

December 28, 2006

Sent by electronic mail only

Re: IO-06-100

You inquired whether the ethics law would prohibit either a county employee or an employee of a state agency, such as the department of motor vehicles, from being appointed to the Board of Appeals. You did not specify the departments or agencies in which the state or county employees work. You also indicated that time is of the essence in this matter. Based on the information that you have provided, the answer to your question is that the ethics law, §7-5-104, would prohibit a county employee from serving on the Board of Appeals. The ethics law would not necessarily prohibit a member of the Board of Appeals from working for the state; however, the answer would depend on the type of position in the state that the board member would hold.

The ethics law does not address the propriety of appointments to the Board of Appeals but it does address issues of secondary employment. Since members of the Board of Appeals are covered by the ethics law pursuant to §7-1-101(5), they are subject to the secondary employment prohibitions and limitations imposed by that law. In [AO-98-154](#), the ethics commission advised that a county employee may not serve on the Board of Appeals. Although the opinion was written before the ethics law was amended in 2003, the commission concludes that this opinion is equally valid under the present law.

In 2003, the pertinent provision of Article 9, Section 3-105 was repealed and reenacted as §5-104, adding another prohibition on secondary employment that may be relevant to your inquiry, and also, exceptions to the prohibitions.

§5-104.

(a) Except as provided in subsection (b) of this section, an employee may not, other than in the course of the employee's official duties, assist or represent a person in any matter:

(1) before any governmental unit of employee of the County; or

(2) in which the County has an interest.

(b) Subsection (a) of this section does not apply to:

(1) the performance of usual and customary constituent services without additional compensation; or

(2) assistance to or representation of an employee without compensation in an employment-related matter by an employee other than an elected or appointed employee; or

(3) assistance or representation that is authorized by law or contract. [In 2005, this provision was recodified without changes as Article 7, §7-5-104.]

Although §7-5-104(b)(3) permits assistance or representation that is authorized by law as an exception to the prohibition in (a)(1) and (2), the ethics commission concludes that the appointment of a county employee to the Board of Appeals would not constitute the necessary “authorization by law” for a county employee to engage in otherwise prohibited secondary employment. After reviewing the present law and the reasoning set forth [AO-98-154](#), the ethics commission concludes that the current law, §7-5-104, applies to prohibit a county employee from serving on the Board of Appeals. The reasons for this conclusion are found in this earlier opinion, which states that:

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?

Without knowing the state position held by the other candidate for the Board of Appeals, the commission cannot advise you whether any sections of the ethics law would prohibit a member of the board from serving as a state employee in this particular case. Generally, §7-5-104 would apply to a board member- state employee if that state employee's duties involve matters in which the county has an interest. The commission would advise the state employee to seek an opinion from the State Ethics Commission as to whether the state's ethics law would prohibit a state employee from serving on the Board of Appeals.

You indicated that time is of the essence in receiving a reply to your inquiry. If you would like to provide the commission with additional information that you believe might be pertinent, the commission will consider that information as soon as possible.

By:

Betsy K. Dawson
Executive Director