

ETHICS BOARD
COLORADO GENERAL ASSEMBLY



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ETHICS BOARD OF THE GENERAL ASSEMBLY

Advisory Opinion 2008 - No. 1

Conflict of Interest: Contractual Relationship with State Entity

REDACTED

1 May 2008

QUESTION

What advice would the Ethics Board of the General Assembly give to a legislator faced with the question of whether his or her position as a principal of a private business that has a contractual relationship with a state entity creates a conflict of interest for purposes of House Rule 21 (c) or Senate Rule 17 (c) in voting for or advocating legislation that directly impacts the finances of the state entity but does not result in the legislator receiving any direct financial benefit through his or her business's contract with the state entity?

ADVISORY OPINION

A legislator faced with the situation similar to the one described in the inquiry submitted to the Ethics Board of the General Assembly ("Board") would not be violating any rules or statutes warranting discipline if he or she advocated or voted on legislation that might directly impact the financial interests of state entities, in general, or a specific state entity, with which the legislator's private business has a contractual relationship. However, the Board recommends that a legislator disclose such facts prior to advocating or voting on such legislation.

A strict reading of Senate Rule 17 (c) or House Rule 21 (c) limits the scope of the conflict-of-interest rule set forth therein to legislators with a personal, financial, or private interest in a pending question or bill. In a prior opinion,¹ this Board concluded that the term "personal or private interest" has been interpreted historically to mean "economic or financial

¹ See Ethics Board of the General Assembly Opinion 2006-1.

interest" and, as such, focuses the attention of the inquiry on what economic or pecuniary benefit the legislator stands to gain, whether directly or indirectly, as a result of his or her vote on a measure. The meaning of the term "personal or private interest" is further clarified in Joint Rule 42 (a) (1), which states that a member has a personal, private, or financial interest if the passage or failure of a pending bill, measure, or question "will result in the member deriving a direct financial or pecuniary benefit that is greater than any such benefit derived by or shared by other persons in the member's profession, occupation, industry, or region." Joint Rule 42 (a) (2) further states that a member is not "deemed to have a personal, private, or financial interest in a pending bill, measure, or question that affects the entire membership of a class to which the member belongs."

No actual conflict-of-interest situation would exist for a legislator at the time that he or she advocates or votes on legislation in a situation similar to the one described in the inquiry requesting an advisory opinion if the legislation that directly impacts the finances of the state entity does not provide moneys to be used for the payment of any obligations arising under the contract existing between the state entity and the legislator's private business. However, the *appearance* of a conflict of interest may exist whenever a legislator whose business has a contractual relationship with a state entity votes or advocates for legislation that financially benefits that state entity. A legislator should consider whether the *appearance* of a conflict of interest, if not an actual conflict, makes full disclosure of the circumstances, and possibly recusal from the vote, advisable.

Notwithstanding the fact that this Board finds no actual conflict of interest arises in the situation described in the inquiry, the Board recommends that a prudent course of action for a similarly situated legislator would be to disclose his or her particular situation or interest relative to a particular bill. After such disclosure, the legislator may then elect to advocate for and vote for the bill or recuse himself or herself from voting on the measure. In either case, the legislator may wish to explain the basis for voting on or abstaining from a vote on the bill.

BACKGROUND

The Board received a request for an advisory opinion concerning whether a legislator is presented with a conflict-of-interest situation requiring the legislator to abstain from advocating or voting for legislation that directly impacts the finances of a state entity when the legislator's private business has a contractual relationship with the state entity. The inquiry stated:

Under the relevant ethics rules, should I have sponsored or voted on legislation that allocated funds to the [state entity] for the repayment of loans, retirement of debt relating to [a facility of the state entity], administrative expenses, operation costs, and promotion of events when there existed a contractual relationship between the [state entity] and the business of which I am a principal?

