

CEO 21-9—September 10, 2021

POST-OFFICEHOLDING RESTRICTIONS

FORMER TAXPAYERS' RIGHTS ADVOCATE REPRESENTING CLIENTS BEFORE THE DEPARTMENT OF REVENUE

NOTE: This opinion was reversed on appeal in 355 So. 3d 527 (Fla. 1st DCA 2023) (Case Number 1D21-3115)

To: Name withheld (Tallahassee)

SUMMARY:

Section 112.313(9)(a)4, Florida Statutes, will restrict the former Taxpayers' Rights Advocate from personally representing persons or entities for compensation before the Department of Revenue for two years after leaving public employment, considering that he is employed by the Department and his influence extends throughout the agency. Referenced are CEOs 19-12, 17-10, 16-13, 14-32, 14-1, 11-19, 10-22, 07-4, 03-10, 02-12, 00-11, 00-6, 00-1, and 94-20.

QUESTION:

Is the Taxpayers' Rights Advocate, prohibited by Section 112.313(9)(a)4, Florida Statutes, from representing persons or entities for compensation before the Department of Revenue for two years after leaving his position?

Your question is answered in the affirmative.

Through your letter of inquiry and correspondence with our staff, you state you are bringing this inquiry on behalf of the Taxpayers' Rights Advocate (hereinafter the Advocate), who is inquiring how the postemployment restriction in Section 112.313(9)(a)4, Florida Statutes, will apply to him once he leaves public employment.

You indicate the Advocate serves in a Senior Management Service (SMS) position, and has held that position since October 2004.¹ The Advocate's responsibilities are set out in Sections 20.21(3) and 213.018, Florida Statutes. These responsibilities include issuing an annual report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Inspector General identifying deficiencies in the Department of Revenue (hereinafter the Department) and recommending corrective actions.² The Advocate also is responsible for reviewing issues regarding Department actions that cannot be "resolved through normal administrative channels within the [D]epartment," as well as reviewing taxpayer complaints involving the "unsatisfactory treatment of taxpayers by employees of the [D]epartment."³ You relate that the Advocate makes recommendations to the Department following his review of such actions, although you state the Department is not obligated to accept those recommendations. That being said, were the Advocate to determine that a Department action or proposed action would cause "irreparable loss" or "significant hardship" to a taxpayer, he is authorized by Sections 20.21(3)(b) and Section 213.018(2) to issue a Taxpayer Assistance Order temporarily suspending or staying the Department's action, although you state the Advocate has not issued such an order since 2008.

Your inquiry, though, does not so much concern the Advocate's responsibilities as it does the administrative placement of his position. It stems from legislative changes made in 2018 to the statutes concerning the Advocate. Prior to 2018, Section 20.21(3) stated the Advocate would be appointed by—and report to—the Department's Executive Director.⁴ However, in 2018, the Legislature modified this language, which you state was part of an effort to give the Advocate more independence to advocate for the rights of

taxpayers and to take positions against the Department. In particular, Section 20.21(3) now states the following, with the underlined language having been added in 2018:

The position of taxpayer rights advocate is created within the Department of Revenue. The taxpayers' rights advocate shall be appointed by the Chief Inspector General but is under the general supervision of the executive director for administrative purposes. The taxpayers' rights advocate must report to the Chief Inspector General, and may be removed from office only by the Chief Inspector General

(emphasis added).

As can be seen, the legislative changes gave the Chief Inspector General the authority to appoint and remove the Advocate, and changed the position's reporting requirement inasmuch as the Advocate now reports to the Chief Inspector General.⁵ However, the portion of the statute stating the Advocate's position was housed within the Department remained unchanged, and the Legislature added new language stating the Department's Executive Director would continue supervising the Advocate for administrative purposes.⁶

Given the legislative changes to the statutes concerning the Advocate, you inquire how the postemployment restriction of Section 112.313(9)(a)4 will apply were he to leave public employment. This question hinges upon whether—following the statutory changes—the Advocate's "agency" for purposes of Section 112.313(9)(a)4 is the Department of Revenue or the Executive Office of the Governor, which houses the Office of the Chief Inspector General.

