

MEMORANDUM

CALFO HARRIGAN LEYH & EAKES LLP

TO: Craig Watson, General Counsel, Port of Seattle

FROM: Timothy G. Leyh and Katherine Kennedy 

DATE: September 10, 2012

RE: Port CEO's Participation on Expeditors' Board

I. Issue and Short Answer

This memo addresses the issue of whether the Port of Seattle's Code of Conduct: Workplace Responsibility Employee Handbook ("Employee Code of Conduct"), Code of Ethics for Port Commissioners ("Commissioners' Code"), or RCW 42.23, Washington's Code of Ethics for Municipal Officers ("Statutory Ethics Code"), preclude Port CEO Tay Yoshitani from sitting on the Board of Directors of Expeditors International of Washington, Inc. ("Expeditors"), a for-profit corporation. We conclude that there is no ethical prohibition under the circumstances presented here, as described below.

II. Assumed Facts

Tay Yoshitani is CEO of the Port of Seattle, receiving an annual salary of \$367,000. Mr. Yoshitani's employment contract with the Port permits him to participate in an outside corporation's Board of Directors. The contract states, in pertinent part:

During the term of this Agreement, CEO may on his own time (e.g. after close of business or while on Paid Time-Off), participate as a member of a Board of Directors for a private entity; *provided*, that prior to accepting such appointment, the Port's General Counsel determines that CEO's participation would not create or appear to create a conflict of interest, or is contrary to any other provision of the Port's Code of Ethics for Employees.

We understand that the term allowing Mr. Yoshitani to serve on a private company board was specifically negotiated as part of his current employment agreement, which was approved by the Port Commission in 2011. We understand that Mr. Yoshitani regarded this term as material to his decision to remain with the Port. We think a reviewing court would find these facts significant, because they suggest a particular focus on this right as a part of Mr. Yoshitani's employment agreement.

In August 2012, the Expeditors Board of Directors announced that it had elected Mr. Yoshitani to its nine-member Board of Directors, effective August 6. Mr. Yoshitani was simultaneously appointed to Expeditors' Audit Committee, Compensation Committee, and the Nominating and Corporate Governance Committee. We understand that Mr. Yoshitani did not solicit the invitation to the Board; it was advanced by Expeditors in light of Mr. Yoshitani's extensive experience and unique perspectives on international trade.

Board membership requires attendance at four meetings a year. The Board provides overall management of the "affairs, property and interest of the corporation" and is not involved in day-to-day operations. The Committees are vested with such powers as the Board designates, but may not usurp the functions of the Board. Expeditors pays its directors, including Mr. Yoshitani, a \$30,000 a year retainer, plus \$1,000 for each day they attend board meetings or do other company work, and gives them restricted stock each year, potentially worth \$200,000.

Mr. Yoshitani, on May 21, 2012, provided a Conflict of Interest Disclosure Form to the Port, stating:

I have joined the board of directors of Expeditors International. Expeditors is a company specializing in seaborne [sic] cargo logistics. It has no contracting relationship with the Port of Seattle and as a member of the board I do not anticipate any circumstance that would lead to a conflict or perceived conflict with my rol[e] as Port of Seattle CEO. I[f] any such circumstance does arise I understand that I would recuse myself from participation in that matter on behalf of Expeditors Intl.

The Port's General Counsel conducted an analysis of the Port's Code of Ethics for Employees ("Employee Code of Conduct") and RCW 42.23, and concluded that "CEO Yoshitani has fulfilled his obligations under contract, statute and policy."¹

Expeditors is an international company offering air and ocean freight consolidation and forwarding, vendor consolidation, customs clearance, cargo insurance, distribution, and other logistics services. It is a Fortune 500 company with more than 13,000 employees worldwide.

We understand that in 2011, about 37% of Expeditors' consolidated net revenues were from airfreight services, either as a freight consolidator or an agent for the airline that carries any given shipment. When acting as a freight consolidator, Expeditors purchases cargo space from airlines and resells that space to its customers.

About 23% of Expeditors' consolidated net revenues were attributable to ocean freight services. Among other ocean freight functions, Expeditors operates an entity that contracts with ocean shipping lines to obtain transportation for a fixed number of containers between various points at an agreed rate. The company also may prepare documentation, procure insurance, arrange for packing and crating services, and provide consultation.

The remaining 40% was attributable to customs brokerage and other services. The company assists importers to clear their shipments through customs by preparing documentation, calculating and providing for payment of duties and other taxes on behalf of the importer, arranging for the required government inspections, and arranging for delivery (as well as other value-added services at destination).

