



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the North Carolina Department of Environmental Quality

FROM: Justina Fugh
Alternate Designated Agency Ethics Official and Director, Ethics Office

TO: John A. Nicholson
Chief of Staff
Region 4

As Chief of Staff for Region 4 of the United States Environmental Protection Agency, you sought permission in January 2022 to participate in specific party matters involving the North Carolina Department of Environmental Quality (NC DEQ). Within the year prior to joining EPA as an Administratively Determined appointee, you served as the Chief Deputy Secretary of the NC DEQ. This memorandum formally confirms my impartiality determination granted orally on January 16, 2022. We realized only belatedly that we had not provided you with written confirmation, for which we apologize.

To analyze this situation, we turned to the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." You have a "covered relationship" with the NC DEQ under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the NC DEQ terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the NC DEQ is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that we take into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;

- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

In reviewing these factors, I concluded that the interests of the United States Government in your participation outweigh any concerns about your impartiality, and I authorized you to participate as Chief of Staff in particular matters that involve the NC DEQ with the following limitation: you must recuse yourself from participating in specific party matters in which you participated personally and substantially while employed with NC DEQ. In making this determination, I took the following factors into consideration:

Nature of the relationship involved – Since February 2017, you served as Chief Deputy Secretary of the North Carolina Department of Environmental Quality. In this role, you helped oversee and manage the state agency whose mission is to protect North Carolina's environment and natural resources. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – I understand that you have a defined benefit plan with the State of North Carolina. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the State's ability or willingness to honor its contractual obligations with respect to your state retirement interests. But pursuant to the regulatory exemptions, this personal financial interest is not a disqualifying one that raises concerns about participation in particular matters affecting the holdings of the plan or in particular matters of general applicability affecting the sponsor of the plan under the federal conflicts of interest statute. *See* 5 C.F.R. §§ 2640.201(c)(1)(ii) and 2640.201(c)(2). In EPA's experience, it is unlikely that you, in your Chief of Staff for Region 4, will be in any position to affect the State's ability or willingness to pay these benefits to its retirees.

Nature and importance of the employee's role – You were selected by the Administrator to fulfill a crucial role in Region 4's management and leadership structure. You provide guidance and advice directly to the Regional Administrator in Region 4, utilizing expertise learned during your time in state government to help the Agency fulfill its objectives with its state partners. In your role, you are required to communicate freely with all states in Region 4, including North Carolina.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the NC DEQ that will rise to your level of attention, merit your participation, and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as the Chief of Staff for Region 4 in such matters will be in the Agency’s interests given the leadership role that you serve. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, effective as of January 16, 2002, you were authorized to participate in specific party matters that involve the NC DEQ, but not on the very same specific party matters on which you worked on personally and substantially while employed by the NC DEQ. With respect to any particular matters involving the NC DEQ as a specific party that you previously participated in personally and substantially, you voluntarily agreed, pursuant to our advice, not to participate at all for the duration of your EPA tenure. If the Agency determines that it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency’s interest in your participation outweighs any impartiality concern.

While I have issued you this determination to interact with the NC DEQ with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves the NC DEQ as a specific party. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

This authorization will remain in effect for the remainder of your cooling off period. After January 14th, 2023, you will no longer have a covered relationship with NC DEQ under the impartiality standards and will no longer require this determination.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at fugh.justina@epa.gov or (202) 564-1786.

cc: Daniel Blackman, Regional Administrator
Fred Thompson, Acting Deputy Regional Administrator
Leif Palmer, Regional Counsel