



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

OFFICE OF THE SECRETARY
1509 West Seventh Street, Suite 401
Post Office Box 3278
Little Rock, Arkansas 72203-3278
Phone: (501) 682-2242
Fax: (501) 682-1029
www.arkansas.gov/dfa

February 2, 2021

Ms. Amy Phelps
107 Polk Road 673
Mena, Arkansas 71903

VIA EMAIL TRANSMISSION:
Amy.Phelps@dhs.arkansas.gov

RE: Advisory Opinion No. 2021-02

Dear Ms. Phelps:

This letter is in response to your written request for an advisory opinion pursuant to Ark. Code Ann. § 19-11-715(b) dated December 14, 2020, that I received on that date regarding the appropriate course of conduct moving forward with a state contract as Nurse Practitioner for Conway Human Development Center in relation to Ark. Code Ann. §§ 19-11-709(b), 19-11-709(b)(2), and 19-11-709(d). On December 16, 2020, you supplemented the original request with additional information.

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

1. On July 26, 2020, you began employment as a nurse practitioner at the Conway Human Development Center (CHDC) in an extra-help position;
2. The primary job functions for a nurse practitioner are as follows:
 - a. Practice medicine using sound medical judgment and adhere to all ethical considerations of the practice of medicine; know limitations and seek consult when advisable; keep abreast of current technologies and industry standards;
 - b. Meet all clinical obligations of the medical practice: Accrediting Agency compliance, CLIA compliance, drug prescription compliance, HIPAA, State and Federal regulations, Safety Regulations, etc.;
 - c. Follow all internal policies and procedures; be accountable for completion of all operational tasks according to departmental guidelines to ensure appropriate clinical processing/documentation;
 - d. Advise administration of any issues that may impact the practice;

Ms. Amy Phelps
Adv. Op. 2021-02
February 2, 2021

- e. See patients in a timely and efficient manner; stay reasonably on time for scheduled appointments in family practice throughout the day, unless exceptional circumstances occur; and
 - f. Charting in the patient's medical record is routinely to be completed on the same day as the patient's visit.
3. On September 20, 2020, your employment status at CHDS transitioned into full-time employment, a benefit of which was the provision of health care for you and your family;
 4. Your job description was appreciably the same, and you also began involvement with the infection preventionist working with COVID-19 measures and serving as a back-up resource for the Medical Director in psychological emergencies;
 5. On October 26, 2020, the Department of Human Services issued an invitation for bid for a Certified Geriatric Nurse Practitioner;
 6. The general responsibilities for this position are:
 - a. Function independently to perform age-appropriate history and physical for complex acute, critical, and chronically ill perioperative patients;
 - b. Order and interpret diagnostic and therapeutic tests, including x-rays, relative to patient's age-specific needs;
 - c. Prescribe appropriate pharmacologic and non-pharmacologic treatment modalities;
 - d. Facilitate the patient's transition within and between health care settings, e.g. admitting, transferring, and discharging patients;
 - e. Collaborate with multidisciplinary team members by making appropriate referrals;
 - f. Facilitate staff, patient, and family decision-making by providing educational tools;
 - g. Perform minor surgery (toenail removal, mole and cyst removal, foreign object removal, etc.);
 - h. Perform suturing and fine needle aspirations as required;
 - i. Perform annual physicals;
 - j. Perform medication reviews;
 - k. Perform the care services listed below (or be willing to learn those services):
 - General orthopedic evaluations/management
 - Basic rehabilitation for musculoskeletal injuries
 - General internal medicine, family medicine, and pediatrics
 - General dermatology
 - General eye problems
 - General electrocardiogram interpretations
 - General gynecological expertise
 - l. Provide emergency management skills and have Advanced Cardiovascular Life Support (ACLS) certification; and
 - m. Other duties as assigned;
 7. On November 9, 2020, you submitted an application in response to the invitation for bid;
 8. You have been selected as the awardee for the contract on the basis of meeting the qualifications and having the lowest bid; and
 9. You were unaware of the provisions of Ark. Code Ann. §§ 19-11-709(b), 19-11-709(b)(2), and 19-11-709(d) prior to applying for the CHDC state contract.

