

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: EDWARD MATTHEW CHARLES,)	No. 21-EEC-001
)	
)	Appeal of OEIG
)	Revolving Door
)	Determination

DECISION

This cause is before the Executive Ethics Commission (“Commission”) on appeal by Edward Matthew Charles (“Appellant”) from a determination by the Office of the Executive Inspector General for Agencies of the Illinois Governor (“OEIG”). Appellant is represented by Michael T. Layden and Collin Bruck of the firm Richard J. Prendergast, Ltd. The OEIG is represented by Assistant Attorney General Neil MacDonald on behalf of the Office of Attorney General Kwame Raoul.

FINDINGS OF FACT

The record of proceedings has been reviewed by the members of the Executive Ethics Commission. The record consists of (i) the OEIG’s August 14, 2020, Revolving Door “Restricted” determination that Appellant could not take employment with NorthShore University Health System (“NorthShore”) due to his having personally and substantially participated in the award an April 10, 2020, State contract and a June 8, 2020, amendment to that contract in amounts greater than \$25,000; (ii) Appellant’s appeal of that determination, dated August 21 and deemed received August 24, 2020; (iii) OEIG’s revolving door determination and file; (iv) the August 28 2020, Response of Office of the Attorney General in Opposition to the appeal (Objection); and (v) Appellant’s August 31, 2020, brief in support of his appeal. No public comment was received by the Commission. The Commission also takes notice of certain facts as indicated below.

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

1. At all times relevant to this appeal, Appellant has served as Division Chief for the Division of Laboratories in the Illinois Department of Public Health’s Office of Health Protection with the position classification title of Senior Public Service Administrator.
2. According to Appellant’s Ethics Officer’s Revolving Door Statement (RD-102), the Department identified Appellant’s position as one that may, by the nature of its duties, have the authority to participate personally and substantially in the award of contracts, grants, or change orders under 5 ILCS 430/5-45(c).
3. Appellant’s position is identified in the Revolving Door Tracking System for agencies under the Governor (<https://cmssecure.illinois.gov/RevolvingDoor/>), been on the “C”

List” due to its authority to participate personally and substantially in the award of State contracts. EIG Revolving Door Determination File (RDDF, at 61.

4. In his Revolving Door Notification of Offer (RD-101), Appellant acknowledged that, in the year prior to termination of his State employment, (i) he and his subordinates had had the authority to execute, or approve the award of, contracts, grants or change orders and (ii) he had participated in, or was a member of a committee or work group that participated in, the awarding of State contracts, grants, or change orders.
5. The RD-101 also requests a detailed description of the activities that resulted in the aforementioned acknowledgements. Appellant’s description of those activities indicates that, although he has no authority to execute, or approve the award of, contracts, he and his subordinates have the authority to recommend vendors and prepare bid specifications for procurement of supplies (consumables), equipment and services necessary for the operation of IDPH Laboratories. He had also participated on RFP review committees for a new laboratory information management system and laboratory warehouse contracts. RDDF at 6.
6. Per the official CMS position description states that, subject to supervision, Appellant:

“directs the Illinois Department of Public Health Division of Laboratories. Develops and implements policies impacting the statewide laboratory program, which includes microbiological, chemical and clinical testing services, in addition to Newborn Screening and laboratory improvement programs for local health departments, private clinical labs and hospitals.”

The position description does not expressly include any mention of procurement, purchasing or contracts, but it indicates 5% of the time of the position is expected to be the performance of other duties as required or assigned that are reasonably within the scope of the other duties enumerated in the description. RDDF at 13-14.

7. NorthShore describes itself as the principal teaching hospital for the medical school at the University of Chicago, and an integrated healthcare delivery system consistently ranked as a Top 15 teaching hospital and comprising five hospitals and a 900-physician multispecialty group practice, among other things, with revenues of \$2.1 billion.
8. According to an article published by Crain’s Chicago Business, NorthShore began thinking about developing its own coronavirus test in January 2020 and had been using the test it had developed to test about 400 people per day before mid-March. Appellant’s Reply to Objection to Appeal (“Reply”), Ex. A. (Henceforth, all date references are to the year 2020 unless otherwise noted.)
9. On March 4, Appellant received an email from NorthShore, requesting RNA samples to use in fulfilling FDA requirements to validate its test. After an exchange about what type of sample NorthShore needed, Appellant asked one of the IDPH Laboratory scientists to provide the necessary sample, which was shipped on March 5. Reply, Ex. B.

