



BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION  
MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY, MARYLAND

Complainant,

v.

THOMAS J. DAGLEY

Respondent

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Case No: 09-11-012

Memorandum and Order

Introduction

This matter arises in the context of a request by a County employee for a pay raise for the employee's subordinate made to the County's Office of Human Resources ("OHR"). The requesting employee was Thomas J. Dagley, who was at the time of the request the County's Inspector General. In the course of correspondence and disagreement over the raise request for his subordinate, Mr. Dagley raised the prospect of conducting a formal Inspector General review of the administration of manager compensation by OHR. Subsequently, the Montgomery County Ethics Commission ("the Commission") received an allegation that Mr. Dagley had misused the prestige of his office in order to obtain a raise for his subordinate.

On December 15, 2009, the Ethics Commission, pursuant to Section 19A-9(a) of the Public Ethics Law, found that an investigation was necessary to consider whether a violation of the ethics law occurred. Pursuant to that finding, the Commission asked the County Attorney's office to conduct an investigation and to provide the Commission with a written report of the investigation.

On July 8, 2010, the County Attorney's Office forwarded a report of the investigation to the Commission. Upon review of the report on August 4, 2010, the Commission found reasonable cause to believe that Mr. Dagley had violated Section 19A-14(a) of the ethics law, which prohibits the use of prestige of office for private gain or the gain of another. As a consequence of the finding of reasonable cause by the Commission, Section 19A-10(c) of the ethics law compelled an adjudicatory hearing.

The Commission held an evidentiary hearing on December 12, 2011. The Commission granted Mr. Dagley's request to open the hearing to the public pursuant to Section 19A-10(h) of the ethics law. In accordance with Section 19A-10(f) of the ethics law, the parties to this hearing were the County as the Complainant and Mr. Dagley as the Respondent. After opening arguments, the County, bearing the burden of persuasion, presented its case first, with Mr. Dagley following. Aside from opening and closing arguments, the County's primary case constituted reading into the record admissions from Mr. Dagley's Answer to the County's Complaint and his interrogatory responses and the presentation of one witness, Mr. Joe Adler, Director of OHR. Mr. Dagley offered two witnesses, Steven Farber, Council Staff Director, and Mr. Dagley himself. Both parties submitted several exhibits.

For the reasons stated further below and based on the preponderance of the evidence presented at the hearing, the Montgomery County Ethics Commission unanimously concludes that Thomas J. Dagley, formerly the Inspector General of Montgomery County, violated Section 19A-14(a) of the Montgomery County Public Ethics Law prohibiting the misuse of prestige of office for private gain or the gain of another.

### **Evidence Introduced at the Hearing**

The evidence submitted at the hearing, and particularly the exhibits, provide the following outline of events.

Mr. Dagley began his first four-year term as Inspector General on July 1, 2005.<sup>1</sup> He was reappointed to a second term beginning July 1, 2009. During Mr. Dagley's first term, he hired Christopher Giusti as Deputy Inspector General. Mr. Giusti's initial salary when he was hired was \$95,000, which was near the mid-range of the Management Leadership Service Manager II pay band ("M2"). When Mr. Dagley was reappointed to a second term to begin July 1, 2009, he, by memorandum dated June 25, 2009, invited Mr. Giusti to remain in the position of Deputy IG for another four year term. At the time of Mr. Giusti's reappointment, his salary was \$105,377.

On the same date he extended the invitation to Mr. Giusti to continue his employment with the Office of Inspector General, Mr. Dagley sent a memorandum to Mr. Adler requesting a within grade pay increase for the Deputy Inspector General. Mr. Dagley had

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<sup>1</sup> The Inspector General is appointed by the County Council to "review the effectiveness and efficiency of programs and operations of County government and independent County agencies; prevent and detect fraud, waste, and abuse; and propose ways to increase the legal, fiscal, and ethical accountability of County government . . ." County Code at Sec. 2-151.

examined the salaries of various M2 employees of Montgomery County and determined that there was a substantial discrepancy between Mr. Giusti's salary level and other similarly situated M2 employees. The requested salary was \$127,974. The memorandum pointed out the difference between Mr. Giusti's then salary and the salary of other M2 incumbents with whom Mr. Giusti interacted. And, it reflected that Mr. Giusti's salary was less than the salary of \$108,000 of the newly-hired Assistant Inspector General, who was a General Salary employee. Mr. Dagley's memorandum stated that there was a need to increase the salary to compensate "Chris" for the "complex duties and responsibilities he will assume as Deputy Inspector General." The memorandum noted that the marketplace for highly qualified auditors and independent evaluators of complex government programs commands competitive salaries, and that this was true of the Deputy Inspector General position. The memorandum also suggested that Steve Farber, Council Staff Director, concurred in the request for a raise for Mr. Giusti.

By memorandum of July 7, 2009, Mr. Adler denied the request for a salary increase. He indicated: "I cannot approve a special within grade pay increase for Chris Giusti because the request does not meet the criteria as set forth" under Montgomery County Regulations. Mr. Adler's Memorandum states that those regulations allow for an increase to the base salary of a merit system employee to: "(1) keep an employee in an occupational class or series which it is difficult to retain employees; or (2) resolve a pay inequity affecting an employee."

