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Report to the Colorado General Assembly



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COLORADO COMMISSION ON HIGHER EDUCATION

**REPORT TO THE GENERAL ASSEMBLY
ON GRIEVANCES OF UNFAIR COMPETITION
BY
COLORADO PUBLICLY SUPPORTED
POSTSECONDARY INSTITUTIONS**

JULY 1, 1991 through JUNE 30, 1992

Colorado Commission on Higher Education
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INTRODUCTION

During the 1988 regular session of the Colorado General Assembly, House Bill 1009, Concerning State Government Competition with Private Enterprise became law, effective July 1, 1988. The law specifies the conditions under which Colorado publicly-supported postsecondary institutions may provide goods, services, and facilities to students and non-students. The law further directed the Commission to develop, in consultation with governing boards and the business community, guidelines and review procedures for the provision of goods and services. According to the law, governing boards were to adopt, in accordance with Commission guidelines, procedures for hearing allegations of unfair competition by privately owned businesses, and the Commission is to report annually to the Governor and the General Assembly on implementation of complaint procedures.

In July 1988, in accordance with the law, the Commission convened a Higher Education/Private Enterprise Guidelines Committee to develop guidelines and grievance review procedures. The committee included representatives of governing boards, business and industry. In October 1988, the Commission reviewed the committee's recommendations and approved the CCHE Guidelines for the Provision of Goods and Services by Publicly-Supported Institutions of Higher Education.

REPORTING REQUIREMENTS

The CCHE guidelines require governing boards to report, by February 1 and August 1 of each year, on the outcome of grievances formally heard by institutions or governing boards. This report is presented to the Governor and General Assembly pursuant to C.R.S. 24-113-104(2)(6) and provides a status report of the complaints received between July 1, 1991 and June 30, 1992.

COMPLAINTS FILED

During the period of July 1, 1991 and June 30, 1992, no complaints were filed against 33 of Colorado's 35 publicly-supported postsecondary institutions, and the Auraria Higher Education Center. Four new complaints and one complaint from a prior period were, however, filed against two institutions and have been reviewed according to the provisions of C.R.S. 24-113 and CCHE Guidelines for the Provision of Goods and Services by Publicly-Supported Institutions of Higher Education.

A summary of the complaints follows.

THE UNIVERSITY OF COLORADO-BOULDER

Boulder Campus Distribution Center

A complaint was filed against the University of Colorado-Boulder Campus Distribution Center. The complaint alleges the Boulder Campus Distribution Center markets Johnson wax products to external entities, in particular the University of Northern Colorado and Colorado State University

Outcome

The complaint was investigated by the University of Colorado at Boulder. The Distribution Center no longer markets the products to external entities. No further action has been taken.

COLORADO STATE UNIVERSITY

Prior Grievance Regarding Proposed Campus Child Care Facility

A complaint was filed against Colorado State University for issuing a Request For Proposals (RFP) to construct and operate a child care facility on campus. The complainant alleged that the land lease was offered below its market value, and that labor would be displaced by student practicum labor.

Outcome

1. The complaint was reviewed by the Vice President for Administrative Services who determined that the statute does not apply to construction and operation of the proposed child care facility. The statute addresses the provision of services by an institution and competitive bidding against the private sector. The child care RFP does not include either of these activities.
2. The complainant appealed the decision and offered new information pertaining to the present CSU laboratory day care center. The Vice President has reviewed the appeal and the University's position remains unchanged.

The complainant did not agree with the determination of the Vice President and, as provided for in the University's policy, appealed to the President. After review, the University notified the complainant their position remained unchanged.

The complainant notified the University of his desire to appeal the decision to the State Board of Agriculture. The matter was heard at the December 1991 State Board meeting. It was noted, however, that the RFP had expired and was no longer valid. The University was to prepare a letter advising the complainant of the current status of the project and the Board's position.

Student Recreation Center

A complaint was filed against the Colorado State University Student Recreation Center. The Student Recreation Center allows students holding a spring activity card to purchase a summer membership at the student rate. Spouses of these students are also eligible. The complainant alleges that because these individuals are not tuition paying students for the summer session they should not be allowed to purchase a summer membership.

