



STATE OF CONNECTICUT

STATE ETHICS COMMISSION

ADVISORY OPINION NUMBER 81-16 (Amended)

Private Employment Related to the Official Duties of an Arbitration Panel Member

The Ethics Commission has been asked whether a member of the Arbitration Panel established in the Department of Education, who was appointed to represent the interests of exclusive bargaining representatives of certified employees, may also serve as a private attorney for an exclusive bargaining representative at various stages of the collective bargaining process.

The Panel, created by section 10-153f, General Statutes, is utilized in the arbitration of teacher and administrator contract disputes pursuant to sections 10-153a through g, id. Persons to represent the interests of local and regional boards of education are nominated to the Panel by the boards; persons to represent the interests of the public are nominated by the State Board of Education; persons to represent the interests of the exclusive bargaining representatives of certified employees are nominated by the bargaining representatives. Subsection 10-153f(a), id. Five members from each list of nominees are appointed to the Panel by the Governor, with the advice and consent of the General Assembly, for a term concurrent with that of the Governor. Id. They may be removed for good cause. Id. Members serve without compensation, but for each day a member is engaged in the arbitration of a dispute he receives a per diem fee, determined on the prevailing rate for such services and paid by the parties. Subsections 10-153f(a), 10-153f(c)(1), General Statutes. The fifteen-member Arbitration Panel does not take action as a single body; rather it is a resource. From it are selected three members (or one member if the parties to a dispute agree) to arbitrate a contract dispute. Subsection 10-153f(c)(1), id. The three-member panel or the single arbitrator has the same powers and duties as are given the State Board of Labor Relations by section 31-108, id., including the power to administer oaths and to issue subpoenas requiring the attendance of witnesses. Subsection 10-153f(d), id. The parties to the dispute are granted a hearing before the three-member panel or single arbitrator after notice. Subsection 10-153f(c)(2), id. The decision of the arbitrator or arbitrators is binding on the parties, subsection 10-153f(c)(4), id., who have the right to then request judicial review, subsection 10-153f(c)(7), id.

The manner of the individual's appointment to office and the powers he exercises once he is assigned to arbitrate a contract dispute make the Panel member a "public official", subsection 1-79(j),

General Statutes; and, therefore, subject to the Code of Ethics for Public Officials, Chapter 10, Part I, id.

Specifically, the Commission has been asked: (1) whether the attorney-panel member may, consistent with the Code of Ethics for Public Officials, offer negotiation or consultant services to an exclusive bargaining representative relative to a contract negotiation; (2) whether he may then serve on a panel established to arbitrate a dispute involving the same contract; (3) whether his law partner or associate may appear before a panel of which he is a member; and (4) whether he or his partner or associate may appear before a panel of which he is not a member.

Before proceeding to address each of these questions in turn, one underlying point must be recognized. Absent special circumstances, a public official accepting private employment of the kind described in these four queries would give rise to the type of fundamental conflict the Code is designed to prohibit. See, e.g., subsections 1-84(a), (b), (c), and (g), section 1-85, id. However, the circumstances present in the instant situation appear to diminish substantially the appropriateness of routinely applying a traditional Code of Ethics analysis. As this Commission has previously stated, "[w]hen the General Assembly provides for the appointment to a board or commission of someone in a position such that there is an inherent conflict of interest, it in effect grants that person a waiver of certain conflict-of-interest provisions of the Code of Ethics for Public Officials with which the public members of the same agency must conform". Ethics Commission Advisory Opinion No. 80-20, 42 Conn. L.J. No. 26, pp. 21,22.

(1) and (2). Questions (1) and (2) are so interrelated that they can best be answered in the same discussion. Extending the reasoning of Advisory Opinion No. 80-20, supra, to the facts at hand, it seems apparent that the Code's prohibition against a public official having a substantial conflict of interest, subsection 1-84(a), section 1-85, General Statutes, and its closely related directive that "...no public official...use his public office... to obtain financial gain for himself..." subsection 1-84(c), id., have only limited applicability when the public official's duty to represent faithfully the interests of the very group he now wishes to accept private employment from is clearly spelled out even before the individual takes office. For the attorney's membership on the Arbitration Panel as an inherently biased representative of exclusive bargaining agents seems to leave little reason to suspect that the bargaining agent or Panel member is seeking to establish a private employment relationship with the understanding or expectation that the Panel member will therefore, at some point in the future, use his office to favor the bargaining agent's interests.

Certainly it is possible to envision situations where this private employment relationship would in fact constitute an impermissible payment for future misuse of public office. For example,

if the attorney informed a bargaining agent that the quality of his performance as an arbitrator would be conditioned on his being privately retained by the bargaining agent during the collective bargaining process, there would be a clear violation of the Code. Subsection 1-84(g), General Statutes. Yet the possibility of this type of scenario occurring seems rather remote, since the bargaining agent, if confronted with such a proposition, could simply choose another of the five potential arbitrators available to represent its interests.