On July 22, 2009, Mr. Dagley sent an email to Mr. Adler with a subject "Follow-up – June 25, 2009 Memo Regarding Base Pay for Deputy Inspector General." This email makes no reference to the July 7, 2009, memorandum of Mr. Adler, suggesting that the July 7 memorandum was not sent, not received, lost, or never read. The July 22 email requested an update on the June 25 request for a raise for Mr. Giusti. Mr. Adler responded by email on July 22 stating "you should expect a response early next week—if not sooner." (Mr. Adler's July 22 email makes no reference to the July 7 memorandum that already purported to respond to the request.)

On July 28, Mr. Adler sent a memorandum to Mr. Dagley, subject "Within Grade Advancement-Deputy Inspector General, Chris Giusti." The memorandum states: "I cannot approve the requested salary adjustment for Mr. Giusti; however I will authorize a pay adjustment to raise his salary to \$108,100 which is \$100.00 more than the new Assistant Inspector General's salary."<sup>2</sup>

Mr. Adler's memorandum was conveyed as an email attachment to Mr. Dagley by Judy Smiley, a Human Resources Specialist. Mr. Dagley then responded on July 30 to Judy Smiley and copied to Joe Adler and Steve Farber with an email stating:

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<sup>2</sup> The July 7 memorandum had stated "the salary of the Assistant Inspector General cannot be a factor for supporting a pay adjustment." Exactly three weeks later, Mr. Adler decided to raise Mr. Giusti's salary to \$100.00 more than the Assistant Inspector General's salary.

Thank you for forwarding Mr. Adler's decision regarding Mr. Giusti's base salary. It is important to note that criteria or other factors used in OHR's decision-making were not discussed with me and not included in the memorandum. I remain concerned about the pay disparity between Mr. Giusti and his peers. In addition, Mr. Adler's decision highlights a broader concern regarding the recruitment and retention of highly qualified individuals for the Deputy Inspector General term position. As explained in my June 25, 2009 memorandum to Mr. Adler, I have no doubt that if Mr. Giusti leaves the Deputy Inspector General position and the position needs to be posted by OHR, the best qualified applicants in our highly competitive Washington D.C. market will require a salary at or near the top of the M2 grade. The increased demand for audit/investigative skills and competencies by federal inspectors general to help oversee federal stimulus money illustrates this point.

Based on my preliminary review of MCPR, other County policies and MCG manager salaries, it is not clear whether management is complying with MCG policies and uniformly applying compensation standards. Do you know whether these issues have been independently reviewed within the past five years? If so, please provide a copy of the report(s). I will use information from your response, my analysis of MCG salary data provided quarterly to the OIG, and discussions with management and the Council to determine if manager compensation should be included as a project in the OIG's FY 2010 work plan.

Mr. Adler responded that evening:

. . . As a department head you have a right to disagree with our determination and ask for additional explanation as to how we look at salary equity concerns and how much flexibility the system allows department hiring managers at the time the initial employment offer is made. As the Inspector General you have the ability to look at suspected cases of fraud, waste, and abuse. In the instant case It [sic] appears that the line between the two functions was blurred and the professionalism expected of a critical County department was not adhered to . . . your last sentence . . . was perceived as a veiled threat to conduct some sort of audit because the of the [sic] decision, and not on any credible evidence that the process was not being administered properly.

An email from Mr. Adler to Tim Firestine, the Chief Administrative Officer for Montgomery County, details what occurred at a meeting between Mr. Adler and Mr. Dagley on July 31. The email states:

. . . I reiterated my concern over his memo. Interestingly he stated that my response was "charged and strongly worded." I went over the process OHR uses to review compensation requests from departments (attached). Tom did not apologize for his language and stated that he feels personally responsible for Chris Giusti's relatively low salary because he followed the rules and offered a salary near the mid point, not knowing that he could have offered a higher salary. He is

especially concerned that most of the managers Giusti interact [sic] with make much more than he does, and that these managers are aware of Giusti's lower salary. The OIG receives quarterly salary information so he has a list of MII's and stated that most are either at the control point (127,924) or at the top (133,982).

Tom stated that he is concerned about the OIG as an institution, and as an independent Montgomery County agency. He plans to bring in several former IG's [sic] to conduct a study for him of best practices and the relative standing of his office. As part of the role of these IG consultants, Tom indicated that they will take a look at salary comparability and make a recommendation to Council concerning inequities which currently exist. Tom kept emphasizing that his goal is not personal but to strengthen the Office of the Inspector General so that his successors will have to [sic] staff and resources needed to be effective.

On August 4, Mr. Adler sent a memorandum to Mr. Dagley stating that "with respect to your concern of a disparity in salary between the Deputy Inspector General's and MII's in other departments, OHR only takes under consideration employees in the same department when we are evaluating pay equity issues. Since the OIG has only one MII on staff, there are no comparable positions within the department for salary comparisons; therefore there is no pay inequity." The memorandum went on to say that the OHR was "consistently applying compensation standards."

The same day, Mr. Dagley replied by email that federal and state/local inspectors general had worked with government leaders to enhance inspector general independence through manager pay comparable "*across* [italics in original] the organization that established the inspector general offices. The principle of making inspector general manager pay comparable to the pay of other MCG managers is clearly different than OHR guidelines used in the Deputy Inspector General decision." Mr. Dagley then states that a review of "MCG's use of pay and other principles unique to inspectors general may be timely" and suggests that if such a review were included in the OIG's required four year work plan, representatives of the inspector general community would be asked to conduct the review.

