



## MONTGOMERY COUNTY ETHICS COMMISSION

### **Advisory Opinion 23-05-010**

**May 1, 2023**

Employees in the County Executive's Office have inquired regarding whether the ethics law imposes restrictions on members of the Sports Advisory Committee appointed to reflect the diversity of the County in several respects, including "sports represented." Several of the persons under consideration have contracts or grants with the County, including with the Department of Recreation, the County agency that will provide staffing to the Sports Advisory Committee. The County Executive's Office would like to know of any ethics limitations on the service of potential appointees in advance of appointment.

The Sports Advisory Committee's enabling legislation is found in Article IV of Chapter 41 of the County Code. Pursuant to Code 41-26:

The Committee consists of 17 voting members appointed by the County Executive and confirmed by the County Council.

The membership of the Committee should reflect the diversity of the County, including diversity in race, ethnicity, sex, gender identity, sexual orientation, geography, sports represented, and non-profit and for-profit organizations.

As for duties, Code 41-27 provides:

The Committee must:

- (a) prepare and submit to the County Executive and the County Council an annual report regarding sports participation in the County, including:
  - (1) factors that affect sports participation in the County, including the availability of and access to athletic fields, facilities, and sports; and
  - (2) recommendations to improve the quality, quantity, and variety of sports opportunities and facilities in the County; and

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- (b) together with the County Executive and County Council, formally recognize teams and athletes in the County who win state or national championships, or who represent the United States in international competition.

Pursuant to 19A-4(m) of the County Code, members of the Sports Advisory Committee are public employees, as that term includes:

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

As the members of the Sports Advisory Committee are public employees, they are subject to the requirements of the public ethics law.

There are three provisions of the ethics law that in theory could be implicated by members of the Sports Advisory Committee be employed by or owning and operating entities with contracts with the County: 19A-11, conflict of interest; 19A-12, prohibited outside employment and prohibited holdings; and 19A-14, misuse of prestige of office for private gain.

### **19A-11 Conflict of Interest**

The prohibition of 19A-11 applies with respect to "any matter that affects, in a manner distinct from its effect on the public generally . . ." certain interests.

The product of the advisory group is an annual report, which relates to sports participation and recommendations to improve the quality, quantity, and variety of sports opportunities. There is no benefit conferred to specific interests through the generation by the Sports Advisory Committee of recommendations to the County Council and County Executive about how County resources could be applied to promote the general objective "to improve the quality, quantity, and variety of sports opportunities and facilities in the County"; any benefit to a specific organization would require the County Council or the County Executive to take action that advances specific interests. The general nature of the duties of the Committee and the intervening steps between Committee recommendations and any specific legislative or executive action supports the conclusion that the Committee does not work on "matters" that affect interests "in a manner distinct from its effect on the public generally."

A reasonable caveat to this analysis would be that it would not apply to recommendations naming specific entities or specific contracts or allocating resources to particular vendors. Recommendations of a general nature such as those recommending more facilities of a certain sort, or more after school sports, or more inclusive sports programming would not raise an issue even if a particular member's contracts or sports interest would potentially benefit from the recommendation being executed (as being a provider of activity consistent with the general

recommendation). In this way, the recommendation would not be specific to the vendor or group but to the class of entities that could in theory seek to answer to the recommendation being made.

### **19A-12 Outside Employment Prohibition and Prohibited Holdings**

19A-12(b) provides:

*Specific restrictions.* Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:

- (1) be employed by, or own more than one percent of, any business that:
  - (A) is regulated by the County agency with which the public employee is affiliated; or
  - (B) negotiates or contracts with the County agency with which the public employee is affiliated; or
- (2) hold any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee.

The restriction of 19A-12(b)(1)(A) and (B) extends only to entities regulated by or contracting with the agency with which the public employee is affiliated. This begs the question of what agency the Sports Advisory Board is affiliated with, if any. The Committee is provided services by the Department of Recreation, but this support does not create an affiliation. ("With regard to § 19A-12(b)(1)(B), the Commission has stated that a board member is not affiliated with a County agency if that agency solely provides staffing for the board member's board." Advisory Opinion No. 03-014 (April 8, 2003). [See Consolidated Advisory opinions 08-03-005 & 08-03-009]). The Commission concludes that the Sports Advisory Committee, whose primary duty involves reporting to the County Executive and County Council, is not affiliated with any other County agency. There is no 19A-12 prohibition on ownership of any interests of entities that are regulated by or contract with County agencies (other than the Sports Advisory Committee itself).

The Commission also does not believe that there is any implication of 19A-12(b)(2) to any Sports Advisory Committee member by virtue of economic relationships with entities that contract with County agencies on matters related to recreation. The County will be receiving exactly the services it expects from appointing persons to the Sports Advisory Committee who have employment relationships with entities that provides sports related activities to the County pursuant to County contracts and grants.

The Commission notes the intent of an exception (19A-12(c)(1)(C)) that excludes from coverage of 19-12(b) prohibitions:

a member of a board, commission, or similar body in regard to employment held when the member was appointed if the employment was publicly disclosed before appointment to the appointing authority, and to the County Council when confirmation is required.

The appointing authority must forward a record of the disclosure to the Commission, which must keep a record of the disclosure on file.

This provision reflects an understanding that there would be circumstances where committee members would have employment related to service as a committee member, but that the provisions of 19A-12 would not apply because, in effect, the relationships were open and notorious. (The Commission does not believe the formal disclosure requirements of 19A-12(c)(1)(C) are triggered with respect to the appointments to the Sports Advisory Committee, only that 19A-12(b)(2) does not create a bar.)

**Sec. 19A-14. Misuse of prestige of office; harassment; improper influence.**

19A-14(a) provides:

Unless expressly authorized by regulation or as may be permitted under Section 19A-16, 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.

The theory here would be a member of the board could be using the presence on the board to advance the employee's private employer or business. This provision is a more general provision than the financial conflict of interest provision and therefore can cover a broader array of circumstances. The Commission does not believe that this provision reaches service on an advisory board like the Committee where the services provided are exactly what the board is supposed to be doing in terms of making recommendations, which is very much akin to the usual and customary (constituent) services allowed under 19A-14(a).<sup>1</sup>

The Commission concludes that none of the ethics prohibitions of the Public Ethics Law relate to appointments to this board, as long as the board members would not be making

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<sup>1</sup> While the Ethics Commission's regulation at COMCOR 19A.14.01.02.2.8 does not apply because it is not clear that the members of the Committee are there "to represent the viewpoint of a particular industry." Nonetheless, it is relevant:

Acting as a Representative on a Board, Commission, Committee, Task Force or Similar Body – A member of a body who is appointed to the body to represent the viewpoint of a particular industry, business or advocacy group may make recommendations to the body in furtherance of the those interests if: 1) the other members of the body are informed of the member's representative status; and 2) the member does not participate in a matter if the member knows or reasonably should know that an entity in which the member has an economic interest, including an employment relationship, is a party to a specific matter before the body.

recommendations that name specific vendors and private entities to be advanced through the recommendations.

This opinion is limited to the Sports Advisory Committee. The Commission notes that the mandates of County boards, committees and commissions are varied, so the design of each one has to be individually examined against ethics requirements.

For the Commission:

A handwritten signature in cursive script that reads "Bruce Romer".

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Bruce Romer, Chair