

METRO
**Observations Relating to Loaned
Employees and Metro's Code of Ethics**

September, 1995

A Report by the Office of the Auditor



METRO

Alexis Dow, CPA
Metro Auditor



METRO

OFFICE OF THE AUDITOR

September 28, 1995

Mike Burton, Executive Officer
Councilor Ruth McFarland, Presiding Officer
Councilor Jon Kvistad
Councilor Patricia McCaig
Councilor Susan McLain
Councilor Rod Monroe
Councilor Don Morissette
Councilor Ed Washington

COPY

Re: Observations Relating to Loaned Employees and Metro's Code of Ethics

Dear Mr. Burton and Councilors:

The accompanying report covers our review of a situation involving a loaned employee and questions regarding Metro's Code of Ethics. We undertook this study in response to an inquiry by a Metro area citizen.

We reviewed a draft of the report with the Executive Officer, the General Counsel and the Transportation Department Director. The last section of this report presents the written response of Executive Officer Burton.

We would appreciate receiving a written status report from the Executive Officer, or a designee, in six months indicating what further progress has been made to address the report's recommendation.

We appreciate the cooperation and assistance provided by the Executive Officer, the Office of the General Counsel and the Transportation Department.

Very truly yours,

Alexis Dow, CPA

Auditor: Leo Kenyon

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Executive Summary

Government agencies at many levels engage in loaned employee programs to take advantage of expertise from both public and private sectors at little or reduced expense. Loaned employees have been and are being used by Metro.

In mid-1993, Metro's Planning Department requested an environmental organization to loan an employee to assist on water resource projects of mutual benefit. The loaned employee began assisting at that time, and a memorandum of understanding formalizing the arrangement was finalized in late 1994.

Prior to and after the arrangement was formalized, some Metro officials became concerned that the loaned employee was too vigorously advocating environmental issues affecting Metro. They were also concerned that his close association with Metro might lead people to believe he was a Metro employee. The loaned employee resigned in January 1995. It appears that his resignation was in both his and Metro's best interests.

At the time the loaned employee agreement was made, Metro had no policy regarding such arrangements. Had such a policy existed, controversies surrounding the loaned employee's activities might have been avoided. We discussed this matter with the Executive Officer and Metro's General Counsel during our review. On August 24, 1995, the Executive Officer signed a policy for loaned employees.

The loaned employee was authorized to contract with Metro under certain conditions. The environmental organizations that employed or contracted with him also contract with Metro. We reviewed the payments Metro made to him and these organizations, and found no improprieties.

A Senior Planner who worked closely with the loaned employee was found to be an unpaid officer in the nonprofit environmental organization that employed the loaned employee. After discussing this information and our concerns as to the propriety of these relationships with Metro's General Counsel, he concluded that the

relationships as disclosed to him were permitted by the Oregon Revised Statutes and Metro's Code.

The questions the Metro area citizen asked that initiated our review suggest an apparent conflict of interest with respect to these relationships. Apparent conflicts of interest exist whenever a reasonable person might suspect that private interests may cause employees to commit prohibited or unethical acts or to perform official duties in a way other than they would have if they had no such interests.

There is no evidence that the Senior Planner's relationship with the loaned employee and the environmental organization caused her to perform official duties in a way other than how she would have without such interests. In view of the Metro area citizen's concerns, those relationships created an apparent nonfinancial conflict of interest that the Senior Planner should have disclosed to her supervisor.

The Metro Code, which has parallel provisions in the Oregon Revised Statutes governing all public employees in the state, does not address this situation because the Code and state law cover only actual or potential financial conflicts of interest. Had Metro's code of ethics included discussions of nonfinancial and apparent conflicts of interest, management and other reasonable persons could have made informed judgments and acted accordingly with respect to the activities of the Senior Planner.

Metro's code of ethics omits many factors usually found in such codes—clear statements regarding the need for trust, objectivity, accountability and leadership, and the actions required to achieve these goals.

We suggest that the Executive Officer and Council evaluate Metro's need for a more comprehensive code of ethics. Such a code could establish clear criteria to guide employees in fulfilling their duties and help avoid unethical conduct or its perception.