Subsequent emails from Mr. Dagley reflect his continued interest in the pay issue and in keeping Mr. Farber apprised of developments. A meeting between Mr. Dagley and Mr. Adler occurred on September 4 and email exchanges in the following week reflect additional consideration of the issue of pay for Mr. Giusti.

On September 11, 2009, Mr. Farber sent an email to Mr. Adler. This email quoted the August 4 memorandum from Mr. Adler to Mr. Dagley regarding OHR's only taking under consideration employees in the same department when it evaluates pay disparity issues. Mr. Farber then states:

. . . This definition strikes me as neither fair nor defensible. It potentially places employees from small departments, as in this case, at a huge disadvantage when

OHR evaluates pay equity questions and therefore risks inconsistent treatment of employees in our unitary merit system. A county-wide comparison seems not only sensible but essential. It is OHR's practice –not the Personnel Regulations – that mandates the current definition. If OHR were to revise the definition, as I strongly believe it should, then a fresh look at the Giusti issue would be in order. It is good that Tom now stipulates that he erred in failing to press – as other department directors regularly do – for a more appropriate initial salary for Giusti. It is also good that every one now agrees on the importance of scrupulous separation of roles and functions, a principle that applies to all of us at all times. The stage is now set, if OHR is willing, to take a fresh look at the pending request in a County-wide context. I think that would produce a sound result.

After a few exchanges by email regarding when a decision would be rendered, Mr. Dagley indicated by email on September 27, that he was “finalizing the annual report that I am required by the IG law to publish in October each year. I plan to comment on OIG challenges pursued during fiscal year 2009, such as . . . equitable compensation. Receipt of your information by October 2 will be timely for the purpose of the annual report project.”

On October 2, 2009, by memorandum to Mr. Dagley, Mr. Adler authorized an increase in the base salary of the Deputy Inspector General to \$127,974. Mr Adler wrote:

In authorizing this salary adjustment, we took in consideration that Mr. Giusti has a level of responsibility that is unique to the legislative branch where he is working with officials. The salaries of other MIIs in the County were also reviewed and compared with Mr. Giusti's salary to determine if there was any pay inequity since there are no other MIIs in the Office of the Inspector General.

County Exhibit 15, the Inspector General's Four-Year Work Plan dated January 22, 2010, states at page 3:

In fiscal year 2009 and continuing into fiscal year 2010, the Inspector General continued to work with County leaders to increase the independence and effectiveness of the OIG by making compensation for its employees equitable when compared to other County officials. This work was controversial at times; however, it led to the resolution of a pay disparity for one OIG employee in October 2009, incident to the modification of Office of Human Resources Policy.

### **Testimony**

Before calling its witness, the County read into the record answers from interrogatories it had posed to Mr. Dagley. Much of this evidence confirmed matters reflected in the documentary evidence. In addition, the County read interrogatory responses addressing the Inspector General's level of efforts to conduct a review of the County's compensation system, with particular emphasis on that period of time following the decision by Mr. Adler to give Mr. Giusti the requested raise.

Question, describe fully any and all actions you took or investigations you made subsequent to the approval of Christopher Giusti's salary increase to \$127,964 to determine whether the Office of Human Resources was uniformly applying compensation standards either for initial hiring or within grade raises, and give exact dates for each such action you took.

Mr. Dagley's answer, quote, no actions were taken subsequent to October 2, 2009, the date on which Mr. Adler informed me that he had approved Mr. Giusti's salary increase, end quote. [Tr. at 44, ln. 14-24.]

### *Testimony of Mr. Adler*

Mr. Adler testified that at the time the request for salary increase had been submitted, there were ongoing activities of the Inspector General or recently concluded activities that involved Mr. Adler's department. [Tr. at 126.] Mr. Adler agreed that newspaper articles had been unflattering as regards County government based on these OIG activities. Mr. Adler acknowledged that he disagreed with some of the positions taken by the Office of Inspector General in these matters. Furthermore, Mr. Adler believed that Inspector General reviews cause disruption and reallocation of resources.

Mr. Adler stated that when a department received an unfavorable decision from OHR on a salary decision, the typical route to appeal that decision would be to the Chief Administrative Officer. Mr. Adler testified that processes for disagreeing with compensation decisions were not formalized. [Tr. at 150.] Mr. Adler testified that Mr. Dagley did not go to the Chief Administrative Officer. Instead, Mr. Adler says that Mr. Dagley "was going to do an investigation based on our refusal to approve his request." [Tr. at 64, ln. 7-9.]

It was Mr. Adler's opinion that conducting the investigation was beyond the purview of the Inspector General. Counsel to the County asked "Why is it that you're mentioning these words fraud, waste or abuse?" Mr. Adler answered: "That's the Inspector General's charge." In Adler's view, Mr. Dagley "crossed the professional line between a department director and inspector general for Montgomery County Government." [Tr. at 67, ln. 3-5.] Mr. Adler perceived the IG's position as a "veiled threat to conduct some sort of audit because of the decision and not on any credible evidence that the process was not being administered properly" [Tr. at 67, ln. 16-20.] Mr. Adler's reason for "taking issue" with Mr. Dagley's suggestion to review the compensation system was, in part, Mr. Adler's view of the Inspector General's job as "simply investigating fraud, waste, and abuse." [Tr. at 139-140.] With respect to a decision not to give a raise because a policy was to only look intra-departmentally instead of county wide for comparison purposes, Mr. Adler testified that he did not consider that to be "fraud, waste, and abuse" but instead "a discretionary application of a policy" and that he questioned the Inspector General's taking a look at it. [Tr. at 156.] Mr. Adler had testified that "it was within our purview to do salary adjustments. But again there was no fraud, waste or abuse of process. It was a legitimate disagreement of how we applied it but that's not fraud, waste, or abuse." [Tr. 86, ln. 7-11.]

