



## MONTGOMERY COUNTY ETHICS COMMISSION

Susan Beard  
*Chair*

Bruce Romer  
*Vice Chair*

**April 20, 2021**

### **Waiver 21-04-004**

Pursuant to Chapter 19A-16(c) of the County Code, a public employee must not knowingly accept a direct or indirect gift from any individual or organization that the public employee knows or reasonably should know does business with the County agency with which the public employee is affiliated. In addition, the ethics law provides that an employee may not misuse the prestige of office for personal gain or act in matters in which they have a financial interest. The Director of-Operations of the Montgomery County Revenue Authority (MCRA) has asked the Ethics Commission for an advisory opinion as to the applicability of these provisions with respect to the manner in which the Revenue Authority manages compensation to its food and beverage employees. Further, in the event the Ethics Commission believes the provisions of the ethics law do prohibit the manner of compensation to these employees, the Director of Operations asks that the Commission issue a class waiver to allow the compensation practice. The waiver request is concurred in by MCRA's Chief Executive Officer. The Commission finds that the prohibitions of the ethics law do apply to the circumstances but issues a class waiver as further described below.

#### Statement of Facts

The MCRA was formed by State law in 1957 and came under County law in 1994. The MCRA does not receive any County funds for its operating or capital budgets. The operating and capital funds of the MCRA are maintained and managed in separate accounts from the County.

The MCRA operates nine golf courses in the County. The MCRA opened the first golf course, Falls Road Golf Course, 60 years ago and developed a system of 5 golf courses by the late 1990s. In 1964, the Maryland National Parks and Planning Commission (MNCPPC) opened its first golf courses and developed four courses by the late 1990s. In 2005, the County Council was subsidizing the MNCPPC's golf courses with over \$1 million in annual operating subsidy and capital projects funds. The County Council decided that taxpayer money should not be used to operate golf courses and in 2006, the MNCPPC and the MCRA entered into a lease agreement for MCRA to operate four of MNCPPC's golf courses. The lease agreement provided for public bonds to build the Little Bennett Golf Course. The golf course system includes over 2,200 acres of valuable open spaces and serves over 400,000 residents annually.

---

#### **MONTGOMERY COUNTY ETHICS COMMISSION**

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

The MCRA maintains and operates the facilities by employing standard business practices used in the golf industry as well as the food and beverage industry country-wide. In the Food and Beverage department, over 90% of the staff are college and high school students working during their summer break. Tips received by food and beverage staff are viewed as part of the employees' standard compensation. Food and beverage staff is paid at an average rate of \$9.78 per hour, plus tips. The rate relies on the wage and hour law's tipped employee exemption from having to pay applicable minimum wage. The Maryland Department of Labor minimum wage law in Montgomery County permits an employer to pay a minimum of \$4.00 per hour provided the employer guarantees that the combined hourly rate and tip income is equal to the standard minimum wage hours, which is set to increase to \$15.00 per hour on July 1, 2021. The hourly rate was developed based on the amount of tips received by MCRA food and beverage employees which is closely monitored. Additionally, MCRA compares the percentages of tips to sales across the facilities to ensure that tip revenues are consistent and being reported. If a particular facility is below other facilities in reporting tip revenue as a percentage of sales, management will meet with staff to address the apparent shortfall in reporting.

If the MCRA did not allow tipping and instead paid its Food and Beverage employees the applicable minimum wage, the impact on MCRA would be an additional \$325,000 of annual expense. An increase of expense to this extent would render the food and beverage part of the MCRA business not financially feasible.

In addition to monitoring tip revenue, checks and balances are in place to ensure that special treatment is not being given to specific customers. Staff is rotated in performing different duties. The responsibilities include the beverage cart (serving customers on the golf course), preparing and serving meals in the snack bars, and cooking on the outdoor grills. Monthly inventories are taken to assure product is not given away (in exchange for tips). Beverage cart inventory is checked (and replenished) by a supervisor at the beginning, middle, and end of shifts.

#### Analysis

MCRA employees are "public employees" pursuant to Chapter 19A-4(a)(3) and are subject to the provisions of the County's ethics laws.

Based on the idea that the tips are simply part of the compensation of MCRA food and beverage employees, the Ethics Commission is asked to conclude that the ethics law does not preclude compensation in the form of tips. The Ethics Commission does not reach such a conclusion and finds that tipping of public employees by customers of County agencies is prohibited by the ethics law even where such tipping is intended by the agency to be part of the compensation to the employees. The Commission concludes that tips are prohibited gifts and that receiving tip compensation from third parties also contravenes the prohibition on use of the prestige of office for private gain.

19A-16(c) of the County's ethics law provides that a public employee must not knowingly accept a direct or indirect gift from a restricted donor. 19A-4(h) defines "gift" as the transfer of anything of economic value, regardless of form, without an exchange of consideration of at least equal value. Pursuant to 19A-4(o), a restricted donor is a person or business that: . . . (2) does

business with the County agency with which the public employee is affiliated; (3) is engaged in an activity regulated or controlled by the County agency with which the public employee is affiliated; or (4) has a financial interest that may be substantially and materially affected in a manner distinguishable from the public generally by the performance or nonperformance of the public employee's duties.

Pursuant to 19A-14(a), 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 Commission believes that tipping of County employees, regardless of whether the employees are "tipped" employees pursuant to labor laws, constitutes gifts that are prohibited pursuant to the gift prohibition. While the definition of gift excludes circumstances where there is an exchange of consideration, that caveat does not apply where the consideration provided by the employee is government time or property because that consideration is considered provided by the County rather than the employee. The Commission notes that the of use of prestige of office for private gain prohibition specifically allows for performing "usual and customary constituent services", but only as long as it is given "without additional compensation." While the MCRA believes the tips to Food and Beverage staff to be part of their compensation package, the Commission views the tips as "additional compensation" from third parties.

Pursuant to 19A-8(a) of the ethics law, the Commission is authorized to issue a class waiver if the Commission 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.

The Commission believes the best interest of the County would be served by granting a class waiver because, as presented by the waiver request, it allows for food and beverage operation to be sustainable and keeps prices affordable for County residents. The Commission accepts the view presented in the request that the importance to the County of the food service employees doing their jobs for tips outweighs the actual or potential harm of any conflict of interest because it allows MCRA to serve customers in a manner consistent with industry practices and avoids loss of employment for the food and beverage staff. The Commission also agrees that a waiver would not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public. These seasonal employees are paid a salary that is less than the standard minimum wage-and the benefit of the prohibited tips does not result in any substantial advantage to these employees.

The waiver is limited to the class of MCRA food and beverage staff who are "tipped" employees who receive less than standard minimum wage rates. The tipping that occurs must conform to MCRA policies and Montgomery County minimum wage laws regarding tipping. The waiver request was concurred in by the Chief Executive Officer of MCRA, Mr. Keith Miller. The

waiver is based on and limited to the facts presented by the requestor, and the waiver is limited to the class of persons identified.

For the Commission:

A handwritten signature in cursive script that reads "Susan Beard".

---

Susan Beard, Chair