



## MONTGOMERY COUNTY ETHICS COMMISSION

**Waiver 22-03-005**

**March 13, 2022**

Ms. Laurie Boyer Babb served as the Economic Development Manager for the Business Advancement Team in the Office of the County Executive until March 11, 2022.

She was recently contacted by a third-party recruitment agency regarding a position at the Montgomery County Economic Development Corporation (MCEDC). Ms. Babb then sent her resume to MCEDC for consideration, interviewed, and was offered a position as Director of Economic Development.

County Code Section 19A-13(b) prohibits a former public employee from working for another person or business for one year after leaving County service if that employee significantly participated in regulating or contracting with that person or business.

Ms. Babb has requested that the Ethics Commission waive the application of Section 19A-13(b) employment of former public employees.

### Ethics Law Prohibitions on Former Employees and On County Vendors

The County's ethics laws ensure public integrity with respect to County employees negotiating with or taking jobs with vendors of the County. The law's framework includes the conflict of interest prohibition in 19A-11 on a public employee working on a matter affecting an entity with which the employee has an application or is negotiating for employment; the post-employment permanent bar of 19A-13(a) on assisting anyone other than the County with respect to a specific matter that the employee significantly participated in as a public employee; and the one-year bar of 19A-13(b) on a former employee being employed by a person or entity where the public employee significantly participated in regulating or in contractual activity with the person or entity. A former employee also is prohibited from using confidential information gained while a public employee for private gain. To complement the restrictions on public employees and former public employees, vendors to the County are prohibited by the procurement integrity provisions of County procurement law at 11B-52(a)

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from employing or offering to employ a public employee if the duties of the public employee include significant participation in the procurement matter with the vendor.

This framework of laws is generally intended to assure that County employees are objective and impartial in the execution of their duties. More specifically, these laws are intended to prevent the real or appearance of corruption associated with the "revolving door" between government service and private entities. Dealings with vendors are not to be, in effect, one long job interview where County employees are "feathering their nests" and seeking opportunities with the very persons who are affected by the conduct of their County jobs. And the provision of 11B-52(a), applicable to vendors, is to keep them from corrupting County employees who they deal with and to prevent the vendors from inducing employees to violate the ethics provisions that are applicable to the employees.

MCEDC is designated, in accordance with Chapter 15A of the County Code, as the County's economic development corporation. Pursuant to 15A-4(a)(3), a designee is:

(3) incorporated for the purpose of serving as the County's Economic Development Corporation and implementing the County's economic development strategic plan, adopted under Section [20-76](#), and related programs. These programs must include:

- A. attracting and retaining businesses;
- B. facilitating economic, industrial, and commercial development in the County;
- C. encouraging investment in commerce, industries, and businesses in the County;
- D. promoting job growth and talent attraction, in coordination with the Montgomery County Workforce Development Board;
- E. advising and informing County officials on economic development matters;
- F. providing services to resident businesses in the County, including business retention, counseling, business planning, and other services to maintain and grow the existing economic base;
- G. stimulating and nurturing the development of new business;
- H. supporting minority, female, and disabled owned businesses, including assisting minority, female, and disabled owned businesses to gain access to capital; and

- I. promoting the development of a vital and balanced economy.

MCEDC is “not an instrumentality of the County.” 15A-4(a)(d). Its members are not, by virtue of membership on the MCEDC, public employees of the County subject to Chapter 19A of the County Code. Chapter 15A provides that the designee’s bylaws must have certain attributes more typically associated with public entities, including compliance with the Maryland Open Meetings law and the Maryland Public Information Act. MCEDC is also required to “protect against any conflict of interest or similar impropriety by members of the Board of Directors or the Executive Director or any other employees.”

Pursuant to 15A-3(e), the bylaws must include:

1. a prohibition against self-dealing and collusive practices;
2. a provision for the disclosure of a financial or similar interest of any person in any matter before the corporation that would create a conflict of interest;
3. a provision establishing conditions under which a person is disqualified from participating in decisions or other actions in which there is a conflict between the person’s official duties and private interests;
4. appropriate remedies for a violation of the bylaws, including removal or termination; and
5. a policy to protect whistleblowers.

