Denver Board Of Ethics

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DENVER BOARD OF ETHICS
DIGEST OF SELECTED OPINIONS
July 1– December 31, 2013

PLEASE NOTE: This is a selected set of summarized opinions given by the Denver Board of Ethics between July 1 and December 31, 2013 in response to fact-specific requests for advisory opinions or complaints.
These opinions should not be used as conclusive guidance for situations where the facts may differ. Please contact the Board of Ethics to discuss any specific issues you may have.

Case 13 - 18 (gifts, travel expenses)

A Forensic DNA Analyst in the Police Department Crime Lab was invited to speak at one or two conferences sponsored by an international for-profit vendor of "instruments and reagents used in a variety of biotechnology purposes, including forensic casework applications." The company offered to pay for his travel, hotel and per diem expenses, in return for speaking at the conferences about "The Use of Familial DNA Searching as an Investigative Tool." The employee said that "the City and County of Denver has been at the forefront in researching and implementing this new method" and that "personnel from the District Attorney's Office and the Crime Laboratory have been invited to present on this topic across the country."

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The employee advised the Board of Ethics that, as a scientist, he uses many of the company's products and instruments on a daily basis, but that "I do not make final decisions on what products the laboratory will use, nor do I place orders for supplies" and that his supervisor "makes those decisions based upon scientific data and the needs of the DNA Section." He also advised the Board that purchasing decisions are based on a team approach and on internal validation studies of the equipment and products to be purchased and that the Crime Lab, which has approximately 50 employees, purchases items from several different companies.

Gifts, including travel expenses are regulated by Section 2-60 of the Denver Code of Ethics:

> **Sec. 2-60. Gifts to officers, officials, and employees.**
>
> The purpose of this section is to avoid special influence by those who give gifts to city officers, employees or officials.
>
> (a) Except when acceptance is permitted by paragraph (b) below, **it shall be a violation** of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items **if (1) the officer, official, or employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, business, or regulatory relationship with the donor:**
>
> (1) Any money, property, service, or thing of value that is given to a person without adequate and lawful compensation;…
>
> (6) **Travel expenses and lodging;..**

The definition of "direct official action" in Section 2-52(b) of the Code of Ethics includes "negotiating, approving, disapproving, administering, enforcing, recommending for or against a contract, purchase order,…"

The Board of Ethics determined that the employee will not violate Section 2-60 of the Code of Ethics by accepting travel expenses from the company because, given all of the circumstances described above, he is not in a position to take direct official action regarding the company.

The Board urged, him, however, to encourage his supervisors and colleagues to develop purchasing protocols so that direct official action decisions are not made by persons who have received impermissible gifts from vendors or potential vendors, unless a waiver has been obtained from the Board of Ethics. The Board also cautioned that the travel and lodging expenses that he accepts should be reasonable and not extravagant.

Case 13-19 (no jurisdiction)

A citizen filed a complaint concerning "Denver Parking," stating that there was inadequate signage at a location on a street where she was given a parking citation. This case was dismissed because the Board of Ethics does not have jurisdiction over such issues and because the Board cannot consider complaints against city departments or agencies and can only consider complaints against individual elected officials, employees or board and commission members.

Case 13-20 (conflicts of interest)

A City Councilmember requested an advisory opinion as to whether two appointees to the Cherry Creek North Technical Task Force have a conflict of interest prohibited by the Denver Code of Ethics because they are on the Denver Planning Board and one of them is also the Executive Director of the Cherry Creek North Business Improvement District. The Councilmember recently appointed an informal Technical Task Force to evaluate rezoning options for Cherry Creek North (CCN) and to assist the City in developing CCN as a new zone district that fits within the new 2010 Zoning Code. The Task Force is a group of interested stakeholders who will gather information and provide input to City staff concerning the potential rezoning of the CCN District to guide and inform the staff recommendation to the Planning Board and then to City Council.

