

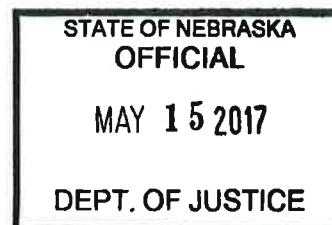


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17-003



SUBJECT: (1) Executive Director's Part-Time Work With Telecommunications Consulting Firm As Violation Of The Oath Required By Neb. Rev. Stat. § 75-106 (2009); And (2) Validity Of Executive Director's Employment Contract Permitting Termination For "Just Cause".

REQUESTED BY: Tim Schram, Chairman
Nebraska Public Service Commission

WRITTEN BY: David Bydalek, Deputy Attorney General
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INTRODUCTION

The Nebraska Public Service Commission ["NPSC" or "Commission"] has requested our opinion on two questions related to the Commission's Executive Director. The first question is whether the Executive Director's outside employment with a national consulting firm that provides economic, financial, and policy analysis for regulated industries, including telecommunications companies, violates the Executive Director's oath of office required by Neb. Rev. Stat. §§ 75-102 and 75-106 (2009). The second question is whether the Executive Director's employment contract, which permits termination for "just cause", is valid and effective, and precludes termination without cause.

For the reasons stated below, we conclude that: (1) The Executive Director's outside employment does not violate the oath required by §§ 75-102 and 75-106, as it does not result in the Executive Director being "indirectly interested in any common carrier" subject to the Commission's jurisdiction; and (2) The Executive Director's

employment contract, which creates a five year term and provides for termination only for “just cause”, is invalid and unenforceable, as the Commission lacks authority to create a term or tenure for the office of Executive Director created by § 75-106, or to alter the at-will nature of the office of Executive Director.

FACTS

Jeff Pursley commenced service as the Commission's Executive Director on July 1, 2015. On July 2, 2015, Mr. Pursley and the Chairman, on behalf of the Commission, executed a contract regarding Mr. Pursley's employment as Executive Director [the “Contract”]. The Contract establishes an initial five year term of employment (from July 1, 2015 to June 30, 2020), and includes provisions for renewal. The Contract also provides it “may be canceled or terminated for just cause by the NPSC at any time prior to its expiration.” “Just cause” is determined based on a finding by a majority of the Commission that one of several enumerated factors exist regarding Mr. Pursley or his performance as Executive Director. In addition to provisions governing the term of the agreement, renewal, and termination, the Contract includes provisions governing compensation and benefits, reimbursement of certain expenses, organization of staff, disability, and the conduct of an annual performance review. The Contract also specifically states: “Mr. Pursley may undertake other professional duties and obligations which do not represent a conflict or interfere with the performance of his duties as Executive Director.”

Prior to assuming his duties as Executive Director, Mr. Pursley was a Director with Parrish, Blessing & Associates [“PB&A”]. PB&A is a national consulting firm that provides economic, financial and policy analysis for regulated entities providing telecommunications, natural gas, electricity, and water services. Since commencing service as Executive Director, Mr. Pursley has maintained a part-time role with PB&A focused on federal telephone compliance work for companies outside the Commission's jurisdiction. Mr. Pursley has developed a model to automate the population of federal forms and supporting documentation for filings required by the FCC. The filings relate to “price cap” regulation, which is the manner in which larger incumbent local telephone companies interstate rates are regulated by the FCC. The interstate rates of these carriers are not subject to Commission jurisdiction. Mr. Pursley collects and imports the data for price cap filings by three carriers, none of which are subject to the jurisdiction of the Commission.¹ Windstream Communications, a carrier that does engage in activity regulated by the Commission, has recently contracted with PB&A to perform price cap filings with the FCC. While the model developed by Mr. Pursley is used for these filings, Mr. Pursley has no role in performing any filings for Windstream, nor would he do so for any entity subject to the Commission's jurisdiction. PB&A has also asked Mr. Pursley to participate in development of a similar model for companies subject to federal rate of

¹ The three companies are Alaska Communications Systems, Puerto Rico Telephone Company, and U.S. Virgin Island Telephone.

return regulation. As with the price cap model, this model would automate the population of various federal forms required by the FCC and would not apply to any services subject to the Commission's jurisdiction. While this model has not been completed, Mr. Pursley will have no involvement in use of the model or the development or review of any forms or rates for any company subject to the jurisdiction of the Commission.

