

November 27, 2007

Sent By Electronic and Interoffice Mail

Re: AO-07-87

After receiving advisory opinion AO-07-67, you requested an opportunity to meet with the ethics commission to express concerns about the opinion. The commission met with you during its meeting of November 5, 2007. Because you had invited members of volunteer fire companies and a member of the press to join you at this meeting, it was held in open session.

Since the ethics commission addresses particularized inquiries, and speaks as a body rather than as individuals, the commission's chairperson declined your request to engage in an open-ended dialogue with you during that meeting. However, you did ask a number of specific questions, and the commission has endeavored, with this letter, to answer those questions. The questions you asked are the following:

1. What was the basis of the "opposition" to your participation in Bill 71-07 that was expressed in AO-07-67?
2. Whether the act of drafting legislation, by itself, can constitute an ethics violation?
3. Whether it is an ethics violation for you to draft, discuss, or prepare fire safety legislation?
4. Whether the chairman of the county council is prohibited in any way from presiding over a council meeting or other proceedings involving the fire department if that chairman is the spouse of a firefighter?

The commission's responses are as follows.

1. What was the basis of the "opposition" to your participation in Bill 71-07 that was expressed in AO-07-67?

This question concerns an opinion issued to you on October 9, 2007. In AO-07-67, the ethics commission responded to the Disclosure of Apparent Conflict of Interest form you submitted concerning your participation in Bill 71-07. You stated in that form that you believed that you would be "able to vote and otherwise participate in this matter fairly, objectively, and in the public interest." The commission agreed with your

conclusion, and advised that you could participate in legislative activity involving that bill. The opinion then stated, “[y]ou should also be aware that there was considerable opposition to this decision, and the members concluded that your participation, while not strictly prohibited, would create a significant appearance of conflict of interest.” You specifically asked the reason for the opposition and what was “the perceived conflict or the perceived appearance of conflict.”

Over the years, the ethics commission has issued you approximately 26 written opinions, many of which concerned your participation in matters involving the fire department. The first opinion, AO-98-105, was issued while you were running for the office of county council. Contrary to your statement at the ethics commission meeting of November 5, 2007, the ethics commission did respond with an opinion to your request for advice while you were a candidate. And because that opinion set forth the underlying policy for all its future opinions, it may be helpful to refer to some of the comments made by the commission at that time. Specifically, the ethics commission wrote that:

Participation as a council member, in any matters involving the fire department by the spouse of the firefighter, will create at least an appearance of a conflict of interest. A vote that *benefits the firefighters* or even vocal support during discussions of fire department issues will be suspect. The assurance of impartiality of its legislators is the stock and trade of honest government. (Emphasis added.)

In that same opinion, the commission concluded specifically that,

. . . a council member whose spouse is a career firefighter and union member cannot participate in any way in matters involving the fire department’s budget, personnel, duties and responsibilities, or other issues. The council member cannot participate in matters involving firefighters’ union issues. This prohibition would include not only public debate and voting, but also private discussions with other council members or members of the administration.

The commission’s latest opinion to you, AO-07-67, is entirely consistent with its first opinion to you, in stating that your participation in any legislation that “benefits firefighters” creates the appearance of a conflict of interest. Bill 71-07 added benefits to certain firefighters and, as you stated in your submission to the ethics commission, “the

allowances create a financial benefit.” Because of the benefit potentially accruing to your spouse’s co-workers, your spouse’s superior officers, and potentially to your spouse as well, the ethics commission concluded, and still believes, that your participation is “suspect.” However, under the provisions of §7-5-111, disqualification from participation in legislative activity may be “. . .suspended if a councilmember with *an apparent* or presumed conflict files with the Ethics Commission a sworn statement that describes the circumstances of the *apparent* or presumed conflict and the legislation . . . to which it relates and asserts that the Councilmember is able to vote and otherwise participate in action relating to the legislation fairly, objectively, and in the public interest.” (Emphasis added.)

You indicated that your spouse currently receives this allowance because of his union membership, and even if your spouse is “crazy enough to want to get out of the union,” your spouse may never qualify to receive the allowance. If your spouse ever qualifies for the allowance, it will only be after you “would have already been term limited out.”¹ With only a remote possibility of an actual conflict of interest, the commission agreed, although some members did so reluctantly, that you could participate in the legislation.

In reviewing the many opinions issued to you over the years, the commission was unable to find any significant inconsistencies, either in its advice to you, or in the reasoning used by the commission in rendering its advice. In seven of the opinions you requested, the ethics commission advised that you could participate in specific legislation. In only four instances were you advised that you could not participate in specific legislation. A summary of some of these opinions may be helpful in resolving your apparent confusion about the ethics commission’s position on apparent as opposed to actual conflicts of interest as it relates to your participation in fire department legislation.