The question presented is whether participation by these individuals on the CCN rezoning Task Force would be "direct official action" under the Code of Ethics or otherwise be a conflict of interest under the Code.

Section 2-52(b)(1) of the Code reads as follows:

> ***Sec. 2-52. Definitions***
>
> (b) Direct Official Action means any action which involves:
>
> > (1) Negotiating, approving, disapproving, administering, enforcing, or recommending for or against a contract, purchase order, lease, concession, franchise, grant, or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making…

Section 2-61 of the Code reads as follows:

> **Sec. 2-61. Conflict of interest while employed.**
>
> The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,
>
> (a) Except when advised by the city attorney that the rule of necessity applies, an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter. A substantial interest shall be deemed to exist if:
>
> (1) He or she or a member of the immediate family, a business associate or an employer other than the city is the other party in the matter;
>
> (2) He, she, a spouse, a domestic partner or minor children solely or aggregated together, a business associate or an employer owns or own one (1) percent or more, or a member of the immediate family other than a spouse, domestic partner or minor children own or owns five (5) percent or more, of another party in the matter;

(3) He or she, a member of the immediate family, a business associate or an employer is an officer in another party in the matter;

(4) He or she, a member of the immediate family, a business associate or an employer is directly involved in obtaining the city's business for another party in the matter;

(5) He or she, a member of the immediate family, a business associate or an employer is directly involved in negotiating the contract or preparing the bid, proposal, response to a request for qualifications, or similar document for another party in the matter, other than in a purely clerical capacity; or

(6) A member of his or her immediate family performs more than a nominal portion of the work in the matter, or supervises or manages more than a nominal portion of the work

(7) He or she or a member of his or her immediate family participated personally in providing legal representation or lobbying for another party in the matter or owns five (5) percent or more of a law firm or lobbying firm representing another party in the matter.

Based on the above facts and the language of the Code, the Board of Ethics determined that the Code of Ethics does not apply to the appointment of the 2 members to the CCN Technical Task Force, which is a legislative study group composed of a variety of citizens and officials, all of whom have an interest in the rezoning. Under the tests set forth in *City of Aurora v. Zwerdlinger*, 194 Colo. 192, 571 P.2d 1074 (1977), an original act of zoning is legislative because it is of a general and permanent character and involves a general rule or policy.

The proposed rezoning of a large area of the City is a legislative matter that is not a "contract, purchase order, lease, concession, franchise, grant, or other similar instrument" and therefore is not a "matter" covered by Section 2-61 of the Code of Ethics. The Task Force, staff, and Planning Board will gather information at public meetings, from informal conversations with citizens and others, from memoranda prepared by City staff, and from other sources, and present the information to City Council, which will then deliberate as a legislative body and implement a policy by enacting an ordinance. On some matters, the Planning Board and City Council act on contracts or in an administrative manner such that the Code of Ethics could apply, but not in this situation.

Therefore, the Board concluded that the conflict of interest provisions in the Code of Ethics do not apply to this situation.

Case 13-21 (gifts, travel expenses)

The Controller requested an advisory opinion and/or waiver regarding travel expenses offered to a Senior IT Systems Analyst in the Payroll Division of the Controller's Office.

In 2008 the city contracted with a major software company, to manage the timekeeping system for Career Service Authority employees. The implementation was completed in 2010 and is now being upgraded. The Analyst did not and does not have any direct role in negotiating, approving or administering the contract. The contract is managed/administered by the Technology Services

Department, not the Controller's Office. The Analyst says that she is the system administrator for the company, but would have no influence over the renewal or non-renewal of the contract. According to the Controller:

> …as the city made the decision to utilize the company, there is no plan to cease its use. The current maintenance contract ends at the end of 2014, and Technology Services plans on extending that contract.

