

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: JAYASHREE JAYARAJ,

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No. 21-EEC-005

Appeal of OEIG
Revolving Door
Determination

DECISION

This cause is before the Executive Ethics Commission ("Commission") on appeal by Jarashree Jayaraj ("Appellant") from a determination by the Office of the Executive Inspector General for Agencies of the Illinois Governor ("OEIG"). Appellant is represented by Attorney Carl R. Draper. The OEIG is represented by Assistant Attorney General Neil MacDonald 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 25 and 28, 2021, of an OEIG Revolving Door "Restricted" determination that Appellant could not take employment with the Metropolitan Water Reclamation District of Greater Chicago ("District"); (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. Appellant applied and completed an examination for an Associate Civil Engineer position with the District in September 2018. After passing a qualifying examination, Appellant was notified in January 2019 that she had been placed on the District's employment "eligible list," which had a duration of three years.
2. Beginning on November 18, 2019, Appellant began employment with the Illinois Environmental Protection Agency ("Agency") as an Environmental Protection Engineer I ("Engineer I") assigned to the Agency's Bureau of Water, Field Operations Section.
3. The Illinois Department of Central Management Services' ("CMS") Class Specification for the Engineer I position provides that the position requires a bachelor's degree in an engineering science but no previous experience. It also provides that the Engineer I is to perform a variety of closely supervised functions that are designed to provide a basic introduction to, and training in, the explicit engineering programs of the Agency.

4. Prior to her employment by the Agency, Appellant had been awarded a master's degree and a doctorate and had several years' experience.

5. Appellant was automatically promoted to the position of Environmental Protection Engineer II ("Engineer II") on November 18, 2020.

6. The CMS Class Specification provides that an Engineer II is expected to:

"Conduct field and office engineering investigations and studies of routine problems relating to the design, construction, location, maintenance or the inspection of a subsystem of a large and complex or the complete system of a smaller public or private facilities relating to water pollution, public water supply, land pollution, air pollution and noise abatement.

These positions are typically assigned routine engineering functions that require the application of standard prescribed engineering methods and procedures. Work assignments are generally screened to eliminate difficult or unusual problems, however, the incumbent will be required to be sufficiently familiar with the use of standard engineering principles and practices to assist a higher level engineering position in performing investigations of, and developing solutions to complex engineering projects."

7. The position description for an Engineer II, includes among the duties and responsibilities of the position the following:

"performs inspections and sampling/surveys at industrial storm water facilities, storm water construction sites and municipal separate storm sewer systems (MS4) communities to assess compliance and adequacy of operation and maintenance of municipal, industrial and private wastewater treatment facilities."

8. Beginning in March 2020 – well before her promotion to Engineer II – Appellant was instructed to begin conducting inspections alone.

9. Appellant conducted routine, annual National Pollutant Discharge Elimination System ("NPDES") compliance inspections of four different District facilities in the year prior to her anticipated separation from Agency employment. These inspections took place on October 6, 2020 (Kiri facility), March 18, 2021, April 1, 2021, and May 20, 2021. The purpose of such inspections was to ensure compliance with the Environmental Protection Act, environmental regulations, and NPDES permits.

10. As she is required to do, Appellant conducted such inspections in accordance with an inspection plan prescribed by her supervisor and the Agency's Field Procedures Manual for Appellant's division ("Field Manual"), including the NPDES Compliance Inspection Manual ("NPDES Manual") and other policies, procedures, and standards incorporated by reference into the Field Manual.

11. The Field Manual Introduction discusses the general responsibilities of Field Operations Staff as follows:

“Field activities are conducted for the general purposes of collecting and evaluating information to be utilized in various Agency programs, making technical evaluations of facility or treatment plant performance intended to maintain compliance, and providing information to facilities and the public regarding water pollution. An important reason for collecting information is to gather evidence for compliance or enforcement activities. Any information obtained during the course of a field visit becomes a public record and has the potential to become part of a future enforcement case. Therefore, all inspection work must be accurate and follow legal requirements for admissibility of evidence. Field staff is expected to be familiar with applicable water pollution control laws, regulations, permits, and policies. Proper evidence collection procedures must be learned and followed. *Because an enforcement action depends in large measure on evidence gathered during field work*, observations made during field work must be properly recorded to serve in preparing the inspection report, determining the appropriate enforcement response, and giving testimony in an enforcement case.” [Emphasis added.]

