



MONTGOMERY COUNTY ETHICS COMMISSION

Rahul K. Goel
Chair

Susan Beard
Vice Chair

MEMORANDUM

TO: Detective Sergeant Michael S. Yu,
Supervisor, Electronic Crimes Unit

FROM: Montgomery County Ethics Commission

SUBJECT: Waiver

DATE: December 15, 2020

Waiver 12-11-013

You have requested a class waiver for digital forensic examiners assigned to the Montgomery County Department of Police, Electronic Crimes Unit (ECU) to engage in outside employment with the National White Collar Crime Center (NW3C) as contract teachers. The Chief of Police, Marcus G. Jones, concurs in the request and has recommended that the waiver be granted.

County employees are prohibited pursuant to County Code section 19A-12(b) from engaging in outside employment with an entity that is regulated by or negotiates or contracts with the County agency with which the public employee is affiliated. Further, County employees are prohibited from any employment relationship that could reasonably be expected to impair the impartiality of the employee in performing official duties. Here, not only does the NW3C arrange training in Montgomery County with your unit, but there is also the distinct likelihood that the employees engaged in outside employment with NW3C would be selected to teach the courses that have been arranged for NW3C to provide using County facilities and with audiences including Department employees. The prospect of County employees profiting (through outside employment) from teaching arranged for by their Department implicates notions of use of the prestige of office for private gain pursuant to 19A-14(a) of the County Code in addition to the prohibition of 19A-12(b). Because you and the Department believe the training activities to be in the best interest of the County and that it is in the best interest of the County to have County employees teaching courses for NW3C, you seek a waiver of applicable ethics restrictions in connection with the activity. For the reasons stated below, the Ethics Commission grants a waiver of ethics restrictions for the class of individuals from your unit that will be engaged in

MONTGOMERY COUNTY ETHICS COMMISSION

100 MARYLAND AVENUE, ROOM 204, ROCKVILLE, MARYLAND 20850
OFFICE: 240.777.6670 FAX: 240.777.6672

teaching for NW3C subject to and contingent upon the conditions set forth in this waiver being observed.

Relevant Facts

You are the Detective Sergeant for the Electronic Crimes Unit and the Supervisor of the Unit. The unit assists County investigators with digital forensic needs. This involves the extraction and analysis of data stored on electronic devices such as computers, laptops, tablets and cellular phones.

In the last ten years, the department has trained an extensive number of personnel in a multitude of courses.¹ As much as DNA changed forensics in investigations in the 1990s and early 2000s, digital evidence is the latest focus in the evolution of forensics. Many law enforcement agencies across the world are struggling to keep up with the ever-evolving pace of information technologies. This partnership has allowed the County to better train its police officers and investigators to understand how technology can prevent and solve crime, provide education to children at schools on how to remain safe from online predators, and better understand the legal and constitutional requirements of information technology in reducing crime in the County. As a result of this, the ECU is one of the busiest and most productive digital forensics labs in the country. The ECU is one of only 90 accredited labs in the country out of approximately 18,000 federal, state, county, local and tribal law enforcement agencies.

Several of the digital forensic examiners assigned to the Montgomery County Department of Police, Electronic Crimes Unit have been asked to teach classes for the National White Collar Crime Center (NW3C). The NW3C is a nonprofit, membership affiliated organization comprised of state, local, federal and tribal law enforcement and prosecutorial and regulatory agencies. It provides support in addressing economic and high-tech crimes. In pursuit of this, it provides training in computer forensics, cyber and financial crimes investigations and intelligence analysis. It is funded by the United States Congress, with oversight via the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.

In the past, you have arranged the logistics of hosting NW3C courses at various County facilities and disseminated NW3C training information to Montgomery County Police Officers about webinars, online courses, and available training at locations both in and outside the County. The unit has had a long working relationship with hosting courses taught by instructors from the NW3C, and you are the designated representative to the NW3C by the Montgomery County Chief of Police.

As a byproduct of the working relationship with the NW3C, the NW3C has requested several digital forensic examiners to pilot a new program to hire them as contractors in assisting with

¹ These course include: Social Media & Open Source Intelligence, Virtual/Cryptocurrency, Social Media Basics, Introduction to Cell Phone Investigations, Apple Introduction, Identifying and Seizing Electronic Evidence, Introduction to Computer Networks, First Responders and Digital Evidence, Search Warrants & Digital Evidence, Advanced Digital Forensic Analysis-macOS, Advanced Digital Forensic Analysis-iOS & Android, Advanced Digital Forensic Analysis-Windows, Basic Cyber Investigations-Cellular Records Analysis, Basic Cyber Investigations-Dark Web & Open Source Intelligence, Basic Digital Forensic Analysis, Basic Digital Forensic Analysis-Seizure, Intermediate Cyber Investigations-Virtual Currency, Intermediate Digital Forensic Analysis-Automated Forensic Tools, and other additional courses.

teaching in various teaching locations throughout the country. This would allow its full-time instructors to reduce their travel and focus on more content creation for courses. As a high demand course location here in Montgomery County, it is anticipated that Montgomery County ECU examiners will be asked to teach locally. The digital forensic examiners assigned to ECU will not have the ability to determine locations for courses offered by the NW3C.

