

Op. 96-111

Issue:

Whether an elected official may serve on the Anne Arundel Community College Foundation Board without violating the local ethics law?

Background:

The Anne Arundel Community College is a state institution with significant County connections. The county code, Art. 1A, §§1-105, 1-106, and 20 - 101, provides that for funding and for the coordination of state and county services at the local level, and to the extent not prohibited by law, the Community college is in the Administrative Core Group of the Executive branch of County government. Approximately one-third of the College's budget is derived from the County , with the remaining two-thirds coming from the State and from tuition.

The Anne Arundel Community College Foundation is a charitable 501(c)(3) corporation. It is a fundraising organization that provides money for student scholarships, faculty and technological development, equipment, and other things that might be requested by the College administration, exclusive of current operating expenses. Most of funds raised by the Foundation go for endowments. The College provides some support services to the Foundation which for the first time this year, is partially reimbursing the College through its budget. The support services include some staffing and office space.

The Foundation's current endowment is \$1,300,000. The Foundation's operating budget, about \$19,000, comes from a percentage of the unrestricted contributions received by the Foundation.

The Foundation has four committees. The major gifts committee solicits large donations. The planned giving committee solicits gifts through estate planning. The annual giving committee solicits donations on an annual basis. The finance committee, which originally developed the investment policy, now oversees the plan, which is managed by an independent investment firm. The Foundation's investments are divided by percentage among different types of investments.

The Foundation does not regularly solicit funds from the federal, state, or county government. It did in the past receive a contribution from the Anne Arundel County government, which may or may not have been solicited. The Foundation may in the future solicit further contributions from the public sector, but it has no formal plan to do so.

Discussion

There are two issues involved in determining whether an elected county council member may serve on the operating board of a private non-profit foundation whose purpose is to raise

funds for the Anne Arundel Community College. The first issue is whether this activity would constitute unlawful outside employment under the provisions of §3-105.

The threshold question is whether by serving on the board of the private entity, the council member would be an "employee" of that entity. The State Ethics Commission has repeatedly held that such activity would constitute "employment" regardless of whether the person receives any compensation. The Commission has reasoned that it is the nature of the relationship, and not the payment of compensation, that is the key to determining the existence of the employment relationship. It is the fact that the board member owes a fiduciary duty and a duty of loyalty to the goals of the entity that is significant in finding an employment relationship. *See, e.g.*, State Ethics Commission Op. 80 - 4, 82-45, 86-17. There have been many instances in which the State Commission has found that a public official serving on the board of a private non-profit entity is an "employee" of that entity for purposes of the ethics law. *See*, Op. 89 - 9.

The Anne Arundel County Ethics Commission believes however, that something more than mere participation in an activity is necessary to constitute an employment relationship. This conclusion stems from the recognition that volunteerism is as worthy a goal as the maintenance of the public's trust in the impartiality of its government officials and employees. Unless the volunteer activity of the official tends to create competing or conflicting interests with county employment, the Commission concludes that membership on the board of a non-profit private entity does not constitute an "employment relationship that would impair the impartiality or independent judgment of the employee". In this case, where the County through its budget process, supports the activity and purposes of the community college, the interests between county and the Foundation, are parallel and complementary interests, not conflicting ones.

Section 3-105 (b)(1) also prohibits outside involvement with any entity in which the official or other county employee has an interest if that entity is subject to the authority of the County or is negotiating or has entered into a contract with the employee's agency. Section 1-101 (n)(2)(i) specifically excludes the interest held as an "agent" or other fiduciary relationship from the type of interest that is subject to the prohibitions of §3-105(b). Since the county council member has no "legal or economic interest" in the Foundation, he is not prohibited from serving on its board by reason of a prohibited interest. Moreover, while it may be arguable that the community college is subject in a limited way to the authority of the county council, through the budget process, the Foundation is not. And while the community college may enter into contracts with the county, the Foundation has not done so. Absent these relationships between the County and the Foundation, the provisions of §3-105(b)(1) would not apply as a bar to the council member's membership on the Foundation board.

The final provision limiting outside employment is found in §3-105(c)(1) which prohibits an employee from assisting or representing a person in connection with a matter in which the county has an interest. The Commission believes that this provision is limited to including only those interests which may at some point conflict or compete with each other. Both the Foundation and the County support the college financially, the Foundation in a supplementary way. These are not conflicting or competing interests. The County supports the college through

the general fund and the Foundation supports the college through privately solicited donations.

Finally, Section 3-104 provides that an county employee may not use the prestige, title, or authority of the employee's office or position for the gain of another. The Commission has previously concluded that an official's title may be used in connection with his private activity as long as the title is not used in fund-raising literature. The Commission has also prohibited the official's personal involvement in fund-raising that specifically targets as potential donors, any persons or entities subject to the authority of the official's agency, or having a contractual relationship with the county.

Conclusion:

The Anne Arundel County Ethics Commission advises that the council member may participate on the Anne Arundel Community College Foundation Board without violating either §3-104 of §3-105 of the ethics law, subject to the limitations set forth in this opinion. The Commission acknowledges the possibility however, that particular matters may arise in which a real or potential conflict may occur. In such instances, the council member should be aware of the requirements for disclosure under §3-102(c) and the recusal requirements imposed by §3-101.

Date:

By: The Anne Arundel County Ethics Commission