

SUBJECT: POST-EMPLOYMENT PROVISIONS OF ETHICS REFORM ACT

SUMMARY: For the purposes of the Ethics Reform Act, legal representation in private practice would be considered employment with regard to the provisions of Section 8-13-755. "Direct and substantial" participation involves specific work on a matter which is of material value to the outcome of any resolution to the matter. An attorney would not be prohibited from representing a NPDES permit holder on environmental matters on which he did not work or on matters involving that permit on which he did not work.

QUESTION:

A Staff Attorney for DHEC has asked the following questions:

1. For purposes of Code Section 8-13-755(B), is legal representation in private practice considered "employment"?
2. Does advising a bureau director about interpretations of the regulations regarding permit issuance enforcement constitute "direct and substantial participation" in a particular permit or order?
3. DHEC administers Regulation 61-9, NPDES Permits (24 S.C. Code Ann. R. 61-9) and other environmental regulations. Is an attorney formerly employed in the Office of General Counsel, Department of Health and

Environmental Control, who rendered legal advice on enforcement of NPDES permits generally and interpretations of Regulation 61-9 barred by Code Section 8-13-755(b) from subsequently representing a client who has an NPDES permit (a) on other environmental matters on which the attorney did not work? (b) on matters involving that particular NPDES permit, on which the attorney has not worked?

DISCUSSION:

This opinion is rendered in response to a letter dated January 3, 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 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:

(1) serve as a lobbyist or represent 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(2) was intended to prohibit the "revolving door" whereby a regulator leaves public service and begins work with a regulated person on matters in which he had participated as a regulator. Employment, for the purposes of this section, would include the provision of legal representation. Therefore, employment or representation could not be entered into with a regulatee with responsibilities including those specific matters with which the person was engaged while with the regulatory agency. Absent responsibilities on those specific matters, there would not be a prohibition against such "employment".

"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(1953).

Therefore, in this case, if the employee personally advised the Bureau Director concerning a regulation's impact upon the issuance of a particular permit, and that advice was valuable to the Bureau Director, then the employee directly and substantially participated in that matter.

As to the third question, the Commission advises that the restriction of Section 8-13-755 would not preclude employment by a NPDES permit holder for work on other environmental issues on which the attorney did not work. Such employment or representation would not be prohibited on matters involving a particular NPDES permit on which the attorney has not worked.