10. On March 12 Appellant, various other State personnel, and lab directors from across the state were invited to a meeting with the Governor on March 13 to discuss what the labs, including State labs, were doing related to COVID-19 testing. According to the invitation, the discussion was to include each lab's current testing capacity, needs to expand capacity, names of suppliers and types of equipment used, and impediments to increasing capacity; there was no mention in the invitation of State contracting. In addition, the group would hear from the person who had developed a test for the University of Washington. Appellant's Verified Statement ("VS"), Ex. H, and RDDF at 85.
11. Appellant states that neither he nor anyone else discussed contracting at the meeting. VS ¶ 19.
12. As described in August to the OEIG interviewer by Mollie Foust, Senior Counsel to the Deputy Governors and the person responsible for facilitating the process for the State's COVID-19 testing contracts, labs began submitting daily surveys of their COVID-19 tests after the March 13 meeting, making the Governor's Office aware of how many tests each lab was conducting. Also after the meeting, the Governor's office began cold calling hospitals and labs to see and track who had what materials and machines. RDDF at 85.
13. Appellant was used as a "conduit" and "resource" by putting the Governor's Office in contact with the labs across the state. RDDF at 85. On March 17, IDPH Chief of Staff DeWitt emailed a request to Appellant that he provide the Chief of Staff for the Governor's Office of Management and Budget with a list of contacts for labs then currently offering COVID-19 testing. VS, Ex. C. Nothing in the record documents exactly how Appellant responded to the request.
14. Two weeks into the tracking of the labs, the Governor's Office began making daily calls to labs regarding materials. As individual testing sites were opening up, the Governor's Office would, depending on the location, begin identifying nearby labs with the capability to test samples from the testing sites and having conversations with those labs about entering into contracts with the State for COVID testing. The Governor's Office was independently reaching out to the labs. RDDF at 85.
15. On March 26, at about the same time the Governor's Office began making the daily calls and identifying labs for contract purposes, Mr. DeWitt sent Appellant and two others the following message with copies to Molly Lamb, Appellant's direct supervisor at the time, and to Darrah Dunlap:

"I have tasked Darrah Dunlap to be the liaison with the GO [Governor's Office] staff working on labs and testing. You all have your hands full ensuring that we implement 2nd shift operations and increase our testing capacity. Darrah will coordinate the inquiries coming in from Mollie [Foust] and others and distribute those for response, as well as,

communicate the responses in a singular fashion back up to GO. Implementing structure will help our Department be responsive and message in concert with the Director and Deputy Governor Flores' directives . . .”

VS, Ex. K. The record, however, contains no documentation of any communication to or from Appellant through the liaison regarding any potential contract with NorthShore.

16. At the end of March, Appellant applied for a job with NorthShore in response to a post on ZipRecruiter.
17. On April 8, Appellant was asked by Associate General Counsel Anna Crane of the Governor's Office via email:

“To move forward with testing of specimens at NorthShore – is there any validation or anything that you would do with them comparable to Reditus [Laboratories]?”

He replied the same day, “We validated their results initially when they first started testing. No worries there and no need for a contractual requirement.” VS, Ex. I.

18. Early in the morning of April 10, a NorthShore representative contacted Ms. Crane of the Governor's Office to request a draft of the lab services agreement that was to be in place before NorthShore would begin testing to be generated from the State's tent testing site beginning the next day. A draft was provided with a couple of issues-to-be-resolved identified. NorthShore provided edits that were forwarded by the Governor's Office to IDPH Assistant Deputy Directory Brandy Lane, who, in turn, forwarded them to Appellant along with a request that he take a quick look at proposed changes to deliverables and make sure there would be no negative impact on the IDPH Labs. He responded, “Seems fine to me. Really, this is outside my purview but from a lab perspective looks find.” VS, Ex. J.
19. Also on April 10, the State executed a contract with NorthShore “for COVID-19 testing services to be provided for specimens collected at the drive-thru testing location at the Former EPA Emissions Testing Site in Chicago.” The contracting agency was the Illinois Emergency Management Agency, and Mr. DeWitt signed for IDPH as the managing agency. Under the terms of the contract, NorthShore could be called upon to provide as many as 500 tests per day through contract expiration on June 8 (60 days) at a cost of \$63.25 per test, not to exceed a total of \$1,897,500.
20. Apart from what is described above, there appears to be no documentation of any involvement by Appellant in the determination of need for the contract, the selection or evaluation of NorthShore as a contract awardee, or the decision to execute a contract with NorthShore. In contrast, the OEIG's determination file includes documentation of his questions and suggestions for editing contracts with other vendors and a draft request for

