



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 470

May 12, 2006

*Whether a former assistant general counsel for a state agency may represent a person in a case that was opened while the former assistant general counsel was an employee of the agency. (AOR – 533)*

The Texas Ethics Commission has been asked to consider whether a former assistant general counsel for the Board of Nurse Examiners for the State of Texas (the agency) may represent a person in a contested case before the agency if the case was opened while the former assistant general counsel was an employee for the agency.

As background information the former employee provides the following:

I worked in the Department of Administration, sharing responsibility for supervising one to two paralegals with the General Counsel and a peer Assistant General Counsel. All Investigators were in the Department of Enforcement and were directly supervised by Supervising Investigators and by the Director of Enforcement. As an attorney working for the agency, I had full computer and hard copy access to the Investigator's files, and did regularly access files when I was working on contested cases that were the subject of Formal Charges and/or contested cases hearings.

The former employee states that the case at issue was not assigned to her, that her name did not appear on any document related to the case, that she did not participate in any way with the investigation of the case, and that she had no knowledge of the existence of the case.

A case filed with the agency is initially assigned to an investigator who may work with agency lawyers throughout investigation, settlement, and adjudication of the case. The executive director of the agency states that although the former employee's work with investigators was primarily associated with the advanced stage of an investigation, she and the other two lawyers in the agency maintained an open door policy for any investigator for questions or advice at any stage of the investigation of any case. The executive director takes the position that the former employee is prohibited from the representation at issue because the representation would involve a case that was within the former employee's "official responsibility" and that "personal involvement" is not the controlling issue due to the impracticality of its confirmation.

The executive director submitted an organization chart of the agency showing that the agency consists of four divisions. Assistant general counsels are in the administration division overseen by the general counsel. Investigators are in the enforcement division overseen by the director of enforcement. The executive director also included a definition of the former employee's responsibilities that consists of the following:

Performs highly responsible professional legal and administrative work for the Board of Nurse Examiners. Handles prolonged, complex and/or unusual legal cases. Interprets laws and regulations; gives legal advice; prepares and reviews opinions, briefs and other legal documents; consults with agency General Counsel, trial attorneys and maintains liaison with the AG's office. Works under administrative direction of the agency General Counsel with wide latitude for individual professional action and decision.

The revolving door statute contains two separate prohibitions. The one at issue here provides as follows:

A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility.

Gov't Code § 572.054(b). In short, this prohibits a former state employee from working on a "matter" the former state employee "participated" in as an employee of the state agency.

In a 1995 opinion this commission said:

That [Section 572.054(b) of the Government Code] describes two types of "participation," participation in the form of personal involvement and participation based on the fact that a matter was within the officer's or employee's official responsibility. The import of those descriptions is that the word "participation" does not necessarily imply personal involvement. Rather, it suggests that "participation" in a matter can be nothing more than having authority over the individuals who do have personal involvement with a matter, even if that authority is not actively exercised.

It has been suggested, however, that the applicable statutory definition of "participated" undercuts that reading of the statute. The statute defines "participated" to mean "to have taken action . . . through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." Gov't Code § 572.054(h)(1). Although that definition equates "participation" with "action," we do not think that definition overcomes the language in section 572.054(b) that describes "participation" in a matter to include being in a position of authority over those who have personal involvement in the matter. Read in its entirety, we think the revolving door law makes clear that the legislature intended section 572.054(b) to restrict a former officer or employee from receiving compensation in connection with any matter over which the former officer or employee had authority, even if the former officer or employee was not aware that his subordinates were working on the matter.

#### [Ethics Advisory Opinion No. 285 \(1995\).](#)

Therefore, the former employee would be prohibited from the representation at issue if she participated in the particular case through personal involvement or because the case was a matter within her official responsibility as an employee of the agency.

The former state employee did not have personal involvement in a case if the case was not assigned to her and if she did not take action in connection with the case as an employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action. In our opinion, having access to a case file does not by itself constitute personal involvement.

The remaining question is whether the former state employee was in a position of authority over individuals who had personal involvement in the case. The executive director contends that the case was within the former state employee's "official responsibility" because her job duties include being available for investigators to ask questions or advice regarding the case. In our opinion, by being available to answer questions from or give advice to investigators who had personal involvement in a case, the former employee was not placed in a position of authority over those investigators. However, the former employee may have been in a position of authority over one of two paralegals in the agency based upon the former employee's role as a supervisor. If a paralegal was personally involved in the case before us, section 572.054(b) of the Government Code would prohibit the representation at issue if the former employee supervised the paralegal's personal involvement in the case.

**SUMMARY**

The revolving door provision in section 572.054(b) of the Government Code does not prohibit a former assistant general counsel for a state agency from representing a person in a case that was opened while the former assistant general counsel was an employee for the agency if as a state employee she did not personally participate in the case and if the case was not within her official responsibility.