Furthermore, the Code's prohibition against accepting other employment which will impair one's independence of judgment as to his official duties, subsection 1-84(b), id., does not seem to create an insurmountable obstacle to all future arbitration service by an individual who has previously been employed by a party regarding the contract in dispute. It is true that as an appointee to a three-person arbitration panel the individual would be bound to consider six statutory criteria in reaching a decision (the criteria being "(A) The negotiations between the parties prior to arbitration; (B) the public interest and the financial capability of the school district; (C) the interests and welfare of the employee group; (D) changes in the cost of living; (E) the existing conditions of employment of the employee group and those of similar groups and (F) the salaries, fringe benefits, and other conditions of employment prevailing in the state labor market." Subsection 153f(c)(4), id.). However his basic role, that of representative for exclusive bargaining agent interests, would nevertheless remain unchanged. Subsection 153f(a)(2), id.

Consequently, in going from a consultant's role to that of arbitrator, the shift in emphasis the individual would be called upon to make should not be so drastic, within the context of his admittedly partisan role on the Panel, as to pose a problem for one who is sensitive to the requirements of his office and the ethical considerations involved. However, if the attorney-panel member served privately as an advocate--for example, as chief negotiator for an exclusive bargaining agent in a contract dispute--he might well have difficulty exercising the requisite independence of judgment as an arbitrator when attempting to apply the above criteria. Therefore, if, upon reflection, the individual realizes that, due to the extent of his private involvement in a specific collective bargaining process, he might not in a subsequent arbitration exercise the degree of independence of judgment called for by the Code and his public position, he should decline the official appointment to the three-person panel in question.

Thus, the attorney-panel member may accept private employment from an exclusive bargaining representative relative to a contract matter that may eventually be assigned to a three person panel for arbitration. He may, with the above restrictions in mind, subsequently serve on that panel, provided (as discussed in (3), infra) the employment relationship has ceased prior to his accepting the designation.

(3) After a matter has been assigned to a three person arbitration panel on which the individual in question sits, the ethical considerations involved in his firm's accepting or continuing an employment relationship with an exclusive bargaining representative concerning the matter under arbitration are significantly different. In analyzing these considerations, it must be

recognized that, since the attorney-panel member is a partner in his law firm, the firm is a "Business with which he is associated". Subsection 1-79(a), General Statutes. Therefore, within the terms of the Code, employment of the firm, or of any person working for the firm, by a bargaining representative results in a financial arrangement being established between the attorney-panel member and that bargaining representative. Thus, if the panel member's firm undertook the advocate's role at a hearing where he was sitting on the arbitration panel, he could be receiving compensation from the bargaining representative involved for both advocating and arbitrating the same matter at the same time. While a declaration by the attorney-panel member that he would not share in any fee resulting from his firm's involvement in an arbitration proceeding before a three person panel on which he sits would eliminate the most troubling aspect of this arrangement, his firm's receipt of such payments would nevertheless still cast doubt on whether the attorney-panel member was capable of exercising the requisite independence of judgment. Subsection 1-84(b), *id.* See, e.g., Code of Professional Responsibility DR 5-105(A) which mandates that a "...lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected...", and DR 5-105(D) which states that, "if a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment". 1 Connecticut Practice Book, p. 30 (1979). Therefore, the attorney-panel member's law partners and associates may neither accept nor continue representation of an exclusive bargaining agent before an arbitration panel on which the attorney sits.

(4) The issue of whether the attorney or his firm may come before an arbitration panel of which he is not a member as representatives for an exclusive bargaining agent appears essentially analagous to that of the attorney undertaking such employment before arbitration commences. See (1) and (2) *supra*. However, here there can be no question of the attorney-panel member's future official judgment regarding the matter being impaired, since the panel is already constituted to arbitrate the issue in dispute. Undoubtedly, the situation presents at least some opportunity for collusion between the attorney-panel member, functioning as an advocate, and the interest group representatives on the three person panel, who might plausibly reverse roles in some future arbitration proceeding. While both the attorney and the members of the three person panel must guard against such prohibited conduct, the possibility of improper trade-offs occurring is minimized by the tripartite, partisan nature of the Arbitration Panel. As a consequence, both the attorney and his firm may represent an exclusive bargaining agent before an arbitration panel on which the attorney does not sit.

In summation, the attorney-panel member may, consistently with the Code of Ethics for Public Officials, accept private employment from an exclusive bargaining representative of certified employees relative to a contract that may eventually be assigned to arbitration; he may subsequently serve on a three person panel selected to arbitrate that contract, provided the previous employment has been terminated and he is confident that his judgment is sufficiently unbiased despite his previous involvement; and he or his firm may represent an exclusive bargaining representative before an arbitration panel of which he is not a member. However, his firm may not represent an exclusive bargaining representative before an arbitration panel on which the attorney sits; and he should not accept assignment to a panel when his representation of one of the parties before it has been such that he cannot exercise the requisite independence of judgment.

Additional guidance may be found in the Code of Professional Responsibility, with which all attorneys must conform, and the Code of Judicial Conduct, although its applicability may well be limited by the partisan nature of the Arbitration Panel member's position.

By order of the Commission,

Lucille E. Brown

Dated 19 November, 1981