Mr. Pursley's compensation from PB&A is based on his generic model work for both the current price cap model and the proposed rate of return model. His work is performed to ensure that the models are in compliance with federal requirements, and include continuing efforts to improve the efficiency of the models and compliance with new versions of software and related federal rules. Mr. Pursley's compensation is also based on direct work for Alaska Communications Systems, Puerto Rico Telephone, and U.S. Virgin Island Telephone. As noted previously, none of these companies are subject to the Commission's regulatory jurisdiction.

ANALYSIS

I. Does The Executive Director's Part-Time Employment With PB&A Constitute An Indirect Interest In A Common Carrier Which Violates The Oath Of Office Required By Neb. Rev. Stat. §§ 75-102 and 75-106?

The Executive Director is required to "take the same oath as the commissioners." Neb. Rev. Stat. § 75-106 (2009). In addition to the oath of office prescribed in the Nebraska Constitution, each Commissioner and the Executive Director "shall...swear that he or she is not directly or indirectly interested in any common carrier or jurisdictional utility, subject to the provision of Chapter 75, nor in the bonds, stocks, mortgages, securities, contracts, or earnings of any such common carrier or jurisdictional utility,...." Neb. Rev. Stat. § 75-102 (2009). As there is nothing to suggest that Mr. Pursley possesses a "direct" interest in any common carrier regulated by the Commission, the issue is whether Mr. Pursley's part-time work for PB&A constitutes an impermissible "indirect interest" in a common carrier regulated by the Commission.

"In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense." *Piska v. Nebraska Dep't of Social Services*, 252 Neb. 589, 594, 567 N.W.2d 544, 547 (1997). "[A]n appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it." *Henery v. City of Omaha*, 263 Neb. 700, 705, 641 N.W.2d 644, 648 (2002). "Statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary." *PSB Credit Services, Inc. v. Rich*, 251 Neb. 474, 477, 558 N.W.2d 295, 297 (1997). "In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results." *In re Estate of Eickmeyer*, 262 Neb. 17, 22, 628 N.W.2d 246, 250 (2001).

The prohibition in § 75-102, applicable to the Executive Director by virtue of § 75-106, is against the Executive Director being “directly or indirectly interested in any common carrier... subject to the provisions of Chapter 75.” “Interest” in this context means “a share, right, or title in the ownership of property, in a commercial or financial undertaking, or the like....” <http://www.dictionary.com/browse/interest>. “Indirect”, in turn, refers to something “coming or resulting otherwise than directly or immediately, as effects or consequences.” <http://www.dictionary.com/browse/indirect>. Chapter 75 contains the statutes relating to the Commission’s regulatory scope and authority over entities engaged in various activities, including intrastate motor carriers, rail carriers, pipeline carriers, and grain dealers. Neb. Rev. Stat. § 75-109.01(8) (2009) provides that the Commission has jurisdiction over “[t]elecommunications carriers pursuant to” various statutes. Thus, §§ 75-102 and 75-106 plainly contemplate that the oath taken by the Commissioners and Executive Director precludes them from any ownership or financial interest, direct or indirect, in any common carrier subject to the Commission’s regulatory jurisdiction.

Mr. Pursley’s work for PB&A is limited to maintenance and development of models used by certain telephone companies for compliance with interstate rate filings with the FCC. In addition, Mr. Pursley collects and imports data for three telephone companies that are not subject to the Commission’s jurisdiction. While Windstream, a carrier regulated by the Commission, has contracted with PB&A for price cap regulation compliance work, Mr. Pursley will perform no services for Windstream. Moreover, his compensation is based solely on the generic model work and direct work performed for companies that are outside the Commission’s jurisdiction. Accordingly, Mr. Pursley’s relationship with PB&A does not, in our view, result in his having an ownership or financial interest that constitutes an “indirect interest” in any common carrier prohibited by his oath of office.

