

MEMORANDUM OF OPINION

DATE: October 22, 2012

TO: Port of Seattle Commission

FROM: Gerry L. Alexander

RE: Port of Seattle CEO's Service on Board of Directors of Expeditors International
(ATTORNEY-CLIENT CONFIDENTIAL)

Background

Pursuant to a motion passed by the Seattle Port Commission on September 11, 2012, I was retained as outside legal counsel to "provide an independent review and analysis of the legal basis for a finding of no actual, potential or apparent conflict of interest with respect to the [Port of Seattle] CEO's outside board position. . . and compliance with all applicable state and federal laws." The statement in support of the motion was as follows:

Expeditors International of Washington, Inc. ("*Expeditors*") announced on August 10, 2012, that Port of Seattle Chief Executive Officer ("CEO") Tay Yoshitani had accepted its invitation to join the Expeditors International Board of Directors. The CEO's Retention Agreement, adopted by the Commission in public session on March 1, 2011 (the "*Retention Agreement*"), specifically allows the CEO to participate on a private sector board of directors.

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

It is important that the Seattle Port Commission (the "*Commission*") carefully review this matter and obtain the best outside legal counsel and ethical advice to ensure that it is carrying out its fiduciary responsibilities to the Port under state law and the Commission's Bylaws, to confirm that all terms of the Retention Agreement were properly complied with, and to properly oversee the implementation of the delegation of authority (to the CEO) as provided by Commission Resolution No. 3605, as amended.

At the aforementioned meeting, the Seattle Port Commission also authorized retention of an expert to “provide a timeline of pertinent events from the time Mr. Yoshitani’s Retention Agreement was approved on March 1, 2011 to September 10, 2012, with respect to the approval process relating to the Expeditors’ board position.” Attorney Russ Perisho has been retained to prepare the timeline of events and I have communicated extensively with Mr. Perisho since I was retained as outside counsel in order to make certain that I was fully aware of the events that are pertinent to my charge. I have also examined numerous documents relating to the operation of the Port of Seattle and Expeditors International, and I have listed the most relevant of the documents in an Appendix to this Opinion. In addition, Mr. Perisho and I jointly conducted a 2½-hour interview of Mr. Yoshitani on October 12, 2012, at the Seattle Port Commission’s offices at SeaTac International Airport. Finally, the September 11, 2012, motion called for Mr. Perisho and me to render our reports to the Seattle Port Commission in a public session on October 23, 2012.

Throughout my review of this matter, I have kept in mind the fact that the CEO of the Port of Seattle is a public official. As such, the CEO has a public trust and is subject to the requirement that he “avoid conflicting interests that convey the perception that a personal rather than a public interest might affect their decision on matters of concern.” McQuillian, The Law of Municipal Corporations §12:173-22/3d ed. 2012). That same section in the McQuillian text indicates that there “should be strict enforcement of conflict of interest statutes so as to provide a strong disincentive for officers who might be tempted to take personal advantage of their public offices.”

I make these points at the outset because port districts are somewhat unique public agencies. The Washington State Legislature has authorized the creation of such districts in every county in the State and has given them the broad powers to: acquire, construct, maintain, operate, develop and regulate “harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, and other commercial transportation, transfer, handling, storage and terminal facilities and industrial improvements.” RCW 53.04.010. In engaging in these authorized activities, a port district like the Port of Seattle, which owns and operates cargo and aircraft facilities, marinas, parking garages, conference facilities and grain terminals, as well as several thousand acres of industrial and commercial property, necessarily does business with and is engaged with many non-governmental entities. Consequently, in the view of some, a port district may be looked upon as a quasi-private entity.

That is not the case. A port district is a municipal corporation that exists by virtue of a statute and it is no less public than other municipal corporations such as cities, towns, public utility districts and school districts. The CEO of the Port of Seattle is, therefore, subject to Washington’s Code of Ethics for Municipal Officers as well as the Port of Seattle’s Code of Conduct: Workplace Responsibility Employee Handbook. Although the Code of Ethics for Port Commissioners does not specifically apply to the CEO of the Port of Seattle, for purposes of this review I have assumed that it is applicable to Mr. Yoshitani.

