

Memo

To: Commissioners

From: Wayne Barnett

Date: April 28, 2010

Re: Application of post-employment restrictions to employees who are involuntarily laid off

At the April meeting, the Commission directed me to provide an analysis of how the Ethics Code might be amended to address the concerns of employees who may be laid off as the City struggles to close its budget gap. Employees at risk of layoff question why the Ethics Code should limit their post-employment prospects when they do not seek out the “revolving door,” but are instead forced into the job market as a result of the recession.

The City’s post-employment restrictions fall into four categories:

- A **one-year ban** on communicating with your former department on behalf of any person.
- A **one-year ban** on competing for a contract that you helped the City develop.
- A **two-year ban** on assisting any person on a matter in which you participated as a City employee.
- A **lifetime ban** on disclosing or using confidential information gained by reason of your City work.

My research revealed just one other jurisdiction that has enacted legislation to modify its post-employment restrictions for laid-off employees, New York State. Wendy Pond from the Federal Office of Governmental Ethics convened a panel on the application of post-employment restrictions to laid-off employees at the 2009 COGEL conference, and she told me she found that very few jurisdictions have laid employees off, with most opting to implement furloughs or other cost-cutting measures to address budget shortfalls. She referred me to an attorney at the New York State Office of Public Integrity, where the state legislature last year elected to reinstate exemptions that were put in place in 1995 and expired in 1999. (The new law will sunset on April 1, 2011.)

New York State has a two-year bar on appearing or practicing before your former agency, and a lifetime bar on appearing, practicing, communicating or otherwise rendering services before and state agency in connection with a matter in which you participated while a state employee. Until April of next year, laid-off employees are exempt from the first restriction, but not the second.

Under New York State law, the state agency that terminates the employee must certify that the employee has been terminated “because of economy, consolidation or abolition of functions, curtailment of activities or other reductions in the State work force.”

Here are two changes that the Commission could recommend that Council make to address employees’ concerns.

- *Follow New York State’s lead, and suspend the one-year bar on communicating with your former department for employees who are involuntarily laid off.*

While I have never read an ethics code that didn’t bar former employees for some period of time from assisting others with matters in which the individual participated while a public employee, there are codes which contain no provisions, like Seattle’s, that bar former employees from contacting their former departments on *any* matter. Washington state law, notably, contains no comparable bar for former state employees, and Massachusetts law contains no comparable bar for former municipal or state officials.

I believe that putting laid off Seattle employees in the same position as former Washington state employees does not do irreparable damage to the City’s Ethics Code. During these tough economic times, I think it is the right thing to do.

- *Modify the two-year bar on assisting others on matters in which the former employee participated. Permit assistance to City contractors and subcontractors.*

The bar on assisting others on matters in which a former employee participated has two primary motivations: first, to bar former employees from using their knowledge to the City’s detriment; and second, to bar former employees from leveraging their knowledge of particular matters to secure gainful employment in the private sector from persons who are interested in those matters.

The danger posed by a former employee using his or her knowledge to the City’s detriment is significantly diminished when the City is the ultimate client. The Commission could even recommend tracking the exemption for former employees who go to work for government agencies, and stipulate that the contractor’s interest in the matter may not be adverse to the City’s interests. That would effectively bar former employees from assisting contractors with their disputes with the City.

The latter motivation is less of a factor when an employee is involuntarily laid off. The employee has been forced out, and is looking for work not out of choice but out of necessity. While the public may look askance at an employee who trades their City job for a high-paying job in the private sector, I suspect that the public would take a more charitable view of an employee who is laid off and subsequently finds work with a private entity working to advance the City’s interests.

Like New York State, I recommend that the City’s exemption be of limited duration. If the economic downturn persists, the Commission could always recommend extending the exemption. Based on current projections, I recommend that the exemption sunset on June 30, 2012.

I further recommend that the exemption be unavailable to employees who volunteer to separate from the City. If Employee A has more seniority than Employee B but volunteers to leave the City, then Employee A should not qualify for the exemption. The exemption should only be

extended to those who are given no choice but to end their employment with the City, and like New York the City should require that fact to be established by a written certification from the departing employee's department. Doing so will greatly diminish the risk of employees gaming the new law.