

MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

This is a final decision on a request for a waiver of certain provisions of the Ethics Regulations concerning “outside employment” (also known as “other employment” or “secondary employment”).¹ As specified below, this decision is subject to a request for reconsideration by the Commission and, if reconsideration is not sought or is sought and denied, to judicial review by the Circuit Court for Montgomery County.²

Pertinent Facts

A member of the Montgomery Police Department submitted a request for outside employment in connection with a limited liability company he created. According to a memorandum he submitted as a follow-up to his outside-employment-approval request:

- This venture will offer safety and security surveys; site hardening; threat assessment evaluations; training and education programs; emergency and disaster planning; a variety of criminal, civil, and employment background screening investigations.
- Waivers are requester for a number of issues:
 - A direct report, . . . is my business partner—he also owns more than 5% of the business.

¹ The waiver provisions of the Montgomery County Public Ethics Law require that the Commission disclose to the public any waiver that it grants. If a request for a waiver is denied, the Commission may publish its response as an advisory opinion. But the identity of any public employee who applies for a waiver must be kept confidential until the waiver is granted. The Commission may reveal the identity of any public employee who applies for a waiver that is not granted only if: (1) the public employee authorizes public disclosure; or (2) the Commission has reasonable cause to believe that the public employee has engaged in the conduct for which the waiver was sought. MONT. CO. CODE §19A-8(f).

² RECONSIDERATION & APPEAL RIGHTS

Reconsideration. A person affected by a final decision of the Commission on a request for a waiver or a request for “other employment” approval may ask the Commission for a reconsideration. A request for rehearing or reconsideration must be filed within 30 days after the issuance of the Commission’s final decision, and must state in writing all reasons in support of the request. A request for reconsideration does not stay the effect of the Commission’s decision unless the Commission orders otherwise, but does stay, until the Commission takes final action on the request, the time in which an appeal to the Circuit Court may be filed. *See* MONT. CO. CODE §19A-6(d).

Judicial Review. A final decision of the Commission on a request for a waiver, or request for “other employment” approval may be appealed to the Circuit Court under the applicable Maryland Rules of Procedure governing the judicial review of decisions of administrative agencies. An “administrative appeal” does not stay the effect of the Commission’s decision unless the court hearing the appeal orders a stay. *See* MONT. CO. CODE §19A-6(c).

- This company will conduct a variety of investigations, but will not interfere with or compromise any incident previously reported to and/or under investigation by the Montgomery County Police.
- Investigations that may be conducted will be conducted by officers with appropriate State of Maryland licenses, allowing access to certain data because of licenses and not because of active law enforcement status.
- The Collective Bargaining Agreement (Article 27, Section F.10) prohibits uniform [ed.: uniformed] off-duty security employment for employers doing pre-employment investigations; potential contractors working for me would conduct investigations in civilian attire.
- Potential Montgomery County Police staff to be utilized will be hired as a subcontractor and not as a full or part-time employee and will only be utilized if/when business dictates.

Applicable Law

1. *The Statute.* The Montgomery County Public Ethics Law, codified as Chapter 19A of the Montgomery County Code, restrains the “other employment:

A public employee must not engage in any other employment unless the employment is approved by the [Ethics] Commission. The Commission may impose conditions on its approval of other employment.

MONT. CO. CODE, §19A-12(a)(1). For the purposes of this law, “public employee” includes “any person employed by a County agency,” and “employment means “engaging in an activity for compensation.” *See* Mont. Co. Code §19A-4(m) and (g).

2. *The Regulation.* The statutory prohibition of “other employment” is supplemented by Montgomery County Ethics Commission Regulation 25-01, entitled “Administrative Policies and Procedures for Outside Employment.” In pertinent part, the Regulation provides:

4.3. County employees are prohibited from working for any person(s) or any entity in which an economic interest is held by a person(s) the county employee supervises or who supervises the County employee as part of their County employment.

4.10. County employees with police powers may not engage in any outside employment which requires a Maryland State Investigator’s License; this requirement shall not be applicable to ownership/conduct of a business which engages in security-related work only.

For these purposes, paragraph 2.7 defines “security-related outside employment” as:

Any employment where the County employee is hired for the express purpose of:

- a. Protecting the proprietary interest of the outside employer;
- b. Protecting the outside employer’s employees or customers; or

c. Controlling vehicular or pedestrian traffic on or near the outside employer's place of business.

Paragraph 4.13 of the Regulation permits a County employee to "request a waiver of these policies in accordance with the criteria established in §19A-8 of the Montgomery County Code." The criteria applicable to this request are set forth in paragraph (a) of §19A-8(a):

After receiving a written request, the Commission may grant to a public employee or a class of public employees a waiver of the prohibitions of this Chapter and Sections 11B-51 and 11B-52(a) 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.

Analysis and Conclusion

Because a member of the Montgomery County Police Department who reports directly to the requester has a financial interest in the business, the "outside employment" for which approval is sought clearly is within the scope of paragraph 4.3. A waiver, therefore, is required.

Furthermore, if the requester himself will be engaging in investigative services that require a Maryland State Investigator's License, the prohibition set forth in paragraph 4.10 will apply because the company will not be engaging in "security related work *only*." The services the company will offer—"safety and security surveys; site hardening; threat assessment evaluations; training and education programs; emergency and disaster planning; a variety of criminal, civil, and employment background screening investigations"—go well beyond the scope of services of "security related work" as defined for the purposes of the Regulation. Therefore, engaging in such outside employment is prohibited, unless the Commission grants a waiver.

The facts presented did not satisfy the first prong of the three-pronged standard set forth in §19A-8(a) of the Ethics Law. In particular, the Commission was not persuaded that the best interests of the County would be served by granting a waiver of either of these prohibitions implicated by this request. The Commission, therefore, denied the requested waivers and, as a result, could not approve the described outside employment.

FOR THE COMMISSION:

[signed]

Elizabeth Kellar, Chair

March 2002