

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: MATTHEW STROUGH

)
)
)
)
)

No. 22-EEC-003

Appeal of OEIG
Revolving Door
Determination

DECISION

This cause is before the Executive Ethics Commission (“Commission”) on appeal by Matthew Strough (“Appellant”) from a determination by the Office of the Executive Inspector General for Agencies of the Illinois Governor (“OEIG”). Appellant appears by and through his attorney Dale Strough. The OEIG is represented by Assistant Attorney Generals Neil MacDonald and Gretchen Helfrich on behalf of the Office of the Attorney General.

FINDINGS OF FACT

The record of proceedings has been reviewed by the members of the Executive Ethics Commission. The record consists of (i) Appellant’s appeal, dated June 1, 2022, of an OEIG Revolving Door “Restricted” determination that Appellant could not take employment with the Kankakee Valley Construction Company (“Kankakee Construction”) due to Appellant’s having participated personally and substantially in the issuance of ten change orders to Kankakee Construction; (ii) the OEIG’s revolving door determination and file; (iii) the Attorney General’s Response in Opposition To An Appeal From A Revolving Door “Restricted” Determination (Objection); and (iv) Appellant’s Reply in Support of Appeal. The Commission received no public comment regarding this matter.

Based upon this record, the Commission makes the following findings of fact:

1. Effective October 4, 2010, Appellant began his employment with the Illinois Department of Transportation (“Department”). At all times relevant to this appeal, Appellant served in the capacity of Senior Resident Engineer in the Department’s Project Implementation Bureau.
2. The Department’s position description for the Senior Resident Engineer position requires the employee to hold current registration as a Licensed Professional Engineer in the State of Illinois and five years of experience in civil engineering, three of which are to be in the field of highway engineering. The position description also provides:

“This position is accountable for the supervision of all field activities involved in the construction of one highly complex project or multiple related projects in a highway district.

* * *

“The position must supervise projects that involve new construction techniques, which requires a high degree of engineering knowledge and practical experience in construction procedures. Projects involve multiple contractors and subcontractors who must be monitored for schedules, workmanship and performance. The position’s responsibilities include verifying that the contractor complies with all provisions of the contract plans, special provisions, and specifications. The incumbent oversees that construction work is performed with the least possible change in the aesthetic nature of the environment, and ensures that the contractor performs work in accordance with plans and specifications to maximize the effectiveness of the use of taxpayer dollars in the highway system.

“Typical problems of the position are to obtain contractor compliance in adhering to the provisions of the contract . . . and handling unexpected construction changes. The greatest challenge of the position is to obtain total compliance from the contractor with the plans and specifications of the contract in order to obtain a high quality completed job without unnecessary cost overruns and/or delays.

“ . . . The incumbent is responsible for directing and overseeing plan changes and handling unexpected construction problems.

“The incumbent accomplishes accountabilities through the following staff: Assistant Resident Engineers, Inspector/Assistant Resident Engineers, Resident Technician/Inspectors, and Inspectors who perform layout work, inspection and testing . . .

* * *

“The incumbent has wide latitude in supervising the project; however, design changes, personnel problems, major construction problems and inquiries from attorneys or insurance companies are referred to a supervisor for assistance.”

3. Appellant’s oversight authority with respect to contracts for road and bridge construction projects includes initiating progress pay estimates for work actually completed in accordance with specifications and initiating “authorizations,” which adjust the amount of funds in a contract in order to address unexpected needs for things such as additional materials, replacements, repairs, conditions, etc., in order to complete the contract.
4. The Department’s Construction and Materials Management System (“CMMS”) generates a form used to initiate and approve authorization requests. Near the top of the form is a pair of checkboxes used to indicate whether the proposed authorization is for a contract adjustment or a change order. The form also includes spaces to indicate whether the transaction was the result of changes being requested by a consultant or in-house

employee, the type of materials or actions required, the reason for the transaction, and a determination of germaneness to the original contract.

