GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

September 4, 2019

[redacted]

Dear [redacted]:

This opinion responds to your request for advice on how the post-employment rules apply to you as a former District government employee. Specifically, you asked for guidance on whether you are prohibited from contacting the Department of General Services ("DGS"), which you do not consider to be your former agency, during the one-year period following your departure from the District government. After reviewing the information that you have provided, we conclude that you are prohibited from contacting both DGS and the Office of the City Administrator ("OCA") for one year after your separation from District government employment.

Background

Based on your communications with our office, we understand the background in this matter to be as follows: You worked for the District as a Project Manager. In October 2017, you became employed with the Office of Public and Private Partnerships ("OP3"), which was an office with the OCA. While at OP3, you mainly ran procurement on the renovation of a District property. On March 7, 2019, OP3 was restructured and dissolved. At that time, you were "verbally requested to report to DGS to assist with gathering technical information for a project." You were also advised that your primary renovation project was being "paused" while a decision was made about continuing.

Although you were never provided a formal detail letter from OCA for your DGS assignment, you complied with the request and reported to DGS on March 11, 2019. While working at DGS, the agency Chief Operating Officer (COO) was assigned as your daily point of contact, and you were physically located at DGS where you interacted with DGS staff. You claim to have not been "involved substantively" in any projects at DGS. You also state that you were on vacation for five (5) out of the twelve (12) weeks that you were detailed at DGS. Your correspondence does not describe what, if any, substantive job duties you performed for OCA after being reassigned from OP3. When you decided to leave District government employment, you gave notice to both your DGS point of contact, the COO, and the Chief of Staff for OCA. Your official last day of District government service was May 31, 2019.

You now work for a private sector entity and seek advice from our office regarding whether you may contact DGS on behalf of your new employer during the one-year period following separation from District government.

Applicable Standards and Discussion

As a previous District government employee, Chapter 18 of Title 6B of the District of Columbia Municipal Regulations – also referred to as the District Personnel Manual ("DPM") – and the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012, District Law 19-124, District Official Code § 1-1161.01 *et seq.*, are implicated by your inquiry. Although you believe that contacts with DGS within the one-year cooling-off period would not violate the DPM or the Ethics Act, this opinion analyzes all of the post-employment rules implicated by your inquiry. Please bear in mind that any examples listed herein are listed for reference and do not represent an exhaustive list of possible restrictions of the DPM and Ethics Act.

Post-Employment Restrictions

All District government employees are subject to certain post-employment rules when they separate from District government employment.[1] As explained below, these restrictions are intended to prevent former District employees from leveraging their previous employment with the District to gain an unfair advantage when dealing with the District government upon joining the private sector.[2] These rules are not meant to prevent former District employees from working in the private sector after leaving government, nor are they meant to be so restrictive as to make following them impossible. Rather, the post-employment rules set forth varying restrictions upon the ways in which a former employee may or may not interact with his or her prior government agency.

The District Personnel Manual identifies the post-employment restrictions that apply to District employees and requires that District employees comply with the provisions of the federal post-employment restrictions, codified at 18 U.S.C. § 207, and its implementing regulations set forth in the Code of Federal Regulations.[3] There are three main post-employment restrictions: (1) a permanent restriction, (2) a two-year restriction, and (3) a one-year restriction. Although the one-year cooling-off period is primarily at issue here, this opinion will address how each of these restrictions applies to you.

Permanent Prohibition: A former government employee who *participated personally and substantially in a particular government matter involving a specific party* shall be **permanently prohibited** from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before an agency and that former employee shall be permanently prohibited from making any oral or written communication to an agency with the intent to influence that agency on behalf of another person.[4] A "particular

[1] *See* 6B DCMR § 1811, *et seq*. (hereinafter DPM)
[2] DPM §1811.11.
[3] DPM § 1811.1 ("District employees shall comply with the provisions of 18 U.S.C. 207 and implementing regulations set forth at 5 C.F.R. Part 2641, Subparts A and B.").
[4] *See* DPM §§ 1811.3 and 1811.4 (emphasis added).

government matter involving a specific party" includes "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the District government is a party or has a direct and substantial interest, and which has application to one (1) or more specifically identified persons or entities."[5] "Participated personally and substantially" means taking any action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or other such action.[6]

Essentially, this means that if you personally and substantially worked on any particular projects, initiatives, cases, requests etc., that involved specific parties during your time as a Government employee, you are permanently banned from switching sides to work on those particular matters on behalf of a new employer, even if the specific parties you previously worked with are not associated with the employer. This restriction applies to all particular matters that you worked on at OP3, OCA, and DGS.

