



MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion 08-03-005 & 08-03-009

Pending before the Commission are two opinion requests that the Commission will consolidate because each presents the same issues. The first issue is whether an unpaid member of a County board, commission, or committee (collectively referred to as “board”) must obtain outside employment approval from the Commission before submitting an offer in response to a solicitation from the County. The second issue is, if an unpaid member of a County board is successful in pursuing a solicitation from the County, under what circumstances must that member seek a waiver from the Commission.

SHORT ANSWER

As to the first issue, an unpaid member of a County board need not obtain outside employment approval from the Commission before submitting an offer in response to a solicitation from the County. The Commission’s outside employment regulation exempt unpaid board members from the general requirement of outside employment approval set out in § 19A-12(a). Moreover, even as to those (paid) employees who are subject to this general requirement, merely submitting an offer in response to a solicitation is not, standing alone, engaging in “employment” as defined in the ethics law.

As to the second issue, although an unpaid board member is exempt from the general requirement to obtain outside employment approval under § 19A-12(a), he or she is still subject to the specific restrictions on outside employment set out in § 19A-12(b). If the outside employment will violate one of those specific restrictions, the board member must first obtain a waiver from the Commission before engaging in the outside employment.

In each case before the Commission, the unpaid board member may submit an offer in response to a County solicitation without prior Commission approval. The board member does not require a waiver to enter into a County contract so long as the employment under that contract does not violate the specific restrictions on outside employment set out in § 19A-12(b). Based upon the facts presented, the Commission does not discern any violation of § 19A-12(b) necessitating a waiver.

ANALYSIS

Submitting an offer in response to a County solicitation is not employment.

Section 19A-12(a) provides that a public employee must not engage in outside employment without Commission approval. But the Commission’s outside employment regulation, COMCOR 19A.06.02, exempts unpaid board members. The employees subject to that regulation are limited to “[a]ny person, including elected or appointed officials (unless excepted in context), **who are compensated in whole or in part** by the Montgomery County Government or the Revenue Authority, Housing Opportunities Commission, Board of License Commissioners, independent fire departments or rescue squads.” 19A.06.02.02.2 (emphasis added). Thus, unpaid board members are exempt from the general requirement to obtain Commission approval before engaging in outside employment.

Moreover, submitting an offer in response to a solicitation is not, standing alone, engaging in “employment” as defined in the ethics law. Employment is defined in § 19A-4(g) as “engaging in an activity for compensation.” The Commission does not believe that submitting an offer in response to a solicitation is “employment” any more than sending a resume to a prospective employer constitutes “employment.” To be sure, employment may be the ultimate goal, but the act of seeking that employment is not, itself, employment.¹ Thus, an employee, paid or otherwise, does not engage in “employment,” and therefore does not Commission approval under § 19A-12(a), merely by submitting an offer in response to a County solicitation.

The Commission’s opinion in Advisory Opinion No. 90-1 (March 9, 1990) is distinguishable. In that opinion, the Commission noted that a board member may contract with the County only if he or she obtains a waiver from the Commission or resigns prior to submitting a proposal to the County. But that opinion was written before the Commission exempted unpaid board members from the general requirement to obtain Commission approval before engaging in outside employment. Furthermore, in a subsequent opinion, the Commission ruled that the ethics law does not generally prohibit a public employee from submitting an offer in response to a solicitation in the absence of a specific conflict (e.g., the employee has some responsibility for, or participated in, the preparation of the solicitation, the evaluation of the offers, or the selection of the winning offeror). Advisory Opinion No. 02-008 (Sept. 2002).

Unpaid board members still subject to the specific restrictions on outside employment set out in § 19A-12(b).

Although an unpaid board member is exempt from the general requirement to obtain outside employment approval under § 19A-12(a), he or she is still subject to the specific restrictions on outside employment set out in § 19A-12(b). Those restrictions provide as follows:

- (b) 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 would impair the impartiality and independence of judgment of the public employee.

Thus, if an unpaid board member (or any employee for that matter) is successful in his or her pursuit of a County solicitation, he or she must first obtain a waiver before entering into a County contract if employment under that contract would violate a provision of § 19A-12(b). 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). *But see* Advisory Opinion No. 02-013 (board is affiliated with agency providing staffing where that board performs a “watchdog” function over the agency). In this case, the requestors’ boards are staffed by County agencies (the Department of Environmental Protection and the Department of Health and Human Services), but are not “affiliated” with those agencies within the meaning of § 19A-12(b)(1)(B). Moreover, neither requestor has any responsibility for preparation of the solicitation, evaluation of the offers, or the selection of the winning offeror.

CONCLUSION

Merely submitting an offer in response to a County solicitation is not, standing alone, engaging in “employment” as defined in the ethics law. Thus, no advance approval from the Commission is required.

¹ Other provisions of the ethics law might come into play. For example, an employee cannot participate in a matter if the employee knows, or reasonably should know, that any party to that matter is any business with which the employee is negotiating or has any arrangement about prospective employment. § 19A-11(a)(2)(C).

Although an unpaid board member is exempt from the general requirement to obtain outside employment approval under § 19A-12(a), he or she is still subject to the specific restrictions on outside employment set out in § 19A-12(b).

In reaching this decision, the Commission has relied upon the facts as presented by the requestor(s).

A handwritten signature in black ink, appearing to read "Antar C. Johnson". The signature is fluid and cursive, with a long horizontal flourish at the end.

April 30, 2008

Antar C. Johnson, Chair