The inquiring legislator actually sponsored legislation to allocate moneys to the [state entity] to be used: 1) To pay off loans made to the [state entity] by the State Treasurer; 2) to pay off outstanding debt incurred by the [state entity] to build the [state entity's facility]; and 3) for administrative expenses, operating costs, and promotion of events at [state entities facilities]. At the time of the legislation, the legislator was a principal of a [business] that had a contractual relationship with the [state entity] relating to certain capital improvements at the [state entity]. However, none of the moneys allocated to the [state entity] by the legislation were to be used to pay for any capital improvements at the [state entity's facilities]. As a result, the legislator did not realize any direct financial benefit from the legislation.²

ANALYSIS

At the outset, the Board notes that section 24-18-113 (2), C.R.S., appears to anticipate the rendering of advisory opinions to be used prospectively to guide a legislator's future decision making, behavior, or conduct in response to factual circumstances that have already arisen or might yet present themselves in the future. However in this case, as in 2006, the Board has been presented with a factual situation in which the legislator has already taken action. Senate Rule 41 (g), however, contemplates advisory opinions that address a Senator's past, current, or anticipated conduct. Accordingly, the following advisory opinion will address the specific factual scenario presented in the inquiry addressing conduct that has already occurred, but it will also attempt to provide general guidance to legislators faced with similar circumstances in the future that could raise potential conflict-of-interest issues.

A. Personal, Private, or Financial Conflicts of Interest

1. Colorado Constitution

a. Personal or private interest

As with prior Board of Ethics opinions, the situation presented in this inquiry raises questions about the potential for a conflict of interest arising between a legislator's private business interests and his or her legislative duties. It requires the consideration of principles related to conflict of interest and undue influence. The state constitution, statutes, and legislative rules all address when a member of the General Assembly may not vote on legislation in which the member has an interest. The Colorado constitution, article V, section 43, provides:

Section 43. Member interested shall not vote. A member who has a personal or private interest in any measure or bill proposed or pending before the general assembly,

² House Bill 06-1384 was approved by the Governor and became law on June 5, 2006.

shall disclose the fact to the house of which he is a member, and shall not vote thereon.

The issue of whether a member has a personal or private interest in a particular bill has historically arisen when a member's business, profession, or occupation is impacted by that bill. The phrase "personal or private interest", therefore, has been interpreted over time to mean a *financial* interest through one's business, profession, or occupation affected by the legislation that is not shared by other members of that business, profession, or occupation.

b. Financial Interest

In the inquiry presented to this Board, the legislator, a principal in a [business] that had been awarded contracts to do capital improvements at the [state entity's facilities], was the second-house sponsor of a bill (hereinafter "the bill"), providing considerable funding to the [state entity]. The testimony before the Board of [one witness] confirmed that all of the contracts that the legislator's [business] had been awarded with the [state entity] had gone through the proper competitive negotiations procedures for professional services as set forth in statute. In addition, [another witness], testified that the bill provided much-needed *operational* funding to the [state entity], not funding for capital improvements. Had the funding in [the bill] been for capital construction purposes, the possibility of a direct financial interest would have been of more concern to this Board.

2. Statutory "Standards of Conduct"

The statutory standards of conduct, including the "Code of Ethics", part 1 of article 18, of title 24, C.R.S., echo the principles established in the state constitution and in the rules of the Senate and the House of Representatives. It provides further guidance by defining a "financial interest" to include a "substantial interest" held by an individual which interest is an ownership interest in business or real or personal property or a directorship or officership in a business.³ In addition, the ethical principles outlined in section 24-18-107 (2), C.R.S., of the statutory "Code of Ethics" mirror the constitutional language by recommending that a member of the General Assembly who has a "personal or private interest" in a proposed or pending measure or bill disclose that interest and not vote on the bill.⁴ This section enumerates the following factors for a member to consider when determining whether the member has a "personal or private interest": (1) Whether the interest impedes the member's independence of judgment; (2) the effect of the member's participation on public confidence in the integrity of the General Assembly; and (3) whether the member's participation is likely

³ Section 24-18-102 (4) (a) and (f), C.R.S.