Outcome

The University responded that the Student Recreation Center policy serves to promote the physical and mental well being of the student -- a traditional goal of the University. Additionally, the University strongly believes that it is in the students' best interest to allow spouses of students to join them in campus activities. The Vice President for Administrative Services notified the complainant of his determination and continuation of the policy. The complainant has not responded to the Vice President's notification.

Colorado State Forest Service

A complaint was filed against the Colorado State Forest Service regarding their policy of opening state-owned cutting areas and allowing the general public to choose and cut Christmas trees for a fee. The complainant alleged that the state has advantages that allow a lower cost to be charged for the trees than owners of private Christmas tree farms.

Outcome

There is substantial statutory authority for providing wild, uncultured Christmas trees through the CSFS program as it is currently structured. It was suggested to the complainant that representatives from the CSFS would appreciate the opportunity to meet with their organization to discuss its concerns, explain the details of the CSFS program, and answer any additional questions the complainant may have about the role of the CSFS in state forest management. The complainant has not responded to the Vice President of Administrative Services notification.

Nuclear Magnetic Resonance Laboratory

A complaint was filed against the Colorado State University Nuclear Magnetic Resonance Laboratory alleging that the University is soliciting for paying customers to use its National Science Foundation (NSF) funded nuclear magnetic resonance instrumentation. The complaint went on to state that this activity appears to be in conflict with NSF intent and guidelines, as well as state law.

Outcome

The University is in the process of reviewing this complaint. A response was to be prepared and sent to the complainant prior to the statutory deadline.

COLORADO REVISED STATUTES 24-113
STATE GOVERNMENT COMPETITION
WITH PRIVATE ENTERPRISE

24-113-101. Legislative Declaration. The general assembly hereby finds and declares that state government competes with the private sector when state government provides certain goods and services to the public. Recognizing this problem, it is the intent of the general assembly and the purpose of this article to provide additional economic opportunities to private industry and to regulate competition by state agencies, including institutions of higher education. To that end, it is the intent of the general assembly that neither the faculty nor administration of such institutions use research equipment or facilities purchased or provided with state funds to provide goods or services to the public for a fee when such action is in direct competition with private companies that provide similar goods or services.

24-113-102. Definitions. As used in this article, unless the context otherwise requires:

- (1) "Commission" means the Colorado commission on higher education.
- (2) "Institution of higher education" means a state-supported college, university, or community college.
- (3) "Invited guest" means persons who enter onto a campus for an educational, research, or public service activity and not primarily to purchase or receive goods and services not related to the educational, research, or public service activity for which such persons enter onto the campus.
- (4) "Private enterprise" means an individual, firm, partnership, joint venture, corporation, association, or any other legal entity engaging in the manufacturing, processing, sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services for profit.
- (5) "State agency" means a department, office, commission, institution, board, or other agency of state government. Such term shall not include the Colorado state museum or the state historical society, nor shall such term include institutions of higher education.

24-113-103. State competition with private enterprise prohibited - exceptions.

- (1) A state agency shall not engage in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services to the public which are also offered by private enterprise unless specifically authorized by law.
- (2) A state agency shall not offer or provide goods or services to the public for or through another state agency or a local agency, including by intergovernmental or interagency agreement, in violation of this section.

(3) The restrictions on competition with private enterprise contained in this section do not apply to:

(a) The development, operation, and management of state parks, historical monuments, and hiking or equestrian trails, or to the management, protection, or restoration of Colorado's forest and soil resources;

(b) Correctional industries established and operated by the department of corrections pursuant to article 24 of title 17, C.R.S.;

(c) State veterans' homes, except the state veterans' home at Rifle, Colorado;

(d) The Colorado tourism board;

(e) Printing and distributing information to the public if the state agency is otherwise authorized to do so, and printing or copying public records or other material relating to the state agency's public business if the costs of such printing, copying, and distribution are recovered through fees and charges;

(f) The department of public safety;

(g) The construction, maintenance, and operation of state transportation facilities;

(h) The provision of free medical services or equipment to indigents in association with a community service health program; and

(i) The regional transportation district and the transit construction authority.

(4) The provisions of section 24-113-104 and not the restrictions contained in subsection (1) of this section shall apply to institutions of higher education.

24-113-104. Competition with private enterprise by institutions of higher education - rules.

