



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
JAMES
Digitally signed by JAMES
PAYNE
Date: 2021.03.11
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FROM: James Payne **PAYNE**
Designated Agency Ethics Official and Deputy General Counsel for
Environmental Media and Regional Law Offices

TO: Michael S. Regan
Administrator

As the Administrator of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the North Carolina Department of Environmental Quality (NC DEQ). Within the last year, prior to being confirmed, you served as Secretary of the NC DEQ.

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state and local government is excluded under the definition of "former employer."¹ Therefore the Ethics Pledge does not apply to your NC DEQ employment. Federal ethics rules, however, do not contain a similar exclusion for state or local government, so those rules do apply to your prior employment with the NC DEQ.

What remains is an impartiality concern under 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).

¹ *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include... State or local government."

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 have concluded that the interest of the United States Government in your participation outweighs any concerns about your impartiality, and I am authorizing you to participate as Administrator in particular matters that involve the NC DEQ with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with NC DEQ. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2017, you have served as Secretary of the North Carolina Department of Environmental Quality. In this role, you oversaw the state agency whose mission is to protect North Carolina's environment and natural resources. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the NC DEQ. 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 you, as the Administrator, 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 have been appointed by the President and confirmed by the Senate to serve as the EPA Administrator, which is a crucial role in guiding and planning the Agency's work. As the leader of EPA, you are expected to communicate freely with states, 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 Administrator 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, you are authorized to participate in new or future 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 and in which you previously participated personally and substantially, you have 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.

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

cc: Dan Utech, Chief of Staff
Alison Cassidy, Deputy Chief of Staff for Policy
Dorien Paul Blythers, Deputy Chief of Staff for Operations
Kathleen Lance, Director of Scheduling and Advance
Justina Fugh, Alternate Designated Agency Ethics Official