¹ In that analysis, General Counsel Craig Watson notes that Mr. Yoshitani was "officially invited to join the board" of Expeditors in August 2012. Mr. Yoshitani's Conflict of Interest Disclosure Form in May 2012 stated that he already had joined the board, while in fact he was not formally elected to the board until August. We understand that Mr. Watson, in the Spring of 2012, provided Mr. Yoshitani with an oral opinion stating that there would be no ethical violations, and that Mr. Watson's written opinion was provided when Mr. Yoshitani was, in fact, elected to the board.

The Port of Seattle is a public agency whose primary mission is to invest public resources to advance trade and commerce, promote industrial growth, stimulate economic development, and create jobs. The Port owns and operates cargo and airport facilities, marinas, parking garages, conference facilities, and grain terminals, as well as four thousand acres of industrial and commercial property.

Expeditors has no contracts or other direct relationship with the Port of Seattle, although Expeditors has contracts with shippers who use Port of Seattle facilities.

III. Legal Authorities and Analysis

A. General Standards.

According to Eugene McQuillian, *The Law of Municipal Corporations* § 12:173.22 (3d ed. 2012),

[p]ublic confidence requires that municipal officials avoid conflicting interests that convey the perception that a personal rather than the public interest might affect decision-making on matters of concern. Officials must be free of even the potential for entangling interests that will erode public trust in government actions. Thus, it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself from acting on a matter of public interest.

The general rule is that there should be strict enforcement of conflict of interest statutes so as to provide a strong disincentive for officers who might be tempted to take personal advantage of their public offices. The test for disqualification is fact-sensitive and depends on whether, under the circumstances, a particular interest had the likely capacity to tempt the official to depart from his sworn public duty.

Mr. Yoshitani's relationship with the Port is governed by his employment contract, which was approved by the Port Commission, including the provision that Mr. Yoshitani could, on his own time, participate as a board member for a private entity as long as the Port's General Counsel determined that such participation would not create or appear to create a conflict of interest or otherwise violate the Port's Code of Ethics for Employees (in the Code of Conduct).

Mr. Yoshitani has complied with the requirements of his employment contract, obtaining an opinion from General Counsel that the CEO's participation on Expeditors' Board of Directors violates no relevant ethical rule. If the Port Commission sought to force Mr. Yoshitani from Expeditors' Board of Directors after it specifically approved the contract permitting Mr. Yoshitani to so serve, the Port could be faced with a breach-of-contract lawsuit.

B. Employee Code of Conduct: Workplace Responsibility Handbook

The Port's Employee Code of Conduct (referred to in Mr. Yoshitani's employment contract as "the Port's Code of Ethics for Employees") applies to all employees, including the CEO, requiring that they "serve the Port with the highest standards of ethical conduct and . . . avoid situations that create a real or perceived 'conflict of interest.'" The Code states that "the Port's interests [must] come first," and requires employees to disclose all potential conflicts of interest as well as to report any potential violations.

In particular, the provisions of the Code of Conduct addressing "Employee Ethics and Conflict of Interest" state:

A "conflict of interest" exists when an employee's duty to give undivided loyalty to the Port is influenced, or could be influenced, by personal interest. The fact of a conflict of interest is not in itself a violation of the policy. Instead, it is something that should be reported (see Section IV) so the Port may ensure that decisions are not made that could be influenced by the conflict of interest, or perceived to have been influenced by it.

....

Port employees must avoid real, or perceived, conflicts of interest between their private activities and their duties and responsibilities as employees. At a minimum, potential conflicts should be reported so that the Port may consider what, if any, actions should be taken to ensure that decisions are not influenced (or perceived to be influenced) by personal interests.

While the Code of Conduct addresses "perceived" conflicts as well as "real" ones, the perception of a conflict must meet an objective, "reasonable person" standard. A conflict must be either actually apparent or reasonably apparent based on the actual facts, not supposition. *See*

Code at III (“Employees must avoid circumstances in which it appears, or to a reasonable person might appear, that the employee is requesting or otherwise seeking special consideration, treatment or advantage because of the employee’s position with the Port”); *see also, Tatham v. Rogers*, 2012 Wash. App. LEXIS 1939 (Aug. 14, 2012) (under the appearance of fairness doctrine, the test to determine whether “impartiality might reasonably be questioned is an objective test that assumes that ‘a reasonable person knows and understands all the relevant facts.’”).