5. The authorization form also contains a signature block in which the initiator's name and the date of initiation are automatically generated.
6. As a Senior Resident Engineer, Appellant has authority to execute authorizations for amounts up to \$20,000 without supervisory approval, but he asserts never has done so. Instead, whether the amount of the authorization amount is above or below the \$20,000 threshold, he seeks supervisory approval of his decision to recommend authorization before initiating the authorization in CMMS.
7. Appellant's supervisors typically agree with his recommendations that an authorization is necessary. In the rare instance that his recommendation is rejected, the rejection is communicated verbally.
8. Following discussion with his supervisors, Appellant prepares the authorization in CMMS for supervisory approval/signature, including necessary documentation.
9. Appellant was assigned to work on three Kankakee Construction projects in the year immediately preceding his anticipated employment termination date.
10. Kankakee Construction is a highway construction company with operations in Kankakee, Livingston, Ford, LaSalle, Will, and Iroquois counties in Illinois. Kankakee Construction has over 300 pieces of equipment, operates five asphalt plants and, per its website, is one of the largest highway contractors in north central Illinois.
11. Beginning in November 2021, Appellant initiated the ten authorizations with respect to Kankakee Construction contracts that served as the basis for the OEIG's determination. The authorizations are as follows:

Initiation Date	Amount	Purpose
11/21/21	\$32,521.40	HMA Surf CSE and Structural Steel Fill Plates
12/17/21	\$21,298.40	Multiple items
1/12/22	\$5,715.48	Guardrail Repair
3/10/22	\$1,600.84	Electric Pole Rem
3/14/22	\$3,150.00	Replace TY
4/11/22	\$25,698.10	Multiple items

4/15/22	\$41,760.00	Deck Slab Repair
4/28/22	\$15,370.00	Deck Slab Repair
4/28/22	\$13,000.00	Rock Excavation
4/28/22	\$78,050.00	Drilling and Setting Soldier Piles
TOTAL	\$238, 164.22	

12. The authorizations were justified for a variety of reasons, including such things as needs to remove rock or a utility pole, to adjust for deteriorating conditions, to provide for safety, to use more appropriate materials at the direction of other Department personnel, or to correct plan error. In each case, the authorization form indicated that the authorization was for a contract adjustment rather than a change order and includes the statement:

“The undersigned determine that the change is germane to the original contract as signed, because provision for this work is included in the original contract.”

13. Appellant, who had been seeking employment with consultants, met with the owner of Kankakee Construction on May 11, 2022, to discuss his experience and qualifications. On May 12, 2022, without having participated in a formal interview, he received an offer of employment from Kankakee Construction.
14. Appellant’s proposed end date of State employment was to have been May 31, 2022, as was his anticipated start date with Kankakee Construction.
15. Appellant would like to accept Kankakee Construction’s offer of employment for the position of Project Manager, a position in which appellant would be involved in cost estimation, project management, creating project bids, ordering construction supplies, and creating project progress schedules. The annual compensation for the prospective position is \$120,000.
16. Appellant’s position at the Department has been classified as a c-list position, meaning that it has been identified as a position that may have the authority to participate personally and substantially in the award of State contracts or grants or the issuance of State contract change orders or in licensing and regulatory decisions for purposes of subsection (c) of section 5-45 of the State Officials and Employees Ethics Act (“Ethics Act”)(5 ILCS 430/5-45(c)) and that Appellant would be required to notify the OEIG before accepting an offer of non-State employment pursuant to subsection (f) of that section.

17. On August 5, 2020, Appellant acknowledged receipt and understanding of the c-list revolving door prohibitions in section 5-45 in an email to Department's Ethics Officer, stating:

“I acknowledge receipt of the Revolving Door C list notification and acknowledgment form. I have read, understand and make the acknowledgments set forth within it.”

The accompanying Notice and Acknowledgement form, which comprised more than six pages and included a full quote of the statute as it existed prior to its amendment by Public Act 102-664, effective January 1, 2022. Thus, the notice and acknowledgement contained no mention of the term “fiscal administration.”

18. Appellant submitted his Revolving Door Notification of Offer form (RD-101), notifying the OEIG of Kankakee Construction's offer of employment, on May 13, 2022. In that submission, Appellant expressly declared that he was required to notify the OEIG of Kankakee Construction's employment offer under 5 ILCS 430/5-45(f). He also declared that he had, in the year prior to termination of his employment, the authority to participate in the fiscal administration of contracts but had not the authority to execute or approve the award of contracts or change orders.
19. Appellant also stated on his RD-101 that “[a]s Resident Engineer, I initiate progress pay estimates for work completed in the field. Progress payments can only equal the amount awarded through the Department bidding process, no more or no less. If adjustments need to be made, I would initiate change orders to submit to my supervisors for their approval.”
20. Appellant was interviewed by the OEIG on two occasions: May 19, 2022, and May 20, 2022.
21. On May 23, 2022, the OEIG determined Appellant was restricted from accepting the employment opportunity with Kankakee Construction “on the basis of [his] personal and substantial participation in the issuance of ten change orders (authorization of contract changes) to Kankakee [Construction] in November 2021, December 2021, January 2022, March 2022, April 2022, and May 2022.
22. On Wednesday, June 1, 2022, Appellant submitted an appeal of that determination to the Commission. The Attorney General provided Appellant and the Commission with a copy of the OEIG's complete determination file the following day.
23. The Attorney General filed an Objection to the appeal on June 7, 2022.
24. Appellant filed a reply to the Objection on June 8, 2022.