This conclusion is supported by Nebraska Supreme Court cases interpreting statutes prohibiting indirect interests in other contexts. In *Jeffrey Lake Development, Inc. v. Central Nebraska Public Power and Irrigation Dist.*, 262 Neb. 515, 524, 633 N.W.2d 102, 110 (2001) [*Jeffrey Lake*], the Supreme Court considered whether a sublease by a district board director of a lot leased by the district to a third party [JLDI] violated a statute prohibiting a board member from having a direct or indirect interest “in any contract to which the district, or any one for its benefit, is a party.” (*quoting* Neb. Rev. Stat. § 70-642.02). Stating “[t]here is no question that [the director] was not directly interested in the [] lease...”, “[t]he question presented [was] whether [the director’s] sublease from JLDI [was] an indirect interest under the terms of the statute.” *Id.* at 524-25, 633 N.W.2d at 110. Noting that the question of whether an indirect interest existed was “a question of fact”, the Court stated the “analysis of whether a director’s interest [was] an indirect interest contemplated by the statutory prohibition depend[ed] on a showing that potential for a conflict of interest exist[ed].” *Id.* at 525, 633 N.W.2d at 110. As the district did not

present evidence showing any indirect interest in the lease between the district and JLDI creating a potential conflict of interest, the Court sustained the trial court's finding that the district did not meet its burden to prove a violation of the statute. *Id.* at 525-26, 633 N.W.2d at 110-111.

In *Nebraska Liquor Distributors, Inc. v. Nebraska Liquor Control Comm'n*, 269 Neb. 401, 402, 693 N.W.2d 539, 542 (2005) [*Nebraska Liquor Distributors*], the Supreme Court considered "what type of interested relationship between an alcoholic wholesaler and a manufacturer of alcoholic liquor is prohibited by state law." Neb. Rev. Stat. § 53-169.01 provides that "no manufacturer of alcoholic liquor outside this state... shall, directly or indirectly,... be interested in the ownership, conduct, operation, or management of any alcoholic liquor wholesaler." *Id.* *Nebraska Liquor Distributors, Inc.* ["NLD"] filed an application for a wholesale liquor license. The Nebraska Liquor Control Commission ["NLCC"] denied the application after it found that Mitchell Johnson ["Mitchell"], the sole shareholder of NLD, had a business interest in United States Distilled Products Company ["USDP"], a manufacturer of alcoholic liquor. *Id.* On appeal of the denial by NLD, the Court recognized that "[t]he scope of the interest forbidden is wide, prohibiting interests 'directly or indirectly' held." *Id.* at 409, 693 N.W.2d at 547. While "[t]he list of ways a manufacturer can hold a forbidden interest in a distributor is substantial," the Court noted "each one listed indicates an interest of a financial or business nature." *Id.* at 409-10, 693 N.W.2d at 547. Thus, the Court held "that the interest forbidden by § 53-169.01 is a financial or business interest." *Id.* at 410, 693 N.W.2d at 547. The Court reversed the denial of NLD's wholesaler application, finding the "largely familial" interest between Mitchell and USDP "[fell] short of establishing that the interest [was] a financial or business one...", and "was not indicative of the type of relationship which § 53-169.01 would forbid if NLD were licensed." *Id.*

The decisions in *Jeffrey Lake* and *Nebraska Liquor Distributors* support construing the type of "indirect" interest prohibited by § 75-102 as a conflict of interest or business or financial interest involving a common carrier subject to the Commission's jurisdiction. The services provided by Mr. Pursley for PB&A create no conflict of interest, as they do not involve any work performed for any carrier regulated by the Commission.² Nor does

