

October 28, 2003

Ms. Linda McCulloch
Superintendent of Public Instruction
P.O. Box 202501
Helena, MT 59620-2501

Dear Superintendent McCulloch:

You have requested an opinion from the Attorney General concerning the following question:

Does Montana law prohibit a state employee from serving on the board of directors of an organization when (1) the organization receives funds from or through the State, (2) the employee serves on the particular board as an agent of the State, and (3) the employee's service on the particular board is within the employee's scope of employment.

Because this issue appears to be quite fact-specific, it has been determined that a letter of advice rather than a formal opinion is appropriate.

Montana's Code of Ethics (the Code) governs public officials and public employees. Its purpose is to prohibit "conflict between public duty and private interest as required by the constitution of Montana." Mont. Code Ann. § 2-2-101. The Code also recognizes "that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances." Mont. Code Ann. § 2-2-101.

During your legislative audit, the auditor identified a relationship between an office employee and an organization receiving federal Migrant Education funds administered by OPI. The employee served as a member of the board of directors of the recipient organization while also having responsibility for administration of these funds at the OPI office. The auditor determined that this relationship was a conflict under the Code.

The Auditor's analysis in this instance rests on Mont. Code Ann. § 2-2-105.¹ Section 105 provides, in part, "a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency." "Interest" is not defined in this context. However, "private interest" is defined within the Code as "an interest held by an individual that is: (a) an ownership interest in a business; (b) a creditor interest in an insolvent business; (c)

¹ 2-2-105 Ethical requirements for public officers and public employees.

(1) The requirements in this section are intended as rules of conduct, and violations constitute a breach of the public trust and public duty of office or employment in state or local government.

(2) Except as provided in subsection (4), a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency.

(3) A public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant.

(4) When a public employee who is a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the public employee's influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.

(5) A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

an employment or prospective employment for which negotiations have begun; (d) an ownership interest in real property; (e) a loan or other debtor interest; or (f) a directorship or officership in a business.” Mont. Code Ann. § 2-2-102(6) (emphasis added).

Your employee’s position as a member of the board of directors of a non-profit corporation falls squarely under the definition articulated in subsection (f). Furthermore, membership on the board of directors of a corporation carries with it fiduciary responsibilities to that corporation, including the duty to act in good faith, with the care an ordinarily prudent person in a similar position would exercise under similar circumstances, and in a manner the director reasonably believes to be in the best interests of the corporation. Mont. Code Ann. § 35-2-416. This would not be a duty that the employee owed to any other organization that might be applying for and receiving funds from OPI, other organizations which may also benefit OPI and the public. Thus, that particular non-profit organization may benefit from the employee’s concurrent positions with OPI and its board of directors.

Though not precisely on point, a 1979 Attorney General’s Opinion offers some guidance on this issue. Attorney General Mike Greely addressed the conflict of interest of a county commissioner serving on the board of directors of an organization that receives county contract funds. Attorney General Greely conducted his analysis under the old Code of Ethics governing public officials and public employees that was repealed in 2001. However, the language is nearly identical to the language in the current code and at issue in this case. The Attorney General opined:

A county commissioner who is a voting member of the board of an organization that actually receives county contract funds does not have a prohibited conflict of interest under section 7-5-2106 (3), MCA,² unless the commissioner receives a personal pecuniary or proprietary benefit from the contract. **He does however, breach his fiduciary duty under 2-2-125(2)(b), [repealed 2001, replaced by the Code]³, MCA, by acting**

² **7-5-2106. Control of conflict of interest.** No member of the board must be directly or indirectly interested: (1) in any property purchased for the use of the county; (2) in any purchase or sale of property belonging to the county; or (3) in any contract made by the board or other person on behalf of the county for the erection of public buildings, the opening or improvement of roads, the building of bridges, or the purchasing of supplies or for any other purpose.

³ **2-2-125 [repealed in 2001].** Rules of conduct for local government officers and employees. (1) Proof of commission of any act enumerated in this section is proof that the actor has breached a public duty subjecting the actor to disciplinary action by the

officially to award county contracts to the organization unless he complies with the voluntary disclosure requirements of section 2-2-125(3), MCA.

38 Op. Att’y. Gen. No. 190 (Mont. 1979) (emphasis added). Notably the Attorney General found that the commissioner had not violated the more specific rules controlling conflicts of interests. Instead, he found that the commissioner had breached his more general fiduciary duty to the public. Specifically, the Attorney General found that the commissioner’s actions violated the provision which prohibited a county officer from performing an official act which would directly economically benefit a business or other undertaking in which the officer had either, (1) a substantial financial interest, or (2) was engaged as counsel, consultant, representative, or agent. *Id.* (citing Mont. Code Ann. § 2-2-125(2)(b)). The language found in Mont. Code Ann. § 2-2-125(2)(b) is nearly identical to that found in the current Code.

Here, like the commissioner, the OPI employee certainly did not acquire a “personal pecuniary or proprietary benefit” from the service on the board of directors of the non-profit corporation, and thus this would not be an example of a per se conflict. However, the OPI employee’s position on the board of directors does provide a benefit to the non-profit corporation to the exclusion of other such organizations which may also benefit the public and OPI. In this way, just as with the commissioner, the more general ethical requirements for public employees is violated.

Just as with the statutes examined by Attorney General Greely, the current Code provides that a public employee may not acquire an interest in any business or undertaking which may be directly benefited economically by an action taken by the employee or the

employing entity.

- (2) An officer or employee of local government may not:
 - (a) engage in a substantial financial transaction for the officer’s or employee’s private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties; or
 - (b) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.
- (3) Notwithstanding the provisions of subsection (2), a member of the governing body of a local government may perform an official act when the member’s participation is necessary to obtain a quorum or otherwise enable the body to act. The member shall disclose the interest creating the appearance of impropriety.

Ms. Linda McCulloch

October 28, 2003

Page 5

employee's agency. Mont. Code Ann. § 2-2-105 (2). The OPI employee's position on the board of directors of the non-profit corporation falls within the definition of private interest as provided by the Code. Further, it is an "interest" which very well could be "economically benefited" by official action of the OPI employee or OPI generally in the administration of grant funds. I believe this relationship violates both the letter and spirit of the Code.

This letter of advice may not be cited as an official opinion of the Attorney General.

Very truly yours,

PAMELA D. BUCY
Assistant Attorney General

pdb/jym