



MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion 22-10-017 October 18, 2022

Because one or more Councilmembers expressed interest in updating a 2011 Council resolution, you have requested an advisory opinion as to whether County Councilmembers may consider and vote upon a Council resolution that would alter retiree health benefits applicable to current Councilmembers (and elected officials taking office in the future). The Ethics Commission concludes that the contemplated consideration and voting on a resolution that would create eligibility for current elected officials is inconsistent with the County's public ethics law and is prohibited.

Your request states that as a result of voters adopting a Charter amendment in 2016 to impose term limits on the County's elected officials, County Council members were limited to serve three terms in office. Under current resolution and policy, a term limited Council member who leaves County service at the age of 50-59 after the maximum of three terms (12 years), would not qualify for retiree health insurance benefits.

You indicate:

The contemplated Council resolution would result in elected officials between the ages of 50 and 60 becoming eligible for retiree health insurance coverage with minimums of 12 years of County service. Currently . . . such employees would need 15 years of service to qualify under the 2011 resolution.

Being deprived of the opportunity to seek a fourth term due to term limits effectively precludes Councilmembers from obtaining the benefit that other County personnel who are not term-limited could obtain by continued service. As you state, "the idea would be to treat these elected officials in an equitable manner that allows them to gain retiree health care coverage despite term limits." Of course, it is noted that if Councilmembers were to continue service as employees after serving three terms by being elected County Executive or otherwise being employed by the County in a position covered by the retirement benefit, the number of years served would not be limited to 12 years.

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The Ethics Commission believes the contemplated action is inconsistent with the intent of the ethics law, which by its terms is to be liberally construed to accomplish its objectives. The introductory language provides:

Sec. 19A-2. Legislative findings and statement of policy.

- (a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.
- (b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.
- (c) To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.
- (d) The Council intends that this Chapter, except in the context of imposing criminal sanctions, be liberally construed to accomplish the policy goals of this Chapter. . . .

The Commission believes the contemplated action would not be or appear to be impartial or a product of independent judgment; moreover, the Commission concludes that the appearance or reality of lack of impartiality would undermine confidence in the execution of County governance.

Specific prohibitions of the ethics law are implicated. Section 19A-11 is focuses on financial conflicts of interest. It provides:

Sec. 19A-11. Participation of public employees.

- (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;

. . . .

This provision prohibits a public employee from participating in any matter that affects an employee's economic interest in "property" in a way that is distinct from its effect on the public generally. For purposes of the question before the Commission, the Commission concludes that retiree health benefits are "property" interests that involve economic interests. And the contemplated actions would benefit just elected officials, not members of the public generally or even as members of the class of County employees, but as a small and distinct group.

The Commission notes that three of the nine Councilmembers would immediately qualify for the benefit from the contemplated action at the end of this year when the Councilmembers' terms conclude. The potential benefit to other Councilmembers is varied because of their differing ages and how they could theoretically reach 12-14 years of service (triggering the benefit from the contemplated policy if they have also reached age 50.) At least two Councilmembers would have no theoretical way of benefitting from the contemplated policy. As to three others, the path to becoming qualified for the benefit based on the contemplated policy is convoluted and unlikely. And one would be qualified to benefit only upon winning elections and serving out additional terms of office.

In theory, there are ways 19A-11's prohibition could be deemed not to apply – including through application of an exception to 19A-11 for matters where recusal would cause a circumstance where too few members of a deciding body would be available to constitute a quorum. (19A-11(b)(1)). However, the Commission is concerned that there is no way for the current Council to consider the matter without giving an appearance that action was taken to serve the interests of themselves or the other current members of the Council. And this concept of avoiding use of the prestige of office for personal gain or the gain of others is codified in Section 19A-14 of the Code. Further, public employees are prohibited from seeking to influence or attempting to influence another employee to take action that would violate the ethics law.

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

(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.

....

(f) A person must not influence or attempt to influence a public employee to violate this Chapter.

The Commission recognizes that there are many instances where County employees advocate for themselves or other employees to the Office of Human Resources or to other County officials regarding benefit and human resource issues without running afoul of ethics principles or law. Here, however, the contemplated action would involve changing County policy so that current Councilmembers (and future elected officials) could get a benefit that they otherwise would not get. The Commission concludes that the intent of the ethics law is to preclude the use of government to advance personal financial interests and that consequently, the contemplated action is inconsistent with both 19A-11 and 19A-14. This conclusion would not preclude consideration and voting on retiree health benefits for future office holders who are not current Councilmembers.

The Commission is sensitive to the possibility that an inequity affecting a set of County decision-makers warrants correction that only the affected set of decisionmakers can repair – and

understands that that idea is what underpins the justification for what is requested here. For this reason, the Commission emphasizes that this opinion is limited to the facts presented. Moreover, the Commission recognizes that there may be circumstances where the Commission's authority to issue a waiver of the law's requirements would appropriately be exercised as being, among other things, in the best interests of the County (in accordance with 19A-8(a) of the ethics law.)

For the Commission:



Susan Beard, Chair