

October 3, 2006

Ms. Rita Strmensky  
Executive Director, State Ethics Commission  
PO Box 082  
Trenton, New Jersey 08625-0082

Dear Executive Director Strmensky:

New Jersey's senior public colleges and universities appreciate the opportunity to discuss with the Commission application of certain regulations that cause significant compliance problems at our institutions. Because we believe these standards contradict provisions of collective bargaining agreements and are inconsistent with long-standing policies and traditions in higher education, and because they impede our institutions in carrying out their respective missions, we would like to raise a number of key issues with the Commission, and suggest means of remedy.

The analysis that follows results from the collaboration of all our senior public institutions: Kean University; Montclair State University; New Jersey City University; New Jersey Institute of Technology, Ramapo College of New Jersey; Rowan University; Rutgers, The State University; The College of New Jersey; The Richard Stockton College of New Jersey; Thomas Edison State College; University of Medicine and Dentistry of New Jersey; and William Paterson University of New Jersey. Note that while this letter is signed by the ELO's, the contents of this document have been vetted by the Chief Academic Officers and Presidents of the colleges and universities listed.

Above all, we want to emphasize that our institutions are committed to the highest ethical standards established by law, regulation and executive order. Even so, we believe that applying a single set of rules in a uniform way to all state employees, regardless of the type of work they do, will seriously impair state colleges' and universities' ability to recruit and retain the most qualified faculty, provide our students with the highest quality education, and operate as efficiently as possible. In effect, current standards are impractical and inhibit fundamental business within the educational enterprise. We respectfully recommend modifications in the interpretation and application of the Conflict of Interests Law, and revisions in the guidelines and "Plain Language Guide to New Jersey's Executive Branch Ethics Standards."

We are particularly concerned about the treatment of honoraria, published works, use of titles, attendance at events, travel, joint ventures and private financing of state activities and receipt and use of desk or examination copies of textbooks. Each of these issues is addressed in the following pages, with specific recommendations for treatment of college and university employees. Although we support the intent of the law and Commission standards, we believe that New Jersey would profit from following the example of other states by implementing standards, and amending law to permit necessary and reasonable activities at our public colleges and universities. The State of New York, for example, provides exceptions in its conflict-of-interest laws for academic employees that allow its public colleges and universities to carry out their missions and remain competitive, while maintaining high ethical standards.

We look forward to discussing our recommendations with the Commission, at its October 18 public session.

Sincerely yours,

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## HONORARIA

The *Merriam–Webster Online Dictionary* defines an honorarium as “a payment for a service (as making a speech) on which custom or propriety forbids a price to be set.” Honoraria are customarily used in academia to compensate individuals for scholarly activity.

The New Jersey Conflicts of Interest Law and applicable regulations currently prohibit all State employees from accepting honoraria “related to official duties.” This strict ban has an adverse impact on employees in higher education in that it impedes the recruitment and retention of qualified educators, reduces their interaction with professional groups, and raises constitutional issues regarding public employees’ freedom of speech. In light of these concerns, the State Ethics Commission should reevaluate its current interpretation and consider circumstances under which honoraria represent compensation for services.

If the Commission cannot endorse a reevaluation, it should consider adopting laws and regulations similar to those of federal and other state jurisdictions. New Jersey’s strict ban on honoraria might be inconsistent with a Supreme Court decision that held unconstitutional a federal law banning honoraria. Other states do allow public and/or academic employees to accept honoraria. These jurisdictions either permit honoraria under specified circumstances or simply exempt honoraria for academic employees from their regulations.

### Prohibitions on Honoraria for State Employees in New Jersey

The New Jersey Conflicts of Interest Law (N.J.S.A. 52:13D-24a) currently prohibits all State employees from accepting honoraria:

No State officer or employee, special State officer or employee, or member of the Legislature shall solicit, receive or agree to receive, whether directly or indirectly, any compensation, reward, employment, gift, honorarium, out-of-State travel or subsistence expense or other thing of value from any source other than the State of New Jersey, for any service, advice, assistance, appearance, speech or other matter related to the officer’s, employee’s, or member’s official duties, except as authorized in this section.

The Rules for the State Ethics Commission also strictly ban honoraria. State employees cannot accept honoraria when making speeches or presentations at events sponsored by interested parties (N.J.A.C. 19:61-6.4g) or even at events sponsored by entities other than interested parties (N.J.A.C. 19:61-6.5d).

Further, this prohibition is promulgated in the September 2006 Plain Language Guide to New Jersey’s Executive Branch Ethics Standards and the recently adopted New Jersey Uniform Ethics Code. According to the Plain Language Guide, “You are not allowed to accept an honorarium or fee for a speech or presentation at an event.” The Uniform Ethics Code prohibits State employees from receiving honoraria when attending or participating in an event.

Notwithstanding these prohibitions, the Conflicts of Interest Law does permit members of the State Legislature to accept honoraria under certain circumstances. A State legislator may accept up to \$250 in compensation — including honoraria — each calendar year (N.J.S.A. 52:13D-24.1a), and even this limitation does not apply if the legislator accepts the honorarium from his or her non-State employer during the course of employment (N.J.S.A. 52:13D-24.1b).

