



Department of Transformation and Shared Services
Governor Asa Hutchinson
Secretary Amy Fecher

January 20, 2022

Mr. Gary J. Mitchusson
Post Office Box 882
Forrest City, Arkansas 72336-0822

RE: Advisory Opinion No. 2022-02

Dear Mr. Mitchusson:

This letter is in response to a written request for a waiver pursuant to Ark. Code Ann. §19-11-715(b) and (c), which was sent to me electronically in a letter dated January 11, 2022, and received on January 19, 2022, regarding the circumstances described below involving Lease Number 62-485-P9919 to the Department of Community Corrections (DCC) for a property located at 409 North Rosser Street, Forrest City, Arkansas.

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

1. You have leased the above-referenced property to the DCC for over 20 years;
2. You are one of two public defenders for St. Francis County and have been employed in that position for over 10 years;
3. The DCC lease predates your employment as a public defender;
4. Your duties as a public defender have not impacted or affected the lease agreement that you have maintained with the state; and
5. You have provided the leased facility and services to the best of your ability and commit to continuing to do so.

Chris Bell, Administrator for Real Estate Services at the Arkansas Department of Transformation and Shared Services Division of Building Authority, has provided additional information as follows:

6. The lease has been in place since 1999 as follows:
 - a. 1999-2005 – Original Lease Agreement Rate/SF: \$8.50
 - b. 2005-2006 – Renewal, New Lease Form Rate/SF: \$8.50
 - c. 2005-2009 – Renewal, Expansion, New Lease Form Rate/SF: \$8.85
 - d. 2009-2011 – Renewal, New Lease Form Rate/SF: \$9.07
 - e. 2011-2013 – Renewal, First Lease Amendment Rate/SF: \$9.07
 - f. 2013-2015 – Renewal, Second Lease Amendment Rate/SF: \$9.07
 - g. 2016-2017 – Renewal, New Lease Form Rate/SF: \$9.07
 - h. 2017-2018 – Renewal, First Lease Amendment Rate/SF: \$9.16
 - i. 2018-2019 – Renewal, Second Lease Amendment Rate/SF: \$9.16
 - j. 2019-2020 – Renewal, Third Lease Amendment Rate/SF: \$9.16
 - k. 2020-2021 – Renewal, Fourth Lease Amendment Rate/SF: \$9.16

Office of the Secretary

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7. The proposed Fifth Lease Amendment term is December 1, 2021, to November 30, 2022, and retains the same Rate/SF at \$9.16 as contained in the Fourth Lease Amendment and includes 5,670 square feet of office space and adequate automobile parking spaces;
8. The Rate/SF is fair for the local conditions; and
9. Subsequent to the lease initiation, and upon your employment as a public defender, you have appropriately disclosed this information on the Contract and Grant Disclosure and Certification Form.

I. Relevant Law

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 non-salaried individual performing personal services for any state agency." "State agency" is defined in Ark. Code Ann. §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."

Ark. Code Ann. §19-11-701 (2) defines "business" to mean "any corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or any other legal entity." The term "financial interest" is defined in Ark. Code Ann. §19-11-701 (9) as meaning:

- (A) Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, more than one thousand dollars (\$1,000) per year, or its equivalent;
- (B) Ownership of more than a five percent (5%) interest in any business; or
- (C) Holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management;

The ethical strictures set forth in Ark. Code Ann. §19-11-705 (a)(1)(A) prohibit state employees from participating directly or indirectly in any particular matter pertaining to any state agency contracts in which an employee or an employee's immediate family member has a financial interest. See Ark. Code Ann. §19-11-705. Ark. Code Ann. §19-11-705 (a)(2) defines "direct or indirect participation" as including, but not being limited to, "involvement through decision, approval, disapproval, recommendation, preparation of any part of a procurement request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity."

II. Analysis

Based on the above representations, your employment as a public defender for St. Francis County classifies you as a state employee, and your lease of property to DCC establishes that you have a financial interest in a state agency contract.

In this case, I find the fact that the lease predates your state employment by approximately 10 years to be persuasive in demonstrating that the inception of the lease agreement did not involve an ethical issue, and the subsequent rate increases are modest and supported by local market conditions. It is also germane that you timely completed and submitted the Contract and Grant Disclosure and Certification Form upon state employment in conjunction with the lease agreement. These circumstances

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demonstrate that the conflict is insubstantial or remote, and a waiver is appropriate in this procurement process.

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 and conditions as specified in this letter. This decision grants a waiver in accordance with Ark. Code Ann. § 19-11-715 (c). 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,



Amy Fecher
Secretary

cc: Mitch Rouse, Office of State Procurement