Objectives

A Metro area citizen asked us to determine the reasons an individual resigned as a loaned employee from Metro and whether that individual may have benefited from his relationship with Metro. The concerned citizen advised us that a Metro employee, who worked with the loaned employee on water resource programs, was an officer in a not-for-profit environmental organization that employed the loaned employee. He asked us to inquire into the propriety of that relationship.

Scope and Methodology

To determine why the loaned employee resigned, we reviewed the newspaper accounts regarding his departure, his letters to the newspapers explaining his reasons for resigning, and his letter of resignation. We also interviewed a number of Metro officials, who were aware of this individual's role as a loaned employee, regarding his resignation.

To ascertain if the loaned employee received compensation from Metro, either directly or indirectly, we searched Metro's financial records for payments to this individual and to two environmental organizations and one program with which he was known to be associated. We compared recorded payments to these organizations to vouchers and supporting documentation and pertinent contracts.

To determine whether the Metro employee's relationship with one of the organizations was proper, we reviewed the articles of incorporation and the 1994 and 1995 annual reports of the organization. We also reviewed the memorandum of Understanding between Metro and the loaned employee as well as pertinent sections of Metro's Code and the Oregon Revised Statutes. We discussed the facts of this case with Metro's Office of the General Counsel and requested an opinion on the propriety of the relationship.

We conducted our review between May and August 1995 in

accordance with generally accepted government auditing standards.

Background

The individual in question first served as an employee loaned to Metro in about 1990. An environmental organization loaned him to the Planning Department to assist the Department in developing the Greenspaces Master Plan. We were told that the previous Planning Department director negotiated the agreement with that organization, but apparently did not prepare a formal memorandum of understanding. One Metro official told us that there was a letter between the Planning Department director and that organization confirming the agreement, but the official said that he had not seen it. We could not locate such a letter in Metro files.

Between 1990 and 1992, the Metro provided the loaned employee access to a desk, telephone, computer, etc. but he was never employed by Metro. He did a substantial amount of work during that period on the Greenspaces Master Plan and helped to put the first Greenspaces bond issue together. We were told that after the bond issue was defeated by the voters in 1992, this individual was seen only occasionally around the Metro offices.

In mid-1993, the current Planning Department director asked this individual to assist the department on projects of benefit to two environmental organizations and Metro. The Planning Department director formalized the relationship in a memorandum of understanding in late 1994.

Loaned Employee with Metro

1994 Memorandum of Understanding

One of Metro's Senior Assistant General Counsels told us that Metro did not have a policy on loaned employees when he and the Director of Planning drafted the loaned employee memorandum of understanding covering this individual. He

also said that because of an oversight, the memorandum of understanding was not signed until several months after it was drafted. All parties signed the memorandum of understanding on November 8, 1994.

In accordance with the memorandum of understanding, Metro assigned the loaned employee cubicle space and gave him access to Metro's computer system, photocopiers, FAX machine, telephone and reasonable use of office equipment. Metro also provided him with access to its mailing resources for normal correspondence related to his tasks done for Metro. In return, this individual was to work on regional water resources planning issues and to continue cooperating with the Parks Department's Metropolitan Greenspaces program. He was to prepare public information materials, participate in joint activities and provide advice on regional trails programs components and other Greenspaces projects as needed. The memorandum of understanding prohibited the loaned employee from any political advocacy on Metro's premises or when using Metro facilities such as telephones or copiers.

**Region 2040
Tabloid
Controversy**

The loaned employee started becoming controversial in the summer of 1994. He asked an environmental organization to purchase 3,500 of Metro's Region 2040 tabloids to be used by the organization in an outreach project. He included a critique of the Region 2040 growth management plans with the tabloid and urged the organization's constituents to communicate their views to Metro.

**Later Activities
Add to
Controversy**

We were told that the mailing of the tabloids caused some Metro councilors and other officials to become concerned. They felt that the loaned employee was attempting to unduly influence decisions on the Region 2040 project, becoming increasingly involved in policy debates, and being overly aggressive advocating an environmental organization's interests. We were also told that the loaned employee began receiving more visibility with respect to the Open Spaces bond issue. Metro officials began to be concerned that his activities, his close association with Metro and statements attributed to him could lead people to believe that he was a Metro employee. Metro employees were

precluded from actively promoting passage of the Open Spaces bond issue during work hours.

