



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

Memorandum

To: Current and Former State Employees Subject to Revolving Door Prohibitions¹
From: Ricardo Meza, Executive Inspector General
Re: OEIG Revolving Door Determinations
Date: June 19, 2012

This memorandum is intended to provide State employees with information regarding so-called “revolving door” determinations under the State Officials and Employees Ethics Act (“Ethics Act”). It also seeks to provide employees with information regarding the role of the Office of Executive Inspector General for the Agencies of the Illinois Governor (“OEIG”) in revolving door determinations, as well as the role of other agencies involved in the process.² Prior to discussing the OEIG’s role in revolving door determinations, it is important to note the general purpose of these sorts of restrictions on post-State employment. Although Illinois courts have yet to opine on revolving door matters, in *Forti v. New York State Ethics Com’n*, 75 N.Y.2d 596, 605 (N.Y. 1990), a New York court noted that “[i]n general, the purpose of ‘revolving door’ provisions . . . is to prevent former government employees from unfairly profiting from or otherwise trading upon contacts, associations and special knowledge that they acquired during their tenure as public servants.”

The OEIG does not dispute this general proposition. However, we assume that the majority of government employees act in the best interest of the public and not in their own self-interest regarding future employment.

I. Revolving Door Prohibition

The provisions of the revolving door prohibition are set forth in Section 5-45 of the Ethics Act.³ Subsection (a), which pertains to contracting decisions, states in relevant part:

No former officer, member, or State employee . . . shall, within a period of one year immediately after termination of State employment, knowingly accept employment or

¹ Note that the revolving door prohibition of the State Officials and Employees Ethics Act applies to current and former employees of the four Chicago area Regional Transit Boards, as they are considered “State” employees for purposes of the revolving door prohibition.

² Instructions for submitting a revolving door notice may be found on the OEIG’s website at <http://www2.illinois.gov/oeig/Pages/RevolvingDoorInstructions.aspx>.

³ The Ethics Act may be found on the OEIG’s website at <http://www2.illinois.gov/oeig/Pages/EthicsAct.aspx>.

receive compensation or fees for services from a person or entity if the . . . 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) (emphasis added). Subsection (b), which pertains to regulatory or licensing decisions, states in relevant part:

No former officer of the executive branch or State employee . . . with regulatory or licensing authority . . . shall, within a period of one year immediately after termination of State employment, knowingly accept employment or receive compensation or fees for services from a person or entity if the . . . State employee, during the year immediately preceding termination of State employment, participated *personally and substantially* in making a regulatory or licensing decision that directly applied to the person or entity, or its parent or subsidiary.

5 ILCS 430/5-45(b) (emphasis added).

II. OEIG Revolving Door Determinations

Pursuant to Section 5-45(f) of the Ethics Act, certain current and former State employees, *e.g.*, those who occupy positions covered by subsection (c) of Section 5-45, are required to notify the OEIG prior to accepting an offer of employment so that the OEIG may determine whether the employee is restricted from accepting the offer of employment. Section 5-45(f) states, in relevant part:

Any State employee in a position subject to the policies required by subsection (c) . . . who is offered non-State employment during State employment or within a period of one year immediately after termination of State employment shall, prior to accepting such non-State employment, notify the appropriate Inspector General. Within 10 calendar days after receiving notification from an employee in a position subject to the policies required by subsection (c), such Inspector General shall make a determination as to whether the State employee is restricted from accepting such employment by subsection (a) or (b). In making a determination, in addition to any other relevant information, an Inspector General shall assess the effect of the prospective employment or relationship upon *decisions* referred to in subsections (a) and (b), *based on the totality of the participation by the former officer, member, or State employee in those decisions*....

5 ILCS 430/5-45(f) (emphasis added).

In order to determine whether a State employee is prohibited from accepting certain employment, the OEIG reviews the employee's revolving door forms,⁴ and may also interview witnesses such as the agency ethics officer and the employee's supervisor(s). The OEIG cannot

⁴ The OEIG has designed forms to elicit information to assist the OEIG in making its determination. The forms may be found at the OEIG's website at <http://www2.illinois.gov/oeig/Pages/RevolvingDoorInstructions.aspx>.

determine that an employee should be prohibited from accepting employment, unless it initially concludes that the State employee participated *personally and substantially* in making a contract award or a regulatory or licensing decision that directly applied to the person or entity, or its parent or subsidiary. 5 ILCS 430/5-45 (a), (b), and (f).