The company invited the Analyst to attend a conference in Orlando, Florida and to participate in a panel of their government customers to share their upgrade experiences, lessons learned and best practices. The purpose of the conference is to provide education workshops, technical sessions, new product information, technical training and business sessions. Approximately 2000 attendees are expected at the conference. The company offered to pay for the conference fee, airfare and hotel expenses for the Analyst, estimated to be $2, 372.

Receipt of gifts, including travel and lodging expenses, by city personnel is regulated by Section 2-60 of the Code of Ethics:

> **Sec. 2-60. Gifts to officers, officials, and employees.**
>
> The purpose of this section is to avoid special influence by those who give gifts to city officers, employees or officials.
>
> (a) Except when acceptance is permitted by paragraph (b) below, it shall be a violation of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items if (1) the officer, official, or employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, business, or regulatory relationship with the donor:..
>
> (6) Travel expenses and lodging;…

The definition of "direct official action" in Section 2-52(b) of the Code of Ethics is:

> *Direct official action* means any action which involves:
>
> (1) Negotiating, approving, disapproving, administering, enforcing, or recommending for or against a contract, purchase order, lease, concession, franchise, grant, or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making…
>
> (3) Selecting or recommending vendors, concessionaires, or other types of entities to do business with the city;…

The Board of Ethics concluded that the Analyst would violate section 2-60(a) of the Code of Ethics if she accepts the conference expenses from the company, because she is in a position to take direct official action regarding the company. Even though she does not have a direct role in negotiating, approving or administering the contract, since the contract is managed/administered by the Technology Services Department, she is, nonetheless, the key person in the city for all questions related to the

company. She also made recommendations about the size and scope of work of the upgrade contract and she receives and approves the bills and will probably also make recommendations about extending the maintenance contract in 2014.

However, the Board also concluded that it will be in the City's best interest if the Analyst would attend the conference so that she can learn from the company and the other attendees about new developments and techniques in time-keeping for government entities and share Denver's experiences with others. As a result, the Board determined to grant the Analyst a waiver, pursuant to Section 2-54(f) of the Code of Ethics so that she may accept the travel, lodging and conference registration expenses from the company. If a similar situation arises in the future, the Board encouraged the Analyst and/or the Controller to approach the Board again at that time, because the Board's opinion may differ depending on the future specific facts and circumstances.

Case 13 – 22 (outside employment)

A technology employee at Denver International Airport requested an advisory opinion regarding possible outside employment as a part-time consultant for approximately 10 – 15 hours per week during off-duty hours. The employee told the Board of Ethics:

> I have been asked by (the company) of Phoenix, AZ to consult with some of their airport clients. I would be presenting high-level concepts of non-proprietary solutions to improve their technical infrastructure for flight data and system data integrations. These are not trade secrets of DIA, but will present a "lessons learned" perspective based on our experiences.

The company provides information technology consulting, project management, design services and strategic planning for various airports. Although it had one contract in the past with DIA, the company does not currently have and is not competing for any contracts with DIA. The employee also expected that the company might ask him to consult separately with some of the company's airport customers.

The employee's supervisor indicated that he had no problem with approving this outside employment, but he preferred to have the employee obtain an advisory opinion from the Board of Ethics. The employee and the supervisor both indicated that neither believes that any competitive disadvantage, loss of proprietary information or any other harm to DIA would result from this consulting. Both indicated that it would be an advantage for all airports to share the information and techniques that the employee would be consulting about.

Outside employment or business activity is regulated by Section 2-63 of the Denver Code of Ethics:

> **Sec. 2-63. Contemporaneous or outside employment.**
>
> The purpose of this section is to avoid possible conflicts of interest and time conflicts between city jobs and outside employment or business activity.
>
> (a) All officers other than elective officers and all employees shall report existing or proposed outside employment (excluding unpaid volunteer activity) or other outside business activity annually in writing to their appointing authorities and obtain his or her appointing authority's approval thereof prior to accepting initial employment or outside business activity. All officials shall immediately report any change in employment status to their appointing authorities which could give rise to a conflict of interest.

