STATE OF WISCONSIN

STATE PERSONNEL BOARD

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MARK A. WEBER,

Appellant,

v.

DAVID ADAMANY, Secretary,
Department of Revenue,

Respondent.

Case No. 75-235

* *

OFFICIAL

OPINION AND ORDER

Before: JULIAN, Chairperson, SERPE, STEININGER, WILSON and DEWITT, Board Members.

FINDINGS OF FACT

Appellant is employed in the classified service as a Property Assessment Technician 2 in the Fond du Lac Property Assessment Office, Bureau of Property and Utility Tax, Department of Revenue. On September 23, 1975, the Appellant filed a Request for Approval of Outside Employment pursuant to the Department of Revenue Code of Ethics, Administrative Directive 365-1, requesting approval of employment as a real estate salesman. On October 6, 1975, the Director of the Bureau of Property and Utility Tax denied the request, which was appealed by the Appellant to the Secretary of Revenue. On October 30, 1975 the Deputy Secretary upheld the denial.

The Appellant then filed an appeal with the Director of the Bureau of Personnel, who referred it to this Board with a request that it be accepted as an appeal of a third step grievance decision. This was received at the Board office December 22, 1975. A prehearing conference was held January 9, 1976, at which the parties agreed to submit the appeal for decision on the basis of written statements and documents in lieu of hearing, reserving the right to a hearing in the event that this submission revealed a dispute over material facts. The written materials were submitted and no hearing was requested or held.

Based on the written materials in the record, we find that there are no significant disputes over material facts. The Appellant's work involves data concerning real estate transactions in the manufacturing

and vacant commercial land area. This work involves preliminary steps in the valuation of commercial property, including recording the sale prices of commercial property and the Department's assessment of such property, photocopying commercial sales forms, and mapping land sales from legal descriptions. His work brings him in contact with Wisconsin Real Estate Transfer Returns, which are required by state law to be filed in connection with real estate sales in Wisconsin. These forms contain the names of the buyer and seller, the nature of the transfer, the intended use of the property, the legal description, and the purchase price. The public does not have access to these forms which are restricted to government use.

Other personnel in the Fond du Lac office are involved in similar duties in the residential area, although manufacturing is a separate section organizationally and is on a separate floor of the building.

The Appellant's projected part-time employment would be primarily within the field of residential sales, although on occasion the firm for which he would work has a commercial listing and the Appellant might be required to respond to an inquiry regarding it.

CONCLUSIONS OF LAW

The basis for the authority exercised by the Respondent in denying Appellant's request for approval of outside employement is found in Chapter 19, Subchapter III, CODE OF ETHICS FOR PUBLIC OFFICIALS, and specifically S. 19.45(11)(a), Wis. stats.:

> The director of the bureau of personnel shall adopt rules to implement a code of ethics consistent with this subchapter for classified and unclassified state employes not included in S. 20.923, except university of Wisconsin system teaching personnel.

Pursuant to this directive the director has adopted Ch. Pers. 24, Wisconsin Administrative Code, which includes S. Pers. 24.01:

> This code of ethics is promulgated under the directive of section 11.05(11)(a) [19.45(11)(a)] Wis. stats., to prevent activities which cause, or tend to cause a conflict of interest to employes of this state;

and S. Pers. 24.09(1):

> With the prior approval of the director, an appointing authority may modify this chapter to permit the development of provisions unique to a particular department, office or position in conformity with chapter, [sections 19.41-19.50] Wis. stats., and this chapter.

Pursuant to this provision the Respondent established by administrative directive a departmental code of ethics. This code of ethics regulates employes' outside employment as follows, paragraph III. A. 1:

> The code does not prevent employes from accepting outside employment as long as it will not interfere with their regular state duties. However, employes of this department are required to have the written approval of their division administrator for all outside employment . . . Employes of the department will not be permitted to hold outside employment which involves performing investigations, detective work, preparation of tax returns, appraisal or valuation work, bookkeeping or accounting or the practice of law, if such outside work is related to or conflicts with their regular state duties. ...