The Employee Code of Conduct gives examples of different types of actual and potential conflicts. “Conflicts from business relationships” may arise when an employee “has a Financial or Beneficial Interest in . . . an organization that competes with the Port, is doing business with the Port; or plans to do business with the Port.” No employee may have a financial or beneficial interest, direct or indirect, in any contract by “or for the benefit of the Port.” The Code of Conduct also precludes an employee from “participat[ing] in any decision-making, review, approval, selection, authorization or supervisory activity concerning any contract or Port transaction in which he/she . . . has a Financial or Beneficial Interest.” “Financial or Beneficial Interest” is defined to include an “ownership interest in an amount or value in excess of \$1,500,” although—unlike the Commissioners’ Code—the definition does not expressly mention ownership of stock. The Code of Conduct does state that employees should “avoid owning interests in or operating companies that compete with the Port, or that sell (or plan to sell) products or services to the Port, other than minimal amounts of stock in publicly-traded companies).”

Mr. Yoshitani stated in his Conflict of Interest Disclosure Form that neither he nor any relative has any financial or business interests in Expeditors, and that Expeditors “has no contracting relationship with the Port of Seattle.” Even if the CEO’s stock ownership in Expeditors (after he began service on the Board) is considered a financial or business interest, we

understand that Expeditors does not compete with the Port, do business with the Port, or plan to do so. The “direct or indirect” language of this Policy modifies “financial or beneficial interest” in a contract, and because there apparently are no contracts or other direct dealings between Expeditors and the Port, the language would not apply here.

The Code of Conduct also states that “conflicts from outside employment” may arise from “[w]orking with any organization that has a business relationship with the Port, or seeks to have one, [where] that business receives, or may receive, more favorable treatment as a result of the employee’s relationship with the business.”

As a result, working for those with whom the Port has a business relationship is prohibited unless expressly approved in writing by the Workplace Responsibility Officer.

Even if outside employment is with an organization that does that does not have a business relationship with the Port, conflicts of time and energy may arise. Accordingly, salaried, exempt employees must obtain prior written approval from his or her Department Head before holding a job with another organization. If such approval is granted, the employee acknowledges that satisfactory job performance with the Port must be maintained and that no conflict of interest can exist. (Emphasis added.)

All employees with other jobs will continue to be judged by the same performance standards and will be subject to the Port’s scheduling demands, regardless of any existing outside work requirements. If the Port determines that an employee’s outside work interferes with performance or the ability to meet the Port’s changing requirements, employees may be asked to terminate outside employment in order to continue employment with the Port.

The “time and energy” considerations of this provision could be implicated in Mr. Yoshitani’s case even if Expeditors has no business relationship with the Port. Under his employment contract, however, Mr. Yoshitani may participate in Expeditors’ matters on his own time (*e.g.*, after close of business or on his time off). The fact that Mr. Yoshitani’s contract with the Port specifically allows him to participate on a private entity’s Board, provided that General Counsel determines that such a role will not “create or appear to create a conflict of interest, or is

contrary to any other provision of the Port's Code of Ethics for Employees," corroborates the conclusion that Mr. Yoshitani has complied with the Employees' Code of Conduct regarding "conflicts with outside employment."

Another provision of the Code, "Use of Position for Personal Benefit," addresses the type of conflict that may arise "when an employee is in a position to exploit his or her role with the Port to advance his or her personal interest."

Employees must avoid circumstances in which it appears, or to a reasonable person might appear, that the employee is requesting or otherwise seeking special consideration, treatment or advantage because of the employee's position with the Port.

It could possibly be argued that Mr. Yoshitani used his position as Port CEO to obtain the "special privilege" of serving on Expeditors' Board. However, I have found no authority for the notion that membership on a board (particularly when expressly permitted by an employment contract) is a "special privilege" within the contemplation of the ethics rule; the term appears intended, instead, to refer to such things as "abuse of office" by doling out "favors" contrary to law and the public interest. *See, e.g., Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 692 (2002) (County planning director waiving compliance with zoning laws for a hotel development could constitute giving a "special privilege" to another, contrary to RCW 42.23.070(1)).

Furthermore, the Expeditors' Press Release announcing Mr. Yoshitani's election to the Board cited his "wealth of experience and a distinctive set of talents" that qualified him for the position, as well as his "unique" perspective on international trade. These were the motivating factors for Expeditors' action with regard to Mr. Yoshitani, not his current position at the Port.

The Employee Code of Conduct, in "Duty to Report Conflicts of Interest," reiterates that "the fact of a conflict of interest is not, in and of itself, a policy violation. Rather, it is the failure to disclose a real or potential conflict of interest, and/or taking action on behalf of the Port when there is a real or perceived conflict of interest that is of concern to the Port." No "real" conflict

of interest has been identified here, and Mr. Yoshitani provided the Port with a “Conflict of Interest Disclosure Form” agreeing to recuse himself in the event of an actual or perceived conflict.

