

## **Anne Arundel County Ethics Commission**

### **Advisory Opinion**

**00-05**

#### **Issue:**

Whether, and under what circumstances, a union official member of the personnel board may testify before the board.

#### **Background:**

One of the members of the Anne Arundel County Personnel Board is an official with a bargaining unit representing a number of county employees. This member of the board was appointed pursuant to the Anne Arundel County Charter, §520, which requires that one member of the board shall be a classified employee. Within a year, the member was elected to a post in the union.

The duties of this union representative often include participation in the county's grievance procedures, particularly at the at the departmental level of the process. If the issues are not resolved at that level, the matter goes before the personnel officer. If the grievance is not resolved at this step, the aggrieved employee can choose whether to proceed to an appeal before the personnel board, or to submit to binding arbitration.

The personnel board has established a policy that requires automatic recusal by the union official board member in any grievance or other matter before the personnel board involving the union or union employees. However, because of the member's past and continuing union duties, there are occasions when that member has knowledge of facts that are relevant to the appeal before the board.

#### **Discussion:**

The ethics commission has previously advised that a union official may sit on the personnel board, in accordance with §3-105(d) of the Public Ethics Law. See, AO- 97-36. The ethics law generally prohibits a county employee from engaging in secondary employment that might conflict with that employee's official duties. However, §3-105(d) specifically exempts from this prohibition those people that are appointed to regulatory bodies because they are subject to the jurisdiction of that body. In this case, the charter provides for membership on the personnel board by a classified employee. Since the charter does not differentiate between union members, union officials and other classified employees, the ethics commission will not do so.

However, members of the personnel board, including the classified employee member, are subject to the conflict of interest provisions of the ethics law. The provisions that are

applicable to this inquiry are §§3-101(non-participation), and 3-104(use of the prestige of office).

Section 3-104 prohibits an employee from misusing the prestige, title, or authority of the office or position for the private gain of another. In an opinion involving a county council member who wanted to provide evidence of good character of an employee involved in an appeal before the Anne Arundel County Board of Appeals, the ethics commission advised that such testimony would violate §3-104. See, IO-97-27. The commission further advised that the council member could provide relevant factual evidence before the board, if that council member's testimony would be necessary and otherwise unobtainable. By analogy, Canon 2B of the Code of Judicial Conduct, Maryland Rule 16-813, provides that a judge should not testify voluntarily as a character witness. The Maryland Court of Appeals has stated that a judge could be summoned to provide factual evidence that is relevant and necessary to prove a material element of a case. Ginsberg v. McIntire, 348 Md. 526(1998). The Court acknowledged that the Canon discouraging the giving of character evidence prevents the use of the prestige of judicial office on behalf of a litigant. The Court cited cases from other jurisdictions, standing for the proposition that even factual evidence provided by a judge should be used only "sparingly" or when there is a "compelling need". The same standard has been held to apply when the judge is called as an expert witness as to matters that occurred prior to the judicial appointment, although in K&K Management, Inc. v. Lee, 316 Md. 137 (1989), the Court allowed expert testimony to be given by an Orphan's Court judge as to matters that occurred prior to the judicial appointment. The Court reasoned that the jury was never made aware of the judicial status of the witness, and therefore, the use of the prestige of office was not an issue.

The ethics commission believes that the reasoning applies equally to the present case involving the union representative on the personnel board. The members of the personnel board act as both judge and jury. They should not provide character or expert testimony, or advocacy in cases before the board, because of the inherent credibility that is accorded to a member of that board by the other members. However, the employee member of the board may testify as to factual evidence that is: 1) unobtainable from other sources; and 2) relevant to the matters before the board. If evidence of relevant fact can be obtained elsewhere, it would be a misuse of the prestige of the office for the personnel board member to testify as to those matters.

Section 3-101 prohibits an employee from participating in discretionary matters in which the employee has a interest. The personnel board's practices already prohibit the union official member from participating in any matter in which a union employee from the member's union is involved. This practice is correct, because the union official has an interest in all matters involving the union and its members. See §3-101(a)(1)(i)(a legal interest in the matter), and §3-101(a)(2)(i)(contractual relationship with a party to the matter). As long as automatic recusal is enforced, there is nothing in the ethics law that would preclude the union official member from continuing to perform union duties, even if the those duties include providing factual evidence before the board. While the ethics commission acknowledges that as a consequence of this duty, the union official member may bring certain biases to the deliberations of the personnel board, it must also acknowledge that the county charter implied an approval of this bias by requiring the appointment of a classified employee to the board.

**Conclusion:**

While §3-104(a) would prohibit a union official member of the personnel board from giving character or expert testimony, or being an advocate in matters before the board, it would not bar that member from providing factual evidence that is relevant, necessary and unobtainable from other sources. However, that member cannot participate as a personnel board member, in any matters before the board that involve the union or its members, unless the union is part of the larger class of classified employees in the matter before the board. Further, the union official member of the board must be mindful of the provisions of §3-107 prohibiting the use of confidential information for the economic benefit of a party. This section would prohibit the union member of the board from using information acquired during personnel board deliberations to strengthen the position of the union or its members in any matter before the board.

Date:

By: the Anne Arundel County Ethics Commission