
1996 Wis Eth Bd 4
IMPROPER USE OF OFFICE;
USE OF STATE'S TIME, FACILITIES, SUPPLIES, AND SERVICES

A state public official may, consistent with statutes the Ethics Board administers, accept compensation from a publisher for a book the official will write on public policy and politics as long as (1) the official does not, in writing the book, rely upon the state's time, facilities, services, or supplies not generally available to everyone; (2) the terms of the contract are standard in the industry and were arrived at through an arms-length transaction; and (3) in the event that lobbyists, lobbying principals, or others having business before the official's agency arrange for significant purchases, outside the normal course of their business, the official turns over royalties arising from those purchases either to the state or to a charity with which the official is not associated. OEB 96-4 (February 29, 1996)

Facts

- [1] This opinion is based upon these understandings:
- a. You are a state public official.
 - b. A publisher has proposed to enter a contract with you to publish a book you will write.
 - c. The publisher has proposed to pay you an advance for the book, plus royalties based on sales.
 - d. The publisher's proposed business arrangement with you is independent of and in no way related, even remotely, with any other business interest of the publisher, its parent company, or any of its affiliated businesses.

Question

- [2] The Ethics Board understands your question to be:

May you, consistent with laws administered by the Ethics Board, accept compensation for a book on public policy and politics?

Discussion

[3] The provisions of the Ethics Code that are pertinent to your question are §19.45(2), with its attendant exception, §19.56(3), and §19.46(1)(b), *Wisconsin Statutes*.

Sections 19.45(2) and 19.56(3)

Reduced to its elements, §19.45(2) provides:

No state public official
May use his or her public position or office
To obtain financial gain or anything of substantial value
For personal benefit.¹

[4] You are a state public official. Use of office includes using the title, status, or prestige of office to obtain a contract.² Based on your description of the proposed book as one whose subject is public policy and politics, it certainly appears that the book contract arises from, and is intimately related to, your holding public office.³ Finally, the book contract's proposed compensation is something of substantial value and a substantial benefit for you.

[5] Standing alone, §19.45 would prohibit you from accepting the contract. However, §19.56(3), *Wisconsin Statutes*, also is applicable to your question. That section specifically encourages state public officials to meet with the public "to discuss and to interpret legislative, administrative, executive, or judicial processes and proposals and issues initiated by or affecting a

¹ Section 19.45(2), *Wisconsin Statutes*, provides:

19.45 Standards of conduct; state public officials. (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

² See, e.g., 1994 Wis Eth Bd 9; 1994 Wis Eth Bd 2; 10 Op. Eth. Bd. 19 (1988); 9 Op. Eth. Bd. 45 (1987); 9 Op. Eth. Bd. 21 (1986); 8 Op. Eth. Bd. 61 (1985).

³ The Ethics Board recognizes a distinction between using one's office and using the experience and knowledge gained in office. However, the Board does not have enough facts to know whether you would have been offered a similar contract if you were not currently a state official.

department or the judicial branch.” §19.56(1), *Wisconsin Statutes*. Section 19.56(3) provides, in relevant part:

19.56(3) Notwithstanding s. 19.45 . . . an elected official may retain reasonable compensation, for a published work . . . related to a topic specified in sub. (1) if the payment . . . is paid or arranged by . . . the publisher of the work.

[6] Thus, if the book’s subject concerns issues affecting Wisconsin government, as it appears it will, then §19.45 does not restrict you from entering the contract and accepting reasonable compensation for writing the book.

[7] The remaining question is whether the compensation is reasonable. The Ethics Board has said that a payment’s reasonableness is determined by the totality of the circumstances.⁴ Relevant factors in assessing the reasonableness of the proposed compensation in this case include:

The publisher’s relationship to the official and the State of Wisconsin;
The amount of work required in writing the book;
The compensation paid by the publisher to non-Wisconsin officials for similar work; and
The importance of the work.

[8] A state public official should not retain compensation for a published work if the official relies upon the state’s time, facilities, services, or supplies not generally available to everyone, in writing the book. Section 19.45(5), *Wisconsin Statutes*, prohibits an official to use office to obtain an unlawful benefit. Wisconsin law clearly establishes that state funds and resources may only be used for a public purpose of state-wide concern.⁵ Utilizing state resources to write a book for private gain may well run afoul of this doctrine and violate §19.45(5).

