



Current Legal and Liability Issues for Ports and You, the Governing Board Member

Andrea L. Hermer
General Counsel

Cyndi Carrasco
Deputy General Counsel to
Governor Eric Holcomb





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PUBLIC PORT AUTHORITIES

- Created by statute
- Bodies corporate and politic
- Function as independent corporations, but exist to serve the public
- Perform “essential governmental functions”
 - Modern port system
 - Economic development

PUBLIC PORT AUTHORITIES

- Members appointed by elected officials, but are not under the direct control of such officials
- Enjoy certain benefits as governmental entities (e.g. tax exemptions, statutory legal protections)
- Not subject to the same traditional oversight that apply to governmental entities/operations

BOARD OF DIRECTORS

- Public Port Authorities are governed by a board of directors
- The board of directors are the policy making body responsible for making policy decisions both on internal and external matters;
- Board members serve a dual role as director of a corporation and public official

FIDUCIARY DUTIES

- Board members owe fiduciary duties which if breached can result in legal liability
- Three types of duties recognized:
 - Duty of Loyalty
 - Duty of Care
 - Duty of Obedience

Duty of Loyalty

- Essentially, avoidance of conflicts of interests through disinterested board members
- Disinterested member is one who has no personal or professional stake in a business deal and does not stand to derive personal gain from any business decision

Duty of Care

- Involves good faith efforts of management
- Members must take reasonable efforts to be attentive and prudent in making business decisions and must apply diligence to the needs of the authority

DUTY OF CARE

- Members cannot “rubber stamp” decisions or stay willfully uninformed to avoid liability from resulting decision
- Members can rely upon information, opinions, reports or statements, prepared by others so long as he has no knowledge that his/her actions are inappropriate
- Improper oversight is a significant cause to breaching a member’s duty of care

DUTY OF OBEDIENCE

- Members should not exceed their direct authority beyond defined statutory powers or rules of governance (e.g. By-Laws)
- Member should not exceed their delegated authority

DUTY OF OBEDIENCE

- Delegation of Authority
 - Balancing correct amount of oversight without unduly interfering with day-to-day duties
 - Should always be in writing
 - There are limits: ultimately members cannot abdicate their policy making or supervisory functions

BUSINESS JUDGMENT RULE

- Rule: “When a reasonable purpose for a decision can be found, objecting parties must defer to the judgment of the board members”
- A defense to breach of duty allegations
- Preserves the discretion of members to manage without undue interference from outside parties
- Protects members when well-meaning decisions result in failure

TO WHOM ARE FIDUCIARY DUTIES OWED?

- As a public authority, there are at least three potential beneficiaries of the board member's fiduciary duties:
 - The public official or entity which appointed the member
 - The authority itself
 - The public to which the authority serves

TO WHOM ARE FIDUCIARY DUTIES OWED?

- Members ***have no fiduciary duty*** to the person or entity which appointed them to their position
- However, the potential for influence from the appointer is great
- Members can consider views and interests of individual outside the authority which often times is part of good decision making
- But, members decisions should not be dictated or influenced by the appointer

TO WHOM ARE FIDUCIARY DUTIES OWED?

- Members owe fiduciary duties to ***the authority itself and the public in general***
- Two potentially competing interests
 - What happens when there is a conflict?
 - To whom does the member owe a greater duty?
- Statute and authority mission statements can be helpful to reconcile these interests
- Best way to serve public interest is to act in the best interest of the authority itself

Ethics in Government

Morals

VS

Ethics

Morals

Refers to an individual's own principles regarding right and wrong.

Ethics

Refers to rules provided by an external source.

Examples are codes of conduct in workplaces or principles in religion.