Two-year Prohibitions: A former government employee who previously *had official responsibility for a matter* shall be **prohibited for two years** from knowingly acting as an attorney, agent, or representative, in any formal or informal action before the agency regarding that matter.[7] Official responsibility is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, personally or through subordinates, to approve, disapprove, or otherwise direct governmental action.[8] This includes any matter that was actually pending under the former employee's responsibility within a period of one (1) year before the termination of such responsibility.[9] The two-year period shall be measured from the date when the former employee's responsibility for a particular matter ends (not necessarily your termination date).[10] This means that you are prohibited for two years from the date of the termination of your official responsibility from appearing before the District on a matter for which you previously had official responsibility. This restriction applies to matters for which you had official responsibility at OP3, OCA, and DGS.

In addition, there is also a two-year **behind-the-scenes ban** which prohibits a former employee "for two (2) years from knowingly representing or aiding, counseling, advising, consulting, or assisting in representing any other person (except the District of Columbia) by personal appearance before an agency as to a particular government matter involving a specific party if the former employee participated personally and substantially in that matter as a government employee."[11] This two-year period behind the scenes ban begins when an employee leaves District government. This means that for two years from the date of your separation from District government, you are prohibited from knowingly working behind the scenes to assist another who is representing anyone before an agency as to a particular government matter involving a specific party if you personally and substantially participated in that matter while you were a government employee. This restriction applies to any particular matters involving specific parties that you worked on at OP3, OCA, and DGS.

[5] *See* DPM §§ 1899.1. *See* 5 C.F.R. § 2641.201(h)(1) (defining particular matter broadly).
[6] 5 C.F.R. § 2641.201(i).
[7] DPM § 1811.5 (emphasis added).
[8] DPM § 1899.1.
[9] *See* DPM § 1811.6.
[10] *See* DPM § 1811.7 (emphasis added).
[11] *See* DPM § 1811.8.

***One Year Prohibition**:* Finally, most relevant here, a former government employee shall be **prohibited for one (1) year** from *having any transactions with their former agency intended to influence the agency, in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest, whether or not such matter involves a specific party.*[12] This is commonly referred to as a one-year cooling-off period. The one-year cooling-off period is unique in that it provides an explanation for its purpose. This restriction shall apply without regard to whether the former employee had participated in, or had responsibility for, the particular matter, and shall include matters which first arise after the employee leaves government service.[13]

You argue that the one-year cooling-off prohibition described above should not apply to your contacts with DGS. You contend that DGS should not be considered your former employing agency because you were detailed there for a brief time period. Specifically, you state that:

> Within one month of beginning my detail I gave notice to the Chief Operating Officer (COO) that I would be accepting a position outside of the District. I did not have any substantive DGS assignments, was not involved substantively in projects, and spent 5 weeks of the total 12 weeks I was detailed out on vacation. I was not given a DGS position title during my very brief time there.

We conclude that despite your contentions, DGS, along with OCA, is your former employing agency. There is no language in the District Personnel Manual that limits the application of the one-year cooling-off period for minimal periods of employment. If the District intended to exclude employees who only serve at an agency for a short time from the one-year cooling-off period, the restriction could have been drafted to take effect only after an employee had served in a position for a certain amount of time (e.g., 30 days). Instead, a reading of the DPM makes clear that the District intended for the cooling-off period to apply broadly enough to cover employees who have no substantive involvement in matters. DPM § 1811.11 explicitly states that "the restriction shall apply without regard to *whether the former employee had participated* in, or had responsibility for, the particular matter, and *shall include matters which first arise after the employee leaves government service*."[14] Thus, even if you did no substantive work on a particular government matter while you were at DGS (as you contend), or if a matter arose after your departure, you are still prohibited from having any transactions with DGS intended to influence the agency on any particular government matters during your one-year cooling-off period.

DPM § 1811.11 suggests that the one-year cooling-off period is intended to prevent even the appearance that former District employees can use their influence in a manner that compromises the impartiality of their former agency (since it applies even if an employee did not actually participate in or have responsibility for a particular matter). As explained, the one-year cooling-off period was put in place to prevent employees from leveraging the familiarity and favor they may have accrued as District employees to benefit themselves or their subsequent employers after separating from the District.

