

IN THE EXECUTIVE ETHICS COMMISSION  
OF THE STATE OF ILLINOIS

IN RE: ANDREW M. SCHWARTZ, )  
 )  
 ) No. 18-EEC-010  
 )  
 ) Appeal of OEIG  
 ) Revolving Door  
 ) Determination

DECISION

This cause is before the Executive Ethics Commission (“Commission”) on appeal by Andrew M. Schwartz (“Appellant”) from a determination by the Office of the Executive Inspector General for Agencies of the Illinois Governor (“OEIG”). Appellant is represented by Katherine Exo. The Office of the Attorney General is represented by Assistant Attorney General John Wolfsmith.

FINDINGS OF FACT

The record of proceedings has been reviewed by the members of the Executive Ethics Commission. The record consists of (i) Andrew M. Schwartz’s June 13, 2018 appeal of an OEIG Revolving Door “Restricted” determination, (ii), the Office of the Attorney General’s June 18, 2018 Objection, (iii) Andrew M. Schwartz’s June 21, 2018 reply, and (iv) public comments from Darlene Harney, Rebecca Gold, Russell T. Hayes, and Frederick S. Frankel.

Based upon this record, the Commission makes the following findings of fact:

1. At all times relevant to this matter, Andrew M. Schwartz (“Schwartz” or “Appellant”) was an employee of the Illinois Department of Public Health (IDPH), serving in the capacity as Assistant General Counsel.
2. In this role, Appellant’s duties include acting as an IDPH prosecutor in administrative proceedings, including those involving long-term care licensure violations. As a prosecutor, his responsibilities include advising on settlement proposals from opposing parties and trying the case or preparing settlement documents. According to IDPH’s General Counsel, once Appellant has reached a settlement offer that he believes is fair, he sends the terms of the settlement and his legal recommendation to the Office of Healthcare Regulation. That Office concurs with the recommendation of legal counsel “approximately 99 percent of the time.”
3. IDPH identified Appellant as an employee, who, by the nature of his duties, has the authority to participate personally and substantially in licensing or regulatory decisions, thereby subjecting him to revolving door restrictions found at 5 ILCS 430/5-45(c).

4. Appellant is seeking employment as an attorney with Aperion Care, Inc. (Aperion). Aperion is an Illinois corporation that purports to manage approximately 40 skilled nursing facilities in Illinois and other states. Aperion is owned by Yosef Meystel. Its attorney is Frederick S. Frankel, who also represents individual Aperion long term care facilities in proceedings before IDPH.
5. The corporate structure and daily management relationship between Aperion and its 40 skilled nursing facilities is not perfectly clear from the facts presented to the Commission. The corporate web site, [aperioncare.com](http://aperioncare.com), lists the locations and recruits staff for the individual facilities. It describes the staff at the facilities as “our multi-disciplinary teams.” (Emphasis added.) Also, as mentioned above, Aperion’s General Counsel, Frederick S. Frankel, represents the individual facilities in proceedings before the Illinois Department of Public Health.
6. In Appellant’s RD-101, signed by Appellant, he affirms that he “participat[ed] in a licensing or regulatory decision with respect to [his] prospective employer or client, its parent, or its subsidiary.”
7. In Aperion’s RD-103, signed by Thomas Lindsey, Director Talent Management for Aperion, Lindsey answered yes to the question “4) In the year prior to the prospective employee’s or contractor’s termination of state employment, was the prospective employer or client, its parent, or its subsidiary subject to any licensing or regulatory actions by a state agency with which the prospective employee or contractor was employed.”
8. In Aperion’s RD-103, signed by Thomas Lindsey, Director Talent Management for Aperion, Lindsey answered yes to the question “5) If you answered “yes” to any of Questions 2-4, please indicate whether the prospective employee or contractor had any role, no matter how minor, in those contracting actions (including the award of grants or change orders) or regulatory/licensing actions.”
9. In Aperion’s RD-103, signed by Thomas Lindsey, Director Talent Management for Aperion, Lindsey described Appellant’s anticipated duties, responsibilities or services to be provided as “Primarily responsible for identifying areas of legal risk and loss prevention throughout our facilities.”
10. Frederick S. Frankel asserts, however, in his public comment “Aperion is in no way involved in the day to day operations or decision making of the facilities.” Appellant has not, however, in its response or elsewhere, clarified the relationship between Aperion Care, Inc. and the facilities.
11. On May 18, 2018, Appellant was offered a position with Aperion’s legal department. In that position, Appellant would be supervised by Aperion’s Frederick S. Frankel. On the prior day, May 17, 2018, Appellant participated in a prehearing conference concerning a private citizen complaint to defend the Department’s investigation (In re Complaint No.