proposals with respect to another contract. In his Verified Statement and in his Reply, Appellant steadfastly denies any such involvement with respect to NorthShore.

21. According to the summary of statements made by Ms. Foust in the course of her interview with the OEIG, Ms. Foust stated generally that Appellant participated in conversations regarding COVID-19 contracts but that ultimately it was Mr. DeWitt's decision which labs would be awarded a contract except for the NorthShore contract. The summary continued:

“[T]here were no questions about whether this contract was going to be awarded because it was the first one. . . . [NorthShore] generally had a good reputation, was producing more tests than anyone else in the state, had more machines, and had practice doing these tests because they were the first non-state lab to be running these tests.”

Ms. Foust added that NorthShore would have been awarded a testing contract even without IDPH's involvement. She also stated that subsequent contracts were awarded to labs with which IDPH hadn't previously worked, so IDPH needed to test samples from those labs to validate their tests; IDPH was more heavily involved in those contracts and the tests of those labs were sent to Appellant. RDDF at 85-86.

22. Although recollections and scope of knowledge varied as to whether Appellant may have made recommendations of NorthShore for a contract, there appears to be no disagreement that Appellant had no direct role in contract negotiations with NorthShore or in determining contract rates, duration, or scope. Representatives from NorthShore who were contacted indicated that they had worked on the contract with representatives from the Governor's Office and not with Appellant.
23. IDPH Assistant General Counsel Elizabeth Paton advised the OEIG that she had become involved in the award of COVID testing contracts in late March. She said that Appellant had, as a subject matter expert, been involved in conversations with the Governor's Office to craft deliverables for contracts with private labs. Appellant would not have been a decision maker in terms of awarding the contract NorthShore, but his expertise may have been sought in determining contract deliverables, he would have had input on the final contract. RDDF at 279.
24. On June 8, the State and NorthShore executed an amendment to the April 10 testing contract, extending it until August 31, adding testing site locations, and increasing the number of tests per day to 750 and the total amount payable to over \$5 million. RDDF at 54, 56. IDPH Deputy Chief of Staff Joanne Olson stated to the OEIG that Appellant was not necessarily involved in the decision to extend the contract but was consulted as to whether there were any issues with NorthShore during the first contract. RDDF at 82.
25. On June 10, Appellant agreed to participate in meetings with non-State labs to work on data flow issues, presumably with respect to COVID test reporting. RDDF at 271-272.

26. On July 30, Appellant received an offer of employment from NorthShore to work as “AVP Lab and Pathology Medicine” to beginning in September at an annual salary of \$190,000.
27. Appellant notified the OEIG of the NorthShore employment offer on July 30. The OEIG received the Ethics Officer’s Revolving Door Statement (RD-102) on August 4.
28. On August 14, 2020, the OEIG determined that Appellant was restricted from accepting the employment opportunity with NorthShore due to his personal and substantial involvement in the award of the April 10 State contract.
29. Appellant submitted his appeal of that determination to the Executive Ethics Commission via email dated August 21 and deemed received on Monday, August 24.
30. In accordance with 5 ILCS 430/5-45(g), the Executive Ethics 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. No public comment has been received.

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. 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).
3. Appellant’s appeal of the OEIG’s August 14, 2020, revolving door determination is properly before the Commission, and the Commission has jurisdiction to consider the appeal.
4. 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:
 - (a) No former . . . State employee . . . 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 . . . State employee, during the year immediately preceding termination of State employment, 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.