#### Honoraria as Compensation for Outside Employment

Pursuant to most definitions, including those contained in the Conflicts of Interest Law and the Rules for the State Ethics Commission, honoraria represent compensation for a service such as a speech or other presentation. This definition is also consistent with the honoraria provisions of the Master Agreement between the State of New Jersey and the Council of New Jersey State College Locals, AFT, AFL-CIO (“AFT Contract”). (The New Jersey Institute of Technology, Rutgers, the State University, and the University of Medicine and Dentistry of New Jersey are not party to the AFT Contract. Nevertheless, all three institutions have policies or practices in place similar to those described as part of the AFT Contract, covering such things as additional compensation, copyright and travel.) One such provision relates to sabbatical leaves for tenured faculty members and librarians: “Faculty members or librarians on such leave are permitted to receive additional compensation in the form of fellowships, government grants, and honoraria” (AFT Contract, Article XXVII B.7).

Because honoraria are compensation from a source other than the State, their permissibility should be interpreted in light of rules governing outside employment rather than attendance at events. From this perspective, each State college and university would regulate honoraria in accordance with the general restrictions on outside employment (N.J.S.A. 52:13D-23(e)1-5):

1. No State officer or employee or special State officer or employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.
2. No State officer or employee or special State officer or employee should engage in any particular business, profession, trade or occupation which is subject to licensing or regulation by a specific agency of State Government without promptly filing notice of such activity with the State Ethics Commission, if he is an officer or employee in the Executive Branch, or with the Joint Legislative Committee on Ethical Standards, if he is an officer or employee in the Legislative Branch.
3. No State officer or employee or special State officer or employee should use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others.
4. No State officer or employee or special State officer or employee should act in his official capacity in any matter wherein he has a direct or indirect personal financial interest that might reasonably be expected to impair his objectivity or independence of judgment.

5. No State officer or employee or special State officer or employee should undertake any employment or service, whether compensated or not, which might reasonably be expected to impair his objectivity and independence of judgment in the exercise of his official duties.

#### Agency-Specific Codes of Ethics

The State Legislature intended that each individual State agency be permitted to enact a code of ethics to address its unique concerns, presumably including honoraria. Although the Conflicts of Interest Law promulgates general ethical standards for the conduct of State employees, it, too, is intended to provide flexibility for each agency to establish a code of ethics to address its unique concerns:

To ensure propriety and preserve public confidence, persons serving in government should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards amongst them. Some standards of this type may be enacted as general statutory prohibitions or requirements; *others, because of complexity and variety of circumstances, are best left to the governance of codes of ethics formulated to meet the specific needs and conditions of the several agencies of government* [emphasis added]. (N.J.S.A. 52:13D-12b)

In its most recent amendments to the Conflicts of Interest Law (P.L.2005, c. 382), the Legislature mandated that each State agency promulgate a supplemental code of ethics that would govern specific issues unique to each agency:

The head of each State agency, or the principal officer in charge of a division, board, bureau, commission or other instrumentality within a department of State Government designated by the head of such department for the purposes hereinafter set forth, shall within six months from the date of enactment, promulgate a code of ethics to govern and guide the conduct of the members of the Legislature, the State officers and employees or the special State officers and employees in the agency to which said code is applicable. *Such code shall conform to the general standards hereinafter set forth in this section, but it shall be formulated with respect to the particular needs and problems of the agency to which said code is to apply* and, when applicable, shall be a supplement to the uniform ethics code promulgated pursuant to paragraph (2) of this subsection [emphasis added]. (N.J.S.A.52:13D-23(a)1)

Clearly, the State Legislature intends that each State agency should have the ability to address ethical issues unique to that agency. That would naturally include State colleges and universities, and the acceptance of honoraria is a common and accepted practice in academia.

#### Treatment of Honoraria in Other Jurisdictions

**Federal:** A compelling argument against New Jersey's strict prohibitions on honoraria is found in the United States Supreme Court case of U.S. v. National Treasury Employees Union, 513 U.S. 454 (1995). In this case, the Supreme Court held that the honorarium ban in the federal Ethics in Government Act violated the First Amendment rights of certain mid-level, federal government employees. Specifically, the Court found that the statute's "prohibition on compensa-

tion unquestionably imposes a significant burden on expressive activity” (U.S. v. National Treasury Employees Union at 468).

In making this determination, the Court made use of the balancing test promulgated in Pickering v. Board of Education, 391 U.S. 563, 568 (1968), the seminal case regarding the regulation of a public employee’s speech. That decision deemed it necessary “to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” (Pickering v. Board of Education, 391 U.S. at 568). In applying this test, the Court determined that honoraria received by federal employees were protected by the First Amendment:

Respondents’ expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace. The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment. (Id. at 466)

In light of U.S. v. National Treasury Employees Union, the Conflicts of Interest Law prohibition on honoraria might violate New Jersey State employees’ First Amendment rights.

