

Anne Arundel County Ethics Commission

Advisory Opinion

98 - 119

Issues:

1. Whether the Department of Aging and the Anne Arundel Trade Council may jointly host a public event where the proceeds of the event will be donated to the Friends of Arundel Seniors, Inc, a private, non-profit corporation that provides services to senior citizens.
2. Whether employees of the Department of Aging may serve as members of the board of directors of the Friends of Arundel Seniors, Inc.

Background:

In the spring of 1999, the Department of Aging ("DOA") will be collaborating with the Anne Arundel Trade Council to hold the sixth annual "55+ Expo". This event will provide county senior citizens with information about products and services available to them. The event will be publicly advertised and all county businesses will have an opportunity to exhibit their products or services at booths for which they will pay a fee.

Although this event is billed as a Trade Council/DOA event, the Trade Council will handle the advertising and publicity for the event and will collect the fees and pay the bills. The revenue will be used to cover the costs of planning and advertising the event with the remainder being given to the Friends of Arundel Seniors, Inc. ("Friends"). In the past, the event has generated about \$20,000 for the Friends.

The Friends is a private, non-profit corporation whose stated purpose is to "sponsor and obtain grants, funds, gifts and services to be used primarily to promote the well-being of and services to the senior citizens of Anne Arundel County, Maryland." Revenue received by the Friends from previous Expos has been used in an emergency housing fund for seniors in need. The Friends also provide safety hardware to seniors with disabilities. The equipment is provided for free and installed by volunteers in the Kiwanis Club.

The Friends is managed by a board of at least ten directors. Although the bylaws of the organization do not affirmatively provide for any DOA employee membership on the board, they do limit the number of department employees to no more than 49% of the board. Assuming that the board of directors has ten members, there can be four employees of the DOA serving on the board. Six members of the board constitute a quorum, so theoretically at least, four DOA employee members of the board could have significant influence upon the operations of the Friends.

The board of directors has full authority over the business and property of the Friends. The board elects the officers, hires personnel and fixes salaries. The board must approve all fund

raising activities and expenditures. The board coordinates all the activities of the organization, including serving as liaison between the Friends, the senior centers and the Kiwanis Club. Board members are also appointed to serve on the three standing committees: finance, executive, and nominating.

Discussion:

The DOA is an executive agency of county government with the functions and duties set forth in the Anne Arundel County Charter, §550B. That section provides in part, that:

The Department of Aging shall develop, administer and direct countywide services and programs dealing with the problems and need of the aging; review plans of primary concern to the aging that are developed by other offices, departments, agencies and commissions of the county government; and *coordinate with other government agencies and private agencies, organizations and individuals the provision of government and nongovernmental services to the aging. (emphasis added.)*

The 55+ Expo falls well within the duties of the DOA- it is a coordinated effort between the department and a private organization, the Trade Council, to provide services and information to the aging. As long as the department does not give financial support to the Trade Council or to the Friends, (which the event publicity should make clear), does not receive any of the proceeds from the event, does not endorse or promote the Trade Council's activities (beyond the Expo), and does not have any regulatory authority over either organization, there will be no appearance of a conflict of interest.

The second and more complicated issue is whether employees of the DOA may serve as members of the Friends' board of directors. By limiting the number of DOA board members, the corporation's bylaws circuitously provide for DOA employee membership on the board. Since the corporation was neither created by ordinance nor executive order, it is a purely private entity whose bylaws are not binding on the Department of Aging. There is no operating agreement between the Friends and the County that establishes an official role for the DOA in the Friends' organization. The first question therefore, is whether the DOA employees on the board are serving in their official capacities, or as private citizens.

A private entity cannot dictate the duties of a government agency. It may elect the President of the United States to its board if it chooses to do so, but the election is certainly not binding on the President. It is only by the Constitution of the United States, or by some other governmental authority, that the President can be given official duties and responsibilities. The county government operates the same way. Department employees who are elected by the Friends to serve on the board will therefore be serving only in their private or personal capacities. It is only if they are appointed by the director of their agency to serve on the board as part of their duties, that they will be serving in an *ex officio*, or official capacity. Employees

serving in an official capacity serve at the director's pleasure and only while they hold their county positions.