In organizing this opinion, I have divided it into two sections. The first section is a recitation of facts. It is based on the timeline of events prepared by Mr. Perisho as well as my

review of certain documents and the interview of Mr. Yoshitani. The factual section gives a broad overview of the circumstances that led to my retention as outside counsel.

The second portion of the opinion is the analysis section. In it, I have endeavored to apply the facts I have gleaned to pertinent statutes and employees' codes in order to render an opinion on the ultimate question before me, which I would state as follows: Does CEO Tay Yoshitani's participation on the Board of Directors of Expeditors International ("Expeditors") create or appear to create a conflict of interest, and/or is it contrary to any statutory provision or provision in Codes of Ethics applicable to employees or commissioners of the Port of Seattle? For ease of understanding, I have set forth some facts in the Analysis section that are not contained in the Facts section but which are specific to the issue being discussed.

Facts

Tay Yoshitani is the Chief Executive Officer of the Port of Seattle. He has served in that position since 2007. Mr. Yoshitani has an extensive and impressive background in the field of port management, having served as Deputy Executive Director of the Ports of Los Angeles and Oakland and as Executive Director of the Ports of Baltimore and Oakland. Mr. Yoshitani's salary as Chief Executive Officer of the Port of Seattle is \$367,000 a year.

On March 1, 2011, a divided Port of Seattle Commission adopted a motion to authorize execution of a Retention Agreement with CEO Yoshitani. Thereafter, Mr. Yoshitani and Bill Bryant, President of the Port of Seattle Commission, executed the Agreement. It permitted Mr. Yoshitani to participate, "on his own time," as a Board member of a Board of Directors for a private entity; "provided, that prior to accepting such appointment, the port's General Counsel determines that CEO's participation would not create or appear to create a conflict of interest, or is contrary to any other provision of the port's code of ethics for employees." Mr. Yoshitani has advised Mr. Perisho and me that when he negotiated this provision in his current employment contract in early 2011, he had no specific understanding that he would be asked to serve on the Board of Expeditors.

In early 2012, Mr. Yoshitani had talks with several executives and directors of Expeditors regarding his serving on the Board of that company. Expeditors is a for-profit, international company headquartered in Seattle. It enjoys the distinction of being a Fortune 500 company with 13,000 employees worldwide. Expeditors is engaged in the business of providing global logistics services. The company's services include the consolidation or forwarding of air and ocean freight, vendor consolidation, customs clearance, cargo insurance, distribution and other logistics services.

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

About 23% of Expeditors' consolidated net revenues were attributable to ocean freight services. Among other ocean freight functions, Expeditors operates an entity that contracts with

ocean shipping lines to obtain transportation for a fixed number of containers between various points at an agreed rate. The company also may prepare documentation, procure insurance, arrange for packing and crating services, and provide consultation.

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

Expeditors does not perform any work for the Port and it has no contracts or other direct relationships with the Port. In that regard, Mr. Perisho and I examined the Port's involvement with Expeditors' application to have its warehouse in King County designated as a Foreign Trade Zone (FTZ). Although it appears that the Port has a role in the application process, it is purely ministerial in that it forwards FTZ applications to U. S. Customs for review and to the FTZ Board for approval. For this function, the Port is permitted to collect a modest fee to cover its administrative costs in connection with the application. Because the Port of Seattle exercises no discretion in the matter, I do not consider this a direct business relationship between the Port and Expeditors. Expeditors does, however, have contracts with air and ocean freight companies who use Port of Seattle facilities.