5 ILCS 430/5-45(a)

5. Appellant is subject to subsection 5-45(c), because he had, by the nature of his duties, the authority to participate personally and substantially in the award of State contracts.

6. Subsection 5-45(f) provides:

(f) 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).

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. Questions as to Appellant's authority to award the NorthShore contract or his direct involvement aside, the Attorney General correctly argues that one may participate personally and substantially in a decision without having final or signature authority, even if the same decision would have been made without the employee's involvement.

The Attorney General suggests that Appellant participated in the award in the following ways:

- a. Participating in the March 13 meeting and discussing contracts and procedures,
 - b. Recommending NorthShore for a contract when the Governor's Office consulted him,
 - c. Having input on deliverables for testing contracts, including NorthShore's,
 - d. Working with NorthShore to validate their testing during the development of their test,
 - e. Finding other labs across the state with the capacity to perform COVID-19 testing for the State
 - f. Consulting on provisions for contracts with other labs between June and August, and
 - g. During the same time period, working on the drafting of an RFQ for a new contract and agreeing to meetings with non-State labs to discuss dataflow issues with respect to the reporting of data under existing contracts.
9. The State Officials and Employees Ethics Act does not define what is meant by "award" of a State contract. The term is, however, generally understood to mean the notification to a bidder or offeror of the acceptance of the bid or offer. See, e.g., definitions at www.lawinsider.com/dictionary; www.businessdictionary.com/definition/contract-award.html; www.thelawdictionary.org/award/. The Illinois Procurement Code defines the term "contract award" for the purpose of publishing notice of award as "the determination that a particular bidder or offeror has been selected from among other bidders or offerors to receive a contract, subject to the successful completion of final negotiations." 30 ILCS 500/15-25(b-5). The common thread is that "award" of a contract connotes selection of one's contracting partner.
10. Taking into account the effect of Appellant's prospective employment on the decision to award a COVID-19 testing contract to NorthShore, including the totality of Appellant's participation in the decision, it does not appear that Appellant participated substantially in the award decision. The person leading the selection process clearly indicated that Appellant's opinion had no real bearing on the selection of NorthShore for a contract due to its having been the first non-State lab to test and its testing experience and capacity despite his well-respected expertise. Virtually every lab with testing capacity received a contract. The weight of the evidence indicates that Appellant's "working with" NorthShore to validate NorthShore's test amounted to the provision of material so that NorthShore could validate its own test, and this was done weeks before talk of State contracts with non-State labs for COVID testing began. That Appellant responded to inquiries from the Governor's Office regarding the identity of labs with possible testing capacity and their points of contact for the Governor's Office to use in soliciting potential vendors does not amount to substantial participation in the award of the contract in these unique circumstances. Appellant may have been consulted regarding deliverables, but there is little context and no documentation provided to indicate if that type of advice was provided specifically with regard to NorthShore or the testing contracts generally. As to the NorthShore contract, it appears he was given very little time for a very narrow range of comment on the day of contract execution and the day before performance was to

begin. Moreover, there is a difference between contract award, which involves selection, on one hand, and contract execution, implementation, and administration on the other. The work Appellant may have done with other potential contractors or solicitation documents does not have any bearing on what he did with respect to the NorthShore contract. To the contrary, the existence of evidence of that work and not work done with respect to NorthShore matters suggests that Appellant did not perform the same sort of work with respect to NorthShore. One would expect that, if Appellant truly participated personally and substantially in the award of a contract of the magnitude of the NorthShore contract, there would be some documentation of that participation beyond recollection of conversations months after the fact.

11. Considering all relevant information and the effect of the prospective employment upon the contracting decisions referred to in subsection (a) of 5 ILCS 430/5-45, and based upon the totality of the participation by Appellant in those decisions, the Commission finds that there is insufficient evidence to conclude that Appellant Edward Matthew Charles participated personally and substantially in the award of the April 10 COVID testing contract to NorthShore, his prospective employer, within one year of his termination of State employment.

WHEREFORE, for the foregoing reasons, the Commission grants Mr. Charles' appeal and determines that Mr. Charles is not restricted from accepting employment with NorthShore.

SO ORDERED.

DATE: September 3, 2020

The Executive Ethics Commission

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