

DEPARTMENTS

Ethics Inquiries

The Moonlighting Employee

ICMA members engaged in a lively exchange in the Association's online discussion group on local government management. The essence of the discussion and debate on employees who moonlight is captured in this column. Contributors' names or locations are not included here, except when they themselves granted ICMA the permission to use this information in the text.

The online discussion began with this scenario submitted by a participant:

An elected official has requested that one of our IT people do some computer work for this elected official's business, noting that he would pay the employee and that the work would be done after normal working hours and on the employee's own time. We also have dealt with a request from a department director, who asked if she could pay one of the maintenance workers to do some work at her home for pay.

1. Does your locality have any policies that address employees' moonlighting for elected officials or for department directors and other staff members?
2. What potential conflicts do you see arising from allowing employees to work on the side for elected officials, department directors, or other staff members?

City Manager

Here is what contributors to the discussion had to say:

My approach is to think how this story would look if it appeared on the front page of the newspaper the next day. Would the public really think the employee was doing this on his own time and that no city time was spent on the project? It might be difficult to explain.

While our city does not have a written policy that prohibits it, when asked, I try and steer our employees away from such jobs.

City Manager

If your employees are like most, they appreciate the opportunity to earn some extra money. Should we keep them from earning extra income on their own time?

The question I would ask is whether or not this outside employment could make a difference in the employee's evaluation.

The best approach is to adopt a written policy before it becomes an issue.

Town Manager

Our city government does not allow this type of activity.

City Manager

Our city has had a few instances of this sort of outside employment, and we do not have any policy. While we have not had any problems so far, I have thought [that there is a] potential for a public perception problem. It is sad when we have to restrict people's rights, not because of actual wrongdoing but because of possible misconceptions and misperceptions.

When elected and appointed officials and employees choose to work for government at any level, they recognize that they must give up some of the rights they have chosen to defend and protect by working for government. Sometimes, government feels compelled to develop policies to restrict officials and employees in their personal lives, limiting their opportunities to hire particular individuals or to work for particular individuals. This sort of restriction can make public employees and officials feel like second-class citizens.

Because of these complexities, it's important to take care in adopting new policies, as they may needlessly take away the rights of our employees.

City Manager

Our city requires full-time employees to seek management approval before working at another position during outside hours. Exceptions to this are jobs that would be considered to be nonrecurring, such as giving a lecture at a college.

This being said, as long as it isn't detrimental to the employee's performance here, I generally support an employee's request for outside employment. In small towns, it can be difficult for employees/ councilmembers to maintain an arm's-length relationship in every aspect of their lives. At the same time, I prefer that employees not work for individual councilmembers. If they do, it is in their best interest to keep impeccable records of hours worked and dollars paid.

Personally, it would have been convenient for me to hire employees for several jobs at my home, work that could have been done with my own tools (and for market pay). I have not offered these opportunities to town employees, however, so that I avoid even the appearance of impropriety.

Town Manager

Our city government has a general policy related to work outside of city employment. The guideline considers city employment primary and all other employment secondary. It includes certain prohibitions against conflicts of interest but leaves plenty of room for interpretation. The policy requires employees to register and disclose their outside employment each year, usually with their annual evaluation. This discipline helps the city screen for any abuse and can avoid potential conflict situations.

We advise employees not to do outside work for managers or city council, as there could be an appearance of a conflict of interest that could become a legal conflict of interest. Even the most honest of arrangements [may not] appear that way to others. There can be allegations of improper use of city funds or equipment, employee favoritism, or retaliation.

For example, the city could face a charge of theft of city property and funds, as well as discrimination and unlawful distribution of employee leave time, when a supervisor has had his subordinates "helping with a fence and landscape project at his home." Legal issues that could arise include employment discrimination charges, theft, health stress claims, wrongful termination, reinstatements, and valid termination. It can take years to clean up a problem in a department afterwards and for management and employees to regain a respectful relationship.

It is not a good idea to adopt a policy at the same time as you are dealing with an immediate request. If the employee is an exempt manager or has a direct report to you, you should discourage the employee from working for the councilmember by explaining your concerns about the appearance of or the potential conflict of interest. Assuming that this approach is successful, then you can help the employee extricate himself or herself from the deal with the councilmember. It is tricky but necessary. Sometimes, legal counsel can be helpful in talking with the employee. Be clear about your position before you start confronting people.

