

# CONFLICT OF INTEREST LAW

## I. OBJECT AND PURPOSE

The object of the conflict of interest statute is to remove or limit the possibility of personal influence which might bear upon a public official's decision. *See Yetman v. Naumana*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (1972). The purpose is to prevent self-dealing by public officials and public employees. The financial interests of public officials or employees must not conflict with the unbiased performance of their public duties. One cannot serve two masters with conflicting interests. *See Maucher v. City of Eloy*, 145 Ariz. 335, 701 P.2d (1985); *see also Williams v. State ex rel. Morrison*, 83 Ariz. 34, 36 (1957) (where the court stated "It is imperative that a public official have no personal interest that might clash or conflict with that of the state").

## II. SUBSTANTIAL INTEREST CONFLICT

A public official or employee who has, or whose relative has, a non-speculative, non-remote, substantial interest in a public body's decision, contract, sale, purchase or service, shall make known the substantial interest in the official records of the public agency and shall not participate in or influence the decision, vote, contract, sale, purchase or service. *See* A.R.S. § 38-503(A). Even negligence in failing to comply with this conflict of interest law can trigger serious consequences. *See e.g.* A.R.S. § 38-510(A)(2), where reckless/negligent violations are considered to be a class one misdemeanor. A public officer or employee therefore has an obligation to become aware of their interests and those of their relatives. A "substantial interest" is a non-speculative, non-remote, pecuniary or proprietary interest, either direct or indirect, by which a person will gain or lose something that is not abstract. General sympathy, feeling or bias is not pecuniary or proprietary. *See Hughes v. Jorgenson*, 203 Ariz. 71, 50 P.3d 821 (2002). *See also Yetman, supra*.

## III. THE "CITY PROVIDER" CONFLICT

General Rule (A.R.S. § 38-503(C)(1)). A conflict of interest exists any time a public officer or employee supplies goods or services to their public entity, not pursuant to public competitive bidding.

Exception (A.R.S. § 38-503(C)(2)). An exception to this rule exists if the goods or services are valued at less than \$300 for a single transaction, with a maximum aggregate for all transactions of \$1,000 annually.

#### IV. THE SELF-DEALING CONFLICT

General Rule (A.R.S. §§ 38-504 and 38-505). A public officer or employee shall not:

- A) represent another person for compensation before a public agency during their tenure, or within 12 months afterwards, concerning any matter in which they were directly involved or concerned; or
- B) disclose or use for personal profit, during or within 2 years after leaving office, confidential information that they became aware of while a public officer or employee; or
- C) use or attempt to use their official position to secure any valuable thing or benefit from that which would not normally accrue to them in the performance of their official duties, the benefit being of such a character as to manifest a substantial or improper influence upon them with respect to their duties (*i.e.* benefiting donor rather than the public good); or
- D) receive or agree to receive, directly or indirectly, any additional compensation for any service in connection with any matter pending before them.

#### V. WHY SHOULD ANYONE CARE?

Potential consequences for violating the law include:

- A) criminal penalties for knowingly or intentionally violating the law, a class 6 felony punishable by prison time and a maximum fine of \$150,000; negligent or reckless violation, a class 1 misdemeanor punishable by a maximum of 6 months jail, a fine of \$2,500 plus penalties and assessments, 3 years probation, and other orders deemed appropriate by the court. *See* A.R.S. § 38-510.
- B) forfeiture of public office or public employment, contract cancellation (3 year window pursuant to A.R.S. § 38-511(A)) and assessed attorney fees and costs, inclusive of fee or commissions paid in furtherance of the contract under A.R.S. § 38-511(E).
- C) private citizen lawsuits alleging violation of civil rights and violation of the conflict of interest statutes under A.R.S. § 38-506, which can lead to removal from appointed office and an award of attorney fees. *See Welch v. Cochise County, et als.*, 251 Ariz. 519 (Arizona Supreme Ct. 2021) (where the Court

invalidated appointment by Board of Supervisors (“BOS”) of one of its own members to justice of the peace who participated in the selection process without publicly disclosing his interest in the position; and where the BOS briefly first met to discuss the appointment, conducted unknown discussions in executive session with an unexplained hour-long delay in reconvening, ending in a surprise nomination of a sitting supervisor – all of which raised the spector of secrecy).