The ethics commission has previously advised that county employees may serve on the boards of non-profit, private entities in their personal capacities, under certain circumstances, and subject to certain restrictions¹. Since the Friends is not doing business or seeking to do business with the county, is not subject to regulation by the DOA, and since it shares common interests and goals with the agency that are neither adversarial nor competitive, service on the board in a personal capacity would not be prohibited by §3-105(c) (prohibiting certain types of outside employment). If at some point, the Friends were to become active in lobbying with respect to matters within the department's jurisdiction, §3-105(c) would require these employee directors to terminate their affiliation. The same result would be required if matters were to arise with the Friends organization that would impair the impartiality or independent judgment of the employee.

The issue of whether county employees may serve on the boards of private entities in an *ex officio* capacity is a different question. The State Ethics Commission has reasonably concluded that *ex officio* service on such boards is only permissible if the private entity creates an "agency" seat to be chosen by the head of the agency; and, the agency, "based on its mission definition and goals, believes that it needs to be represented in the management of a private organization"; or, "where the private entity was established directly at the instigation of a State (county) agency and functions almost in its entirety in implementation of a defined public mandate of the State (county)." See, State Ethics Commission Opinion, 98-3, Maryland Register, Volume 25, Issue 16, July 31, 1998. Since DOA employees sitting on the Friends' board are serving in their personal capacities and not *ex officio*, there is no need to determine whether that type of service would be permitted under the Public Ethics Law.

DOA employees serving on the Friends board in a personal capacity are still subject to various restrictions imposed by the Public Ethics Law, §3-104, (use of the prestige of the office), §§3-101(a)(1)(i) and §3-101(a)(2)(iii) (non-participation), and §3-106 (limiting the solicitation and receipt of gifts).

Section 3-104 prohibits an employee from using the prestige, title, or authority of the employee's county position for the gain of another. The commission has concluded that this provision prohibits county employees from using their official titles in any fund raising efforts.

¹ See, AO-96-109 and AO-96-111.

These employees must also avoid participating in any fund raising that targets people or entities doing or seeking to do business with the county, subject to the regulation or control of their department, or lobbyists. Employee-directors should also avoid participating in any Friends' activities involving the receipt or distribution of gifts or monetary donations. The reasoning for this conclusion should be obvious. Contractors or lobbyists with the DOA may feel pressure to make donations to the Friends, or may believe that doing so will enhance their business prospects with the Department of Aging. Similarly, the impartiality of decisions made with regard to expenditures will be open to question by potential beneficiaries as well as contractors.

Finally, county members of boards of directors for private entities may not disclose confidential information learned in the course of their agency activities. Section 3-107. They may not use their official positions to secure any privileges and they may not receive compensation for their services. Section 3-104. They must be alert to potential conflicts of interest and ensure that they do not participate in matters in their county jobs that may create even an appearance of impropriety. Section 3-101. The ethics commission cannot anticipate what possibilities for conflict may occur, but would recommend that employee board members seek advice from the commission should potential conflicts arise.

Conclusion:

The Department of Aging can cohost Expo 55 with the Anne Arundel Trade Council where the proceeds will go to the Friends of Arundel Seniors. Employees of the department may serve on the board of the Friends in a personal capacity. Employee - directors may not use their official titles in any fund raising or other solicitations, participate in fund raising that targets controlled donors or the recipients of department services, participate in decisions regarding the expenditure of donations, disclose confidential information, receive compensation or other privileges accorded to non-employee board members, or participate in any matters that may appear to impair their impartial or independent judgment. In lieu of department representation on the board, it may be equally useful to arrange for department representatives to attend and participate informally at the meetings of the Friends. That choice rests with the Friends and the Department of Aging.

Date:

By: The Anne Arundel County Ethics Commission