**State:** Other states have rules much more liberal than New Jersey’s and permit their employees, or at least their academic employees, to accept honoraria under certain circumstances. New York permits its employees to accept honoraria subject to certain limitations (19 NYCRR 930.3), and academic employees of the City University of New York and the State University of New York are exempt from even these limitations as long as the “publication of books and articles, delivery of speeches or attending meetings or conferences are within the discipline of the individual involved” (19 NYCRR 930.7). Although Florida prohibits its employees from accepting honoraria from lobbyists or political committees under certain circumstances, it generally permits its employees to accept honoraria subject to disclosure (Florida Statutes, Section 112.3149 1991). In principle, the state of Washington also permits the acceptance of honoraria, limiting them only when:

- (a) The person offering the honorarium is seeking or is reasonably expected to seek contractual relations with or a grant from the employer of the State officer or State employee . . . ,
- (b) The person offering the honorarium is regulated by the employer of the State officer or State employee . . . ,
- (c) The person offering the honorarium (i) is seeking or opposing or is reasonably likely to seek or oppose enactment of legislation or adoption of administrative rules or actions, or policy changes by the State officer’s or state employee’s agency. (RCW 42.52.130)

It is illuminating to consider opinions rendered by other State Ethics Commissions regarding the acceptance of honoraria by State employees, including college or university professors. The Arkansas State Ethics Commission considered whether a State employee could attend

a meeting and accept an honorarium from the sponsoring entity. Pursuant to Arkansas Ethics Commission Advisory Opinion No. 2005-EC-013 (September 16, 2005), an employee from the Arkansas Department of Health and Human Services was permitted, on her own time and in her private capacity, to participate in a public health advisory meeting and accept remuneration from a sponsoring drug company. The Commission identified the questions to consider when deciding whether an honorarium could be accepted: Was the invitation solicited by the employee? Does the sponsoring entity have a business relationship with the governmental body served by the employee? And does the employee have any influence in the decision-making process with respect to that relationship?

In a State Advisory Opinion dated March 22, 1996 (No. 305), the Texas Ethics Commission allowed a professor at a State university to accept an honorarium “as long as the public servant’s official status was not a deciding factor in the decision to request the public servant to perform the services at issue. *Presumably university employees are often asked to perform services because of their academic expertise and not because they hold a position at a particular institution*” (emphasis added). The Texas State Ethics Commission recognized that in academia, individuals are recognized for their expertise in a particular scholarly field, and they are not necessarily singled out because they work at a State institution.

### **Recommendation**

The State Ethics Commission should interpret the Conflicts of Interest Law to permit honoraria as a form of compensation subject to the restrictions on outside employment. In addition, it is apparent that the Legislature intends that each State agency be permitted to enact an institutional code of ethics to address concerns unique to it, and there are many factors that distinguish State colleges and universities from other State agencies. One of those factors is the earning of honoraria, which is an accepted and common practice in academia. Finally, the State Ethics Commission must consider New Jersey’s Conflicts of Interest Law within the context of other federal and state laws and regulations. The Supreme Court has raised the issue of whether a state may regulate the acceptance of honoraria at the expense of public employees’ First Amendment rights. And in other states, the acceptance of honoraria is typically permitted in principle if regulated in practice, and our neighbor New York goes so far as to recognize the uniqueness of its academic employees by exempting them from the normal honoraria regulations. New Jersey’s practice of prohibiting its employees from accepting honoraria under any circumstances whatsoever is unusual and counterproductive.

## **PUBLISHED WORKS**

Higher education plays a critical role in the State’s economy and in the well-being of its citizens. The Commission of Higher Education recognized this role in its *Update 2005: A Blueprint for Excellence, New Jersey’s Long-Range Plan for Higher Education* as follows:

Higher Education has become increasingly important to the success and the quality of life of individuals, states, and the nation. New Jersey’s economic competitiveness and prosperity are directly related to the quality and capacity of its colleges and universities, which develop human potential and discover and apply knowledge through teaching, re-

search and service. It is essential that New Jersey harness the intellectual power of higher education to propel the economy forward and serve the needs of the state and its citizens.

Unfortunately, the ethical guidelines that currently govern published works make New Jersey's institutions of higher education less competitive than those in other states and hinder them in accomplishing their respective institutional missions.

Colleges and universities strive to recruit and retain highly qualified and motivated faculty and other academic employees. In general, professors are evaluated on the basis of educational attainment, scholarship, teaching, and service to the academic community. With the exception of educational attainment, the *Blueprint for Excellence* passage quoted above cites all these criteria. In the past, New Jersey codified these criteria when addressing the evaluation of tenured faculty and qualifications for rank (e.g., expired regulations of the Department of Higher Education, N.J.A.C. 9:6-4.4, "Evaluation of tenured faculty"; N.J.A.C. 9:6-3.5, "Qualifications for rank"; N.J.A.C. 9:6-3.6, "Criteria for promotions"). Under the Higher Education Restructuring Act (N.J.S.A. 18A:3B-1 et seq.), which granted more autonomy to institutions of higher education, our institutions have retained or adopted similar criteria.

#### Problems with Current Interpretations of the Conflicts of Interest Law

Although the Conflicts of Interest Law permits State employees to receive fees for published works, Commission guidelines and regulations (e.g., N.J.S.A. 52:13D-24, "Plain Language Guide," N.J.A.C. 19:61-6.7) can be interpreted to significantly restrict the ability of faculty and other academic employees to conduct and disseminate scholarly work. The Commission's Guidelines Governing Outside Activity read, in part, as follows:

Under the rule addressing compensation for published works, N.J.A.C. 19:61-6.7(b), section 24 of the Conflicts Law and under Commission precedent, a State employee may accept compensation for published works under the following conditions.

- There is no prohibition governing such activity in the Department's enabling legislation or Code of Ethics.
- The State employee must obtain prior approval from his/her Department head.
- The published work must not use or disclose information not generally available to the public.
- The State employee must not use State time or resources in connection with the published work.
- The State employee must not use his/her official title in connection with publication or promotion of the published work.
- The State employee must indicate that his/her views do not represent those of the State.
- The State employee cannot promote, advertise or solicit sales of the published work to co-workers or individuals with whom he/she has official dealings.
- The State employee may not contract to sell the published work to the State except in compliance with section 19 of the Conflicts Law.
- The published work must not have been prepared as part of the State employee's official duties.



