the board; individuals or entities that are likely to be significantly impacted by official actions taken by the Requester; individuals or entities that are negotiating with or doing any manner of business with the board during their campaign; or, any situation where there is the expectation or understanding that a campaign contribution could affect an official action by the Requester. Additionally, the Requester should not accept or solicit campaign donations from subordinates.²

§ 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 Section 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 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. Considerations related to outside employment are not limited to outside activities that are paid.

Here, the Requester’s proposed a course of action potentially touches on all three of the above considerations. However, because the Requester’s actions are still speculative, the Commission does not possess sufficient facts to determine whether the proposed activities are inconsistent, incompatible, or in conflict with the Requester’s board duties. For example, the Commission does not know whether the Requester plans to request time off related to running for office, how much impact that might have on board functions, or whether anything in the Requester’s proposed platform could contradict board policies or positions. It is also entirely possible for the Requester to construct a course of action that avoids implicating the above considerations. For example, the Requester could conduct all campaign activities outside of regularly scheduled work hours, avoid all mentions of the subject matter handled by the board while engaging in campaign activities, and refuse all campaign contributions or other forms of support that could lead to a conflict or the appearance one. The Commission also notes that managerial discretion plays a role in determining whether outside activities are incompatible with a public servant’s official duties. The Commission recommends that before embarking on the proposed course of action, the Requester meet with their relevant supervising authorities and come to an agreement on parameters related to campaign activities, including any anticipated requests for time off, the course of action to be followed related conflicts of interest and the appearance of conflicts of interest, and how questions related to board activities by members of the public during campaign activities should be handled.³

² This includes consultants, and others who work on behalf of the Board.

§1203g. GIFTS

("A public servant shall not solicit or accept a gift unless permitted under this section. For purposes of this subchapter, "gift" means anything of value, tangible or intangible, that is given for less than adequate consideration.")

When determining whether a gift is permitted under Section 1203g, we first look to see whether the gift in question meets any of the exceptions listed in Section 1203g(a)(1)-(14). Section 1203g(a)(14) allows a public servant to accept "gifts otherwise permitted and legal," and states that a "public servant may accept a gift that is otherwise expressly permitted under State law." Here, 17 V.S.A. § 2901 expressly permits candidates running for office to accept campaign contributions as defined in 17 V.S.A. § 2901(4), and subject to the limitation laid out in 17 V.S.A. § 2941. However, while a campaign contribution is an allowable gift under Section 1203g(a)(14), this provision of the Code must be read in tandem with Sections 1203(a)(1) and 1203(c). Here, the Requester should not accept otherwise permissible campaign contributions that create a conflict of interest, the appearance of a conflict, or create the opportunity for preferential treatment, as discussed above.

§ 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 Section 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.

As mentioned above, nothing in the Code of Ethics bars the Requester from running for office while serving as an appointed board member, and seeking elected office is an opportunity generally available to members of public. However, the Requester must not use their current state position to give them undue advantage over other candidates seeking the same office. This includes avoiding any suggestion that the board specifically, or the State generally, endorses or promotes their candidacy. During public appearances, either on behalf of the board or while campaigning, the Requester must be clear about their role during the appearance and not discuss their candidacy during board appearances or vice versa. While the Requester may reference their current board service in a campaign biography, those references should be restricted to a statement of their title and a factual description of their position. No such restrictions apply to instances of past public service with the State, which can be freely referenced and discussed.

As previously discussed, the Requester should not solicit or accept campaign contributions from individuals or businesses their board regulates; entities who do business with the board or are likely to have business before the board; are likely to be significantly impacted by board decisions, or where there is otherwise the expectation or understanding that the campaign contributions would affect any official action by the Requester. The Requester should also not solicit campaign contributions from subordinates or otherwise use state connections gained through their board membership to solicit support for their candidacy.

§ 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 Section 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.

The Commission notes that running for elected office can require a great deal of time and resources. The Requester must ensure that all campaign activities take place on personal time, and that no state resources of any kind, including photocopiers, state email addresses, telephones, or computers are used in support of the campaign, nor is any type of assistance provided by board staff on state time.

II. Conflicts of Interest and Dual Public Service Roles

The Requester has suggested that, should they be elected to legislative office, they may need to resign from their board position as the two roles might be incompatible. As this scenario is speculative, the Commission refrains from opining on the issue. However, the Commission takes this opportunity to note that the legislature's conflict of interest rules and definition differ from the State Code of Ethics when an official action relates to a core legislative function, such as voting.⁴ Should the Requester ultimately serve in the legislature while maintaining their board membership, the Requester should be mindful of these two sets of rules, each of which may require a different course of action depending on the context of the official action, and even when the underlying matter is the same.

CONCLUSION

The Commission finds that the Code of Ethics does not bar a public servant from running for legislative office while serving as an appointed member of a state board, provided that campaign activities otherwise comply with the State Code of Ethics. Should the public servant be successful in their pursuit of legislative office and maintain their board position while serving in the legislature, the public servant should be mindful that the legislature applies different conflict of interest standards when an official action relates to a core legislative function, such as voting. While legislative rules may allow one course of action in the legislative context, the State Code of Ethics may require a different course of action in the board context.

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. 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

⁴ The State Code of Ethics conflict of interest rules still apply to legislators when it comes to non-core legislative functions, such as the acceptance of gifts.

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

§ 1203a

§ 1203d

§ 1203f

§ 1203g

§ 1203i

Related Advisory Opinions

AO 3-2023

Keywords

Conflict of Interest

Appearance of Conflict of Interest

Outside Employment

Employment Restrictions

Misuse of Position

Misuse of Resources

Boards and Commissions

Gifts

Preferential Treatment

Core Legislative Functions