Mr. Adler testified that after looking at the broader criteria suggested by Mr. Farber, the decision was made to grant the salary raise to Mr. Giusti. Mr. Adler acknowledged that the discussions with Mr. Farber played into the decision as the rationale for utilizing the intra-department salary comparison did not present a “strong defense.” [Tr. at 88, ln. 6-7.] Mr. Adler stated “we could not strongly defend the process we were using, that in fact, Steve [Farber], whose opinion I value, said that we believe that this is not defensible, yes. That was a factor. And then as I indicated, I wanted to move on and we have many, many other, too many more important things at that point and case closed, move on. And then I did. . . . I was interested in putting this behind us and moving on.” [Tr. at 158, ln. 4-10.]

Mr. Adler stated that the “veiled threat” by Mr. Dagley “to follow through with some sort of investigation” was a consideration that went into the approval of the 22 percent raise. [Tr. at 85, ln. 5-7.] Mr. Adler acknowledged that this reason was not included in Mr. Adler’s October 2, 2009, memorandum, which was the formal written record on what was taken into consideration for the granting of the raise to Mr. Giusti. [Tr. at 134, ln. 15-18.] Mr. Adler testified that the raise of 22 percent for Mr. Giusti was unusually high. [Tr. at 158.]

Mr. Adler said that the policy regarding intra-department comparisons was not set out in any law, regulation, or formal written policies governing OHR decisions.<sup>3</sup> In Mr. Adler’s view, OHR has flexibility in establishing implementing practices governing salary decisions in the MLS. [Tr. at 101, ln. 9; Tr. at 102, ln. 12-14; Tr. at 103, ln. 1-4.]

Mr. Adler testified that the OHR instituted changes to its policy of looking only at one department with respect to an in-grade pay increase. In response to a question regarding whether the policy was changed, Mr. Adler responded “I had a discussion with the compensation folks and indicated that if a small department makes a request, that obviously then if there are no M-2s or there are very few M-2s to make a comparison, we need to them [sic] take a broader look.” [Tr. 98, ln. 5-8.] In response to a question from a Commissioner, Mr. Adler indicated that “we take a look at some broader criteria as a result of this.” [Tr. 145, ln. 6-8.] Mr. Adler further testified that the change in policy was not communicated to Mr. Dagley other than what was in the October 2 memorandum (which indicated that the salaries of other M2s in the County were reviewed and compared with Mr. Giusti’s salary to determine if there was any pay inequity.)

With the end of Mr. Adler’s testimony, the County rested its case.

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<sup>3</sup> The Commission notes that the Montgomery County Personnel Regulations at 10-16(c)(1) provide guidance consistent with the “same department” rule, although the hearing witnesses including the Director of OHR indicated that OHR’s policy on that is not codified.



### *Testimony of Mr. Farber*

Mr. Dagley's first witness was Steve Farber. Mr. Farber testified as to his role as the County Council's Staff Director. He testified that he acts as the administrator of the legislative branch, to include the Office of Inspector General. In this capacity, he helps some of the small offices in the legislative branch with personnel, administrative, and budget issues. [Tr. at 162.] Farber testified that while the Office of Inspector General is in the legislative branch, the unitary merit system including all employees in the legislative branch falls under the purview of the Chief Administrative Officer. [Tr. at 164.]

Mr. Farber testified that the rationale provided by Mr. Adler regarding the policy of looking only intra-department for comparison on salary equity decision for MLS was indefensible:

. . . it struck me as completely inconsistent with the thrust of management leadership service. Management leadership service is a countywide entity. . . . And the whole point of the management leadership service is that it would create a cohort of senior managers in the county government who, to a certain extent, would be able to move from one department to another. And for Mr. Adler to have said as he did in the August 4 memo that Mr. Giusti, as the only person at that rank in the Office of Inspector General, could not be considered for a pay increase struck me, as I later wrote to Mr. Adler, as neither fair nor defensible.

Keep in mind that that statement was not imbedded in the personal regulations. This was simply an administrative conclusion or practice that the Office of Human Resources had arrived at and . . . it just seemed to me that that was inherently unfair. [Tr. at 167-168.]

Mr. Farber testified that Mr. Dagley told him that he had not heard back after filing the request for a raise for Mr. Giusti and that Mr. Dagley "was concerned about whether or not he would get a fair hearing." [Tr. at 165.] Farber testified that he was not trying to obtain a specific result, but that he was interested in the promotion of a process "that everyone would perceive as fair." [Tr. at 185.]

On cross-examination, the County read into evidence questions and answers from interrogatories posed to Mr. Farber.

. . . you were asked did you view this as a threat. Answer: "I did not view it as a threat. I viewed it as inappropriate. My knowledge of Mr. Dagley over the last four or five years that he's been here does not include any experience with his making threats. I don't think he operates that way. I think this was a mistake, a mistake that he subsequently acknowledged in conversations with me and perhaps with others. I think it was born of frustration; frustration at having tried for a protected period of time to get what he thought was a fair and logical solution to the salary of an employee who might otherwise leave.