**Loaned Employee
Resigns**

Because of these actual and perceived controversies, Councilors and the Executive Officer discussed whether this individual should remain a loaned employee. We were told that neither the Councilors nor the Executive Officer asked the loaned employee to resign. He resigned as a loaned employee on January 25, 1995, to pursue his advocacy work on the Region 2040 program.

**Observations
Regarding
Resignation**

It appears that this individual's resignation as a loaned employee was in both his and Metro's best interests. His resignation eliminated any perception that he was openly advocating the Open Spaces bond issue in an official capacity as a Metro employee. We believe, however, that the controversy surrounding his activities at Metro may have been avoided had there been a firm policy governing the privileges, duties and responsibilities as a loaned employee. We discussed this matter with the Executive Officer and Metro's General Counsel during the course of our review. On August 24, 1995, the Executive Officer signed a policy for loaned employees. A copy of this policy is attached as Attachment 1.

The Loaned Employee, Environmental Organizations and Metro

**The Loaned
Employee and One
Environmental
Organization**

One environmental organization is a nonprofit corporation. It was incorporated in March 1981 to engage in and promote research and scientific study of wetlands and the education of the general public concerning wetlands. It also was to promote the acquisition, preservation, conservation and management of wetlands and related uplands systems as ecological, scientific, educational, scenic, historic and recreational resources. According to the memorandum of understanding, the loaned employee was an agent and employee of one organization as well as a director of one of its programs. He was also a contractor to a second environmental organization. The memorandum of

understanding authorized the loaned employee to enter into additional contracts with Metro for specific tasks that were agreed to by Metro and/or the environmental organization.

Metro Payments to the Organization

During the period June 30, 1992 and July 20, 1995, the organization that employed the loaned employee had 9 contracts in force with Metro. Payments totaling nearly \$58,000 were made by Metro to that organization on 7 of these contracts and one sponsorship. We reviewed all of the payments made to the organization between October 31, 1992 and July 20, 1995 and found only three that were requested by the loaned employee on behalf of organization. One was for \$200 to co-sponsor a bicycle tour for the environment. A second for \$2,500 from the Parks Department was to co-sponsor an Adopt-A-Stream conference. The third was for \$5,500 from the Solid Waste Department to co-sponsor design and construction of interpretive signs for the Heron Lake Golf Course. None of the documentation showed that the loaned employee received any of the funds paid to the organization.

As of July 20, 1995, no payments had been made against the last 2 contracts. The total value of these contracts is not to exceed \$20,300. The contracts are with the Parks Department's Planning and Capital Development Division.

Metro Payments to a Second Environmental Organization

Because the loaned employee was also a contractor with a second environmental organization, we reviewed all payments made by Metro to it between October 16, 1992 and July 20, 1995. We found no evidence that this individual received any payments through the second organization. We also reviewed the two highest value contracts with this organization and found that both were paid, or to be paid, from enhancement grant funds for work done or to be done for the Solid Waste Department.

No Payments to Loaned Employee or the Programs He Directed

We found no payments from Metro to the loaned employee nor to the program he directed for the first organization during the period June 30, 1992 and July 20, 1995.

Observations Regarding Payments We found no evidence indicating that this individual received any financial compensation from Metro directly for his work as a loaned employee or indirectly through the two environmental organizations and one program that were named in the memorandum of understanding. The loaned employee was properly compensated with work space and other service privileges for the work authorized by Metro under the memorandum of understanding.

Metro Employee an Officer in One Environmental Organization

Membership Allowed The 1994 and 1995 annual reports of the organization that employed the loaned employee and other documents showed that during those years, a Metro Senior Planner was secretary of the organization and later its president. According to Metro's General Counsel, neither state ethics rules nor Metro's Code prohibit employees from being members or officers in such organizations.

