

City of Memphis Board of Ethics

October 24, 2011

Advisory Ethics Opinion No. 11-04

This opinion responds to a specific question presented, particularly whether certain behavior is permissible pursuant to the City of Memphis Code of Ethics, Ordinance 5206. It does not address any other applicable local, state or federal laws.

Question

Whether it is permissible pursuant to the City of Memphis Code of Ethics for a City employee, particularly an employee with supervisory and decision making authority in his or her department, to maintain secondary employment with a company who is subcontracted by another company to provide services to the City, particularly in the department in which the employee is assigned.

Opinion

Secondary employment of City employees is not permissible if it conflicts with the City charter, ordinances or policies, including but not limited to the Code of Ethics and the Executive Order regarding high ethical conduct. Because the secondary employment in this instance has the appearance of a conflict of interest, it should be terminated or measures should be taken to ensure the company which employs the City officers/employees does not also provide its services to the City, specifically the department/division where the City officers/employees are assigned.

Facts

Employees of the Memphis Police Services Division, Organized Crime Unit (OCU) generally receive specialized training from the Regional Counterdrug Training Academy (RCTA). The RCTA courses are sponsored by the United States Department of Defense at no cost to the City except in very rare circumstances. However, the City pays fuel costs for its vehicles for the employees to attend and receive the specialized training offered by RCTA.

There is a Memorandum of Understanding (MOU) between the Memphis Police Services Division and RCTA which provides that OCU officers/employees may serve as instructors and/or role players for RCTA. Additionally, the OCU officers/employees may bring in specialized outside consultants to assist with the training. According to the City of Memphis Internal Audit department, RCTA reimbursed the City for any lodging and food for these City officers/employees and also paid the cost of any outside consultants. However, the City did not receive any reimbursement for the normal salary and/or overtime pay for the officers/employees that serve as instructors/role players under the MOU.

RCTA also entered into agreements with other companies, including Investigative Techniques Unlimited (ITU), to provide instructors/role players and training. Pursuant to Memphis Police Department Policy and Procedures, DR 124 OFF-DUTY EMPLOYMENT, which requires approval of off-duty employment, several OCU officers/employees obtained permission from the Police Services Division for secondary employment with ITU. ITU provided instructors for some of the RCTA courses for a fee. At least one OCU officer/employee, who is also an ITU employee, held a supervisory position with OCU and had the responsibility for ensuring undercover officers were adequately trained, including recommending approval for officers to attend RCTA courses.

Analysis

Section 9 of Memphis City Ordinance No. 5206 provides in pertinent part that:

An officer or employee may not accept or continue any outside employment if the work... conflicts with any provision of the City's charter or any ordinance or policy.

Based on the above, it is clear that a City employee shall not continue in the employment if said employment is a violation of the City charter, ordinance or other policy.

Further, Executive Order No. 2-2009, An Order Establishing High Ethical Standards for City Employees Regarding the Acceptance of Gifts and Conflicts of Interest, Section 5 provides in pertinent part as follows:

No employee shall enter into or derive any benefit, directly or indirectly, from any contractual arrangement with the City or its agencies.

Although ITU does not contract directly with the City to provide services, ITU instructors teach RCTA courses. It should be recalled that RCTA provides training to City employees. The OCU officers/employees who also work for ITU are being compensated by ITU for teaching RCTA courses that City employees attend. Accordingly, it appears that these OCU officers/employees are, in fact, obtaining a financial benefit by virtue of RCTA's relationship with the City. It does not matter that the compensation to ITU does not come directly from the City but from RCTA. The ordinance and order do not require compensation come directly from the City to be prohibited.

Additionally, Section 3, of Executive Order No. 2-2009, provides that:

No employee shall ... accept, directly or indirectly, ... any gift, including but not limited to any gratuity, service, favor... or any other thing of monetary value from any person or entity that:

...

- ii. Conducts operations or activities that are regulated by the department, division or agency of the City for which the individual is employed...

Section 8(b) of Memphis City Ordinance No. 5206 provides that:

An officer or employee *may not use or attempt to use his position to secure any privilege or exemption for himself or others that is not authorized by the charter, general law, or ordinance or policy of the City.* (emphasis added).

Similarly, Section 2 of Executive Order 2-2009 provides in pertinent part as follows:

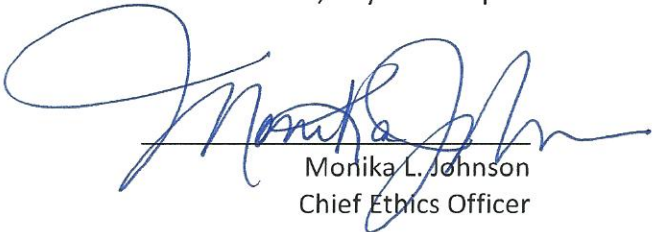
Each employee shall avoid any action, whether or not specifically prohibited by statute, regulation or this Order, which might result in or *create the appearance of using public office for private gain...* (emphasis added).

Not only does there appear to be a financial benefit obtained by the OCU officers/employees described above, but this financial benefit derives from specialized training obtained within the department/division of City government in which the OCU officers/employees are assigned and not some other City division/department for which those officers/employees have no influence. Additionally, there is the appearance of a conflict of interest, especially with the supervisor, because this individual has the ability to influence and/or create demand for services that could result in his company (ITU) being compensated. The supervisor can recommend and approve training and other professional development for his/her subordinates. This creates the appearance of using his/her position with the City for private gain.

Conclusion

Based upon the foregoing, it is my opinion that to avoid any appearance of a conflict of interest, the OCU officers/employees who are also employed with ITU should either terminate employment with ITU or take appropriate measures to ensure that ITU will not teach courses attended by City employees.

Board of Ethics, City of Memphis



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