REVOLVING DOOR PROHIBITION

Role of the Office of Executive Inspector General for the Agencies of the Illinois Governor

March 6, 2015

Revolving Door Prohibition

- State employees who participate in contract decisions
- State employees who participate in regulatory or licensing decisions
- "C-List" employees
- "H-List" employees

Revolving Door Determinations

- C-List employees must notify the OEIG upon receiving an offer of non-state employment prior to accepting the offer; form RD-101
- C-List employees must also notify their agency's ethics officer
- Ethics officer must submit an RD-102 form to the OEIG within 5 days of receiving the employee's notification
- The OEIG must make a determination as to whether the employee may accept the non-state employment within 10 calendar days of having received both the RD-101 form and the RD-102 form

OEIG Procedures for Making Revolving Door Determinations

- Revolving Door Forms, RD-101; RD-102; and RD-103
  - New forms have been implemented
- OEIG inquiry
  - Revolving door forms
  - Interviews
  - Other research
- Basis for determination
  - Personal and substantial participation in a contract award or in a regulatory or licensing decision
  - Effect of the prospective employment on a contract, regulatory or licensing decision based on totality of participation

OEIG Interpretation of Revolving Door Criteria

- "Personal and substantial" participation requires, at minimum, an ability to influence the outcome of a contract, regulatory or licensing decision
- "Substantial" participation does not require decision-making authority or actual decision-making
- "Effect-test" – The OEIG is required (under 5 ILCS 430/5-45(f)) to assess the effect of the prospective employment on the contract, regulatory or licensing decision at issue

OEIG Interpretation (cont'd)

- The effect-test does not require the OEIG to find that there was a *quid pro quo* or that the prospective employment had an actual effect on the relevant decision before the OEIG can determine that the employee is restricted from accepting the offer of employment
- However, the OEIG believes that the effect-test (Section 5-45(f)) requires it to consider evidence that the prospective employment did *not* improperly affect the relevant decision, *e.g.,* evidence that the state employee made, or participated in, a decision that was adverse to the prospective employer

Tricky Issues

- Meaning of "personal and substantial" participation
- Meaning of "contracts"
- Timing of a contract "award"
- Meaning of "regulatory decision"
- Ramifications of treating prospective "clients" as prospective "employers"
- Meaning of a contract "involving" State agency

Revolving Door Determinations– Recent Developments, Ongoing Duties

Office of the Illinois Attorney General
2015 Ethics Officer Conference
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OAG's R-D Review: Process And Timing

After receiving OEIG's notice of determination, fact sheet, and investigative file, OAG *reviews the record* in order to assess its response, if any, to OEIG's restricted/not restricted determination.

- "An Inspector General's determination regarding restrictions under subsection (a) or (b) may be **appealed** . . . by the person subject to the decision <u>or</u> the Attorney General ***no later than* the 10th calendar day after the date of the determination**." —5 ILCS 430/5-45(g)*
- A timely OEIG determination, *and*, if necessary, a timely appeal by the OAG, "or the person is **deemed eligible** for the employment opportunity." —5 ILCS 430/5-45(f).
- 5 ILCS 430/5-45(f) requires that C-List employees seek an OEIG determination "**prior to accepting** such non-State employment."
  - "Marr's present OEIG notification . . . is, in effect, seeking approval of an **already-existing [employment] relationship** . . . . To the extent that Marr should have notified the OEIG *prior to entering that relationship,* he has already **violated the revolving door prohibition.**" *In re Marr*, 14-EEC-001 (July 22, 2013); *accord In re Schroeder*, 14-EEC-008 (June 6, 2014) (same).

* *In re Johnson*, No. 12-EEC-012 (May 24, 2012): "Though the tenth day after the OEIG determination fell on a Saturday, the Attorney General filed its appeal on Monday . . . . [T]he present appeal . . . is properly before the Commission and the Commission has jurisdiction to consider the appeal." (Citing 5 ILCS 70/1.11 ("Time, Computation").)

Who Is Subject To The Act's R-D Provisions?

Sections 5-45(a), (b), and (h) of the Ethics Act impose restrictions on the ability of certain State employees who leave public service to accept, fees, compensation or an employment opportunity from a prospective employer:

- **"C-List:"** Section 5-45(c) identifies employees who, "***by the nature of their duties,***" may have the authority to **participate *personally and substantially*** in the award of State contracts/grants or in making regulatory/licensing decisions, pursuant to Sections 5-45(a) and (b).
- **"H-List:"** Section 5-45(h) identifies categories of **senior-level State employees** who are restricted from accepting an employment opportunity "***regardless* of whether he or she participated *personally and substantially*** in the award of the State contracts . . . or the making of the regulatory or licensing decision in question."
- Look to Section 1-5 of the Ethics Act for the definitions of "officer," "member," and "State employee."