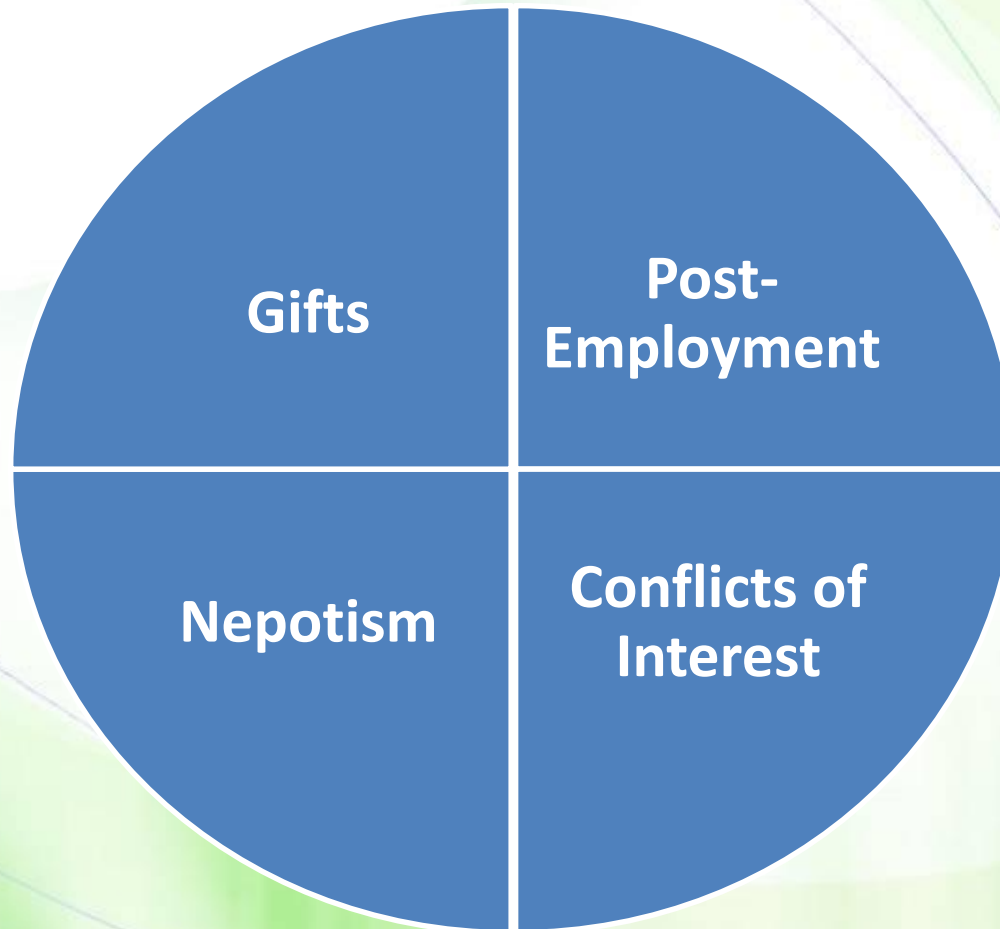
Codes of Conduct

Establish minimum standards of acceptable conduct for employees.

Are key components of an organization's ethics.

Successful implementation depends on education, advice and enforcement.

Common Ethics Rules



Risk Assessment

Conflicts of Interest

Decisions and Votes

Interests in Contracts

Managing Risks

Conflicts of Interest

Awareness

Screening

Disclosure

CONTRACT/TORT LIABILITY

- Generally, a member of a commission is not personally liable on port authority contracts or for torts not committed or authorized directly by the member
- Caveat: This is true so long as member was acting within the scope of his/her authority and as a member of the authority. Member can be responsible for its own individual acts or omissions

CONTRACT/TORT LIABILITY

- Members should always sign contracts using both their individual name and position
- Members should operate in their role as member; do not taken responsibilities for day-to-day operations

Statutory Protections

- Member of commission may not be named as a party in a civil suit that concerns the acts taken by the governmental commission as a whole
- Any judgment rendered with respect to or settlement made by a governmental commission bars an action by the claimant against any member whose conduct may have given rise to the claim
- Governmental commission shall provide counsel and pay all costs and fees incurred by or on behalf of the member in defense of a claim

INDEMNIFICATION/INSURANCE

- Authority can indemnify members for claims arising from member's acts or omissions so long as member acting within its scope of authority
- Public Officials Liability Insurance ("POL")
 - Covers errors and omissions of public officials
 - Serves same function as directors and officers insurance for private corporations

PUBLIC RECORDS ACCESS LAWS

- As a public entity, a port authority is generally subject to state public records access laws
- By providing the public with the opportunity to review and copy public records, the public has the opportunity to obtain information relating to their government and more fully participate in the governmental process

PUBLIC RECORDS ACCESS LAWS

- “Public Record” is defined broadly
- This means that your written communications (e.g. emails, texts, letters, notes) regarding port business are subject to disclosure
- Any items you turn into for reimbursement (e.g. expense report) are subject to disclosure
- Keep your private and public work separate

OPEN PUBLIC MEETING LAWS

- As a public entity, port authorities are subject to public open meeting laws
- When the public has an opportunity to attend and observe meetings the public may witness government in action and more fully participate in the governmental process
- Laws are liberally construed in favor of the public

EXECUTIVE SESSION

- That portion of a meeting from which the public may be excluded
- Only permissible to address specific topics:
 - Litigation matters
 - Collective bargaining
 - Security matters
 - Individual employee matters
 - Negotiations with business prospects

EXECUTIVE SESSION

- If the matter is not listed as part of permissible topics, then should not be addressing in executive session
- Public notice is required
- No final action may be taken
- Minutes of the session are not required, but may be a good idea to demonstrate compliance

OPEN PUBLIC MEETING

- A “meeting” triggers requirement for an open public meeting, which is defined as:

“a gathering of a ***majority*** of the ***governing body*** of a public agency for the purpose of taking ***official action*** upon public business”

REMEDIES

- REMEDIES
 - Declaratory judgment
 - Injunctive relief for continuing, threatened, or future violations
 - Declare void any policy, decision or final action
 - Award attorney's fees and court costs
 - Civil penalty against officer or management