

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



Office of Government Ethics

VIA EMAIL

April 15, 2015

Mr. Ron M. Linton
3401 38th Street, N.W., No. 608
Washington, D.C. 20016

Dear Mr. Linton:

This responds to your March 14, 2015, email, and follow-up conversations, in which you request advice on whether you are permitted to work with taxicab company leaders in establishing a D.C. Taxicab Cooperative (“Co-op”), which was authorized by rules adopted during your tenure as Chairperson of the D.C. Taxicab Commission (“DCTC”). You also ask whether you are permitted to serve as [REDACTED] of the Co-op, or respond to inquiries from your successor or other employees at your former agency who may seek your input on the rationale and background of prior Commission actions. This would include communications with the Commissioners or Commission employees for the purpose of information exchange and with no intent to influence Commission decisions.

Based upon the information you have provided, I conclude that, as long as you ensure that you meet the requirements set forth below, you may be involved in efforts to organize and implement the Co-op rules, and communicate with the Commission concerning ministerial or personal issues, but that if you were to serve in a capacity that required you to appear before, or communicate with the DCTC in any manner that could be construed as intending to influence the agency on behalf of the Co-op, you would violate the post-employment restrictions.

Background

Under rules adopted by the DCTC on January 2, 2015 (62 DCR 147), during your tenure as Chairperson, taxicab companies may organize a D.C. Taxicab Cooperative. The Co-op would be an industry-owned association organized under the laws of the District of Columbia to promote the use of DCTC-licensed taxicabs, including wheelchair accessible vehicles, by residents and visitors to the District. The Co-op would manage, and provide service and support for the District of Columbia Universal Taxicab Application (“DC TaxiApp”), with which all DCTC-licensed taxicabs would be equipped, in addition to any other apps their owners and operators wish to use. The Co-op would establish and

maintain competitive, market-based rates and charges for trips booked through the DC TaxiApp. Taxicab companies required by D.C. Official Code § 50-329.02 to provide dispatch services, are considered charter members of the Co-op, and other taxicab companies, associations, and independent owners and operators may also become members of the Co-op. Your work would consist of advising and assisting taxicab company leaders in establishing the Co-op by adopting bylaws, developing a management team, and implementing the technology and marketing plans.

Post-Employment Restrictions

Although the District has in place post-employment rules, they are not meant to prevent District employees from working in the private sector after their government service ends or to be so restrictive as to make following the post-employment rules impossible. There are, however, certain requirements you must follow.¹

One-Year Cooling-Off Period

A former District employee is prohibited, for one year, from having any transactions with the employee's agency that are **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. Specifically, 6B DCMR § 1811.10 provides:

A former employee ... shall be prohibited for one (1) year from having any transactions with the 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.²

This restriction is “intended to prohibit the possible use of personal influence based on past government affiliations to facilitate the transaction of business,” which explains why the one-year prohibition is sometimes referred to as a cooling-off period. This prohibition applies regardless of whether the particular government matter involves a specific party and regardless of whether you participated in or had responsibility for that particular matter when you were a DCTC employee. In addition, this prohibition applies to matters that first arose after you left District service, as long as they concern a particular government matter that was pending before DCTC when you worked there or in which DCTC has a direct and substantial interest. Therefore, you, as a former District employee, are prohibited for one year from the date of your separation from service, January 2, 2014, from having any transactions with DCTC that are intended to influence DCTC on any particular government matter pending before DCTC or in which DCTC has a direct and substantial interest. Although the term “direct and substantial interest” is undefined in 6B DCMR Chapter 18, it is clear that easily identified matters such as contracts, leases, and other specific projects are included in the term.

¹ The discussion of post-employment restrictions that follows is based on 6B DCMR Chapter 18, which was revised and became effective on April 11, 2014 (61 DCR 3799).

² 6B DCMR § 1811.11.

