

## Anne Arundel County Ethics Commission

### Advisory Opinion

98 - 154

#### Issue:

Whether a classified employee in the utilities bureau of the Department of Public Works can serve as an appointed member of the County Board of Appeals without violating §3-105 of the Public Ethics Law.

#### Background:

A classified employee with the county is being considered for appointment to the County Board of Appeals. The employee is in a non-supervisory position.

#### Discussion:

The County Board of Appeals has the powers and duties set forth in the Anne Arundel County Charter, Article VI, §601- 605. The charter provides that the board of appeals " . . .shall perform its functions as a board that is independent of both the legislative and executive branches of the County government. . . ." §602. Although the board members are appointed by the county council members, and the powers and duties are established by charter and ordinance, it is clear that as an "independent" body, the board does not represent either the executive or legislative branch of county government. Therefore, in its decision-making role, the board of appeals is separate and distinct from county government. For this reason, the ethics commission believes that the board of appeals is a separate, and "secondary employer" for purposes of the Public Ethics Law, §3-105 (restricting certain types of secondary employment). Members of the board of appeals are compensated, and for purposes of the ethics law, have an employment relationship with the board of appeals.

The general authority of the board includes the power to hear appeals: 1. of orders relating to zoning, e.g., rezoning, special exceptions, and variances; 2. of orders relating to licenses and permits, e.g. building and grading permits; 3. orders relating to buildings; 4. of administrative or adjudicatory orders (that do not affect internal operations); and 5. decisions involving the extension of sewer and water lines. §602.

There are three types of appeals listed in the Charter that create issues under the Public Ethics Law. The first type of appeal is from decisions concerning the extension of sewer and water lines. These decisions are issued by the same department that employs the potential appointee to the board. Is there a conflict of interest for an employee of the utilities bureau to be a member of a board that hears appeals from decisions rendered by the employee's own department head or that department head's designee?

The Public Ethics Law, §3-105(b)(2) and (c)(1) are the relevant provisions in this issue.

The first section prohibits a county employee from holding " . . . any other employment relationship that would impair the impartiality or independent judgment of the employee". In determining whether the employee's membership on the board of appeals would impair the employee's independent judgment, the ethics commission does not rely on the employee's statement that it would not, or on the employee's unquestionable integrity. Rather, the commission looks at the opportunities for impairment of judgment that could arise in the secondary employment.

Although decisions regarding sewer and water extensions are appealable to the board, actual appeals from these decisions are rare. The personnel involved in these decisions are not the same people with whom the potential employee is involved on a day to day basis and there is no supervisory relationship between them. Further, under §3-101(a) of the ethics law, it would be possible - and advisable - for an employee of the utilities bureau in the Department of Public Works to abstain from participating in any appeal involving a decision of that department. Recusal is an effective technique for avoiding conflicts of interest in situations that occur on an infrequent basis. Therefore, this type of appeal, in and of itself, does not present a significant obstacle to service on the board.

Another type of appeal that presents potential problems is from decisions involving rezoning. Article 3, §2-105 of the Anne Arundel County Code, which governs the board of appeals, provides that a rezoning may not be granted without an affirmative finding that water and sewer systems for the new zoning uses are adequate or are programmed for construction. These findings involve, at least to some extent, the operations of the Department of Public Works.

Although it is the Department of Planning and Code Enforcement that presents the county's case to the board of appeals, the area of water and sewer are the ultimate responsibility of the employee-board member's department. Where the adequacy of these systems are an issue in a rezoning case, the board member would probably have to abstain from participating in the matter.

The third type of appeal that presents potential conflicts is the broader authority to hear appeals from any executive, administrative, or adjudicatory orders, other than those affecting the internal operation of the executive branch. Presumably, this type of appeal could include decisions rendered by the Director of the Department of Public Works, or the chief of the utilities bureau, or any other employee of the department of public works who can issue these orders. A utilities employee sitting on the Board of Appeals would be required to abstain from these appeals as well.

Even if a county employee sitting on the board of appeals can avoid actual conflicts of interest by abstaining from participating in the specific types of appeals discussed in this opinion, there are other, obvious issues concerning the appearance of impropriety. Members of the public might perceive that the board is not truly independent of the executive or legislative branches if one or more of its members are county employees. One county employee on the board of appeals may not raise any suspicions about impartiality, but what if there were two, or

three, or more county employees on the board of appeals? The board's credibility as an independent agency would certainly be suspect in this situation. These employee members may in fact believe that their own best interests would be served by ruling in favor of the county whenever possible. Put another way, how does an employee publicly question the decisions of the employer, or rule against the employer without a thought of the possible consequences to that employee's career?

This conclusion may seem extreme at first glance, but it is one that the ethics law anticipated in §3-105(c)(1) which reads: *An employee may not be employed by any person or undertake on behalf of any person to assist or represent that person in connection with a matter in which the County has an interest, except in the course of the employee's official duties.*" By wholly prohibiting employment by a county employee with any person<sup>1</sup> in connection with matters in which the county has an interest, the law anticipates that an employee cannot be unbiased in the secondary employment relationship. This reasoning may be based on the common law notion that an employee cannot serve two masters, or put another way, that an employee owes ". . . an undivided and unselfish loyalty. . ." to the employer. See for example, Maryland Metals, Inc. v. Metzner, 282 Md.31(1978). The ethics commission has generally concluded that in §3-105(c)(1), the matter in which the county has an interest must be potentially adversarial to the interest of the secondary employer before the prohibition will apply to the secondary employment. In this case, the county employee may be obligated to rule against the county with some frequency. This result is precisely what §3-105(c)(1) seeks to avoid.

**Conclusion:**

The ethics commission concludes that the prohibition of §3-105(c)(1) applies to the present situation. Simple recusal from appeals involving the department in which the board member is employed will not satisfy the strict prohibition of §3-105(c)(1). Therefore, the ethics commission advises that the county employee cannot serve on the County Board of Appeals.

Date:

By: the Anne Arundel County Ethics Commission

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<sup>1</sup> Although the section refers to employment by a "person", the county code, Article 1, §1-101(h) defines person to include any type of "entity" as well, and the ethics commission has followed this rule.