



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

November 7, 1983

Mr. Charles W. Herf
Wentworth & Lundin
Attorneys at Law
3500 Valley Bank Center
201 North Central Avenue
Phoenix, Arizona 85073

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ARIZONA ATTORNEY GENERAL

Re: Addendum to I83-111 (R83-113)

Dear Mr. Herf:

In our October 13, 1983 opinion, confusion may have resulted from language utilized in a footnote of the opinion 1/leading the district to believe all district employees also employed by Scottsdale Educational Enrichment Services, Inc. (SEES) had to file a disclosure statement with the district. This letter is an addendum to our opinion to clarify any confusion.

District employees who are also SEES employees need only file a disclosure statement as provided in A.R.S. § 38-503(A) and (B) when presented with the opportunity to participate in any contract, sales, purchases, or acquisitions of services between the district and SEES or any decision of the agency affecting SEES. Otherwise disclosure is not automatically required for all district employees who are also employed by SEES.

1/ Footnote 3 of the opinion stated: "3/ For the same reasons, all district employees who are employed by SEES have substantial interests in district decisions affecting SEES."

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November 7, 1983
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We hope this clarifies any confusion which may have arisen from our October 13th opinion.

Sincerely,



BOB CORBIN
Attorney General

BC:VBW:kmw



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October 13, 1983

Mr. Charles W. Herf
Wentworth & Lundin
Attorneys at Law
3500 Valley Bank Center
201 North Central Avenue
Phoenix, AZ 85073

Re: I83-111 (R83-113)

Dear Mr. Herf:

We have reviewed your opinion dated August 4, 1983, to Mrs. Suzanne Doggett of the Scottsdale Unified School District Governing Board concerning a potential conflict of interest of one of the district's employees. The facts as have been presented to us are summarized as follows:

Mr. John Kearney, an administrator in the district, is also secretary/treasurer of the Board of Directors of Scottsdale Educational Enrichment Service, Inc. (SEES), a nonprofit corporation. Mr. Kearney receives a salary from SEES for the work he performs as secretary/treasurer. While the district and SEES have employees common to both, the organizations are separate and distinct entities. SEES rents district facilities to use for its summer school and other classes.

In his position with the district, Mr. Kearney reviews proposed contracts between SEES and the district. If the contracts are in proper form, Mr. Kearney approves the contracts subject to district governing board approval.

For the reasons discussed below, we have revised your opinion. We conclude that Mr. Kearney may not participate in any manner in decisions involving contracts between the district and SEES.

Mr. Charles W. Herf

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Two elements must be met before Mr. Kearney can be said to have a conflict of interest. We will address each of these in turn.

1. Is a school district administrator a "public officer or employee" subject to the provisions of the conflict of interest statutes?

"Employee" is defined in A.R.S. § 38-502.2 to include persons employed by a political subdivision for remuneration. Clearly, a school district administrator comes within this definition.

In determining whether an individual has a conflict of interest, no distinction is made between public officers, such as school district governing board members, and employees of a public body. Therefore, the fact that Mr. Kearney does not vote on matters concerning SEES or have final decision-making authority does not relate to the issue of whether or not he has a conflict of interest. See A.R.S. § 38-503.A and B.

2. Does the employee have a "substantial interest in any contract" of the public agency? See A.R.S. § 38-503.A.^{1/}

A substantial interest is defined as "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502.11. Since Mr. Kearney's interest does not come within any of the specified remote interests,^{2/} the only question is whether it is a direct or indirect "pecuniary or proprietary interest." The Arizona Court of Appeals has defined such an interest as one by which a person will gain or lose something as contrasted to general sympathy,

1. A.R.S. § 38-503.A governs conflicts of interest regarding a "contract, sale or purchase." A.R.S. § 38-503.B governs conflicts of interest relating to "any decision" of a public agency.

