

Anne Arundel County Ethics Commission

AO-02-73

Issues:

1. Whether §3-105 prohibits a county employee from serving as an alderman for the city of Annapolis.
2. Whether §3-105 prohibits a county employee from participating as an alderman for the city of Annapolis, in sponsoring, debating, voting, or otherwise participating in legislation to annex portions of the county into the city.

Facts:

The employee, a senior planner in the Department of Planning and Zoning, is also an elected alderman on the city council for the city of Annapolis. On April 8, 2002, the city council enacted legislation co-introduced by the employee and another alderman, lowering the number of votes required by the city council to annex real property. (Ordinance No. 0-6-02.) The city council is currently considering three resolutions to annex properties. The employee is the sponsor of one of the resolutions.

As a senior planner for the county, the employee assists in the development of the county's small area plans for inclusion into the county development plan. The employee does not participate in the plans that are contiguous to the city, specifically the Annapolis Neck or the Parole plans¹, but has participated in the plans for Severn, Severna Park, Broadneck and Odenton. The employee provides information to the citizens on the small area planning committees about the applicable zoning laws, the current general development plan, projections for growth in the area, the recommendations of the Department of Planning and Zoning, and other data relevant to the committee's deliberation. After the general plan is completed, the employee will be involved in its implementation, including the review of subdivision and site plans.

The city council of Annapolis is the legislative body of the municipality. It functions in part through standing committees, which make recommendations to the county council for legislation as appropriate. For example, the employee is a member of the Rules and City Government Committee, the Economic Matters Committee, and the Finance committee, for which the employee serves as chairperson. The finance committee makes recommendations regarding budget appropriations, and maintains ongoing "surveillance" over the budget.

Among other responsibilities, the chairman of the finance committee participates in the

¹ The employee's assignments appear to have been a conscientious decision by the department and the employee, in order to avoid any potential conflicts of interest.

"discussions" between the county and the city involving the tax differential. The county is required by law to discuss the differential with the city on a regular basis. Annotated Code of Maryland, Tax-Property Article, §6-305(c). The differential is a tax credit given to the city for services that the city provides to its residents in lieu of receiving county services. (e.g. fire and police). Although the county's decision on the amount of the differential is final, the city has not always agreed with the county's decision, and has over the years, offered its own opinions on the appropriate amount of the differential.

In addition to the tax differential, there are a number of ways in which the county and city governments interact. Over the years, there have been a number of contracts between the city and the county, and a number of contracts in which the city and county have joined with other parties. The county has on occasion, contributed funds to the city for the operation of its bus system, which provides services to county locations, its annual fireworks display, and overtime expenses for city police officers. The city uses the county's contract with a private transfer station to dump city trash, and the city uses the county's public library system and its animal control services. The county also provides tax billing services to the city. And of course, the county funds the public education system.

In addition to these types of city/county relationships, there are a number of connections between the city and the county's planning and zoning office. For example, the county and the city have entered into agreements for traffic and transportation studies that require the input of planners in the employee's division of the Office of Planning and Zoning. At least one of those contracts is current. In addition, the city and county offices of planning and zoning consult with each other frequently and informally about matters of mutual concern including for example, school capacity and development, housing and commercial development, sewer service and capacity, roads and transportation and other matters.

In the case of proposed annexations of property, the city provides an annexation study for the county's review and recommendation. It is the planning division, the employee's own immediate supervisor, to whom these studies are forwarded for review, although the employee does not participate in the review, or in the making of recommendations on proposed annexations. The effect of annexation on the county may be significant. Once property is annexed to the city from the county, the county loses control over the zoning of the property and may lose tax revenue as well. Annexation may affect county school capacity and costs, and may affect traffic volume. With some exceptions, the county is generally opposed to annexation proposals.

Discussion:

There are three provisions under §3-105 of the Public Ethics Law that are relevant to this inquiry. The first provision, subsection (b)(1) prohibits an employee from being employed by an entity that is negotiating or has entered into a contract with the employee's agency. Since county agencies do not enter into contracts, the ethics commission has interpreted this provision to refer to contracts entered into with the county but which involve the employee's agency. See, e.g. AO-01-41. The city has entered into contracts with the county that involve the employee's

agency. The issue is whether the existence of these contracts require that the senior planner discontinue employment as an alderman, under §3-105(b)(1) of the ethics law.

The second provision, §3-105(b)(2), prohibits an employee from holding any employment relationship that would impair the impartiality or independent judgment of the employee. The state ethics law has an identical provision.

The third provision, §3-105(c)(1), prohibits an employee from being employed by or undertaking on behalf of any person, to assist that person in connection with a matter in which the county has an interest. The state does not have a comparable provision. In a number of opinions, the ethics commission has concluded that the interest of the county must be potentially adversarial or competitive to the secondary employment in order for this prohibition to apply. See Advisory Opinions: 01-58, 00-9, 99-197, 99-26, 99-17, 98-154, 98-119. This conclusion is compatible with the approach taken by the Office of Governmental Ethics. See, 18 U.S.C. 205, 5 C.F.R. 2635.801, 1998 OGE LEXIS 37, 1996 OGE LEXIS 327.

