

ADVISORY OPINION NO. 123

The question is whether part-time work as an instructor in a specialized discipline at a local college by a City employee with expertise in the same discipline violates any of the City's standards of conduct.

The Ethics Commission [Commission] is of the opinion that the employee could instruct a class in the specialized discipline, subject, however, to restrictions as prescribed hereinafter.

The Commission conducted an informal preliminary hearing regarding the case. The employee was present at the meeting and responded to questions posed by the Commissioners. Based on his responses to the questions and his testimony, the Commission found that the following facts were relevant in the case:

1. The employee is employed by the City as a supervisor in a specialized field. There are approximately (number) employees under his supervision. His primary duty as a supervisor is to oversee operations in the specialized field which are assigned to him. In addition to his supervisory function, his administrative duties include fiscal, personnel, and budget responsibilities.

2. Part of the employee's administrative duties relating to personnel includes participation in interviewing prospective employees or subordinates slated for promotion, and after such interview, submitting his recommendations to his superiors regarding prospective employees or branch subordinates being considered for promotion.

3. The employee's class at the college will commence (date). His subject will be basic technology in his specialized field, and there are (number) enrollees, all of whom are City employees within his branch of the City agency and some of whom are his subordinates.

4. As an instructor the employee will be compensated at the rate of (amount) per credit hour.

Under the foregoing facts, Section 11-102.3, RCH, and Sec-

tion 11-104, RCH, are applicable. Section 11-102.3, RCH, provides that no officer or employee shall

[E]ngage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of his official duties or which may tend to impair his independence of judgment in the performance of his official duties.

Section 11-104, RCH, states that no officer or employee shall

[U]se his official position to secure or grant special consideration, treatment, advantage, privilege or exemption to himself or any person beyond that which is available to every other person.

Before Section 11-102.3, RCH, can apply in the employee's case, the Commission must determine whether or not he has either a financial or a business interest as an instructor at the local college. In Section 6-1.1(6)(C), ROH, financial interest is defined in pertinent part as "(C) . . . an employment . . ." Based on the foregoing facts and definition, he is an employee of the local college. As an instructor, he receives a stipend based on the number of credit hours assigned to his class. Accordingly, the Commission concludes that he has a financial interest in connection with his non-City employment.

Section 11-102.3, RCH, is one of the conflict of interest standards of conduct. The conflict between the employee's instructorship and his duties as supervisor may be readily ascertained by examining the following definition of conflict of interest found in 73 *Michigan Law Review* 758 (1975):

A 'conflict of interest' may be defined as any circumstance in which the personal interest of a public official in a matter before him in his official capacity may prevent or appear to prevent him from making an unbiased decision with respect to the matter.

The definition is illustrated in a diagram depicting the employee's situation, shown in Appendix A, attached hereto. Note that the lines from the blocks above the single block converge upon the

single block. When the lines converge, a conflict of interest or an appearance of a conflict of interest is usually the rule rather than the exception. For example, when the employee interviews and recommends an applicant who was or is a student in his class or recommends for promotion, a branch employee who was his student one may question whether or not he made an unbiased decision because of his instructor-student relationship. Accordingly, his instructorship is incompatible with the proper discharge of his duties or may tend to impair his independence of judgment as a supervisor.

The following scenarios may assist in recognizing the incompatibility of a teacher with duties as a supervisor:

1. This scenario involves the employment of an applicant for a position as an assistant to the supervisor. One of the employee's duties as a supervisor is to interview and to recommend prospective employees to his superiors. His class consists of employees and non-employees of his branch of the City agency. During the term, a vacancy occurs in his sector. All of the non-City employees are submitting applications for the position. A week after his class ends, the Civil Service Department conducts a written examination to establish an eligible list for the vacant position. Based on the Rule of Five, the Civil Service Department submits five applicants who passed the examination. One of the employee's former students passed and is one of the five successful applicants. However, he is ranked fifth while the other four who were not his former students were ranked higher. Under this scenario, if he recommended his former student to fill the vacant position, there might be an allegation of bias on his part.

2. The foregoing scenario may also be applicable when employees of the supervisor's branch of the City agency in his district are to be promoted. The Civil Service Department submits five names for employees who were not his students and for an employee who ranked fourth out of five was his former student. In this scenario, an allegation may be made that he was in favor of an employee who was his student if he recommended such employee for promotion.

