

July 24, 1997

Kathryn T. Whalen  
Board Member  
Employment Relations Board  
528 Cottage Street NE, Suite 400  
Salem, Oregon 97310

Dear Ms. Whalen:

This letter is in response to your correspondence and correspondence received from John S. Bishop, both dated July 17, 1997, concerning the application of ORS Chapter 244 to your past employment with the law firm of Bennett, Hartman, Reynolds & Wisner and your activities as a member of the Oregon Employment Relations Board.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION  
NO. 97S-021**

STATED FACTS: An attorney worked for a law firm for approximately 10 years prior to withdrawing as a partner effective June 30, 1996. When the attorney withdrew as a partner, the attorney retained certain rights to receive income for work that had been performed by the law firm prior to the attorney's withdrawal. The attorney is still receiving payments from the law firm and will likely do so through calendar year 1997. The attorney has no right to receive any money for any work that the law firm has performed or will perform since the attorney's withdrawal. The attorney's economic interest in matters pending in the law firm prior to the attorney's withdrawal exceeds \$1,000 in value.

In May 1997, the governor of Oregon appointed the attorney to serve on the Oregon Employment Relations Board (ERB). The board consists of three members including a labor representative, a management representative and a public representative. The attorney was appointed to serve as the labor representative on the board. The Oregon legislature approved the attorney's appointment and the attorney now serves on the board and is hearing and deciding cases which come before that body.

The board interprets, administers and enforces the provisions of the Oregon Public Employee Bargaining Act (PECBA). Among other things, it determines whether employers or labor organizations have committed unfair labor practices as that term is used under the

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PECBA. The board also resolves questions involving the representation of public employees by labor organizations. The board handles other matters, but these are the more common types of disputes which come before that body.

Disputes which are filed with the board are typically assigned to an Employment Relations Administrative Law Judge (ALJ) who investigates the matter to determine whether a hearing is warranted. If it is determined that a hearing is necessary, the ALJ usually schedules and conducts the hearing.

Following the close of the hearing, the ALJ issues a Recommended Order and serves a copy to the parties. Following receipt of the Recommended Order, the parties may file specific written objections with the board. The board then hears oral argument from the parties and/or considers their written arguments in aid of or in lieu of oral argument. Thereafter, the board issues the final order based on the record made during the hearing and on all the written and oral submissions of the parties.

In situations in which a ALJ conducts hearings, the ALJ generally does not discuss the case with board members. Moreover, the subject board member has given specific instructions to ALJs that they are not to discuss with the board member any cases in which the member's former law firm represents a party.

The law firm represents a number of labor organizations which could become involved in disputes that ultimately will be considered and decided by the board. During the period of time that the board member practiced with the law firm, the board member would have provided legal services for many if not all of those labor organizations. Given the passage of time between the board member's departure from the law firm and the member's appointment to the board, it is unlikely that any dispute that the law firm would take before the board would have been pending in the law firm's office at the time of the member's departure. In the unlikely event that such a dispute ultimately comes before the board, the law firm would assume that it would not be appropriate for the law firm to handle that specific dispute.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the

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person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (8)(a) to (c) of this section.

ORS 244.020(2): Business means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

ORS 244.020(7): Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business

with which the public official or a relative of the public official is associated.

ORS 244.120: Methods of handling conflicts; generally; application to elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

(c) If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority.

QUESTION #1: Once the law firm has completed all of its payments due to the board member, will there be any restrictions on the law firm's ability to appear before the member or in the member's ability to participate in and render a decision on cases which the law firm brings to the board?

OPINION: The GSPC has jurisdiction over public officials as defined in ORS 244.020(15). The GSPC does not have jurisdiction over private businesses. The law firm would not be restricted from appearing before the member nor would it appear that the member would be restricted from participating in cases the law firm brings before the board once the law firm has completed all payments due to the member.

ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or **a business** with which the official or the official's relative is associated. This prohibition exists regardless of whether actual conflicts of interest or potential conflicts of interest are disclosed pursuant to ORS 244.120.

After the payments due the board member by the law firm for cases that were handled by the firm at the time the member was a partner in the firm have all been made to the member, it would appear that the law firm would not be a business with which the person [board member] is associated.

ORS 244.020(1) defines actual conflicts of interest. ORS 244.020(7) defines potential conflicts of interest. The difference between an actual conflict of interest and a potential conflict of interest is determined by the words **would** and **could**. An **actual** conflict  
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of interest occurs when the action taken by a public official is reasonably certain to result in a financial benefit or detriment to the public official, a relative of the public official or a business with which the public official or a relative is associated. It will occur when an action taken by the official would directly and specifically affect the financial interest of the official or the official's relative or a business with which the official or a relative is associated. A **potential** conflict of interest exists when an official takes action that could possibly have a financial impact on that official, a relative of the official or a business with which the official or a relative is associated. Such possible financial impact is not certain.

If the board member would not be financially impacted by an action taken in the member's capacity of an ERB member and the member no longer has any financial relationship to the law firm, it would appear that no conflict of interest, either actual or potential, would exist.

QUESTION #2: While the law firm is still making payments due to the board member, can the law firm file complaints and other actions with the ERB and pursue them until the ALJ issues the ALJ's Recommended Order to the board?

OPINION: Again, the law firm is not regulated by Government Standards and Practices laws. The law firm may file complaints with the ERB. If the subject board member becomes involved, in an official capacity, with a complaint filed by the law firm and the member could be or would be financially impacted by an action the member takes with regard to the complaint, the member would be required to comply with ORS 244.120(2)(a) and ORS 244.120(2)(b)(A). In this instance, if the member was met with a potential conflict of interest, the member would be required to announce publicly the nature of the conflict prior to taking any action thereon in the capacity of a public official.

If the member was met with an actual conflict of interest, the member would be required to announce publicly the nature of the conflict and refrain from participating as a public official in any discussion or debate on the issue out of which the conflict arises or from voting on the issue. If the member's vote would be necessary to meet a requirement of a minimum number of votes to take official action, the member would be eligible to vote, but would not be able to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

QUESTION #3: Would it be proper for the board member to consider an ERB case that the law firm has pursued through the ALJ level, so long as the law firm no longer represents the client when the case proceeds to the board level and so long as the law firm derives no further income for work on that case?

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OPINION: Yes. It would appear that if the law firm did not represent the client before the board and would derive no further income for work on the case, the board member would not have a conflict of interest in the matter and would be able to take official action without restrictions.

**THIS RESPONSE IS BASED SOLELY ON THE INFORMATION PROVIDED IN YOUR WRITTEN INQUIRY AND IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.**

This staff opinion will be submitted to the GSPC for adoption as a formal advisory opinion pursuant to ORS 244.280 at the next regular GSPC meeting which is scheduled for August 21, 1997.

Sincerely,

L. Patrick Hearn  
Executive Director

c: John S. Bishop  
Bennett, Hartman, Reynolds & Wiser

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