2. One of the remote interests defined by statute is that of "a nonsalaried officer of a nonprofit corporation." A.R.S. § 38-502.10(a). Since Mr. Kearney receives a salary for his work as an officer of SEES, this exception to the definition of a substantial interest does not apply.

Mr. Charles W. Herf

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feeling or bias. Yetman v. Naumann, 16 Ariz. App. 314, 492 P.2d 1252 (1972). As we have discussed in previous opinions, we believe that employment by an organization which is an interested party in a contract with the public body constitutes such a pecuniary or proprietary interest since the contract will confer an economic benefit or detriment upon the organization and therefore will have at least an indirect pecuniary effect on the employee. See Ariz. Atty. Gen. Ops. 179-263; 177-146; see also Ariz. Atty. Gen. Op. 183-098 in which we concluded that a member of the Liquor Board had a substantial interest in a decision involving a client of the bank of which he was chairman of the board and a stockholder.

The fact that the district does not determine Mr. Kearney's tenure or compensation from his employment by SEES is not dispositive of the conflict-of-interest question. The issue, instead, is whether Mr. Kearney has any direct or even indirect pecuniary or proprietary interest other than a remote interest in a decision of the board.

Therefore, we conclude that Mr. Kearney is an employee of a public agency and has a substantial interest in any district contract with SEES.³ We next consider the proper course of action for Mr. Kearney to follow.

1. The employee must disclose the interest.

An employee with a substantial interest in a contract entered into by the public body, here the district, must disclose that interest "in the official records of such public agency." A.R.S. § 38-503.A. The school district must maintain for public inspection in a special file all documents necessary to "memorialize all disclosures of substantial interest." A.R.S. § 38-509.

2. The employee must refrain from participating in any manner in the subject contract.

In addition to prohibiting a public officer from voting on an issue in which he has a substantial interest, A.R.S. § 38-503.A requires that an employee with a substantial interest may not participate "in any manner . . . in such contract." Thus, the employee must not make recommendations, give advice,

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3. For the same reasons, all district employees who are employed by SEES have substantial interests in district decisions affecting SEES.

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or otherwise communicate in any manner with anyone involved in the decision-making process. Ariz. Atty. Gen. Op. 182-004.

In addition to refraining from participation in district contracts with SEES, Mr. Kearney must also refrain from participating in any matters concerning SEES. A.R.S. § 38-503.B.

3. Another employee of the district may be appointed to act in Mr. Kearney's capacity with regard to SEES contracts.

Mr. Kearney's "superior authority" may appoint another employee to act in Mr. Kearney's capacity with regard to SEES contracts, or the superior may act himself. A.R.S. § 38-508. Any employee so appointed must of course not have a conflict of interest with regard to SEES matters.

In summary, we conclude that Mr. Kearney, in his employment with the district, may not continue to be involved in any way in contracts with SEES, Inc., a company by which he is also employed. Mr. Kearney's supervisor should appoint another employee to review and make recommendations concerning any contracts between the district and SEES. Failure to so comply with the conflict-of-interest statutes could result in civil remedies against the district⁴ and/or criminal penalties against those involved.⁵

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC/VBW/kb

4. Any person affected by the decision of a public agency may bring a civil action to enforce the conflict-of-interest laws and a court may order such equitable relief as it deems appropriate.

5. An intentional or knowing violation of the conflict-of-interest statutes is a class 6 felony; a reckless or negligent violation is a class 1 misdemeanor.

WENTWORTH & LUNDIN

A PROFESSIONAL ASSOCIATION

LAW OFFICES

3500 VALLEY BANK CENTER
201 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85073
TELEPHONE (602) 257-7822

OF COUNSEL
PETER KIEWIT, JR.