Ms. Amy Phelps
Adv. Op. 2021-02
February 2, 2021

On December 18, 2020, Thomas Tarpley, Deputy Director of the Arkansas Department of Human Services Division of Developmental Disabilities Services (DHS), sent a letter to me in which he provided supplemental information and expressed "... support for an advisory opinion permitting the geriatric nursing contract solicited by Conway Human Development Center to move forward with Ms. Phelps as the contractor." As the basis for the Department's support, Mr. Tarpley cited policy provisions contained in Ark. Code Ann. §§ 19-11-703.

I. Relevant Law

In regard to former state employees and matters connected with their former duties, Ark. Code Ann. § 19-11-709(b)(1) permanently disqualifies former employees 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 addresses a one-year representation restriction regarding matters for which a former employee was officially responsible. Ark. Code Ann. § 19-11-709(b)(2) provides that it is a breach of ethical standards for any former state employee, within one year after cessation of the former employee's official responsibility in connection with any contract to knowingly 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. *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.*, section 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." "State agency" is defined in section 19-11-701 (16) as meaning "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 underlying section 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." *See* 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." *See* 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). Taken together, then, these provisions make clear that the restrictions should not be construed in an overly broad manner that reaches beyond true conflicts of interest, but should be balanced against the

Ms. Amy Phelps
Adv. Op. 2021-02
February 2, 2021

legislative intent to avoid unnecessary restrictions and construed pragmatically and with common sense so as to prevent actual conflicts of interest and self-dealing.

Arkansas Code Ann. § 19-11-715(b) gives the Secretary of the Department of Finance and Administration (DF&A) authority to, upon written request of an employee or contractor and in consultation with the Attorney General, render an advisory opinion regarding the appropriateness of the course of conduct to be followed in proposed transactions.

II. Analysis

As a threshold matter, I reiterate that I am relying upon the representations that you have presented to me. As noted above, section 19-11-715(b) gives me authority, as the Secretary of DF&A, 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, I rely upon the information provided to me in analyzing and formulating my opinions. This opinion is limited to the representations submitted to me and is withdrawn in the event that any of the material information presented to me proves to be false.

Based on the submitted information as applied to the above-cited statutory provisions, your current employment with CHDC certainly classifies you as a state employee; however, since your job descriptions have not, and do not, include procurement responsibilities, neither Ark. Code Ann. § 19-11-709(b)(1) nor (b)(2) is applicable to your submitted application for the CHDC contract for a Certified Geriatric Nurse Practitioner. Furthermore, even if the statutory provisions were deemed to be applicable, your provision of nurse practitioner services to the state are in alignment with the state's interests in providing nurse practitioner services as you are not knowingly acting as a principal or as an agent for anyone other than the state in the anticipated position.

I am persuaded at this time by the information that you have provided to me, which is supported by Deputy Director Tarpley, that you are not and have not been involved personally or substantially in the contract process relating to the CHDC Certified Geriatric Nurse Practitioner contract position. If this fact does not change during your state employment, then the cited statutory provisions would not be applicable under these circumstances to your selection and provision of services pursuant to the CHDC Certified Geriatric Nurse Practitioner contract position. *See* Ark. Code Ann. § 19-11-709(b)(1) and (b)(2).

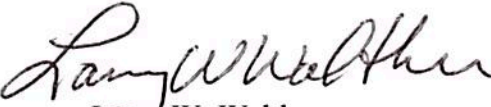
III. Decision

Thank you for seeking my counsel and approaching the issue with transparency. I am persuaded that, under the representations as stated above, any ethical conflict that might exist is insubstantial or remote, and I grant permission to proceed to such extent and upon such terms

Ms. Amy Phelps
Adv. Op. 2021-02
February 2, 2021

and conditions as specified in this letter. Compliance with the above course of conduct is deemed to constitute compliance with the ethical standards of the Ark. Code Ann. §19-11-701 *et seq.*

Sincerely,



Larry W. Walther
Secretary

cc: Edward Armstrong, Office of State Procurement
Amy Fecher, Cabinet Secretary