Section 112.313(9)(a)4 states:

An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

Essentially, Section 112.313(9)(a)4 places a two-year prohibition on a former agency employee representing persons or entities before the agency "with which he or she was employed." The term "employee" is defined in Section 112.313(9)(a)2.a., Florida Statutes, to include SMS employees. As you relate that the Advocate's position is considered SMS, the two-year prohibition in Section 112.313(9)(a)4 will apply to him once he leaves public employment. Thus, the only issue here, as you indicate, is determining the agency "by which [the Advocate is] employed" for purposes of the statute.⁷

The purpose of Section 112.313(9)(a)4, in general, is to prevent influence peddling, which occurs when former public employees use their previously-held positions to create opportunities for personal profit. See CEO 14-32 and CEO 11-19. That being said, Section 112.313(9)(a)4 is a penal statute and, accordingly, we must strictly construe its language to ensure we do not usurp the role of the Legislature by broadening its reach or enlarging the terms used within it. See CEO 19-12 and CEO 17-10. In the past, the Commission has found the "agency" of a former employee—to which the two-year prohibition extends—means only the particular agency where the employee was actually employed. See CEO 16-13, CEO 10-22, and CEO 02-12, Question 1. This reflects the language of the statute, which mentions only the "agency with which [the employee] was employed." Therefore, while a former employee may have worked with personnel from, or been involved with the subject matter of, an agency other than the one where he or she is employed, that work or involvement does not extend the prohibition's reach to that other agency. See CEO 16-13 and CEO 00-11.

Turning to the Advocate's particular situation, you emphasize that, due to the recent legislative changes, the Department of Revenue and its Executive Director have little to no influence over the Advocate's substantive decision-making. You relate that while the Advocate has chosen to have monthly meetings with the Executive Director and Department staff to review taxpayer complaints and offer recommendations, he directly reports to the Chief Inspector General. You state the Chief Inspector General alone has the ability to direct the Advocate's actions, and this allows the Advocate to take positions counter to decisions made by the Department. Regarding

the Advocate's interface with the Department, you state it mainly involves requesting leave, and matters concerning staffing, materials, and office space. You indicate this change in reporting duties shows the Legislature intended to "transfer" the Advocate's position from the Department to the Executive Office of the Governor.

However, equating the legislative changes to a "transfer" of position seems an overstatement. The Legislature could have changed the language in Section 20.21(3) stating the Advocate's position was "created within the Department of Revenue," but kept that portion of the statute intact, indicating an intent to keep the position housed within the Department. This is also reflected in the fact that while the Legislature required the Advocate to begin reporting to the Chief Inspector General, it also gave the Department's continued oversight of the position by stating the Advocate would be "under the general supervision of the [Department's] executive director for administrative purposes." And this apparent intent to maintain the position within the Department is reflected in the final bill analysis regarding the legislative changes, which stated that while the Advocate would now be appointed by the Chief Inspector General, the position would continue to be "within" the Department.⁸

Other factors also indicate the Advocate's employment continues to be with the Department rather than the Executive Office of the Governor. The State of Florida currently lists the Advocate as a salaried employee of the Department.⁹ His W-2 Federal tax form for 2020 lists his address as a post office box maintained by the Department.¹⁰ The Department continues to include the Advocate on the organizational membership list that it annually submits to the Commission on Ethics for financial disclosure purposes. And the webpage for the Office of Taxpayers' Rights Advocate continues to be maintained on the Department's website.¹¹

In addition, it cannot be overlooked that the Advocate's substantive responsibilities—indeed the position's sole focus—is to review and make recommendations concerning the Department's actions and procedures. As previously mentioned, the Advocate is staffed by the Department, reviews taxpayer complaints, makes recommendations concerning how the Department's processes can be improved, and has the authority to suspend or stay Department actions, even if that authority is seldom used. And your letter of inquiry states the Advocate frequently interacts with the Department's Office of General Counsel, its Technical Assistance and Dispute Resolution Office, its Office of the Executive Director, and its General Tax Administration Program staff, demonstrating the position's influence throughout the agency.

