

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



Office of Government Ethics

September 7, 2022

Advisory Opinion

Outside Employment and Private Representation

Pursuant to D.C. Official Code § 1-1162.19(a-1)(1), the Director of Government Ethics issues this opinion, *sua sponte*, to provide guidance on the restrictions surrounding outside employment and private representations. Specifically, this opinion will clarify that employees are prohibited from engaging in outside employment that is incompatible with government service, and that Board or Commission Members are prohibited from representing a third party before their board or commission and employing agency.

A. Outside Employment and Activity

The Financial Conflicts of Interest law and outside employment and private representations rules form the basis of all guidance for employees engaging in work or activities not associated with the District government. The conflicts of interest law prohibits an employee from using their official position or title, or personally and substantially participating... [in a] particular matter, or attempt[ing] to influence the outcome of a particular matter, in a manner that [they] know is likely to have a direct and predictable effect on [their] financial interests or the financial interests of a person closely affiliated with [them].¹ This means that employees must recuse themselves from taking official action that would have a direct and predictable effect on their financial interests or the financial interests of family members, business partners, or potential or current employers.² Therefore, employees must avoid engaging in outside employment or activities that create an actual or potential conflict of interest. For example, an employee whose duties involve regulating a certain industry should not obtain employment with a company who is subject to his agency's oversight.

The outside employment rule is codified in Title 6B Chapter 18, Section 1807 of the District of Columbia Municipal Regulations (hereafter referred to as the Section 1807 of the District Personnel Manual ("DPM")) and requires employees to ensure that their outside employment or other activity is not incompatible with the full and proper discharge of their duties and responsibilities. The rule provides a non-exhaustive list of activities or

¹ [D.C. Official Code § 1-1162.23\(a\)](#); see also D.C. Official Code § 1-1161.01(43) (defining a person closely affiliated as a spouse, dependent child, general partner, a member of the employee's household, or an affiliated organization).

² See [D.C. Official Code § 1-1162.23\(c\)](#). An employee is required to immediately recuse themselves in writing should any matter described above come before the employee in their official capacity as a District government employee.

actions that are not compatible with government employment, including engaging in outside employment that interferes with the efficient operation of the District government, maintaining a financial interest in an outside entity if there is a likelihood that entity will have business with the District, capitalizing on an official title or position³, ordering a subordinate to perform personal services during regular hours, engaging in employment that impairs the employee's physical or mental capacity, and engaging in any outside employment or activity which is in violation of federal or District law, etc.⁴ There is also a restriction on divulging any official government information to unauthorized parties or making use of or allowing others to use confidential information. Employees are therefore prohibited from using confidential government information to perform duties for their outside employment or providing that information to their private employer.

Employees who seek to supplement their District employment should be especially mindful of the prohibition on engaging in or using government time or resources for other than official business. This provision of Section 1807, which is the most-often violated provision, prohibits employees from engaging in outside employment or activities while on duty⁵, as well as obtaining employment that entails the same tour of duty as their District government tour of duty⁶. It also prohibits the misuse of government property, such as a computer, cell phone, email, or office equipment, to engage in outside employment.⁷

Employees should also avoid associating any outside, personal teaching, writing or speaking with the District government. Employees may accept compensation for teaching, writing or speaking only if the teaching, writing or speaking is not substantially devoted to their District government work, does not make use of non-public District government information and is conducted outside of regular working hours, or while they are on annual leave, compensatory leave, exempt time off, or leave without pay.⁸ Lastly, employees may only list their title and position amongst other biographical information in any outside activity materials (i.e. biographies and resumes).

While the outside employment rule is not a total ban on outside employment, employees seeking to engage in outside employment must abide by these restrictions to avoid any ethics issues. If an outside employment or activity might cause an employee to violate one of the restrictions, the employee should not engage in that particular employment or activity.

B. District Service and Outside Representation

³ See 20-0003-F H. Iida Negotiated Disposition, February 4, 2022, (Respondent capitalized on their official title to obtain employment.) available at <https://bega.dc.gov/publication/20-0003-f-h-iida-negotiated-disposition>.

⁴ See DPM 1807.1 for the full list of restrictions.

⁵ See 21-0070-P T. Brooks Negotiated Disposition, January 10, 2022, (Respondent engaged in nail painting business while on duty.) available at <https://bega.dc.gov/publication/t-brooks-negotiated-disposition>.

