

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: SETH SLAUGHTER,

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No. 22-EEC-001

Appeal of OEIG
Revolving Door
Determination

DECISION

This cause is before the Executive Ethics Commission (“Commission”) on appeal by Seth Slaughter (“Appellant”) from a determination by the Office of the Executive Inspector General for Agencies of the Illinois Governor (“OEIG”). Appellant appears *pro se*. 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 July 22, 2021, of an OEIG Revolving Door “Restricted” determination that Appellant could not take employment with Caterpillar Inc.; (ii) the OEIG’s revolving door determination and file; (iii) the Appellant’s emailed responses to the OEIG’s revolving door determination file; (iv) 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 January 4, 2020, Appellant began his employment with the Illinois Environmental Protection Agency (“Agency”) as an Environmental Protection Engineer I (“Engineer I”). Appellant was assigned to the Agency’s Bureau of Air, Permit Section.
2. Appellant was automatically promoted to the position of Environmental Protection Engineer II (“Engineer II”) on or about January 4, 2021.
3. The Illinois Department of Central Management Services’ (“CMS”) Position Description for the Engineer II position provides that the position requires a bachelor’s degree in an engineering science and one-year of professional engineering experience. It also provides that the Engineer II is to perform “detailed engineering analysis which involves the solving of routine problems related to the granting, denying and rejecting of assigned permits for air pollution sources operated by miscellaneous industrial categories.”
4. The CMS Position Description for an Engineer II, includes among the duties and responsibilities of the position the following:

“Performs detailed in-depth engineering analysis of permit applications received by the Permit Section; assures applications meet all applicable requirements established by Federal, State and Agency rules and regulations; contacts applicant to request additional information, discuss applications and permit actions, and arrange meetings, as necessary; prepares appropriate letters of response to permit applications; makes recommendations for agency action on applications (grant, deny or reject) in a timely manner; and identifies and isolates problem areas in this review process and develops feasible solutions; coordinates other activities with other Bureaus/Divisions/Sections/Units on compliance issues and multi-media sources . . . Assists in the preparation of legal cases, giving testimony on Agency actions . . .”

5. As an Engineer II, Appellant has responsibilities with respect to the issuance of permits issued pursuant to Title V of the federal Clean Air Act (“Title V permits”), which are intended to regulate sources of air pollution that have the potential to emit large or harmful amounts of gasses by establishing operating restrictions and conditions. Without such a permit, which is subject to renewal every five years, a regulated plant would not be permitted to continue operations and would be subject to substantial monetary fines.
6. Appellant’s responsibilities include reviewing Title V permit applications and supporting materials, engaging in discussions with permit applicants concerning support materials, and recommending whether these permit applications should be granted, denied, or amended. In the process, Appellant drafts a new permit with updated terms and conditions.
7. On August 31, 2020, the Agency received a Title V permit renewal application that identified the emission source as the Advanced Tri-Gen Power Systems Cogen Plant located at 1823 E. Neal St., Mossville, IL 61552 (“ATG”). The application was submitted under cover of a letter on Caterpillar letterhead that identified the sender as:

Caterpillar Inc.
Advanced TriGen Power Systems

The application identified the Plant as the source owner and Caterpillar Inc. as the operator, both at the same address.

8. Caterpillar’s Securities and Exchange Commission (SEC) annual 10-K filing for the year ending December 31, 2019, identified Advanced Tri-Gen Power Systems, LLC, (“ATG LLC”) as a subsidiary of Caterpillar, a multinational corporation involved in the manufacturing of construction and mining equipment, diesel and natural gas engines, industrial gas turbines, and diesel-electric locomotives.