MCEDC has a contract with the County pursuant to which the County obtains the services of MCEDC to carry out its role as the County’s economic development designee. That contract includes standard terms and conditions of County contracts, including a provision that states that the Contractor is required to abide by the requirements of Section 11B-52(a) concerning “the prohibition on a person engaged in a procurement from employing or offering to employ a public employee.” (The Commission notes that the standard contract language is more inclusive than the statutory language in 11B-52(a) as that provision only extends to employment or offers of employment to public employees significantly participating in procurement matters.)

Employees and former employees seeking employment with MCEDC, as an entity that is, by definition, not an instrumentality of the County, are subject to the provisions of the ethics law normally applicable to employees and former employees seeking employment with private organizations. As the County’s economic development designee, MCEDC’s existence is a function of Montgomery County law. In that law, Chapter 15A, there is no suggestion that the

laws concerning the “revolving door” would be suspended with respect to the County’s designee for economic development. Moreover, MCEDC is an entity that is subject to 11B-52(a).

19A-13 provides:

- a. A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter if the employee significantly participated in the matter as a public employee.
- b. For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business if the public employee significantly participated during the previous 3 years:
  1. in regulating the person or business; or
  2. in any procurement or other contractual activity concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).

The prohibition contained in 19A-13(a) is not subject to waiver by the Ethics Commission, and the implication of this for the current circumstances will be discussed further below.

County Code Section 19A-8(c)(2) authorizes the Commission to waive the prohibitions of Section 19A-13(b) if it finds that: (1) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or (2) the proposed employment is not likely to create an actual conflict of interest. If either of these standards are met, a waiver can be issued. Ms. Babb has requested a waiver of Section 19A-13(b) to be employed by MCEDC on the basis that the statutory standard for issuance of a waiver is met.

Ms. Babb cites that in her role as Economic Development Manager for MCG, she works collaboratively with MCEDC on business attraction and retention projects to advance the economic health and stability of the County. She states that she does not have any Contract Administrator or Contract Management roles as it relates to MCEDC's contract with Montgomery County and she has never been involved with approving any MCEDC invoices for payment.

Ms. Babb states that actual recommendations from MCEDC regarding business incentives must receive approval from either the Department of Finance, since these programs are funded through the Economic Development Fund (EDF) in the Department of Finance, or through the County Executive and County Council. She states that MCEDC provides recommendations on

these programs to the County Government, but it is Montgomery County Government that makes the final decisions. From her perspective, the programs she works on with MCEDC encourage job growth and investment in the County without financial benefit to MCEDC.

Ms. Babb correctly points out in her request that MCEDC was created to work in partnership with the County government to improve the overall quality of life in Montgomery County for the businesses and residents located here.

She posits that her employment at MCEDC would not create any conflict of interest as she will continue to focus on enhancing the quality of life in the County. She further relates that all the work that she has done in conjunction with MCEDC as a Montgomery County Government employee is related to the objectives defined in Section 15A-1 of the County Code. Moreover, she believes that there is no actual conflict of interest between the work performed by the County and MCEDC because MCEDC is seeking to put into effect the County's own economic development goals and objectives.

She also states that failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees to serve in her current role, or similar roles, where a collaborative relationship exists between the County and third-party organizations, because it would effectively shut the door between public and private employment on matters related to economic development. She points out that this could create a chilling effect on the County's ability to hire qualified candidates where other nonprofit organizations established by local statute to carry out County objectives are involved.

The Chief Administrative Officer of the County recommends to the Commission that the waiver be granted, subject to certain conditions.

In most instances where an employee has sought a waiver of 19A-13(b), in determining whether there was no conflict of interest, the Commission has looked at the nature of the employee's position with the new employer and the extent to which the employee would be engaged in communications with the County after leaving County service. The Commission has also considered whether the employee would be able to comply with the requirements of 19A-13(a), the unwaivable permanent bar on working on the same specific matters the employee significantly participated on while an employee. Here, where the very reason for the organization is to fulfill the statutory mandate of Chapter 15A and contractual requirements to the County, the Commission acknowledges that there would be communication and coordination between Ms. Babb and the County on economic development matters generally.