Although such prohibitions make sense for employees in a typical State agency, they do not work for faculty or other academic employees. The production of published works and participation in academic conferences are not isolated or intermittent events that are separate and apart from such individuals' responsibilities as a faculty member. Rather, such production and participation are a routine and important part of their normal work load and responsibilities. At most institutions, scholarly achievement is *required* for appointment, advancement, and tenure. Faculty members and other academic employees are evaluated on the basis of their scholarship and are encouraged to use agency time and resources to accomplish this work.

Faculty and other academic employees routinely receive fees for their scholarly works and honoraria in return for their participation in academic events. By themselves, public institutions of higher education and the State do not have the financial and other resources necessary to retain highly qualified faculty and allow them to keep their scholarship up to date. Much of a professor's scholarship is funded by the faculty member her or himself, by public or private grants, by professional organizations, or by other colleges and universities.

#### Provisions of Existing Collective Bargaining Agreements

Over the years, the State and faculty representatives have recognized the right and need of faculty and other academic employees to receive compensation for their scholarly work. For example, in the AFT Contract for the term July 1, 2003, through June 30, 2007, the parties directly addressed the issue of ownership of published works and established a detailed procedure for determining ownership and royalties of copyrighted materials. Article XXXIII reads, in part, as follows:

The creation of copyrighted works is one of the ways the College/University fulfills its mission of contributing to the body of knowledge for the public good. The College/University encourages the creation of original works of authorship and the free expression and exchange of ideas.

This Article is intended to embody the spirit of academic tradition, which provides copyright ownership to employees for scholarly and aesthetic copyrighted works, and is otherwise consistent with the United States Copyright Law, which provides copyright ownership to the College/University for its employment-related works.

For purposes of this Article, "incidental use" means normal academic use of resources commonly available to the employee such as the use of an employee's office, computer, Internet services, library facilities and/or office equipment.

#### A. Ownership of Copyright

1. When a member of the negotiations unit during the course of his or her employment creates a product that constitutes copyrightable property, the ownership of copyright to such property shall reside as follows:

a. Employees shall be the sole owners of the copyright if:

(1) The copyrightable property is embodied in textbooks, manuscripts, scholarly works, works of art or design, musical scores and performances, dramatic works and performances, choreographic works, popular fiction and non-fiction works, poems, or other works of the kind that have historically been deemed in academic communities to be the property of their author, including lecture notes, course outlines, handouts, exercises and tests developed by employees to support their own teaching activities unless covered under (b) below; or

(2) The copyrightable property is embodied in a storage medium such as films, videos, audio recordings, multimedia materials, distance learning materials, and courseware unless covered under (b) below; or

(3) The copyrightable property has been released by the College/University to the creator; or

(4) The copyrightable property is created on sabbatical leave with no more than incidental use of College/University facilities.

b. The College/University shall be the sole owner of the copyright if:

(1) The copyrightable property is embodied in a work that is commissioned by the College/University pursuant to a signed contract; or

(2) The copyrightable property is embodied in a work that the employee is specifically assigned to create; or

(3) The College/University indicates, in writing, at the time it grants an alternate assignment within load, that it intends to claim ownership of copyright to any work made possible by the alternate assignment; or

(4) The copyrightable property is created with more than incidental use of College/University facilities or financial support.

c. The ownership rights described in (b) above may be modified by an agreement between the creator and the College/University.

d. Copyright ownership of any type of recorded synchronous course shall be determined by mutual agreement between the creator and the College/University. The parties shall enter such agreement prior to the recording of the course.

e. The copyrightable property that is created in the course of research supported by the College/University which is funded by the College/University and/or a sponsor pursuant to a grant or research agreement, or which is subject to a materials transfer agreement, confidential disclosure agreement or other legal obligation affecting ownership, will be governed by the terms of such grant or agreement, as approved by the College/University. The College/University will ordinarily own copyright to such property.

## B. Royalties and Licenses

1. Where the College/University owns the copyright to the work, the College/University shall retain all royalties or other benefits from any commercialization of such work, unless there is a mutual written agreement between the creator and the College/University regarding shared ownership of copyright to such work.

2. Where the employee owns the copyright to the work pursuant to A.1 (a) above, the employee shall retain all royalties or other benefits from any commercialization of the copyrightable property he/she owns. However, the College/University reserves the right to use the copyrightable property royalty-free as long as it is a viable course, unless the creator has specifically demonstrated that such royalty-free use significantly impairs the creator's right to commercialize the copyrightable property he or she owns. The employee may make reasonable revisions or updates at his or her discretion upon notification to the Provost/Vice-President for Academic Affairs.

## **Recommendation**

A faculty member or other academic employee with special expertise in a particular field wins standing in academia and the community at large. Given that status, the scholar will likely be asked to comment on issues within his or her field. One part of that individual's identity is employment at a specific institution, which typically supports and encourages his or her scholarly work. In return, this affiliation brings honor and prestige to the institution, making it more competitive in the recruitment of students and other faculty/academic employees. When a published work has educational value, it should not be excluded from New Jersey classrooms simply because it was written by a State employee.