⁶ See 22-0001-F M. Redmond Negotiated Disposition, December 14, 2021, (Respondent served as Principal of a Rhode Island school while simultaneously serving as Assistant Principal of a District school.) available at <https://bega.dc.gov/publication/22-0001-f-m-redmond-negotiated-disposition>.

⁷ See 21-0059-P A. Reitnauer Negotiated Disposition, December 3, 2022, (Respondent used government facility to conduct training for private association.), available at <https://bega.dc.gov/publication/21-0059p-reitnauer>.

⁸ See [DPM §§ 1807.2, 1807.3 and 1807.4](#); see also [Advisory Opinion 1448-001 Meaning of the Phrase "Devoted Substantially" in DPM § 1807.4](#).

Also relevant to this discussion is the restriction on “serving in a representative capacity or as an agent or attorney for any outside entity involving any matter before the District of Columbia.” Activities such as attending meetings and signing and submitting documents are tantamount to representation for purposes of this rule. With certain exceptions, Section 1807.1(h) prohibits representing a party in a claim against the District or in connection with any matter that the District is a party or has a direct and substantial interest.⁹ According to 18 U.S.C. § 205(b), which is applicable to District government employees, engaging in prohibited representational activities shall result in criminal penalties.¹⁰

Although the representation prohibition applies District-wide for full-time government employees, it only applies to Board or Commission Members, as it pertains to their own Board or Commission and agency.¹¹ Pursuant to DPM § 1807.5 “[a]n employee who is employed for not more than one hundred thirty (130) days during any period of three hundred sixty-five (365) consecutive days, to perform temporary duties, either on a full-time or intermittent basis, shall be subject to Subsection 1807.1(h) only in relation to a particular matter involving specific parties in which he or she has at any time participated personally and substantially as a District government employee, or which is pending before his or her employing agency.” Most Board or Commission Members are defined as special government employees because their service does not exceed one hundred and thirty (130) days in a calendar year.¹² They also usually maintain full-time employment outside of the District government. Representation issues arise, most often, in the context of board members appearing before their own agency on behalf of their outside employer.

The District government seeks to retain professionals who are experts in a given field to serve on corresponding Boards and Commissions. For instance, the DC Real Estate Board needs competent real estate professionals to serve on the Board. Although this practice is perfectly acceptable, it creates a unique atmosphere for conflicts of interest. If the Real Estate Board appoints DC realtors, it leads that the Board will have Members who have interests or clients that are before their own Board; this is true of almost all Boards and

⁹ See D.C. Act 24-441 (Law number L24-0150) which amends the Ethics Act (D.C. Official Code § 1-1162.23(a)) allows employees to provide pro bono legal representation before District of Columbia courts and agencies, and federal courts and agencies. *see also* DPM 1807.1(h) containing an exception for representation that is permitted by subsection 1807.6 (non-compensated representation of another employee in a personnel matter, if not inconsistent with the employee’s duties) or 1807.7 (representing a parent, spouse, child, or estate, with permission for an official supervisor, except in matters in which the employee participated personally and substantially).

¹⁰ It is worth noting that the U.S. Office of Government Ethics has concluded that certain types of communications, made without the intent to influence, do not violate 18 U.S.C. § 205(a). *See* U.S. Office of Government Ethics Legal Advisory Opinion LA-20-08, issued on October 22, 2020, (concluding that federal government employees may submit certain applications or forms on behalf of another person when the submission consists of factual information and seeks a routine action that does not contain an appreciable element of dispute, available at [https://oge.gov/Web/oge.nsf/Legal%20Docs/E89A5591CC56E3808525860D006C55D6/\\$FILE/LA-20-08.pdf?open](https://oge.gov/Web/oge.nsf/Legal%20Docs/E89A5591CC56E3808525860D006C55D6/$FILE/LA-20-08.pdf?open)). These types of communications rarely occur with the District government, and we encourage employees to seek guidance before engaging in this activity.

¹¹ Pursuant to DPM § 1807.5 “[a]n employee who is employed for not more than one hundred thirty (130) days during any period of three hundred sixty-five (365) consecutive days, to perform temporary duties, either on a full-time or intermittent basis, shall be subject to Subsection 1807.1(h) of this section only in relation to a particular matter involving specific parties in which he or she has at any time participated personally and substantially as a District government employee, or which is pending before his or her employing agency.”

