

OPINION NO. 21-01

An opinion has been requested concerning the extent to which the post-employment provision of §5-504(d) of the Public Ethics Law limits the activities of a former Maryland Department of Health (“MDH”) employee now providing services through a private consulting business. This request is presented on behalf of a former Wicomico County Health Department (“WCHD”) Deputy Health Officer (the “Requestor”). Representatives of MDH, WCHD, and the Maryland Department of the Environment (“MDE”) also joined in this request.

As a WCHD Deputy Health Officer, the Requestor’s former job responsibilities related to the development of residential and commercial properties and included the review and approval or disapproval of applications for on-site septic system installation, repair, and replacement, and for evaluations of the suitability of land for placement of on-site septic systems in accordance with Maryland law and regulations. The Requestor’s responsibilities fell within a delegation agreement between MDE and WCHD, where WCHD is responsible for performing delegated duties, and MDE provides oversight and guidance as needed.

The Requestor worked for WCHD for over sixteen years. After resigning from WCHD in 2018, the Requestor formed a private environmental consulting business in Wicomico County, Maryland. According to the entity’s articles of organization, its purpose is “septic system inspection and design”. The Requestor and the State agencies involved in this matter seek clarity on the application of the post-employment restriction of the Public Ethics Law to four specific scenarios as detailed below.

The post-employment provision of the Public Ethics Law 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 . . . (ii) the former official or employee participated significantly in the matter as an official or employee.” Md. Code Ann., Gen. Prov., § 5-504(d).

Applying this prohibition in most situations involves the question of whether the matter is the same matter, and whether the person’s participation while an official or employee was significant. As stated in Opinion No. 07-01, “[t]his section of the law does not prohibit all employment with an agency contractor or entity involved in a matter relating to the former agency. Rather, we look to identify particular or specific matters in which the individual was involved in a significant way in his or her service with the State agency.” The question at issue in this request is whether the matters in which the Requestor seek to be involved as a private consultant are the same matters in which he participated significantly while employed by WCHD.

This request presents four questions for the Commission’s consideration:

- 1) Whether a former WCHD employee, may assist or represent a party for compensation, in a matter before the WCHD, where property owners for certain lots in a subdivision seek changes to a sewage disposal area and approval of lot sizes, where previously, as an employee, he reviewed and/or performed soil testing, and

either approved or denied certain lots in a subdivision and/or signed the record plats for the subdivision?

- 2) Whether a former WCHD employee, may assist or represent a party for compensation, in a matter before the WCHD, where a party is seeking to have a property approved for a sewage disposal system as a five bedroom property, where previously, as an employee, he approved a septic system and site plan for the same property as a three bedroom property?
- 3) Whether a former WCHD employee, may assist or represent a party for compensation, in a matter before the WCHD, with the review of an application seeking approval to install a garage workshop within a previously approved designated sewage disposal area, where previously, he as an employee approved the installation of a septic system within the same sewage disposal area?
- 4) Whether a former WCHD employee, may assist or represent a party for compensation, in a matter before the WCHD, to subdivide a property, where previously, as an employee, he approved a prior subdivision of the same property?

The Commission has considered the concepts of matter and significant participation in connection with the application of §5-504(d) of the Public Ethics Law. We have viewed the term “matter” to include “any proceeding, application, submission, request for ruling, or other determination, contract, claim, case, or other such particular matter”. Opinion No. 80-17. The “basic criteria” in determining whether a matter is the same includes “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.” Opinion No. 07-01. “[W]e have considered whether the situation involves discrete and identifiable issues or called-for action so that the parties and issues can be discerned, whether the parties to the matter are the same, whether the State interest is still important, whether the subject matter is the same (such as the same property, same grant, etc.), and whether the issues are the same.” Opinion 91-02. As stated in Opinion No. 95-02, if the matter is the same as one the employee previously participated in, “[t]here is no time limit on this prohibition”. The prohibition extends for the duration of the specific matter.

Significant participation includes “acting or failing to act in one’s official capacity, “personally and substantially, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.”” Opinion No. 80-17. “[W]e have generally viewed participation as not being limited to final authority or responsibility for a matter. Providing advice and recommendations as to a matter, for example, is viewed as participation.” Opinion 97-13.

However, the post-employment restrictions have been “found not to apply where the former employee was only tangentially involved” in a matter. Opinion 83-12. In that opinion, the Commission advised the requestor to “continue to keep in mind the various matters in which he participated as a State employee and avoid any representation or assistance regarding these matters for any party other than the State.”