In the *Blueprint for Excellence* cited above, the Commission laid out the following vision for higher education in the state: "New Jersey and its colleges and universities embrace their shared responsibility to create and sustain a higher education system that is among the best in the world, enabling all people to achieve their maximum potential, fostering democratic principles, improving the quality of life, and supporting the state's success in a global economy." Existing ethical guidelines governing published works hinder the ability of New Jersey's public institutions of higher education from achieving this vision. They have a negative impact on the development, recruitment, and retention of faculty and other academic employees, and in the long term will place New Jersey and its citizens in a less competitive position. The Commission should adopt one of the several solutions which would clarify that academics may freely publish and may be paid for their publications: one solution would be to clarify the Commission's guidelines and regulations to include exemptions for published works produced by the academic community.

## **USE OF TITLES**

The State Ethics Commission staff has informally advised State colleges and universities that development officers may not use their official titles while assisting the private, non-profit foundations that raise funds for their respective institutions. Specifically, N.J.A.C. 19:61-6.6 provides that "[a] State official shall not permit the use of his or her official title for the purpose of fundraising for a private organization."

It is not obvious that the law was intended to apply to the practice of using one's title to assist these private, non-profit foundations. The enabling statute for N.J.A.C. 19:61-6.6 is N.J.S.A. 52:13D-23(e)3, which provides that "[n]o State officer or employee or special State officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others." Clearly, a State employee's title, which is conferred to conduct public business, should not be used for personal benefit or to the advantage of a private organization. But when State employees use their titles to raise funds for the private foundations that support State colleges and universities, they are not using those titles to secure unwarranted benefits for themselves or the foundations. Rather, they are using their titles for the warranted purpose of benefiting State institutions, and N.J.A.C. 19:61-6.6 should be interpreted in that light.

## **Recommendation**

The Commission should implement the regulation in such a way as to allow the use of official titles under the limited circumstances pertinent to assisting the private, non-profit foundations that raise funds for their respective institutions. Because these non-profit foundations have a quasi-public character and undoubtedly serve a State purpose, the use of official titles under these limited circumstances should not be regarded as use for a private organization. A narrow interpretation of the regulation would severely limit financial support for State colleges and universities, and this would be inconsistent with the State's explicit goals, particularly given the diminution of public funds to support higher education in New Jersey.

If the Commission determines that N.J.A.C. 19:61-6.6 was, in fact, intended to bar the use of official titles by State college and university officials engaged in fundraising, it should consider amending the regulation to permit an exception under the limited circumstances described above. Our public institutions of higher education would be very pleased to work with the Commission in drafting suitable language for such an amendment.

## **APPROVAL FOR ATTENDANCE AT EVENTS AND ACTIVITIES**

The Commission's Plain Language Guide requires approval from an ELO for officers and employees to attend an event "that takes place away from your work location, is sponsored or cosponsored by a non-State government source and the invitation for which is extended to you because of your official position." Under the AFT contract, travel and reimbursement matters are handled by the institutions' deans, not ELOs (Article XXIII). Moreover, the contract is clear that faculty and other academic employees may expect to receive approval from their deans to attend "professional improvement meetings, workshops, conferences and other approved functions" (Article XXIII, I.).

Similarly, even if faculty or other academic employees attend professional improvement meetings, workshops, conferences, and other approved functions and are not requesting reimbursement they typically must get approval through a dean or his or her designee regarding attendance at such events.

In the higher education community, faculty or other academic employees attend conferences and undertake travel as a part of their regular and routine job duties and responsibilities. They are encouraged and rewarded for traveling for such purposes through promotions and salary increases. Unlike employees in other State agencies and institutions, their participation in academic and scholarly conferences is not unusual or intermittent. Rather, attendance at and participation in academic and scholarly conferences is a routine and important part of the normal work load and responsibilities of faculty and other academic employees. They do so all over the world, and much of what they do is funded by the individual him or herself, by public or private grants, or by a professional organization; the latter are usually such non-profit organizations as other colleges/universities, or professional associations. Professional-association events may or may not be funded exclusively by membership fees, and a few events may be funded by "for profit" entities. However, unless advertised or solicited, those attending the scholarly conference would not normally have access to this funding information.

## **Recommendation**

It is recommended that the current practice of obtaining only the dean's approval, which is consistent with the AFT's collective bargaining agreement as set out in Article XXIII, continue. Additionally, Article XXIII does not require employees to complete a Request for Approval form (seeking ethics approval) every time they attend an event, and so we recommend that this not be required under the Commission's regulations.

The current requirement that the ELO approve every travel voucher should be dropped in favor of what we suggest above.

An exemption from ELO approval to attend events should also be provided to trustees of the State colleges and universities. Trustees regularly attend national conferences sponsored by groups such as the Association of Governing Boards of Colleges and Universities. These conferences provide valuable information about best practices for college and university governance, updates on federal laws and regulations, and information from national experts and scholars. Under New Jersey law, the trustees of the State colleges and universities serve without compensation but "shall be entitled to be reimbursed for all reasonable and necessary expenses" (N.J.S.A. 18A:64-5). Executive Order No. 14 (Corzine) recognizes that the trustees of the State colleges and universities "volunteer time and energy as a commitment to public service" and are subject to separate ethics disclosure than other State officials. Under these circumstances, the trustees of the State colleges and universities and their institutions should continue their current procedures regarding attendance at events and reimbursement for expenses.

