

Stephan W. Fogleman, Chair
Donna M. Davis, Vice-Chair
Melodie Hengerer
Arnold Sampson
Vacant



Executive Director: Isabel Mercedes Cumming
Director: Jeffrey Hochstetler

Baltimore City Board of Ethics
Ethics Opinion 21-001
(February 11, 2021)

The Ethics Board has recently realized there is a need to clarify the Ethics Law’s provision limiting a City public servant’s employment opportunities after they leave City service. The Ethics Law’s post-employment provision provides:

After leaving office or terminating employment, a former public servant may not assist or represent a party, other than the City, in a case, contract, or other specific matter for compensation if: (1) the matter involves City government; and (2) the former public servant significantly participated in the same matter as a public servant.

City Code, Art. 8, § 6-22(a) (“post-employment restriction”).

This provision is based on the State Ethics Law’s post-employment provision, which is substantially similar.¹ The post-employment restriction serves two purposes. First, it seeks to avoid the appearance that a public servant is “switching sides” in a particular matter and could use special knowledge acquired in their City employment for the benefit of a party other than the City. *See* State Ethics Commission Opinion 07-01 (Mar. 8, 2007). Second, it seeks to avoid the appearance that a public servant is using their City position to secure a private employment opportunity. State Ethics Commission Opinion 07-01.

Three questions often arise around the post-employment restriction: 1) the scope of the restriction; 2) what it means to assist or represent a party “other than the City”; and 3) whether the restriction terminates after a period of time. We address these questions in turn.

What is the scope of the post-employment restriction in § 6-22?

The plain language of the post-employment restriction limits the scope to matters that “involve[] City government” and on which “the former public servant significantly participated” while employed by the City. If the former public servant’s employment does not meet both of these criteria, it does not fall under the post-employment restriction. Determining whether a matter involves City government is usually straightforward enough. But whether the matter constitutes the same one in which the public servant significantly participated while employed by the City requires a case-by-case analysis.

¹ The State’s provision provides that “a former official or employee may not assist or represent a party, other than the State, in a case, a contract, or any other specific matter for compensation if: (i) the matter involves State government; and (ii) the former official or employee participated significantly in the matter as an official or employee.” Md. Code Ann., General Provisions Article, § 5-504(d).

As a general matter, the post-employment restriction does not prohibit a former public servant from going to work for someone that does business with their former agency or with the City more broadly. *See* State Ethics Commission Opinion 91-2 (Mar. 7, 1991). Rather, the post-employment restriction is concerned about whether the new employment involves the same matters in which the former public servant was involved during their time with the City, and whether that involvement was significant. *See* State Ethics Commission Opinion 97-13 (Nov. 18, 1997). Factors to consider in determining whether the matter is the “same matter” include whether it involves “the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important government interest.” State Ethics Commission Opinion 07-01. And when determining whether the public servant’s participation in a matter was significant, the inquiry does not stop at whether they had final authority or responsibility for the matter, but also considers other involvement, such as providing advice and recommendations. *See* State Ethics Commission Opinion 97-13.

For example, if a former public servant was involved in advising on or making recommendations about a particular City contract, grant, or procurement while they worked for the City, they likely would be prohibited from performing work under that same contract, grant, or procurement for another party after they leave City employment. *See, e.g.,* State Ethics Commission Opinion 07-01 (prohibiting a former State official from assisting a property developer on matters proposed or anticipated by an agreement the former official had negotiated while employed by the State); State Ethics Commission 95-2 (Jan. 11, 1995) (prohibiting a former State employee from working on certain grant-related matters for a private corporation where the former employee had been instrumental in drafting and managing the grant process while employed by the State); State Ethics Commission 91-13 (Oct. 30, 1991) (prohibiting a former State employee from providing consulting services on behalf of a private employer related to studies and reports in which he had been significantly involved while in State service).

Any analysis under the post-employment restriction in § 6-22(a) depends significantly on the facts of the situation. Specifically, the analysis must consider both the former City public servant’s previous work and their proposed work after leaving City service. Accordingly, the Ethics Board recommends that former and soon-to-be former public servants seek guidance from the Board if there is any possibility their post-City employment horizons could implicate § 6-22(a).