III. “Personal and Substantial” Participation

Neither the Ethics Act nor Illinois case law define the phrase “personally and substantially” as used under 5 ILCS 430/5-45. However, certain federal conflict of interest statutes, such as 18 U.S.C. §§ 207 and 208, use the phrase “personally and substantially.” Specifically, 18 U.S.C. § 207(a), places restrictions on the communications of former officers and employees of the executive branch of the United States or District of Columbia when certain factors are met, including the factor that “the person participated *personally and substantially* as such officer or employee.” 18 U.S.C. § 207(a)(1).

Unlike State law, the Code of Federal Regulations defines the terms “personally” and “substantially” under 18 U.S.C. § 207. *See* 5 C.F.R. § 2641.201. Under Section 2641.201 to participate “personally” means “(i) [d]irectly, either individually or in combination with other persons; or (ii) [t]hrough direct and active supervision of the participation of any person he supervises, including a subordinate.” 5 C.F.R. § 2641.201(i)(2). The term “substantially” is also defined in the federal regulations as follows:

To participate “substantially” means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budgetary procedures or scheduling meetings) is not substantial.

5 C.F.R. § 2641.201(i)(3).

Federal courts have distinguished “personal and substantial” participation under 18 U.S.C. § 207 from ministerial or procedural acts. For example, in *Beall v. Kearney & Trecker Corp.*, 350 F. Supp. 978, 983 (D. Md. 1972),⁵ the district court held that although the former government employee was the primary patent examiner during the time the patent application was pending and signed the formal notice allowing for the patent, his participation in evaluating the patent was not personal and substantial. The district court reasoned that because another

⁵ The language of 18 U.S.C. §§ 207 and 208, as applied in the cases cited, has been amended since some of these decisions, however the phrase “personally and substantially” has remained throughout the amendments.

employee was responsible for evaluating the patent application, the patent examiner's signature on the notice letters was merely to comply with internal policies, and therefore his role was ministerial. *Id.* In contrast, where an employee participates in discussions and conducts site visits, then that employee's signature on a material notice suggests personal and substantial involvement, rather than a ministerial act. See *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 590 (7th Cir. 1971) (stating that the government patent examiner's signature on a "notice of allowance" for a patent was "not a mere ministerial act," where the government employee, among other things, visited the patent applicant's factory to see the demonstration of a machine for which a patent was pending and directly participated in discussions regarding the patent); see also *Space Age Eng'g Inc. v. United States*, 4 Cl. Ct. 739, 740-43 (Cl. Ct. 1984) (holding that the employee's participation was not substantial, but rather, tangential and general in nature, in that his role was as an administrator to ensure deadlines were met).

Similarly, 18 U.S.C. § 208 prohibits current federal employees from acting on matters in which they have a financial interest. Specifically, Section 208 prohibits:

an officer or employee of the executive branch of the United States Government [from]... participat[ing] *personally and substantially* as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest

18 U.S.C. § 208(a) (emphasis added).

With regard to Section 208's use of the terms "personally and substantially," the Code of Federal Regulations defines the two terms in 5 C.F.R. § 2635.402, as follows:

To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

5 C.F.R. § 2635.402 (b)(4).

With regard to 18 U.S.C. § 208, it is notable that the plain language of the statute relates “personal and substantial” participation to tasks such as decision, approval, and investigation, but “excludes employees performing purely ministerial or procedural duties.” *United States v. Ponnappula*, 246 F.3d 576, 582 (6th Cir. 2001). Moreover, the policy of preserving integrity does not require the statute to apply to those employees that lack decision-making authority. *Id.* at 583 (stating “[a] statute aimed at preserving the integrity of the decision[-]making process does not need to extend to employees who have no discretion to affect that process”).