(1) Institutions of higher education shall not, unless specifically authorized by statute:

(a) Provide to persons other than students, faculty, staff, and invited guests, through competitive bidding, goods, services, or facilities that are available from private enterprise, unless the provision of the good, service, or facility offers a valuable educational or research experience for students as a part of their education or fulfills the public service mission of the institution of higher education; however, institutions of higher education may sponsor or provide facilities for recreational, cultural, and athletic events or facilities for food services and sales. If the institution of higher education enters into competitive bidding, its bids shall include all direct and indirect costs of providing the good or service unless the agency receiving the bid requires all bidders to use a specific procedure or formula.

(b) Provide goods, services, or facilities for or through another state agency or unit of local government, including by intergovernmental or interagency agreement, which, if provided directly by the institution of higher education would be in violation of this section.

(c) In determining whether the provision of a good or service offers a valuable teaching, education, or research experience, the following criteria shall be considered:

(I) Whether the provision of the good, service, or facility is substantially and directly related to the instructional, research, or public service mission of the institution of higher education;

(II) Whether the provision of the good, service, or facility is necessary or convenient for the campus community;

(III) Whether there is a demand in the public for the good, service, or facility;

(IV) Whether the price charged for the good, service, or facility reflects the direct and indirect costs and overhead costs of providing such good, service, or facility and the price in the private marketplace; and

(V) Whether measures have been taken to ensure that the provision of a good, service, or facility is only for students, faculty, staff, or invited guests and not for the general public.

(2) (a) The commission shall develop, after consultation with governing boards of institutions of higher education and Colorado business organizations, guidelines for the provision of goods, services, and facilities to students, faculty, and staff of institutions of higher education and to the invited guests of such students, faculty, and staff.

(b) The commission shall annually report to the governor and to the general assembly as to the implementation of the complaint procedures developed pursuant to subsection (3) of this section.

(3) (a) The governing board of each institution of higher education shall adopt, in accordance with guidelines established by the commission, procedures for the hearing of complaints by privately owned businesses. If a privately owned business makes a complaint of unfair competition in relation to the activities of an institution of higher education, the business shall have an opportunity for a hearing regarding such complaint. The complaint shall first be heard by the chief executive officer of the institution, or his designee, and appeal may be made by the privately owned business to the governing board of the particular institution involved in the complaint.

(b) The governing board of each institution of higher education shall submit semiannual reports to the commission regarding the complaint procedure established by the governing board.

(4) This section shall not apply to:

(a) The Colorado health sciences center operated by the university of Colorado, except in those cases in which the health sciences center provides prosthetic or medical devices, or services related to such devices, and a surgical or medical treatment or procedure is not involved in the application of the device;

(b) The provision of free medical services or equipment to indigents in association with a community service health program;

(c) Public service radio and television stations licensed to a governing board or to the institution of higher education under its jurisdiction.

24-113-105. State agency competition - complaints - advisory board.

(1) (a) Any person who believes that a state agency has violated any provision of this article may file a written complaint with the advisory board to the office of regulatory reform stating the grounds for such complaint. The board shall receive such written complaints and shall transmit such complaints to the state agency which is alleged in the complaint to be in violation.

(b) The state agency named in the complaint shall respond to the board in writing within forty-five days after receipt of a complaint. The state agency shall either admit or deny the allegations made in the complaint and it shall indicate whether remedial action will be taken.

(c) A majority of the board may determine whether to hold public hearings on complaints and the majority shall determine whether the state agency is in violation of the provisions of this article.

(d) Within sixty days after the response, the board shall issue a report of its findings to the complainant and the state agency.

(2) The board shall provide information and guidance and shall transmit an annual report of its activities in January of each year to the governor, the general assembly, and the state auditor.

(3) The state auditor shall provide performance audit information to the board. Any person providing information or staff support pursuant to this subsection (3) shall not sit with the board in its review of specific complaints.

(4) The activities of the board shall be subject to existing state and federal law and any regulations promulgated pursuant thereto.