Sometime in April 2012, Mr. Yoshitani contacted Craig Watson, General Counsel for the Port of Seattle, and advised him that he was considering serving on the Expeditors Board. Mr. Yoshitani asked Mr. Watson if he believed that serving on Expeditors' Board would constitute a conflict of interest. Mr. Watson indicated that he would look into the matter and get back to Mr. Yoshitani. Several days later, Mr. Watson orally advised Mr. Yoshitani that it was his opinion that there would be no ethical violation if Mr. Yoshitani joined Expeditors' Board.

Following his conversation with Mr. Watson, Mr. Yoshitani notified officials at Expeditors that he was interested in serving on its Board. In May 2012, Mr. Yoshitani met with several executives and Board members of Expeditors and advised them of his willingness to serve on the Board. He then notified the five members of the Seattle Port Commission by email that he had accepted a position on the Board of Expeditors. The email message was as follows:

As you'll recall, I had asked that a provision be added to my contract that permitted me to join corporate boards, as long as there was no conflict of interest. I wanted to let you know that after reviewing any possibility of conflicts with Craig Watson, I have accepted an invitation to join the Board of Directors for Expeditors International. Although they are a Fortune 500 Company, Expeditors maintains a fairly low profile in the community. There will be some sort of official filing with the SEC, but I doubt that any public announcements will be forthcoming. As for me, I would like to keep a low profile as well and hope that the Commission will accommodate this desire.

All of their Board meetings are right here in Seattle and I will, of course, be taking personal time off to attend them. In short order, I will become very

knowledgeable about "3rd party logistics providers" and hope that this will be beneficial to the POS. As far as I'm concerned, nothing changes with my on-going role as CEO of the Port. If you have any questions about my additional new role, please give me a call.

On May 21, Mr. Yoshitani provided a conflict of interest disclosure form to the Port of Seattle, which stated:

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

On August 6, 2012, Mr. Yoshitani was formally elected to serve on the Board of Expeditors through May 2013. Mr. Yoshitani was present at the Board meeting at which the election was held. Expeditors issued a press release on August 9, 2012, indicating that it had elected Mr. Yoshitani to a term on its nine-member Board of Directors, effective August 6, 2012. The announcement said that Mr. Yoshitani would serve on Expeditors' Audit, Compensation, Nominating and Corporate Governance Committees. Mr. Yoshitani has filed a conflict of interest disclosure form with Expeditors.

Members of the Board of Expeditors are expected to attend four meetings each year. Although the Board provides overall management of the "affairs, property and interest of the corporation," it is not involved in day-to-day operations of the corporation. Expeditors pays each of its six so-called "outside" directors, including Mr. Yoshitani, a \$30,000 per year retainer plus \$1,000 for each day they attend a Board meeting or do committee work. Outside Board members ordinarily receive \$200,000 worth of restricted stock in Expeditors each year they serve on the Board. Because of the timing of Mr. Yoshitani's election to the Board of Expeditors, he has not received stock in Expeditors. It is understood, however, that Expeditors intends to provide compensation of equivalent value to Mr. Yoshitani during his term as a director.

On August 28, 2012, following Mr. Yoshitani's election to the Board, General Counsel Watson provided a written opinion to Kurt Beckett, the Port of Seattle's Chief of Staff. The conclusion Mr. Watson reached is generally consistent with the oral opinion that he had earlier provided to Mr. Yoshitani. Thereafter, attorneys Timothy G. Leyh and Katherine Kennedy, of the law firm of Calfo Harrigan Leyh & Eakes LLP, were asked to address the question of whether the Port of Seattle's Employee Code of Conduct, Code of Ethics for Port Commissioners, or RCW 42.23, Washington's Code of Ethics for Municipal Officers, preclude the Port's CEO, Tay Yoshitani, from sitting on the Board of Directors of Expeditors. They concluded that under the circumstances presented here, there is no ethical prohibition to Mr. Yoshitani serving on Expeditors' Board.