Considering the foregoing, we find that the Advocate's "agency" for purposes of Section 112.313(9)(a)4 is the Department, as it has been and continues to be the "agency" by which he is employed. In making this finding, we are mindful that the Legislature was attempting to increase the Advocate's independence and objectivity by requiring the position to report to the Chief Inspector General. However, having responsibilities—reporting or otherwise—to an entity outside your agency does not mean you are "employed" by that other entity for the purposes of Section 112.313(9)(a)4.

For example, in CEO 00-11, we considered whether the General Counsel for the Department of Environmental Protection (DEP) was prohibited by Section 112.313(9)(a)4 from representing clients, within two years of leaving public employment, before the Board of Trustees of the Internal Improvement Trust Fund (BOT). The General Counsel's duties included participating as staff to the BOT and attending meetings before the Governor and Cabinet sitting in their capacity as the BOT. Despite the fact that the General Counsel had duties and obligations to the BOT, we emphasized the language of Section 112.313(9)(a)4 confining his "agency" to where he was employed, which was the DEP, and refused to extend that designation to the BOT, which is a separate and distinct unit of government.

Similarly, in CEO 02-12, we found a former attorney for the Agency of Health Care Administration (AHCA) was not prohibited by Section 112.313(9)(a)4 from representing clients before various Department of Health boards, despite the fact that AHCA had assigned her to handle cases before those boards. Again, despite her duties and obligations, we found her employing agency to be AHCA and, as such, the prohibition's reach was confined to AHCA alone.

And in CEO 16-13, we addressed a former commissioner and chair of the Florida Commission on Offender Review who wanted to represent clients before the Board of Executive Clemency within two years of leaving his position.¹² A portion of the responsibilities of the Commission on Offender Review was to report and provide recommendations to the Board of Executive Clemency. However, the Clemency Board was a separate and independent entity from the Commission on Offender Review. Given this separation, we concluded the former commissioner and chair could represent clients before the Clemency Board within the two-year prohibition period, despite the fact that he provided recommendations to it.

In each of these opinions, we found that reporting to or having responsibilities regarding a particular agency does not necessarily mean one is "employed" by that agency for the purposes of Section 112.313(9)(a)4. Similarly here, while the Advocate has reporting obligations to the Chief Inspector General, that does not mean he is an employee of the Governor's Office, where the Office of the Chief Inspector General is found. Instead, for the reasons stated above, his employment is with the Department and, accordingly, the two-year prohibition in Section 112.313(9)(a)4 applies to the Department, which is his "agency" for the purposes of the statute.¹³

While you raise additional arguments as to why the Advocate's "agency" is the Governor's Office instead of the Department, we do not find them persuasive. For instance, you claim the Chief Inspector General's authority to appoint and remove the Advocate means that the position has been "transferred" to the Governor's Office. However, in the context of State government, public officials often place individuals on boards and agencies other than their own. This does not mean the appointee is employed by the appointing authority. For instance, members of the Commission on Ethics are appointed by the Governor, the Speaker of the House of Representatives, and the President of the Senate, although their agency is the Commission. See Section 112.321(1), Florida Statutes. Moreover, the Commission has never found that the authority to appoint or remove is synonymous with employment. In CEO 00-1, we opined that the "agency" of the former Executive Director of the Department of Revenue was the Department, and did not suggest he would be prohibited from representing clients before the Governor and Cabinet, despite the fact that the Governor and Cabinet appointed the position. See also CEO 00-11.