If the employee is nonexempt, a good strategy is to work on a policy to permit outside employment but to establish some parameters for the approval. Outside employment is a sensitive area. Employees have certain protections in their pursuit of outside employment, even by their primary employer, so long as it is not affecting their primary employment in a direct and adverse or unlawful way.

City Manager

In Oregon, the laws regulating ethics for public officials are set at the state level (city policies can be more strict). There are several ways in which this situation could violate Oregon state law and city policy.

First, state law and city policy require that no city resources be used in any outside employment. Thus, the computer technician/parks maintenance workers could not use any tools or vehicles for any outside employment, regardless of who was hiring them. But under Oregon law, there are additional potential violations for the councilmember, the department head, and the employee performing the work.

State law and city policy prohibit using public office for personal financial gain (or avoiding financial detriment). If the computer technician gave the councilmember a discount over what they have ordinarily charged (if they have worked for others outside the city government), the councilmember would be in violation. Theoretically, if the technician charged the councilmember a rate lower than other businesses performing the same service, the councilmember could also be in violation.

The technician could potentially violate city policy and state law by providing these services if they do not have an established outside business. They would fail the "but for" test. The technician would not have been asked to work on the councilmember's computer "but for" his or her employment at the city (a violation of the personal financial gain provision).

It's possible that one of the reasons the councilmember and department head want to hire city staff for these services is that they are paying less than they would for a similar service from a private sector competitor. This would suggest that the councilmember or department head might profit from their public position in violation of Oregon's law.

The employment may be acceptable if the employees have existing businesses and if the councilmember and department head have procured their services through an advertisement or some means outside the city government and paid the same fee as any ordinary citizen. But then the question would be: Why not just hire the competing business and avoid any appearance of impropriety?

City Manager

In our business, perception is reality. The relevant policy of the city of Sterling, Kansas (population 2,642), follows:

Section 4. Outside Employment

No employee of the City of Sterling shall be permitted to engage in any outside employment, where such employment conflicts or interferes with the performance of City duties.

No employee shall conduct, or in any way engage in, another occupation or field of endeavor while on duty with the City.

The employee should inform the outside employer that the City job comes first when scheduling conflicts occur, including overtime and callbacks.

Section 6. Favors, Gifts, Gratuities, Rewards

No employee shall seek, receive, or give any gratuity (in the form of compensation, entertainment, trips, gifts, favors, or otherwise) of "significant value" from or to those who have or seek business dealings with or receive service from the City of Sterling.

It is expressly prohibited for any employee, in any way, to use their position or influence for private gain for themselves or others.

Brian Silcot, City Manager, Sterling, Kansas

Willard, Ohio's policies read somewhat like Sterling, Kansas' policies:

Incompatible Employment.

(a) No full-time employee of the City may engage in any occupation or outside work that is incompatible with his employment with the City. If any employee engages in work similar to his City employment on off-duty hours, no City equipment shall be utilized.

(b) Any employee of the City engaging in outside work for compensation shall inform the Personnel Director, in writing, of this work, its nature, and the time consumed in or on such work. The Director shall decide whether or not such outside work is incompatible with City employment and shall regulate the number of such hours for this outside work. Failure to comply with this section shall leave the employee open to disciplinary action.

Gratuities.

No employee of the City shall accept any gratuity, gift, or other valuable thing for his personal use from any other person or corporation when such a gift is given with the expectation or understanding that the employee will attempt to secure for such person or corporation, at the hands of the City, better or more favorable treatment.

As I serve also as the personnel director, I look closely at any request for outside employment. If there is even a hint of potential incompatibility, I deny the request.

Working for a councilmember or someone who is directly above them in the chain of command, or one of those persons' immediate family members, is a definite no-no. I can appreciate wanting to give public employees the opportunity to make some extra money for their families. But every job brings with it certain conditions of employment, and this has to be one of those conditions for public employment. In a perfect world, we wouldn't worry about appearances or what potential outcomes may be, but this isn't such a place. As public servants, we all must go beyond what the private citizen does in order to maintain our assertions that public programs are provided fairly, honestly, and without being compromised. The value of that integrity is incalculable and next to impossible to regain once lost.

Brian Humphress, City Manager, Willard, Ohio

Editor's note: ICMA's management discussion group is open to ICMA members working in local government. For more information about joining ICMA, visit ICMA's Web site, icma.org. At the site, members can click on "Interest Groups and Discussion Lists" and then on "Listserve" for information on signing up for the discussion list.