

SUBJECT: POST-EMPLOYMENT

SUMMARY: A former public employee may not take employment with a contractor until one year has expired from the time that the contractor had procurement activity with the former employer in a matter in which he “directly and substantially participated.” And, requestor is prohibited from lobbying the agency or representing clients before the agency on a matter in which he “directly and substantially participated” for a period of twelve months from leaving employment. Further, requestor is advised that §8-13-725 (A) prohibits the use or disclosure of confidential information gained in the course of or by reason of one’s official responsibilities if it would affect an economic interest.

FACTS: The requestor served as the Deputy Superintendent of Operations for Charleston County School District until his retirement on June 30, 1998. In that position, he had responsibility for most business support services for the District. His areas of responsibility included departments of finance service, buildings and grounds, and support services, including bus transportation.

One of his involvements was the attempt to privatize school bus transportation services. At his direction, his staff prepared bid specifications after the decision was made to privatize. A contract was executed with Laidlaw Transit on January 17, 1997. Daily management of the contract continued to be handled by the Director of Support Services.

In August 1997, the District Superintendent reorganized the district and reassigned six area superintendents to report directly to the requestor. These area superintendents were assigned geographic areas and given complete decision making authority in their areas of responsibility which included contract management of transportation. The area superintendents were given authority to make decisions including contract termination and modification of service contracts.

After August 1997, the requestor removed himself from decision making authority in the areas of transportation, custodial services, and maintenance. Each of the area superintendents were given complete decision making in the areas of transportation, maintenance, and custodial services; they did not require the requestor’s prior authorization on even substantial contract decisions.

After announcing his retirement, the requestor was informally contacted by a Laidlaw employee concerning interest in employment. The requestor’s interest in employment with Laidlaw has increased.

DISCUSSION: The Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act No. 248 of 1991; Section 2-17-5 et. seq. and Section 8-13-100 et. seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. An opinion rendered by the Commission, until amended or revoked, is binding on the Commission in any subsequent charges concerning the person who requested the opinion and who

acted in reliance on it in good faith unless material facts were omitted or misstated by the person in the request for the opinion. Identities of parties involved must be withheld upon request.

The S.C. Ethics Act imposes certain post-employment restrictions on former public employees.

The relevant statutes are §8-13-755, which provides a one year "cooling off" period, and §8-13-760.

A former public official, former public member, or former public employee holding public office, membership, or employment on or after January 1, 1992, may not for a period of one year after terminating his public service or employment:

- (1) serve as a lobbyist or represent¹ clients before the agency or department on which he formerly served in a *matter* which he *directly and substantially participated* during his public service or employment; or
- (2) accept employment if the employment:
 - (a) is from a person who is *regulated by the agency or department* on which the former public official, former public member, or former public employee served or was employed; and
 - (b) involves a *matter* in which the former public official, former public member, or former public employee *directly and substantially participated* during his public service or public employment. Section 8-13-755.

Accordingly, per §8-13-755(1), for a period of twelve months after leaving public service, the employee may neither lobby his former agency nor represent clients before his/her former agency on a *matter* in which he *directly and substantially participated*.

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Represent is defined in §8-13-100(28) as:

"Represent" or "representation" means making an appearance, whether gratuitous or for compensation, before a state agency, office, department, division, bureau, board, commission, or council, including the General Assembly, or before a local or regional government office, department, division, bureau, board, or commission.

In prior opinions, the State Ethics Commission has examined the terms “directly and substantially participated” and “matter.” [CONFIDENTIAL OPINION SEC AO94-012]. In SEC AO92-062, the State Ethics Commission advised that “direct and substantial participation involves specific work on a matter which is of material value to the outcome of any resolution to the matter. Examples of substantially participates would encompass inspection and issuance of permit or license, representation of the agency in legal action, preparing documents for agency action, etc. “Directly and substantially participated” can include participation through making a decision or recommendation, rendering advice, or conducting an investigation.² Participation includes “decision, approval, disapproval, recommendation, the rendering of advice, or vote.” ‘Directly’ is often defined as “without [any] intervening agency or person...not by secondary but by direct means.” 26(a) C.J.S. pp. 956, 957. See also, Tangen v. State Ethics Commission, 57 He. 87, 550 P .2d 1275 (1976). ‘Substantially’ is a more difficult word to define. In fact, substantial has been said to be “as elusive a word as the English language contains.” 83 C.J.S. p. 762. However, considering the context, the Commission finds substantially as “of real worth and importance; of considerable value; valuable.” Tax Commission of Ohio v. American Humane Education Soc., et al., 181 N.E. 557 (1931). See also, 83 C.J.S. p. 762 (1953).

Section 8-13-755 does not define the term “matter;” however, the State Ethics Commission has advised that a specific matter³ includes a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, rulemaking, or legislation. Matter was defined in SEC AO98-008 to mean a discrete, identifiable transaction or conduct involving a particular situation and specific parties. “Matter” emphasizes that the employment situation applied to specific cases and not general areas of activity. The Model Rules of Professional Conduct (1982) provide that “...a lawyer shall not represent a private client in connection with a **matter** in which the lawyer **participated personally and substantially** as a public officer or employee” (emphasis added). A matter under the Model Rules has been defined as a “discrete, identifiable transaction or conduct involving a particular situation and specific parties.”