It is generally considered improper for a public official to use his or her public office for private gain — i.e., income beyond the regular salary for the position. Thus the legislature has seen fit to prohibit the use of a "public position or officer to obtain financial gain for himself . . . or for any business with which he is associated." S. 19.45(2), Wis. stats. In the general statement of intent of the Code of Ethics, the legislature has stated: ". . . a state public official holds his position as a public trust, and any effort to realize personal gain through official conduct is a violation of that trust." S. 19.45(1), Wis. stats. Beyond these specific prohibitions it seems fairly clear that conflicts may arise from situations where there are no direct ascertainable financial benefits to the public official or employe, but where the potential for gain is so great that the activity is or should be deemed a conflict of interest. For example, if a state employe were responsible for deciding what land were to be condemned for highway construction, there could be little question but that it would be a conflict of interest for him or her to engage in real estate transactions in the same geographic areas covered by his or her official duties, despite any denial of intention to use official knowledge for personal gain. Problems in defining conflicts arise as the relationship between official duties and private pursuits grows more remote and the opportunity for financial gain grows less.

These considerations are reflected to some extent in the Code of Ethics promulgated by the Director in the Wisconsin Administrative Code within the language S. Pers. 24.01: Policy Statement: "This code of ethics is promulgated . . . to prevent activities which cause or tend to cause, a conflict of interest to employes of this state." (Emphasis supplied.) In other words, in attempting to determine how far the law's

coverage extends on a continuum between situations involving no conflict and situations involving clear conflict, this statement of intent indicates the law is to be interpreted expansively.

Inasmuch as this language is not found in the enabling statute, the first question that must be resolved is whether the rule is within the authority expressed in the statute: "The director . . . shall adopt rules to implement a code of ethics consistent with this subchapter . . . ." S. 19.45(11)(a). We conclude that the language of the Director's rule is implicit in a code of ethics and within the purview of this statutory authorization. This conclusion is consistent with the language of the Wisconsin Supreme Court calling for the liberal construction of such enactments to favor protection of the public. See State ex rel Beierle v. Civil Service Commn., 41 Wis. 2d 213, 219 (1969):

> The purpose of this municipal ordinance is to require full devotion to public duty and to insure freedom from situations which might give rise to a conflict of interest in a public official. Such an ordinance should be read in favor of the public and for the protection of the public. Public officials cannot object if they are held to a strict accounting of their stewardship of public business. (Emphasis Supplied.)

Furthermore, the Supreme Court's interpretation of this ordinance to "insure freedom from situations which might give rise to a conflict of interest" is consistent with the generally understood law in this area:

> The basic idea behind conflict of interests is that a public servant occupies a position of trust and confidence. This idea was borrowed from the common law rules of trusts and imposed on the public servant the obligation of acting solely in the interests of the cestui que trust, the public. This idea, however, did not remain static, but rather broadened itself to include the situation not only where the officer actually breached his fiduciary obligation, but also where he even put himself into a position which allowed public doubts to arise as to his undivided loyalty and integrity. A situation of possible conflict, rather than actual breach, has thus become the scope of inquiry in this area.
> Note, Conflict of Interests: State Government Employes, 47 Va. L. Rev. 1034 (1961)

Section III. A. 1. of the department's ethics code lists a number of occupations, not including real estate sales, which are proscribed if work by department employes in such operations "is related to or conflicts with their regular state duties." The Appellant argues that because this listing does not include the employment he seeks it must be interpreted as permitting such employment. The Respondent argues that this enumeration is intended as a basic guide not intended to cover every possible situation.

The general guide to statutory construction analogous here is that of express mention, implied exception, or, "the mention of one thing implies the exclusion of another. ..." 73 Am. Jur. 2d Statutes S. 211, p. 405. However, this guide is not without its exceptions. If the department intended this enumeration to be way of example, it undoubtedly would have been much clearer and more expedient to have said so explicitly in the directive. However, we must interpret this language in light of the intent of the directive taken as a whole, as well as the overall intent of the enabling statute and administrative code provisions, and can provide the omitted language where necessary. See 82 C.J.S. Statutes S. 344, pp. 689:

> While ordinarily a court must construe and give effect to the language of the statute as written, and cannot add to the words used, where it appears from the context that certain words have been inadvertently omitted from a statute, the court may supply such words as are necessary to complete the sense, and to express the legislative intent.

