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Formal Advisory Opinion 2015-2
Post City Private and Public Employment

Opinion Summary

The City's Standards of Conduct (Atlanta Ethics Code) in Section 2-810 addresses the issue of the activities for which a former city employee can be compensated for a period of one year after leaving the City. Although the Board of Ethics has previously interpreted the language of the provision as imposing a very broad prohibition on activities which involve interaction with the City, the Board has determined that the current language of the Code does not support a broad prohibition, but instead indicates very specific instances when such activities are prohibited. Additionally, the Board is recommending that the Code provision be amended to specifically address subsequent employment with public entities with a presumption that public employment will not be prohibited, but should be examined on a case-by-case basis.

Questions Presented

(1) Does the language of Sec. 2-810 support the Board's prior interpretation of restrictions on post city employment activities?
(2) Does the language of Sec. 2-810 which restricts post city employment activities include restrictions on employment by public agencies?

Facts

Section 2-810 of the Atlanta Ethics Code was adopted by the City Council in April of 2002. The Ethics Board has issued two Formal Advisory Opinions in which it provided guidance about the interpretation of this provision of the Ethics Code. In Formal Advisory Opinion 2004-3, *Restrictions on Representation after Leaving City Employment*, the Board determined that a former city employee, who had been a policy analyst who was directly concerned and personally participated in the issue of new and annual taxi driver training by third-party companies while employed with the city, was precluded from appearing before any city agency or receiving compensation for any services rendered on behalf of his business in relation to that

issue. In that same opinion, the Board concluded that a former hearing officer who personally participated in and actively considered cases involving complaints that individual taxi drivers and companies had violated the city's regulations on vehicles for hire must wait a year from the date of her resignation before she could conduct taxi driver training courses.

In Formal Advisory Opinion 2005-5, the Board, in response to a request from a former deputy city attorney who retired from the City of Atlanta and then went to work for a law firm that had several pending matters involving the city, concluded that a former deputy city attorney, generally, may not, for a period of one year after leaving the city, appear before any city agency or represent a client that has a claim against the City of Atlanta, unless that claim involved a new matter about which the deputy had gained no knowledge or information while employed with the city.

The following language, contained in FAO 2005-5, is the primary focus of the dispute regarding the Board's authority to interpret the Code:

> *A former deputy city attorney may not appear or practice for one year before any city agency, which includes city boards, departments, and offices, on behalf of a client having a case, claim, or controversy against the City of Atlanta. To "appear before any city agency" includes formal presentations, letters, telephone calls, conversations, and other forms of communication in which the former employee seeks to influence city decisions on behalf of another business or person.*

Former city employee, Nina Gentry, through her attorney Kevin Ross and former Chief Counsel Lemuel Ward have argued that the Board and Ethics Office have construed the restrictions of Section 2-810 of the Ethics Code more broadly than the language of the Code allows. In sum, these parties assert that the restrictions regarding compensation for employment during the one year period after city employment should be limited as follows:

> *"to any case, proceeding, or application with respect to which such former...employee was directly concerned or in which such...employee personally participated during the period of such...employee's service or employment or which was under such ...employee's active consideration or with respect to which knowledge or information was made available to such...employee during the period of such...employee's service or employment."*

Former city employee Tom Weyandt's position is that neither the Ethics Code nor the Formal Advisory Opinions address the issue regarding the employment of a former city employee by another public agency immediately after leaving the city.

Discussion

A. *Does the language of Sec. 2-810 support the Board's prior interpretation of restrictions on post city employment activities?*

Section 2-810 of the Atlanta Code of Ethics states the following:

> *No person who has served as an official or employee shall, for a period of one year after separation from such service or employment, appear before any agency or receive compensation for any services rendered on behalf of any person, business or*

association in relation to any case, proceeding, or application with respect to which such former official or employee was directly concerned or in which such official or employee personally participated during the period of such official's or employee's service or employment or which was under such official's or employee's active consideration or with respect to which knowledge or information was made available to such official or employee during the period of such official's or employee's service or employment. Nothing in this section shall be construed to preclude a former official or employee from being engaged directly by the city to provide services to or on behalf of the city during this one-year period.

