

[Advisory Opinion 1996-16]

September 17, 1996

[Name1 withheld]

Re: Request for Advisory Opinion/Waiver

Dear [Name1 withheld]:

You have asked for advice and a waiver to permit you to accept a contract with the Human Relations Commission (HRC) while serving as a member of the Employment Panel of the HRC. The contract involves the preparation of a fair housing plan for the HRC to consider. Although your membership on the Employment Panel is uncompensated, the contract would be a paid position.

As a member of the Employment Panel, you are governed by the County's Ethics Law. The Law defines a public employee as "any person appointed by the County Executive . . . to a board, commission . . . or similar body, whether or not . . . the person is compensated for serving on the body . . ." Section 19A4(m)(3)(A) of the Montgomery County Code 1994, as amended. The Ethics Law identifies certain conflict of interest situations and prohibits public employees from participating in such situations. See Section 19A-11 of the Montgomery County Code 1994, as amended. In addition, a public employee must not "[b]e employed by any business that . . . is regulated by the County agency with which the public employee is affiliated; or . . . negotiates or contracts with the County agency with which the public employee is affiliated. . . ." Section 19A-12(b)(1) of the Montgomery County Code. See also 11B-52 of the Montgomery County Code (prohibiting County contractors from hiring County employees).

Pursuant to Section 19A-12(b), an employee should obtain a waiver before applying for a contract with her own agency, due to the prohibition against negotiating with the County while a public employee. In your situation, you have applied for, been offered, and wish to accept, a contract to perform work for the agency with which you are affiliated. At this late stage in the process, you nonetheless need a waiver in order to contract with the County and to remain a member of the Employment Panel. The standard governing waivers of Section 19A-12(b) requires the Commission to find that:

- (1) the waiver is needed to ensure that competent services to the County are timely and available;
- (2) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or
- (3) the proposed employment is not likely to create an actual conflict of interest.

Section 19A-8(b) of the Montgomery County Code. The standard governing waivers of Sections 19A-11 and 11B-52 is set forth in Section 19A-8(a). In part, the Commission is required to find that "the best interests of the County would be served by granting the waiver."

Based upon the information provided, the Commission must deny the request for a waiver and advise you that, in order to accept the contract, you must resign from your position on the Employment Panel of the HRC. The Commission is not persuaded that the best interests of the County would be served by granting the waiver. Despite your considerable qualifications, there is also insufficient information suggesting that the Employment Panel will be unable to perform its work if you must resign. Similarly, there is insufficient information establishing that the County's ability to retain qualified employees on the Employment Panel will be reduced if the waiver is not granted. Finally, your dual role as a member of the HRC and a contractor with the HRC would create an actual conflict of interest. The contract requires you to coordinate with and perform work for the commission on which you serve.

For these reasons, the Ethics Commission advises you that the waiver request is denied and that you may not continue to serve on the Employment Panel concurrently with acceptance of the contract to prepare a fair housing plan. You may participate on either the Panel or accept the contract and resign from the Panel.

In conclusion, the Ethics Commission is extremely concerned about the process that was used to select a contractor. The appearance of impropriety in this instance is significant. No waiver was obtained prior to the bid submission and only one application was received by the HRC. The Ethics Commission does not view these facts as ideal and hopes that public employees and the HRC will handle future requests for proposals differently.

If you have any questions regarding this decision, please do not hesitate to contact the Commission

Sincerely,
[signed]
Laurie Horvitz, Chair
Montgomery County Ethics Commission