The Code states that after disclosure, the “Workplace Responsibility Officer” should “document the disclosure and determine any steps that should be taken to avoid the employee’s participation in any decision.” Mr. Yoshitani’s contract effectively gave that role to the Port’s General Counsel. The General Counsel documented the disclosure and conducted an analysis. He concluded that that there was “no direct conflict,” and indeed that “a thriving Port of Seattle is directly aligned” with Expeditors’ business strategies. He stated: “It can even be argued that CEO Yoshitani’s participation on the Expeditors Board will give him a unique insight into the needs of businesses engaged in the shipment of goods that will benefit the Port.” Any potential for a perceived conflict was cured by Mr. Yoshitani’s “express commitment to recuse himself from participation in any Expeditor’s matter.” These conclusions appear reasonable under the circumstances.

C. Commissioners’ Code

The Code of Ethics for Port Commissioners was enacted by Resolution 3583 on September 11, 2007. While it does not by its terms apply to the Port’s CEO, its standards likely are applicable to him at least by analogy.² The Preamble states, in pertinent part:

The Code is intended to provide guidance in the event of conflicts between a Commissioner’s personal or professional interests and the interests of the Port. It is not intended to be comprehensive in scope addressing every perceived conflict or issue; rather, it should be viewed as a framework which Commissioners and the public can apply to particular circumstances. Commissioners are elected officials entrusted with public confidence.

² It is not referenced in Mr. Yoshitani’s employment contract, which requires that the Port’s General Counsel determine that “CEO’s participation [in a private entity] would not create or appear to create a conflict of interest, or is contrary to any other provision of the Port’s Code of Ethics for Employees (*i.e.*, the ethics provisions in the Code of Conduct: Workplace Responsibility Employee Handbook).

It is assumed and expected that a Commissioner will act in accordance with applicable law and with integrity, and will strive to avoid any appearance of impropriety in the conduct of his/her office. Ultimately, ethics for Port Commissioners are a matter of personal honesty, common sense and good judgment. Neither this, nor any other code, can be an adequate substitute for those attributes.³

The Code's "Standard of Conduct," Section 2, adds:

A Commissioner shall perform his/her official duties consistent with the highest standards of ethical conduct and in accordance with the Port of Seattle By-laws, in a manner that reflects the fiduciary duty to the Port and the residents of King County that is required and expected of elected officials.

In its "Conflict of Interest" provisions, Section 4, the Code prohibits Port Commissioners from knowingly engaging in activities "which are in conflict, or which have the potential to create a conflict, with the performance of official duties." Such a conflict, for example, may exist where a Commissioner "influences . . . the conduct of business between the Port and any entity when the Port Commissioner . . . has a Financial Interest in that entity . . ." The Code defines "Financial or Beneficial Interest" to include an "ownership interest (including without limitation, ownership evidenced by stock purchase) in an amount or value in excess of \$1500 . . ."

In addition, Section 3, "Use of Office," parallels the prohibition in the Employee Code of Conduct and RCW 42.23.070(1) against using a Port office to obtain special treatment for another entity (among other prohibitions). The relevant language is as follows:

A Port Commissioner shall not use his or her position to secure special privileges or exemptions for himself, herself, members of his/her Family or others.

The circumstances here, however, do not appear to implicate these prohibitions. Because Expeditors has no direct relationship or any contracts with the Port, and Mr. Yoshitani has

³ The Commissioners' Ethics Code creates a Board of Ethics comprised of five members, none of whom is a Port Commissioner or employee, empowered to receive and investigate any suspected or alleged violation of the Code and render written opinions, including advisory opinions regarding questions of ethics and conflicts of interest.

pledged to recuse himself from any situations that pose actual or perceived conflicts of interest, Mr. Yoshitani presumably will not be in a position to “influence the conduct of business” between the Port and Expeditors, or use his Port position to secure “special privileges or exemptions” for Expeditors, despite his ownership of stock in the corporation. Furthermore, as discussed above, it is unlikely that Mr. Yoshitani could be found to have violated this provision by using his position as Port CEO to obtain the “special privilege” of serving on Expeditors’ Board. Mr. Yoshitani did not solicit the Board position, but (as stated in an Expeditors Press Release) was elected in view of his wide experience and unique perspective on international trade.

D. Statutory Ethics Code (RCW 42.23)

The provision in Mr. Yoshitani’s employment contract permitting him to sit on the board of a private corporation under certain circumstances is not dispositive of the ethics issue, nor is compliance with the Port’s Employee Code of Conduct or Commissioners’ Code, unless those provisions incorporate and/or are consistent with state ethics law. In fact, the Port Codes are very similar to RCW 42.23.