⁴ Section 24-18-107 (1), C.R.S., specifies that the ethical principles serve only as guides to determining whether a member's conduct is ethical. Section 24-181-107 (4), C.R.S., further states that "[i]f a member of the general assembly elects to disclose the interest, he shall do so as provided in the rules of the house of representatives or the senate, but in no case shall failure to disclose constitute a breach of the public trust of legislative office."

to have any significant effect on the disposition of the matter.

a. Impact on legislator's independence of judgment

The first consideration is whether the legislator's interest impedes his or her independence of judgment. The legislator who submitted this inquiry sponsored legislation to help the [state entity's] financial situation. He was also the owner and principal of [a business] that was awarded several capital improvement contracts with the [state entity]. As previously stated, the "Code of Ethics" expressly recognizes that the director of a business has a "substantial interest" in the business and therefore, by definition, a "financial interest". If the legislator received any direct economic benefit as a result of the legislation he sponsored and the award of [the state entity] contracts to his company, the potential that his judgment may have been influenced is possible. However, when weighing the impact of a legislator's interest on his or her independence of judgment, the question is examined from the point of view of the legislator. This factor requires the legislator to consider, examine, and assess whether his or her interest would affect his or her decision making. In this case, [the legislator's] testimony credibly demonstrated his belief that his [business's] prior award of [state entity] contracts, and potential future contract awards, did not motivate him or otherwise influence his decision to sponsor and vote for [the bill]. This Board does not find a reason to doubt that fact and, accordingly, determines that [the legislator's] possible interest did not, in fact, affect his independence of judgment.

b. Impact on public confidence in the integrity of the General Assembly

The second consideration for possible recusal is the effect that the member's conduct may have on the public's confidence in the integrity of the General Assembly. The Colorado General Assembly is a part-time citizen legislature. As such, members must balance their roles as legislators with their roles as members of businesses, professions, and occupations. Because this legislature is a part-time citizen legislature, the potential for real and perceived conflicts of interest is great and, therefore, the need to be particularly sensitive to the possibility that the public will perceive a conflict situation, even when an actual conflict may not exist, is very real. While legislators cannot be expected to completely divorce themselves from their personal life experiences in making decisions in their legislative capacity, they need to be especially thoughtful in considering what effect their vote or action will have on the public's confidence. When legislators must vote on bills that potentially affect their personal interests, whether directly or indirectly, as opposed to their legislative interests, the public expects the legislators to exercise an abundance of caution to guard against the influence of their own personal interests. Legislators, therefore, should err on the side of caution to protect the public's confidence in the integrity of the legislative process rather than expecting the public to understand subtle distinctions the legislator believes eliminate an actual conflict of interest.

Looking at the situation at hand from the public's point of view, it is possible that the public's confidence in the overall integrity of the General Assembly could have been compromised by the fact that the public could have reasonably believed that the legislator was in a unique position to receive preferential treatment in the award of contracts with the [state entity]. The public could have also believed that the legislator was in a position to influence other members of the body with respect to the legislation that was crafted to benefit the financial viability of the [state entity]. The legislator's [business] had a history of receiving contracts with the [state entity]. Given the use of competitive negotiation process for the award of professional services contracts, as opposed to "blind" competitive bidding, the fact that the legislator's [business] had previously been awarded contracts with the [state entity] increased the chances and expectation that the legislator would receive additional contracts with the [state entity]. Therefore, even though there was no evidence that the sponsorship of the legislation was driven by the legislator's own personal interest in benefitting his [business], abstention may nonetheless have been advisable under the ethics rules because it would have been reasonable for the public to perceive that such a situation did, in fact, exist.

