

STATE ETHICS COMMISSION

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SUMMARY OF POST-EMPLOYMENT AND RELATED LIMITATIONS

This summary is intended to alert State employees to issues that can arise when they make a decision to leave State service. This includes implications for them in the waning days/weeks of their State employment with respect to possible limitations on the work they can perform for their new employer, and possible implications for the new employer in bidding on State contracts.

Disqualification and Prestige

Disqualification from Participation

State employees who plan to leave State service should be aware that certain provisions of the Public Ethics Law (General Provisions, Title 5, Annotated Code of Maryland) apply to constrain their conduct while they continue in their State positions. Section 5-501 prohibits participation in their State capacities in matters in which they have an interest or which involve entities to which they have applied for positions, are negotiating for employment or have any arrangements regarding future employment. The disqualification restriction applies when there is a one-to-one conversation or negotiation for employment, but it generally does not apply to situations in which the State employee sends resumes to a number of potential employers or to a State employee who has received an unsolicited offer of consideration for future employment. (See State Ethics Commission Opinion No. 82-19.) Once negotiations or an arrangement for future employment commence, the State employee needs to disclose this information and he or she may not participate in any matter involving the new or potential employer.

Prestige

Section 5-506 of the Public Ethics Law prohibits officials or employees from using the prestige of office for personal economic gain or that of another. This provision does not, however, preclude the State employee from including on his or her resume facts and general information related to the State employment and experience in State employment that may be a qualifying factor for the future employment.

Post-Employment Provision

Section 5-504(d) of the Public Ethics Law prohibits a former official or employee from assisting or representing in any way a party other than the State in a matter involving the State if the

matter is one in which the individual participated significantly as a State employee.¹ Several formal Ethics Commission advisory opinions provide some general direction regarding the nature of the constraints established by this section of the Public Ethics Law. (See, for example, Opinion Nos. 07-1, 91-2, 89-11, 85-9, 82-24 and 82-17). This section of the law does not bar employment with an entity involved in matters relating to a former agency or an individual's appearance before the agency, rather it looks to identification of particular matters in which the individual had significant involvement in the context of his or her State employment and forbids assistance or participation as to those matters on behalf of another party. There is no time limit on this prohibition.

The purposes of § 5-504(d) are: 1) to avoid the appearance of "switching sides" and thereby providing another party the special knowledge acquired in the context of one's State employment; and 2) preventing the use of prior involvement to benefit the employee or another. Application of this prohibition relies on specific facts to determine whether the matter is the same matter and whether the person's participation while a State employee was significant.

The Commission generally has viewed participation in a matter as a State employee as including more than theoretical final authority or responsibility for a matter. Facts demonstrating personal supervision in a matter as a State employee of the work of others, involvement in a required sign-off or concurrence capacity, or, in some cases, the provision of advice or recommendations as to a matter, may lead to a conclusion of significant participation. If the proposed new work has any relationship to the individual's former agency activities, the question the individual needs to consider is whether the proposed work for a new employer involves the same matter in which the individual participated as a State employee.

Advice with regard to post-employment issues depends on the specific facts of the situation. It is difficult to provide advice in a hypothetical or speculative context. The time elapsed since the work was performed as a State employee and since the termination of State employment is a factor, although not the determinative factor or the only factor. The focus is whether the former official or employee significantly participated in the matter in his or her State capacity. If a potential assignment for a new employer involves a matter that flows from or is otherwise related to a matter on which the individual worked while a State employee, the individual should consult with the State Ethics Commission for a more detailed review in the context of the specific facts. In terms of how much work a former employee must perform for the new employer to constitute "assisting" for purposes of the prohibition in § 5-504(d), it is best to consult with the Commission concerning the specific facts of the situation.

The Commission has determined that the Public Ethics Law does not prohibit former officials and employees who leave State service from working directly for the State as contractual employees (i.e. personal services contract) on the same matter they worked on during their State service. On the other hand, the Commission has determined that the Public Ethics Law prohibits former officials and employees from working on these same matters if they attempt to do so by forming a sole proprietorship or by working for a contracting business. The distinction here is that as a direct contractor, the former official/employee is still working directly for the State, is not assisting or representing another party for compensation, and therefore has not "switched sides." In the latter situation (sole proprietorship or employed by a contractor) the insertion of a business entity into the

¹ Note the additional restriction on the Governor, Lieutenant Governor, Attorney General, Comptroller, State Treasurer or Secretary of a principal department of the Executive Branch, who may not assist or represent another party for compensation in a matter that is the subject of legislative action for one calendar year after leaving State office.

relationship creates a conflict in that the former official/employee has a primary duty to his/her new employer rather than the State.

Additional Restrictions on Elected Officials and Cabinet Secretaries

Section 5-504(d) of the Public Ethics Law also prohibits a former member of the General Assembly, Governor, Lieutenant Governor, Attorney General, Comptroller, State Treasurer or Secretary of a principal department of the Executive Branch from assisting or representing another party for compensation in a matter that is the subject of legislative action for one calendar year from the date the official leaves State office. The limitation does not, however, apply to representation of a municipal corporation, county, or State governmental entity.

Special Procurement Provisions

Individuals who are involved in State procurement activities must be aware of § 13-211 of the Finance and Procurement Article, Annotated Code of Maryland, which provides that, during a procurement process, a competing contractor or its agent or consultant may not make an offer or promise of future employment or business opportunity to, or engage in any discussion of future employment or business opportunity with, any procurement official of the agency conducting the procurement. “Procurement official” is a broader term than “procurement officer,” and the prohibitions contained in the Finance and Procurement Article are broader than the restrictions contained in the Public Ethics Law discussed above.

Note that the State Finance and Procurement Article also places certain restrictions on former officials and employees with respect to other procurement matters. Section 13-212.1 (formerly §5-508 of the Public Ethics Law) generally prohibits persons from bidding on a procurement if that person assisted the State in the drafting of specifications, an invitation for bids, a request for proposals for a procurement, or the selection or award made in response to an invitation for bids or request for proposals. Furthermore, and very important for a former official or employee to know, this section of the State Finance and Procurement Article applies the same prohibition to an employer that employs a former official or employee who provided the type of assistance to the State as discussed above, even if that former official or employee has no role in preparing the proposal for the employer. Former employees and their new employers should take care not to disqualify the employers from bidding on a procurement in which the employees participated during their State service.

Limitations of this Summary

This summary is not intended to be an exhaustive discussion of the post-employment provisions of the Public Ethics Law. Rather, it reflects informal guidance based on the State Ethics Commission’s application of the Law as articulated in previous formal opinions. It does not constitute an opinion of the Commission. Opinion Nos. 07-01, 92-11, 91-13, 90-12, 86-24, 85-14, 84-33, 83-12, 82-3, 81-15, and 80-1 provide further information. Commission staff is available to answer questions and provide additional information regarding application of the post-employment and related provisions of the Public Ethics Law. Questions regarding interpretation of the procurement provisions should be directed to your agency’s Assistant Attorney General.