97964, NH 18-G-0028). Frederick S. Frankel also appeared at this conference on behalf of the facility.

12. During the year prior to his proposed separation from State employment, Appellant represented IDPH in six matters concerning Aperion facilities. Four involve matters where proceedings were initiated by complainants after IDPH declined to issue a notice of violation to Aperion facilities. Two involve matters where Aperion has initiated proceedings to contest IDPH's finding of violations. The argument of the Office of the Attorney General focuses on these two matters.
13. The first matter, *IDPH v. Aperion Care Chicago Heights*, NH 17-C-356, remains pending as of June 4, 2018. Appellant recommended dismissal of this matter, noting "weaknesses in the case" and advising the division chief that it was likely that IDPH would not meet its burden of proof at hearing. The division chief concurred with Appellant's recommendation. In the meantime, Appellant continues to represent IDPH until an administrative law judge rules on Appellant's recommendation of dismissal. In this matter, Aperion Care Chicago Heights is represented by Frederick S. Frankel, Appellant's potential supervisor at Aperion.
14. The second matter, *IDPH v. Aperion Care Evanston*, NH 17-S-505, was resolved in February 2018. In this matter, Appellant represented IDPH and negotiated, recommended, and drafted a settlement agreement. Again, Aperion was represented by Frederick S. Frankel, Appellant's potential supervisor at Aperion.
15. As described above, on forms RD-101 and RD-103, Appellant and Aperion Care Inc.'s representative, respectively, affirmed that Appellant participated in a licensing or regulatory decision with respect to the prospective employer or client, its parent or subsidiary.
16. On June 4, 2018, the OEIG issued a restricted revolving door determination, based upon Appellant's personal and substantial participation in regulatory decisions that directly applied to Aperion.
17. In accordance with 5 ILCS 430/5-45(g), the Executive Ethics Commission has sought written public opinion on this matter by posting the appeal on its website and posting a public notice at its offices in the William Stratton Building.

#### CONCLUSIONS OF LAW

1. An Executive Inspector General's determination regarding revolving door restrictions may be appealed to the Commission by the person subject to the decision or the Attorney General no later than the 10th calendar day after the date of the determination. 5 ILCS 430/5-45(g).

2. Appellant's appeal of the OEIG's June 4, 2018 revolving door determination is properly before the Commission and the Commission has jurisdiction to consider the appeal.
3. Subsection (b) of the revolving door section of the State Officials and Employees Ethics Act provides:

(b) No former officer of the executive branch or State employee of the executive branch with regulatory or licensing authority, or spouse or immediate family member living with such person, shall, within a period of one year immediately after termination of State employment, knowingly accept employment or receive compensation or fees for services from a person or entity if the officer or State employee, during the year immediately preceding termination of State employment, participated personally and substantially in making a regulatory or licensing decision that directly applied to the person or entity, or its parent or subsidiary.

