

May 18, 2006

Joan S. Kelsey  
City Attorney  
Lincoln City  
P. O. Box 520  
Tillamook, Oregon 97141

Dear Ms. Kelsey:

This is in response to your correspondence dated April 11, 2006 regarding a city councilor who has a spouse that is a city employee who will represent the employees in negotiating a new collective bargaining agreement.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION**  
**STAFF OPINION NO. 06S-016**

**STATED FACTS:** A city council is involved in negotiations with the collective bargaining unit that represents 60 city employees. One member of the bargaining unit is the spouse of one of the members of the city council. The councilor's spouse is also a representative of the bargaining unit that meets with the city council to negotiate terms of an agreement that may affect salary, available leave, health insurance and other benefits. Six members of the bargaining unit are at the top of their salary bracket ("frozen") and would not be impacted other than an across-the-board cost of living adjustment unless the city council adjusts the top rate for those six members. The same member that is the city councilor's spouse is one of those six members.

**RELEVANT STATUTES:** The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

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 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 (14) of this section."

244.020(14) " '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:"

244.020(14)(b) "Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify the smaller class that qualify under this exception."

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."

244.020(16) " 'Relative' means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse."

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:"

244.040(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."

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:”

244.120(2) “An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:”

244.120(2)(a) “When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or”

244.120(2)(b) “When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:”

244.120(2)(b)(A) “Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.”

**QUESTION NO. 1:** Would the member of a city council be met with a conflict of interest when participating in official action in negotiating or ratifying a collective bargaining agreement with city employees when there may be a financial benefit to the councilor’s spouse who is a member of the bargaining unit?

**OPINION:** Oregon Government Standards and Practices laws define “actual conflict of interest” [ORS 244.020(1)] and “potential conflict of interest” [ORS 244.020(14)]. 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 of interest occurs when the action is certain to result in a financial benefit or detriment. It will occur when an action taken by the official would directly and specifically affect the financial interest of the official, the official’s relative or a business with which the official or a relative of the official 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 that official or a business with which the official or the relative of that official is associated. Such financial impact is not certain.

ORS 244.020(14)(b) provides an exception to conflicts of interest when an official action affects all members of a “class” to the same degree. Sometimes a public official may take action that would have a financial effect on that official, a relative of that official or a business with which the official or a relative of that official is

associated. If a significant number of other persons or entities are also “affected to the same degree” by that action, the official would be exempt from conflict of interest requirements on the basis of a “class exception.”

Only the Oregon Government Standards and Practices Commission (GSPC) is authorized by law to determine the existence of a class or the size of a class for the purpose of compliance with ORS Chapter 244.

The stated facts indicate that the collective bargaining unit, represented by and including the spouse, consists of 60 city employees. If all 60 employees would be equally impacted by any action of the board with regard to pay and other benefits related to compensation, the class exception would apply. The city councilor would be exempt from conflict of interest disclosure requirements and would be able to participate in official action that might financially impact the spouse.

QUESTION NO. 2: Would the member of a city council be met with a conflict of interest when participating in official action to increase the salary of a spouse and five other city employees, who have reached the maximum rate of pay for their positions?

OPINION: The stated facts indicate that the spouse of the councilor has reached the top of the range of salary steps for the position held by the spouse. There are five other city employees in this similar circumstance, but the stated facts do not indicate that these six employees are all in the same salary range. Assuming that they are not all in the same salary range, it appears that the councilor would be met with a potential conflict of interest during any negotiations with the bargaining unit on this issue. However, when the action involves approval, such as voting, on whether or not to raise the salary range for the spouse, the councilor would be met with an actual conflict of interest.

In either case, when met with a conflict of interest, the city councilor would be required to disclose that the issue would impact the spouse’s official salary, but when met with the actual conflict of interest the councilor would be required to refrain from further participation.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM**

Joan S. Kelsey  
GSPC Staff Opinion 06S-016  
May 18, 2006  
Page 5

**LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON STANDARDS AND PRACTICES COMMISSION.**

Please contact this office again if you would like this opinion submitted to the Government Standards and Practices Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn  
Executive Director

LPH/dc 06S-016