RCW 42.23.030, “Interest in contracts prohibited—Exceptions,” states, in relevant part:

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.

In addition, RCW 42.23.070, “Prohibited Acts,” states:

- (1) No municipal officer may use his or her position to secure special privileges for himself, herself, or others;
- (2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter concerned with or related to the officer’s services as such an officer unless otherwise provided for by law.

- (3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.
- (4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.

A provision that potentially could apply in the current circumstances is RCW 42.23.070(1), which—like similar provisions in the Employee Code of Conduct and the Commissioners' Code—precludes use of an officer's position to secure “special privileges or exemptions . . . for others,” *i.e.*, for the private corporation on whose board a municipal officer sits.

In *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 692 (2002), the Washington Supreme Court applied that provision to find genuine issues of material fact regarding whether a County planning director violated RCW 42.23.070(1) by allegedly ignoring zoning requirements for the benefit of “others,” *i.e.*, a hotel developer, even though there was no evidence that the planning director had any interest in the hotel development.

Hubbard involved a claim for wrongful termination in violation of public policy, where plaintiff claimed the public policy was stated in the Ethics in Public Service Act. The Court of Appeals held there could be no such claim because of the absence of any interest by defendant in the hotel development. The Supreme Court reversed, holding:

RCW 42.23.070(1) creates a valid public policy in favor of prohibiting municipal officers from granting special privileges or exemption to others. In so holding, we recognize the burden this may place on public officials. However, because public officials serve the interests of the citizens of Washington, consistent with the Ethics in Public Service Act, we find it appropriate to hold them to a high standard.

Id. at 713. The Court noted that RCW 42.23.070, as original enacted, addressed only conflict-of-interest situations, but in 1994, it was amended to include the prohibition on use of an official position to obtain special privileges for others.

Under RCW 42.23.070(1) and the case law applying it, the analysis of Mr. Yoshitani's potential ethical violations cannot be limited to contractual conflict-of-interest situations. Mr. Yoshitani also may not use his position as Port CEO to "secure special privileges or exemptions" for Expeditors or himself. Again, the fact that the Port does not deal with Expeditors is relevant to the remote likelihood that Mr. Yoshitani would be in a position to seek special treatment for the corporation. And his commitment to recuse himself from any "conflict or perceived conflict" situation would obligate him in any situation—if any were to arise—where Expeditors could potentially receive special treatment.

This conclusion is buttressed by *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 106 P.3d 290 (2005), where Division 1 of the Court of Appeals held that a City Council member did not violate the "beneficial interest in a contract" provision of RCW 42.23.030 when there was no contract between the City and the towing company owned by the councilmember. In that case, the City's police had historically called on "Pete's Towing" for towing jobs, but there was no contract between the City and Pete's.

There is no evidence in this record that Councilman Petersen self-dealt with respect to any individual towing transaction or with respect to towing transactions generally. Instead, after Peterson took office, towing transactions were handled as they had been for decades previously—police officers and other authorized city staff decided which towing company to call, and not because Petersen took office but because they had always done it that way, they almost always caused Pete's towing. Thus, the trial court's ruling (finding a violation of RCW 42.23.030) is tantamount to a ruling that, given the preference among city police and other authorized officials to use Pete's Towing due to the superior service it provided, Petersen was simply disqualified from serving as a city council person for so long as he held any interest in Pete's Towing.

....

The City of Des Moines has not made any such contract, express or implied, with Pete's Towing. . . . Not only has Councilman Petersen engaged in no self-dealing, but even if inclined to do so, his ability, and that of the city council as a whole to affect the exercise of discretion by police is limited, both by statute and the Fourth Amendment.

Id. at 766, 768-69.

Similarly, in *In re. Petition to Recall Cynthia Olsen*, 154 Wn.2d 606, 116 P.3d 378 (2005), the Washington Supreme Court held that the "beneficial interest" provision of RCW 42.23.030 did not apply to noncontractual acts or decisions by a Port commissioner who had voted on a motion for the Port District to defend and indemnify the commissioner in an action alleging violations of the Open Meetings Act. The Court held that the decision to indemnify did not involve a contract; "we cannot see how Olsen has a beneficial interest in a contract between the port and counsel." *Id.* at 612-13.

Mr. Yoshitani cannot be prohibited, under his employment contract and the various ethics rules discussed herein, from serving on the Expeditors Board and committees when Expeditors has no contractual or other relationship with the Port. The CEO has committed to recuse himself from participating in any situations that would involve a conflict or perceived conflict between the Port and Expeditors. He cannot reasonably be foreclosed from sitting on Expeditors' Board of Directors on his own time.