



MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion No. 03-011

A public employee (Employee) has requested permission to engage in secondary employment consisting of writing a book and consulting on a movie.¹ Although the book and movie are intended to be life-spanning memoirs, a portion of each will recount the Employee's lead role in a recent high profile case in the Montgomery County and surrounding areas. It is fair to say that these events, which garnered world-wide attention, will be the main draw of the book and the movie.

We conclude that the Employee cannot engage in the requested activity because the Employee does not meet the standard for a waiver of the ethics law's prohibition against the use of prestige of office for private gain.²

The proposed book and movie implicate four sections of the ethics law:

- § 19A-14(a) prohibition against the use of prestige of office for private gain
- § 19A-14(b) prohibition against the use of County or agency title or insignia without approval of the Chief Administrative Officer
- § 19A-14(c) use of County agency facility, property, or work time
- § 19A-15(a) prohibition against the disclosure of confidential information

The Employee arguably could write the proposed book and consult on the movie in a manner consistent with all of these prohibitions except one — prestige of office. The Commission must grant the Employee a waiver from that prohibition if the Employee is to engage in the proposed outside employment.

¹ Section 19A-12(a)(1) Montgomery County Code (1994), as amended, provides that a public employee must not engage in any other employment unless approved by the Commission. Unless otherwise indicated, all references are to the County Code.

² The Commission has considered the following documents: (1) employee's February 11, 2003, Request for Employment Outside of the County Service forms (one for the book and one for the movie), (2) February 12, 2003, cover letter from the Chief Administrative Officer (CAO), (3) March 10, 2003, letter from the employee, (4) March 10, 2003, cover letter from the employee's attorney, (5) March 12, 2003, letter from the County Executive, and (6) the employee's oral presentation to the Commission, along with the employee's wife and the CAO, at the Commission's March 3, 2003, meeting.

Prestige of Office

While the prestige of office prohibition directly proscribes an employee from intentionally misusing the influence of the employee's position, a public employee also violates the prohibition against the use of prestige of office for private gain by accepting remuneration for any service directly and immediately related to that employee's governmental activities. The Commission recently stated this rule in Advisory Opinion No. _____ (Dec. 20, 2002). The specific issue in that case involved command police officers who received requests to speak at law enforcement seminars about their recent experience with the sniper shootings. The requests included offers of "honoraria" for speaking at these events. The Commission concluded that "giving a presentation or participating as a panelist, for a fee or honorarium, in the discussion of a subject that is directly and immediately related to one's governmental activities constitutes the use of the prestige of one's office, and, therefore, is prohibited."

Accepting remuneration for services directly and immediately related to an employee's governmental activities violates the prestige of office prohibition because, to paraphrase the state ethics commission, those services "go with the job."³ In other words, a public employee, so long as he or she remains a public employee, cannot receive any gain beyond his or her salary for providing outside services directly and immediately related to his or her job. That is not to say, for example, that a county attorney cannot teach a class on local government law or a police officer cannot write a book on hostage negotiation tactics. But it is a different matter if the county attorney is to be paid for recounting his handling of a specific case or the police officer paid to recount her day-to-day involvement in a high-profile hostage drama.

For prestige of office purposes, it does not matter whether the remuneration is characterized as a fee or honorarium because § 19A-14(a) broadly prohibits use of the prestige of office "for private gain or the gain of another." If, however, the service offered by the public employee is not directly and immediately related to the employee's governmental activities, and thus does not implicate the ethics law's prohibition against the use of prestige of office, the fee/honorarium distinction would be important in determining whether the remuneration is a gift (honorarium)⁴ or fee for service (employment).

Waiver of the prohibition against use of prestige of office

³ Opinion No. 80-7 (May 5, 1980), available at COMAR 19A.80.07.

⁴ Payment for writing a book is statutorily excluded from the definition of "honorarium" under the state ethics law. Md. Code Ann., State Gov't § 15-102(r)(2).

The Employee cannot engage in the proposed outside employment without a waiver of the prohibition against the use of prestige of office. The ethics law contains three separate waiver provisions. Two of those provisions are not at issue in this case.⁵ The most stringent provision, § 19A-8(a), applies to all other prohibitions contained in the ethics law, including waivers of the prohibition against using the prestige of office for personal gain.

Although the Commission is frequently called upon to apply the § 19A-8(a) waiver provision as it relates to a conflict of interest issues, this is the first time the Commission has been asked to apply it to the ethics law's prohibition against the use of prestige of office.⁶ Simply put, there are certain prohibitions in the ethics law (such as the prohibition against use of prestige of office or the disclosure of confidential information) that, until now, either no one has asked the Commission to waive or the employee was able to engage in the proposed outside activity in a manner consistent with those prohibitions. Nonetheless, § 19A-8(a) does allow the Commission to waive "the prohibitions of this Chapter," including the prohibition against the use of prestige of office for private gain.

Under § 19A-8(a), the Commission may waive the prohibition against the use of prestige of office for private gain only if it finds each of the following elements applies:

- (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 a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

Although the Employee has not persuaded the Commission that the Employee meets any of these tests, the Commission is particularly concerned about the first two.

Best interests of the County

The Employee and the County Executive suggest that the book and the movie would be

⁵ One of those provisions, § 19A-8(b), only applies to a waiver of § 19A-12(b) (outside employment with a business that is regulated by or contracts with the county). The other provision, § 19A-8(c), only applies to a waiver of § 19A-13 (employment of former public employees).