“And I think, as I say, it was inappropriate, it was a mistake. It’s something that he should not have written because it’s essential not to confuse roles and this certainly can be perceived as a confusion of roles. And Mr. Adler, in his response, which is also dated July 30th and that I have here and that he copied me on made it very clear that he thought this language was, could be construed as a threat. Now, this is all subject to interpretation. As I say, I think Mr. Dagley made a mistake, arguably, a serious mistake, in including this language.”

[Tr. at 199.]

### *Testimony of Mr. Dagley*

Mr. Dagley testified about the hiring of Mr. Giusti. Mr. Dagley understood that when persons were hired from outside Montgomery County government, the mid-point of the salary range would be the maximum salary that could be offered, except in unusual circumstances. [Tr. at 220.] When Mr. Giusti was hired, he was hired at just above the midpoint. [Tr. at 220.] Mr. Dagley testified that later, in 2007 and 2008, he learned that many of the people who were the peers and points of contact for audit activities and who were in M2 positions had been hired at well above the midpoint, and even at above the control point or at the maximum salary available.<sup>4</sup> [Tr. at 220.] Mr. Dagley recalled that on one occasion a person who had come into County government at the top of the M2 pay range in 2007 expressed interest in a position in the Office of the Inspector General, but was surprised to hear what the (low) salary was for the Deputy Inspector General. [Tr. at 222.] The raise was sought based on Mr. Dagley’s newer understanding of the way in which MLS employees were being compensated. Mr. Dagley now understood that the criteria for salary setting were different from what he was previously told. [Tr. at 225.]

Mr. Dagley testified that at the time of Adler’s July 28 decision, it was Mr. Dagley’s belief that salaries of other people in the M2 pay band were not considered by OHR. [Tr. at 233.] Excel spreadsheets reflected that Mr. Giusti’s salary ranked, by amount, 102<sup>nd</sup> of 106 members of the M2 pay band. [Tr. at 116.]<sup>5</sup>

Based on the Excel spreadsheets, and conversations that Mr. Dagley had had about persons being brought into the M2 at salaries other than the midpoint, he had questions about whether compensation policies were being complied with or consistently applied. [Tr. at 239-240.] Mr. Dagley testified that as of the time he wrote the email on July 30: “the documents that I had been provided up to that point, the conversations I had[,] appeared to have some inconsistencies and appeared to . . . include criteria that were

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<sup>4</sup> Control point is term defined in MCPR 10-1(c) as being: A point established at 90 percent of the salary range that is used to control an employee’s progression through the pay range associated with an MLS class.

<sup>5</sup> These Excel spreadsheets included publicly available information and were obtained by the Office of Inspector General from the Office of Human Resources on a quarterly basis. Among other things, this listed enabled the Office of Inspector General to understand the status of designated points of contact for audits or reviews. [Tr. at 221.]

different than what at least initially I understood to be the reasons for arriving at a \$108,100 salary adjustment for Mr. Giusti.” [Tr. at 239.] Mr. Dagley testified that when he reviewed the OHR policy which resulted in comparing only employees from the same department, he had an additional reason for needing to understand OHR practices. [Tr. at 264-265.]

Mr. Dagley testified that the request for information in the July 30 email was to try to pull in the best available information for establishing criteria for a possible review to be included in the four-year work plan, which he hoped to have prepared by October or November of 2009. [Tr. at 241-242.] Mr. Dagley specifically denied that the July 30 email request for information with a view towards a possible review of management compensation was included to threaten or coerce Mr. Adler to succumb to Mr. Dagley’s request to adjust Mr. Giusti’s salary to approximately \$127,000. [Tr. at 242.] He further testified that it was not uncommon for the OIG to come across issues in its day to day operations that became audit candidates. [Tr. at 245-246.]

Mr. Dagley testified about the ongoing dialogue with OHR about a possible review. In particular, he described how he believed that other members of the Inspector General Community might be able to bring in expertise to the management compensation issues to increase understanding of the issue. Mr. Dagley recognized at this point there was “an independence issue because I realized that there was what I considered to be some perception problems. And I made the statement CIGIE [Council of Inspectors General on Integrity and Efficiency] and/or AIG [Association of Inspectors General] will be asked to conduct a review and . . . report any opinions, conclusions or recommendations directly . . . to the council and executives so that the report will be impartial and viewed by others as impartial. It would take me out of it.” [Tr at 252.] Mr. Dagley testified that he never sought the assistance of the outside consultants or entities because the OIG had not decided yet that it was going to do the work. [Tr. at 252.]

Mr. Dagley testified further that the proposed audit activity never made the work plan. [Tr. at 253.] He gave three reasons for this. First, on approximately November 16, 2009, when Mr. Dagley learned that allegations had been filed with Ethics Commission that he had misused his office, Mr. Dagley concluded that “conducting a management compensation review was not going to be a part of our work plan.” Mr. Dagley considered the allegations as creating an impediment to a review being conducted pursuant to principles of independence for Inspectors General. [Tr. at 254.] Mr. Dagley considered that it would appear to be an ethical conflict for him to pursue the review. [Tr. 254-255.] Second, Mr. Dagley testified that an additional reason for not conducting the audit “was that the policies and procedures were not consistent, were in the process of being changed and therefore, not . . . suitable to conduct a performance audit. . . . It was obvious to me throughout that October/November/December time frame and leading up to the issuance of my January 2010 work plan that the manager compensation . . . policies and procedures were in the process of change.” [Tr at 258.] The third reason Mr. Dagley provided for not putting the audit on the work plan was that the audit could always have been added to the work plan at a later point in time.