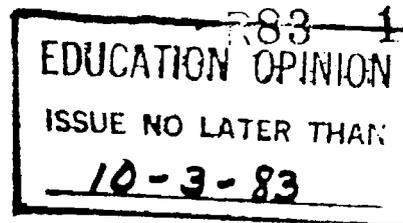
AFFILIATED SAN FRANCISCO OFFICE
WENTWORTH LUNDIN & LATTA
ONE CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111
(415) 981-2663

PAUL V. WENTWORTH
JOHN E. LUNDIN
THOMAS A. LATTA **
RICHARD M. FELDMHEIM
STEPHEN W. MYERS
TIMOTHY H. BARNES
CHARLES W. HERF **
JEAN E. HARRIS
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* ADMITTED ONLY IN CALIFORNIA
** ADMITTED IN CALIFORNIA AND ARIZONA

August 4, 1983

8-16-83 *pc*
EDUCATION



Mrs. H. Suzanne Doggett
President, Governing Board
Scottsdale Unified School District
Post Office Box 15428
Phoenix, Arizona 85060

Re: Conflict of Interest - Mr. Kearney

Dear Sue:

This letter is in response to a request, on behalf of the Governing Board of Scottsdale Unified School District ("SUSD"), for an analysis under Arizona's conflict of interest statutes as to whether Mr. John F. Kearney, Administrative Manager to the Governing Board, is prohibited as a matter of law from simultaneously maintaining that position and the position of Secretary/Treasurer on the Board of Directors of Scottsdale Educational Enrichment Service, Incorporated, an Arizona nonprofit corporation ("SEES") or whether maintaining the positions creates a conflict that must be disclosed under Arizona's conflict of interest statutes. After reviewing the relevant statutes, cases and Attorney General Opinions, as indicated in the following discussion, it appears under the facts reviewed that Mr. Kearney is not precluded from maintaining both positions simultaneously, nor is he engaging in Board decisions so as to create a "substantial interest" mandating disclosure and maintenance of a conflict of interest file as would be required under A.R.S. § 38-503.

The facts giving rise to this inquiry are as follows. SEES was incorporated March 24, 1971. Preceding its formation on March 2, 1971, the Board of Education/Trustees gave approval for the corporation to be formed and authorized the District Superintendent to cooperate in renting facilities to SEES in order to offer summer school

and adult education programs. Mr. Kearney was an incorporator and member of the original Board of Directors and was elected Secretary-Treasurer.

Mr. Kearney, in addition to maintaining his salaried position as Administrative Manager to the Governing Board of SUSD, has retained the position of Secretary-Treasurer of the Board of Directors of SEES, for which he receives a salary. There is no infringement upon the time required to be spent by Mr. Kearney to accomplish his duties for SUSD as a result of his performance of his obligations to SEES. SEES Board meetings are not held during SUSD regular hours and SEES financial reports are prepared by Mr. Kearney during evening or weekend hours. SEES work is not performed at the expense of SUSD employment duties or in a manner that interferes with Administrative Manager responsibilities.

Mr. Kearney has participated in the activities of SEES since its inception in March, 1971, drawing a salary for his efforts since the Fall of 1971. Mr. Kearney's salary derived from SUSD is determined by the Governing Board, over which neither he nor SEES has control, and his salary derived from SEES is determined by the Board of Directors of that organization (comprised of 16 persons including Mr. Kearney), over which SUSD has no control. Determination of compensation is wholly independent and job performance for one organization has no relationship to compensation awarded to an employee of the other.

The Governing Board of SUSD consists of five publicly-elected officials who vote on and make the decisions of the public agency. Mr. Kearney does not vote on matters which come before the Governing Board of SUSD but is responsible solely for developing and maintaining conformance with a budget for the District which conforms to the policies mandated by the State Department of Education. He therefore is not involved in policy-making for SUSD but is limited in his involvement to an administrative capacity. Mr. Kearney's duties for SEES include all aspects of administrative financial management of the affairs of that organization, and limited policy-making capacities by virtue of his vote (one of 16) on the Board of Directors.