[12] *See* DPM 1811.10 (emphasis added).
[13] DPM § 1811.11
[14] *Id.* (emphasis added).

Twelve weeks is enough time to develop proximity and familiarity with the agency's employees through your daily interactions in the workplace. In light of the DPM's clear language, we conclude that both DGS and OCA are your former employers for the purpose of your one-year cooling-off period.[15]

Furthermore, the post-employment rules do not require that they be applied to just one District government entity. Federal post-employment guidance outlines a special rule for detailees, which makes clear that an employee who is detailed may have post-employment restrictions for more than one agency. Under 18 U.S.C. § 207, a "person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, **be deemed to be an officer or employee of both departments, agencies or such entities**."[16]

Consistent with federal guidance, we consider both OCA and DGS to be your former employing agencies. Thus, the one-year cooling-off period applies to contacts with both the OCA and DGS. Specifically, your one-year cooling-off period applies to the City Administrator's Office because you remained an employee of that office when OP3 was restructured, and it applies to DGS because you were detailed there, physically located at the agency for 12 weeks, and interacted with the staff until you left District employment. The conclusion that you were an employee of DGS for purposes of the post-employment rules is further bolstered by your admission that you served the COO of DGS with your notice when you decided to leave the District.

Any other conclusion is counterintuitive under the circumstances and would appear to contravene the very purpose of the one-year cooling-off period established in the DPM, which is to ensure that former District employees do not improperly use, or appear to use, their personal influence based on past governmental affiliations to facilitate the transaction of post-employment business.

Possible Permissible Contacts

Though the one-year cooling-off period may appear broad at first glance, federal regulations state that certain communications and appearances before the government are not made with the intent to influence, and thus could be permissible. These include communications and appearances made solely for the purpose of:

> (i) Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter;
>
> (ii) Making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract;

[15] You concede that OCA is your former employer and you "do not plan to hve any contact with [your] former agency" during your one-year cooling-off period.
[16] 18 U.S.C. § 207(g). (emphasis added).

(iii) Making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or

(iv) Purely social contacts.[17]

Federal ethics guidance makes it clear that although an employee's contacts with their former agency that lack the intent to influence the agency are permissible, any contacts made with the intent to influence the agency, involving a potential controversy, or requiring a government employee to take action that might impact a matter currently before the agency, are strictly prohibited. This means that for one year following your departure from District government service you are prohibited from having ***any*** contact with your former offices in an attempt to influence those agencies' pending decisions about ***any*** matter, even if that matter did not exist when you were employed by the District.

Conclusion

Assuming your representations to be complete and accurate as to the pertinent facts, we conclude that you are prohibited from having any transactions with both the Office of City Administrator (OCA) and the Department of General Services (DGS) intended to influence those agencies for one year after your departure from District government employment as mandated by the post-employment rules. Although you were a direct report of OCA, you were assigned to DGS for 12 weeks; thus, there is an appearance that you created work relationships with DGS staff which could lead to the impermissible use of your personal influence due to your former government affiliation.

Aside from OCA and DGS, you are free to appear before other District agencies to work on projects that do not involve particular matters that you worked on at OP3, OCA and DGS. As stated above, you are prohibited for two years from representing another person or entity before the District on matters over which you had official responsibility, and you are prohibited for two years from providing behind the scenes assistance on any particular government matter involving a specific party if you participated personally and substantially in that matter (e.g., projects) as a government employee. Finally, you are permanently prohibited from switching sides to work on any particular matters involving specific parties in which you participated personally and substantially.[18]

I encourage you to contact BEGA should you have any uncertainty about a specific action you would like to take with regard to your new position and the post-employment restrictions.

Please be advised that this advice is provided to you pursuant to section 219 of the Ethics Act (D.C. Official Code § 1-1162.19), which empowers me to provide such guidance.

[17] *See* 5 CFR § 2641.201(e)(2).
[18] The post-employment prohibitions apply to work done at OP3, OCA and DGS.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that identifying information will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at brentton.wolfingbarger2@dc.gov.

Sincerely,

BRENTTON WOLFINGBARGER
Director of Government Ethics
Board of Ethics and Government Accountability

BW/RWF/ASM