## **TRAVEL**

Scholarship and service are integral parts of the mission of all New Jersey State colleges and universities; the scholarly and service activities of faculty and other academic employees also contribute directly to the intellectual climate, economy and image of the State. As with the "Approval for Attendance at Events and Activities" area just discussed, another area of the Conflicts of Interest law that impedes faculty and other academic employees is the restriction on travel imposed by the Uniform Code of Ethics. This prevents faculty and staff from pursuing scholarly research, collaborating with colleagues in sharing knowledge, and staying competitive in the higher education arena. Moreover, this restriction deleteriously affects the mission that higher education in the State of New Jersey is striving to attain and retain.

The Plain Language Guide requires approval from an ELO for employees to attend an event "that takes place away from your work location, is sponsored or cosponsored by a non-State government source and the invitation for which is extended to you because of your official position." Under the AFT contract, travel and reimbursement matters are handled by the institutions' deans, not ELOs (Article XXIII).

Moreover, the contract is clear that faculty may expect to receive approval for their deans to attend “professional improvement meetings, workshops, conferences and other approved functions” (Article XXIII, I.).

In looking at the codes of ethics of neighboring states, it appears that the issue of travel by academic employees has been taken into consideration. New York’s regulations state:

(a) Academic employees of the State University and City University of New York including all their constituent units who are covered by §73 of the Public Officers Law and employees serving in the titles of "Research Scientist," "Cancer Research Scientist," and "Research Physician" who also serve in academic status are exempt from the limitations on the receipt of honoraria and reimbursement for travel expenses to the extent that the publication of books and articles, delivery of speeches or attending meetings or conferences are within the discipline of the individual involved.

(b) Such academic employees who are also employed by a State agency other than the State University of New York or the City University of New York, in a title other than "Research Scientist," "Cancer Research Scientist," and "Research Physician" shall not be exempt from the limitations on the receipt of honoraria and reimbursement for travel expenses in their capacity as State officers or employees (19 NYCRR Part 930.7)

### **Recommendation**

The New Jersey senior public institutions of higher education respectfully suggest that New Jersey adopt an exemption from the travel restrictions for academic employees, perhaps incorporating the language from 19 NYCRR 930.7.

## **JOINT VENTURES AND PRIVATE FINANCING OF STATE ACTIVITIES**

Current Commission guidelines governing “Joint Ventures and Private Financing of State Activities” were enacted under the presumption that private financing of State activities arises from the necessity to find creative financing in difficult economic times. This construct, however, does not translate to the role of a public college or research university, and does not adequately embrace the robust programmatic and/or research and technology partnerships that are encouraged by legislative mandate and by governmental policy. Likewise, it is inappropriate to the work and progress of the State colleges and universities in New Jersey’s “senior-public” sector as they strive to create partnerships that will result in improved service and academic offerings to their students. Applied as written, the Commission’s guidelines are redundant to current controls, and could be construed to hamper and limit grant activity at public universities, particularly research universities. The role of university research and technology commercialization was underscored in Governor’s Corzine’s *Economic Growth Strategy for the State of New Jersey* (2007). Indeed, the strategy report specifically calls for the creation of an Innovation Fund which will serve, in part to accelerate the commercialization of technology, including through the use of seed funding for a college/university venture. Growth and core industries vital to the

State of New Jersey include life sciences, nanotechnology, stem cell research and innovation, renewable energy, and communications technology. Grant and partnership activities are also essential to the establishment of academic programs that are responsive to the needs of New Jersey's workforce development and to the stated demands of citizens and employers statewide.

Existing legislation already provides for approval mechanisms for university participation in joint ventures, through Board of Trustees approval, and subject to the Governor's veto. Both UMDNJ and NJIT, for example, have similar provisions in their enabling legislation specifically allowing the universities to

(s.) Participate as the general partner or as a limited partner, either directly or through a subsidiary corporation created by the university, in limited partnerships, general partnerships, or joint ventures engaged in the development, manufacture, or marketing of products, technology, scientific information or services and create or form for profit or not for profit corporations to engage in such activities; provided that any such participation shall be consistent with the mission of the university and the board shall have determined that such participation is prudent. (N.J.S.A. 18A:64E-18; see also, N.J.S.A. 18A:64G-6, relating to UMDNJ with the additional proviso that "nothing herein shall be construed to authorize any change in the legal status of University Hospital.")

Both statutes further provide that the Board must forward the minutes of such approval to the Governor, who may veto the action within thirty days. Further, any such actions must comport with the Conflicts of Interest law. Under this mechanism, the approval of any joint ventures is ceded to the governing body and subject to state executive veto. Decisions affecting the university's mission are thus within the purview of the governing body; the ELO for the institution of higher education is not fairly in a position to make these vital determinations.

Similarly, the governing boards of state colleges and universities have been granted wide latitude to develop institutional plans, and to determine the programs and degree levels to be offered by the institution consistent with the institution's plan and programmatic mission. (See the Higher Education Restructuring Act of 1994, N.J.S.A. 18A:64-3B-1 et seq., N.J.S.A. 18A:3B-2 and 18A:64-6.) In addition to the formulation of institutional plans and programs, state colleges and universities are authorized to accept from any government, public, private or other source grants or contributions of money or property in aid of any of its purposes. N.J.S.A. 18A:64-6; N.J.S.A. 18A:64G-6.

Collaborative or joint agreements/ventures are often entered into with other public and private organizations to achieve an educational, academic or programmatic goal. In such situations, creative and innovative relationships are formed, costs are shared, funded by the joint partner(s) or funded by some other organization, all consistent with the academic mission of the institution. Again, ELO's are not in a position to make these vital educational, academic and programmatic determinations..