3. This scenario involves a request for a specific period for vacation leave by two subordinates in similar positions. Employee

"A" is a student in his class, while Employee "B" is not. Since the department is short-handed, to have both employees on vacation at the same time is not feasible. The reason why "A" could not take his vacation at the usual time was because he was attending the supervisor's class. He did not want to take a vacation and commute from his home to attend the supervisor's class because of the distance. He decided to continue to work so at the end of the day he could attend the class. In this scenario, if the supervisor grants employee "A" his vacation rather than employee "B", there may be an allegation of bias on the supervisor's part because employee "A" was his student while employee "B" was not.

4. The next scenario involves disciplinary action against a subordinate who is or was a student in the supervisor's class. Employee "A", who was his student, is before him for recommendation for disciplinary action because of insubordination against his supervisor. Another employee in a similar situation who was not his student was recommended by him for one week's suspension without pay. However, in the case of employee "A", he recommended a written reprimand. In this case, there can be allegations of bias on his part because employee "A" was his former student.

Generally, when an officer or employee of the City is engaged in non-City work, there may be a tendency to use City time, equipment, and material for non-City work. Such use is contrary to Section 11-102.3, RCH, because such use is an improper discharge of the employee's duties as a supervisor, or may tend to impair the independence of the employee's judgment. Moreover, since he may have many subordinates in his district, they may consider his use of City time, equipment, and material for his class during working hours as taking advantage of his position. An example of his use of City time is when an employee who is his student seeks his assistance during working hours in connection with classwork, and he takes time to assist him. Another example of use of City equipment may include using the telephone to call the college to check on whether or not a slide projector and screen are available for use in his class. There are other examples that might involve the use of City time and equipment that are too numerous to relate. Although such prohibition is not expressly stated, it is implied because such use is incompatible with the proper discharge of an officer's or employee's official duties, or

may impair his independence of judgment.

In all of these scenarios, if the allegation of bias in favor of the individuals who were the employee's students are sustained, there is a violation of Section 11-104, RCH, relating to fair and equal treatment. [*Supra*, at 3.]

The employee may question the use of conjectural words, language, or scenarios in the application of a standard of conduct. Such practice is the rule rather than an exception whenever a standard of conduct is applied. Words such as "appear," "could," and "may" permeate the application of standards of conduct. For example, in the above quoted definition of conflict of interest, the word, "appear" is used in the phrase ". . . or appear to prevent an unbiased decision." [Emphasis added] The word "could" was used in *People ex. rel. Ullrich v. Bell*, 24 NYSR 114. In that case the court upheld dismissal of a policeman who was engaged in selling cigars at wholesale to retail outlets. The court stated that:

[A]n evil minded policeman, if permitted to peddle, *could* coerce storekeepers to buy goods under fear of arrest for some technical violation of the law. [Emphasis added]

Also, when Section 11-102.3, RCH, is examined, the words, "may tend", are found in the phrase, ". . . or may tend to impair" [Emphasis added.] Moreover, the reason for using conjectural words, language, and scenarios is to nip any potential conflict of interest this Commission may foresee. The issuance of advisory opinions, which reflect reasoned and objective analyses of an officer's or employee's business or financial interests in relation to his official duties, is another means to express the concerns of this Commission. The foregoing means and method of analysis of a situation are to assist the Commission in attaining the primary purpose for the enactment of the standard of conduct provisions. That purpose is to attain and enhance the confidence of the public in City government. [See Sec. 11-101, RCH.]

Furthermore, the foregoing scenarios and statements reflecting alleged violations were not made to impugn the employee's character and integrity. The Commission is confident that he will avoid situations where there may be doubt as to whether or not the employee's decisions as a supervisor relative to his subordinate-

students is biased. However, the Commission requests that he examine the scenarios and the statement of alleged violations from the standpoint of the public. Had the Commission permitted him to be an instructor without placing any restrictive safeguards thereon, he could be certain that the public's criticism of his off-duty position would be based on personal aggrandizement. This statement is based not on any figment of imagination, but on actual statements made or questions posed by the public regarding the fidelity of officers and employees of the City.