Montgomery County has been an ideal location for NW3C training. The County is not far from NW3C's West Virginia headquarters and the County's facilities are located in the middle of the East Coast, in a densely populated area close to three airports. Many of the digital forensic jobs in the United States in federal, state, local and corporate are highly concentrated in the District of Columbia, Virginia and Maryland areas. While the NW3C does not always fill its classes held elsewhere in the country, the ones held here in Montgomery County are always full. These courses have been held for no charge at Montgomery County Police facilities.

By using County ECU examiners to teach locally, the NW3C will be able to reduce travel, lodging and per diem costs to its instructors. The benefit to Montgomery County is an ability to provide more free training to Montgomery County Police Officers and allied agencies without travel, lodging and per diem costs. Many digital forensic courses cost anywhere between three to five thousand dollars. These courses have allowed for the County to have more officers and investigators in the area better understand how to investigate crimes involving financial and, in particular, digital evidence.

Meeting the Standard for the Issuance of a Class Waiver

Section 19A-8(a) of the County Code provides that 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 Chapter 19A, including 19A-14(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 a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

Section 19A-8(b) provides that the Commission may waive the prohibitions of subsection 19A-12(b) if it finds that:

- (1) the waiver is needed to ensure that competent services to the County are timely and available;
- (2) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or
- (3) the proposed employment is not likely to create an actual conflict of interest.

The Commission finds that the standards for issuing a waiver pursuant to both 19A-8(a) and 8(b) have been met, and the waiver of 19A-14(a) and 19A-12(b) will apply to the class of MCPD ECU employees who are employed as instructors by NW3C.

The standard in 19A-8(a) is satisfied as:

(1) The Ethics Commission concludes that the best interests of the County are served by granting this waiver. Due to the offsetting costs for lodging, travel and per diem, having County personnel as the instructors could provide more opportunities for the County to be selected as a host site. Having the County as a host site promotes the County's ability to attract candidates with needed skills and to further the skills of the existing workforce in important forensic and technological investigative techniques. Without local training by NW3C, the ECU would not have the time or resources to provide the same level of training to County officers. Moreover, if the courses were not held here, the County would have to pay for travel, lodging and per diem to County investigators to attend the courses at venues potentially not close to the County.

(2) The Commission finds that the importance of having the class of ECU employees engaged in the NW3C training outweighs the actual or potential harm of any conflict of interest. The entire outside employment relationships contemplated with NW3C redounds to the benefit of the County as it furthers the County's ability to be at the forefront of developments in digital forensics and information technology as it relates to police investigations; and

(3) The Commission further concludes that the granting of this waiver will not give a public employee or class or employees an unfair economic advantage over other public employees or members of the public. The NW3C will make the selections of who will be hired as instructors and where those instructors will be assigned. The selections can be presumed to be based on subject matter expertise, and there is no identifiable unfair advantage over the public or other employees.

The Commission also finds that the standard of 19A-8(b) is met by meeting the standard of 19A-8(b)(2): failure to grant the waiver may reduce the ability of the County to hire and retain highly qualified public employees. The NW3C has identified several highly experienced and talented digital forensic examiners assigned to the ECU. Typical jobs in the federal and private sectors for such jobs often pay significantly more than the County. Without granting the waiver, the County would risk these highly qualified employees to seek outside employment due to opportunities for them in the Federal or private sector. Three previous digital forensic examiners in ECU have left the County prior to normal retirement and are understood to be earning significantly more in the private sector.

Notwithstanding these conclusions, the Commission believes that it would not be appropriate for NW3C training that is coordinated with the MCPD to create an income source for police employees engaged in outside employment. Accordingly, where NW3C training is coordinated with the MCPD and conducted in Montgomery County, MCPD employees may not conduct the training for NW3C as an outside employment activity. However, the training may be conducted by MCPD employees who otherwise have outside employment with NW3C where the employees conduct the training in a duty status and are not compensated by the outside employer with respect to that training. To restate: if NW3C wants its training staff who are County employees to teach at County facilities pursuant to an arrangement with the ECU for them to do so, the employees could be assigned to teach in their official County capacity and be compensated by the County (and not the NW3C) for this training. In this fashion, these

employees would be conducting training as County employees in the interest of the ECU and the MCPD and not as a part of their outside employment. The Commission is informed that this arrangement is satisfactory to NW3C. The Commission notes that the imposition of this condition creates a separate ethics issue, where the affected employees would be teaching in a duty status with respect to training sessions given by the employees' outside employer. The Commission believes, in the context of the facts presented, that it is preferable to have these employees paid by the department with respect to training that is for, in large part, the MCPD rather than having employees receive compensation from an outside employer to present that training.

In addition to the condition addressed above, the waiver is conditioned on the class of persons who are affected by the waiver - ECU employees with outside employment as instructors with NW3C – not being involved in coordinating any training activities in Montgomery County that relate to NW3C. The affected employees may not refer other employees to training conducted by NW3C or decide whether other MCPD employees will attend such training. Further, the affected employees may not focus on Montgomery County policies and practices in the outside employment activity or divulge the specifics of their respective experiences as County employees. These limitations do not apply with respect to the training these employees give while in an official duty status.

The Commission notes that this waiver does not waive the obligation of any member of the class covered by the waiver from seeking approval for outside employment in accordance with the ethics law and applicable regulations.

This waiver is limited to the specific facts presented here.

Sincerely,



Rahul K. Goel, Chair