

**[Waiver 1995-2]**

TO: Bruce Romer  
Chief Administrative Officer

FROM: Jay L. Cohen, Chair  
Montgomery County Ethics Commission

RE: Request for Outside Employment Approval and/or Waiver for Office of  
Economic Development Appointment

You have requested outside employment approval and/or a waiver to allow the County to appoint Mr. David Edgerley as the Director of the Office of Economic Development (OED). The following information has been provided by you through memoranda, attachments, and supplemental comments provided during your attendance at the meetings of the Ethics Commission on July 11, 1995, and August 30, 1995. The Commission also received, considered and relied upon information and comments voiced during its meetings by the County Attorney, Charles W. Thompson, Jr.; the President of Montgomery College, Dr. Robert Parilla; the Director of Human Resources for Montgomery College, Frank Tusa; the Chairman of the Board of Trustees for Montgomery College, Michael Gildea; the applicant, David Edgerley; and other representatives of the College and County Executive's office.

**Background**

As you explained to the Commission, for the past nine months the Department of Economic Development ("OED") has been without the leadership of a director. After extensive interviews of candidates recommended by numerous sources, you have selected Mr. Edgerley as the candidate who would best serve in this position and most effectively promote economic development in Montgomery County. You have advised us that, based on this exhaustive selection process, you have found Mr. Edgerley to be uniquely qualified for this appointment and have strongly argued that it is in the best interest of the County to retain him.

Mr. Edgerley is currently employed as the Director of Economic Development for Alleghany County and has participated in the Maryland State Retirement System for over 17 years. Due to the nature of this retirement system and the system currently in place in Montgomery County, we have been advised that Mr. Edgerley would forfeit substantial retirement benefits if he were hired directly by the County. He has indicated his desire to remain in the State Retirement System so that his retirement benefits will not be diminished. For this reason, a unique and creative partnership agreement between Montgomery County and Montgomery College has been forged to provide an opportunity to retain Mr. Edgerley while serving the best interests of Montgomery County.

In discussions with the Ethics Commission, you have cited a study of community colleges "Blueprint for Quality: Final Report of the Committee on the Future of

Maryland Community Colleges” which states that “community colleges should be recognized and used as a major economic development resource in their community and State for manpower training and small business support.” Utilizing this philosophy, you have proposed that the County and the College promote a coordinated approach to economic development by hiring a single person to serve as both Director of Economic Development (for Montgomery County) and as Special Assistant to the President of Montgomery College. By hiring Mr. Edgerley to this joint position through the College (which is under the State Retirement System), he could continue his participation in his current retirement plan while serving as a county employee. Under the partnership agreement between the County and College, Mr. Edgerley will be paid directly by the College. In turn, the College will receive a grant from the County to cover the salary and fringe benefits associated with Mr. Edgerley’s position. Mr. Edgerley’s salary and benefits package is reportedly comparable to that of other Department Directors in Montgomery County, and to the College’s employee benefits packages.

Although the partnership concept originated as a means to protect Mr. Edgerley’s retirement status within the State Retirement System, the specific terms of the partnership have developed into a logical cooperative effort between State and County entities that you anticipate will achieve long-term mutually beneficial results. The County has expressed an intention to use the College more effectively in the County’s economic development efforts, and has noted that the County Government is the largest single source of funding to Montgomery College. Written and verbal communications represent that the County and the College will both be involved in the recruiting of new businesses and the servicing of existing companies. Finally, the College has represented to the Commission that the focus of Mr. Edgerley’s duties would be on economic development for Montgomery County and that Mr. Edgerley would not be expected or required to serve as a spokesman for the College or to conduct fundraising activities for the College.