25. In accordance with 5 ILCS 430/5-45(g), the Commission has sought written public opinion on this matter by posting the appeal on its website and posting a public notice at its offices in the William Stratton Building in Springfield, Illinois.

CONCLUSIONS OF LAW

1. At all times relevant to this matter, Appellant was a “State employee” for purposes of the State Officials and Employees Ethics Act (5 ILCS 430). 5 ILCS 430/1-5.
2. Section 5-45 of the State Officials and Employees Ethics Act (5 ILCS 430/5-45) establishes revolving door prohibitions, notification requirements, and procedures for making and appealing determinations as to the applicability of the prohibitions. The relevant revolving door prohibition is found in subsection (a) of that section, which provides, in part:

“No former officer, member, or State employee, or spouse or immediate family member living with such person, shall, within a period of one year immediately after termination of State employment, knowingly accept employment or receive compensation or fees for services from a person or entity *if the officer, member, or State employee, during the year immediately preceding termination of State employment, participated personally and substantially in the award or fiscal administration of State contracts, or the issuance of State contract change orders, with a cumulative value of \$25,000 or more to the person or entity, or its parent or subsidiary.*”

5 ILCS 430/5-45(a) (Emphasis added.)

3. Appellant’s job title is properly classified as a “c-list” position pursuant to §5-45(c) of the Ethics Act because a person in that position may possess the authority to participate personally and substantially in the award or fiscal administration of contracts. 5 ILCS 430/5-45(c).
4. Subsection 5-45(f) provides:

“Any State employee in a position subject to the policies required by subsection (c) or to a determination under subsection (d), but who does not fall within the prohibition of subsection (h) below, who is offered non-State employment during State employment or within a period of one year immediately after termination of State employment shall, prior to accepting such non-State employment, notify the appropriate Inspector General. Within 10 calendar days after receiving notification from an employee in a position subject to the policies required by subsection (c), such Inspector General shall make a determination as to whether the State employee is restricted from accepting such employment by subsection (a) or (b). In making a determination, in addition to any other relevant information, an Inspector General shall assess the effect of the prospective employment or relationship upon decisions referred to in subsections (a) and (b),

based on the totality of the participation by the former officer, member, or State employee in those decisions. A determination by an Inspector General must be in writing, signed and dated by the Inspector General, and delivered to the subject of the determination within 10 calendar days or the person is deemed eligible for the employment opportunity.”

5 ILCS 430/5-45(f).

5. An Executive Inspector General’s determination regarding revolving door restrictions may be appealed to the Commission by the person subject to the decision or the Attorney General no later than the 10th calendar day after the date of the determination. 5 ILCS 430/5-45(g).
6. Appellant’s appeal of the OEIG’s May 23, 2022, revolving door determination is properly before the Commission, and the Commission has jurisdiction to consider the appeal.
7. Subsection 5-45(g) provides, in part:

“In deciding whether to uphold an Inspector General’s determination, the appropriate Ethics Commission or Auditor General shall assess, in addition to any other relevant information, the effect of the prospective employment or relationship upon the decisions referred to in subsections (a) and (b), based on the totality of the participation by the former officer, member, or State employee in those decisions.”

5 ILCS 430/5-45(g)

8. Because the ten authorizations identified as the basis for the OEIG determination were contract adjustments and not change orders, the evidence is not sufficient to support the determination that Appellant personally and substantially participated in the issuance of contract change orders to Kankakee Construction.
9. Based upon the totality of the circumstances, the Commission grants the appeal from the Office of the Executive Inspector General’s May 23, 2022, determination that Appellant is restricted from the offer of employment from Kankakee Construction.

ANALYSIS

Appellant appeals the OEIG’s determination that he is restricted from accepting employment with Kankakee Construction on two grounds. First, Appellant contends that the OEIG erred in finding that Department’s Senior Resident Engineers are c-list employees under the Act. Second, Appellant contends that, regardless of the c-list designation, that his participation in the issuance of the change orders in question Kankakee Construction was not personal and substantial.

