

MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion

11-04-002

Section 19A-13(a) of the ethics law provides that a former employee “must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.” A former employee who significantly participated in a series of lease agreements with a developer that were signed in 2002, but impose continuing obligations, asks whether he can work for that developer so long as he does not work on those agreements. The Commission concludes that the former employee must not work on or assist the developer with the implementation of any obligation flowing from the scope of work of those agreements without first obtaining a waiver from the Commission.

The former public employee left County employment in December of 2006.^[1] During his employment he significantly participated in a series of lease agreements between the County and a developer. The Commission understands that although those agreements were signed in 2002, they impose obligations that continue to this day.

Section 19A-13, entitled “Employment of former public employees,” states as follows:

(a) A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.

* * *

(c) Significant participation means making a decision, approval, disapproval, recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. Significant participation ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

The Commission “has narrowly interpreted § 19A-13(a), given its proscription against working on the same ‘specific matter’ and its relatively harsh 10-year prohibition.” *AO 07-11-020* (Johnson, Feb. 8, 2008). Thus, the Commission has permitted former public employees who significantly participated in matters to work for someone else on related matters, so long as they were not the same specific matter. *See AO 03-015* (Kellar, Apr. 8, 2003) (former County employee could work for company conducting inventory of bus stops (specifically including recommendations for capital improvements to bus stops having safety concerns) although duties as a public employee included planning bus service, recommending route changes, and community outreach); *AO 03-016* (Kellar, May 15, 2003) (former County employee could work for County contractor on DHHS’ budget applications although duties as a public employee included work for DIST on budget applications); *AO 07-11-020* (Johnson, Feb. 8, 2008) (former County employee could service County bank account as president and CEO of the bank although

duties as public employee included responsibility for management of the account when it was at a different bank).

The State Ethics Commission has similarly interpreted a similar prohibition in the State ethics law. Md. Code Ann., State Gov't § 15-504(d), prohibits a former employee from assisting or representing a party other than the State in any matter involving the State if the matter is one in which he or she participated significantly while an employee. The State Ethics Commission interpreted that provision most recently in *Opinion No. 07-01* (Mar. 8, 2007). In that case, the requestor was the Executive Director of the Pen Mar Development Corporation (PMDC). PMDC was created in response to the Base Closure and Realignment Commission laws. Those laws called for the creation of local redevelopment authorities to facilitate the sale and private economic development of military installations designated for closure. Ft. Ritchie in Washington County, Maryland was one such installation. A developer bought Ft. Ritchie from PMDC in October 2006 for \$9 million pursuant to a (1) July 26, 2004, purchase and sale agreement and (2) November 12, 2004, development agreement with PMDC. The requestor sought an opinion from the State Ethics Commission regarding his ability to work for the developer as its on-site representative.

The State Ethics Commission found that the requestor significantly participated in the 2004 agreements, which transferred Ft. Ritchie to the developer, although he did not have final approval authority on those agreements. The next issue was determining the scope of “the matter” in which the requestor significantly participated. The State Ethics Commission wrote that this determination turned on whether the two matters involved “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.” The State Commission wrote:

We have addressed the concept of “matter” taking in to account substantial federal case law relating to similar federal requirements. In Opinion 97-11, we discussed factors to be considered in determining whether the matter is the same matter:

. . . The resulting basic criteria that we have considered in applying this provision are whether a matter involves the same matter as a previous activity, 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.**” As a particular example, in a 1987 enforcement matter (which was sustained by the Court) the Commission concluded that a property tax assessment for one year in which a former supervisor of assessments did not participate was nevertheless the same matter as a prior year assessment, since the key issue being contested by the former employee was one where he had been instrumental in the initial policy development. . . . (Emphasis added.)

We recognize that the Requestor’s situation is somewhat atypical in State government. PMDC was created and exists to accomplish a long-term objective involving the full economic development of the Ft. Ritchie property. The project could easily extend over 25 years. The Requestor suggested that the current PMDC “matter” was the planning process that resulted in the transfer and sale of the property to the Developer. He also suggested that the actual

redevelopment of the property would be “new” matters that should not disqualify him from considering employment with the Developer.

We have very carefully reviewed and considered the facts of this matter. . . . The 2004 Agreements create financial and development obligations that have survived the actual transfer of Ft. Ritchie to the Developer and may continue for many years. The Development Agreement requires the Developer to spend \$7.5 million on development and construction within 5 years or the property will transfer back to PMDC. There is a job creation requirement that could reduce the purchase price up to \$4 million in nine years. The Developer is required by the PMDC approved development plan to complete work for an historical area, a general and restrictive business area, and a residential area. The Developer must also provide periodic reports to PMDC on the progress of the development and jobs created on site. PMDC also has responsibilities related to monitoring of the Developer’s activities pursuant to the BRAC requirements that will continue for at least seven more years. It must also spend the funds it has accumulated (from the sale and the prior leasing of the property) for the benefit of the project. In this regard, PMDC and the Developer have discussed a joint effort to develop a community center on the property.

Having determined that “the matter” was the 2004 agreements, the State Ethics Commission concluded that the State ethics law prohibited the requestor from being employed by the Developer to assist in any activities “that flow from the 2004 Agreements.”

Therefore, the Requestor may not oversee the proposed development activities that were promised in the Development Agreement, including the demolition projects and the new construction infrastructure projects. Nor could he market the property to potential tenants related to the development plan or manage environmental issues that may be part of the Developer’s new obligation to comply with the Corporation’s agreements with the United State Army and the State Historic Preservation Officer. Neither could he represent the Developer on the board of directors for the community center that was part of the Fort Ritchie Development Plan proposed by the Developer and approved by PMDC.

Therefore, we advise that the Requestor’s proposed employment as the Fort Ritchie on-site asset manager or owner’s representative for the Developer would be prohibited by the post-employment provisions of §15-504(d) of the Ethics Law. We note that, as discussed above, the Ethics Law does not generally prohibit all affiliations with entities involved with one’s former agency. Other assistance or employment by the Requestor with the Developer that does not deal with the activities proposed or anticipated by the 2004 agreements at Ft. Ritchie would not be barred.

The State EC also wrote that the Developer “could hire the Requestor to market its development capabilities to other BRAC sites nationally. He could also serve on the Museum Board of Directors that was not part of any agreement prior to the transfer.”

In this case, the former public employee significantly participated in a series of lease agreements with a developer that were signed in 2002. Those lease agreements are the “case, contract, or other specific matter” under § 19A-13(a). Because the Commission understands that those agreements impose continuing obligations, the former employee cannot work on or assist the

developer with the implementation of any obligation flowing from the scope of work of those agreements.^[2] The former employee's request seeks to work for the developer on "ongoing operational issues" including "security, safety, maintenance, tenants, regional development, special events, and county facilities." The former employee cannot work on those ongoing issues to the extent they flow from the scope of work of the agreements. This prohibition ends 10 years after the former employee last significantly participated in the matter as a public employee.

In reaching this decision, the Commission has relied upon the facts as presented by the requestor.

FOR THE COMMISSION:

A handwritten signature in black ink, appearing to read "Nina A. Weisbroth". The signature is written in a cursive style and is positioned above a horizontal line.

Date: June 22, 2011 Nina Weisbroth, Chair

[1] The former employee is not categorically precluded from working for the developer under § 19A-13(b) because it has been well over one year since he left County employment.

[2] In his request, the former employee stated that he would not "be working on the legal agreement between the County and [the developer] or any case or specific matter involving the County and [the developer] that I worked on as [a County employee]."