Two-Year Ban: Behind-the-Scenes Advice and Official Responsibility

Former District government employees also are subject to a two-year ban that can take either or both of two forms. The first prohibits former employees from giving behind-the-scenes advice or assistance to someone else in representing another person before any District agency. Specifically, 6B DCMR § 1811.8 prohibits former employees for two years from knowingly “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**”³ if the former employee participated personally and substantially in that matter as a government employee.” Pursuant to this section, you would be prohibited from giving any behind-the-scenes advice or assistance on any particular matter involving a specific party on which you participated personally and substantially as a government employee.

The second form of the two-year ban prohibits former District employees from working on matters in which they did not participate personally and substantially, but over which they had official responsibility. Specifically, 6B DCMR § 1811.5 prohibits them for two years from knowingly “acting as an attorney, agent, or representative in any formal or informal matter before any agency if [they] previously had **official responsibility** for that matter.”⁴

Permanent Ban for the Lifetime of Particular Matters Involving Specific Parties

Finally, a former District government employee is also “permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal **appearance** before an agency as to a particular matter involving a specific party if the employee participated personally and substantially in that matter as a government employee.”⁵ Similarly, 6B DCMR § 1811.4 provides that “[a] former government 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 as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee.”

These two provisions, therefore, operate as permanent bans on your undertaking representational activities regarding any particular matters involving specific parties on which you participated personally and substantially (i.e., did substantive work) while in the government’s employ. The appearance and communications bans apply for the lifetime of each particular matter involving specific parties.

³ The term “particular government matter involving a specific party” is defined in 6B DCMR § 1899.1 to mean “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.”

⁴ For purposes of §1811.5, 6B DCMR § 1811.6, provides that “a matter for which the former government employee had official responsibility is 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.” Further, 6B DCMR § 1811.7 provides that the two-year period in 6 DCMR § 1811.5 is to be “measured from the date when the former employee’s responsibility for a particular matter ends, not from the termination of government service, unless the two (2) occur simultaneously.”

⁵ 6B DCMR § 1811.3.

Discussion

From your request and your subsequent conversations with my staff, the restriction that would potentially have the greatest impact on you would be the two-year ban on engaging in behind-the-scenes assistance in representing another person before your former agency (measured from the date of termination of employment). This provision applies if it is determined that you participated in a particular government matter involving a specific party **and** that your participation in the matter was “personal and substantial.” 6B DCMR § 1811.8.

Addressing the second prong first, whether an individual's participation was personal and substantial is typically a question resolved by the agency where the former employee worked, as the agency is best able to gauge the extent of the former employee's work in a matter and the importance of that work to the matter. Federal OGE Informal Advisory Letter 96 x 7 (March 27, 1996). However, in this instance, you have acknowledged that your participation involving the Taxicab Co-op regulations was personal and substantial, as your email notes that you were the “principal creator of the regulations,” the “primary executive in the implementation of the regulations,” and that you have “arguably the most inclusive body of knowledge of the Commission’s regulations and the history and reasoning for their adoption.”

Under the first prong of § 1811.8, if your participation in the Co-op rulemaking is determined to be a “particular government matter involving a specific party,” you would be barred from both communicating with the DCTC and providing behind-the-scenes advice to a prospective employer or client. A “particular government matter involving a specific party” must have application to “one (1) or more *specifically identified persons or entities*.” (emphasis added) 6B DCMR § 1899.1. Generally, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See, federal OGE Informal Advisory Opinion 96 x 7 (“rare” example of a rulemaking that involved specific parties). The example in that federal OGE Opinion involved the regulation of a specific parcel of property. Here, because the pool of affected persons is not known, the rulemaking would be considered one of general applicability. Concrete examples contained in the rules (5 C.F.R. § 2641.201) implementing the federal post-employment restrictions support the interpretation that a rulemaking such as this one would not be construed to be a particular government matter involving a specific party.⁶

⁶ Two examples of matters involving rulemaking found in the notes to the federal rules, though not binding on District employees, are instructive:

Example 1: A former employee of the Mine Safety and Health Administration (MSHA) participated personally and substantially in the development of a regulation establishing certain new occupational health and safety standards for mine workers. Because the regulation applies to the entire mining industry, it is a particular matter of general applicability, not a matter involving specific parties, and the former employee would not be prohibited from making post-employment representations to the Government in connection with this regulation.