In Opinion No. 91-02, the Commission considered whether a former Division Director of MDE may, through his consulting firm, assist a private client in a situation involving MDE that arose while he was a State employee, and in which he had some involvement. There, the former employee advised that since his departure from MDE, there was now “much more voluminous information”, and accordingly, his firm had been requested to “conduct a review and evaluation... and assist... in preparing a recommendation to the MDE”. Nonetheless, the Commission advised the former employee not to participate in the matter because it “grew directly” from a matter he was previously involved in:

In the situation here, we believe that the consideration of the original investigation constituted an identifiable particular matter which was not resolved and which continues to the present. The parties are the same and the property is the same, and the State continues to have the same interest and authority in dealing with groundwater contamination at the site. Also, though there is apparently a significant increase in information, and the scope and direction of the issues may have fluctuated in the intervening years, we believe that the issues continue as fundamentally the same. In our view, the matter that is currently pending grew directly from the initial submission and review by the agency in which the Request participated, and the original question continues to be a part of the current investigation.

Opinion No. 91-02.

In Opinion No. 97-11, the Commission held that a former Chairman of the Maryland Stadium Authority could not participate in a matter involving a Memorandum of Agreement concerning lease negotiations with the Baltimore Ravens, where, at least five years prior, the Chairman had participated in a Memorandum of Understanding with the Baltimore Orioles that included identical terms and a parity agreement between the two teams. The Commission held that despite time elapsed and significant differences from the previous Memorandum of Understanding, the former Chairman’s participation in the Raven’s lease negotiations was prohibited under the post-employment provisions of the Public Ethics Law:

We are aware that in the situation here there has been some time elapsed since the Requestor was involved in Authority activities, and that the Ravens agreement involves a client not involved in the Requestor’s State activities. We also recognize that the current Memorandum of Understanding that is a likely basis for a new agreement was generated after the Requestor left the Authority and has some significant differences from the early prototype football agreement developed in part by the former Chairman. Nevertheless, we believe that we must conclude that his participation on behalf of the Ravens in the current negotiations would entail his involvement on behalf of another in a matter in which he participated as an

official of the State. It is clear from the information provided by the Authority that this agreement is being based in substantial part on the Orioles agreement, with the basic outline and many of its specific provisions closely following those developed by the Requestor in his role as Authority Chairman.

Opinion No. 97-11. There, although the Commission determined that the requestor was barred from participating in lease negotiations on behalf of the Ravens, the Commission did “note, however... that the Law does not generally prohibit all affiliations with entities involved with one’s former State agency. Other representation by the Requestor of the Ravens that does not deal with the lease or other specific matters involving determinations or decisions in which the Requestor significantly participated as Authority Chairman would not be barred.” Opinion 97-11.

Question 1:

MDH and MDE have provided information that the Requestor, as an employee of WCHD, reviewed and/or performed soil testing, and either approved or denied certain lots in a subdivision and/or signed the record plats for a 22-lot subdivision within Wicomico County. Specifically, MDH and MDE have stated that the Requestor performed soil testing for the subject subdivision in 2011 and signed the record plat for the subdivision in 2013. In 2015, while still a state employee, the Requestor revoked the septic system approval for lots 14-19 of the subdivision, and then a year later approved those lots for onsite septic systems.

In 2018, after resigning from WCHD, MDH and MDE have provided information that the Requestor sought to represent the owners of the subdivision through his consulting business in a matter before WCHD to discuss changing septic system designs within the subdivision. Specifically, lots 14-19 of the subdivision had previously been approved for sand mound septic systems in the front yard, and the subdivision owners sought the Requestor’s assistance in changing the septic system design to one other than a sand mound.

Here, the Requestor significantly participated in this matter as a State employee. The Requestor signed the record plat for the subdivision in 2013, revoked septic system approvals for lots 14-19 in 2015, and thereafter approved the septic systems for those lots. Moreover, the Requestor had considerable responsibility and authority at WCHD in 2015 and 2016.¹ Like the situation before the Commission in Opinion No. 91-02, we believe that here, the consideration of the original septic system approval constituted an identifiable particular matter, which was not resolved, and which continues to the present in the discussions of changing the septic system design as originally approved by the Requestor. These matters would involve consideration of the same basic facts, the same related issues, the same or related parties, and the continuing existence of an important government interest. For these reasons, we advise that the Requestor’s proposed involvement would be prohibited under §5-504(d) of the Public Ethics Law.

¹ Although the Commission is not aware of the exact dates of the Requestor’s promotions within WCHD, the position descriptions provided by MDH reflect that the Requestor was responsible for “managerial supervision” as early as December, 2007, as the Environmental Sanitarian II. The position descriptions reflect that the Requestor was later promoted to Environmental Sanitarian Director II in 2013, and Deputy Health Officer in 2016.

Question 2:

MDH and MDE have provided information that the Requestor, as an employee of WCHD, created and approved a septic site plan for a property as a three-bedroom property in 2002. MDH and MDE have provided information that in 2018, after leaving State service, the Requestor sought to represent the same property owners, through his consulting business, in their request to have the property approved for a sewage disposal system as a five-bedroom property under the existing septic site plan from 2002.

Although the Requestor maintains that his involvement on the property as a WCHD employee was solely as a “closely-supervised Sanitarian Trainee”, the Commission has “generally viewed participation as not being limited to final authority or responsibility for a matter.” Opinion 97-13. At issue in this question is that the Requestor both created and approved a septic site plan for the property. The Requestor acknowledges that that site plan was used to generate the property’s septic permit. These facts support that the Requestor was more than “tangentially involved” in this matter at a State employee, and that the Requestor’s participation was significant.