(b) If the appointing authority or the officer, official or employee believes that there is a potential conflict of interest between the person's public responsibility and his or her possible outside employment or outside business activity, he, she or they are encouraged to consult the board of ethics.

(c) An officer or employee who has received the written permission of the appointing authority may engage in outside employment or other outside business activity.

(d) Copies of documents arising from this section shall be placed in each officer's or employee's departmental personnel file.

(e) City resources may not be used for any outside employment or outside business activity.

Outside employment is also regulated in the conflicts of interest section of the Code of Ethics by:

> **Section 2-61(g)** No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city.

The Board of Ethics advised the employee that, given his representations regarding the scope of the anticipated consulting engagement with the company, he will not violate Section 2-63 or Section 2-61(g) of the Denver Code of Ethics, so long as he obtains his appointing authority's written approval for the outside consulting work on an annual basis and also recommended, in order to avoid the appearance of impropriety that:

- He should not use any city time or other city or DIA resources in his consulting work;
- He should not share any proprietary DIA information or other information that would harm DIA or the City and County of Denver;
- He should not issue any recommendations or references for the company to any airports;
- If the company is being considered or is competing for any consultant work at DIA, the employee should not be involved in the selection.
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Case 13-23 (outside employment)

A Senior Social Caseworker in the Department of Human Services (DHS) requested an advisory opinion. His principal work is foster care certification, in which he investigates and writes reports regarding whether one or more non-parent family members (such as grandparents or aunts/uncles) are suitable to be certified and paid financial support by DHS as foster parents of young people who are not in their parents' homes. His reports are given to others in DHS, who make the final decisions about certification.

The employee was considering whether to contract to perform similar tasks for a 3rd-party non-profit organization which provides similar investigations and reports for Arapahoe, Douglas and Jefferson Counties. He would be paid by the non-profit by the report. In Colorado, all counties use the same assessment criteria for foster care kinship certification.

The employee informed the Board of Ethics that:

> I understand that in taking on this added work it in no way can occur during normal business hours, be conducted using any of Denver Human Services' property (i.e. a laptop, cell phone) or impede in any of my current duties with Denver Human Services. Given the nature of the work,

I can at any time decline to work with a family should a conflict of interest arise. As each family being studied is pursuing Foster Care licensing for the purpose of a specific child, the potential for conflicts I believe is minimal. In addition, should my work with Denver Human Services become intensified to the point where I'm unable to take on work from the non-profit, I will have the flexibility to pass on work from them at that time.

Outside employment is regulated by Section 2-63 of the Denver Code of Ethics:

Sec. 2-63. Contemporaneous or outside employment.

The purpose of this section is to avoid possible conflicts of interest and time conflicts between city jobs and outside employment or business activity.

(a) All officers other than elective officers and all employees shall report existing or proposed outside employment (excluding unpaid volunteer activity) or other outside business activity annually in writing to their appointing authorities and obtain his or her appointing authority's approval thereof prior to accepting initial employment or outside business activity. All officials shall immediately report any change in employment status to their appointing authorities which could give rise to a conflict of interest.

(b) If the appointing authority or the officer, official or employee believes that there is a potential conflict of interest between the person's public responsibility and his or her possible outside employment or outside business activity, he, she or they are encouraged to consult the board of ethics.

(c) An officer or employee who has received the written permission of the appointing authority may engage in outside employment or other outside business activity.

(d) Copies of documents arising from this section shall be placed in each officer's or employee's departmental personnel file.

(e) City resources may not be used for any outside employment or outside business activity.

Outside employment is also regulated in the conflicts of interest section of the Code of Ethics by:

Section 2-61(g) No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city.

The Board of Ethics concluded that it did not find any conflict or incompatibility between his responsibilities to DHS and his proposed work for the non-profit or that the outside employment with the non-profit would adversely affect DHS or the City and County of Denver. The counties are not in competition with each other and the families are not in competition with each other.