1. Appellant's position was appropriately identified as a c-list position in accordance with section 5-45(c) of the Ethics Act.

The relevant provision of Section 5-45(c) of the Ethics Act states as follows:

“...Each executive branch constitutional officer and legislative leader, the Auditor General, and the Joint Committee on Legislative Support Services shall adopt a policy delineating which State positions under his or her jurisdiction and control, by the nature of their duties, may have the authority to participate personally and substantially in the award or fiscal administration of State contracts or in regulatory or licensing decisions.”

5 ILCS 430/5-45(c).

Appellant argues that “[t]he point of this appeal is to suggest that such low-level employees should not be on the list and that the position of the Attorney General imposing such a burden on such low-level employees is not within the intent and purpose of the statute” and that “[n]o appeal could ever be granted if simply participating in the process, and acknowledging a position might be on the ‘c-list’ were enough to deny the application and ultimately be used against him in the appeal.” Appellant’s Reply at P. 2-3.

The nature and scope of Appellant’s duties, as described in the Department’s official position description and by Appellant and his supervisor in interviews with the OEIG, make clear the appropriateness of the classification of his position as one that “may have the authority to participate personally and substantially in the award or fiscal administration of State contracts or in regulatory or licensing decisions.” 5 ILCS 430/5-45(c). As a Senior Resident Engineer, Appellant is responsible for handling plan changes and unexpected construction problems, with an objective of obtaining the contractor’s compliance with contract plans and specifications without unnecessary cost overruns. OEIG-Strough RD-0017 – 18. Appellant and his supervisor indicated that Appellant has authority to enter into change orders up to \$20,000 without supervisory approval and to initiate requests for authorization for change orders of greater value. *Id.* at 80, 82.

Appellant also argues:

“The position held by the Appellee is a job in which he is employed by a union and it is not a political appointment. Union members switching jobs between the members, accepting various job positions, and switching back and forth between the State and private contractors, wouldn't and shouldn't be considered by any means improper. Nor should an engineer, who is a Teamster, switching from State to private employment, be considered improper.”

Appellant’s Reply at 3.

Appellant’s union membership argument is without a basis in fact or law. Appellant is employed by the State, not a union, which is his collective bargaining representative. The Ethics Act makes no distinction between union and non-union employees; union membership (or lack thereof) plays no role in revolving door applicability.

Appellant's inclusion on the c-list is further supported by his own apparent acceptance of the designation. First, as argued by the Attorney General and evidenced by the record, Appellant acknowledged receipt of the c-list notification and acknowledged the revolving door requirements imposed on c-list employees. OEIG-Strough RD-0020-27. Second, Appellant indicated on his RD-101 submission that he was notifying the OEIG of an offer of employment because he participated in the issuance or fiscal administration of contracts or change orders and was required to notify the OEIG under section 5-45(f). *Id.* at 008.

Appellant's position was properly included on the c-list.

2. Appellant did not personally and substantially participate in the issuance of State contract change orders because the authorizations are not change orders as contemplated by the Illinois Procurement Code.

The OEIG issued a determination that Appellant was restricted from accepting employment with Kankakee Construction on the basis of Appellant's "personal and substantial participation in the issuance of ten change orders (authorizations of contract changes) to Kankakee [Construction]" between November 2021 and April 2022, quoting §5-45(a) of the Ethics Act with emphasis on "participated personally and substantially in the award of State contracts, or the issuance of State contract change orders, with a cumulative value of \$25,000 or more to the person or entity, or its parent or subsidiary." OEIG-Strough RD-001-002.

The parties have devoted a great deal of attention to Appellant's level of participation in the issuance of authorizations but none as to whether the authorizations in question constitute change orders, seeming to ignore any distinction between authorizations for change orders and those for contract adjustments as indicated on the authorization forms. Indeed, the investigative reports of interviews of Appellant and his supervisor suggest that even they use the terms loosely and without careful attention to any distinction.

The Ethics Act does not define the term "change order," so the Commission looks elsewhere for guidance as to how the term should be construed. Construction contracts under the jurisdiction of the Department are subject to the Illinois Procurement Code, which defines a "change order" as follows:

"'Change order' means a change in a contract term, *other than as specifically provided for in the contract*, which authorizes or necessitates any increase or decrease in the cost of the contract or the time for completion for procurements subject to the jurisdiction of the chief procurement officers appointed pursuant to [30 ILCS 500/10-20]." [Emphasis added.]

