GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
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Legal Counsel Division

March 31, 2023

Re: Commissioners as Special Government Employees

Dear Commissioners:

We were recently asked to address whether Advisory Neighborhood Commissioners are "special government employees" ("SGEs") under personnel rules implementing the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA").[1] They are not.

This question involves the extent to which an Advisory Neighborhood Commission ("ANC") and its Commissioners may have contact with former Commissioners, and thus bears directly on the powers and duties of ANCs and their Commissioners. To answer it, we employ "standard tools of interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). We read the governing law "according to its terms," *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020), giving "effect, if possible, to every clause and word," *Roberts v. Sea-Land Servs.*, 566 U.S. 93, 111 (2012) (internal citation omitted).

We start with some background. The CMPA governs (with exceptions not relevant here) "all employees of the District of Columbia government,"[2] and an "employee" is "an individual who performs a function of the District government and who receives compensation for the performance of such services."[3] The CMPA also regulates unpaid officials such as Commissioners[4] through standards of conduct that govern not only each employee, but also each "member of a board or commission" and each "public official of the District government."[5]

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[1] Effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq*.).

[2] D.C. Official Code § 1-602.01(a).

[3] *Id.* § 1-603.01(7). That definition applies except to the extent the CMPA explicitly provides. *Id.*

[4] *See id.* § 1-309.13(o) ("Except for out of pocket expenses approved by the Commission, Commissioners shall not be compensated for personal services rendered on behalf of the Commission").

[5] *See id*. §§ 1-618.01(a) and 1-618.02; Letter to Comm'rs Costello and Piekara, Feb. 2, 2022, at 2, *available at* https://oag.dc.gov/sites/default/files/2022-03/ANC-5B-Letter-to-Commissioners-Costello-and-Piekara-Re-Conflicts-of-Interest-.pdf (noting that a "Commissioner, as a public official of the District government," must abide by the CMPA's conflict-of-interest restrictions); Bd. of Ethics and Gov't Accountability, Advisory Opinion of April 10, 2017, at 4-5, *available at* https://bega.dc.gov/sites/bega/files/publication/attachments/1009-015%20-%20Advisory%20Opinion%20-%20Ethics%20Applicability%20to%20ANC%20Commissioners_0.pdf (discussing CMPA conflict-of-interest restrictions that Commissioners, as public officials, must follow).

The SGE language that prompts this question comes from a regulation, adopted by the Department of Human Resources,[6] that implements the CMPA. That regulation establishes a one-year ban on transactions between a "former employee" and their "former agency" that are "intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest."[7] SGEs are exempt from this ban.[8]

CMPA rules define an SGE as:

> any officer or employee of an agency who is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for not to exceed one hundred and thirty (130) days during any period of three hundred and sixty five (365) consecutive days.[9]

Commissioners are not "retained, designated, appointed, or employed." They are elected officials[10] who serve without pay.[11] Nor do Commissioners generally "perform temporary duties." They are elected for two-year terms.[12] Even when a Commissioner is elected to serve only a partial term, it is not clear that such a Commissioner would serve only 130 days in a calendar year. ANC vacancies are not filled unless they arise more than six months before the general election,[13] and they must be filled within 90 days.[14] Accordingly, we conclude that Commissioners are not SGEs.

We considered whether, since former Commissioners are not SGEs, they are subject to the one-year transaction ban. In our view, they are not. That ban applies only to contacts between a "former employee" and their "former agency."[15] In our view, a former Commissioner is not a "former employee" of an ANC, and the ANC is not a Commissioner's "former agency."

A former Commissioner is not a "former employee" of the ANC because a serving Commissioner is not an ANC employee. Under CMPA rules, a person is an employee if they are compensated for performing services on behalf of the District government, or if they are a member of a District of Columbia board or commission.[16] Commissioners are neither. They are not compensated for

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[6] *See* 61 DCR 3799 (Apr. 11, 2014).

[7] 6-B DCMR § 1811.10 ("A former employee (other than a special government employee who serves for fewer than one-hundred and thirty (130) days in a calendar year) shall be prohibited for one (1) year from having any transactions with the former agency intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest, whether or not such matter involves a specific party.").

[8] *Id.*

[9] *Id.* § 1899.1.

[10] *See* D.C. Official Code § 1-207.38(b) ("Advisory Neighborhood Commission members shall be elected from single-member district within each neighborhood commission area by the registered qualified electors of such district").

[11] *See id.* § 1-309.13(o).

[12] *See id.* § 1-309.06(b)(1).

[13] *Id.* § 1-309.06(d)(1).

[14] *See id.* § 1-309.06(d)(3).

[15] 6-B DCMR § 1811.10.

[16] *Id.* § 1899.1.

their services.[17] Nor are they members of a board or commission. Under the CMPA, a board or commission is a body that "consist[s] of appointed members."[18] Commissioners are elected, not appointed.[19]

We also conclude that an ANC cannot be a former Commissioner's "former agency" because an ANC does not satisfy the CMPA's three-prong definition of an "agency."[20] First, an ANC does not "administer any law, rule, or any regulation adopted under authority of law,"[21] because an ANC is not an administrative entity. As the D.C. Court of Appeals has held, the role of ANCs "is 'advisory,' as their very name suggests; they do not have an enforcement responsibility - or authority." *Kopff v. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1376 (D.C. 1977). Second, an ANC is not "created or organized by the District of Columbia Council as an agency."[22] The Home Rule Act directs the Council to establish ANCs,[23] and the ANC Act specifies that these shall be established by resolution in neighborhoods that approve them,[24] but neither Act provides that they shall be established "as agencies."[25] And third, an ANC is not "created by the reorganization of 1 or more of the units of an agency,"[26] since ANCs are only created from other ANCs or newly established in the same manner as previous ANCs.[27]

It is possible, we caution, that the Board of Ethics and Government Accountability ("BEGA") could take a different view, either of the SGE provision or of the one-year transaction ban, although we are not aware of any published advisory opinion that does so. If a Commissioner (or an ANC employee) has questions about whether conduct they are contemplating would be consistent with the ethical requirements established by District law, they can and should seek guidance from BEGA.[28]

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[17] *See* D.C. Official Code 1-309.13(o).

[18] *Id.* 1-603.01(2).

[19] The ANC Act underscores that Commissioners are not ANC employees by distinguishing the two. ANC employees, it says, are partially covered by the CMPA and are considered District employees for those purposes. *Id.* § 1-309.13(o). That same provision is the one that says Commissioners (whom the ANC Act also never describes as District employees) cannot receive compensation for their services beyond "out-of-pocket expenses approved by the Commission." *Id.*

[20] *See id.* § 1-603.01(1).

[21] *See id.* (defining an "agency" to include a District government entity that is "required by law, by the Mayor of the District of Columbia, or by the Council of the District of Columbia to administer any law, rule, or any regulation adopted under authority of law").

[22] *See* D.C. Official Code § 1-603.01(1).

[23] *See id.* § 1-207.38(a).

[24] *See id.* § 1-309.04(b).

[25] Indeed, the ANC Act consistently contrasts ANCs from agencies. For example, section 13 of the ANC Act (D.C. Official Code § 1-309.10) contrasts "agencies" (which must provide notice and great weight) and ANCs (which receive it).

[26] *See* D.C. Official Code § 1-603.01(1).

[27] *See*, *e.g.*, *id.* § 1-309.08 (describing the process for modifying ANC boundaries).

[28] *See id.* 1-1162.19 (BEGA advisory opinions); https://bega.dc.gov/service/ethics-advice (describing the process for seeking ethics advice from BEGA).

Sincerely,

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