In interpreting this Code provision in Formal Advisory Opinion 2005-5, the Board stated the following:

> "The purpose of this provision is to prevent former city employees from attempting to further their own or others' financial interests by using inside information obtained during city service, deriving personal benefits from actions made while employed with the city, or asserting undue influence on former colleagues who continue to work for the city.
>
> "The Board of Ethics has previously interpreted the revolving door provision as placing two separate restrictions on the work that former employees may perform for one year after leaving city service. The Board chose to broadly construe the one-year ban against appearances before city agencies to prevent not only an actual conflict of interest but also the appearance of impropriety. The Board was concerned that former employees would use their contacts and personal relationships developed while with the city to receive favorable treatment for their clients and companies immediately after moving to the private sector.
>
> "Second, the Board has determined that section 2-810 bans former employees from being paid for services related to any matter in which they were directly concerned, personally participated, or actively considered, or in which information was made available to them while employed with the city." (Pages 2-3, FAO 2005-5)

The question for the Board is whether this interpretation is supported by the plain language of the Code. While the Board's statements in the previously-mentioned Formal Advisory Opinions regarding the purpose of the post-employment activities of former city employees are consistent with the rationale for such provisions in local government ethics codes, it appears that the current language of the Code supports a more restrictive reading of the Code than the Board has set forth in its subsequent opinions. See, for example, Wechsler, Robert (2012) Local Government Ethics Programs: A Resource for Ethics Commission Members, Ethics Reformers, Local Officials, Attorneys, Journalists and Students (www.cityethics.org). If the first sentence of the Code had ended after the word "application" and ended with the words "before the city or its agencies" instead of proceeding with language which sets forth specific conditions, then the broad interpretation of the Board could be supported. However, this is not the case, and the provision at issue states conditions on when the employee is precluded from engaging in certain post-employment activities.

This conclusion is not to suggest that the Board's rationale is not a good one. In fact, there is support for a broader prohibition than that which the Code states; however, the language of the Code as it currently exists does not support such a reading. As stated by Robert Wechsler:

"Post-employment, or "revolving door," provisions are intended to prevent officials and employees from giving special treatment to individuals and entities while in office, in order to get jobs or contracts with them after they leave public service. They are also intended to make it harder for individuals and entities to use a job offer to get this special treatment or unfair advantage. In addition, these provisions are intended to prevent individuals and entities from having undue influence or unfair advantage by hiring former officials and employees to make use of their personal relationships with members of governmental agencies and boards to give special treatment to their employer."

The interpretation that the Board has given previously supports this rationale. However, the language of the Code does not.

Interestingly, in the case of the former Chief Counsel as well as the former deputy City Attorney, there are other rules which would apply and would probably support a broader prohibition on post city employment activities. For example, Rule 1.11 of the State Bar of Georgia Rules of Professional Conduct entitled "Successive Government and Private Employment" imposes certain notice requirements that a former government attorney has to his former employer regarding matters in which his current firm provides representation in order for the government entity to ascertain compliance with the professional rules.

Thus, the prohibition on compensated activities for city employees in the year after they leave the City applies to any case, proceeding, or application with respect to which *(1) such former official or employee was directly concerned or (2) such official or employee personally participated during the period of such official's or employee's service or employment or which was under such official's or employee's active consideration or (3) knowledge or information was made available to such official or employee during the period of such official's or employee's service or employment.*

At this time, the Board is not taking a position regarding whether the language of the Code needs to be modified to conform with the Board's previous interpretation of the "one year cooling off period."

B. *Does the language of Sec. 2-810 which restricts post city employment activities include restrictions on employment by public agencies?*

The language of Section 2-810 does not specifically speak to the issue of whether its restrictions apply to post city employment for other public entities. Additionally, the previously mentioned Formal Advisory Opinions do not address the issue of employment for public entities. Although the Ethics Office has previously opined that the language, "person, business or association" is inclusive of public entities, the Board has decided to address this issue specifically and to recommend that the Atlanta City Council amend Section 2-810 of the Ethics Code to address subsequent public employment.

The Board takes the position that post city employment with public entities be reviewed on a case-by-case basis with a presumption that such employment is allowed. The basis for the Board's support of a case-by-case analysis lies in there being situations where public entities can take positions that conflict with one another. In such instances, a failure to place any limitations on a former city employee's ability to work on behalf of a public entity on a matter in which they were involved or had special knowledge which was acquired while employed with the city can be detrimental to the city's interest. For example, if jurisdictions are engaged in negotiations involving intergovernmental agreements or are even engaged in litigation against

one another, it is conceivable that if there were no restrictions, a former city employee could provide information to the opposing jurisdiction that would give that jurisdiction an advantage that it would not have had but for hiring someone who has gained information while employed by the city. On the other hand, there are situations where it may be to the city's advantage to have a former employee working for another public entity when the interests of the city and that entity are aligned.

Adopted November 19, 2015

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