9. Caterpillar's 10-K for 2020, however, did not list ATG LLC as either a wholly or partially owned subsidiary. Further, the Illinois Secretary of State's corporate records reflect that ATG LLC withdrew from doing business in the State of Illinois on April 8, 2021. Caterpillar's Corporate Counsel, Roberto Durango, however, informed the OEIG on July 14, 2021, that ATG LLC is a Caterpillar subsidiary despite the omission, for which he had no explanation.
10. ATG's Title V permit renewal application was the first permit review assigned to Appellant following his successful completion of a six-month probationary period of employment by the Agency. Appellant began working on the draft application in March 2020. Appellant's drafting of the renewed permit was overseen by his lead worker, a person with over 20 years' experience.
11. Apart from the application itself, there is no standardized checklist for engineers to use in reviewing permit renewals due to the unique nature of each individual permit. A Title V permit renewal application is traditionally reviewed by comparing it to prior permits to identify any changes in information or operations. The engineer also reviews the permit application for compliance with applicable laws and regulations, as well as the conditions set forth in other Agency permits that may have been issued to the applicant (e.g., construction permits) or included in court orders or settlement agreements since the issuance of the expiring permit.
12. According to his manager, Appellant was responsible for overseeing the entire permit process from the point of its assignment to him through issuance of the permit. Due to his lack of experience, Appellant would have worked closely with his lead worker who would have checked his work as he reviewed every line of the application, drafting the new permit as he progressed. Then Appellant would revise the draft permit for submission and further review by the applicant and by the public and the United States Environmental Protection Agency ("USEPA").
13. Most of the conditions and requirements to be included in a Title V permit are dictated by regulation or statute, but engineers may propose additional monitoring requirements as necessary to ascertain compliance with prescribed terms and conditions.
14. Appellant drafted a new Title V permit for ATG and recommended Agency approval. He spent numerous hours reviewing and drafting the new permit. He met with his lead worker multiple times for two to three hours per session to review his work and identify areas where additional refinement was needed. Once managerial approval was given, he was also responsible for sharing the draft permit with the Plant, including direct contact with Caterpillar employees, and, subject to supervision, conveying explanations and working out any final adjustments before public notice of the renewal was published. Due to the basic nature of ATG's Title V permit ("ATG Permit"), Appellant did not create any new monitoring requirements.
15. Once managerial approval was given, Appellant sent the permit information to the Agency's Office of Community Relations on April 27, 2021, for preparation and posting

of the public notice of the proposed renewal of the ATG Permit. Appellant participated in clarifying correspondence with the Office, and the agency published the notice on May 5, 2021.

16. The Agency received no public comment on the proposed renewal by the expiration of the comment on June 4, 2021, and no comment from the USEPA by its deadline of June 19, 2021.
17. The Agency issued the ATG Permit on June 25, 2021. The permit identifies the Plant as the emission source, ATG LLC as the source owner, and Caterpillar as the source operator. The permit also identifies the Permittee as the source owner and the source operator.
18. Appellant told the OEIG that he had wished to work for Caterpillar for some time, so when he heard that the economy and hiring were picking up, he inquired at Caterpillar and applied for employment there. He “formally interviewed a few times” and received an offer of employment on July 1, 2021. Appellant’s proposed end date of State employment was July 23, 2021, and his start date with Caterpillar was to have been August 1, 2021.
19. Appellant would like to accept Caterpillar’s offer of employment for the position of Engineering Team Lead, a position in which Appellant would be involved in the development of cooling systems for new engine electrification systems. The annual salary for the position is \$108,000.
20. 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).
21. Appellant submitted his Revolving Door Notification of Offer (RD-101), notifying the OEIG of the Caterpillar’s offer of employment, on July 1, 2021. In so doing, Appellant acknowledged that he was required to notify the OEIG of Caterpillar’s employment offer under 5 ILCS 430/5-45(f) and that, in the year prior to termination of his State employment, he inspected, reviewed, surveyed, or otherwise evaluated the premises and/or operations of Caterpillar or a subsidiary.
22. In the course of the Appellant’s interviews with the OEIG, which occurred on July 12 and July 13, 2021, Appellant expressed knowledge that ATG had previously had “a known relationship” with Caterpillar.
23. On July 15, 2021, the OEIG determined that Appellant was restricted from accepting the employment opportunity with Caterpillar due to his personal and substantial involvement

in a regulatory decision that directly applied to a subsidiary of Caterpillar, specifically the issuance of ATG's Title V permit issued on June 25, 2021.

24. On Thursday, July 22, 2021, Appellant submitted an 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. Appellant supplemented his appeal by responding to the OEIG's determination file on July 23, 2021.
26. The Attorney General filed an Objection to the appeal on July 27, 2021.
27. Appellant filed a reply to the Objection on July 28, 2021.
28. 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 July 15, 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, Appellant's involvement in the drafting and processing of ATG Permit within the one year immediately preceding July 23, 2021, the date on which he anticipated termination of his State employment, constituted personal and substantial participation in a regulatory decision that directly applied to Caterpillar, his prospective employer.

ANALYSIS

There is no dispute that the decisions made with respect to the renewal of the ATG Permit were regulatory in nature. The purpose of a permit is to ensure compliance with statute, regulation, and permit requirements or conditions. As stated by the Attorney General's Objection, the ATG Permit sets forth "legal, technical, and reporting requirements, as well as potential sanctions for failure to strictly adhere to compliance and procedural standards." Therefore, the content of the ATG Permit, which was drafted by Appellant, is clearly regulatory in nature because the permit's intent is to ensure that its recipient operates in accordance with the established laws, regulations and other dictates. See *In re Jayaraj*, No. 21-EEC-005 (July 8, 2021).