In determining whether an employee participated “personally and substantially” under 18 U.S.C. § 208, courts have focused on whether the employee could influence the ultimate decision or whether the employee’s role was merely ministerial. *See United States v. Shelby*, 557 F.3d 968, 973 (9th Cir. 2009) (noting that rather than having a ministerial role, the employee had “a significant discretionary role” in the contract and “could and did influence the decision process”). In *Shelby*, the Ninth Circuit held that an employee’s participation was substantial where the employee, among other things, “actively participate[d] in [] internal agency deliberations leading up to its decisions to expand the scope of the work to . . . [the company] and where [the employee] continued to recommend or urge co-workers to recommend expansion of the contract.” *Id.* at 973. In contrast, the Sixth Circuit held an employee did not substantially participate under Section 208, even though the employee was involved in a real estate transaction, among other things, and sent notices to individuals and published the legal notices of sale, because the employee did not advise on the terms of the sale and could not have influenced which bidder would win. *Ponnappula*, 246 F.3d at 583.

As a result, in the absence of Illinois case law, the OEIG looks to federal statutes, regulations and case law as persuasive authority when investigating whether a given individual was “personally and substantially” involved in a contracting, licensing or regulatory decision within the meaning of the Ethics Act. These factors include, but are not limited to, whether the employee:

- participated primarily or directly on a matter involving his or her prospective employer;
- engaged in activities that were either ministerial or procedural in nature;
- possessed (or lacked) decision-making authority; and/or,
- had the ability to influence an ultimate decision relating to his or her prospective employer.

If the OEIG concludes that the employee’s involvement was not personal and substantial, then the inquiry ends.

IV. Factors the OEIG Considers in Making its Determination

The OEIG narrowly construes the revolving door prohibition for two main reasons. First, we recognize that our determinations have significant implications for State employees. Second, under the Statute our Office only has 10 calendar days to make these determinations. If the OEIG finds that the applicant participated in a contract award or licensing, or regulatory decision that applied to his or her prospective employer, and the participation was “personal and substantial,” the Ethics Act also requires the OEIG to “assess the effect of the prospective employment or relationship upon the decisions referred to in subsections (a) and (b), based on

the totality of the participation by the former officer, member, or State employee in those decisions.” 5 ILCS 430/5-45(f). In making this determination, the OEIG undertakes an individualized analysis of any particular revolving door submission and the effect of the prospective employment or relationship upon those decisions based on the totality of the participation by the State employee.

V. Attorney General or Employee Appeals of OEIG Revolving Door Determinations

After the OEIG issues its determination, a copy of its file is forwarded to the Office of the Illinois Attorney General (among others) for its review. Pursuant to Section 5-45(g) of the Ethics Act, an inspector general’s determination may be appealed to the Executive Ethics Commission (“EEC”) by:

[t]he person subject to the decision or the Attorney General no later than the 10th calendar⁶ day after the date of the determination.

In other words, the OEIG determination is not final, and may be appealed to the EEC either by the employee or the Attorney General (if either disagrees with the OEIG decision).

VI. Executive Ethics Commission Appeal Process

On appeal, the EEC shall seek, accept and consider written public comments regarding a determination. 5 ILCS 430/5-45(g). In considering an appeal of a revolving door determination, the EEC “shall assess, in addition to any other relevant information, the effect of the prospective employment or relationship upon the decisions referred to in subsections (a) and (b), based on the totality of the participation by the former officer, member, or State employee in those decisions.” *Id.*; see *In Re: Samuel Shiel*, No. 12-EEC-007.

In its revolving door decisions, in relation to its consideration of the “relevant information,” the EEC has categorized certain facts as “aggravating” or “mitigating.” *Id.* The aggravating and mitigating facts the EEC considers are generally case specific and after identifying “aggravating” and “mitigating” facts, the EEC ultimately concludes whether an individual’s prospective employment would violate the Ethics Act’s revolving door prohibition.

VII. Conclusion

The OEIG will continue to review each revolving submission case on an individual basis.

⁶ The Executive Ethics Commission recently ruled in substance that if the 10th calendar day falls on a weekend or a holiday, then the 10th day shall be the next business day. See *In re: Marcia Johnson*, No. 12-EEC-012.