5 ILCS 430/5-45(b)

4. Appellant is subject to 5 ILCS 430/5-45(c), since, by the nature of his duties, he may have the authority to participate personally and substantially in the award of State contracts or in regulatory or licensing decisions.
5. Subsection (f) of the revolving door section of the State Officials and Employees Ethics Act provides:

Any State employee in a position subject to the policies required by subsection (c) or to a determination under subsection (d), but who does not fall within the prohibition of subsection (h) below, who is offered non-State employment during State employment or within a period of one year immediately after termination of State employment shall, prior to accepting such non-State employment, notify the appropriate Inspector General. Within 10 calendar days after receiving notification from an employee in a position subject to the policies required by subsection (c), such Inspector General shall make a determination as to whether the State employee is restricted from accepting such employment by subsection (a) or (b)... A determination by an Inspector General must be in writing, signed and dated by the Inspector General, and delivered to the subject of the determination within 10 calendar days or the person is deemed eligible for the employment opportunity.

5 ILCS 430/5-45(f).

6. Subsection (g) of the same section provides:

(g)...In deciding whether to uphold an Inspector General's determination, the appropriate Ethics Commission or Auditor General shall assess, in addition to any other relevant information, the effect of the prospective employment or

relationship upon the decisions referred to in subsections (a) and (b), based on the totality of the participation by the former officer, member, or State employee in those decisions.

5 ILCS 430/5-45(g)

7. A State employee may be personally and substantially involved in a regulatory decision even though he or she was not the final decision maker.
8. Appellant argues that since no final decision has been made in one of the matters he is prosecuting, *Aperion Care Chicago Heights*, Appellant's involvement in that matter cannot have triggered the revolving door prohibition. The revolving door statute, however, does not require that a final decision be made to trigger the revolving door prohibition. The fact that Appellant has been negotiating employment with an opponent while the matter remains pending is particularly troubling.
9. During the year prior to his proposed termination of State employment on June 15, 2018, Appellant was personally and substantially involved in making regulatory or licensing decisions with respect to his prospective employer on two occasions:
  - a. First, in *IDPH v. Aperion Care Chicago Heights*, NH 17-C-356, as he continues to represent IDPH in the prosecution of this matter and has recommended that IDPH dismiss the matter, and
  - b. Second, in *IDPH v. Aperion Care Evanston*, NH 17-S-505, when he represented IDPH and negotiated, recommended, and drafted a settlement agreement.
10. While the Ethics Act does not define "parent" or "subsidiary," it appears that Aperion Care, Inc. exercises significant control over the facilities. It maintains a web site for the individual facilities and coordinates hiring for the facilities through that web site. Aperion Care, Inc.'s legal counsel represents the facilities in proceedings before the Illinois Department of Public Health.
11. Furthermore, both Appellant and Aperion Care, Inc. have acknowledged in the RD-101 and RD-103, respectively, that Appellant was involved in licensing or regulatory decisions that applied to Aperion Care, Inc., or its parent or subsidiaries.
12. The Commission encountered a similar corporate structure issue in *In re: Esuarte*, 13-EEC-019 (April 26, 2013). In that matter, the management company also exercised considerable control over facilities. Based upon this control and assertions made by the management company, the Commission determined that Esuerte participated personally and substantially in making regulatory or licensing decisions that directly applied to the management company.
13. Considering all relevant information and the effect of the prospective employment upon the regulatory or licensing decisions referred to in subsection (b) of 5 ILCS 430/5-45,

based upon the totality of the participation by the employee in those decisions, the Commission finds that Appellant Andrew M. Schwartz participated personally and substantially in making regulatory or licensing decisions that directly applied to Aperion, within one year of his termination of State employment.


WHEREFORE, for the foregoing reasons, the Commission affirms the Office of the Executive Inspector General's June 4, 2018 determination and rejects this appeal. Andrew M. Schwartz may not pursue his employment opportunity with Aperion Care, Inc.

The Commission also notes that Appellant's negotiation for private employment may run afoul of one or more Rules of Professional Conduct. This matter shall be referred to the Illinois Attorney Disciplinary Commission.

SO ORDERED.

DATE: June 25, 2018

The Executive Ethics Commission

By:   
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Chad D. Fornoff  
Administrative Law Judge  
Executive Director