While the Commission has not typically waived circumstances where a former employee would be involved in communicating with the former employee's very agency on matters related to what the former employee worked on as a public employee, the Ethics Commission has previously issued a waiver of 19A-13(b) where "when the proposed employer is a public entity subject to its own stringent procurement regulations and the state's ethics law, as opposed to a

private company with a profit motive.” See Waiver No. 05-02-004W. That opinion involved the Maryland Environmental Service, a nonprofit public corporation established pursuant to State law.<sup>1</sup> In that circumstance, the Commission acknowledged that the requestor:

significantly participated in contractual activity with MES within the past three years. Nonetheless, the Commission believes that a waiver is appropriate to allow him to pursue employment with MES. Section 19A-13(b) is intended to preclude a public employee from offering a contractor a favorable recommendation (or action) in a procurement matter in exchange for a latter offer of employment. The evil that this section of the ethics law is designed to prevent is unlikely to occur when the proposed employer is a public entity subject to its own stringent procurement regulations and the state’s ethics law, as opposed to a private company with a profit motive. The MES, like the Northeast Maryland Waste Disposal Authority, is part of a network of public corporations serving the environmental needs of Maryland citizens through agreements with both public and private entities. We conclude a waiver is appropriate under these circumstances.

Here, while the corporation is not subject to the State (or the County’s) ethics law, it is subject to the Open Meetings Act, the Maryland Public Information Act and the statutory direction to have significant ethics requirements in the organization’s bylaws. The Commission also recognizes that MCEDC’s existence and responsibilities are in significant part derived from those responsibilities that were previously carried out by the County’s Department of Economic Development (until 2015) and amount to the execution of County functions by a non-profit organization. In carrying out its statutorily defined mission, MCEDC does not operate like a private organization in the normal sense of seeking business from the County through a competitive procurement process. Further, the nature of Ms. Babb’s work as a County employee with MCEDC involved collaboration on a number of programs; she was not working on contract administration but collaborating with a non-profit statutorily mandated to pursue the County’s economic development objectives.

A majority of Commission members (3-2) concludes that under the circumstances presented, that if Ms. Babb abides by the restriction imposed by 19A-13(a), as further discussed below, that there will be no conflict of interest in her execution of a position at MCEDC. Further, the Commission acknowledges that failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees. In short, the standard for issuance of a 19A-13(b) waiver has been met. The Commission notes the support for and concurrence in the request for a waiver from the Chief Administrative Officer, whose advice is given substantial weight to the determination of whether the waiver standard has been met. The CAO’s support for the waiver was conditioned on Ms. Babb’s not working for one-year on certain matters. Accordingly, the Commission will grant a waiver of 19A-13(b).

As indicated, the waiver is conditioned on compliance with 19A-13(a). Compliance with 19A-13(b) means Ms. Babb may not work for MCEDC on the very same specific matters that she worked on as a County employee.

In correspondence with the Commission separate from her waiver request, Ms. Babb has articulated her work on MCEDC matters as follows.

In my capacity as Economic Development Manager of the Business Advancement Team for Montgomery County Government, I specifically work with MCEDC on a few programs: the MOVE Grant program, incubator/entrepreneurial support to local businesses, and the Economic Development Fund Grant and Loan Program.

For the MOVE Grant program, MCEDC receives all MOVE applications through an on-line portal, they do an initial review of all applicants and if the applicant meets the minimum requirements, they submit their recommendation for approval along with all backup documentation to me for an internal County review. I then review all documentation to confirm eligibility and submit recommendations for approval to the Fiscal Management Division Chief in the Department of Finance for final approval. To clarify, qualified applicants must be new to the County, have signed a minimum 3-year lease in commercial space, and be in Good Standing. If they meet the qualifications, they are eligible for a grant of \$8/square foot for the space leased (a maximum of 20,000 s.f., but grants are capped at \$80,000).

Incubator/entrepreneurial support is a new project following an Incubator Feasibility Study that we completed with an outside consultant last year. That study recommended a more comprehensive approach to creating an entrepreneurial ecosystem in the county and we have been working with MCEDC to determine what that could look like. I have had some involvement with this project, but one of my staff members is the principal point of contact for overseeing the incubators and this project with MCEDC.

