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

Office of Government Ethics

May 30, 2024

Ryan L. Jones
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Dear Mr. Jones:

This responds to your request for a formal advisory opinion regarding the application on the District's post-employment restrictions to you based on your prior employment with the Office of the Attorney General ("OAG"). Specifically, you request guidance on whether you may represent a client in connection with a civil fraud claim against the District. Based on the information you provided, I conclude that the post-employment restrictions would limit your representation of your client in connection with the pending litigation until after a year from the termination of your District employment. With respect to your specific situation, this would prevent you from entering an appearance in a matter where OAG represents the District until after your one-year cooling off period ends.

Background

Based on your prior communications with this office, we understand that you worked as an Associate Attorney General for Special Projects reporting directly to the Attorney General from January 2, 2023, through November 4, 2023. In that position, you state that, among other matters, you worked on internal OAG issues and community engagement initiatives, served as an interface with the media, and reviewed legal sufficiency of laws and rules.

After your departure from OAG, you entered private practice. You advise that you have been retained as counsel for the plaintiff in a civil suit where the District and the District's Office of Lottery and Gaming ("DC Lottery") are named defendants represented by OAG. Plaintiff filed the complaint in this matter in D.C. Superior Court on November 21, 2023, after your departure from OAG. Prior to filing the litigation at issue, plaintiff sought an administrative hearing in connection with his claim before the DC Lottery. You state that you did not have any interaction with the DC Lottery as part of your work for the District. You have been hired to serve in an advisory role on the legal team for this matter. While you acknowledge that you would not be able to participate in negotiations in this matter, you state that the lead counsel has asked that you enter

an appearance in the matter. You seek guidance regarding the application of the post-employment restrictions to your representation of the plaintiff in the pending litigation.

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 in your inquiry. This opinion analyzes the post-employment rules applicable to you. 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

The District Personnel Manual ("DPM") sets forth the post-employment restrictions that apply to District employees.[1] District employees are also required to comply with certain 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.[2] As explained below, these restrictions are intended to prevent former 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.[3]

While these restrictions do not prohibit former District employees from working within the private sector after leaving government service, the post-employment rules set forth varying restrictions on interactions between a former employee and his or her prior agency. These restrictions are broken down into three categories: (1) permanent ban; (2) two-year ban; and (3) one-year cooling off period.

1. Permanent Ban

A former District employee who participated personally and substantially in a particular government matter involving a specific party is permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before an agency.[4] In addition, the former employee is also permanently prohibited from making any oral or written communication to an agency with the intent to influence the agency on behalf of another person.[5]

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[1] *See* 6 DCMR § 1811, *et seq.* (hereinafter DPM).

[2] 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."); *see also*, Office of Government Ethics, *Letter to a Former City Council Member dated May 21, 1997*, Informal Advisory Letter 97x9 (May 21, 1997)("OGE Advisory Letter 97x9"); Office of Government Ethics, *Letter to an Employee of the District of Columbia Government dated December 9, 1986*, Informal Advisory Letter 86x18 (Dec. 9, 1986)("OGE Advisory Letter 86x18")(confirming application of the permanent and two-year restrictions to District government employees and officials).

[3] DPM § 1811.11.

[4] *Id.* at § 1811.3.

[5] *Id.* at § 1811.4.

The parallel restriction at 18 U.S.C. § 207 prohibits a former District employee from knowingly making any communication or appearance on behalf of a third party with the intent to influence "any officer or employee of the District" in a particular matter if the District is a party to the matter or has a direct and substantial interest in the matter. [6]

A "particular government matter involving a specific party" is defined as a matter "where 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."[7] To "participate personally" in a matter means that an employee, either directly or through direct and active supervision, took action through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action to affect the outcome of a matter.[8] An employee's participation is "substantial" if it is of "significance to the matter."[9]

The permanent ban would prohibit you from switching sides to work on a particular matter if you personally and substantially worked on any particular projects, initiatives, cases, requests, etc., that involved specific parties during your tenure at OAG. With respect to the specific litigation at issue in your request, while the District is a party to the pending litigation, which is a particular matter involving a specifically identified party, the matter arose after your departure from OAG and there is no indication that you participated personally and substantially in the related proceedings before the DC Lottery as part of your work for the District. Accordingly, the permanent ban would not prohibit your representation of the plaintiff in connection with this specific matter subject to the additional limitations set forth below.