### **Other Approvals**

We understand that Montgomery College has sought and received guidance from the State Ethics Commission<sup>1</sup>. The State’s informal reply to the College’s inquiry advised that “[t]hrough the arrangement between the College and the County is unique and presents some possible concerns, these do not appear to be ethics issues.” Explaining further, the State’s informal response set forth the following rationale for its position:

“Mr. Edgerley will be employed by the College as a regular employee with College requirements and benefits, and part of his official duties in that capacity will be assignment to provide services to the County pursuant to an agreement between the County and the College. The Commission has tended in the past not to apply the Ethics Law to establish restrictions in situations involving agency management decisions regarding assignment of staff and allocation of agency personnel resources.”

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<sup>1</sup>August 18, 1995, letter from State Ethics Commission to Montgomery College.

Additionally, we understand that the State Retirement Board has voted to include the newly created position of “Special Assistant to the President” of Montgomery College under the Maryland Teachers’ Retirement System so long as Mr. Edgerley remains as an employee of Montgomery College and a “professional” employee.<sup>2</sup>

### **Applicable Law**

The pertinent sections of the Ethics Law are as follows:

Section 19A-4(m)(2) & (5) defines “public employees” in pertinent part:

*[P]ublic employee means:*

\* \* \*

- (2) any person employed by a County agency, including the director of the agency;

\* \* \*

- (5) any other person providing services without compensation to a County agency if that person:
  - (A) exercises any responsibility for government-funded programs, procurement, or contract administration for an agency; or
  - (B) has access to confidential information of an agency that relates to government-funded programs, procurement, or contract administration.

Section 19A-11 governing conflicts of interest states in pertinent 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; or . . .
- \* \* \*
- (2) any matter if the public employee knows or reasonably should know that any party to the matter is:

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<sup>2</sup>August 28, 1995, letter from State Retirement Agency to Director Human Resources, Montgomery College.

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

Section 19A-12 governing outside employment states in pertinent part:

- (b) *Specific restrictions.* Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:
  - (1) be employed by any business that:

\* \* \*
  - (B) negotiates or contracts with the County agency with which the public employee is affiliated; or
  - (2) hold any employment relationship that would impair the impartiality and independence of judgment of the public employee.

Section 19A-8(a) provides the test<sup>3</sup> for waivers of Conflicts of Interest

- (a) After receiving a written request, the Commission may grant to a public employee . . . a waiver of the prohibitions of this Chapter . . . if it finds:
  - (1) the best interests of the County would be served by granting the waiver;
  - (2) the importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
  - (3) granting the waiver will not give a public employee an unfair advantage over other members of the public. (Emphasis Supplied)

Section 19A-8(b) provides the test for waivers in Secondary Employment:

- (b) After receiving a written request, the Commission may grant a waiver of the prohibitions of subsection 19A-12(b) . . . if it finds:
  - (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. (Emphasis Supplied).

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<sup>3</sup> The Ethics Law provides two different standards for the review of waiver requests. Waivers to the conflict of interest provisions set forth in Section 19A-11 are governed by the more stringent test set forth in Section 19A-8(a). Waivers to the outside employment provisions set forth in Section 19A-12 are governed by the less stringent test set forth in Section 19A-8(b).

## Analysis

**Public Employee.** The first issue which must be addressed is whether or not the proposed joint employment would result in Mr. Edgerley being a “public employee” of Montgomery County for purposes of the Montgomery County Ethics Law.

The question of whether or not any person holding this new hybrid position would qualify as a “person employed by a County agency” [Section 19A-4(m)(2)] is a question which has never before been precisely raised to the Commission for its consideration. Interesting arguments can be made both for and against the inclusion of this hybrid position under the County’s Ethics Law. For instance, since the proposed partnership between Montgomery County and Montgomery College contemplates that it is the College which will formally hire and pay Mr. Edgerley, it could be argued that he would be a College “employee” and not an “employee” of Montgomery County. On the other hand, given the fact that the County will be providing the funds for his salary and benefits to the College through a special grant, that he would have the title of “Director, OED”, that he would be supervising County employees, and that he would be reporting directly to the County’s Chief Administrative Officer, it also could be argued that Mr. Edgerley would be an “employee” of the County.