Collaborator Not Supervisor In 1994 and early 1995, the loaned employee was working with this Senior Planner on water resource programs. The memorandum of understanding between Metro and the loaned employee stated that he was not entitled to monetary compensation and was an independent contractor, not subject to supervision by Metro employees. The Senior Planner as a member of a collective bargaining unit was not entitled to exercise supervisory authority over anyone. The Planning Department director told us that the Senior Planner collaborated with the loaned employee on projects, but never supervised him. The director also told us that he had not been aware of the Senior Planner being an officer in the environmental organization. We found no evidence that the Senior Planner had supervised the loaned employee either as a Metro employee or as an officer in the environmental organization.

**Advocacy
Prohibited During
Work Hours**

The memorandum of understanding with the loaned employee limited his work with Metro to normal coordination work and not advocacy for the environmental organizations or the program he directed while at Metro. It also precluded him from advocacy for a bond issue while at Metro. Neither the memorandum of understanding, Oregon statutes nor the Metro Code forbade such activities after work hours, once he was away from Metro premises.

The statutory prohibitions regarding political activity by public employees, i.e. the Senior Planner, are also clear that while off the job Metro employees may engage in political activity. As long as the Senior Planner, while in a paid status at Metro, did not engage in activity that promoted or opposed any ballot measure or candidate, no statutory or Metro Code violation occurred. Again, we found no evidence that either party engaged in any prohibited activities while at Metro.

**Employee's Action
in Signing
Contract Allowed**

The Senior Planner, in the capacity of president of the environmental organization, signed a \$15,000 Greenspaces Restoration Grant contract with the Parks Department's Capital Development Division. Metro's General Counsel told us that this action was permissible. He advised us that as long as the Senior Planner held only an unpaid position in the nonprofit environmental organization, no violation of ORS 244.040 (prohibiting public officials from using their positions to obtain personal financial gain or financial gain for any business with which the official is associated) or ORS 244.120 (requiring disclosure of any actual or potential financial conflicts of interest) had occurred. He further stated that the statutes clearly provide for an exemption for public officials who serve in a nonpaid capacity with 501(C)(3) not-for-profit organizations.

**Observation
Regarding
Employee's
Conduct**

We found no evidence that the Senior Planner's working relationships with the loaned employee or the environmental organization that employed him were inappropriate. Metro's General Counsel advised us that neither the Oregon Revised Statutes nor the Metro Code prohibited the Senior Planner's activities.

Does Metro Need a More Comprehensive Code of Ethics

Responsibilities of Government Employees

Government service requires unusually high standards of honesty, integrity, impartiality, and conduct by employees to assure the proper performance of government business and to maintain the confidence of citizens in their government. In all their dealings, government employees should conduct themselves as to permit no reasonable basis for suspicion of unethical conduct or practices.

Metro Citizen's Concerns

The questions asked by the Metro citizen that initiated our review suggested an apparent conflict of interest with regard to the loaned employee, the Senior Planner and the environmental organization that employed the loaned employee. Apparent conflicts of interest exist whenever a reasonable person might suspect that private interests might cause government employees to commit prohibited or unethical acts.

Conflicts of Interest

Conflicts of interest, or apparent conflicts of interest, may be financial, nonfinancial or those resulting from non-government employment. Nonfinancial conflicts may include personal relationships or organizational membership or affiliations which might cause employees to perform official duties in a way other than they would have if they had no such interests.

Apparent Conflicts of Interest at Metro

With respect to the loaned employee, the Senior Planner and the environmental organization, Metro's General Counsel concluded that no statutory or Metro Code violations had occurred. There is also no evidence that the Senior Planner's relationship with the loaned employee and the environmental organization caused her to perform her official duties in a way other than how she would have without such interests. However, in view of the Metro citizen's concerns, those relationships may have created an apparent nonfinancial conflict of interest which should have been disclosed to the Senior Planner's supervisor so that he could have determined whether conflicts existed.

Metro's Code of Ethics

The Metro Code, Section 2.02.240 establishes a code of ethics for Metro public officials who are not represented by bargaining units. There is no separate code of ethics for employees represented by bargaining units, but according to Metro's General Counsel, ORS Chapter 244 establishes a code of ethics for all public employees which is virtually identical to the provisions of the Metro Code and pertains to those employees as well. Metro's code of ethics, which is consistent with the Oregon Revised Statutes, describes actual or potential financial conflicts of interest, but does not address nonfinancial or apparent conflicts of interest.