The relationship between SEES and SUSD is a close one but the two organizations are fundamentally independent of each other. In response to needs for community educational services, SUSD declined to provide the services but

spawned SEES in 1971 to meet those needs as an independent, nonprofit corporation operated separately from SUSD but relying on SUSD personnel to maintain the educational and administrative services provided by SEES. Both SUSD and SEES are audited annually by separate certified public accounting firms, have independent insurance and employing authority, and have been represented by separate and distinct legal counsel.

SUSD maintains no authority to control SEES and vice versa. No alignment exists between these entities except the involvement of SUSD employees as SEES employees and except the presumption that SEES' printed promotional materials conform to SUSD standards for such materials in order to approve them for distribution to SUSD students. Otherwise, no preference is shown by SUSD to SEES in any way, including most importantly, the charge imposed upon SEES to utilize SUSD facilities for SEES activities. SEES has remained a separate entity from SUSD with a wholly separate income source. SUSD does not have any power to dissolve SEES nor to take or contribute money in any fashion other than the means which exist with respect to all community groups. No favoritism is provided by SUSD for SEES in any way. The essence of the relationship between SEES and SUSD is the involvement of SUSD personnel in SEES' activities, separate and apart from their activities for SUSD, in order to provide educational services to the community which SUSD determined it did not have the capacity to provide. None of the ongoing business of SEES is subject to SUSD approval in a fashion other than that to which all other educational programs in the district are subject.

The SEES Board of Directors has provided that in the event of its dissolution, any surplus monies are to be distributed to SUSD. This distribution, under the law, could not be automatic. It would require an agenda item at a properly noticed SUSD meeting and express acceptance by the SUSD Board as a gift to the District.

SEES uses SUSD's facilities and property under the same established terms and conditions as all other community groups. In this regard, SUSD is allowed by statute to permit the use of school property for the benefit of the community so long as the use does not interfere with school activities and is conducted without cost to SUSD. A.R.S. § 15-1105. Rules, regulations and fees are promulgated and established annually by the Governing Board, which set out the standards to be followed for use of school property by such groups.

SEES, along with all other groups who wish to use school property, is subject to these rules and regulations and pays the same exact fees as such other groups. Approximately 12% of the amounts paid to SUSD for use of school district facilities annually is paid by SEES.

With respect to direct contact between SEES and SUSD, Mr. Kearney does not draw up and approve any contracts with SEES on behalf of SUSD nor does he approve such contracts on behalf of SEES without conformity to prior approved contract forms or being subject to strict regulations adopted by the Governing Board of SUSD concerning such contracts. In fact, the extent of any "contracts" between SEES and SUSD involve the use by SEES of SUSD facilities which, as discussed at length above, is subject to strict rules and regulations from which neither entity may vary. It is our understanding that Mr. Kearney has no authority either on behalf of SEES or SUSD to negotiate or alter terms or approve any contracts on behalf either entity. The "Use of School Property" policy is implemented by a building principal completing a form contract that has been approved by the Governing Board. That contract is submitted to Mr. Kearney who compares its terms for rental to current Board-approved charges and, if consistent, he performs the ministerial act of approving it, subject to Board review. SEES has operated under the March, 1971, Board directive and is subject to the same Board rules, policies and fees as any other entity. Further, all distribution and income of funds on behalf of both organizations appears to be strictly confined to matters subject to specific approval by the Boards of that particular organization.

The issue which we have been asked to address is whether, under the facts as described, a conflict of interest exists for Mr. Kearney under Arizona statutes.

The potentially applicable portion of Arizona's conflict of interest law is set forth at A.R.S. § 38-503(B), which provides as follows:

B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an offi-

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cer or employee in such decision. (Emphasis added.)

The term "substantial interest" is defined at A.R.S. § 38-502(11) as "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest."

As the following discussion will demonstrate, this statute section does not apply to the particular facts reviewed involving the relationship between SUSD and SEES. Decisions by the public body, i.e., SUSD, if any exist that can impact on SEES, do not appear to involve any pecuniary or proprietary interest, either direct or indirect, to Mr. Kearney so that he does not have a "substantial interest" in any decision. In fact, it appears that SEES operates wholly independently of SUSD in its program, policies and determination of employee compensation.