2. Two-Year Ban

In addition to the permanent ban on communications and appearances with intent to influence an agency "as to a particular matter", if the former employee participated personally and substantially in that matter, the employee is also subject to a two-year restriction on providing behind-the-scenes advice or assistance in connection with the matter.[10] Specifically, a former District employee is prohibited 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 matter" if the former employee participated personally and substantially in that matter as a government employee.[11] The two-year restriction on providing behind-the-scenes assistance starts from the termination of District employment.[12]

Former District government employees are also subject to a two-year cooling off period that prohibits "acting as an attorney, agent, or representative in any formal or informal matter before an agency if [they] had official responsibility for that matter".[13] The former employee who had official responsibility for a matter may not make any communication or appearance before any

[6] 18 U.S.C. § 207(a)(1).
[7] DPM § 1899.1. *See also* 5 C.F.R. § 2641.201(h)(1) (defining particular matter broadly).
[8] 5 C.F.R. § 2641.201(i)(1)-(2).
[9] *Id.* at § 2641.201(i)(3).
[10] DPM § 1811.8.
[11] *Id.* at § 1811.8.
[12] *See id.* at § 1811.9.
[13] *Id.* at § 1811.5.

office or employee of the District on a behalf of a third party regarding that matter if the District is a party or has a direct and substantial interest in the matter.[14] The matter must be one that was actually pending under the former employee's responsibility during the period of one (1) year before the termination of such responsibility[15] or that the employee "knows or reasonably should know was actually pending under his or her official responsibility" during the one-year period prior to the termination of his or her government service.[16]

"Official responsibility" includes "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."[17] The scope of an employee's official responsibility is determined by "those functions assigned by statute, regulation, Executive order, job description, or delegation of authority."[18] The DPM provides that the two-year period is measured from the date on which the former employee's responsibility for a particular matter ends, not the termination of government service, unless the two occur simultaneously.[19] The federal regulations, however, state that the cooling off period extends two years from the end of government service.[20]

This means that for two years after the date of your separation from the District government, you are prohibited from knowingly working behind the scenes to assist in representing anyone in connection with a particular matter involving a specific party that you worked on while you were employed by OAG. You are also prohibited from appearing before or communicating with the District on behalf of a third party on a matter for which you previously had official responsibility during the period you were employed by OAG. The two-year restrictions, however, do not appear to limit your representation of plaintiff in the pending litigation as the matter arose after your departure from OAG and you represent that you did not have responsibility over matters related to the DC Lottery while you were employed by OAG.

3. One-Year Cooling Off Period

Most relevant to your specific situation is the one-year cooling period that applies to all former District employees. A former District employee is prohibited for one year from having any transactions with his or her 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 or substantial interest, whether or not such matter involves a specific party."[21] This prohibition is broader than the permanent ban and the two-year restrictions and applies to all communications, appearances, or any other transactions intended to influence the employee's former agency without

[14] *See* 18 U.S.C. § 207(a)(2).
[15] *See* DPM § 1811.6; *see also* 18 U.S.C. § 207(a)(2)(B).
[16] 18 U.S.C. § 207(a)(2).
[17] DPM § 1899.1; *see also* 5 C.F.R. § 2641.202(j)(1).
[18] 5 C.F.R. §2641.202(j)(1).
[19] *See* DPM at § 1811.7; *but see* 18 U.S.C. § 207(a)(2) (restriction extends for two years after termination of government service).
[20] *See* 5 C.F.R. § 2641.202(a).
[21] DPM § 1811.10. Although the language of the federal one-year cooling off period under 18 U.S.C. § 207 parallels the DPM's one-year cooling off period, the one-year federal restrictions do not extend to District employees. *See* 18 U.S.C. § 207(c), OGE Advisory Letter 97x9, and OGE Advisory Letter 86x18.

regard to whether the employee participated in, or had responsibility for, the particular matter and includes communications and appearances related to matters that originated after the employee left government service.[22] The one-year cooling off period applies even if the former employee is not representing a third party in connection with the communications or appearances.[23] The DPM provides exceptions to the one year cooling off period under certain circumstances.[24]

As a former District employee with OAG, you are prohibited for one year from the date of your separation from service, November 4, 2023, from having any transactions with OAG that are intended to influence OAG on any particular matter pending before OAG or in which OAG has a substantial interest.[25] This prohibition applies regardless of whether the particular matter involves a specific party and regardless of whether you participated in or had responsibility for that particular matter when you were an OAG employee. In addition, this one-year prohibition applies to matters that arose *after* you left District service. Therefore, according to the post-employment restrictions, you are not permitted to have any transactions or communications with OAG with the intent to influence OAG until November 4, 2024.