c. Effect on disposition of the matter

The final factor enumerated in the "Code of Ethics" for a legislator to consider when contemplating whether he or she has an actual conflict of interest in an issue dictating abstention is whether the member's participation is likely to have any significant effect on the disposition of the matter. This factor is only helpful to the extent the legislator faced with the possible conflict of interest knows in advance the climate of the body and whether there is substantial support for the measure or whether it is a controversial issue. In the specific case brought before this Board, while the member sponsored the legislation in the second house, the bill actually passed [unanimously in one house and with only one vote in opposition in the other house.] It appears there was broad support for the measure, regardless of the legislator's sponsorship and possible interest in its passage. The legislator testified before the Board that, in hindsight, he may not have needed to vote for the bill and that another member may have been able to have sponsored the bill. It is unlikely, based upon this testimony and the vote record, that the member's sponsorship of the bill influenced other members of the General Assembly to support the bill.

3. Legislative Rules

Senate Rule 17 (c) mirrors the constitutional and statutory language by requiring any senator having "a personal or private interest" in any question or bill to disclose such fact to the Senate and not vote. House Rule 21 (c) varies slightly from the constitutional and Senate rule language by requiring any representative "who has an immediate personal or *financial* interest in any bill or measure" to disclose such fact to the House and not vote thereon. (Emphasis added.) Although House Rule 21 (c) does not define "financial interest", it has

historically been construed to exist if there is a possibility that the member has a financial or economic interest in particular legislation or the member has a personal relationship with an individual who has an economic or financial interest in the legislation.

Senate Rule 41 (b) states that a Senator is disqualified from voting upon a question if his or her personal interest conflicts with the public interest, impacting the Senator's independence of judgment. That rule describes personal or private interests as economic or financial interests, whether held directly or indirectly by the member. Senate Rule 41 (b) (2) (A) also provides that a question arises as to whether a personal or private interest tends to affect a Senator's independence of judgment if the Senator "[h]as or acquires a substantial economic interest by reason of the Senator's personal situation, distinct from that held generally by members of the same occupation, profession, or business, in a measure proposed or pending before the General Assembly; or has a close relative or close economic associate with such an interest."

It should be noted that Joint Rule 42⁵ provides some guidance, as well. Joint Rule 42 explicitly states that "[a] member of the General Assembly shall be considered to have a personal, private, or financial interest in a pending bill, measure, or question if the passage or failure of such bill, measure, or question will result in the member deriving a direct financial or pecuniary benefit that is greater than any such benefit derived by or shared by other persons in the member's profession, occupation, industry, or region." By this language, Joint Rule 42 creates an exception to the potential conflict of interest if the legislator is a member of a class impacted by the bill, measure, or question, but permits the legislator, nevertheless, to disclose that fact and not vote on the matter.

In addition, Senate Rule 41 (c) states that a "Senator shall not use his or her public position, intentionally or otherwise, to obtain or attempt to obtain any confidential information or special advantage or a decision from a public body on a matter unrelated to his or her senatorial duties in which he or she has a financial interest for himself or herself, a close relative, or a close economic associate." When a legislator is faced with a difficult decision with respect to action on a certain matter, the legislator should consider, among the other factors, whether his or her actions amount to inappropriate undue influence over another person or persons to improve the legislator's financial interest.

a. Member of a Class

[One of the witnesses] also testified that, on each of the [state entity's] contracts put out for competitive negotiation pursuant to statute, there were approximately four qualified [businesses that] met the criteria for professional services and who were interviewed before the contracts were actually awarded. This fact indicates that the legislator's [business] was

⁵ Joint Rule 42 was the product of House Joint Resolution 1016, which resolution was adopted on May 8, 2006.

not the only [business], but rather one in a small group of experienced and qualified [businesses], vying for the contracts. The legislator's [business] was not, apparently, uniquely qualified to receive the [state entity's] contracts, rather it was one among a few similarly situated business concerns that were able to perform the jobs, as well.