The crucial issues in determining whether such a conflict of interest exists revolve around (1) whether any decisions have been made by SUSD which impact upon SEES in such a way as to give rise to an opportunity for Mr. Kearney to act in a prejudicial manner or to confer a pecuniary interest upon himself, and (2) whether Mr. Kearney's position as Administrative Manager for SUSD allows him to participate in decisions affecting SEES. Our understanding of the facts of this matter as conveyed to us by SUSD representatives leads us to conclude that the answer to both of those questions is negative, so that the conflict of interest statutes are inapplicable to the unique factual circumstances regarding SEES. Therefore it appears that Mr. Kearney's position is not within the contemplated scope of A.R.S. § 38-503(B) and he is not involved in a conflict of interest situation as a result of his dual employment by SUSD and SEES.

1. Does SUSD Render Decisions Concerning SEES Which Could Result in Prejudicial Decisions by Mr. Kearney so as to Create a "Substantial Interest"?

The cases and Attorney General Opinions concerning conflict of interest generally involve questions pertaining to participation by Governing Board members as opposed to employees. Therefore, the analysis of Mr. Kearney's situation is somewhat novel. However, it appears logical to

assume that similar concerns must be examined in the case of a school district employee in order to answer the question of whether a conflict of interest exists. The crucial question in either situation is whether one or the other of Mr. Kearney's positions prejudices decisions in which he is involved with respect to the other entity, which question must be answered on the basis of the facts of each particular case. See Atty. Gen. Op. Nos. 175-10 and 179-290. Put another way, does either of Mr. Kearney's positions depend for its continuation or compensation on the maintenance of certain performance standards in the other position so as to create a "substantial interest" in any decision in which he is involved? Our understanding is that the answer to that question is "No."

The thread which runs through the Attorney General Opinions regarding conflict of interest for Governing Board members involves the concern for the demands for allegiance made upon that member as a result of the two positions and the creation of the potential for the member to use his or her position on the Board to promote his or her status with the other employment position. At the heart of that concern is the possibility of participation by the Board member in decisions regarding or indirectly affecting the issues of tenure and compensation of the other position. See Atty. Gen. Op. No. 179-290 and the other Opinions cited therein. Such issues and concerns simply do not arise in Mr. Kearney's case.

As discussed at length above, no contracts are negotiated or entered into by and between SUSD and SEES. No decisions are made by the Board of either organization concerning the other organization specifically. All matters creating intercourse between the organizations are the subject of standardized policies, rules and regulations so that no discretionary decisions are made by either organization, much less by Mr. Kearney on behalf of either, with respect to the other.

Hence, any decisions made by SUSD with respect to SEES do not present an opportunity for favoritism to SEES nor could they result in any detriment to SEES in light of the maintenance of the independent status of the two organizations. Consequently, even if Mr. Kearney could be involved in decisions by SUSD affecting SEES, he would have no opportunity to engage in such decisions in a manner which could create a "substantial interest" as defined by statute.

Mrs. H. Suzanne Doggett
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2. Does Mr. Kearney Participate in any Decisions by SUSD Concerning SEES?

In view of Mr. Kearney's position as an administrator as opposed to a policy-maker, i.e., he is not a member of the Governing Board, it is clear that Mr. Kearney's decision-making powers with respect to SEES (even if decisions were made by SUSD concerning or relating to SEES) do not allow him to make the sort of decisions which could give rise to a conflict of interest. All but one of the Attorney General Opinions of which we are aware concerning the potentiality of a conflict of interest in a dual position situation have involved Governing Board members who, by definition, are in a position to vote on policy-making issues in which they may be prejudiced as a result of holding a salaried position for an entity subject to decisions of the Governing Board. The potentially sensitive political position of a Governing Board member in a decision making capacity is obvious.