This would necessarily limit your representation of the plaintiff in the pending litigation during the remainder of the one-year cooling off period. While you acknowledge that you would not be able to enter negotiations with OAG during the cooling off period, you ask about whether you can enter an appearance in the matter and argue that you would not be seeking to influence OAG by entering an appearance.

Entering an appearance in a matter where OAG represents the District as a party to the litigation, however, would fall within the prohibition of the one-year restrictions. The Department of Justice ("DOJ"), in analyzing comparable restrictions under 18 U.S.C. § 207(c), concluded that former DOJ officials would be prohibited from filing briefs or making oral arguments on behalf of a party other than the United States in cases where DOJ represents one of the parties, noting that this would amount to seeking "official action" from DOJ.[26] In advising a former District Councilmember on the provision of behind-the-scenes advice, the federal Office of Government Ethics distinguished between permissible activities such as consulting and assisting in the preparation of briefs and activities such as signing briefs or other communications or action that might constitute an appearance under the post-employment restrictions.[27] By entering an appearance in the litigation where OAG represents the District, you would no longer be providing behind-the-scenes assistance to the plaintiff, and instead would be engaging in the type of transactions with a former agency intended to influence the agency, which the one-year cooling off period is intended to prohibit.

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[22] *See* DPM 1811.11.
[23] *See id.* at § 1811.12.
[24] *See id.* at §§ 1811.13-1811.18. Both the DPM and 18 U.S.C. § 207 provide exceptions to both the permanent ban and the two- year cooling off period. *See* DPM §§ 1811.13-1811.15; 18 U.S.C. § 207 (j); 5 C.F.R. § 2641.301.
[25] *See* DPM § 1811.10.
[26] *See* Briefing and Arguing of Cases in Which the Department of Justice Represents a Party, 17 Op. O.L.C. 37, 43-44 (Aug. 27, 1993) ("briefing and oral argument by their nature, not only request action by the court but also 'seek official action' by the Department"); *see also* "Communications" Under 18 U.S.C. § 207, 25 Op. O.L.C. 59, 62 (Jan. 11, 2001) ("a former official who submits a signed pleading, meets in person with agency officials, or calls those officials necessary intends to be identified as the source of the information she conveys").
[27] *See* OGE Advisory Letter 97x9.

Accordingly, while you may be able to provide behind-the-scenes assistance to the plaintiff and his legal team, to comply with the post-employment restrictions, you should not enter an appearance in the matter until the end of your one-year cooling-off period. You should also avoid being identified as the source of any behind-the-scenes assistance to avoid triggering the post-employment restrictions during the cooling-off period.

Conclusion

While you may serve as part of the legal team for the plaintiff in the pending litigation, you must take care that your representation of the client complies with the post-employment restrictions outlined above. Specifically, you should avoid entering an appearance in the litigation or taking any other steps that would amount to a communication, appearance, or transaction with the intent to influence OAG in the pending litigation until after a year from the termination of your District employment. As the two-year and permanent restrictions do not appear to apply to your representation of this plaintiff, your post-employment restrictions with respect to this matter would end on November 3, 2024.

Separate from your post-employment restrictions, professional bar rules apply to employees who are attorneys.[28] You should consult with the D.C. Bar for advice concerning the impact of these restrictions on your practice.

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. As a result, no enforcement action for a violation of the District's Code of Conduct may be taken against you in this context, provided you have made a full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

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. Pursuant to Chapter 3 of the D.C. Municipal Regulation Regulations § 5405.7, this proposed advisory opinion shall be published in the District of Columbia Register for a 30-day public comment period during which time a person may submit information or comment to bega@dc.gov.

Please let me know if you have any questions or wish to discuss this guidance.

Sincerely,

ASHLEY D. COOKS
Director of Government Ethics
Board of Ethics and Government Accountability
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[28] *See, e.g.,* Rule 1.11, D.C. Rules of Prof. Cond.