Analysis

Although I have not been specifically asked to directly comment on the question of whether Mr. Yoshitani fully complied with the terms of his employment contract with the Port of Seattle when he accepted Expeditors' offer to serve on its Board, it seems apparent that he did comply with the requirements set forth in the contract. I reach that conclusion because prior to accepting the appointment to the Board of Expeditors, Mr. Yoshitani did what he was supposed to do under the employment contract—he obtained an opinion from the Port's General Counsel that his participation on the Expeditors Board violated no ethical rules.

The fact that Mr. Yoshitani complied with that requirement does not, however, resolve the questions that have been posed to me. I say that because whether Mr. Yoshitani's service on the Board of Expeditors is an actual or apparent conflict of interest and/or contrary to the law or to the Port of Seattle's Employee Codes is, under circumstances such as we have here where there is no real dispute about the facts, a question of law which I have been charged with analyzing *de novo*.

As noted above, I have been retained by the Seattle Port Commission to conduct an independent review and analysis of the legal basis for the finding that there was no actual, potential or apparent conflict of interest with respect to Mr. Yoshitani's position on the Board of Expeditors and whether he is in compliance with all applicable laws. I have confined my analysis to what I believe is the relevant state law, being of the view that state law controls here. I, therefore, have not analyzed any federal statutes.

A. Chapter 42.33 RCW—Code of Ethics for Municipal Officers.

RCW 42.23.030 provides as follows:

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

It is my view that this provision has little relevance here. I reach that conclusion because there are no contracts or direct business relationships between the Port of Seattle and Expeditors. An instructive case on this point comes from our state's court of appeals, *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 106 P.3d 290 (2005). There, the court concluded that a member of the Des Moines City Council did not violate the "beneficial interest in a contract" provision of RCW 42.23.030. The facts in that case were that City Councilman Petersen owned a towing company which was frequently called upon by the Des Moines Police Department to tow cars. An action was brought to have Petersen disqualified from serving on the City Council so long as he held an interest in the towing service company. The court of appeals rejected the argument that he should be disqualified based on the fact that there was no

self-dealing by Petersen since the City of Des Moines had not made any contract, express or implied, with the towing company owned by the Council member.

More relevant to the issues before me is another provision in RCW Chapter 42.23. It is RCW 42.23.070, which sets forth “prohibited acts.” It reads as follows:

- (1) No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.
- (2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.
- (3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.
- (4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.

I have focused on Section (1) of RCW 42.23.070 because it appears that it has the most potential to apply in these circumstances. Clearly this provision would prohibit Mr. Yoshitani from using his position as the CEO of the Port of Seattle to secure special privileges or exemptions. . .for himself or others, such as Expeditors.

I am satisfied that the facts do not support a conclusion that Mr. Yoshitani used his position at the Port of Seattle to secure a special privilege for himself. While it is certainly a fact that Mr. Yoshitani has been appointed to the Board of Expeditors and that he receives considerable remuneration for his Board service, I have not seen or heard anything which even suggests that there was a *quid pro quo*, i.e., that Mr. Yoshitani secured the appointment in exchange for a direct or implied promise to use his position at the Port of Seattle to bestow some benefit on Expeditors. Rather, it is reasonable to assume that Mr. Yoshitani was elected to the Board of Expeditors because of his background and wide experience in the logistics field and his knowledge about international trade issues. I make this latter statement while conceding that I do not have any particular expertise in the subject of corporate governance. I believe, though, that it is well accepted that publicly-held corporations of the Fortune 500 variety make an effort to bring persons onto their Boards who lend prestige to the corporation and, at the same time, possess knowledge about the field of business in which the corporation is engaged. This makes sense because it promotes investor confidence. It is also well known that members of Boards of large corporations receive compensation that is based more on the reputation of the Board member and the advice he or she can provide than on the amount of time the director spends on corporate business.

