

Anne Arundel County Ethics Commission

Advisory Opinion

00-10

Issues:

1. Whether a member of the county council may accept an appointment to the board of directors of a private, non-profit corporation, in an ex officio capacity.
2. Whether a county council member, sitting on the board of directors of a non-profit corporation can participate in legislative activity affecting the corporation.

Background:

The London Town Foundation, Inc. is a private corporation, chartered under the laws of Maryland in 1985. Its purpose is to support the preservation, development, and operation of the London Town Public House and Gardens, a property owned by the county government, and operated by the department of recreation and parks. The bylaws of the corporation authorize the appointment of between six and 20 members to the board of directors, one third of whom, but not more than six, are appointed by the county executive. The other directors are elected by the membership. All of these directors serve for a period of three years. The bylaws also create an "Ex-officio Director" category, and declare that these directors will serve "by virtue of being a public official". The board of directors determine which public officials will serve on the board in this capacity, and also determine the length of the term that these directors shall sit. The bylaws further dictate that ex officio directors will not be voting members, and that their presence at a board meeting does not count towards establishing a quorum.

At a recent meeting, the current board of directors selected several public officials to serve on the board, including the "Anne Arundel County Council member from District 7". Two other employees of the Anne Arundel county government were also selected, the county archaeologist, and the chief of Environmental Facilities and Programs.

Discussion:

According to Black's Law Dictionary, (Sixth Ed., 1991), "ex officio" means:

from office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer which are not specifically conferred upon him, but are necessarily implied in his office; these are *ex officio*. Thus, a judge has *ex officio* the powers of a conservator of the peace.

The definition of "Ex officio services" are: "services which the law annexes to a particular office and requires the incumbent to perform". These definitions indicate that service in an ex officio capacity means service by law, either express or implied, as part of the natural functions of the office.

There are many instances in which officials of both the state and its political subdivisions, have served in an ex officio capacity, performing functions in addition to their usual duties. In virtually all of these positions, the service is provided by statute. Discussions as to the practical meaning and application of an ex officio duty are rare. In one case, Moberly v. Herboldsheimer, 276 Md. 211 (1975), the state legislature enacted a statute creating a board of governors to erect and maintain a city hospital in Cumberland. The statute provided that the mayor and president of the county commissioners would serve as ex officio board members. Subsequently, the statute was amended, incorporating the board, and giving the corporation the same broad powers that would be allowed to any corporation under the general public laws of Maryland. The ex officio membership of the public officials was not changed by this amendment. The Court of Appeals held that the corporation thus created was an agency of the city and was subject to existing public information laws. In a dissent that was joined by another judge, the Chief Judge of the Court of Appeals commented on the nature of the ex officio membership of the officials. He noted the majority's reasoning that, "there is no provision in the Hospital's legislative charter that could not have been included in the charter of a corporation established under the general corporation laws . . .". *Id.* at 228. The chief judge disagreed, commenting that,

[i]n my opinion, however, Chapter 411 of the Acts of 1927 created a private corporation with a governing body not obtainable under the general incorporation laws, viz., a board which included two governmental officials, each serving in an ex-officio capacity. No provision existed in the general law for the appointment of such governmental officers as ex-officio board members. . . nowhere is there found support for the proposition that the type of ex-officio board memberships mandated by the Legislature in creating the Hospital corporation could be achieved under the general corporation law. . . In my view, the provision in the Hospital's charter for the ex-officio membership on the governing board of the Mayor and President of the County Commissioners was not responsive to any specification in the general law and could not have had any force and effect absent the special act. *Id.* at 228-229.

The ethics commission finds this comment to be a reasoned consideration of the relationship between private (or quasi-public) corporations and governmental officials serving on their boards. The duties of a member of the county council are determined by law, not by the bylaws of a private corporation. A corporation may certainly invite a governmental official's participation, but cannot require it. To be effective, the invitation must be accepted by the official, acting within the scope of the official's authority. However, in the case of a council member, the Charter does not recognize this type of ex officio service. Specifically, §303,

provides that:

in all its functions and deliberations, the County Council shall act as a body and shall have no power to create standing committees or to delegate any of its functions and duties to a smaller number of its members than the whole. The Council may, however, appoint special ad hoc committees solely for the purpose of inquiry and fact finding.

It appears from this charter provision that a single council member cannot act in an ex officio capacity, as a representative of the county council. In contrast, the ethics commission has previously advised that under certain circumstances, an agency employee may sit in an ex officio capacity on the board of a private corporation. If the agency is charged with administering a program, and if the corporation was created to support that program, the agency director may determine that ex officio representation on the board is in the agency's best interest. In that event, the director may appoint an employee to the board, to represent the interests of the agency. See, AO-99-175. One of the reasons for this distinction between agency employees and members of the county council is that in the former case, the employees carry out executive agency functions, while the powers of the council are legislative and not executive in nature.

Conclusion:

For these reasons, the ethics commission advises that the service to which the council member has been appointed is not ex officio, but is to be regarded as an invitation to sit on the board in a strictly personal capacity. In previous advisory opinions, the ethics commission has concluded that elected officials may serve on boards of directors of non-profit corporations where the goals and operations of the corporation do not conflict with the county's interests. See, opinions 99-197, 98-50, and 98-39. In this case, there is no inherent conflict, since the corporation was created to support a county agency program. However, it is equally true that as a member of a corporation's board serving in a personal capacity, a council member would be prohibited by §3-101(a)(2)(3), and §3-102(b)(1)(3) of the Public Ethics Law, from participating in any legislation or other official matters that would affect the corporation in a significant way. The reason for the prohibition against participation by a director of an entity is the recognition that the director has a duty of loyalty to advance the mission of that entity. But the corporation's agenda may not always reflect what is in the best interests of the county. A council member must avoid the conflicting loyalties that may result from these potentially competing agendas.

Date:

By: the Anne Arundel County Ethics Commission