⁴ 8 Op. Eth. Bd. 51 (1985); 8 Op. Eth. Bd. 43 (1985).

⁵ See, e.g., *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464 (1975); *State ex rel. Wisconsin Development Authority v. Dammann*, 228 Wis. 147 (1938); 72 Op. Att’y Gen. 172 (1983); 66 Op. Att’y Gen. 43 (1977).

Section 19.56(3)(b), *Wisconsin Statutes*, formerly provided for the acceptance of compensation only if an official did not use the state’s time, facilities, services, or supplies not generally available to all citizens of the state. This section was amended to its current form by Senate Amendment 20 to 1989 Assembly Bill 611, which became 1989 Act 338.

[9] The Board is not aware of any special relationship of the publisher either to you or the State of Wisconsin. The Board is not in a position to know whether the terms of your contract with the publisher are standard in the industry. If they are, and if those terms were arrived at through an arms-length transaction, then the Board believes them to be reasonable.

[10] The Board recognizes that an individual or organization doing business in Wisconsin may decide to make large bulk purchases of your book. This raises concerns if lobbyists, lobbying principals, or others having business before your agency arrange for large purchases outside the normal course of their business. It would be inappropriate for you to reap the financial benefit of such a purchase. Thus, we recommend that if such a person purchases a large quantity of books outside the normal course of its business, you turn over royalties arising from that purchase either to the state or to a charity with which you are not associated.⁶

Section 19.46(1)(b)

Reduced to its elements, §19.46(1)(b) provides:

Except in accordance with the Board's advice
 No state public official
 May use his or her office or position
 To produce or assist in the production of
 A substantial benefit
 For the official.⁷

⁶ See §19.56(4), *Wisconsin Statutes*. Section 19.56(4) provides:

19.56 (4) If a state public official receives a payment not authorized by this subchapter, in cash or otherwise, for a published work or a talk or meeting the official may not retain it. If practicable, the official shall deposit it with the department or municipality with which he or she is associated or, in the case of a justice or judge of a court of record, with the director of state courts. If that is not practicable, the official shall return it or its equivalent to the payor or convey it to the state or to a charitable organization other than one with which he or she is associated.

⁷ Section 19.46(1)(b), *Wisconsin Statutes*, provides:

19.46 Conflict of Interest Prohibited; Exception. (1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

* * *

(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

[11] This statutory section contains elements virtually identical to §19.45(2). However, unlike §19.45, the exception contained in §19.56(3) does not, by its terms, apply to §19.46. Nevertheless, the statute permits you to proceed in accordance with the Board's advice, and the Board advises that you may enter the contract and accept compensation for the book.

[12] The Board's advice is informed by the stated policies and purposes of the Ethics Code. The primary purpose of the Ethics Code is to "promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees." §19.41(1), *Wisconsin Statutes*. The Ethics Code also states: (1) that the Board "shall protect to the fullest extent possible the rights of individuals affected" §19.41(2), *Wisconsin Statutes*; (2) that the Code "does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state" §19.45(1), *Wisconsin Statutes*; and (3) every official is "encouraged . . . to discuss and to interpret legislative, administrative, executive, or judicial processes and proposals and issues initiated by or affecting a department or the judicial branch" §19.56(1), *Wisconsin Statutes*.

[13] Here, there is an expressed legislative intent that state public officials talk about processes and proposals affecting state government. Moreover, many potentially important matters and informative analyses and observations could go unsaid or unwritten without the incentive of reasonable compensation for an official. Finally, the restrictions we have imposed on your acceptance of compensation address concerns raised on the national scene by public officials' book deals and should help ensure that the public's confidence in Wisconsin's government and officials is not undermined.

Advice

[14] The Ethics Board advises that you may, consistent with statutes the Board administers, accept compensation from a publisher for a book you will write on public policy and politics as long as (1) you do not rely, in writing the book, upon the state's time, facilities, services, or supplies not generally available to everyone; (2) the terms of the contract are standard in the industry and were arrived at through an arms-length transaction; and (3) in the event that lobbyists, lobbying principals, or others having business before your agency arrange for significant purchases, outside the normal course of their business, you turn over royalties arising from those purchases either to the state or to a charity with which you are not associated.