12. In a section on Responsibilities of the NPDES Inspector, the Compliance Manual provides:

The primary role of a NPDES inspector is to gather information that can be used to determine the reliability of the permittee's self-monitoring data and evaluate compliance with permit conditions, applicable regulations, and other requirements. The NPDES inspector also plays an important role in case development and support. To fulfill these roles, inspectors are required to know and use policies and procedures for effective inspection and evidence collection; accepted safety practices; and quality assurance standards.

* * *

“* * * Because the Government's case in a civil, criminal, or administrative enforcement action depends on the evidence gathered, inspectors must keep detailed records of each inspection. These notes and documentation will be used for preparing the inspection report, determining the appropriate enforcement response, and giving testimony in an enforcement case.”

13. In accordance with IEPA processes, Appellant is required to submit reports of her inspections to her supervisor for review and approval. Appellant submitted a report of her October 6, 2020, Compliance Evaluation Inspection of the District's Kiri facility on February 10, 2021, but, as of the date of her appeal, she had not yet submitted a final report with respect to her inspections of the other three District facilities.

14. As part of the Kiri inspection report, Appellant submitted a Field Report containing technical information and photos related to District's operations. The Field Report form concludes with a section labeled "Summary." The Summary section of the Kiri report described a deficiency observed by Appellant, Appellant's recommendation related to the deficiency, and anticipated District action to address the deficiency.
15. The Kiri inspection report also included the standard "Inspection Checklist." The inspection checklist is formatted in checkbox fashion in which the person conducting the inspection may, when evaluating certain criteria, select "yes," "no," "not applicable," or "unable to determine." The inspection checklist also contains a separate area for the inspector to provide related comments.
16. Reports of the inspections of the other three District facilities would follow the same format as the report of the Kiri facility.
17. Appellant had no further involvement with the Kiri inspection report or decisions related to this report following its submission to her supervisor.
18. Generally speaking, if the supervisor believes an identified deficiency rises to the level of sending a violation notice, Appellant would, according to the report of her supervisor's interview, "narrate the issue to [the Agency's] compliance section." If the compliance section agrees, the issue would be sent to the enforcement section, which would determine whether to proceed with an enforcement action. Appellant would not be involved in the making of any such decisions.
19. Appellant was contacted by the District and interviewed for the Associate Civil Engineer position in early 2021 and received an offer of employment from District on June 7, 2021. Appellant's proposed start date with the District was June 24, 2021.
20. Appellant would like to accept the offer of employment from the District for the position of Associate Civil Engineer, an entry-level civil engineering position working in the design, construction, maintenance and operation of water reclamation plants and sewers. Appellant's duties may also include the supervision of sub-professional personnel. The annual salary for the position is \$85,000.
21. Appellant's position at the Agency has been classified as a c-list position, meaning 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 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)). It also means Appellant was required to notify the OEIG before accepting an offer of non-State employment. 5 ILCS 430/5-45(f).
22. Appellant submitted her Revolving Door Notification of Offer (RD-101) notifying the OEIG of the District's offer of employment on June 9, 2021. In so doing, Appellant

acknowledged that she was required to notify the OEIG of the District's employment offer under 5 ILCS 430/5-45(f) and that, in the year prior to termination of her State employment, she inspected, reviewed, surveyed, or otherwise evaluated the premises and/or operations of the District.

23. On June 17, 2021, the OEIG determined that Appellant was restricted from accepting the employment opportunity with District due to her personal and substantial involvement in a regulatory decision that directly applied to the District, specifically the inspections of District facilities conducted on October 2020, March 2021, April 2021, and May 2021.
24. On Monday, June 28, 2021, Appellant submitted a perfected appeal of that determination to the Commission, and the Attorney General provided Appellant with a copy of the OEIG's complete determination file the same day.
25. The Attorney General filed an Objection to the appeal on July 2, 2021.
26. Appellant filed a reply to the Objection on July 6, 2021.
27. 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 (b) of that section, which provides, in part:

No former officer of the executive branch or State employee of the executive branch with regulatory or licensing authority... 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 or State employee, during the year immediately preceding termination of State employment, *participated personally and substantially in making a regulatory or licensing decision that directly applied to the person or entity, or its parent or subsidiary.*

5 ILCS 430/5-45(b) (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 regulatory or licensing decisions.

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 June 17, 2021, 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:

(g)* * *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. Based upon the totality of the circumstances, the conducting and reporting of NPDES compliance inspections of District facilities by Appellant within the one year immediately preceding the June 18, 2021, date on which she anticipated termination of her State employment constituted personal and substantial participation in regulatory decisions that directly applied to the District.