Mr. Dagley testified that after the October 2 decision to grant the raise to Mr. Giusti, he continued to have concerns given the significant change in the criteria from what had been discussed earlier. [Tr at 266, at ln 6-9;] Dagley had additional questions as to “how this change from late July/early August to the October 2 memo had come to be.” [Tr. at 267, at ln. 11-12.]<sup>6</sup>

Mr. Dagley testified that there had been a number of ongoing OIG activities that involved the OHR and that these activities had some contentious aspects. [Tr. at 270.] Mr. Dagley testified that he met with the chief of staff of a County Council member and then the County Executive about the Deputy Inspector General and MLS pay issues. [Tr. at 272-3.] He was unaware of any appeal process for pay decisions. [Tr. at 290.]

In answer to a question from a Commissioner, Mr. Dagley testified that management compensation was a viable topic for the four-year plan and was certainly a bullet, maybe even in pencil, in various drafts within the OIG. [Tr. at 276.]

### **Findings and Application of Law**

The Montgomery County Ethics Commission concludes that by the preponderance of the evidence Thomas J. Dagley, formerly the Inspector General of Montgomery County, violated Section 19A-14(a) of the ethics law prohibiting the misuse of prestige of office for private gain or the gain of another. The Commission views Mr. Dagley’s bringing the question of audit into the raise discussion as an abuse of authority, and it views the prestige of office provision as guarding against abuses of authority of this sort when they are used to obtain gain for another person.

The intent of the Public Ethics Law, as stated in Section 19A-2, is to provide County residents with great “trust in their officials and employees.” The law acknowledges that “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.” Accordingly, the law sets forth comprehensive standards for the conduct of County business. The County Council has provided that the Public Ethics Law be liberally construed to accomplish the policy goals of the Law.

Section 19A-14(a) of the Ethics Law provides:

A public employee must not intentionally use the prestige of office for private gain or the gain of another. Performing usual and customary constituent services, without additional compensation, is not prohibited by this subsection.

A “Public employee” is any person employed by a County agency, including the director of the agency. See 19A-4(m). The Office of Inspector General is a County agency, and

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<sup>6</sup> In addition to comparing Mr. Giusti with other M2s in the County, which had not been done previously, Mr. Adler’s October 2 memorandum cited Mr Giusti’s level of responsibility as constituting a justification for the raise, while his memorandum of July 7 specifically rejected increased responsibilities as being a justification for a raise where there was no change in position.

the Inspector General is a public employee for purposes of the prohibition of 19A-14(a). See 19A-4(a); 1A-203(b).

The prohibition only applies to “intentional” acts; but “intentional” does not mean that there must be intent to misuse the prestige of one’s office. Rather, “it merely requires intent to commit an act, not scienter or intent to violate the law.”<sup>7</sup> In this case, the Ethics Commission finds that Mr. Dagley’s references in his July 29, 2009, email and subsequent correspondence and conversations about conducting of a review of management compensation at OHR were “intentional” acts, regardless of whether Mr. Dagley was aware such actions might violate the ethics provisions governing use of the prestige of office.

Many of the prestige of office opinions of the Ethics Commission and of the Maryland State Ethics Commission examine the nexus between a County employee’s job and an outside activity and the extent to which the compensation or gain from the outside activity “flowed directly and immediately from the individual’s state duties.” The opinions reason that if the gain from the private activity flows from the relation to Office, then the prohibition applies. Use of one’s office to obtain a Government benefit can also trigger the prohibition. For example, seeking a retirement benefit to which one is not entitled can trigger the prohibition.<sup>8</sup> The facts in the referenced case involved a public employee abusing her office to obtain a Government retirement benefit. While the facts are very different from the present case in that misrepresentation was the vehicle pursuant to which the benefit was obtained and the gain was for the employee herself and not a subordinate, the case demonstrates that employee benefits can constitute the “gain” associated with a misuse of prestige of office.

Several State Ethics Commission opinions also indicate that a misuse of the prestige of office requires no outside activity or wholly private benefit. If an employee, for example, advances the interests of a relative who is also a State employee, that can constitute misuse of the prestige of office even without showing nongovernmental gain.<sup>9</sup> These opinions show that the potential misuse can involve Government salary or personnel benefits.

It is important to distinguish use of prestige of office for private gain or gain of another from completely appropriate activities involving the conduct of office that results in the appropriate conferring of a benefit. Use of “prestige of office” is action that is “directly and immediately related to the official’s . . . duties.”<sup>10</sup> And if private gain or gain of another accrues from the use of the prestige of office, then the prohibition by its terms is applicable. But the provision is not aimed at just doing one’s Government job. That is the import of the second sentence of 19A-14(a) concerning usual and customary constituent services.

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<sup>7</sup> MCEC, Advisory Op. No. 03-010; see also, Mont. Co. Atty. Op. 12/6/02 at page 4 (discussing knowledge element of gift acceptance prohibitions.)

<sup>8</sup> See MSEC, Order and Stipulation, Complaint No. C-83-08.

<sup>9</sup> MSEC Adv. Op. 1981.02; 1984.08.

<sup>10</sup> Mont. Co. County Atty. Op. 12/6/02 at fn. 36.

Government officials routinely advocate for or make decisions that result in benefits to individuals and entities, including personnel matters such as raises. These activities do not implicate the use of prestige of office prohibition without either an inappropriate use of office or an inappropriate basis for the gain. In the normal course where an employee advocates for a raise for a subordinate, and even strongly so, and appeals to higher authority, such as the CAO, the Council Staff Director, or even the County Executive, there is no use of prestige of office for gain of another.