Appellant contends that the OEIG erred in its determination that he is "restricted" from accepting Caterpillar's offer of employment because he was not the final decision maker and did not make any significant decisions regarding whether the permit or a related regulation would be issued. Instead, he argues, his lead worker and his supervisor made all substantial decisions. Appellant also argues that his activities regarding the ATG Permit were very limited. He characterizes his substantive work as that of merely compiling data from various sources, such as rules and other permits, and putting the pertinent information into the permit. Therefore, he concludes, he did not participate substantially in the issuance of the permit.

The Attorney General argues that substantial participation in a regulatory decision does not require either exclusivity or finality as to decision-making authority and that the record shows Appellant's regulatory responsibilities were specialized and consequential rather than ministerial and routine or inconsequential. Citing *In re Murray*, No. 16-EEC-003 (October 19, 2015), the Attorney General also points out that a "but for" analysis is not required. "The fact that the same decision might have been made without the employee's involvement does not necessarily mean that the employee could not have been personally and substantially involved in a decision." *Id.* at p. 3.

The word "substantial" is not defined in the Ethics Act, so we look to dictionaries for assistance in ascertaining the word's plain and ordinary meaning. Among the definitions are:

- "large in size, value or importance"
(<https://dictionary.cambridge.org/us/dictionary/english/substantial>)
- "b: not imaginary or illusory : Real, True or c: Important, Essential
(<https://www.merriam-webster.com/dictionary/substantial>)
- "of ample or considerable amount, quantity, size, etc."
(<https://www.dictionary.com/browse/substantial>)

As the Attorney General suggests, there is a clear distinction between personal and substantial participation in a matter and official responsibility over a matter. See *City of Chicago v. Purdue Pharma L.P.*, No. 14 C 4361, 2014 WL 7146362 at 6 (N.D. Ill. Dec. 15, 2014) (not reported in Fed. Supp.) (involving application of a rule regulating the professional conduct of attorneys to a former state attorney general who had had official responsibility for a matter but had not substantially participated therein). In the *Purdue Pharma* matter the court contrasted

involvement that is “direct, extensive, and substantive” with involvement that is only “peripheral, clerical, or formal.” *Id.* Guidance can also be found in a rule adopted by the U.S. Office of Government Ethics to implement a statutory prohibition against employees’ participating personally and substantially in matters in which they have financial interests as follows:

“(4) Personal and substantial. To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.”

5 C.F.R. §2635.402(b)(4) (2021) (https://www.ecfr.gov/cgi-bin/text-idx?SID=1de7bdd3ea4f790d66db92640f347bd7&mc=true&node=se5.3.2635_1402&rgn=div8)

The review of Appellant’s work by his supervisors acted as a safeguard in the permitting process in order to ensure that Appellant, a relatively new employee, performed the correct analysis, but their involvement does not negate Appellant’s role in awarding the ATG permit. Appellant’s work was direct, extensive, and substantive, as opposed to peripheral or clerical or a mere formality. Appellant engaged in substantive research and a highly technical analysis of federal rules and regulations and other permits that he used in drafting the permit’s terms and conditions. Appellant’s involvement in the permit drafting process was an integral part of the process of the permit’s ultimate issuance, and he worked directly with Caterpillar employees in working out the final details. He may have received a high level of internal guidance as he worked through the process, but he participated substantially in arriving at the end result of the regulatory decision to issue the new permit.

Moreover, his substantial participation occurred in roughly the same time frame in which he successfully pursued employment with the facility operator, Caterpillar. Although there is no evidence that the possibility of employment influenced any decisions made by the Agency with respect to the permit, the timing adds an appearance of impropriety.

Appellant raised doubts as to whether ATG LLC is still a Caterpillar subsidiary due to its omission from Caterpillar’s most recent SEC 10-K annual filing, indirectly suggesting that the revolving door prohibition does not apply because the regulatory decision to issue the ATG Permit would not be one that would apply to Caterpillar, his prospective employer, or its subsidiary. Ascertaining the exact relationship between ATG LLC and Caterpillar is not necessary, however, in order to determine whether the revolving door prohibition applies in this

case. Caterpillar was identified in the permit as the source operator and as a Permittee. Thus, the regulatory decision to issue the ATG Permit directly applied to his prospective employer, irrespective of whether ATG LLC was a subsidiary.

Considering all relevant information and the totality of the participation by the employee in the regulatory decision to issue the ATG Permit, the Commission finds that Appellant has participated personally and substantially in a regulatory decision that directly affected his prospective employer, Caterpillar Inc.

WHEREFORE, the Commission denies Seth Slaughter's appeal and affirms the Office of the Executive Inspector General's July 15, 2021, determination.

SO ORDERED.

DATE: August 2, 2021

The Executive Ethics Commission

By: 

Stephen J. Rotello
General Counsel and
Administrative Law Judge