What Employee Conduct Is Subject To The Act's R-D Prohibitions: C-List

A former officer, member, or State employee, or the spouse or an immediate family member living with the former officer member, or State employee, shall not,

- *within a period of one year immediately after termination* of State employment, accept employment or receive compensation or fees from a person or entity ***if***
- the officer, member, or State employee, *during the year immediately preceding termination* of State employment, ***participated personally and substantially***
  - in the award of State contracts, or the issuance of State contract change orders, with a **cumulative value of $25,000** or more **to the person or entity**, or its parent or subsidiary (5 ILCS 430/5-45(a)); *or*
  - in making a regulatory or licensing decision that ***directly applied to the* person or entity**, or its parent or subsidiary. (*Id.* § 5-45(b).

"Personally and Substantially" Is Not Limited To "Ultimate" Or "Exclusive" Decision Making

In re Mrozowski, No. 14-EEC-002

- part of a 4-person team that reviewed a grantee's request to modify the terms of a grant, but uninvolved in awarding the original grant;
- the team reviewed the grantee's application for compliance with the terms of the original grant and general Agency requirements;
- "not an independent decision" by Mrozowski to approve the grantee's term modification request; and
- the grant modification was "ultimately approved and signed by" the Agency Director, not Mrozowski.

"**Even though an employee may not have been the final decision maker . . . , the employee may still have participated personally and substantially** in the award of State contracts."

"Personal and substantial involvement requires more than ministerial activity," though a "'but for . . . ' analysis is not determinative as to whether an employee was personally and substantially involved in a decision." *In re Stephensen-Schroeder*, No. 14-EEC-008 (respondent facilitated transactions that were approved by others).

"H-List" Employees: Who Qualifies?

- Members the General Assembly or executive branch constitutional officers;
- Members of a commission or board created by the Illinois Constitution;
- Persons whose appointment to office is subject to the advice and consent of the Senate;
- The head of a department, commission, board, division, bureau, authority, or other administrative unit within the government of this State;
- Chief procurement officers, State purchasing officers, and their designees whose duties are directly related to State procurement; and
- Chiefs of staff, deputy chiefs of staff, associate chiefs of staff, assistant chiefs of staff, and deputy governors. —5 ILCS 430/5-45(h)(1)-(6).

Section 5-45(f) does not require an H-List pre-employment determination; *however*

Section 20-23(3) permits ***the agency's EO*** to "provide guidance to *officers* and employees . . . which the officer or employee may in good faith rely upon."

H-List Employees: *What* Conduct Is Prohibited By The Act's R-D Provisions?

Designated senior-level officers, or members of the General Assembly shall not . . .

- within a period of one year **immediately after termination** of office or State employment,
- knowingly accept employment / receive compensation or fees for services from a prospective employer/client (or its parent or subsidiary), *if*
- during the year **immediately preceding termination** of State employment,
- the prospective employer/client was a **party to a State contract** or contracts with a cumulative value of **$25,000** or more ***involving*** the officer, member, **or State employee's State agency**,
- or was the subject of a **regulatory or licensing decision** ***involving*** the officer, member, **or State employee's State agency**,
- ***REGARDLESS OF WHETHER*** he or she participated **personally and substantially** in the award of the State contract or contracts or the making of the regulatory or licensing decision in question —5 ILCS 430/5-45(h)

Meza v. Maram, No. 14-EEC-006

http://www2.illinois.gov/eec/Documents/04.23.14%20Maram%20Published%20Report.pdf

Background Facts:

- Director of the Department of Healthcare and Family Services until notified in early 2010 of pending change in direction for DHFS;
- Prior to departure, Maram interviewed with, and received an offer from a law firm (the "Firm") that had represented DHFS and Maram (as Director) within the year immediately preceding his pending departure from DHFS;
- The Firm had been selected and engaged by GOMB, without input from Maram or DHFS; legal fees were paid jointly by DHFS and GOMB through an IGA;
- Prior to departure, Maram sought guidance from his agency's EO regarding the RD restrictions, if any, on accepting a position as an attorney at "a law firm." He failed to disclose his interview with the Firm or their offer to him;
- Based on the facts and circumstances disclosed, the EO opined that Maram was not restricted, *per se*, from working at a law firm, but cautioned that an IGA in excess of $25,000 could be construed as a prohibited "contract" for RD purposes, and specifically identified the IGA linking the Firm and DHFS;
- Prior to his departure from DHFS, Maram sought advice from the Firm itself and from the Senate majority leader's chief legal counsel; and
- Maram went to work for the Firm within a week of his departure from DHFS.