² Mr. Pursley requested the Nebraska Accountability and Disclosure Commission ["NADC"] to review whether his part-time employment with PB&A was prohibited by the Nebraska Political Accountability and Disclosure Act ["NPADA"], including whether such work constituted a conflict of interest as to matters before the Commission involving Windstream by virtue of Windstream's status as a client of PB&A. The NADC issued a staff opinion concluding that Mr. Pursley's work for PB&A was not prohibited by the NPADA, provided he did not use government resources and performed such work on his own time. The NADC opinion also concluded no conflict of interest was implicated, as no official action or decision Mr. Pursley would make as Executive Director would result in any financial benefit to him based on his part-time employment with PB&A, and because PB&A was not a "business with which [he was] associated." NADC letter to Jeff Pursley dated March 17, 2017 at 3-4. While the NADC's conclusions are based on the specific

Mr. Pursley's work for PB&A create a business or financial interest in a common carrier regulated by the Commission. Accordingly, we conclude that Mr. Pursley's outside employment with PB&A does not violate the oath required by §§ 75-102 and 75-106, as it does not result in him being "indirectly interested in any common carrier" subject to the Commission's jurisdiction.

II. Is The Executive Director's Employment Contract, Which Creates A Five Year Term And Provides For Termination Only For "Just Cause", Valid And Enforceable?

As noted previously, Mr. Pursley and the Chairman, on behalf of the Commission, entered into an employment contract on July 2, 2015. That Contract establishes an initial five year term of employment, with provisions for renewal, and provides that it may be terminated for just cause by the NPSC. In our view, for the reasons discussed below, the employment contract is invalid and unenforceable.

First, Nebraska is an at-will employment state. "The general rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason." *Teetor v. Dawson Public Power District*, 19 Neb. App. 474, 479, 808 N.W.2d 86, 91 (2012). See also *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985), cert. denied, 474 U.S. 1068 (1986); *Mau v. Omaha National Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980). As a result, a government employee, in the absence of statutory limitations, serves at the pleasure of the appointing authority. And, while certain state employees in Nebraska are covered by the Classified System Personnel Rules and Regulations, 273 NAC 1-16, all personnel of the Public Service Commission are specifically exempted from coverage under those rules. Neb. Rev. Stat. § 81-1316(1)(j) (2014).

We must then determine whether the Commission may contract away its right to terminate an at-will employee. It is well established that "administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act." *In re Application A-16642*, 236 Neb. 671, 705, 463 N.W.2d 591, 613 (1990). Neb. Rev. Stat. § 75-106 (2009) creates the "office of executive director" of the Commission, and provides "[t]he salary of the executive director shall be fixed by the commission, payable monthly." No statutory or constitutional provision authorizes the NPSC to contract with its executive director, to create a term for the office, or to alter the at-will nature of the office. The Legislature could have chosen to grant those specific powers to the NPSC.³ Because the Legislature has not granted the

provisions of the NPADA, they confirm our view that Mr. Pursley's work for PB&A does not create the type of indirect interest prohibited by § 75-102.

³ For example, the Legislature has given specific statutory authority to the State Board of Education to contract for a Commissioner of Education for a set term. Neb. Rev. Stat. § 79-315 (2014).

NPSC the necessary authority, we conclude that any purported contractual provisions setting a term of office or allowing termination only for “just cause” are invalid and unenforceable.

We are unaware of a Nebraska case in which the court has squarely addressed the question whether a governmental body may enter into a written employment contract which limits that body’s right to discharge an at-will employee. In an action in quo warranto to remove the Director of Aeronautics, the Nebraska Supreme Court held that, where no term of office was fixed by law, the Governor had the right and power to dismiss the Director. *State ex rel. Beck v. Obbink*, 172 Neb, 242, 109 N.W.2d 288 (1961). The Court in that case stated:

The generally accepted rule [however] is that where no provision is made by statute or Constitution for the removal of an incumbent from office, and it does not appear to have been the intention that he should hold office during his life, and there is no fixed tenure, it is necessary to consider the power of removal as incident to the power of appointment and as exercisable without notice and hearing. . . . It is also a general rule supported by cases in numerous jurisdictions that where no term of office has been fixed by law but the appointing authority has attempted to fix a definite term for the particular officer, the attempt is unavailing to prevent dismissal without notice and hearing. *Id.* at 248, 109 N.W.2d at 292.