In IO-00-44, the commission advised that you could not participate in legislation concerning LOSAP, 508 funds . . . “or any other matters affecting the fire department's

¹ It was only after the issuance of AO-07-67 that you advised the commission that your spouse will not qualify for this allowance for a number of years, and further, that nobody in your spouse’s current chain of command will be immediately affected by this legislation.

budget, personnel or equipment.” The commission reiterated the reasoning it used in AO-98-105, saying,

It would be reasonable for the public to conclude that your spouse's best career interests would be served by your promoting the agenda and preferences of the chief of the fire department. . . . To paraphrase an old cliché, what is good for the fire department, is good for your spouse.

Would the fire department chief be willing to impose discipline on your spouse if you were going to be voting on his request for the use of 508 funds, or on the reorganization of the service awards program? Would the fire chief turn down your spouse's request for a transfer to another duty station or shift, if you were participating in the consideration on funding the department's proposed capital budget? If you did vote on the budget, and your vote turned out to be the only vote in favor of capital budget funding requested by the fire department, would it be unreasonable to conclude that you were considering your spouse's career opportunities when you cast your vote?

In requesting opinion IO-01-08, you submitted a Disclosure of Apparent Conflict of Interest form with regard to Bill 1-01. That bill would adopt “certain fire department pay schedules; providing for increases in the pay of certain fire department employees; and alter work week schedule designations for certain fire department employees.” You acknowledged that since your spouse was on the lieutenant promotion list, the bill could affect his future income. The ethics commission advised that you could not participate in this bill. The opinion addressed the meeting the ethics commission had with you and stated,

You attended a commission meeting, for the purpose of clarifying what you perceived to be over broad limitations on your participation in legislation. The commission, in response to your concerns, sent you a letter, dated August 1, 2000. In that letter, the commission stated that “the interest of your husband in the business of the fire department extends at the very least to matters affecting his salary, pension, conditions of employment, and matters of general concern to the firefighter’s union.” Throughout this series of communications, the ethics commission has advised you that you may participate in bills that affect all county personnel, including fire department employees, as long as you restrict your participation in those portions of the bills that affect the fire department. This advice suggests that while you

may vote on the overall bill, you may not participate in discussions concerning the fire department's portion of the bill, or vote on any amendments affecting only those portions of the bill. The commission has also suggested that there may be bills or other matters that affect the fire department, but do not affect your husband's interest in the fire department, such as the location of new fire stations.

In IO-02-86, the ethics commission advised you that you could not participate in legislation requiring enactment of binding arbitration in the event of an impasse between the county and public safety union in contract negotiations. However, in IO-02-84, the commission advised that you could participate in a resolution that would permit, but would not require, the next elected county council to enact binding arbitration for collective bargaining unit impasse procedures. In offering this advice, the commission quoted from AO-00-167, an opinion issued to another council member concerning zoning legislation that might have an impact on commercial property owned by the council member. The commission wrote,

Where legislation *may affect* a council member's interest, but it is by no means certain that it *would affect* that interest, the law permits for deference to be accorded to the council member's judgment, after full disclosure. This distinction is the difference between an *apparent* conflict of interest and an *actual* conflict of interest.

This opinion, like its predecessors, stressed that even where there is no actual or presumed conflict of interest, there may be an appearance of a conflict of interest.² It also suggested that where there is no actual or presumed conflict of interest, the ethics commission may defer to the council member's judgment that the council member may vote objectively, fairly, and in the public interest. *See also*, AO-02-73. That the ethics commission may defer to the council member's judgment does not mean that the commission cannot or will not acknowledge the appearance of a conflict of interest. On the contrary, the ethics commission considers it to be part of its essential function to advise employees when specific conduct creates an appearance of a conflict of interest. *See, e.g.*, AO-97-42.

² The ethics commission again made reference to this opinion in another recent opinion, AO-07-78.

The only other opinion advising that you could not participate in legislation was IO-03-94. The specific bill at issue there would have required the county council to define the phrase “wages, hours, working conditions, or other terms and conditions of employment.” The opinion stated,

In defining what is meant by terms of employment, the county council will not merely be carrying out a non-discretionary duty imposed by new Charter section 812. It will be exercising discretion in determining what issues may or may not be considered by an arbitrator. In considering this bill, the county council will be considering the viewpoint of the public safety employees’ unions, which have a significant interest in the outcome of this bill. Your spouse is a member of a public safety employee’s union, and therefore, has an interest in, and will be affected by this bill, and by the limitations on the subjects that may be considered by an arbitrator.

In three of these four opinions, the ethics commission concluded that your spouse had a legal or economic interest in the outcome of the legislation. In one opinion, IO-00-44, while the interest of your spouse was not immediate and direct, the commission concluded that the potential for bias in your participation in the specific legislation could significantly impact your spouse’s position in the department.