See also Pfingsten v. Pfingsten, 164 Wis. 308, 313 ( ).

> A statute may be plain and unambiguous in its letter, and yet, giving it the meaning thus suggested, it may be so unreasonable or absurd as to involve the legislative purpose in obscurity. ... In such case, or when obscurity otherwise exists, the court may look to the history of the statute, to all the circumstances intended to be dealt with, to the evils to remedied, to its reason and spirit, to every part of the enactment, and may reject words or read words in place that seem to be there by necessary or reasonable influence, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with, or even contradict, the letter of the enactment.

In this case it would subvert the clear intent of the directive to restrict the prohibition of outside employment to those enumerated in S. III. A. 1. This result also would clearly be at odds with the intent of the enabling statute and administrative code provision.

We are not as restricted in our interpretation of administrative directive as is a court in its interpretation of a statute enacted by the legislature. The administrative directive, which does not have the force and effect of law, must be read to harmonize with statutory and administrative code provisions.

Thus we conclude that the enumeration of occupations in S. III. A. 1. is meant to be by way of illustration only.

Applying the code of ethics as interpreted to the facts of this case, we conclude that the Respondent must be sustained in his decision to prohibit the outside employment sought inasmuch as it would tend to cause a conflict of interest. By this conclusion we of course do not call into question in any manner the Appellant's integrity, which is not at issue here. The basis for the conclusion is the fact that as a state employe the Appellant is required to work with data that is of direct potential benefit to him in the private employment he seeks. The Appellant has admitted that the real estate firm handles an occasional commercial listing. Even if the Appellant were not required to respond to a request for information on the listing, which he would be, the opportunity to discuss the listing with other members of the firm and draw on his state-supplied sources of knowledge of sales of commercial property would tend to cause a conflict of interest.

Even if the firm entirely restricted its efforts to residential sales, there is enough potential conflict to support the decision to prohibit the Appellant's employment. This potential conflict comes from two sources. The first is the information available from fellow state employes. The Appellant points out that anyone could seek this information from these employes. This misses the whole point of the conflict of interest prohibition. As a fellow state employe the Appellant is in a unique position to obtain this information. To reiterate, we do not mean to intimate that the Appellant would actually seek to obtain this knowledge. The point is that his position as a state employe puts him in a position of relative ease of access not possessed by

other people. The second source of potential conflict lies in the connection between residential and commercial sales. We believe it reasonable to conclude that to some extent commercial property value has the potential to affect the value of nearly residential property. In this event the Appellant's knowledge of commercial sales and access to the transfer returns potentially would benefit his private employment.

The Appellant has raised a collateral issue concerning the provision of S. 16.05(2), Wis. stats. that the Board hold a hearing within 45 days after receipt of a request for an appeal. However, this appeal or request for appeal was received by the Board on December 22, 1975. A prehearing conference was held on January 9, 1976, at which point the parties agreed to "submit this matter for decision on the basis of written statements and documents in lieu of a hearing," prehearing conference report dated January 9, 1976, and there was no request for hearing following the submission of written materials. We conclude that this was an effective waiver of hearing. Furthermore, the Wisconsin Supreme Court has held that such time limits are directory and not mandatory. See Will v. H. & S. S. Department, 44 Wis. 2d 507, 517-518 (1969):

> The general rule followed in the construction of time provisions in statutes has been stated as follows:
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> '. . . . a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation.'
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> . . . . the situation is analogous to the case where this court held a sixty-day time limit within which the state employment relations board was required to make a decision directory, not mandatory. In the case before us, not only is there no cutoff of the right to proceed, but no penalty is placed upon failing to meet the schedule set forth.

For all of the foregoing reasons we conclude that the decision of the Respondent on this grievance must be sustained.

ORDER

IT IS HEREBY ORDERED that this appeal is dismissed.

Dated March 22, 1976. STATE PERSONNEL BOARD

Percy L. Julian, Jr., Chairperson