You also emphasize the Department has a standing public records request to obtain a copy of the Advocate's annual report,¹⁴ and that the Legislature has created a statutory exemption allowing the Advocate to access otherwise confidential information received by the Department.¹⁵ You argue the Department would not need to bring a public records request, and no exemption would be necessary, if the Advocate were a Department employee. However, these considerations must be viewed alongside the language in Section 20.21(3) stating the Advocate's position is "within the Department of Revenue" and that the Department's Executive Director has "general supervision" over the position. While clearly the Advocate's position has been uniquely treated by both the Department and the Legislature, we find his employing "agency" for the purposes of Section 112.313(9)(a)4 is the Department, and he will be prohibited from representing persons or entities before it for two years after leaving his public position.¹⁶

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 10 2021, and **RENDERED** 15th day of September, 2021.

John Grant, *Chair*

[1] You relate the Advocate began his employment with the State of Florida in October 1988, when he began serving in a staff attorney position with the Florida Department of Health and Rehabilitative Services. You state he then accepted promotions to other agencies, and began his employment with the Department of Revenue in June 1994. Since that time, he has held a variety of positions with the Department of Revenue, including serving as the Chief Counsel for the Administrative Services section of the Office of General Counsel and as a Senior Attorney in the Office of the Taxpayer Rights Advocate.

[2] See Section 20.21(3)(c), Florida Statutes.

[3] See Section 20.21(3)(a), Florida Statutes.

[4] Section 213.018(1) reiterated this by stating the Department's Executive Director would "designate" the Advocate.

[5] Section 213.018(1) also was amended in 2018 to state the Chief Inspector General "shall appoint the taxpayers' rights advocate[.]"

[6] Similarly unchanged was language in Section 213.018 stating the Department's Executive Director would continue designating adequate staff to assist the Advocate in performing his responsibilities.

[7]Section 112.313(9)(a)6.a., Florida Statutes, contains an exemption to the application of Section 112.313(9)(a)4 for persons employed by the Legislature or another agency prior to July 1, 1989, although it is not applicable to the Advocate's situation. While you indicate the Advocate began State employment in October 1988, you state he has been promoted and employed by several different agencies since that time. We have found the exemption inapplicable in situations such as this, where a former public employee may have been employed by the State prior to July 1, 1988, but has held various positions with more than one distinct State executive or legislative branch agency since that time. *See* CEO 14-1, CEO 00-6, and CEO 94-20 (affirmed, Anderson v. Commission on Ethics, 651 So. 2d 1198 (Fla. 1st DCA 1995)).

[8]This is found within the Final Bill Analysis for HB 7087 from the 2018 legislative session.

[9]*See*, <https://salaries.myflorida.com>.

[10]The same post office box used on the Advocate's W-2 for 2020 is included under the "Additional Contacts and Information" portion of the Department of Revenue's website (<https://floridarevenue.com/pages/contact.aspx>).

[11]*See*, https://floridarevenue.com/Pages/taxpayers_rights_advocate.html.

[12]CEO 16-13 concerned the application of Section 112.313(9)(a)3, Florida Statutes, which is a parallel provision to Section 112.313(9)(a)4. It prohibits members of the Legislature, appointed state officers, and statewide elected officers from personally representing other persons or entities for compensation before their former government bodies or agencies for two years after vacating office.

[13]In the past, we have recognized a separate-agency status for so-called "dotted-line" agencies that are administratively assigned to another agency. *See* CEO 10-22, CEO 07-4, and CEO 03-10. However, in those instances, there was statutory language emphasizing the "dotted-line" agency would operate independent from, and not be supervised by, the agency to which it was assigned. That is not the case here. Section 20.21(3) expressly states the Advocate will be subject to the supervision of the Department's Executive Director on certain matters. Moreover, unlike "dotted-line" agencies, which have a separate budget from the agency in which they are housed, the Advocate's position is considered a salaried employee of the Department.

[14]As previously indicated, Section 20.21(3)(c) requires the Advocate to furnish the annual report only to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Inspector General.

[15]This exemption is found in Section 213.053(7), and states "[a]ny information received by the Department of Revenue in connection with the administration of taxes . . . shall be made available to . . . [t]he taxpayers' rights advocate or his or her authorized agent pursuant to Section 20.21(3) . . ."

