

## Draft Advisory Opinion 2013-01

### Question

If an employee decides not to return to active City employment after an approved sabbatical, does the time clock begin to run for purposes of Ethics Code post-employment restrictions when the sabbatical begins, or when the employee later notifies the City he or she does not intend to return?

### Short Answer

Applying the Commission's past explanation of the rationale underlying the post-employment restrictions (sometimes called "cooling off periods"), the clock begins to run when the employee ceases to perform services for the City - e.g. typically when the sabbatical began.

### Facts

A City employee applied for and was granted a sabbatical leave of absence under the City's Sabbatical Leave Program. The employee's sabbatical began in February 2012 for one year. During the sabbatical, the employee did not perform any City duties. In February 2013, the employee informed their department that they did not intend to return to City employment.

### Discussion

Since the employee in this case provided no services to the City during the sabbatical, the issue is relatively straightforward – Do the "cooling off periods" begin to run when the employee began the sabbatical in February 2012, or only when the employee informed the City in February 2013 that they did not intend to return?

#### 1. The Ethics Code

The Ethics Code includes several post-employment restrictions that operate for either one or two years "after leaving City office or employment". The restrictions, often called "cooling off periods", include SMC 4.16.075 paragraphs B through D:

B. A former City officer or employee may not during the period of two years after leaving City office or employment assist any person on a matter in which he or she participated;

C. A former City officer or City employee may not, during the period of one year after leaving City office or employment communicate, on behalf of any person on a matter involving the City, with an employee of the agency of the City with which he or she was previously employed;

D. A former Covered Individual may not, during the period of one year after leaving City office or employment, participate as a competitor in any competitive selection process for

a City contract in which he or she assisted the City in determining the project or work to be done or the process to be used in selecting a contractor.

## **2. The City Sabbatical Leave Program**

The City offers a sabbatical leave program (See SMC Chapter 4.33). Under that program, a City employee with at least seven years service may request and be granted a sabbatical leave for up to one year. The employee may elect to return to their prior position or to a similar position (see SMC 4.33.020).

## **3. Prior Commission Advisory Opinions**

An employee's "cooling off" periods run for one or two years "after leaving City employment". The Ethics Code does not define that phrase, so we turn to the Commission's prior advisory opinions for guidance in determining its meaning. In Advisory Opinion 2009-02, the Commission addressed a similar question. Does the post-employment clock begin to run on an employee's last day in the office or on the last day on the City payroll (i.e. after the employee has exhausted accumulated paid vacation time)?

In Opinion 2009-02, the Commission first determined that the term "leaving City office or employment" was ambiguous, and therefore examined the underlying rationale for the post-employment provisions. The Commission quoted a prior advisory opinion "[T]he City's post-employment restrictions are intended to prevent former City employees from exploiting or appearing to exploit their time at the City for personal gain, or from using or appearing to use confidential information for private gain" (quoting Advisory Opinion 2006-02).

The Commission then found "no persuasive rationale for applying SMC 4.16.075 to cover that period of time between when an employee stops providing services to the City with no expectation of returning to work and the date of their last paycheck. For that reason, we opine that an employee 'leaves City ... employment' when he or she stops providing services to the City and there is no expectation that the employee will return to work" (Advisory Opinion 2009-02).

## **4. Application of the Code to Sabbatical Leaves**

The issue in sabbatical leaves then is whether in order to start the clock running both: 1) the employee must have stopped providing services to the City; and, 2) there must be "no expectation that the employee will return to work". The Commission may have included the language regarding no expectation the employee would return because the facts in Opinion 2009-02 involved no such expectation. However, the text of the Code and the reasoning underlying the opinion both suggest the focus should be on the date the employee actually discontinued providing services to the City.

The substantive post-employment restrictions in SMC 4.16.075 are triggered by the employee's actions while actively providing services to the City. For example, paragraph B provides that if an employee participated in a City matter, he or she may not then assist any person regarding that matter for two years after leaving City employment. Similarly, Paragraph D provides that if an employee assisted the City in determining the project or work to be done, or the process to be used in selecting a contractor, he or she may then not compete for the contract for one year after leaving City employment.

When an employee is no longer providing the City with services, they are no longer in a position to take any official City actions that they might later benefit from personally. Their "inside" connections also begin to cool since they are no longer regularly in the office performing City work with their colleagues. The employee on leave is not in a position to, in the words of Advisory Opinions 2009-02 and 2006-02, "exploit or appear to exploit" their City job for possible future personal gain. The "cooling off" process has begun.

### **Conclusion**

The Commission concludes that the post-employment "cooling off" clock generally begins to run when the employee in fact stops providing services to the City. In this case, the employee provided no services to the City after February 2012. That is therefore when the clock began to run for purposes of the post employment restrictions in SMC 4.16.075.

The Commission also concludes that an employee in general no longer provides the City with services when they no longer "participate" in City "matters" as those terms are defined in the Ethics Code (See SMC 4.16.020). In a sabbatical or other similar leave, the cooling off time periods would typically begin to run when a full-time leave begins, not when it ends or when the employee notifies the City they do not intend to return. If a particular employee in fact continues to participate in City matters during a sabbatical or other similar leave, then the post-employment time clock would not begin to run.