The Commission also believes that the request to increase the bedrooms on the property from three to five is the same matter under the Public Ethics Law. As a State employee, through creation and approval of the septic site plan, the Requestor significantly participated in approving the septic system on the property to support a three-bedroom home. As a private consultant, the Requestor sought to instead approve the property as a five-bedroom home. This would require further review of the previous septic system, including the existing site plan that the Requestor approved in 2002. In other words, it would involve the same basic facts, the same or related issues, the same or related parties, and the continuing existence of an important governmental interest. Although significant time has passed since the Requestor’s initial involvement as a State employee, “there is no time limit” on the prohibition against former employees working on matters they significantly participated in. For these reasons, we advise that the Requestor’s proposed involvement would be prohibited under §5-504(d) of the Public Ethics Law.

Question 3:

MDH and MDE have provided information that the Requestor, as an employee of WCHD, inspected and approved installation of a septic system in a sewage disposal area on the subject property in 2004. In 2018, after leaving State service, the Requestor through his consulting business sought to represent the owners of the property with an application seeking approval to install a garage workshop within the designated sewage disposal area previously reviewed by the Requestor.

The Requestor was involved in inspecting and approving installation of the septic system on the given property. This level of participation is more than “tangential” involvement, and the Commission finds this involvement to be significant participation. The Requestor points to the passage of time to support his position that he did not significantly participate, and we again note that there is no time limitation on this prohibition against a former employee working on the same matter for anyone other than the State.

The Commission concludes that the 2004 and 2018 reviews are the same for the purposes of the Public Ethics Law. Sewage disposal areas are required to meet certain physical and distance requirements pursuant to the Code of Maryland Regulations 26.04.02.04(E). One such requirement is that the sewage disposal area must be exclusive of buildings and any other permanent or physical objects.² MDH states that the desired garage workshop would be, without prior authorization, a prohibited structure under the regulation. Because the Requestor's prior participation in approving the septic system as a State employee directly relates to (and without prior authorization, directly prohibits) the outcome now desired by the property owners, we believe seeking to install a garage workshop within the sewage disposal area is a matter that grew directly from the initial review and approval by the agency in which the Requestor participated. Moreover, the Requestor's consideration of the original application constituted an identifiable particular matter which was not resolved and continues to the present.

The Commission concludes that the Requestor is prohibited by §5-504(d) of the Public Ethics Law from representing the property owner in seeking this change to the sewage disposal system given his previous significant participation in the same matter as a State employee.

Question 4:

MDH and MDE have provided information that in 2015, as an employee of WCHD, the Requestor approved a subdivision on the subject property. MDH and MDE state that thereafter, the Requestor sought to perform a re-subdivision of the same property. The Requestor maintains that he is working with the owner of a property on a neighboring parcel only.

To the extent that the Requestor was involved in 2015 in approving a subdivision on the property as a State employee, and now wishes to assist a private client through his consulting business to re-subdivide the same property, the Requestor would be prohibited from doing so under the Public Ethics Law. The Requestor was the Deputy Health Officer in 2015 and held significant responsibility and authority. Moreover, working to re-subdivide the same property, now on behalf of the property owners, would involve the same basic facts, related issues, same or related parties, and the continuing existence of an important governmental interest, and would entail reviewing the current subdivision in place in which the Requestor previously significantly participated as a State employee. Such a matter would have grown directly from the initial submission and review by the agency in which the Request participated.

Based on the information provided and the principles developed in prior opinions applying the post-employment provisions of the Public Ethics Law, we therefore advise the Requestor that for each of the questions presented in this request, the matter in which he seeks to participate as a private consultant involves a matter in which he previously significantly participated as a state employee. Similar to the situation before the Commission in Opinion No. 91-02, each matter

² The Code of Maryland Regulations 21.04.02.04 provides that "Sewage disposal areas shall meet all physical and distance requirements outlined in regulations .03 and 04 of this chapter, exclusive of easements, rights-of-way, buildings, and any other permanent or physical objects, and may not be disturbed by earth moving, compaction, tree removal or grading after approval by the Approving Authority without prior authorization of the Approving Authority."

“grew directly from the initial submission and review by the agency in which the Requestor participated, and the original question continues to be part of the current investigation.” The Requestor’s proposed involvement on behalf of the private owners as described herein is therefore prohibited by §5-504(d) of the Public Ethics Law.

As the Commission has noted previously, the Public Ethics Law does not prohibit all affiliations with entities involved with one’s former State agency. Other representation by the Requestor before the WCHD that does not deal with specific matters which the Requestor significantly participated as a State employee would not be barred. The Requestor is encouraged to continue to keep in mind the matters in which he participated as a State employee, and to seek Commission advice regarding future participation in such matters.

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