



MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

The Montgomery County Public Ethics Law (“the Ethics Law”)¹ permits any person who is subject to that law (or certain other County ethics provisions) to ask the Ethics Commission for an advisory opinion on the meaning or application of any of those laws to them.²

This advisory opinion was requested by a member of a County advisory board (the “Advisory Board”) who is seeking part-time employment with a County agency with which the Advisory Board is affiliated.

QUESTIONS PRESENTED

- (1) Would employment by the County agency with which a County Advisory Board is affiliated constitute a conflict of interest for a member of the Advisory Board?
- (2) “[I]f so, how far the [might] the range of limitation on [the requester’s] participation on the [Advisory] Board . . . extend?”

MATERIAL FACTS

The Advisory Board on which the requester sits has statutory authority. With the advice and assistance of the agency with whom the requester seeks employment, the Advisory Board must, among other things, periodically review certain agency programs, determine the needs of those served by those programs, report to the Executive and the Council on the progress of those programs, make certain fiscal recommendations, assist the agency head in the development of a program plan, and act as a local advocate for certain programming. The Advisory Board also may, among other things, participate in certain program evaluations.

¹ MONT. CO. CODE, Chapter 19A. (All statutory references are to this law.)

² See §10A-7(a). Unless the requester authorizes disclosure, the Commission must keep the name of the requester confidential. *Id.* Nevertheless, the Commission must: (a) publish each opinion when it is issued unless the Commission finds that the privacy interest of a public employee or other person clearly and substantially outweighs the public’s needs to be informed about Commission actions; (b) at least annually must publish a list of all unpublished opinions, with the reason why each opinion was not published; and (c) take all reasonable steps consistent with making the opinion useful for public guidance to keep confidential the identity of any person who is affected by the opinion request. §19A-7(b).

The agency head, who is a non-voting, *ex officio* member of the Advisory Board, must: (1) provide staff services and administrative support to the Advisory Board; and (2) facilitate in every way possible the work of the Advisory Board.

THE CONFLICT OF INTEREST PROVISIONS OF THE ETHICS LAW

The conflict-of-interest provisions of the Ethics Law prohibit a public employee from participating in the following matters:

(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

(C) property or business in which a relative has an economic interest, if the public employee knows about the relative's interest;

(2) any matter if the public employee knows or reasonably should know that any party to the matter is:

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

(B) any business in which a relative has an economic interest, if the public employee knows about the interest;

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

(D) any business that is negotiating with a relative or has an arrangement with a relative about prospective employment, if the public employee knows about the negotiations or the arrangement;

(E) any business or individual that is a party to an existing contract with the public employee or a relative, if the contract could reasonably result in a conflict between private interests and official duties;

(F) any business that is engaged in a transaction with a County agency if:

(i) another business owns a direct interest in the business;

(ii) the public employee or a relative has a direct interest in the other business; and

(iii) the public employee reasonably should know of both direct interests;

(G) any business that is subject to regulation by the agency with which the public employee is affiliated if:

- (i) another business owns a direct interest in the business;
- (ii) the public employee or a relative has a direct interest in the other business; and
- (iii) the public employee reasonably should know of both direct interests; or

(H) any creditor or debtor of the public employee or a relative if the creditor or debtor can directly and substantially affect an economic interest of the public employee or relative.

For these purposes:

Public employee means [, among other things,]:

* * *

(2) any person employed by a County agency . . . ; and

(3) any person appointed by the County Executive or County Council to a board, commission, committee, task force, or similar body, whether or not: (A) the person is compensated for serving on the body; or (B) the body is permanent or temporary . . . ,”³ and

Business means any for-profit or non-profit enterprise, including a corporation, general or limited partnership, sole proprietorship, joint venture, association, firm, institute, trust, or foundation. Business does not include a County agency, but includes an independent fire department or rescue squad.⁴

ANALYSIS & CONCLUSION

As a general rule, “employment by more than one County agency is ordinarily not prohibited by County or State law.”⁵ Moreover, in prohibiting a public employee (including members of advisory boards) from participating in certain matters as a public employee, the conflict of interest provisions of the Ethics Law address only conflicts

³ §19A-4(m)(3).

⁴ §19A-4(b).

⁵ *Mont. Co. Att’y Op.* No. 90.002 (March 30, 1990). *See also* August 4, 1981 Memorandum of then County Attorney Paul A. McGuckian to Casey A. Bula, Chief, Store Division, Dept. of Liquor Control (“Article 4, Section 407, of the Charter prohibits any officer or employee of the county from receiving, either directly or indirectly, any other salary, expenses or compensation from the county for the performance of public duties. This section does not, however, prohibit an employee from holding two positions with the county under certain circumstances. The official working hours and official duties of the two positions should not overlap, no conflict of interest should be generated thereby, and the performance of one job should not in any way impede or interfere with the other. Under these circumstances, we believe that a full- or part-time career employee receiving wages and benefits from one county agency may be employed by another county agency in a position which is not eligible for participation in the Montgomery County Employee’s Retirement System.”)

between the individual's interests as a public employee and those as a private individual. Conflicts between the potentially differing interests of two public positions occupied by the same individual are not addressed by the Ethics Law.⁶ To be sure, there are some restraints on simultaneous service as a County board member and a County employee;⁷ however, none arise from the Ethics Law or any other law administered or enforced by the Ethics Commission.⁸

FOR THE ETHICS COMMISSION:

[signed]

Elizabeth K. Kellar, Chair

July 16, 2002

⁶ See §19A-11 (prohibiting a public employee from participating in a matter that affects any property or business in which the public employee or a relative has an economic interest); §19A-4(b) (*see also* §19A-12 (restrictions on "other employment," which, under the Commission's Outside Employment Regulation—Regulation #25-01, means "The employment of a county employee performing work for compensation for other than the County or an agency . . .").

⁷ See, e.g., Council Resolution No. 12-230 (July 18, 1995) ([T]he Council may appoint a Montgomery County employee or confirm an appointment by the County Executive of a County employee to a board, committee, or commission, if the appointment will not conflict with the employee's official duties or those of the employee's spouse). See also *Hetrich v. County Commissioners*, 222 Md. 304, 308 (1960) (The common law doctrine of incompatible positions prevents a public official or employee from accepting an additional public position that is incompatible with the officer or employee's current position, e.g., when "there is a present or prospective conflict of interest, as where one office is subordinate to the other or subject to supervision by the other, or where the incumbent of one office has the power to appoint or remove or to set the salary of the other"); MD. DECL. OF RIGHTS art. 35 (Dual Office of Profit Prohibition). Furthermore, an appointing or confirming authority might question the prudence of permitting an employee of an agency to be a voting member of an advisory board affiliated with the agency when the board's law provides for the agency head to be an *ex officio*, non-voting member of the Board, and requires the agency head to provide staff services and administrative support to the Board and "facilitate in every way possible the work of the Advisory Board."

⁸ The requester may want to seek advice from appropriate County agencies regarding these and other potential restraints.