Conventional Wisdom of Government Ethics

We compared Metro's code of ethics to that of the City of Portland. The Portland code was suggested to us by the Oregon Ethics Common as a clear and concise, yet comprehensive, code for local government agencies. The Oregon Ethics Common is an organization that promotes ethical awareness and behavior by raising and addressing ethical dimensions of issues as they impact our communities.

The purpose of Portland's code is to support ethical decisions and provide training to city officials. The Portland City Auditor reported that the code and explanations represented the conventional wisdom of government ethics, adapted to the city's organization and terminology.

Portland's code is based on the following basic principles:

City of Portland's Code of Ethics

- **Trust.** The purpose of city government is to serve the public. City officials treat their office as a public trust.
- **Objectivity.** City decisions are based on the merits of the issues. Judgment is independent and objective.
- **Accountability.** Open government allows citizens to make informed judgments and hold officials accountable.
- **Leadership.** Ethical leadership sets a good example and treats all citizens with respect.

The City of Portland Code, less detailed explanations, is included as Attachment 2 to this report.

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Recommendation

Consideration should be given to establishing a comprehensive code of ethics for Metro.

While Metro has a code of ethics, it is basically intended to avoid or announce actual or potential financial conflicts of interest. Conventional wisdom of government ethics suggests that a code of ethics is much more. It should establish high standards of honesty, integrity, impartiality and conduct by employees to assure proper performance of government business and to maintain citizens' confidence in their government. We believe that the Executive Officer and the Council may wish to evaluate whether to expand Metro's code of ethics along the lines of Portland's code. As a minimum, the Executive Officer and Council may wish to evaluate whether the current Metro code of ethics should be revised to more clearly explain:

- the need for ethical conduct,
- the need to avoid the perception of unethical conduct,
- the types of conduct that may result in financial and nonfinancial conflicts or apparent conflicts of interest, and
- the methods of resolving such conflicts or apparent conflicts of interest.

If, after such an evaluation, the Executive Officer and Council decide such an expansion is needed, the Office of the Auditor will be pleased to assist in developing a revised code of ethics for Metro.

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EXECUTIVE ORDER NO. 95-56

EFFECTIVE DATE: August 24, 1995

SUBJECT: POLICY FOR LOANED EXECUTIVES

The purpose of this Executive Order is to establish policy and procedures for Metro's participation in loaned executive or loaned employee programs.

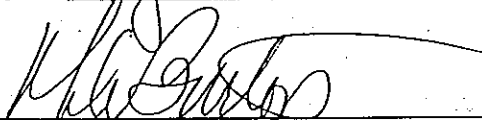
This Executive Order applies to cases where Metro accepts a loaned executive or employee from another entity. In extraordinary circumstances the Executive Officer may apply this policy in cases where Metro will loan an employee to another entity. The terms and conditions for use of all loaned executives and employees must be contained in a written agreement between Metro and the entity which is loaning the executive or employee. Written approval from the Executive Officer is required for all agreements for loaned executives and employees.

The loaned person must perform a task at Metro that is consistent with Metro's mission and existing budget/policy plans. The "loaned" individual shall act under the direct supervision of a Metro supervisor and must be carrying out a specific work plan that is documented in writing.

The agreement shall delineate the funding source and responsibility for payment of all salary and benefits, and shall address the issues of Workers' Compensation insurance liability, and tort claim issues. The agreement shall address potential conflict of interest issues and shall specifically disclose and acknowledge the benefits to be received by the loaning entity. All agreements must be reviewed and approved by the Office of General Counsel.

In the case where this policy is applied to authorize the loan of a Metro employee the Executive Officer shall make explicit findings that establish the benefits to be received by Metro that justify the expenditure of Metro funds or resources and show that the loan is consistent with Metro's mission and adopted budget.

ORDERED by the Executive Officer this 24th day of August, 1995.



Mike Burton
Executive Officer

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To: Elected Officials, City Employees,
Appointees to Boards and Commissions,
and City Volunteers

On April 27, 1994, City Council added a new chapter to City Code covering a code of ethics for all City officials. The ethics code is intended to support ethical decisions, provide training for new officials, and help decentralize administration.

