



## Department of Transformation and Shared Services

Governor Sarah Huckabee Sanders

Secretary Joseph Wood

April 21, 2023

Ms. Jeanette Whatley  
Attorney at Law  
Post Office Box 942  
Marion, Arkansas 72364

RE: Advisory Opinion No. 2023-07

Dear Ms. Whatley:

This letter is in response to a written request for an advisory opinion and a waiver pursuant to Arkansas Code Annotated §19-11-715(b) and (c), which was sent to me in a letter dated March 21, 2023, and received on March 27, 2023, regarding your interest in pursuing a part-time contract with the State of Arkansas to represent indigent parents in the First Judicial District.

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. While in private practice, you represented indigent parents as a parent counsel through a part-time contract administered by the Arkansas Public Defender Commission;
2. As parent counsel, you represented indigent parents whose children had been removed by the Arkansas Department of Human Services, Division of Children and Family Services;
3. You had performed parent counsel representation for a period of at least two decades, eight years of which was performed in Crittendon County through a state contract;
4. Since April 4, 2022, you have been employed by the Office of Child Support Enforcement (OCSE) as an Attorney Specialist;
5. You work in the Marion, Arkansas office;
6. You intend to give notice to leave that employment in late April of this year;
7. Your employment responsibilities with OCSE are limited to Crittendon County, Arkansas in the Second Judicial District;
8. There is a vacant position in the First Judicial District for parent counsel work through a state contract beginning July 1, 2023;
9. You would like to pursue applying for the vacant position;
10. You assert that your current employment with OCSE and the vacant parent counsel position are different types of work, serve different divisions of Circuit Court, and are in different geographical locations;
11. You would like to move forward with accepting a part-time contract with the State of Arkansas to represent indigent parents, even though this contract will commence within two months after the termination of your employment with OCSE; and

12. Brian Welch, Executive Director of the Arkansas Commission for Parent Counsel, has also written to me on March 27, 2023, in regard to your request for an advisory opinion and states:

“... while loosely connected, child support does not overlap with child welfare, so there should be no conflict issues. Also, given [Ms. Whatley’s] extensive experience in the area of Dependency-Neglect, having the ability to contract with her would be of benefit to our clients, the Courts and our State as there would not be a need for training or adapting to the learning curve that comes with these cases. This [First] Judicial District is historically difficult for us to fill vacancies for attorneys....”

## **I. Relevant Law**

Arkansas Code Ann. §19-11-709 addresses restrictions on employment of present and former employees and provides for the permanent disqualification of a former employee who has been personally involved in a particular matter by 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 and where the state has a direct and substantial interest. See Ark. Code Ann. § 19-11-709(b)(1).

Another ethical restriction for former state employees is addressed in 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. The employment restriction imposed is a one-year representation restriction regarding matters for which the former employee was officially responsible.

"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.

The long-standing public policy underlying 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. The policy is implemented by prescribing essential restrictions against conflict of interest without creating unnecessary obstacles to entering public service." Ark. Code Ann. § 19-11-703 (a). 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 ).

In addition, 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.” Ark. Code Ann. § 19-11-701(12) defines, “official responsibility” as “direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct state action.” “State agency” is defined in Arkansas Code Annotated § 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.”

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## II. Analysis

Based on the above representations, your employment at OCSE classifies you as a current state employee, and your anticipated termination from OCSE at the end of April 2023, would change your classification to that of a former state employee. Your status as a former state employee would also be compounded by your previous employment with the Arkansas Public Defender Commission.

The statutory restrictions present the following critical questions: (1) whether you participated personally and substantially in connection to the proposed employment contract, in which case a permanent prohibition for you applies; and (2) whether the proposed 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 from state employment.

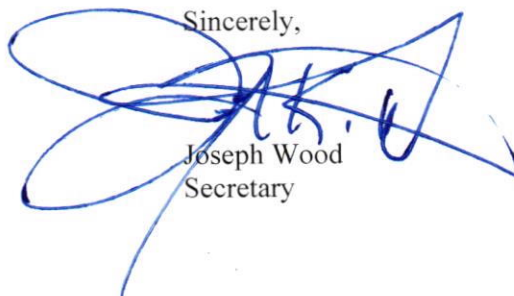
Both questions include the explicit qualification of “knowingly acting as a principal or as an agent for anyone other than the state”. In the circumstances that you describe, it is not apparent that you participated personally and substantially in connection to the proposed employment contract, although it does involve parent counsel responsibilities that you performed in Crittendon County through a state contract. However, in this case, the determining factor in the permanent disqualification assessment is that you performed the services through a state contract and not for anyone other than the state.

Likewise in the one-year prohibition, your anticipated state re-employment as parent counsel in the First Judicial District within two months of ending OCSE employment in the Second Judicial District reflect that both positions are encompassed within state employment. Furthermore, you highlight the distinctions between the two positions as being different types of work, serving different divisions of Circuit Court, and serving different geographical locations. Similarly, Mr. Welch supports your state re-employment on the basis that “... while loosely connected, child support does not overlap with child welfare, so there should be no conflict issues. Also, given [Ms. Whatley’s] extensive experience in the area of Dependency-Neglect, having the ability to contract with her would be of benefit to our clients, the Courts and our State as there would not be a need for training or adapting to the learning curve that comes with these cases. This [First] Judicial District is historically difficult for us to fill vacancies for attorneys....”

## III. Decision

Thank you for seeking my counsel and approaching the issue with transparency. I am persuaded that, under the representations as stated above, the statutory employment prohibitions do not apply in this case as your previous employment, current employment, and anticipated employment all fall within state employment, and you have not been involved in developing the proposed employment contract in the First Judicial District. As a result, you may pursue the identified state employment position, and I grant permission to proceed to such extent and upon such terms and conditions as specified in this letter pursuant to Arkansas Code Annotated § 19-11-715(b) and (c); compliance with the above course of conduct is deemed to constitute compliance with the ethical standards of the Arkansas Code Annotated § 19-11-701 *et seq.*

Sincerely,



Joseph Wood  
Secretary