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In SEC AO93-021, a former right of way appraiser for the South Carolina Department of Highways and Public Safety had established himself as a private right of way consultant. The SEC advised that he could not serve as a lobbyist before his former agency nor represent clients for a period of one (1) year on those matters in which he had directly and substantially participated. “‘Directly’ is often defined as “without [any] intervening agency or person ... not by secondary but by direct means.” “‘Substantially’ is a more difficult word to define . . . the Commission finds substantially to mean ‘of real worth and importance; of considerable value; valuable.’” The Commission found his prior participation to be limited to cost data gathering and therefore not “direct and substantial” on the particular matter for which he was subsequently employed after he left the State.

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A specific matter is some definable and isolatable transaction in which the government has a direct and substantial interest and which involves specific parties. Particular matter means a judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the US is a party or has a direct and substantial interest. 5 C.F.R. §2637.102(a)(7).

Securities Investor Protection Corporation v. Bigman, 387 F. Supp. 1358 (1984) (quoting ABA Formal Opinion No. 342). Implicit in that wording is the recognition that the Commission “should engage in a facts specific analysis, taking a narrow view of impropriety when determining whether a former government employee is engaged in the ‘same matter’ as that in which he had substantial responsibility while employed by the government.” National Bonded Warehouse Ass’n, Inc. v. U.S., 718 F. Supp. 967 (C.I.T. 1989). Thus, rulemaking or policy making do not constitute a matter unless “the activity is narrow in scope and is confined to specified issues and identifiable parties such that it may be properly characterized as ‘quasi-judicial’ in nature.” Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 22, 34 (1984).

The second provision of Section 8-13-755 has a two-step process whereby the person offering the employment must be regulated and the future employment must involve a specific matter on which the employee participated. Thus, unless Laidlaw is a person who is regulated by the agency for which the requestor was previously employed, §8-13-755(2) would not be relevant. The aspect of regulated by a state or governmental agency is also included in §8-13-730. In SEC AO92-110, the Commission pointed out that §8-13-755(2) was intended to prohibit the “revolving door” whereby a regulator leaves public service and begins to work with a regulated person on matters in which he had participated as a regulator. The restrictions of §8-13-755(2) require there to be regulatory authority over the future employer and that the employment to involve a matter in which the employee was directly and substantially involved. Section 8-13-730 basically mirrors its predecessor, §8-13-450 of the previous Ethics Act, and which concept, “regulatory agency that regulates a business with which the employee is associated,” was analyzed in S. C. Coastal Council et. al. v. S.C. State Ethics Commission, 410 S.C. 2d 245 (SC 1991). The South Carolina Supreme Court examined whether Section 8-13-450 applied to members of the Coastal Council. The Court held that Coastal Council regulated the “use of critical areas by a business” but not the specific way a particular business is operated. Therefore, the Court stated that the test is whether the agency regulates the way a business is operated. In a prior opinion, the State Ethics Commission had stated that an agency regulates a business if it “has authority to promulgate rules or regulations or administer legislatively enacted rules and regulations that govern or direct entry into a business, conditions for remaining in that business, and the manner in which the business may be conducted.” Ethics Op 79-015 (Oct. 5, 1978).

It does not appear that the Charleston County School District regulates Laidlaw; therefore, the restrictions contained in §8-13-755 do not apply.

The second statute to examine for post employment restrictions is §8-13-760:

Except as is permitted by regulations of the State Ethics Commission, it is a breach of ethical standards for a public official, public member, or public employee who is participating directly in *procurement*, as defined in Section 11-35-310(22),⁴ to resign

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and accept employment with a person contracting with the governmental body if the contract falls or would fall under the public official's, public member's, or public employee's official responsibilities.⁵

In Advisory Opinion SEC AO92-101, the State Ethics Commission advised that the restriction contained in §8-13-760 would prohibit a former state employee from obtaining employment for one year from a contractor on contracts for which he was responsible for letting or supervising. If the employee performed only ministerial duties regarding the award of prime vendor contract and the employee's anticipated duties for the distributor are not related to his current responsibilities, then §8-13-760 does not apply.

If the requestor participated in procurement, as defined by §11-35-310(22), or if the new employment will encompass a matter in which he "directly and substantially participated" while employed by the district, then he must await the one year period. The one year cooling off period does not commence one year from the retirement date (June 30, 1998) but instead one year from the time the employee last "directly and substantially participated."

From the information provided by the requestor, he last had official responsibility, directly or through his subordinates, as defined in the statute, after the reorganization took place in 1997. Therefore, based on this representation, it would appear that his official responsibility in the procurement contracts with Laidlaw ended in August of 1997.

It has been recognized by the federal and other state commissions analyzing the purpose of post employment provisions that the "revolving door" syndrome involves inherent concerns about the potential use of inside information and for continuing personal influence. Thus, a "cooling off" period is intended to avoid these potentialities.

Section 8-13-725 provides:

(A) A public official, public member, or public employee may not use or disclose confidential information gained in the course of or by reason of his official responsibilities in

Section 11-35-310(22) provides as follows:

"Procurement" means buying, purchasing, renting, leasing or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

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Section 8-13-100(23) provides as follows:

"Official responsibility" means the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action.

a way that would affect an economic interest held by him, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.

KEY WORDS:	Post-employment "Revolving Door"
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ANNOTATIONS:	§8-13-725 §8-13-755 §8-13-760 §11-35-310(22) §8-13-100(23) SEC AO98-008 SEC AO92-101 SEC AO92-111 SEC AO93-019 SEC AO92-243 SEC AO92-243 SEC AO93-019
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