Our conclusion that the NPSC may not by contract create a term of office or alter the at-will employment status of the office of Executive Director is also amply supported by cases from other jurisdictions. In *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A.2d 278 (1960), the Pennsylvania Supreme Court held that a contract which gave an appointed employee of a public parking authority a three year term and fixed salary was invalid and unenforceable. The court found the managing director was an employee-at-will, that “where the legislature has intended that tenure should attach to public employment, it has been very explicit in so stating,” and that the parking authority was granted the power to appoint officers and employees, not to enter into contracts of employment. *Id.* at 155, 166 A. 2d at 281. See also *Sacco v. Township of Butler*, 863 A. 2d 611 (Pa. Commw. Ct. 2004) (Township lacked authority to confer tenure on an at-will public employee and any employment contract entered into with the employee was void and unenforceable); *Guerra v. Redevelopment Authority of City of Philadelphia*, 27 A.3d 1284 (Pa. Super. Ct. 2011) [“Guerra”] (Redevelopment Authority had no power to create anything other than at-will employment relationship with its employees and the doctrine of promissory estoppel could not be asserted to bind the governmental body beyond its statutory powers).⁴

⁴ With regard to promissory estoppel and at-will employment in Nebraska, we have found no case on point. In *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999), the Nebraska Supreme Court recognized promissory estoppel as the basis for a claim by a prospective at-will employee under the factual circumstances of that case. The plaintiff had accepted a job offer with a private medical

In *Boguess v. Housing Authority of City of Charleston*, 273 F.Supp.2d 729 (S.D. W. Va. 2003), the federal district court held that a contract entered into by a city housing authority ["CHA"] and its former executive director was void. The court found that CHA had general authority to make contracts and to appoint officers and employees. The court also found that an implied at-will removal power applied to officers and employees of the housing authority as an incident to the statutory power of appointment. Yet, the statutes in question did not specify fixed terms and the parties had entered into a contract providing for a five year term and dismissal for cause. The court held that this removal right may not be contracted away and, therefore, the contract was void.

Similarly, in *Wiggins v. Housing Authority of Kansas City*, 22 Kan. App. 2d 367, 916 P.2d 718 (1996), the Kansas Court of Appeals held that Kansas was an employment at-will state, that the housing authority had no specific authority to contract for employment for a fixed term, and that even if the housing authority did enter into such a contract with its employees, the contract was void and unenforceable. In *City of Hazel Park v. Potter*, 169 Mich. App. 714, 426 N.W.2d 789 (1988), the court held that an employment contract entered into between a city manager and the outgoing city council was void as it took away the power of the incoming council to appoint and remove public officers. More recently, the Michigan Court of Appeals cited *City of Hazel Park* in holding that the exercise of the governmental power of appointment or removal typically cannot be bargained away by contract. *Aguirre v. State of Michigan*, 315 Mich. App. 706, 891 N.W.2d 516 (2016). See also *Potts v. Morehouse Parish School Board*, 177 La. 1103, 150 So. 290 (1933).

