

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



Office of Government Ethics

MEMORANDUM

To: D.C. Government Employees

From: Darrin Sobin, Director of Government Ethics

Date: April 24, 2014

Re: Post-Employment Restrictions

Introduction

Pursuant to the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 (2012 Supp.)), post-employment restrictions for District government employees are under the jurisdiction of the Board of Ethics and Government Accountability (“BEGA”) and its Office of Government Ethics. This memorandum contains general advice about the restrictions that apply to all District government employees after they leave the District government. It highlights the main features of the restrictions, but does not address every legal issue involved.

The post-employment restrictions are complicated and fact-sensitive. To obtain specific advice about proposed conduct, you will need to provide detailed information about your responsibilities as a District government employee and about the post-employment conduct you are proposing. Ideally, we recommend contacting the Office of Government Ethics before you begin your post-employment job hunt so that we may assist you in avoiding and working through any potential problems.

Although the District has in place post-employment restrictions, 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 restrictions impossible. There are, however, certain requirements that you must follow.

PLEASE NOTE THAT POST-EMPLOYMENT RESTRICTIONS CHANGED SIGNIFICANTLY ON APRIL 11, 2014 WITH THE ADOPTION OF A REVISED CHAPTER 18 OF THE DISTRICT PERSONNEL MANUAL, ISSUED BY THE DEPARTMENT OF HUMAN RESOURCES. THESE NEW REQUIREMENTS ARE PART OF THE CODE OF CONDUCT, WHICH BEGA ENFORCES.

Overview

This memorandum discusses the following five key restrictions on the activities of all former District employees and provides an explanation of the terms used in those restrictions:

1. A **lifetime ban** on knowingly acting as an attorney, agent, or representative in any appearance before an agency regarding a **particular matter involving a specific party** on which the employee worked while a District employee;¹
2. A **lifetime ban** on any communication to an agency with the intent to influence that agency regarding a **particular matter involving a specific party** on which the employee worked while a District employee;²
3. A **two-year ban** on aiding, counseling, advising, or consulting any other person regarding any particular matter involving a specific party if the employee **participated personally and substantially** in the matter;³
4. A **two-year ban** on knowingly acting as an attorney, agent, or representative in any appearance before an agency if the employee had **official responsibility** for that matter;⁴ and
5. A **one-year ban** on having any transactions with the employee's former agency intended to **influence the agency** in connection with any particular matter pending before the agency.⁵

Particular Matter Involving a Specific Party

A "particular matter" includes an "investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding."⁶ The definitions of "particular matter" in the DPM and in the federal statute provide examples of, but not the criteria for, what constitutes a "particular matter." The list of examples is illustrative but not exhaustive, so the key is identifying what these examples have in common. In other words, even if your work did not fit into one of the listed examples, it could still constitute a "particular matter" if it is sufficiently analogous to those examples.

The Justice Department has observed that these examples all involve "a determination of the interests of specific individuals or entities, or a discrete and identifiable class of

¹ This lifetime ban is found in Chapter 18, Title 6B of the D.C. Municipal Regulations. (Hereinafter, Title 6B of the D.C. Municipal Regulations will be referred to as the "District Personnel Manual" or "DPM".) See DPM § 1811.3. The lifetime ban also is found in a federal criminal statute, 18 U.S.C. § 207(a)(1).

² DPM § 1811.4.

³ DPM § 1811.8.

⁴ DPM § 1811.5.

⁵ DPM § 1811.10.

⁶ The DPM defines the term "particular matter" with a non-exhaustive list of examples of "particular matters." See DPM § 1899.1 ("any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter").

individuals or entities.”⁷ In general, a particular matter” is something that is “the object of a deliberation, decision, or action.”⁸ Whether it constitutes a “particular matter” will depend upon “how closely analogous the object of deliberation, decision, or action is to” the list of examples found in the law.⁹ “Particular matters” are narrowly focused. General legislation and policy-making are “too diffuse” to constitute a “particular matter.”¹⁰ But governmental action such as legislation or policymaking that is narrowly focused upon the interests of a specific industry or a specific profession is concerned with a “discrete and identifiable class,” and thus can constitute a “particular matter.”¹¹

Figuring out whether something is a “particular matter” is a fact-specific inquiry, and the analysis may change as matters evolve over time. According to federal authorities, many “matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve specific parties.”¹²

Participated Personally and Substantially

If you worked on a particular matter involving a specific party or parties, the next question is whether you participated personally and substantially in that matter. “Participate” is defined as “action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action.”¹³ Mere knowledge of the government's action in the matter does not constitute “participation.”