The Board advised the employee that, so long as his appointing authority approves this outside employment on an annual basis and so long as he does not use any city time or other resources in his work for the non-profit, such outside work will not violate Section 2-63 or Section 2-61(g) of the Code of Ethics. The Board encouraged him to keep careful track of his time spent on DHS work and work for the non-profit, so that they will be kept separate.

Case 13-24 (conflict of interest, subsequent employment)

A citizen filed a complaint concerning a member ("the member") of the Denver Planning Board, who also was the chair of the Board for several years. His last meeting as a Board member was June 19, 2013 and his term expired on June 30, 2013. The complainant claimed that the member, as a principal in an architectural firm, as well as his firm should not be allowed to present testimony or information before the Planning Board regarding a General Development Plan (GDP) for a large development project ("the project") before February 14, 2014 (seven months after July 13, 2013, the date on which the member was replaced by the vice-chair as Planning Board chair).

The complainant alleged that the member violated Section 2-64 of the Denver Code of Ethics because 1) he was the chair of the Planning Board, and 2) he was the chair of the Denver Zoning Code Task Force (the Denver Zoning Code was substantially revised in 2010). As a remedy, the complainant requested that the "Denver Planning Board should not allow testimony or presentation of the work product for either the member or his firm regarding this GDP before February 14, 2014".

The Board of Ethics considered the following chronology of certain meeting dates related to the Planning Board and/or the project in 2013:

Prior to June 19, 2013, no plans or agenda items relating to the project came before the Planning Board.

June 19, 2013: Planning Board meeting: an Urban Renewal Plan for the project was a non-voting information item on the agenda. The presentation was by a representative of the Denver Urban Renewal Authority. No action was taken by the Board. Although no action was to be taken by the Board, the member nonetheless recused himself and left the table for this information item because his firm was working on GDP for the site. This was the member's last Planning Board meeting as a member.

June 26, 2013: A public community meeting was held, scheduled and sponsored by the project's developer at a church, to present the draft of the project's GDP, at which the member spoke on behalf of the architectural firm, which had been hired by the developer to prepare concept drawings incorporated into the GDP. This was not a Planning Board meeting. The complainant claimed that at this meeting the member was a spokesperson for the developer's architectural firm and the "public face" of the project plans. The member agreed he was a spokesperson for the firm at this meeting but stated that his participation was about 20% of the total presentation.

June 30, 2013 was the last date of the member's term on the Planning Board. He was eventually replaced by another member, although the seat was vacant for a few months.

July 17, 2013: Planning Board meeting: The Urban Renewal Plan for the project was on the agenda for a finding that the plan conforms to the Denver Comprehensive Plan. The member was no longer on the Board and did not participate, nor did his architectural firm.

November 6th, 2013. The project's GDP was on the Planning Board agenda as an information item. The member was no longer on the Board, but he attended this meeting as a member of the audience. No action was taken.

December 18, 2013. Approval of the GDP for the project was expected to be on the Planning Board agenda. This would be the first and only official action to be taken by the Planning Board concerning the

GDP. The member informed the Board of Ethics that he does not plan to be a presenter or spokesperson for the project at this meeting.

Section 2-64(A) of the Denver Code of Ethics reads as follows:

> (A) During six months following termination of office or employment, no former officer, official, or employee shall obtain employment in which he or she will take direct advantage, unavailable to others, of matters with which he or she took direct official action during his or her service with the City.

The Board of Ethics concluded that there are several elements to a possible violation of 2-64(A). First, the matter in question must be one on which the official took direct official action while in office. Second, the former City official must be able to take "direct advantage, unavailable to others" regarding a matter on which he took official action while in office. Third, the official or employee must have obtained employment outside the City. Fourth, the prohibition exists for six months following termination of employment.