I can conceive of an argument going forward that Mr. Yoshitani could use his position as CEO at the Port of Seattle to secure a privilege or exemption for “others,” the others being Expeditors on whose Board he sits. In my judgment, one would have to strain to make such an argument convincing because, as I have already observed, the Port of Seattle has no contracts or direct relationships with Expeditors. Despite the fact that the Port of Seattle and Expeditors have no contractual relationships, it is conceivable, considering Expeditors contractual relationships with companies that do have such relationships with the Port, that in the future Mr. Yoshitani might be in a position to seek favorable treatment for Expeditors. Although Mr. Yoshitani indicated to Mr. Perisho and me that he could not conceive of any way in which he could use his position as CEO to secure a special privilege or exemption for Expeditors, in the event such an opportunity should present itself, Mr. Yoshitani would be obligated to disqualify himself from acting on the matter. He has agreed to do so.¹

B. The Port of Seattle’s Employee Code of Conduct.

The Employee Ethics and Conflict of Interest portion of Port of Seattle’s Employee Code of Conduct (“Employee Code”) requires employees of the Port to maintain “the highest standards of ethical conduct and. . .avoid situations that create a real or perceived conflict of interest.” (Section I) It provides, further, that the “Port’s interests come first” and that employees are required to disclose all potential conflict of interests as well as to report any violations. The Employee Code applies to all employees of the Port, including its CEO.

The Employee Code contains the following provision relating to conflicts of interest:

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

More specifically, the Employee Code indicates that employees should avoid “conflicts from business relationships” which may arise when an employee “has a financial or Beneficial Interest in. . .an organization that competes with the Port, is doing business with the Port; or plans to do business with the Port.” (Section II.A.) The Employee Code goes on to say that no employee may have a financial or beneficial interest, direct or indirect, in any contract by “or for the benefit of the Port.” (Section II.A.) In addition, the Employee Code precludes an employee from engaging “in any decision-making, review, approval, selection, authorizations or supervisory activity concerning any contract or Port transactions in which he/she. . .has a financial or beneficial interest.” (Section II.A.) Finally, the Employee Code says that employees of the Port should “avoid owning interests in operating companies that compete with the Port, or

¹Mr. Perisho and I questioned Mr. Yoshitani about the possibility that Expeditors might benefit from favorable lease rates being afforded to a terminal operator by the Port. Mr. Yoshitani indicated that Expeditors would gain nothing, vis-à-vis its competitors, by high leasing rates or low leasing rates because under the “most favored nation” approach, all terminals will be charged the same rate by the Port.

that sell (or plan to sell) products or services to the Port, other than minimal amounts of stock in publicly-traded companies.” (Section II.A.)

In the conflict of interest disclosure form that Mr. Yoshitani presented to the Port of Seattle on May 21, 2012, he indicated that neither he nor any relative possessed any financial interest in Expeditors. His obligations under the Employee Code are, of course, ongoing and, as I have observed above, he may acquire stock in Expeditors by virtue of his position on its Board. If and when he receives the stock he will obviously possess a financial interest in Expeditors. Expeditors does not, however, compete or do any business with the Port. Thus, it cannot be said that Mr. Yoshitani has a direct conflict of interest by virtue of his position on Expeditors’ Board. One might contend that even though Expeditors has no direct contractual relationship with the Port, it has an indirect relationship with the Port because Expeditors contracts with businesses that have contractual relationships with the Port. The “direct indirect” language cited above modifies the term “financial or beneficial interest” in a contract. There being no contracts or direct dealings between Expeditors and the Port, that language would have no application here.