The State Conflicts of Interest Law also makes specific exception for employee interest in “start up” corporations; though no specific reference is made to institutions of higher education, clearly this is the venue in which most of these situations will arise, due to the essential role of the university as a developer of scientific or technological innovations. Specifically, the law provides the following:

Notwithstanding the provisions of P.L.1971, c.182 (C.52:13D-12 et seq.), a State officer or employee or a special State officer or employee or his partners or any corporation or firm in which he owns or controls more than 1% of the stock, assets or profits may enter into a contract or agreement with a State agency where the contract or agreement is for the development of scientific or technological discoveries or innovations in which the State agency has a property right, if the State agency has a procedure in its code of ethics for authorizing these contracts or agreements which minimizes actual conflicts of interest and the code of ethics was approved in accordance with section 12 of P.L.1971, c.182 (C.52:13D-23) and the contract or agreement complies with that code procedure.

Finally, universities and colleges rely upon private grant funding, in addition to federal and state funding, to drive research initiatives and other initiatives relevant to the development of specific academic programming. These are typically ongoing contractual projects that span months, if not years. Current guidelines make reference only to short-term activities occurring within the business day. The language of the statement of joint ventures is geared to short-term events and conferences, rather than long-term collaborations, which often require travel, collaboration between project investigators and researchers, and presentations. Control over these activities is normally within the purview of academic departments, and it is unreasonable to expect that ELOs, without the appropriate academic and/or research credentials, could make judgments about the propriety of the activities conducted within the research collaboration.

### **Recommendation**

Accordingly, we would recommend that the guidelines be appropriately altered to fit the model of academic and research collaboration and joint ventureship in pursuit of research commercialization and/or the development of academic partnerships in support of fulfilling the stated needs of New Jersey’s citizens. Likewise, we would recommend that both short-term and long-term collaboration be reviewed, decided upon, and approved by the institution’s governing body, and not by the ELO.

### **COMPLIMENTARY DESK OR EXAMINATION TEXTBOOKS**

It is quite common for academic employees of private and public colleges and universities in the United States to receive complimentary desk or examination copies of textbooks from publishers. Desk copies are textbooks that are provided free of charge by the publisher to instructors who have assigned the textbook for a specific course. Examination copies are complimentary textbooks that are provided by the publisher to professors for consideration as an assigned textbook for a future course. This practice is customary in the academic setting and is widely utilized by the publishing industry and higher education academic employees.



However, the State's zero tolerance gift prohibition may restrain the acceptance of desk or examination copies by the State's college and university academic employees. The New Jersey State Ethics Commission is urged to permit the receipt and use of desk and examination copies of textbooks by the State college and university academic employees under one of its exceptions to the zero tolerance gift prohibition. This interpretation would be reasonable and consistent with the legislative intent of the Conflicts of Interest Law, which recognizes that State departments and agencies have unique problems or issues that should be addressed by each individual agency or department by an institutional code of ethics.

If the State Ethics Commission cannot consider the above interpretation, it must consider the adoption of laws and regulations modeled after the jurisdictions of the Commonwealth of Virginia and the State of Washington. These jurisdictions recognize that the receipt of desk or examination copies of textbooks by academic employees do not represent a conflict of interest and should be permitted.

The New Jersey Conflicts of Interest Law prohibits all State employees from accepting gifts. The pertinent section of the law reads as follows:

No State officer or employee, special State officer or employee, or member of the Legislature shall accept from any person, whether directly or indirectly and whether by himself or through his spouse or any member of his family or through any partner or associate, any gift, favor, service, employment or offer of employment or any other thing of value which he knows or has reason to believe is offered to him with intent to influence him in the performance of his public duties and responsibilities. This section shall not apply to the acceptance of contributions to the campaign of an announced candidate for elective public office.(N.J.S.A. 52:13D-14; See also: N.J.S.A. 52:13D-24 a.)

Further, the Conflicts of Interest Law requires that each State agency's code of ethics contain a general standard that prohibits the acceptance of gifts or other items of value:

(e) A code of ethics for officers and employees of a State agency shall conform to the following general standards:

(6) No State officer or employee or special State officer or employee should accept any gift, favor, service or other thing of value under circumstances from which it might be reasonably inferred that such gift, service or other thing of value was given or offered for the purpose of influencing him in the discharge of his official duties.(N.J.S.A. 52:13D-24(e)(6)).

The prohibition to accept gifts are described in page 4 of the September 2006 Plain Language Guide to New Jersey's Executive Branch Ethics Standards. "You may not accept any gift of more than nominal value (e.g., a tee-shirt or a pen) related in any way to your official duties." (See also: New Jersey Uniform Ethics Code, September 2006, p. 6.) Further, the State Ethics Commission has indicated in the Plain Language Guide that it "has adopted a zero tolerance policy for acceptance of gifts..." See also: New Jersey Uniform Ethics Code, September 2006, p. 6.

Exceptions to the zero tolerance policy are defined on page 7 of the recently adopted New Jersey Uniform Ethics Code as follows:

1. Unsolicited gifts or benefits of trivial or nominal value, such as complimentary articles offered to the public in general, and gifts received as a result of mass advertising mailings to the general business public may be retained by the recipient or the recipient's department for general use if such use does not create an impression of a conflict of interest or a violation of the public trust. The receipt of such complimentary articles is not required to be reported to the ELO.
2. A State officer or employee or special State officer or employee may receive a gift, favor, service or other thing of value from a vendor under the same terms and conditions as are offered or made available to members of the general public.
3. A State employee is permitted to give or receive a gift from a co-worker, a supervisor or a subordinate. The gift should not be excessive or inappropriate for a business environment. Such gift shall not be reported to the ELO.
4. In accordance with N.J.S.A. 52:13-24, gift provisions do not apply to the acceptance of contributions to the campaign of an announced candidate for elective public office.

