



STATE OF ARKANSAS
**Department of Finance
and Administration**

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June 14, 2019

Johnny Dunigan
219 West Drew
P.O. Box 405
Monette, AR 72447

RE: Advisory Opinion No. 2019-12

Dear Mr. Dunigan:

This letter is in response to a written request for an advisory opinion pursuant to Ark. Code Ann. §19-11-715 (b), which was sent to my office in a letter dated June 11, 2019 (“the Request Letter”), regarding the circumstances described below involving your former employment with the Arkansas Public Defenders Commission (“PDC”), and a contract between you and the Public Defenders Commission/Parent Counsel (“Parent Counsel”).

This opinion is based upon the following facts that have been presented to me in your request and correspondence, which I am relying upon. It should be noted that if one or more of these facts are later shown to be incorrect, it could result in a revised opinion.

1. Mr. Dunigan was a part time employee with the Public Defenders Commission from January 2016 until January 2019. He represented criminal defendants in Mississippi County, Arkansas, charged with crimes in Mississippi County, Arkansas.
2. Mr. Dunigan has been a contractor with the state as a parent counsel for over ten years, representing indigent parents in Craighead County who have had their children removed from the home by Arkansas Department of Human Services;
3. Parent counsel contracts are now administered under the PDC;
4. Mr. Dunigan states his former work as a criminal public defender in Mississippi County in no way conflicts with his contracted work as parent counsel in Craighead County, and Mr. Dunigan states he did not directly or indirectly participate in the determination of this or any other contract.
5. Parent Counsel Executive Director Brian Welch is directly supervising this contract and confirms the facts in the Request Letter of which he has knowledge.

I. Relevant Law

Regarding former state employees in matters connected with their former duties, Ark. Code Ann. §19-11-709 (b)(1) permanently disqualifies former employees of state agencies from knowingly acting as a principal or as an agent for anyone other than the state in connection with any contract in which the former employee participated personally and substantially through decision, approval,

disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the state is a party or has a direct and substantial interest. *See* Ark. Code Ann. §19-11-709 (b)(1).

Another ethical restriction on the involvement of former state employees regarding matters for which a former employee was officially responsible resides at Ark. Code Ann. §19-11-709 (b)(2), which provides that it is a breach of ethical standards for any former state employee knowingly to act as a principal or as an agent for anyone other than the state in matters which were within the former employee's official responsibility, where the state is a party or has a direct or substantial interest. *See id.* The latter restriction only applies for one year after cessation of the former employee's official responsibility in connection with any contract at issue. *Id.*

For purposes of interpreting Ark. Code Ann. §19-11-701 *et seq.*, Ark. Code Ann. §19-11-701 (8) defines "employee," as an individual drawing a salary from a state agency, whether elected or not, and any nonsalaried individual performing personal services for any state agency. "Official responsibility," is defined in Ark. Code Ann. §19-11-701 (12) as direct administrative or operating authority, whether immediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct state action. Finally, "state agency" in Ark. Code Ann. §19-11-701 (16) means any office, department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the executive, judicial, or legislative branch of this state.

The public policy undergirding Ark. Code Ann. §19-11-701 *et seq* is to "promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the state." Ark. Code Ann. § 19-11-703 (a). "The policy is implemented by prescribing essential restrictions against conflict of interest without creating unnecessary obstacles to entering public service." *Id.* The intent is to require state employees to "discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors," and to "conduct themselves in such a manner as to foster public confidence in the integrity of the state procurement organization." Ark. Code Ann. § 19-11-703 (b). These statutes are a codification of, and can be understood against, the common law, which forbade public officials from engaging in self-dealing in regard to contracts. *See Price v. Edmonds*, 232 Ark. 381, 337 S.W.2d 658 (1960).

II. Analysis

As a threshold matter, I reiterate that I am relying upon the facts that you have presented to me. As stated above, Ark. Code Ann. §19-11-715(b) gives me authority, as the Director of Department of Finance and Administration, to issue an advisory opinion, upon written request of employees or contractors and in consultation with the Attorney General, regarding the appropriateness of the course of conduct to be followed. It does not, however, confer upon me the authority to subpoena documents, compel sworn statements, or utilize other investigative tools entrusted to judicial officers and law enforcement. Consequently, the employee or former employee, contractor and contracting agency are in superior positions to ascertain the relevant facts, and beyond doing basic due diligence in researching publicly available information. Accordingly, I rely upon the facts given to me in analyzing and formulating my opinions. This opinion is limited to the facts

presented, and is withdrawn in the event that any of the material information presented to me proves to be false.


Based on the above recitation of facts as applied to the above cited law, your former employment with the Arkansas Public Defenders Commission certainly classifies you as a former state employee. Given that you ended your employment with the Arkansas Public Defenders Commission in January 2019, the one year statutory "cooling off" period has not yet expired.

However, the critical questions are: (1) whether you participated personally and substantially in connection to this contract, in which case a permanent prohibition for you applies; and (2) whether the contract requires you to act as a principal or an agent in matters which were within your former official responsibility as a state employee, in which case you would be barred for one year.

Your former employment was a part time position in a different county handling different types of cases under, what was then, a different state entity. Contemporaneously, you were contracting with the state to be a parent counsel, the same type of contract currently up for review. I see no self-dealing or other conflict of interest in your former employment and the contract at issue. Accordingly, the contract will be allowed to proceed.

This advisory opinion and written approval is issued in accordance with Ark. Code Ann. § 19-11-715(b) and constitutes compliance with the ethical standards of the Ark. Code Ann. §19-11-701 *et seq.*

Sincerely,



Larry W. Walther
Director

cc: Edward Armstrong, Office of State Procurement