The Employee Code addresses “perceived” conflicts of interest as well as “real” conflicts of interest. The pertinent provision is as follows:

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

In my view, the term “perceived conflict of interest” is akin to the term “appearance of conflict of interest.” The question arises as to what standard applies when one is determining if there is a perceived or apparent conflict of interest. Although the law is not entirely clear as to what standard is applicable when the focus is on a municipal official, there is merit to the proposition that the proper standard is the so-called “reasonable person” standard that applies in appearance of fairness doctrine cases. In those cases, the question is whether a member of a local decision-making body has violated the doctrine when conducting a quasi-judicial proceeding. The standard in such instances is this: do the circumstances make it appear to a reasonable person who is informed of all the facts that the member of the decision-making body acted out of improper motives? This standard is consistent with another provision of the Employee Code which says that employees “must avoid circumstances in which it appears, or to a reasonable person might appear, that the employee is requesting or otherwise seeking special consideration, treatment or advantage because of the employee’s position with the Port.” (Section III) In my judgment, the question of whether there is a perceived or apparent conflict of interest should be viewed from the position of the factually informed reasonable person. When the facts are viewed from that objective perspective, it is reasonable to conclude that there is no perception or appearance of a conflict of interest. While from a vantage point in the present it is difficult to imagine a circumstance that would present a perception of a conflict of interest, no one can predict future events with certainty. It is possible that Mr. Yoshitani could, at some future time, be confronted with a situation that our mythical reasonable person would say creates a perception that he has a conflict of interest. In that event, Mr. Yoshitani must do as he should

when presented with a real conflict of interest—disclose the conflict and recuse if the disclosure does not obviate the necessity of doing so. This is a significant point because it is not “the fact of a conflict of interest” that is a policy violation. It is, as the Employee Code makes clear, “the failure to disclose a real or potential conflict of interest and/or taking action on behalf of the Port when there is a real or perceived conflict of interest that is of concern to the Port.” (Section IV)

Finally, a word should be said about the “time and energy” and “use of Port equipment” provisions in the Employee Code. The pertinent portion of the “time and energy” provision is as follows:

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

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

Potentially, this provision could come into play, notwithstanding the fact that the Port has no business relationship with Expeditors. However, under the Retention Agreement between Mr. Yoshitani and the Port of Seattle, Mr. Yoshitani is to perform his work for Expeditors “on his own time.” In the interview that Mr. Perisho and I conducted of Mr. Yoshitani, he advised us that when he attends meetings of the Expeditors’ Board, he takes paid time-off. He also said that he does not take telephone calls or receive correspondence concerning Expeditors at his office at the Port of Seattle, such calls and correspondence being directed to him at his home address. Mr. Yoshitani is, of course, new to the Expeditors’ Board and, in fact, has only attended one Board meeting. The demands made upon him by Expeditors have thus far not been great but they could increase over time and potentially could interfere with his ability to perform his job as the Port’s CEO. The provision requiring him to conduct Expeditors’ business on his own time, of course, is a continuing requirement, and in the event he is unable to meet that requirement, he would be out of compliance with his employment contract with the Port of Seattle.

The “use of Port” equipment provision is as follows:

Employees are expected to use Port-owned property and equipment for official Port business. An employee shall not take or use Port-owned property and equipment for personal purposes, convenience or profit. This includes

taking or using fleet vehicles, shop tools, fax machines, copiers, postage, office supplies, cameras, cell phones and laptops. (Section III.B.)

It is not a violation of this policy for an employee to (i) engage in the incidental personal use of such property or equipment (such as sending/receiving personal e-mails while using a Port-owned laptop) while at the workplace, or (ii) engage in other incidental uses of such property or equipment that may be specifically permitted by a CEO's adopted policy (such as an employee's use of a Port assigned cell phone to make a long distance call to a family member while traveling on Port business, in accordance with Procedure AC-2) or CEO written authorization. See also Electronic Systems Policy. (Section III.B.)

