

[Advisory Opinion 1996-2]

January 25, 1996

[Name1 withheld]

Re: Request for Advisory Opinion and/or Waiver

Dear [Name1 withheld]:

You have requested a waiver to respond to a request for expressions of interest (REOI) to be issued by your employer, the Department of Health and Human Services (HHS). In your letter to the Commission, you explain that the Department is approving you for discontinued service retirement effective June 28, 1996. You state that you would like to pursue related work after retirement by applying for the contract with the department to provide school health services. You are currently the Director of School Health Services. The HHS contract team writes the REOI but the management team in School Health Services submits information to the Contract Team. You anticipate that the Request for Proposals (RFP) will be issued in the next couple of months by the department.

At this juncture, there is insufficient information available for the Commission to review your waiver request. Specifically, the REOI and RFP have not been issued, so the details of the proposals are not available for consideration. The Commission cannot evaluate the merits of your request without a greater understanding of your current responsibilities and their precise relationship to the REOI and RFP. Therefore, the Commission will provide you with the following advisory opinion and suggests that you return to the Commission when more detailed information is available.

While you are still a County employee, you are governed by a number of ethics provisions. Section 19A-11 of the Ethics Code addresses conflicts between private interests and public duties. That section states, in part:

- (a) *Prohibitions.* Unless permitted by a waiver, a public employee must not participate in:
 - (1) any matter that affects, in a manner distinct from its effect on the public generally, any:
 - (A) property in which the public employee holds an economic interest;
 - (B) business in which the public employee has an economic interest;
 - * * *
 - (2) any matter if the public employee knows or reasonably should know that any party to the matter is:

(A) any business in which the public employee has an economic interest or is an officer, director, trustee, partner, or employee;

* * *

(C) any business with which the public employee is negotiating or has any arrangement about prospective employment;

* * *

Unless an employee obtains a waiver, Section 19A-11 requires the employee to recuse himself from public duties that conflict with certain private interests. Your private plans for prospective employment may ultimately conflict with your official duties. You may wish to recuse yourself from certain activities associated with the development of the REOI and the RFP. By recusing yourself now, you may avoid a conflict of interest, and, simultaneously, improve your post-retirement options.

If the REOI or RFP is issued before your retirement, you may decide that further recusal from your public duties is necessary or prudent. If recusal is not possible, then you may apply for a waiver pursuant to 19A-8(a). That waiver standard provides:

After receiving a written request, the Commission may grant . . . a waiver of the prohibitions of this Chapter . . . if it finds that:

- (1) the best interests of the County would be served by granting the waiver;
- (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give the public employee or class of employees an unfair economic advantage over other public employees or members of the public.

Based on current information, the Commission cannot render an advisory opinion stating that you may respond to an REOI while you are still employed by the County. If the REOI is issued while you are still a County employee, you may contact the Commission again with more specific information.

The first issue that you will face as a former employee seeking to work under a contract with the County involves the restrictions imposed on former public employees for a one-year and a ten-year period. The Ethics Law provides:

- (a) A former public employee must not accept employment or assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.
- (b) For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or

tacit) with any person or business that contracts with a County agency if the public employee:

- (1) significantly participated in regulating the person or business; or
 - (2) had official responsibility concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).
- (c) Significant participation means direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

§19A-13 of the Montgomery County Code 1994, as amended.

Because of your current position regarding school health services, you would be precluded from handling certain matters for at least one year. If it is feasible, you could recuse yourself from those duties that would fall within the above-quoted language. The nature of your duties as Director of School Health Services may also constitute “significant participation” for purposes of the ten-year prohibition, but additional information would be necessary in order to make that determination.

In addition, you may not use confidential information gained during your County employment in furtherance of personal or private endeavors. This would extend to your pursuit of contracts with the County upon your retirement from public employment.

§19A-15(a) of the Montgomery County Code 1994, as amended.

Once the details of the REOI or RFP are known, please feel free to return to the Commission to request a waiver of the rules governing former employees. At that time, you should provide sufficient information for the Commission to address the provisions or §19A-13 of the Ethics Law, quoted above, as well as the following elements of the applicable waiver:

After receiving a written request, the Commission may waive the prohibitions of Section 19A-12(b) if it finds 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.

§19A-8(b) of the Montgomery County Code 1994, as amended.

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

Sincerely,
[signed]

Laurie Horvitz, Chair,
Montgomery County Ethics Commission