Example 5: An employee of the Food and Drug Administration (FDA) drafted a proposed rule requiring all manufacturers of a particular type of medical device to obtain pre-market approval for their products. It was known at the time that only three or four manufacturers currently were marketing or developing such products. However, there was nothing to preclude other manufacturers from entering the market in the future. Moreover, the regulation on its face was not limited in application to those companies already known to be involved with this type of product at the time of promulgation. Because the proposed rule would apply to an open-ended class of manufacturers, not just specifically identified companies, it would not be a particular matter involving specific parties. After leaving Government, the former FDA employee would not be prohibited from representing a manufacturer in connection with the final rule or the application of the rule in any specific case.

In conclusion, for one year after leaving the District government, you are prohibited from having any contact with your former agency that is intended to influence the agency. This includes appearing in front of, or communicating with DCTC employees.⁷ This prohibition is extended for two years for matters that were within your official responsibility. However, because the Co-op rulemaking was not limited to specific parties, you would be permitted to perform behind-the-scenes work with someone else who would communicate with, or appear in front of your former agency.

“Behind-the-scenes assistance” is assistance provided to another that would not involve you making a communication to, or appearance before an employee of the DCTC. However, if you intend that a communication, made by someone else to an employee of the DCTC, be attributed to you, this is considered a prohibited communication and does not constitute “behind-the-scenes assistance.”⁸ Under this interpretation, you are unable to telephone, sign your name to a letter addressed to, or attend a meeting with a DCTC employee, but you may legally tell your employer the name of the government employee to call or write, or with whom to meet.

With respect to any particular matters involving specific parties (like contracts, investigations, applications, claims, or requests for rulings or determinations) that you dealt with personally and substantially as the head of the DCTC (which means you took action via a decision, approval or disapproval, recommendation, investigation or other similar action), we advise you not to communicate with or appear in front of your former agency on that matter. This means that if your work at the DCTC dealt with a specific contract, it would likely be a particular matter, involving a specific party, that you worked on personally and substantially in your capacity as the Chairperson, and you would therefore, be prohibited from communicating with or appearing in front of your former agency regarding that contract, for the life of the contract. If, however, the advice you gave was of the more general variety, then your work with them on similar subjects would not fall into the permanent prohibition category.

Certain provisions of the rules contemplate interaction between the Co-op and DCTC. For example, the Co-op is required to submit documents (bylaws) to DCTC for its review and approval (§ 1613.8). The Co-op is also authorized to apply to grants from DCTC (§§ 1613.7(n) and 1613.10). In both of those instances, a representative of the Co-op would be required to communicate with DCTC in a manner that you could not. The post-employment prohibitions do not restrict an employee from acting on behalf of an outside entity in purely ministerial contacts such as requesting public documents or other information that are routinely made available to the public by an agency,⁹ but any appearance before, or communication with the former agency intended to influence the agency would violate the post-employment prohibitions.

⁷ 6B DCMR § 1811.10.

⁸ See 5 CFR § 2641.201(d)(3) (note) A former employee established a small government relations firm with a highly specialized practice in certain environmental compliance issues. She prepared a report for one of her clients, which she knew would be presented to her former agency by the client. The report is not signed by the former employee, but the document does bear the name of her firm. The former employee expects that it is commonly known throughout the industry and the agency that she is the author of the report. If the report were submitted to the agency, the former employee would be making a communication and not merely confining herself to behind-the-scenes assistance, because the circumstances indicate that she intended the information to be attributed to herself.

⁹ See federal OGE Informal Advisory Letter 85 x 12 (Aug. 29, 1985).

This advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.19), which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

You also 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 your identity will not be disclosed unless you consent to such disclosure in writing. We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

If you have any questions or wish to discuss this matter further, I can be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,



DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

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