What does it mean to represent or assist a party “other than the City”?

The Ethics Board has encountered some confusion about representing or assisting a party “other than the City” for purposes of § 6-22(a). Put another way, what post-employment activity will still count as assisting the City such that the restriction in § 6-22(a) does not apply? For example, can a public servant leave full time City employment but then work on the same or similar matters for the City as an independent contractor or consultant? As explained below, the answer comes down to whether the former public servant assists the City directly or does so through an entity other than the City.

In addressing this question under the substantially similar State post-employment restriction, the State Ethics Commission

[h]as determined that the Public Ethics Law does not prohibit former officials and employees who leave State service from working directly for the State as

contractual employees (i.e. personal services contract) on the same matter they worked on during their State service. *On the other hand, the Commission has determined that the Public Ethics Law prohibits former officials and employees from working on these same matters if they attempt to do so by forming a sole proprietorship or by working for a contracting business.* The distinction here is that as a direct contractor, the former official/employee is still working directly for the State, is not assisting or representing another party for compensation, and therefore has not “switched sides.” *In the latter situation (sole proprietorship or employed by a contractor), the insertion of a business entity into the relationship creates a conflict in that the former official/employee has a primary duty to his/her new employer rather than the State.*

State Ethics Commission, “[Summary of Post-Employment and Related Limitations](#)” (November 12, 2020) (emphasis added). *See also, e.g.,* State Ethics Commission Opinion No. 92-11 (permitting a former State employee to provide consulting services “*directly to his former agency in connection with continuing implementation of programs that he initiated while at the agency*”) (emphasis added); State Ethics Commission Opinion No. 84-33 (permitting a former agency Secretary to enter into a contract with his former agency, where the “*proposed contract is with the former Secretary as an individual, and not with any corporation or formally organized business entity*”) (emphasis added).

Consistent with the clear interpretation provided by the State Ethics Commission under the State’s substantially similar post-employment restriction, a former City official or employee would be precluded by § 6-22(a) from contracting with the City through a private entity to work on matters in which they had significantly participated while in City service. However, § 6-22(a) would not preclude them from entering into such an arrangement as an individual, through a personal services contract or the like. This is not a distinction without a difference. The former scenario could raise the appearance that the former public servant had “switched sides,” *i.e.*, that they were using their former public service to benefit an entity other than the City. The latter scenario does not raise this specter.

Is the post-employment restriction in § 6-22 limited in time?

Finally, perhaps the most widely held misconception about the post-employment restriction in § 6-22(a) is that it terminates after a certain period of time, *e.g.*, six months or a year. However, there is no such time limitation to § 6-22(a).² Instead, the post-employment restriction is indefinite as applied to the particular matters in which the former public servant significantly participated while in City service. *See* State Ethics Commission 95-2.

Nonetheless, from a practical perspective, many matters on which a public servant worked while employed by the City will end after a reasonable period of time. For example, contract and grant agreements usually have a termination date, and § 6-22(a) likely would not prohibit a former

² The only time limitation in § 6-22 is found in the additional post-employment restriction placed on former elected officials in § 6-22(b). In addition to the general post-employment restriction discussed in this opinion, § 6-22(b) prohibits an elected official from assisting or representing another party for compensation—other than State or local government—“*in any matter that is the subject of legislative action for 1 calendar year from the date the elected official leaves office.*” City Code, Article 8, § 6-22(b) (emphasis added). In other words, a former City elected official cannot participate in any form of legislative lobbying for a year after they leave office.

public servant from working for an entity under a new City contract or grant agreement that had been negotiated after they departed City service. However, because the application of § 6-22 is highly context specific, we reiterate that public servants and former public servants should consult the Ethics Board with questions about the potential impact of the post-employment restriction on their future employment prospects.

Baltimore City Board of Ethics

Stephan W. Fogleman, Chair

Donna M. Davis

Melodie Hengerer

Arnold Sampson