GUIDELINES, REVIEW PROCEDURES AND REPORTING POLICIES
FOR THE PROVISION OF GOODS AND SERVICES BY
COLORADO PUBLICLY SUPPORTED INSTITUTIONS OF HIGHER EDUCATION

SECTION I: GUIDELINES FOR THE PROVISION OF GOODS AND SERVICES

A. Introduction

The primary mission of higher education institutions is to create and disseminate knowledge. To perform this mission, it is often necessary for institutions to provide, and charge fees for, goods and services that enhance, promote, or support their teaching, research, and public service functions. It is important, however, that institutions be mindful that the provision of goods and services may be in competition with private businesses, and remain sensitive to the interests of private businesses.

The purpose of these guidelines is to define the legitimate purposes of the provision of goods and services by institutions of higher education and to establish a mechanism for addressing complaints of unfair competition by private businesses. These guidelines were developed in accordance with Colorado Revised Statutes title 24 of article 113, in consultation with governing boards and business to be implemented by governing boards on each of the campuses under their control.

B. Exclusions

In recognition of the teaching, research, and public service missions of higher education institutions, these guidelines shall not apply to the following situations:

- 1) instructional charges;
- 2) services provided in the experiential aspects of instructional and research programs;
- 3) services for fees in extracurricular or residential life programs, including residence halls, food service, athletic, recreational and cultural programs;
- 4) the University of Colorado Health Sciences Center, except in those cases where a prosthetic or medical device is provided without an accompanying surgery or medical procedure;
- 5) the provision of free medical services or equipment to indigents in association with a community service health program; and

- 6) public service radio and television stations licensed to a governing board or to an institution under its control.

C. Guidelines

It is appropriate for higher education institutions to provide and charge for goods and services to students, faculty, staff, and invited guests, under the following conditions:

- 1) The good or service is authorized by statute.
- 2) The good or service offers a valuable educational or research experience for students as a part of their education.
- 3) The good or service fulfills the public service mission of the institution of higher education.
- 4) The good or service is being provided other than through intergovernmental or interagency agreement with another agency of state government or unit of local government, which, if provided directly by the institution would be in violation of these guidelines.

D. Criteria for Provision of Goods and Services to Students, Faculty, and Invited Guests

In determining the appropriateness of a good or service to the campus community, consideration shall be given to the following criteria:

- 1) Whether the good or service is substantially and directly related to the instructional, research, or public service mission of the institution.
- 2) Whether the good or service is necessary or convenient for the campus community.
- 3) Whether the intended use of the good or service is for students, faculty, staff, or invited guests rather than the general public. Invited guest are defined as persons who enter a campus for an educational, research, or public service activity, and not primarily to purchase or receive goods and services not related to the educational, research, or public service mission of the campus.
- 4) Whether the price charged reflects the direct and indirect costs and overhead costs of the good, as well as the price in the private marketplace.
- 5) Whether in establishing the price of the good or service, consideration was given to the price in the private marketplace.
- 6) Whether there is a demand by the general public for the good or service.

E. Criteria for Sales to the External Community

In assessing the validity of providing goods or services to the external community, both of the following criteria must be met:

- 1) The good or service represents a resource that is directly related to an institution's educational mission, not commonly available or otherwise easily accessible, and for which there is a demand from the external community; the goods or services are byproducts of the institution's instructional, research, or public service activities; the institution has specific statutory authority to sell the good or service; or the good or service is produced from the business-like management of the assets of the institution for the exclusive benefit of the institution.
- 2) The price charged is sufficient to recover the full costs, including both direct and appropriate indirect costs, of the good and service. The price of such items in the private market place shall be taken into account in establishing the price or fee.

SECTION II: GUIDELINES FOR GRIEVANCE REVIEW PROCEDURES

In the event that the provision of a good or service by a higher education institution is perceived to be in competition with a privately owned business, that business shall be provided the opportunity for a hearing of such complaint according to the following guidelines:

- 1) The complaint shall first be heard by the chief executive officer of the institution or his designee.
- 2) If resolution is not reached as a result of the initial review by the institutional chief executive officer, appeal may be made to the governing board of the institution.

SECTION III: REPORTING PROCEDURES

- 1) Governing boards shall submit, by February 1, and August 1 of each year, semiannual reports to the Commission regarding the outcome of grievances reviewed pursuant to the procedures established in accordance with Section II of these guidelines.
- 2) The Commission shall report annually to the Governor and the General Assembly as to the implementation of the grievance review procedures.