The New Jersey State Legislature intended that each individual State department/agency be permitted to enact a code of ethics to govern its unique concerns, issues and problems such as the receipt and use of desk and examination copies of textbooks. These provisions of the Conflicts of Interest Law are intended to provide flexibility to each specific agency and department to establish institutional codes of ethics to govern specific issues and problems unique to each department/agency. (See: N.J.S.A. 52:13D-12(b); N.J.S.A. 52:13D-23(a)(1).)

In considering the receipt and use of desk and examination of textbooks by State academic employees in the context of the State's gift prohibition, it is apparent that two exceptions would apply that would permit such a practice at the State colleges and universities. In most instances, publishers distribute unsolicited complimentary desk or examination copies of textbooks to academic employees throughout the United States. A simple internet search will reveal that this practice is widely used by American colleges and universities. Further, an internet search of the major publishers in the United States will reveal this same practice. In such instances, the receipt and use of desk or examination textbooks should be permitted for academic purposes only and would not constitute a conflict of interest. Therefore, the first exception to the gift prohibition in the Uniform Ethics Code would be applicable.

Further, it is apparent that the practice of distributing desk and examination copies of textbooks to academic employees is done in the same manner by all publishers. Thus, a thing of value is being given by a vendor similar to its practice with all other private and public academic institutions in the country. Therefore, the second exception to the gift exception in the Uniform Ethics Code would apply.

If the State Ethics Commission follows the above interpretation, each college and university can adopt specific policies in their supplemental codes of ethics that would govern the receipt and use of desk and examination copies of textbooks. Each policy can be adopted to permit this customary practice for academic purposes only and be tailored to limit any potential conflict of interest for non-academic purposes.

In the event the State Ethics Commission will not permit the receipt and use of desk and examination copies of textbooks, the Conflicts of Interest Law should be amended to permit such a practice for academic employees. There are other State jurisdictions that permit State employees and/or State academic employees to receive honoraria under certain circumstances. One of these jurisdictions is the Commonwealth of Virginia, which adopted the following statute:

#### Code of Virginia

##### § 23-4.3:1. Policies addressing textbook sales and bookstores.

- A. No employee at a Virginia public college or university shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, as an inducement for requiring students to purchase a specific textbook required for coursework or instruction; with the exception that the employee may receive (i) sample copies, instructor's copies, or instructional material, not to be sold; and (ii) royalties or other compensation from sales of textbooks that include such instructor's own writing or work.

The jurisdiction of the State of Washington also permits the acceptance of gifts for items being evaluated by a State employee or for publications that are being used in the State employee's official duties. The pertinent parts of the statute read as follows:

#### Revised Code of Washington 42.52.150

##### Limitation on gifts

(1) No state officer or state employee may accept gifts, other than those specified in subsections (2) and (5) of this section, with an aggregate value in excess of fifty dollars from a single source in a calendar year or a single gift from multiple sources with a value in excess of fifty dollars. For purposes of this section, "single source" means any person, as defined in RCW 42.52.010, whether acting directly or through any agent or other intermediary, and "single gift" includes any event, item, or group of items used in conjunction with each other or any trip including transportation, lodging, and attendant costs, not excluded from the definition of gift under RCW 42.52.010. The value of gifts given to an officer's or employee's family member or guest shall be attributed to the official or employee for the purpose of determining whether the limit has been exceeded, unless an independent business, family, or social relationship exists between the donor and the family member or guest.

(2) Except as provided in subsection (4) of this section, the following items are pre-

sumed not to influence under RCW 42.52.140, and may be accepted without regard to the limit established by subsection (1) of this section . . . .:

(d) Unsolicited items received by a state officer or state employee for the purpose of evaluation or review, if the officer or employee has no personal beneficial interest in the eventual use or acquisition of the item by the officer's or employee's agency;

(e) Informational material, publications, or subscriptions related to the recipient's performance of official duties.

In Advisory Opinion 03-04 dated September 12, 2003, the Washington State Executive Ethics Board interpreted the Washington ethics statutes to permit the acceptance and use of desk and examination copies of textbooks as follows:

The Ethics in Public Service Act allows state officers and employees, including state higher education faculty, to accept gifts of informational material, publications, or subscriptions. Once received, state officers and employees may use or retain such items in a manner consistent with the purpose for which they were provided, use or retain them to perform official duties, or dispose of them as provided under RCW 42.52.010(10)(g).

However, the Advisory Opinion did proceed to prohibit the practice of the faculty members selling the complimentary textbooks for personal benefit.

Clearly, the treatment of desk and examination textbook copies by Washington and Virginia are common-sense approaches that permit a customary academic practice and limit the potential for ethical abuses.

For the foregoing reasons, the State Ethics Commission is urged to interpret the Conflicts of Interest Law to permit the receipt and use of desk and examination copies of textbooks by academic employees as an exception to the gift prohibition. In the alternative, the State Ethics Commission is urged to propose laws and/or regulations that would permit the acceptance and use of desk and examination copies of textbooks for academic purposes similar to the above laws in Washington and Virginia.