Meza v. Maram, No. 14-EEC-006 (cont'd)

Guiding Principles and Concerns:

- A department head; an agency; a State contract with a cumulative value in excess of $25,000; no personal or substantial involvement by the former State employee in the GOMB-law firm contract (5 ILCS 430/5-45(h); *id.* § 5-45(h)(4));
- The Commission may levy a fine for a violation of Section 5-45 "***of up to 3 times the total annual compensation*** that would have been obtained in violation of Section 5-45" (5 ILCS 430/50-5(a-1)); *but*
- Section 5-45(h) was added to the Act by legislative amendment effective 2009; no prior Commission interpretation of Section 5-45(h); Maram asserts several affirmative defenses, including no presumption of legislative retroactivity, SOL, and reliance on legal opinions.
  - Was the IGA between GOMB and DHFS sufficient to "**involv[e]**" Maram or DHFS in the contract executed between GOMB and the Firm?
  - Was Maram's failure to fully disclose relevant facts/circumstances sufficient to preclude his **reliance "in good faith"** on the EO's guidance? (*Id.* § 20-23(3)).
  - The effect, *if any*, of legal advice obtained from persons ***other than the EO?***
- "The essence of settlement is compromise. Each side gains the benefit of immediate resolution . . . and some measure of vindication . . . while foregoing the opportunity to achieve an unmitigated victory." *EEOC v. Hiram Walker & Sons*, 768 F.2d 884 (7th Cir. 1985).

In Conclusion

OAG's role in the RD process is to determine *whether the record sufficiently supports* the OEIG's "restricted/not restricted" determination.

- EOs should attempt to identify all of the conduct, transactions, or relationships at issue *or potentially at issue* so that the RD-102 is sufficiently inclusive and authoritative; and
- EOs must describe *with particularity* the conduct, transactions, or relationships at issue so that the record and the basis for the decisions is clear.
- Very few people are sufficiently situated to know your Agency's business better than you are.

Revolving Door Appeals

Executive Ethics Commission
2015 Ethics Officer Conference
Loyola University College of Law
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Timing of Appeals

- 10 calendar days to file appeal with EEC
- Employee or AG has 5 days to respond
- If employee appeals, will help get record
- EEC has 10 days to issue a decision
- Failure of AG to appeal or EEC failure to decide timely means employee can take job

Some Numbers

- 643 OEIG determinations (2/25/15)
- 9 OEIG substantive restricted determinations
  - EEC agreed or no appeal from employee
- 17 Attorney General appeals
  - EEC agreed with 8 (employee restricted)
  - EEC disagreed with 9 (employee not restricted)

EEC Review

(g)…In deciding whether to uphold an Inspector General's determination, the appropriate Ethics Commission shall assess **in addition to any other relevant information**, the effect of the prospective employment or relationship upon decisions referred to in sections (a) and (b), based upon the **totality of the participation by the former officer, member, or State employee in those decisions.**

5 ILCS 430/5-45(g) (2010)

Totality of Participation

- Decisions made by group or individual
- Team Coordinator (Clements)
- Decisions made by a predecessor (Shiel)
- Ministerial duties, requested original docs (Shiel)
- Presented employer's application for funding (Lasker)
- Supervised employer's audit (Lasker)
- Confusion about regulatory involvement (Wagle)

Other Relevant Information

- Timing of job offer and decision making
- Other interim employment (Lasker)
- Approved grant creating new position (Johnson)
- Close relationship to employer (Clements)
- Actual parent/subsidiary structure (McDorman)
- Assist employer's application to State (McBride)
- Not being truthful on RD application (Inman)
- Premeditated plan to leave and profit (Schroeder)

Law Firms and Associations

- Case-by-case basis determinations
- Law firm with clients employee regulated:
  - Mere fact that firm has clients employee regulated
  - Actually representing regulated clients—no
  - Rules of Professional Conduct also apply
- Association with members employee regulated:
  - # of members, # regulated
  - Nature of association work—general or specific
  - Is association is a "pass through" for payments?

RPC 1.11

Comment

- [1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. **In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest.**

Working With the Ethics Officer

- What am I? H-list or C-list
- What do exiting employees need to do?
- Good faith reliance 5 ILCS 430/20-23(3))