Based on the language in Section 19A-4(m)(5) concerning the applicability of the Ethics Law to persons who provide certain kinds of services even without compensation, it is clear that the individual holding this hybrid position must be considered to be a “public employee” under the Ethics Law. This result is compelled by the fact that the Director of OED exercises significant responsibility for government-funded programs, procurement and contract administration for the agency, and has access to confidential information by virtue of his position with the agency. As a result, the Commission finds that the individual holding this hybrid position must be treated as a public employee for purposes of the Ethics Law.

**Conflict of Interest.** The next issue presented by this request involves conflicts of interest as defined by Section 19A-11 of the Montgomery County Ethics Law. Under subsections (a)(1) and (a)(2) of that law, as quoted above, it is clear that the hiring of a single individual to serve as Montgomery County’s Director of OED and simultaneously as a Special Assistant to Montgomery College would inevitably put the employee in a posture of participating in matters that affect both Montgomery County and Montgomery College (a business in which he has an economic interest), and may put the individual in a posture of participating in a County matter where the College is a party to the transaction.

As noted above, under such circumstances this Commission can grant a waiver only if the three prong test set forth in Section 19A-8(a) is met.

The first prong deals with determining whether or not the best interests of the County would be served by the waiver. Based on the nature of the County’s search, and

its representation that Mr. Edgerley is uniquely qualified for this position, the Commission finds that the best interests of the County would be served by granting this waiver.

The second prong deals with weighing the importance of the public official performing his or her official duties against the actuality or potentiality of any harm which might flow from the particular conflict of interest. Here the answer is not as straightforward.

As an employee of both the County and the College, Mr. Edgerley will report to two different masters and will serve the interests of two different organizations. Whenever the interests of his two masters are the same, then the potential harm from this conflict is small. If, however, the interests of his two employees diverge, then harm may flow from the conflict of interest.

The Commission has carefully examined the likelihood and character of such possible conflicts. Both the County and the College have stated repeatedly that the interests of the College and the County are complementary and compatible with respect to economic development issues. They argue that economic growth benefits both the County and the College. They further contend that the College can serve as a valuable asset in the County's development efforts. The Commission understands the often complementary relationship of the College and the County, but must also focus on the rare or occasional circumstances where the College and the County possess divergent interests or priorities. For example, the College might favor the aggressive pursuit of businesses employing College graduates or requiring extensive employee retraining. By contrast, the County might prefer to recruit companies that provide comparable revenues to the County tax base but do not provide a direct benefit to the College. These possible conflicts were discussed at length with County and College personnel. The Commission was reassured that such hypothetical conflicts are unlikely because of the common benefits gained by both the County and the College from all economic development.

After careful consideration, the Commission has concluded that such divergent interests are likely to be rare. In reaching this conclusion, the Commission has relied heavily upon the representations of County and College personnel. The Commission was greatly influenced by College assurances that: (1) the Director's allegiances will be owed predominantly to the County and (2) the College views itself as a facilitator of County development. This self-perception is supported by the College's mission statement and the "Blueprint for Quality: Final Report of the Committee on the Future of Maryland Community Colleges." Finally, the Commission noted the fact that the job of Director OED is a highly visible and public position, two factors which may mitigate against potential harm which could arise if the potential conflict were hidden from public view. The Commission thus concluded that—with the addition of various conditions and restrictions as further described in the Conclusion below—the benefits which will flow to the County under this arrangement will substantially outweigh the potential harm.

Under the last prong, the Commission must find that the granting of this waiver would not give the employee an “unfair advantage” over other members of the public. While it appears to the Commission that Mr. Edgerley is being given an advantage which is rather unique, the Commission has determined that, in this instance, the advantage is not “unfair”.