The state ethics commission has considered a number of situations involving state employees being elected or appointed to positions in local governments. The reasoning used in these opinions may be helpful in deciding the question presented here. (It should be noted that the constitutional prohibition against holding dual offices does not apply in this situation because the position of senior planner for the county is not an "office".)

1. In Op. 85-13, a hearing examiner for the Public Service Commission was advised that he could not serve as an elected council member on the Baltimore County Council, while retaining his position with the PSC. The ethics commission concluded that holding elective office in the county would impair the hearing examiner's impartiality and independent judgment. The reasons upon which the state ethics commission relied were:

- ▶ Although the county did not appear as a party before the PSC, it could be impacted by decisions of the PSC.
- ▶ Constituents of the county office could be impacted by his decisions, which could affect his popularity, which in turn could affect his loyalties.
- ▶ Although he could be insulated from hearing cases that would impact Baltimore County, what would happen if more than one hearing officer were to assume elective office?
- ▶ The public would not necessarily be aware of the attempt to insulate the hearing officer from cases impacting Baltimore County, and could therefore, consider his elective office as a "politization" [sic] of the PSC.
- ▶ While he was not assigned jobs impacting Baltimore County, he *could* be, and the ethics commission does not "believe that an agency should be put

to the chore of reorganizing its program and operations in such a substantial way in order to accommodate private activities of its employees.

2. In Op. 01-1, an employee of the state Department of Housing and Community Development (DHCD) sought elective office on the city council of Baltimore City. The DHCD employee's duties included providing information to local and county government officials, non-profit organizations, businesses, and individuals, about state programs and resources. The employee did not make funding decisions, but he did provide technical assistance to applicants for state funds. The city participated in a number of programs administered by the employee's unit of DHCD. Although his assignments with DHCD could be made to avoid city contacts, he could be working with competitors of the city. And although he could recuse himself from participating in any matters involving DHCD as a city council member, he would not be able to "use his expertise and knowledge for the City's benefit [which would] limit his value to both the State and the City. For these reasons, the ethics commission advised that the dual employment was prohibited because of the contractual relationship between the city and the DHCD, and because of the impairment provision.

3. In Op.00-03, an industrial development representative in the International Trade unit of the Department of Business and Employment Development (DBED), was elected to be President of the Baltimore City Council. The representative provided counseling and assistance to private Maryland firms, to help them market themselves internationally. Some of the firms with which the representative worked, were Baltimore city businesses. The representative did not participate in the decision process by which any of the businesses would receive funds from the DBED. However, the city and the DBED had significant contractual and other interactions - in some cases, the city would act as a conduit for DBED funds, and in some cases, the city council would have "some involvement with legislative aspects of economic development activities in the City. The ethics commission also noted that as council president, the representative served as chairman of the city's board of estimates. The board is charged with the duty to formulate and execute the fiscal policy of the city. The ethics commission advised that the dual employment violated the contract impairment prohibitions, the latter because her "City constituents and businesses and campaign contributors in the City could also be entities engaged in development activities with her State agency generally or even with the Requestor's particular unit within the agency."

4. In Op. 00-5, a forester with the Department of Natural Resources was appointed to the local planning and zoning commission. The Forest Service is charged with assisting private landowners and local governments in managing forests and trees, and the service also monitors compliance with state conservation laws. Since the forester's county had a state approved conservation program, the county's zoning department was responsible to insure compliance with the state law. The planning and zoning commission has final approval authority of site plans, which plans include conservation requirements. The forester himself did not participate in the conservation program. His duties were primarily concentrated on private land owners. The state ethics commission again noted that his duties, although not currently focused on the county

conservation program, could be changed to include the conservation program. The ethics commission also relied on two more significant factors in deciding that the forester could not sit on the planning commission: the board to which he was appointed had activities regulated by his state agency, and the board was the final decision making authority with respect to the matters involving his agency.

5. In Op. 00-07, a Maryland State Trooper and barrack duty sergeant was elected Commissioner of Public Safety in a local municipality. The interactions between the officer's barrack and the city are significant. The state police may enter the city to serve warrants or issue a summons. They have authority to act on any crimes they witness. They provide support services to the city. The trooper, in his capacity as the barracks duty sergeant, dispatched officers to the municipality as needed supervised the cooperative efforts of the city and state police. In his capacity as a public safety commissioner, the trooper worked on policy and general operational issues, but had no involvement in the daily operations of the police department. One of his efforts as public safety commissioner was to improve the computer capability of the police department, by trying to obtain a grant to allow a hookup to a state terminal. He worked on other programs involving the Maryland State Police. The state ethics commission determined that "agreements setting operational grounds for interactions between entities constituted contracts for purposes of [the secondary employment provision barring employment with an entity that contracts with the employee's agency] even though there was no provision for the transfer of State funds". The trooper was advised that he could not serve as the commissioner for public safety, both because of the contractual relationships between the state police and the city, and because of the impairment provision.