In sum, the Commission concludes that under the facts of the case, Section 11-102.3, RCH, relating to incompatibility, and Section 11-104, RCH, relating to fair and equal treatment, are applicable. Section 11-102.3, RCH, applies because the employee's duties as an instructor at the college, conducting a basic technology class in his field may be incompatible with the proper discharge of his duties as a supervisor, or may tend to impair his independence of judgment. Incompatibility, where two hats are worn, one as an instructor and the other as a supervisor, arises when he reviews and recommends applicants for new positions or recommends his subordinates for promotion; more specifically, it arises when the applicant is one of his students or the subordinate is one of his students. Another of his duties which may raise the incompatibility issue is when he approves vacations for his subordinates or recommends disciplinary action against his subordinates. In all of the foregoing situations, an allegation of bias in favor of his student may be made by a non-student if, on one hand the applicant or subordinate was or is a student in his class, while on the other hand, another subordinate who was never a student in any of his classes comes under his review or consideration for promotion or disciplinary action. Although restrictions as to use of City time, equipment, and material are not expressly prescribed in Section 11-102, RCH, such restrictions are implied. When the supervisor uses City time, equipment, or money on behalf of his class, an allegation can be made that his personal financial interest causes him to use City time, equipment or material at the expense of the City. Also, Section 11-104, RCH, relative to fair and equal treatment, may be applicable if he is biased in favor of his students over non-students.

The Commission reiterates that the statements, conclusions, opinions, and scenarios in this opinion are not meant to impugn

the employee's character and integrity. The Commission has attempted to explain when certain standards of conduct become applicable and has provided illustrations so he would understand their application. All of the Commission's efforts, including those of the officers and employees of the City, are focused on the maintenance of the confidence of the public in City government.

In view of the foregoing, the Commission recommends:

1. At the first meeting of the employee's class, he 1) circulate a written notice stating that he has been advised by the Commission a) not to participate in interviewing and recommending applicants for new positions in the Branch who are students of his class, and b) to abstain from recommending employees for promotion who are students of his class; and 2) he include statements in the notice that in situations where he is required to make a decision involving a subordinate who was a student in his class and a subordinate who was not a student in his class, that he had been advised by the Commission to refer such decisions and recommendations to his immediate superior(s) [and the examples of such situations are reflected in the scenarios]. In the same circular, the employee should include a description of situations where he is required to abstain from submitting a recommendation to his superiors regarding an applicant for a position or a subordinate for promotion. (Examples of such situations are related in the scenarios contained herein.);

2. That the foregoing abstentions be followed so long as the employee conducts his basic technology class;

3. If the employee terminates and is no longer employed as an instructor at the college, that the same abstention continue until a reasonable time after conclusion or termination of his class. The duration of the reasonable time shall be determined by the head of his branch of the City agency; and

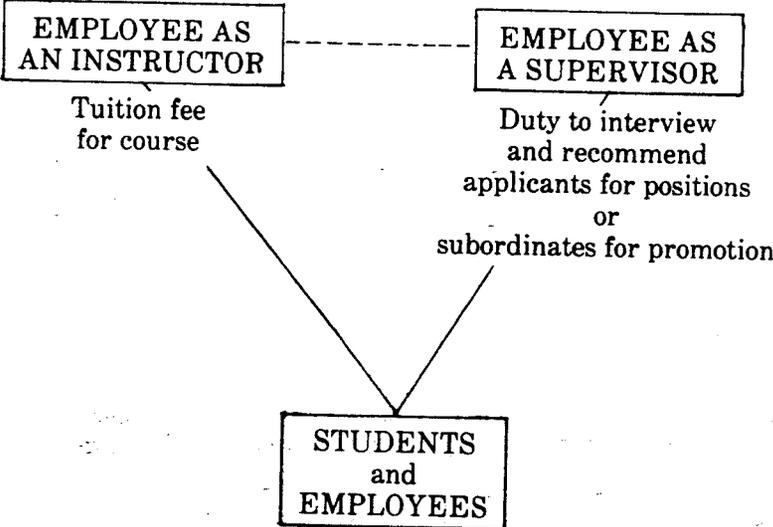
4. The employee shall submit to his immediate supervisors a list of students registered and attending his class or classes. His superiors will use such list to verify whether or not an applicant for a position or a subordinate who is to be promoted was his student.

Other than the foregoing precautions, the Commission is of the opinion that the employee may be an instructor at the college. The Commission requests that it be informed in writing, within 10 working days after the date noted on this opinion, whether or not our recommendation is accepted.

Date: July 8, 1983

ETHICS COMMISSION
Mazeppa K. Costa, Chair

DIAGRAM OF CONFLICT OF INTEREST DEFINITION



APPENDIX A