It appears that in some communications between Expeditors and Mr. Yoshitani, careful attention was not paid to the Port's prohibition of use of Port equipment for personal business. It appears that an assistant to Mr. Yoshitani at the Port handled a few communications by email and telephone on behalf of Mr. Yoshitani that related to Expeditors and, thus, were not Port business. In addition, on a few occasions during the workday, Mr. Yoshitani sent emails regarding Expeditors using Port equipment. It is difficult to understand how email communications about Expeditors in mid-day could be construed as occurring on Mr. Yoshitani's "own time." Yet, these activities by Mr. Yoshitani and his assistant appear to have been incidental and minimal events. Moreover, my task was not to investigate these matters; rather, my job was to understand if Mr. Yoshitani's service on the Expeditors' Board created a conflict of interest, or was contrary to a statutory provision or applicable codes of ethics. On this point, I am satisfied that Mr. Yoshitani's current approach to service on the Board of Expeditors, as he has explained it to me and Mr. Perisho, is consistent with the contractual requirement that the Expeditors' work occur "on his own time." That work for Expeditors must occur on Mr. Yoshitani's "own time" is an important and continuing obligation that may need to be reviewed in the future.

C. Seattle Port Commissioners' Code of Ethics.

As I indicated above, the Code of Ethics for Port Commissioners does not purport to apply to the Port's CEO. Neither is it referenced in Mr. Yoshitani's employment contract with the Port. I am assuming, however, that it should be applied to the CEO by analogy.

The Commissioner's Code was adopted in 2007 and the Preamble states as follows:

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

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

The Commissioner's Code also contains this provision:

A Commissioner shall perform his/her official duties consistent with the highest standards of ethical conduct and in accordance with the Port of Seattle By-laws, in a manner that reflects the fiduciary duty to the Port and the residents of King County that is required and expected of elected officials. (Section 2)

The Commissioner's Code contains "conflict of interest" provisions and "use of office" provisions fundamentally equivalent to provisions in the statute and Port Employee's Code that I have discussed above. Because Expeditors has no direct relationships with the Port of Seattle and Mr. Yoshitani has promised to recuse himself from situations that pose actual or perceived conflicts of interest, these provisions have not been violated.

Conclusion

For reasons stated above, it is my conclusion that Mr. Yoshitani's service on the Board of Expeditors does not create a real, perceived or appearance of a conflict of interest. Neither does his service on that corporation's Board run afoul of the statutory Code of Ethics for Municipal Officers or any Employee Codes of the Port of Seattle.

I could stop here, but having become informed about the circumstances that led to my retention as outside counsel, I would offer one suggestion to the Seattle Port Commission. Going forward, the Commission might consider providing in future employment contracts with its CEO that before the CEO may accept a position on the Board of Directors of a private entity, the Port Commission must give its approval to this outside employment, in addition to the requirement that the Port's general counsel determine that there is no conflict of interest presented. I offer this suggestion because there may be instances in the future where the CEO's service on a corporate Board is not, technically speaking, a conflict of interest but does, at the same time, generate a response from members of the public that is damaging to the Port's reputation and reduces public confidence in it. Requiring an evaluation of the potential impact of such employee-employer relationships before the fact is, in my judgment, far superior to making those determinations after the fact.

APPENDIX

1. Curriculum vitae of Tay Yoshitani.
2. Memorandum dated September 10, 2012, from Timothy G. Leyh and Katherine Kennedy to Craig Watson, General Counsel, Port of Seattle.
3. Port of Seattle Memorandum dated March 16, 2010, regarding second reading of Resolution No. 3635, which provided the Chief Executive Officer (CEO) the authority to submit an application to Reorganize General Purpose Foreign Trade Zone No. 5 under Alternative Site Framework program and for the CEO to implement the program through agreement with prospective companies that desire to utilize the Port's Foreign Trade Zone (FTZ).
4. Port of Seattle Code of Ethics for Port Commissioners.
5. Port of Seattle Employee Code, Ethics and Conflict of Interest provisions.
6. Port of Seattle—Motion Regarding Independent Review of the Chief Executive Officer's position on the Expeditors International Board of Directors and Port of Seattle Conflict of Interest provisions.
7. Resolution No. 3605 of the Port Commission of Seattle (master policy directive delegating day-to-day management and administrative authority to the Chief Executive Officer).
8. United States Securities and Exchange Commission Form 10K (Annual Report of Expeditors International of Washington, Inc.).