Finally, as stated in one authority, "[w]ith regard to offices created to be filled by appointment, if the legislature does not designate the term of the office, the appointee may be removed at the pleasure of the appointing authority. This rule applies even though the appointing power attempts to fix a definite term." 63C Am. Jur. 2d *Public Officers and Employees* § 174 (2017). If asked to determine the validity of the Executive Director's employment contract, we believe it likely that our courts would adopt the general rules set out in the authorities discussed above and hold the contract invalid and unenforceable.

office, gave notice to her current employer and was told not to report for work one day before her first scheduled day of work for the new employer. In *Blinn v. Beatrice Community Hosp. and Health Center, Inc.*, 270 Neb. 809, 708 N.W.2d 235 (2006), an at-will employee with the Beatrice hospital alleged he received oral assurances that he could stay there until he retired, that he declined another job offer, and that he was later fired. The court found there was a genuine issue of material fact to be decided as to his promissory estoppel claim. However, these cases are distinguishable from the current circumstances about which you inquire. Neither case concerned the authority of a governmental body to enter into an employment contract or the validity of such a contract. Here, it is our view that the NPSC lacked authority to enter into a written employment contract and that the contract with Mr. Pursley is invalid and unenforceable. Therefore, as in *Guerra*, it is likely a Nebraska court would find that the doctrine of promissory estoppel could not serve as a basis to bind the NPSC beyond its statutory authority.

A few jurisdictions have held that a public body's employment contract with a director or other official was enforceable, but these cases are distinguishable. In some cases, the public body in question had specific authority to enter into an employment contract for a fixed term. For example, in *Holtzendorff v. Housing Authority of City of Los Angeles*, 250 Cal. App. 2d 596, 58 Cal. Rptr. 886 (1967), a California Court of Appeal held that contracts for a fixed term were valid because the city housing authority had express statutory authority to determine terms of employment. The legislative history of that provision showed that the legislature had deleted a provision that the secretary should serve at the pleasure of the commission and added language authorizing the commission to determine the terms of employment. Similarly, in *Tweed v. City of Cape Canaveral*, 373 So. 2d 408 (4 D.C.A. Fla. 1979), *cert. denied*, 385 So. 2d 755 (Fla. 1980), a Florida District Court of Appeal considered the question whether a contract of employment with a police chief was binding upon the city after a new city council was elected and held that it was binding because the Municipal Home Rule Powers Act "effectively redefines the authority of the City Council to enter into longer term governmental function contracts with employees. . . ." *Id.* at 409. See also *Zerbetz v. Alaska Energy Center*, 708 P.2d 1270 (Alaska 1985) (Energy Center had authority to give three year contract to executive director under statute granting it the power to "employ and determine the salary of an executive director.").

In *Telford v. Clackamas County Housing Authority*, 710 F.2d 567 (9th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984), the federal Court of Appeals looked at Oregon law to determine the validity of a housing authority employee's contract. The court found that, under Oregon law, if Telford performed governmental functions, the contract period could not extend beyond the term of the Board of Housing Commissioners. However, as Telford's contractual duties were primarily proprietary or corporate functions, the housing authority had power to enter contracts outlasting its own term of office and the contract was enforceable. We have found no similar distinction in Nebraska caselaw.

In sum, the general rule is that, where an office is created by statute and no term or tenure of office is created by law, any attempt to create by contract a definite term or to alter the at-will status of a person holding the office is invalid and unenforceable. That is the majority view as outlined in the cases discussed above, and which was cited with approval by the Nebraska Supreme Court in *State ex rel. Beck v. Obbink*. While a minority of jurisdictions have upheld employment contracts of this nature, those cases are, for the reasons noted above, distinguishable. Our courts would likely follow the majority rule, and find that Mr. Pursley's employment contract, which establishes a five year term and for termination only "for cause", is invalid, as there is no term for the office of executive director created in § 75-106, and no statutory authority for the NPSC to alter the at-will nature of the office.

CONCLUSION

Based on the foregoing, we conclude: (1) The Executive Director's outside employment does not violate the oath required by §§ 75-102 and 75-106, as it does not result in the Executive Director being "indirectly interested in any common carrier" subject to the Commission's jurisdiction; and (2) The Executive Director's employment contract, which creates a five year term and provides for termination only for "just cause", is invalid and unenforceable, as the Commission lacks authority to create a term or tenure for the office of Executive Director created by § 75-106, or to alter the at-will nature of the office of Executive Director.


Very truly yours,

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Approved by:



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