In the present situation, there are a number of similarities between the facts set forth in the state ethics commission opinions and the facts that exist with the senior planner who serves as an alderman in Annapolis. The city and county have contracts and agreements between them that involve the senior planner's agency. As an alderman, the senior planner does participate in budgetary decisions affecting these contracts. Although the planner is not assigned to any county work that affects the city, the employee could be assigned to different work that could impact the city, and arguably, the county zoning department should not be put in a position where it must juggle its employee assignments to accommodate this planner.

The letter of the law, as interpreted by the state ethics commission, would therefore seem to prohibit the employee of the Office of Planning and Zoning from being employed by the city. However, and despite the decisions of the state ethics commission, the kinds of contracts that exist between the county and city may not be the kinds of contracts contemplated by the Public Ethics Law. The purpose of the ethics law is to promote impartial and independent judgment by county employees. If an employee worked for a contractor whose contract could be impacted by the employee's official duties, or if a reasonable perception of favoritism could be created by the employment relationship, there would be no doubt that the secondary employment would be prohibited. In this case however, the contracts between the city and the county are not likely to be affected by the employee's county job. These are contracts of necessity or convenience. There are no other parties with whom these agreements could or would be negotiated. And

while every contract confers benefits and obligations upon the contracting parties, the contracts between city and county are comparable to sole source contracts - there is no competition for the contracts and no entities whose interests could be adversely affected by the contracts. Similarly, the employee's position as a city alderman would not appear to affect the impartial or independent judgment of the employee as a county senior planner.

The ethics commission does not believe that the prohibition on employment with entities that contract with the county was intended to be so broad or inflexible. In AO-01-41, the ethics commission considered the effect of §3-105(b)(1) upon the proposed secondary employment of a secretary with the county by a local newspaper that contracted with the county through the secretary's agency. The commission noted that the law did not expressly permit the commission to exercise discretion when the proposed secondary employment did not appear to create either a conflict of interest or the potential for a conflict of interest. However, the commission, citing authority in the state's Public Ethics Law as well as the county Public Ethics Law, concluded that such discretion is available and should be applied in situations where the possibility of a conflict of interest is remote.² In the present case, the employee planner does not participate in any official county capacity, in the implementation or administration of the contracts between the city and the county. The employee's job duties involve no official communication with the city at all.

For these reasons, the ethics commission rejects the interpretation upon which the state ethics commission relies in automatically prohibiting secondary employment where agency-entity contracts exists. The types of contracts and agreements that involve the city and the county would exist and would be implemented even if the alderman was not a senior planner for the county, and even if the senior planner for the county was not an alderman. They are not the kinds of contracts contemplated by the ethics law's prohibition on secondary employment.

² The ethics commission has repeatedly requested that §3-105 of the Public Ethics Law be amended to permit exceptions to the strict prohibitions against secondary employment in the appropriate circumstances.

However, there is another provision of the ethics law, referred to above, that may limit the city alderman's participation in certain activities that may impact the county. As an alderman, the employee does vote on matters that affect relationships between the city and county, and this situation is covered by §3-105(c)(1). This provision prohibits a county employee from assisting or representing any entity in a matter in which the county might have an adversarial or competitive interest. For example, when the alderman sponsors, debates or votes on a resolution to annex county property to the city, the alderman would be representing the city in a matter in which the county would likely be adversely affected, or perceive itself to be.³ This activity would be prohibited by the county ethics law. The alderman may not participate in legislative activity that might be contrary to the county's interest. Nor should the alderman participate in any activities that could result in contractual disputes between the city or the county.

Conclusion:

The ethics commission advises that the senior planner for the county is not prohibited by §3-105(b)(1) or (b)(2) from serving as an alderman for the city of Annapolis. The contracts that exist between the city and the county are not the kinds of contracts contemplated by the ethics law when it prohibited employment with an entity that contracts with the employee's agency. However, §3-105(c)(1) prohibits the planner from assisting or representing the city in matters in which the county may have an adversarial or competitive interest with the city. Annexation is one of those matters, and the planner is advised that participation in any aspect of the annexation process would violate this provision. This prohibition on participation would include discussions regarding the tax differential, as well as any contractual or other disputes that could result in litigation between the city and the county. In reaching this conclusion, the ethics commission reviewed its informal opinion, 01-114, in which it advised that a senior planner could not, if elected, serve as the Mayor of Annapolis. The commission supports its earlier decision, but for some different reasons. The commission believes that the Mayor, as the spokesperson and policy director for the city, has more extensive duties than an alderman, and would therefore, be unable to avoid participating in some capacity, in matters that may adversely affect the county's interests.

Date:

By: The Anne Arundel County Ethics Commission

³ The city and the county litigated at least one successful effort by the city to annex property. In Anne Arundel County v. City of Annapolis, 352 Md. 117 (1998), the county unsuccessfully challenged the city's right to annex a certain property. This case demonstrates the existence of adversarial interests between city and county. In fact, the county has indicated that it generally opposes city annexations.