The particular advantage involved in this case is the creation of dual employment positions with both Montgomery County and Montgomery College which result in protecting Mr. Edgerley’s seventeen years of pension contributions into the state pension system. In reaching this conclusion the Commission has relied upon the following representations made by the County and the College: (1) That the costs of providing retirement under the current State and County plans are comparable, (2) That Mr. Edgerley would lose substantial pension benefits that he has accumulated thus far with the State were he to switch at this juncture, (3) That in the past it was possible to transfer between the State and County retirement systems without this penalty, but that recent changes to the retirement law have effectively eliminated this option for Mr. Edgerley, (4) That the problem encountered by Mr. Edgerley is rare because it could affect only a very small number of State workers who are still participating under the old State pension system but have not yet reached an age permitting their early retirement.

**Secondary Employment.** The remaining issue of concern to the Commission involves granting of a waiver under Section 19A-8(b) for Mr. Edgerley’s secondary employment with Montgomery College. Since the employment with Montgomery College could be viewed as one which could potentially “impair the impartiality and independence of judgment of the public employee” [Section 19A-12(b)(2)], a waiver is needed prior to engaging in such secondary employment.

The standards for a waiver under Section 19A-8(b) are much less difficult to attain than those under Section 19A-8(a). As noted above, in this case it seems apparent that this waiver “is needed to ensure that competent services to the County are timely and available” [Section 19A-8(b)(1)] and that the failure to grant this waiver will reduce the ability of the County to hire the individual which it has determined to be uniquely qualified for this position [Section 19A-8(b)(2)]. Since this secondary employment waiver only requires a finding under one of its three prongs<sup>4</sup> in order to issue a waiver, it is apparent that such a waiver should be granted in this case.

### **Conclusion**

In an effort to reduce the likelihood of any conflicts, the Commission has imposed a number of conditions upon its approval of the requested partnership and secondary employment.

1. This waiver is granted for a period of one (1) year from the date of Mr. Edgerley’s confirmation by the County Council. Renewal of this waiver is contingent upon

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<sup>4</sup> Given the conditions imposed under this waiver the Commission further believes that “the proposed employment is not likely to create an actual conflict of interest.” [Section 19A-8(b)(3)]

- the Commission's review of a report by Mr. Edgerley and the Chief Administrative Officer concerning their experiences during this initial year. This report shall include a description of the actual interplay of the two positions and any conflicts (actual or potential) which may have arisen during said initial year.
2. Mr. Edgerley's primary responsibilities shall be to serve as the Director of OED, while his duties as Special Assistant to the President of Montgomery College shall be secondary.
  3. Mr. Edgerley shall not act as a public spokesman for the College.
  4. Mr. Edgerley shall not solicit funding or grants on behalf of the College. Furthermore, Mr. Edgerley shall not identify County grants for the College except to the extent that he ordinarily identifies such County grants to members of the general public.
  5. Mr. Edgerley shall not divulge to the College any confidential information obtained through his County position. See §19A-15(a) of the Ethics law.
  6. Mr. Edgerley must recuse himself from any transactions which involve as parties, both Montgomery County Government and Montgomery College. See §19A-11(2)(A) of the Ethics Law. See Also §19A-12(b)(1)(B) of the Ethics Law. Neither provision has been waived by this letter.
  7. This opinion shall be provided by you to the County Council prior to Mr. Edgerley's confirmation interview to be conducted by the Council. Furthermore, this opinion shall be placed in the public record prior to the Council's action on Mr. Edgerley's confirmation.
  8. This waiver is based upon the attached position description for the Special Assistant to the President of Montgomery College. If any additional changes are made to this position description, an additional waiver may be necessary.

Based on these determinations, the Commission grants this conditional waiver as set forth above. If you have any questions concerning the decision, please do not hesitate to contact the Commission.

cc: Charles W. Thompson, Jr., County Attorney  
Barbara McNally, Executive Secretary, Montgomery County Ethics Commission