In Mr. Kearney's position, however, his duties to oversee conformity by the school district with an established budget are subject at all times to statutory requirements and regulations, including the Uniform System of Financial Records, A.R.S. § 15-901, et seq., A.R.S. § 15-961, et seq., and other statutory provisions, together with SUSD policies regarding expenditures, as adopted by the Governing Board. He is not in a position to distribute or to take money on behalf of SUSD in any discretionary fashion so as to even potentially result in a temptation for prejudiced decision-making with respect to SEES. He cannot, by virtue of his SUSD position, affect in any way the tenure of or compensation from his employment by SEES.

In the Attorney General Opinion dealing with a potential conflict of interest for a non-Governing Board member, i.e., No. 182-004, the Attorney General cautioned against narrowly construing the concept of the employee's participation in a decision, apparently rejecting the argument that a school superintendent's advising of the Board concerning certain matters does not constitute such participation. In the fact situation addressed in that Opinion, a school superintendent's wife's position as a teacher in the district was found to be the basis for a conflict of interest for the superintendent with respect to decisions in which he participates, which includes negotiation of teacher contracts, compensation and fringe benefits. By contrast,

Mr. Kearney does not, even by indirect means, participate in negotiations or other aspects of decisions of SUSD, if any exist, regarding SEES or his interests in SEES.

Accordingly, Mr. Kearney does not have an opportunity to "participate" in any decisions by SUSD concerning SEES and therefore cannot be involved in a conflict of interest situation under Arizona law by virtue of his dual positions. In fact, Mr. Kearney's position is identical to that of nearly all of the other SEES' employees since they are also SUSD employees, and Mr. Kearney has no greater power over the acts of SUSD vis-a-vis SEES than the other SEES' employees.

Finally, it appears that the only other possible attack on Mr. Kearney's maintenance of the dual positions would come under the provisions of A.R.S. § 38-601, which prohibits dual compensation of public officers. Unlike the instant situation, that statute section is concerned with the situation where one person maintains two positions which are paid from public funds. Such a person would be prohibited from maintaining those positions if the performance of the duties of each position are not compatible and the duties of one of the positions is germane to the duties of the other. Since SEES is not funded by taxing sources and instead derives its funds from private payments for educational services rendered, Mr. Kearney's maintenance of the two subject positions cannot, by definition, run afoul of the prohibitions of A.R.S. § 38-601. See Attorney General Opinion No. 170-7.

If, contrary to the conclusion drawn in this letter, Mr. Kearney's dual employment was found to create a conflict of interest, he would be required, as set forth in the statute quoted above, to make his conflict known in the official records of the SUSD and refrain from participating in any decision in which his conflict of interest is implicated. Additionally, should dual employment by SUSD and SEES be determined to constitute a "conflict" under the statutes for employees who are not in policy-formulating or decision-making positions, all of the SUSD persons holding such positions (in excess of 280) may be required to disclose the conflict and retain files in the official records of the District. As none of the persons holding dual employment status are elected to the Governing Board, or make or participate in decisions that can have financial ramifications on the other, we do not feel this was the intent of the Legislature by the enactment of the conflict of interest provisions.

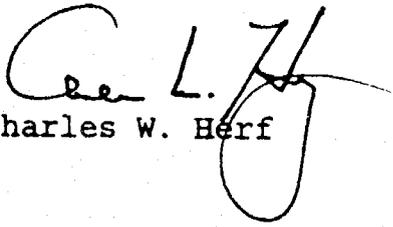
Mrs. H. Suzanne Doggett
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R83- 113

Pursuant to A.R.S. § 15-253.B, we are transmitting a copy of this letter to the Arizona Attorney General for review. After you have had an opportunity to review the contents of this letter, please do not hesitate to contact me if any factual assumptions are not accurate or with any questions you might have.

Very truly yours,

WENTWORTH & LUNDIN


Charles W. Herf

CWH/JCY20:E

Enclosures

cc: Governing Board
Dr. Philip E. Gates
Mr. John F. Kearney
Honorable Robert Corbin