D) criminal felony (class 5) and forfeiture of public office for making or being interested in contracts or becoming a vendor/purchaser in public contracts. (*See* A.R.S. § 38-447).

#### VI. REMOTE INTEREST EXCEPTIONS (A.R.S. § 38-502)

The following are considered “remote interests”, and would not prohibit the public official/relative/employee from being involved in the decision, contract, purchase, sale or service:

- A) non-salaried employees of a nonprofit organization.
- B) landlord/tenants of a contracting party.
- C) attorneys of a contracting party.
- D) non-profit cooperative marketing associations.
- E) insignificant stock ownerships (3% or less of total shares, with income less than 5% of total dividends and other payments from the corporation which are less than 5% of the total annual income from the corporation).
- F) reimbursement of expenses.
- G) recipients of public services generally provided to others by city.
- H) interests of other agencies.
- I) public school board members when relatives are not a dependent or spouse.

- J) class interests (if member of trade, business, profession or other class of persons consisting of at least 10 or more members with which no greater interest than that of other class members).
- K) relative who is an employee of any business or government entity that employs at least 25 employees in Arizona who do not have nor assert management/budget decision making authority or control.
- L) ownership of any publicly traded investments that are held in an account or fund, including mutual fund, managed by one or more qualified investment professionals who are not employed or controlled by the officer or employee and that the officer or employee owns shares or interests together with other investors.

VII. WHAT SHOULD THE PUBLIC OFFICER DO IF HE OR SHE BELIEVES A CONFLICT OF INTEREST EXISTS?

A) Obtain a written opinion from the city attorney. No public officer is personally liable for acts done in their official capacity if good faith reliance on written conflict of interest opinions of the city attorney. (*See* A.R.S. § 38-446, Immunity from personal liability).

B) Disclose and withdraw. Once the conflict has been determined to exist, the public officer shall: 1) declare such conflict publicly; 2) leave the room and not vote on the decision nor influence other decision makers on the vote; and 3) not be a party to the contract, sale, purchase or service which is at issue. CAUTION: A conflict of interest should never be used to escape accountability on a vote, to avoid taking a stand on a controversial issue, or appease an unfounded or unpopular public perception (*i.e.*: a proclaimed abstention is not technically allowed, but declaring a conflict and leaving is).

VIII. CANCELLATION OF CONTRACTS

The city and any of its departments or agencies may cancel within three years after execution any contract without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating a contract or any extension thereof, is an employer or agent of any party to the contract in any capacity or a is consultant to any party of the contract with respect to the subject matter of the contract. In addition, any fees or commissions incurred may be recouped. NOTE: The cancellation clause under A.R.S. § 38-511(A) became the center of controversy some years ago in the Glendale/Phoenix Coyotes Arena deal

where a former employee of Glendale was hired by the Phoenix Coyotes. The court ruled that due to the employee having worked on the Phoenix Coyote Arena deal and then being hired by the Coyotes, a portion of the contract was struck down as null and void. *See Ice Arizona Manager Co., LLC v. City of Glendale, et als.* (Maricopa County Superior Court, circa 2015).

#### IX. REMOVAL FROM APPOINTED OFFICE

For appointed commission and board members, they serve at the pleasure of the mayor and city council and may be removed with or without cause any time during their appointed terms. While it is unlikely removal would be pursued “without cause”, here are some viable “for cause” reasons:

- A) violation of the open meeting law or code of conduct
- B) violation of oath
- C) more than three unexcused absences from meetings
- D) conflict of interest violations
- E) rude, abusive, slanderous or disrespectful behavior directed at public, staff or city council and applicants and their representatives
- F) using title for personal purposes or to influence an election
- G) fraud, collusion, coercion and evidence of bias against or for an applicant or staff member
- H) committing violent acts
- I) inefficiency
- J) neglect of duty or malfeasance in office

#### X. DEFINITIONS

- A) “compensation”: money, any tangible thing of value, or a financial benefit.
- B) “employee”: any person employed by an incorporated city or town, a political subdivision of the state or any of its departments, boards,

commissions, or agencies (inclusive of counties and school districts), whether full-time, part-time, contracted, or who otherwise agrees to some compensation in exchange for performing some function for the government.

