

SUBJECT: POST EMPLOYMENT BY BUREAU CHIEF

SUMMARY:

A Bureau Chief engaged in enforcing controlled substances statutes would not be prohibited from seeking employment from a private sector pharmacy for a period of one year unless such employment involves a matter involving that pharmacy in which the employee was directly and substantially involved.

QUESTION:

The Staff Counsel for the Department of Health and Environmental Control requests an opinion concerning a hypothetical post-employment matter. A Bureau Chief whose responsibilities include enforcing statutes dealing with controlled substances and the managing of a number of drug inspectors. The inspectors are commissioned law enforcement officers and also are registered pharmacists. The Counsel questions whether the Bureau Chief could resign and become employed within a short period of time by a private sector pharmacy. He advises that the enforcement activities include only a portion of a pharmacist's duties, i.e., the proper, legal handling of controlled substances. He further notes that the individual would, most likely, not be involved in a future employment matter in which he directly and substantially participated during his public employment.

DISCUSSION:

This opinion is rendered in response to a letter dated May 29, 1992 requesting an opinion from the State Ethics Commission. 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 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.

Section 8-13-755(2) provides:

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:

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(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.

The Bureau Chief would violate the Ethics Act if he accepts employment involving (1) a regulatory matter (2) in which he directly and substantially participated while employed at DHEC. Applying Section 8-13-755 to the facts of this opinion requires an examination of its terms. For instance, the term "matter" is not defined in the Ethics Act. Furthermore, "matter" is not sufficiently defined in the general reference materials for the purposes of the Ethics Act. However, the interpretations of the rules dealing with the conduct of attorneys clarify this term as used in the context of the Ethics Act. 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." Securities Investor Protection Corporation v. Bigman, 387 F. Supp. 1358 (C.D. Cal. 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 (Ct. Int'l Trade 1989). The definition of "matter" emphasizes that the restriction applies to specific cases and not general areas of activity. 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. PanAmerican World Airways, 103 F.R.D. 22, 34 (D.C. Cir. 1984).

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 (1953). See also, Tangen v. State Ethics Commission, 57 Haw. 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., 42 Ohio App. 4, 181 N.E. 557 (1931). See also, 83 C. J.S. p. 762. Therefore, in this case, if the Bureau Chief personally advised the Bureau Director concerning a regulation's impact upon the issuance of a permit, and that advice was valuable to the Bureau Director, then the employee directly and substantially participated in that matter.

From the facts as submitted, there is a regulatory function provided in the administration of the controlled substances statutes by the Bureau Chief and pharmacist employed at DHEC. Therefore, any employee engaged in such regulation would be prohibited from seeking

employment from a private sector pharmacy for a period of one year when the employment involves a regulatory matter in which the employee was directly and substantially involved. However, this DHEC Bureau Chief is not prohibited from seeking employment from a private sector pharmacy within the one year period if the employment does not involve a specific matter in which the Bureau Chief's personal participation was valuable or important.