In every other opinion issued to you by the ethics commission, the commission either advised that there was no conflict of interest issue that would prevent your participation in legislative activity, or where such a conflict did exist, that you could participate in legislative activity on the overall bill but must refrain from those parts of the bill dealing with specific interests of your spouse.

In IO-00-105 (version #1), the commission advised that you could participate in legislation affecting the pension and pay scales for all employees, including firefighters. The commission reiterated its opinion that, “you should be circumspect in participating in that portion of either bill that deals with items of specific concern to the firefighters’ union since those are matters in which your spouse has an interest.”³ After that opinion was issued, you met with the ethics commission and requested clarification. In response, the ethics commission issued IO-00-105 (version # 2), in which it wrote,

³ The commission issued a similar opinion on this legislation to another council member by e-mail- IO-00-118, advising that participation on the bill was permissible “except for those portions that deal with the firefighter’s union pension or personnel items.”

The ethics commission believes that the interest of your spouse in the business of the fire department extends *at the very least to matters affecting salary, pension, conditions of employment, and matters of general concern to the firefighter's union.* Other matters may also affect [your spouse's] interests. For example, if [your spouse] is the driver of a fire engine, [your spouse] may be interested in a budget item for new, safer, or technologically improved apparatus. If [your spouse] is a paramedic, [your spouse] may be interested in whether more paramedics will be hired, insofar as this decision may impact [your spouse's] overtime opportunities or obligations. Other matters, such as the example you suggested, of determining the location of a new fire station, may not affect those interests. *The possibility that a conflict of interest may exist with regard to a particular matter depends upon the facts of the particular situation.* . . . It is not possible to enunciate a definitive rule with regard to all fire department matters that may be of concern to the county council. (Emphasis added.)

The other commission opinions addressed to you that permitted either full or limited participation in legislation that would have an impact on the fire department include: IO-00-118, IO-01-52, IO-02-84, IO-03-05, IO-07-06, and AO-07-67. There are also a number of opinions addressed to other council members that address issues of participation in legislation involving family members. In all those opinions the ethics commission's advice appears to be consistent with the advice it has offered to you. It may be that there are other opinions not included in this response to your question. If there are, and if they seem inconsistent to you, please bring them to the attention of the commission.

2. Whether the act of drafting legislation, by itself, can constitute an ethics violation?

The term "legislative action" is defined in the ethics law, §7-1-101(16), and means:

. . . an official action or nonaction relating to a bill, resolution, amendment, nomination, appointment, report, or other matter within the jurisdiction of the County Council or to an ordinance or resolution presented to the County Executive for signature or veto. "Legislative action" includes introduction, sponsorship, consideration, debate, amendment, passage, defeat, approval or veto.

This broad definition of legislative action would seem to include drafting legislation because such activity involves “official action” - a council member acting in an official capacity. Any research involved in preparing legislation, including conversations with others, would constitute legislative action. A council member who is interested in drafting legislation may ask for an ethics opinion as to any potential conflicts of interest before undertaking that task.

3. Whether it is an ethics violation for you to draft, discuss, or prepare fire safety legislation?

The answer to this question is that any legislative action, including “drafting, discussing, or preparing legislation” is prohibited if your participation creates a conflict of interest between your official duties and the interests of your spouse. The ethics commission cannot respond to your specific concerns about “fire safety legislation” without additional information. Although you mentioned that the proposed legislation involves a requirement to install water sprinklers in certain new construction, you did not provide any additional facts from which the commission can consider your question. The commission will not speculate about what interests, if any, the fire department, or your spouse, may have in generalized legislation.

4. Whether the chairman of the county council is prohibited in any way from presiding over a council meeting or other proceedings involving the fire department if that chairman is the spouse of a firefighter?

In your comments during the ethics commission meeting, you incorrectly referred to an opinion from January 28, 2003 for the proposition that the chairman of the county council may preside over meetings on legislation when that chairman has a conflict of interest with respect to that legislation. In fact, that opinion, IO-03-05, specifically advised that where there is *no* conflict of interest, the chairman may preside over the meeting. However, in AO-00-57, the ethics commission advised that the chairman of the county council could preside over the invitational part of a council hearing, because that is an administrative function. To the extent that the chairman’s activities in presiding over the council are administrative only, a prohibition on participating in legislative action would not include presiding over a meeting. However, the chairman may not

introduce legislation, even on behalf of the county executive, if the chairman's participation in that bill would be barred by the ethics law. Although it is the practice of the county council to have the chairman introduce legislation requested by the county executive, there is no apparent legal requirement underlying this practice.

The commission hopes that this opinion adequately addresses the questions that you posed and the concerns that you expressed with regard to AO-07-67. The commission has concluded that its advice to you, as well as to other members of the county council, has been both responsive to the questions asked, and consistent with its earlier opinions.

The Anne Arundel County Ethics Commission

| _____ /s/

By: _____
Christopher S. Rizek, Chairperson