The Economic Development Fund Grant and Loan Program is the County's discretionary incentive program. We work with MCEDC to determine if a business prospect should be offered a discretionary incentive, and if so, how much that incentive should be. I had more direct involvement in these projects when my position was within the Department of Finance but have had much less input since the Business Advancement Team (BAT) was created on July 1, 2020 and became part of the Office of the County Executive. I am still involved in bi-monthly calls with MCEDC and the Department of Finance and the CEX Special Projects Manager regarding these prospects.

I also recently provided feedback from input received from my BAT team members to ACAO Jake Weissmann on the Comprehensive Economic Strategy that was submitted by MCEDC to the County, as they need to do per County Code. Input was also provided

from numerous other County departments. Our comments include: the need for prioritization of items in the plan; questions about the SWOT analysis that was included; the need to mention the commercial real estate community in the plan as an important component of business growth; and a suggestion to include responsible stakeholders after each item rather than a long list at the end of the document.

19A-13(a)'s non-waivable restriction is:

- a. A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter if the employee significantly participated in the matter as a public employee.

MCEDC is not a County agency under this provision. Where Ms. Babb significantly participated in a case, contract, or other specific matter as a public employee, then the permanent bar of 19A-13(a) applies. The Commission does not view, for purposes of application of this section, Ms. Babb's work on MCEDC matters as significant participation on the MCEDC contract as a whole. (This is a point Commission staff consulted on with the State Ethics Commission's staff, and the Commission's position is consistent with the views obtained from State Ethics Commission staff.) Instead, MCEDC matters that Ms. Babb worked on that implicate the permanent bar include cases, applications, contracts or other specific matters Ms. Babb worked on. In application, this means that Ms. Babb's work as a County employee on MCEDC-related matters that focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties, will not implicate the bar of 19A-13(a). On the other hand, if a matter was focused upon the interests of identified persons, including MCEDC or any other specific party, in a specific proceeding or an isolatable transaction or related set of transactions, the bar of 19A-13(a) is implicated. The Commission acknowledges that this presents a challenge to Ms. Babb and MCEDC in distinguishing which are matters involving specific parties and which are more general in nature. And the Commission expresses its availability to consult on questions related to this challenge.

No doubt, as the County's Economic Development Manager, Ms. Babb's communications regarding her roles and responsibilities provide general insight to her County role, but presumably do not identify every single issue – and potential matter involving specific parties – that she was involved in with MCEDC in the day-to-day execution of her County role. With respect to those activities that she did identify, 19A-13(a) likely applies with respect to specific MOVE applications, specific instances of incubator/entrepreneurial support to individual businesses, economic development grants and loans to specific enterprises. Those activities that, based on the information supplied and without more facts suggesting consideration individual benefits to a party, would not be subject to the limitation of 19A-13(a), would include the Incubator Feasibility Study that considered a more comprehensive approach to creating an entrepreneurial ecosystem in the county and the development of a Comprehensive Economic Strategy.



Also, the CAO recommended that Ms. Babb be precluded from assisting MCEDC in the following matters for one-year:

1. Programs currently going through reforms or potential reforms — especially the SBIR program due to conversations and meetings we've had.
2. Grants or loans that are currently under evaluation, active, or pending that she is involved i[n] (this may be none).
3. Programs, NDAs, or Contracts that she directly managed or supervised (Laurie oversees the Conference Center, CVB, and Incubator NDAs, as well as Contract Administrator for the Nonprofit Village and the Small Business Development Center).

The Commission adopts these conditions only to the extent that those conditions exceed the requirements of 19A-13(a)'s permanent bar on participation in certain matters. For example, if the condition concerning the SBIR program involves specific, individual applications, those would implicate the permanent bar of 19A-13. Grants or loans identified in (2) would be subject to the permanent bar. Specific contracts would likely implicate the bar of 19A-13(a), and the management of programs and NDA's could implicate the bar of 19A-13(a), depending on the circumstances. Of course, where the bar of 19A-13(a) applies, the bar is permanent and unwaivable. With respect to these conditions of the CAO, where the bar of 19A-13(a) does not apply, then the Commission adopts the one-year preclusion advocated by the CAO.

The issuance of the waiver is based on the facts presented by Ms. Babb in her request for a waiver and other correspondence with the Commission. A separate waiver is being issued to MCEDC regarding the prohibition of 11B-52(a).

For the Commission:



Susan Beard, Chair