A substantial amount of documentary and testimonial evidence was submitted at the hearing that supported differing notions of how this case could be resolved. The Commission weighed this evidence and assessed its relevance as discussed below.

The County claimed that the raise sought for Mr. Giusti was excessive. While the raise was unusual, the Commission did not conclude that it was either excessive or not excessive; the size of the raise did not weigh on the Commission's decision, other than that the raise was sufficiently material to constitute "gain." Given the apparent inconsistencies in OHR policies and practices, the raise awarded to Mr. Giusti was, in the minds of the Commission, just as likely to be a correction of an error as it was "excessive."

Also, the Commission found nothing inappropriate about the IG seeking a raise for his subordinate and found no evidence suggesting that the raise was sought for an improper purpose. While the County had originally alleged that Mr. Dagley had sought the raise for Mr. Giusti at least in part because of an alleged friendship between the two, at the hearing the County stated that friendship was not necessary to its case and offered no evidence to suggest a friendship existed between Mr. Dagley and Mr. Giusti. Had there been a friendship and the County had shown that the raise was due to the friendship instead of legitimate purposes, then that would have been a different basis to suggest a violation. But there was no such showing, presumably because there was no or insufficient evidence to make such a showing.

The Commission also found that had the IG been serious about conducting a review of management compensation, that this would fully and rightfully have been within his purview. Mr. Adler, both at the time of the July 31, 2009 response to Mr. Dagley's seminal email and in his testimony, suggested that the IG's role was limited to fraud waste and abuse (and only then after a complaint is on file.) While this view was wrong, it appears to have fueled the County's Director of OHR's perception that the IG's email constituted an inappropriate "veiled threat." While the County IG law provides for examination of fraud, waste, and abuse, that is only a part of its mandate. The County's IG law in the first instance provides for the Inspector General to examine agency programs for their economy and efficiency. Based on the mandate of the Inspector General, and the increasingly evident inconsistencies in the administration of the management compensation practices of OHR, the Commission finds that not only was the review within the jurisdiction of the IG, but that compelling reasons for conducting such a review were apparent. This made the abandonment of the issue all the more

evidence that the raise for Mr. Giusti was Mr. Dagley's objective and not any OIG review of management compensation policies.

Both in its complaint and its argument, the County suggested that Mr. Dagley had utilized his connections within County government to coerce the raise for Mr. Giusti. The Commission finds nothing inappropriate with respect to Mr. Dagley's engaging Mr. Farber to assist him in seeking the raise for Mr. Giusti. Mr. Farber has the administrative responsibility for the entire legislative branch of County government, of which the Inspector General's Office is a part. In the view of the Commission, it is entirely within the province of Mr. Farber to weigh in with the OHR on issues of personnel compensation for employees of the legislative branch. We further note that Mr. Adler himself sought Mr. Farber's opinion in the beginning of September. The Commission finds the County's suggestion that Mr. Dagley had acted inappropriately in enlisting the senior administrative official in the legislative branch was without merit.

The Commission is convinced that the raise request arose in difficult circumstances. The OIG had conducted several activities that involved OHR, among others, that had gained some notoriety.<sup>11</sup> The testimony of Mr. Adler and Mr. Dagley and the contemporaneous emails suggest something less than a mutually cooperative attitude.

This is to say that the Ethics Commission is cognizant of the environment present at the time of Mr. Dagley's July 30, 2009, email and at the time of his subsequent references to a possible review. The evidence reflects that Mr. Dagley was concerned about whether his staff and his office were being treated fairly by OHR. He may have felt as though he had been misled by OHR through its advice that new employees had to be at or near the midpoint of the salary range. And he may well have perceived that any mistreatment of the OIG in connection with the request for a raise for Mr. Giusti was a consequence of the OIG doing its job as regards at least three activities that had cast a negative light on OHR operations.

All this notwithstanding, the Public Ethics Law does not countenance violations that result from an employee's frustration with Government processes. The Commission's role here is to determine whether a violation of the ethics law occurred and, if so, what a suitable punishment is for the violation. Accordingly, the Commission finds that Mr. Dagley violated 19A-14(a) of the Public Ethics Law.

The Commission finds that Mr. Dagley raised the prospect of the audit at the same time he was questioning the merits of the denial of the raise that he sought. Moreover, the Commission finds that Mr. Dagley's primary objective in raising the prospect of an audit of management compensation practices was to obtain a raise for his subordinate Chris Giusti. The Commission recognizes that a secondary objective was to secure the independence of the OIG from an institutional standpoint. While both of these were legitimate objectives, the former involved the spending of Government money

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<sup>11</sup> These activities involved reviews or investigations of the County's disability retirement program, employee tuition assistance program, and an automobile accident involving a senior fire department official.

constituting “gain to another.” And when Mr. Dagley used an inappropriate means to obtain that gain, he ran afoul of 19A-14(a). The Commission concludes that Mr. Dagley utilized the prospect of a review by his office to leverage a salary raise for Mr. Giusti and, in doing so, inappropriately manipulated the prestige and institutional power of the Office of Inspector General for the gain of his subordinate.

The Commission also finds that Mr. Dagley took no meaningful steps towards actually initiating an audit. Further, when Mr. Dagley obtained what he wanted, a raise for his employee, he dropped the review idea altogether. The Commission views the inaction of Mr. Dagley as convincing evidence that he was manipulating the authority of his office to obtain the raise for Mr. Giusti rather than to improve County management compensation policies.