¹² DPM § 1899.1 (defining Special government employee).

Commissions. Members must recuse from participating in matters that involve their outside employer.

A Board or Commission and its underlying agency are often inextricably linked. The staff of the agency oftentimes provide administrative support to its Board. Board Members and agency staff work together, and Boards have varying levels of personnel authority over agency staff. In many cases, those who have a matter before a Board or Commission must submit relevant documents to the agency. A Board Member who appears before or submits documents to their own agency, is colliding their government work relationship with their outside activity. If a Board Member submits documents to their own agency or board on behalf of a third-party entity, that Board Member is likely representing that third party before the same agency staff who must support and assist them in their capacity as a Board Member.¹³ Board Members, who have matters before their own board or agency, are in a unique position to use favor they may have curried as a Board Member to influence or bias agency staff, either purposefully or inadvertently.

Because of the symbiotic relationship between boards and agencies, Board and Commission Members must be vigilant and adhere to the representation prohibition as it pertains to their Board, Commission, *and* the corresponding agency. They should refrain from personally signing or submitting documents to their agency or board and have a third-party representative sign and submit those documents, i.e., a business partner or attorney.

Illustrative Examples

Example 1

An employee of D.C. Human Resources (“DCHR”) earns extra income by starting a tax preparation company. He provides 24-hour tax services and sets up a home office in his basement. Many of his clients are his DCHR colleagues and he often completes their tax returns in his government office, using his agency issued computer. When refunds are processed, the employee uses his agency cell phone to text refund amounts to his clients.

The employee has violated several outside employment restrictions. He engaged in tax preparation while on duty and using his government computer and cell phone. Also, because the employee provides 24-hour tax services, his outside employment may impair his physical or mental ability to perform his official duties. The employee’s outside employment is incompatible with his government employment.

Example 2

A Member of the Board of Directors for the DC Housing Finance Agency (“DCHFA”) is also a real estate developer operating in the District. The Board Member’s real estate development company is called XYZ Development, and it is one of the largest real estate development companies in the country. XYZ often has several matters before the DCHFA board. When XYZ Development has matters before the Board, the Board Member recuses himself and does not engage in any discussion or voting on the matters. The Board Member has recused himself during the last six board meetings due to potential conflicts with XYZ.

¹³ See supra footnote 10.

Given the overlap between XYZ Development’s interests and the role of the Board, much of the function of the Board appears to be voting on matters relating to the Board Member’s outside company. As a result, the Board Member has had to recuse consistently for six meetings, undermining his ability to fulfill his role as a Member of the Board. Since voting on real estate financing is critical to the Board Members role, recusal may no longer be an option and the Board Member must consider resigning from the board or divesting from XYZ Development.

Example 3

A Member of the Alcoholic Beverage Control Board (“ABC”) owns several nightclubs throughout the District. The ABC Board Member submits documents to the Alcoholic Beverage Regulation Administration (“ABRA”) on a regular basis, in connection with the renewal of liquor licenses for his nightclubs. Once ABRA staff have prepared the applications for review by the ABC Board, the board member recuses himself and does not engage in any board discussion or voting on his own liquor license applications.

The ABC Board Member is representing a third party before his own agency. Signing and submitting applications for approval is a form of representation and the Board Member is prohibited from representing a third party before both ABRA and the ABC Board. He has therefore violated the prohibition against representation. Note that, the Board Member himself is the third party since he is acting on behalf of his nightclubs when he submits the applications.

Example 4

An employee of the Department of Energy and the Environment (“DOEE”) is co-owner of a solar panel manufacturing business called Energia Green Solutions, Inc. (“Energia”). Energia wants to apply for a DOEE clean energy grant. The DOEE employee believes that Energia is prohibited from applying for the grant since she would be violating the representation rule should she sign and submit the grant application.

The DOEE employee is prohibited from signing and submitting documents to DOEE pursuant to DPM 1807.1(h), however her business is not. The District’s outside employment restrictions attaches to the employee. Energia may apply for the grant as long as another Energia employee or other third-party intermediary, such as an attorney signs and submits the grant application and the employee recuses herself from and has no involvement in the matter.

Sincerely,



ASHLEY D. COOKS
Director of Government Ethics
Board of Ethics and Government Accountability

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