The Board of Ethics found that the member took no direct official action relating to the project while on the Planning Board; therefore the first element of a possible violation is not met. Because the member recused himself at the June 19, 2013 Planning Board meeting (where this project was an information item), there is also no evidence that the member took direct advantage, unavailable to others, relating to this project due to his Planning Board membership. Therefore, the second element of a possible violation is not met.

The member does have employment outside the City, as do all Planning Board members. However, there is no evidence that the member intends to take any action relating to the project before the Planning Board during the six month period June 30, 2013 to December 31, 2013. If so, the fourth element of the alleged violation is not met. The member's general experience on the Planning Board or the Zoning Code Task Force does not disqualify him from working on the project for his architectural firm.

The complaint was dismissed pursuant to Section 2-56 (6) of the Code of Ethics for failing to state a prima facie case of a violation of the Code. The allegations, if true, do not state a violation because the member did not take direct official action regarding the project while he was on the Planning Board, and the alleged "future" direct advantage (appearing before the Planning Board in the future), if true, would not constitute a violation. In any event, the member indicated he will not be a presenter or spokesperson for this project before the Planning Board on December 18, 2013.

The Board of Ethics further found that it has no jurisdiction to direct the Denver Planning Board not to take testimony or presentation from the firm on a matter before the Planning Board.

Case13- 25 (outside employment)

A police officer requested an advisory opinion about potential outside business activity. He proposed to be a "co-owner/investor" of a private security company, which would specialize in offering protection to faith-based organizations, such as churches, and their leadership. He told the Board of Ethics that the security guards "will be responsible for crowd control for special events, assist with guarding the facility after hours and during business hours." He said that he would only perform administrative duties,

including scheduling, and would not perform any guard services himself. He said that the company might work inside and/or outside the City and County of Denver and that the company will not hire any Denver police officers to provide guard services and, although the guards would be armed, they would call upon police, fire or medical departments in the appropriate jurisdictions to deal with any incidents. He said that the company will "require all of our security personnel to be licensed. We also plan to be able to train and refer those who are not licensed to the appropriate county to receive proper licensing."

Outside business activity is regulated by Section 2-63 of the Denver Code of Ethics:

> **Sec. 2-63. Contemporaneous or outside employment.**
>
> The purpose of this section is to avoid possible conflicts of interest and time conflicts between city jobs and outside employment or business activity.
>
> (a) All officers other than elective officers and all employees shall report existing or proposed outside employment (excluding unpaid volunteer activity) or other outside business activity annually in writing to their appointing authorities and obtain his or her appointing authority's approval thereof prior to accepting initial employment or outside business activity. All officials shall immediately report any change in employment status to their appointing authorities which could give rise to a conflict of interest.
>
> (b) If the appointing authority or the officer, official or employee believes that there is a potential conflict of interest between the person's public responsibility and his or her possible outside employment or outside business activity, he, she or they are encouraged to consult the board of ethics.
>
> (c) An officer or employee who has received the written permission of the appointing authority may engage in outside employment or other outside business activity.
>
> (d) Copies of documents arising from this section shall be placed in each officer's or employee's departmental personnel file.
>
> (e) City resources may not be used for any outside employment or outside business activity.

In addition, Section 2-61(g) of the Code of Ethics provides:

> **Sec. 2-61(g)** No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city.

The Board of Ethics advised the officer that:

- He must obtain written approval in advance from his appointing authority for this outside business activity/secondary employment, pursuant to Section 2-63 of the Code of Ethics.
- He must renew that approval annually.
- He must not use any city resources, such as city time, computers, paper, etc., while working with the company.
- He should not hire any Denver police officers to work for the company.

- He should not advertise the company as being connected in any way with Denver police officers or the Denver Police Department.
- He should not be personally involved with any security issues while he is off-duty, except in case of emergency.
- The Board of Ethics does not find that this work with the company would be incompatible with his city duties or would adversely affect the interests of the City or would create a conflict of interest or the appearance of impropriety, so long as he complies with his representations and these conditions.