Mr. Dagley had no assurance that OHR was going to modify its policies on “pay equity” which he had previously described as “one of the most important factors that impact our employees . . .” [8/2/09 email to K. Beckley.]<sup>12</sup> Yet Mr. Dagley took no action towards ensuring that the known defects in management of the program were corrected once the raise for Mr. Giusti had been obtained. If Mr. Dagley was serious about the prospect of a review of the compensation issue or, alternatively, was genuinely interested in the County’s policies, he would have responded to Mr. Adler’s October 2 memorandum with a question about whether HR was changing its policy, and he would have otherwise taken steps commensurate with his prior statements of concern. But he did not because in the opinion of the Commission, that was not what he was after. So upon receiving the news of the raise, Mr. Dagley completely dropped the issue of management pay. He, like Mr. Adler, moved on.

As for Mr. Dagley’s three reasons for not following up on the management compensation issue after October 2, the Commission finds these unpersuasive. As an initial matter, the Commission finds no meaningful evidence that Mr. Dagley was going to conduct a review of management compensation either before or after the October 2 decision to give Mr. Giusti the raise. As to the rationale that the independence of the office would have been questioned after he learned of the ethics complaint against him, this rationale does not account for the month and one half that elapsed between October 2 and November 16. During that period, Mr. Dagley made no mention of or took any steps to address what had been a persistent issue prior to October 2. And had Mr. Dagley truly been interested in the issue, one would think he would, upon receiving the final decision on the raise, have at the very least inquired of Mr. Adler as to what the implications of the raise decision were for the County’s management compensation policies, such as the “same department” rule. The Commission believes that this or similar inquiry would naturally

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<sup>12</sup> The only evidence in the record that could have suggested to Mr. Dagley that change might be occurring was the October 2 Memorandum which showed that the prior policy was not being applied to Mr. Giusti. One might infer that this portended a policy change because it contravened prior statements of policy. But given OHR’s “flexibility” to adjust rationales to fit desired results and Mr. Dagley’s recognition that that the issue of MLS compensation was unresolved and still in need of review [Tr. 266, ln 5-9; Tr. 267, ln. 4-18], the Commission concludes that Mr. Dagley did not presume nor believe a policy change was imminent.



have occurred while the issue was still fresh. And, even if one accepts the notion that the one and one half months of silence from Mr. Dagley was reasonable and independence created a bar to an OIG review, Mr. Dagley could have referred this important issue to another entity, such as the Merit System Protection Board, which is required to audit such matters. See OHR Personnel Regulations concerning classification at 9-3(a)(1),(2).<sup>13</sup> But he did not do that either.

The Commission is also not persuaded by Mr. Dagley's suggestion that the policies were too unsettled for conducting a review. First, it was the inconsistency in the application of policies that caused his alleged interest in conducting a review in the first place. Second, the notion that the October 2 raise for Mr. Giusti contravened what Mr. Dagley had been given as the reasons for the prior denial of the requested raise did not lessen the need for review, but possibly strengthened it, as it confirmed that OHR was not operating in a fashion consistent with previously articulated policy. Mr. Dagley's second rationale would only have made sense if he had been told by OHR that as a result of the Giusti raise issue, OHR was going to review its inconsistent and "indefensible" policies and practices. If this had occurred, the Inspector General might have wanted to allow time for this consideration to take place before a review was conducted. This would have been the "moving target" that would support his rationale. And the only way Mr. Dagley could have found out if there was, in fact, a "moving target" would have been to ask the exact same question that he would have if he was truly interested in the issue: what did the October 2 decision mean for management compensation policy including the "same department" rule, and what changes were being contemplated. Instead, Mr. Dagley did nothing.

Lastly, the notion that management compensation could be added to the IG audit plan at some later date was also not convincing to the Commission. The issue was alive and being pursued in the months of July, August, and September by the IG. Based on the IG's actions, the question of what's wrong with management compensation policy and practice apparently died on October 2. The Commission finds that what the IG did and failed to do are much more convincing evidence than unsupported statements of what he could have done at some uncertain date in the future.

## **Order**

The Montgomery County Public Ethics Law Section 19A-10(k) states that if the Commission finds that an ethics violation has occurred, it "must publicly disclose its finding and conclusions, including the identity of the subject of the complaint, the complainant, and the witnesses." The Commission has done this.

Pursuant to Montgomery County Public Ethics Law Section 19A-10(m), the Commission, upon finding a violation of the Ethics Law, has discretion as to whether to impose a penalty and, in the event it exercises that discretion to impose a penalty, a range of penalties is provided for in the law. Under the circumstances of this case, the

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<sup>13</sup> The Inspector General presumably would have been aware of the classification regulations if an OIG review of classification policy was seriously being considered.

Commission concludes this decision is sanction enough for the violation that occurred.  
No further action or penalty is imposed.



March 16, 2012

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Nina A. Weisbroth, Chair  
Montgomery County Ethics Commission

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Date

cc: Mark T. Mixter, Esq.  
The Law Offices of Mark T. Mixter  
20 South Charles Street, Ninth Floor  
Sun Life Building  
Baltimore, Maryland 21201

Christine Collins, Esq.  
Charles Frederick, Esq.  
Office of the County Attorney  
101 Monroe Street, Third Floor  
Rockville, Maryland 20850