[16]While we find Section 112.313(9)(a)4. prohibits the Advocate only from representing persons or entities for compensation before the Department within two years of leaving his public position, we again note the prohibition's purpose is to prevent influence peddling. Given the Advocate's close ties to the Office of the Chief Inspector General within the Executive Office of the Governor, we caution the Advocate that it may not foster public confidence in government for him to represent persons or entities for compensation before the Governor's Office within the two-year prohibition period as well.

CEO 19-12—July 31, 2019

**APPOINTMENT OR EMPLOYMENT OF RELATIVES
OF SCHOOL SUPERINTENDENTS**

EFFECT OF CHAPTER 2018-005, LAWS OF FLORIDA

To: Joy Frank, Esq., Attorney for Florida Association of District School Superintendents (Tallahassee)

SUMMARY:

Advice is provided regarding the amendment to Section 1012.23(2), Florida Statutes, which became effective on July 1, 2019. While the provision's language has been extended to include district school superintendents, prohibiting them from appointing or employing a "relative," as that term is defined in Section 112.3135, Florida Statutes, to work under their direct supervision, it does not apply when a superintendent only makes a recommendation concerning the appointment or employment of a relative. Referenced are CEO 09-16, CEO 02-3, and CEO 00-17.

QUESTION:

Under the recently-added language of Section 1012.23(2), Florida Statutes, are district school superintendents prohibited not only from appointing or employing "relatives," as that term is defined in Section 112.3135, Florida Statutes, to work under their direct supervision, but also from making recommendations to appoint or employ "relatives" to work under their direct supervision?

Your question is answered in the negative.

In your letter of inquiry, you indicate you are inquiring on behalf of several district school superintendents about the applicability of language in Section 1012.23(2), Florida Statutes, which became effective (via Chapter 2018-005, Laws of Florida, HB 1279) on July 1, 2019. While Section 1012.23(2) previously prohibited only district school board members from appointing or employing "relatives," as that term is defined in Section 112.3135, Florida Statutes,¹ to work under their direct supervision, the amended language extends the prohibition to district school superintendents, stating:

Neither the district school superintendent nor a district school board member may appoint or employ a relative, as defined in s. 112.3135, to work under the direct supervision of that district school board member or district school superintendent. The limitations of this subsection do not apply to employees appointed or employed before the election or appointment of a school board member or district school superintendent. The Commission on Ethics shall accept and investigate any alleged violations of this section pursuant to the procedures contained in ss. 112.322-112.3241.

(emphasis added).

Your question stems from the fact that, despite the language in the amendment, district school superintendents do not have authority to appoint or employ district employees, but only to make recommendations to the school board concerning appointment or employment decisions. As support, you cite Section 1012.22, Florida Statutes, which provides in part:

**PUBLIC SCHOOL PERSONNEL; POWERS AND DUTIES OF THE
DISTRICT SCHOOL BOARD.--**The district school board shall:

(1) Designate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees as follows, subject to the requirements of this chapter:

(a) Positions, qualifications, and appointments.—

1. The district school board shall act upon written recommendations submitted by the district school superintendent for position to be filled, for minimum qualifications for personnel for the various positions, and for the persons nominated to fill such positions.

2. The district school board may reject for good cause any employee nominated.

3. If the third nomination by the district school superintendent for any positions is rejected for good cause, if the district school superintendent fails to submit a nomination for initial employment within a reasonable time as prescribed by the district school board, or if the district school superintendent fails to submit a nomination for reemployment within the time prescribed by law, the district school board may proceed on its own motion to fill such position.

4. The district school board's decision to reject a person's nomination does not give that person a right of action to sue over the rejection and may not be used as a cause of action by the nominated employee . . .²

Given the foregoing, you ask what effect the amended language of Section 1012.23(2) will have on district school superintendents, considering they do not have statutory authority to appoint or employ, but only to make recommendations.