30 ILCS 500/1-15.12

The same definition is used in the rules of the Chief Procurement Officer for the Department of Transportation, who has jurisdiction over Department procurements (see 30 ILCS 500/10-20). 44 Ill. Adm. Code 6.40. In addition, section 33E-2(c) of the Criminal Code of 2012 provides:

"'Change order' means a change in a contract term *other than as specifically provided for in the contract* which authorizes or

necessitates any increase or decrease in the cost of the contract or the time to completion.” [Emphasis added.]

720 ILCS 5/33E-2(c).

Consistent across these definitions of “change order” is the idea that the term does not encompass changes for which the contract specifically provides. In contrast, a “contract adjustment” is defined by rule, for purposes of Department construction projects, as:

“A written price adjustment that adds to or deducts from a contract *in accordance with provisions included in the original contract*, including but not limited to increases or decreases in quantities, incentives, changed conditions and the addition of missing pay items called for in the specifications.” [Emphasis added.]

44 Ill. Adm. Code 6.40.

The record contains neither of the contracts with respect to which Appellant initiated authorizations for contract adjustments, so the Commission cannot make an independent assessment of whether the changes were provided for in the contracts. Each of the ten authorizations relied upon as the basis for the restricted determination, however, stated that the requested authorization was a “contract adjustment” rather than a “change order” and stated that “provision for this work is included in the original contract.” There is nothing in the nature of the changes described in the forms or the supporting documentation that suggests the designation was improperly applied.

Therefore, the Commission determines that, although Appellant participated in the process of authorizing contract adjustments, he did not participate in the issuance of change orders to Kankakee Construction. Consequently, there is no reason to consider whether his participation in the issuance of change orders was personal and substantial.

3. Appellant may have personally and substantially participated in fiscal administration of contracts with Kankakee Construction, but that basis was not properly presented to Appellant and the Commission.

In his objection to the appeal, the Attorney General raises the argument that Appellant should be restricted from employment with Kankakee Construction due to Appellant’s personal and substantial participation in the fiscal administration of State contracts with Kankakee Construction as provided in section 5-45(a). This argument appears to have merit. Three of the ten authorizations (those issued on April 15 and April 28, 2022) appear to have originated with recommendations of consultants, and Appellant indicated he has the responsibility to supervise consultants working on contracts assigned to him. *See OEIG-Strough RD – 0080*. The other changes originated “in house,” which, the documentation suggests, could have been from decisions made by inspectors he supervised or by other Department employees over whom he may have had no authority. Some of those adjustments could very well have been in the nature of fiscal administration in which Appellant may have had personal and substantial participation. Moreover, his role in overseeing contract completion and generating pay estimates apart from

adjustments would seem to constitute fiscal administration of the contracts in which he may have had personal and substantial participation.

Appellant's participation in fiscal administration of contracts was not, however, the basis for the OEIG's determination that Appellant was restricted from employment with Kankakee Construction. The sole basis of the OEIG's restricted determination was Appellant's personal and substantial participation in the issuance of the ten change orders previously described. Moreover, the OEIG's determination letter, which included a block quote from section 5-45(a), did not even contain a reference to "fiscal administration." The phrase "or fiscal administration" was added to the list of restricted activities by Public Act 102-664, effective January 1, 2022, and was not included in the language conveyed to the Appellant in the determination letter.

Not only did the determination lack notice of fiscal administration as a potential basis for finding his proposed employment to be restricted, the only acknowledgement in the record of his c-list status and of the revolving door provisions themselves was from August of 2020 – well before the "fiscal administration" language was added to the statute.

Finally, there is no indication in the record that the prospect of employment had any influence on any of the relatively minor contract adjustments made.

Considering the totality of the circumstances and all relevant information presented, the Commission finds that Appellant did not participate personally and substantially in the issuance of contract change orders to Kankakee Construction within one year of his proposed termination date from State employment. Further, the Commission confines its decision to the basis presented in the OEIG's determination notice and declines to consider whether Appellant personally and substantially participated in the fiscal administration of contracts with Kankakee Construction.

WHEREFORE, the Commission grants Matthew Strough's appeal and determines that Mr. Strough is not restricted from accepting employment with Kankakee Construction.

SO ORDERED.

DATE: June 13, 2022

The Executive Ethics Commission

By: s/ Stephen J. Rotello
Stephen J. Rotello
Administrative Law Judge