As drafted, the code and explanations represent the conventional wisdom on government ethics, adapted to the City's organization and terminology. This is the first time the information has been gathered in one place, with the main themes and logical connections identified. Some ethical provisions overlap with federal, state, or local law, and these links are highlighted.

Everyone who worked on this project wanted to make sure the ethics code emphasizes positive expectations, rather than a list of prohibitions. They also want the code to be a first step toward in-depth discussion and training in ethical principles. If you are in doubt about a particular situation, you are encouraged to seek advice.

Barbara Clark, CPA
Portland City Auditor

City Code Chapter 1.03

CODE OF ETHICS

Sections:

- 1.03.010 Definitions
- 1.03.020 Trust
- 1.03.030 Objectivity
- 1.03.040 Accountability
- 1.03.050 Leadership

1.03.010 Definitions.

1. "City official" means any elected official, employee, appointee to a board or commission, or citizen volunteer authorized to act on behalf of the City of Portland, Oregon.
2. "Ethics" means positive principles of conduct. Some ethical requirements are enforced by federal, state, or local law. Others rely on training, or on individuals' desire to do the right thing. The provisions of this chapter which are not elsewhere enforced by law shall be considered advisory only.

1.03.020 Trust. The purpose of City government is to serve the public. City officials treat their office as a public trust.

1. The City's powers and resources are used for the benefit of the public rather than any official's personal benefit.
2. City officials ensure public respect by avoiding even the appearance of impropriety.
3. Policymakers place long-term benefit to the public as a whole above all other considerations, including important individuals and special interests. However, the public interest includes protecting the rights of under-represented minorities.
4. Administrators implement policies in good faith, as equitably and economically as possible, regardless of their personal views.
5. Whistle-blowing is appropriate on unlawful or improper actions.

6. Citizens have a fair and equal opportunity to express their views to City officials.
7. City officials do not give the appearance of impropriety or personal gain by accepting personal gifts.
8. City officials devote City resources, including paid time, working supplies, and capital assets, to benefit the public.
9. Political campaigns are not conducted on City time or property.

1.03.030 Objectivity. City decisions are based on the merits of the issues. Judgment is independent and objective.

1. City officials avoid financial conflict of interest and do not accept benefits from people requesting to affect decisions.
2. If an individual official's financial or personal interests will be specifically affected by a decision, the official is to withdraw from participating in the decision.
3. City officials avoid bias or favoritism, and respect cultural differences as part of decision-making.
4. Intervention on behalf of constituents or friends is limited to assuring fairness of procedures, clarifying policies or improving service for citizens.

1.03.040 Accountability. Open government allows citizens to make informed judgments and to hold officials accountable.

1. City officials exercise their authority with open meetings and public records.
2. Officials who delegate responsibilities also follow up to make sure the work is carried out efficiently and ethically.
3. Campaigns for election should allow the voters to make an informed choice on appropriate criteria.
4. Each City official is encouraged to improve City systems by identifying problems and proposing improvements.
5. City government systems are self-monitoring, with procedures in place to ensure appropriate actions.

1.03.050 Leadership. Ethical leadership sets a good example and treats all citizens with respect.

1. City officials obey both the letter and the spirit of all laws and regulations.
2. Leadership facilitates, rather than blocks, open discussion.
3. All City bureaus and work teams are encouraged to develop detailed ethical standards, training, and enforcement.
4. The City Auditor will publish a pamphlet containing explanations and examples of ethical principles.

Response to the Report



METRO

Date: September 20, 1995
To: Alexis Dow, CPA, Metro Auditor
From: Mike Burton, Executive Officer
Re: Response to "A Report by the Office of the Auditor, Observations Relating to Loaned Employees and Metro's Code of Ethics"

A handwritten signature in cursive script, appearing to read "Mike Burton", written over the "To:" and "From:" lines of the memo header.

I have received the audit report of September 19, 1995, titled "Observations Relating to Loaned Employees and Metro's Code of Ethics." I appreciate the opportunity to review this report. Staff have verified the factual accuracy of the document.

This inquiry has brought attention to an area that could benefit from a more detailed policy. We will work with the Office of General Counsel to refine our current code of ethics. We would appreciate receiving any information you have gathered on this subject that would facilitate our work.