Our interpretation of Section 1012.23(2) necessarily involves recognition of the general principal that, as a penal statute, it must be strictly construed, meaning any doubts as to the meaning of its terms must be construed most favorably toward a potential respondent (i.e., the person against whom it would be applied). City of Miami Beach v. Galbut, 626 So. 2d 192, 194 (Fla. 1993). Strictly construing a statute allows those covered by it to have clear notice of what it proscribes. See CEO 09-16 and CEO 02-3. It also ensures we do not usurp the role of the Legislature by impermissibly broadening a law or enlarging the terms or used in the law. See CEO 00-17.

Here, we find it reasonable that the Legislature knew of the limited role that district school superintendents play in the hiring and appointment process, a role clearly laid out in Section 1012.22. The fact that the Legislature still chose not to include language extending the prohibition in Section 1012.23(2) to situations where a district school superintendent recommends the hiring of a relative shows, to us, that it did not intend for the statute to apply in such a circumstance.³ To interpret the statute otherwise would broaden its scope beyond the plain meaning of its language.⁴ For this reason, we find the amended language in Section 1012.23(2) applies to district school superintendents only in situations where they appoint or employ a relative (as "relative" is defined in Section 112.3135) to work under their direct supervision, not in situations where they make recommendations to the district school board for the board to appoint or employ their relative.

Regarding your remaining issues, you inquire whether a district school superintendent may recommend a relative, as defined in Section 112.3135, for employment if that relative does not fall under the superintendent's direct supervision. As previously indicated, we do not interpret the amended language in Section 1012.23(2) as extending to making employment recommendations. Moreover, to the extent the statute applies to superintendents, it is only when a superintendent appoints or employs a relative to work under his or her direct supervision. So long as a person other than the superintendent will be the direct supervisor of the relative, the statute will not be triggered.

Similarly, in response to your next issue, we find that a district school superintendent will not trigger the statute if he or she recommends for employment a relative of a district school board member. Again, we do not interpret the statute's language to encompass recommendations. In addition, the amended language in Section

1012.23(2) would apply only if a superintendent appointed or employed one of his or her relatives, not when a superintendent appointed or employed a relative of another district officer or employee, such as a relative of a school board member.

Nor will the provision be triggered if a school superintendent proposes a salary increase or bonus for a teacher or school employee who happens to be a relative. As described above, we must strictly interpret Section 1012.23(2). Its language only applies to appointment or employment.

Your final issue concerns the grandfathering language included in the amendment to Section 1012.23(2), which states, in pertinent part, "[t]he limitations of this subsection do not apply to employees appointed or employed before the election or appointment of a . . . district school superintendent." You note that most school personnel are hired pursuant to an annual contract. You inquire whether the grandfathering protection will apply if a relative of a district school superintendent is employed before the superintendent was elected or appointed, and then, following the election or appointment, the relative's annual contract is renewed by the school board upon recommendation of the superintendent.

In view of our findings earlier in this opinion and the high likelihood that no particular superintendent will be faced with a potential "grandfathering" situation, we decline at this time to opine on this point. However, should a superintendent be presented with a concrete grandfathering issue in the future, do not hesitate to contact us for advice.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 26, 2019, and **RENDERED** this 31st day of July, 2019.

Kimberly B. Rezanka, *Chair*

[1]The term "relative" is defined in Section 112.3135(1)(d), Florida Statutes, to mean ". . . father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister."

[2]No other statute directly addresses the hiring process for district school employees, although Section 1001.42(5)(a), Florida Statutes, gives district school board members appointment authority over district personnel and Section 1001.51(7), Florida Statutes, states district school superintendents are responsible "for directing the work of the personnel."

[3]While the bill analyses for the amendment do not address the addition of district school superintendents with any specificity, they do state the intent of the amendment was only to prohibit superintendents "from employing or appointing a relative to work under their direct supervision."

[4] In contrast to the language of Section 1012.23(2), that of Section 112.3135(2)(a), Florida Statutes, which does not apply to school districts, school boards, or school superintendents (see Opinion of the Attorney General AGO 82-48), contains a prohibition related to recommendations as well as an appointment/employment prohibition. It states a public official "may not appoint, employ, promote, or advance, or advocate for the appointment, employment promotion, or advancement" of a relative.