While neither the federal statute nor the District regulations define “personal and substantial,” one can find helpful guidance in federal regulations, which state that the phrase “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.”¹⁴

Official Responsibility

The DPM defines “official responsibility” to mean “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and

⁷ Office of Legal Counsel, *Application of 18 U.S.C. § 205 to Communications Between the National Association of Assistant United States Attorneys and the Department of Justice*, 18 Op. O.L.C. 212 (1994) (quoting unpublished Memorandum from J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel to C. Boyden Gray, Counsel to the President (Aug. 8 1990)). (This OLC opinion focused on the phrase “particular matter” as used in a different conflict of interest statute, 18 U.S.C. § 205.)

⁸ *See id.*

⁹ *Id.*

¹⁰ *Id.* (“Deliberations on the general merits of an omnibus bill, such as the Tax Reform Act of 1986, are too diffuse in their focus to be analogous to the list of particular matters found in the post-employment statute.”) While this Justice Department opinion focused on 18 USC § 208, rather than § 207, both statutes use the same term, “particular matter,” and were originally passed as part of the same 1962 omnibus ethics legislation, making it appropriate to draw on the Justice Department’s analysis of the term in this context.

¹¹ *Id.*

¹² Robert I. Cusick, Office of Government Ethics, DAEOgram 06-029 (October 4, 2006).

¹³ 18 U.S.C. § 207(i)(3).

¹⁴ 5 C.F.R. 2641.201(i)(3). This federal regulation does not apply to District employees, but nonetheless provides useful guidance on the interpretation of 18 U.S.C. § 207(a)(1).

either personally or through subordinates, to approve, disapprove, otherwise direct Government action.”¹⁵ Federal regulations explain that “[a]ll particular matters under consideration in an agency are under the official responsibility of the agency head”¹⁶

Influence the Agency (Lifetime Ban and One (1) year Ban)

DPM §§ 1811.4 and 1811.10 both include, in their prohibitions, “the intent to influence” an agency. These restrictions are intended to prohibit former government employees from using their personal influence with their (recently) former co-workers.

DPM § 1811.4 states that former government employees are “permanently prohibited from making any oral or written communication to an agency with the intent to influence that agency on behalf of another person as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee.” This prohibition is permanent, meaning that it exists for the life of the particular government matter involving a specific party. It also applies only to representational activities, where the former government employee is representing another person or entity before the District.

DPM § 1811.10, on the other hand, limits its prohibitions to one year. Former government employees, however, are prohibited from having any transactions with their former 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, whether or not such matter involves a specific party.¹⁷ Again, the restriction is intended to prohibit the use of personal influence to facilitate the transaction of business.¹⁸

This restriction 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 District employee.¹⁹ Additionally, the restriction applies to matters that first arose after you left District service, as long as they concern a particular government matter that was pending before the District when you worked there or in which the District has a direct and substantial interest.²⁰ Further, this restriction applies regardless of whether the former employee is representing another person or entity or representing him or herself. It also applies both to an appearance before an agency and to communications with that agency.²¹

Former Employee – Attorney

Professional bar rules apply to employees who are attorneys.²² Attorneys should consult the D.C. Bar for advice concerning these restrictions.

¹⁵ DPM § 1899.1.

¹⁶ 5 C.F.R. 2641.201(j)(1).

¹⁷ DPM § 1811.10. Please note that this provision of the DPM is more restrictive than the similar provision found in 18 U.S.C. § 207(b).

¹⁸ DPM § 1811.11.

¹⁹ April 17, 2014 BEGA Office of Government Ethics Advisory Opinion #1165-001 at 2. The Advisory Opinion is available at <http://www.bega-dc.gov/sites/default/files/documents/1165-001%20-%20Advisory%20Opinion.pdf>.

²⁰ *Id.*

²¹ DPM § 1811.12.

²² *See, e.g.*, Rule 1.11, D.C. Rules of Prof. Cond.

Sanctions for Violations

These restrictions appear in both the DPM²³ and a federal criminal statute.²⁴ Under the DPM, the penalties for violation could include up to \$5,000 in fines for each violation,²⁵ and/or three (3) times the amount of receipt of outside income (the difference between your former government salary and your new salary).²⁶ Under the federal criminal statute, the penalties for violation could include up to five years imprisonment.²⁷

²³ DPM §§ 1811.3, 1811.4, 1811.5, 1811.8, and 1811.

²⁴ 18 U.S.C. § 207.

²⁵ D.C. Code § 1-1162.21(a)(1).

²⁶ *Id.*

²⁷ 18 U.S.C. § 216.