Senate Rule 41 (b) (2) (A) and Joint Rule 42 indicate that a legislator's personal or private interest in a bill does not require the legislator's recusal from voting on that bill if that interest is shared by a class of similarly situated persons of which the legislator is a member.⁶ A legislator, therefore, must consider whether any personal benefit he or she may receive from a particular bill, however ultimate or indirect, derives from being a member of the class affected or benefitted by the bill rather than from being a legislator participating in the consideration of the bill by the General Assembly. Therefore, if the legislator is a member of a class of persons who might benefit from legislation, a conflict of interest may not arise. Alternatively, a legislator who sponsors or votes for a measure for which he or she is uniquely qualified to benefit, or whose business interest is uniquely qualified to benefit, may face a conflict of interest.

Although it appears that there were more than one qualified [business] competing for the contracts at issue, it is reasonable to conclude that the legislator, based on his track record of prior work for the [state entity], had some expectation that he was likely to be awarded the contracts. If the legislation supported by a member is not uniquely tailored to suit only a narrowly defined group, but rather suitable to a class, then it is less likely that a conflict-of-interest situation is present. The facts presented do not support a finding that an entire class of *all* [similar businesses] were competing for the contract, but rather a limited number of qualified [businesses]. Therefore, the Board finds that, with the high probability the legislator's [business] would receive the contracts with the [state entity] based on his [business's] track record and the small number of competing [businesses], the better practice in this case would have been for the legislator to have at least disclosed the circumstances before either sponsoring and voting on the legislation or not.

b. Undue Influence

As previously stated, Senate Rule 41 prohibiting a Senator from using his or her position to obtain or attempt to obtain any special advantage or decision from a public body on a matter in which the legislator has a financial interest may also provide guidance. A legislator in a similar position should consider what effect his or her position when sponsoring legislation that might prove to be financially beneficial to the legislator or the legislator's business interest has on the other legislators in the body. Furthermore, the Senate Rule should deter a member in a situation similar to the one at issue from using, or attempting to use, his or her

⁶ See also section 24-18-107 (3), C.R.S., which specifies that, "[a]n interest situation does not arise from legislation affecting the entire membership of a class."

position as a legislator to inappropriately influence or attempt to influence those persons responsible for determining the contract recipients once the legislation is implemented.

CONCLUSION

A legislator who is the principal of a business concern does not face an actual conflict-of-interest situation for purposes of Senate Rule 17 (c) or House Rule 21 (c) or the statutory standards of conduct in sponsoring and voting for legislation that directly benefits a specific state entity with which the legislator's business has a contractual relationship, when the legislator does not enjoy any direct economic or pecuniary benefit as a result. However, despite this determination, this Board finds there was an *appearance* to the public of such a conflict of interest.

When contemplating a possible conflict-of-interest situation and the appropriate course of action to take, a legislator should always consider the perspective of the public. As stated previously, while there was no evidence that the inquiring legislator's sponsorship of a bill benefitting the [state entity] was driven by his personal or financial interest in benefitting his own company, abstention may nonetheless have been the advisable course of action under ethical principles because of the *potential* for public perception that such a situation existed.

The legislator's [position] may have, unbeknownst and unintended by him, strengthened his [business's] opportunity to be awarded the [state entity's] contracts while also improving the chances that the legislation to shore up the financial wherewithal of the [state entity] would pass. This legislator was in a unique position to sponsor the very legislation that, by virtue of its enactment, helped the [state entity] address its financial predicament. As a result, there may have been an *appearance* that it was his own personal interest that was actually affected by his sponsorship of the legislation that helped to rescue the [state entity] from its financial problems.

These facts strengthen the argument and enhance the *perception* that the legislator had a conflict of interest in voting on the measure whether or not, in reality, that was the case. Accordingly, at a minimum, the best practice would have been for this legislator, or a similarly situated legislator, to consider full disclosure of the surrounding circumstances and his or her interests, even if remote, prior to voting on or abstaining from a vote on the measure. If there is even the appearance of a conflict of interest, the Board recommends that the legislator disclose his or her situation or interest relative to the measure at issue prior to electing to vote or abstain from voting.