⁶ Once before an employee asked the Commission to waive the prohibition against the use of prestige of office, coincidentally in a request to write a book, the subject of which was directly and immediately related to that employee's governmental activities. But in that case, the Commission denied the waiver because the employee never provided the Commission with the information necessary to support the waiver request. Advisory Opinion 1994-5 (May 11, 1994) and Advisory Opinion 1994-8 (July 12, 1994).

good for the County because it would show County employees in a positive light, overcoming a difficult situation with a good result. The Employee also suggested that recounting the cooperation between local, state, and federal law enforcement officers would improve what have historically been sometimes strained relations among these different levels of government. But “the best interests of the County” cannot be made to depend upon the content of the book or movie. For example, how could the Commission deny a waiver, finding that the book or movie did not serve the best interests of the County, simply because it cast the employee as the one capable investigator among a sea of incompetent co-employees? The Commission must measure the best interests of the County without regard to the content of the proposed book or movie.

To be sure, the proposed book and movie would serve some County interests. The County Executive notes that the most obvious benefit would be retention of this high-ranking Employee. Although the County Executive acknowledges that he does not know for certain that the Employee would leave County service if the Commission denies the waiver request, he understandably “would like to avoid forcing that possibility.” The County Executive writes that the book and movie would allow County citizens “to better understand their police, the daily hazards they face and the impediments placed in their way.” Finally, the County Executive notes that the book and movie can aid the County in recruiting.

But the Commission is not persuaded by the County Executive’s reasoning because there may be more harm than good in granting the waiver. It is not in the best interest of the County to allow its employees to “trade on” their government activities for private gain in such a direct and immediate fashion. Such conduct leads citizens to question whether public employees are discharging their duties in the public interest or in furtherance of some private interest. This diminishes citizens’ faith in their public servants and erodes their trust in County government. These principles are at the core of the prohibition against using the prestige of one’s office for private gain and neither the County Executive nor the Employee has convinced the Commission that this situation is a good platform to begin waiving those principles.

There are specific pitfalls to be avoided here. Waiving the prohibition against the use of prestige of office could lead to undesirable behavior. Employees permitted to gain from their public service beyond their paychecks might be tempted to consider their personal interests above the County’s interests when dealing with matters in the public eye. The County’s best interests are not served if employees are jockeying for position in high profile projects, anticipating the possibility of some larger return for their County service. Employees might act differently in high visibility matters because of concern about how it would affect their ability to trade on their experiences.⁷

⁷ The Commission is not suggesting that the Employee at any time considered personal interests when performing official duties in this matter.

Actual or potential harm of any conflict of interest

The Employee has not demonstrated that the importance to the County of the Employee performing official duties outweighs the actual or potential harm of any conflict of interest. The Employee's official duties call for the Employee to work cooperatively with prosecutors and other law enforcement officials to bring the defendants in the high profile case to justice. The Employee may, however unintentionally, impede that effort to the extent the Employee reveals the details of the investigation outside of the courtroom. Yet the Employee's personal gain may well be measured, in part, by the extent to which the Employee is willing and able to quench the public's thirst for all of those "inside" details.

Constitutional issues

The Employee suggests that the Commission will violate the Employee's First Amendment rights if it fails to grant the requested waiver. The Commission disagrees.

The Commission's opinion is supported by the federal government's conclusion that it can prohibit its employees from accepting outside compensation for teaching, speaking, or writing that relates to an employee's official duties, consistent with the First Amendment.⁸ That federal prohibition is limited to services that relate to the employee's official duties, unlike the broader federal honoraria ban that the Supreme Court⁹ struck down on First Amendment grounds. The Commission's conclusion that an employee violates the prohibition against the use of prestige of office for private gain by accepting remuneration for any service directly and immediately related to that employee's governmental activities is likewise constitutional.

Finally, the Employee's reliance on the Supreme Court's decision¹⁰ striking down New York's "Son of Sam" law, which regulated an accused or convicted criminal's receipt of income generated by works that described his crime, is inapposite. The Court struck down that law as an unsustainable content-based restriction upon speech. The County's ethics law is neither content nor viewpoint based and the Commission is applying the law in a content neutral fashion.

⁸ DO-00-031. September 7, 2000, memorandum from U.S. Office of Government Ethics Acting Director F. Gary Davis to Designated Agency Ethics Officials regarding enforcement of 5 C.F.R. § 2635.807. See also DO-98-034 at 5 and DO-96-012. Available at <http://www.usoge.gov/home.html>. So-called "DAEOGRAMS" are memoranda from the federal Office of Government Ethics to each executive branch Designated Agency Ethics Official (DAEO) providing guidance on how to interpret and comply with modifications or new issuances of conflict of interest, post-employment, standards of conduct, or financial disclosure policies and procedures.

⁹ *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995), striking down 5 U.S.C. § 501(b).

¹⁰ *Simon & Schuster, Inc. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

Conclusion

Because the Employee has not persuaded the Commission that the Employee meets the standard for a waiver of the ethics law's prohibition against the use of prestige of office, there is no need to consider the remaining sections of the ethics law identified above.

The concerns voiced here arise from the bedrock principles of the County's ethics law. In that vein, it is helpful to reaffirm the express legislative findings set out in § 19A-2 upon which the ethics law is based:

a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.

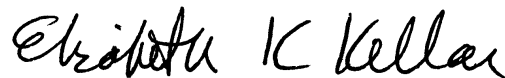
(b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

(c) To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.

(d) The Council intends that this Chapter, except in the context of imposing criminal sanctions, be liberally construed to accomplish the policy goals of this Chapter. The Council also intends that this Chapter meet the requirement under state law that the County adopt legislation that is similar to the state public ethics law.

For the reasons stated above, the requested waiver is denied.

FOR THE COMMISSION:

A handwritten signature in black ink, appearing to read "Elizabeth K. Kellar".

Elizabeth K. Kellar, Chair
March 20, 2003