C) “made” or “make known”: the filing of a paper which is signed by a public officer or employee and which fully discloses a substantial interest, or the filing of a copy of the official minutes of a public agency which fully discloses a substantial interest pursuant to A.R.S. § 38-509.

D) “official records”: the minutes or papers, records or documents maintained by a public agency for the specific purpose of receiving disclosures of substantial interests required to be made known.

E) “pecuniary interest”: an interest by which a person will gain or lose something, as contrasted to general sympathy or bias.

F) “public agency”: all courts, departments, agencies, boards, commissions, institutions, instrumentality or legislative or administrative body of the state, county, an incorporated city, town or any other political subdivisions (inclusive of counties and school districts).

G) “public officer”: any elected and appointed individual of a public agency established by charter, ordinance, resolution, state constitution or statute, any member of an advisory commission, board, council or committee, regardless of whether they are paid for their services.

H) “relative”: any individual within two degrees of kinship, including spouse, child, child’s child, parent, grandparent, brother or sister of whole or half blood and their spouses, and the parent, brother, sister or child of a spouse.

I) “substantial interest”: any non-speculative, pecuniary or proprietary interest, either direct or indirect, other than a remote interest.

## XI. MISCELLANEOUS

### A) Nepotism:

#### State Rule:

It is a class 2 misdemeanor under A.R.S. § 38-481 for a legislative, executive, ministerial or judicial officer to appoint or vote for appointment

of any person related to him or her by affinity or consanguinity within three degrees to any clerkship, office, position, employment or duty in any department of the state, district, county, city or municipal government of which such legislative, executive, ministerial or judicial officer is a member, which involves the payment of government funds.

City Rule:

1) Under Apache Junction Personnel Rules, Rule 4, § 6, individuals cannot be hired employees who are related to a current employee by blood or marriage (parent, spouse, child, grand parent, grand child, brother, sister (of the half as well as whole), uncle, aunt, niece, nephew, 1<sup>st</sup> cousin, mother-in-law, father-in-law, sister-in-law, or brother-in-law) if one of the employees is in a supervisory chain with the other; and

2) No person, by blood or marriage as noted above, related to a councilmember, city manager, city attorney, magistrate judge, or department head, may be appointed to any city employment position.

B) First Amendment:

Can a city board volunteer be removed due to a failure to provide politically consistent connections with the elected body?

Yes. Pursuant to *Shayna Lathus v. City of Huntington Beach*, No. 21-56197 (9<sup>th</sup> Cir. CA) Decided January 5, 2023).

This case involved members of the Long Beach City Council appointing the plaintiff (Lathus) to the City's Participation Advisory Board ("CPAB"). The Long Beach city code allows removal without cause. After her appointment Lathus was photographed at an immigrant's rally standing near persons believed to be Antifa. The councilmember removed Lathus from the CPAB even after she publicly denounced Antifa. Lathus sued in federal district court. She lost and appealed to the 9<sup>th</sup> circuit court of appeals. It affirmed, holding: 1) the speech/activities of the plaintiff could be imputed to the assigning councilmember; 2) plaintiff is the public face of her appointee; and 3) she could therefore be removed for lack of political compatibility by undermining the council's credibility and goals of the board.

C) Standing:



In the 6<sup>th</sup> circuit court of appeals (which covers Ohio and other midwest states), residents and nearby property owners sued to invalidate a variance approved by a county board of adjustment and appeals based on due process violations. The court denied relief since the plaintiff did not have a property interest in the property that was the focus of the variance. This was the decision despite the fact that one of the voting board members had an undisclosed financial interest in the property. The boardmember once owned the property, then transferred it to his son and retained a mortgage on it. The boardmember did not recuse himself nor disclose his interest and the variance was unanimously granted. The plaintiff did not attend the hearing, submit objections, or file an appeal. The variance was to allow a commercial property adjustment to parking requirements, setbacks and fencing adjacent to a residential community. (*See Brooks, et als. v. Butler County, et als.* # 21-4129 (6<sup>th</sup> Cir. Decided July 7, 2022 UNPUBLISHED).