

## Anne Arundel County Ethics Commission

### Advisory Opinion

99 - 45

#### Issue:

Whether the administrative hearing officer may participate in an administrative hearing where one of the party's (not the applicant) is represented by an attorney-partner in a law firm where the spouse of the hearing officer is employed.

#### Background:

The administrative hearing officer is a position created by the Anne Arundel County Charter, §534, *et seq.* The primary responsibility of the hearing officer is to hold public hearings on requests for rezoning, variances, and special exceptions. The hearing officer can grant or deny a request based on the evidence presented and upon certain specified criteria. The decision of the hearing officer is final unless it is appealed, usually to the County Board of Appeals, but in some circumstances, to the Circuit Court for Anne Arundel County.

The spouse of the hearing officer is the director of marketing for a law firm. The spouse is a salaried employee and does not have an ownership interest in the firm. There is currently pending before the hearing officer, a case where one of the parties is represented by the law firm where the spouse is employed.

#### Discussion:

There are several sections of the Public Ethics Law that are pertinent to your inquiry. The first section, §3-101(a)(1)(ii), provides that an employee may not participate in a *matter* in which the employee's spouse has an interest. The hearing officer's spouse has an employment interest in the law firm representing one of the party's in the case. If the law firm is considered to have an interest in the matter, then the spouse would have an interest in the matter as well. The ethics law defines an interest to include "any legal or equitable economic interest". §1-101(n)(1). Assuming that the law firm representing the client is not working on a contingency basis, the law firm does not have an equitable economic interest in the matter. The legal interest that the law firm would have in the matter would be the interest of a representative or fiduciary to the client. This type of interest is specifically excluded from the coverage of the ethics law. §1-101(n)(2)(i).

Another section of the ethics law that is pertinent to this inquiry is §3-101(a)(2)(iii). This section prohibits an employee from participating in any matter in which a *party* to the matter is a business entity that employs the spouse of the employee. If the law firm representing one of the parties to this matter can also be considered a party to the matter, the hearing officer would be precluded from participating in the matter because the officer's spouse would be an employee of

a party.

The Maryland State Ethics Commission has considered the meaning of a "party" as it applies to the State Ethics Law. It concluded that the definition of a "party" to a matter would not include matters in which an entity is "generally interested". The commission wrote that a party must have ". . . some specified and clearly defined role; the [entity] would have to be identified as [a party] to a transaction and likely to be impacted by the transaction in the usual legal sense of that term." See, Opinion 80-17, COMAR.

The opinions of the State Ethics Commission are not binding upon the Anne Arundel County Ethics Commission, but they do offer a point of view that the ethics commission often considers. In the above referenced opinion, the State Commission was asked to review the participation in various matters by an official of the investment division of the state retirement system where the official's spouse worked on commission for a stock brokerage firm. The State Ethics Commission ruled that the official could not participate in specific matters in which the spouse's firm had a contract or was negotiating for a contract with the state. In either of those situations, the spouse's employer would be a party to a matter.

However, the state commission went on to say, that to avoid even the *appearance* of a conflict of interest, the official ". . . should avoid being involved in any situation which could be viewed as involving his decision-making in a matter in which his wife's firm would be involved."

The appearance of a conflict of interest is as great a concern under the Public Ethics Law as an actual conflict of interest. As stated in §1-102(a)(2), the public's trust in government ". . . is eroded when the conduct of the County's business is subject to improper influence or even the appearance of improper influence."

The ethics commission believes that the participation of the administrative hearing officer, in a matter where one party is represented by a law firm that employs the officer's spouse, would create the appearance of a conflict of interest. The fact that the spouse does not have an "interest" in the matter per se, or that the law firm is not a "party" to the matter, is a technical distinction at best. The law firm representing the party is closely connected to the client, and has a very similar interest in the outcome of the hearing. It has more than a "general interest" in the matter, and it has a "specified and clearly defined role" in the matter. Put another way, the law firm has an interest in winning. Winning is good business and it can bring more business. The administrative hearing officer is the sole decision maker in the case. A finding in favor of the law firm's client could well lead to charges of partiality by the hearing officer in favor of the spouse's law firm's business interests. This connection cannot be ignored and its import should not be minimized.

### **Conclusion:**

For these reasons, the ethics commission advises that the administrative hearing officer should refrain from participating in administrative hearings where one party is represented by the

law firm with whom the spouse is employed. Although participation would not technically violate §3-101 of the Public Ethics Law, it would raise significant issues of the appearance of impropriety. Since it is possible to assign the case to specially appointed temporary hearing officer, there is no reason to invoke §3-101(c) of the law, which permits an employee to participate under certain circumstances where there is a conflict of interest.

Date: March 15, 1999

By: the Anne Arundel County Ethics Commission