ANALYSIS

Appellant contends that her activities were ministerial in that she merely collected the information from required facility records and took required photographs and samples. Her role, she argues, was simply that of a fact finder, following a tightly controlled set of procedures that limited any discretion she might have had to conduct inspections. Moreover, Appellant argues, she had nothing to do with any regulatory decision; the only regulatory decisions to be made had to do with the making of determinations that violations had occurred or that enforcement action should be taken, and her position did not allow her to recommend, make, or participate in any of those decisions. Appellant also emphasizes the lack of any connection between the employment offer and the inspections, noting she was determined to be eligible for the District position before she began State employment and citing her lack of contact with anyone at the District responsible for hiring until the offer of employment was received.

The Attorney General argues that substantial participation in a regulatory decision does not require either exclusivity or finality as to decision-making authority. The Attorney General also argues that the record shows Appellant's regulatory responsibilities were specialized and consequential rather than ministerial and routine or inconsequential.

The Ethics Act does not define the term "regulatory," so we look to its plain meaning. According to the Cambridge Academic Content Dictionary (© Cambridge University Press) (<https://dictionary.cambridge.org/us/dictionary/english/regulatory>), "regulatory" in this type of context means "relating to the activity of checking whether a business is working according to official rules or laws." Dictionary.com (<https://www.dictionary.com/browse/regulatory>) defines it as meaning "of or relating to the control or direction of an activity by a set of rules, laws, etc." The record makes it clear that the inspections conducted by Appellant are regulatory in nature. They are conducted for the purpose of ensuring compliance with statute, regulation, and permit requirements or conditions.

The inspection and report can be viewed both as regulatory decisions in their own right and as merely the first steps in the Agency's regulatory decision of whether to take enforcement action with respect to the inspected facility. Viewed as separate decisions, they were, or are being, made with respect to the four District facilities solely by Appellant. Viewed as first steps in the higher level decision, Appellant may have had no say in the ultimate decision in situations where enforcement action is considered, but the decision-making process even in those cases would start if, and only if, Appellant's inspection resulted in a report of a deficiency. In matters involving facilities she inspects alone, Appellant is the only person in the decision chain who actually observes conditions in the field firsthand, and the relevant manuals make it clear that inspections are to be conducted and reports prepared with enforcement action in mind. As the

Attorney General points out, citing *In re Murray*, No. 16-EEC-003 (October 19, 2015), a “but for” analysis is not required. In this case, however, but for a negative inspection report in a given situation, there would be no enforcement action taken. If she determines there are no deficiencies, then a decision is made, in effect, that the facility is operating in compliance with the rules. “Substantial” means “consisting of or relating to substance”; “important”; “essential” (<https://www.merriam-webster.com/dictionary/substantial>) or “basic or essential; fundamental” (<https://www.dictionary.com/browse/substantial>) or “large in size, value, or importance” (<https://dictionary.cambridge.org/us/dictionary/english/substantial>). Whether the inspection and report are viewed as regulatory decisions themselves or as first steps – Appellant’s participation in the decisions is direct as well as essential, fundamental, or important to the regulatory decision, and therefore, personal and substantial.

Appellant asserts that there is no connection between her performance and reporting of inspections and the District’s offer of employment, and there is no evidence to suggest that Appellate was improperly influenced in the performance of her work by the prospect of employment with the District. The point of the revolving door prohibition, however, is to avoid situations that could create conflicts of interest or the appearance of impropriety by removing the prospect of employment by an entity with respect to which the State employee is substantially participating in regulatory decisions within the last year of employment. In this situation in particular, Appellant conducted four inspections of District facilities even though she knew she was on the District’s eligibility list, conducted three of them even after she interviewed for a position, and still had reports of three inspections left to complete after the offer of employment was made. This is the sort of situation that seems to fall squarely within the purpose of the prohibition.

Considering all relevant information and the totality of the participation by the employee in those decisions, the Commission finds that Appellant has participated personally and substantially in regulatory decisions related to her prospective employer within one year of her proposed termination date from State employment.

WHEREFORE, the Commission denies Jayashree Jayaraj’s appeal and affirms the Office of the Executive Inspector General’s June 17, 2021, determination.

SO ORDERED.

DATE: July 8, 2021

The Executive Ethics Commission

By: 

Stephen J. Rotello
Administrative Law Judge