

CHARLES COUNTY ETHICS COMMISSION

Advisory Opinion 2023-01

January 30, 2024

Preliminary Statement

The Charles County Ethics Commission (“Commission”) issues this Advisory Opinion pursuant to Section 170-4.J. of the Charles County Ethics Code (“Ethics Code”), which authorizes the Commission to issue an “advisory opinion” to any person who is subject to the Ethics Code. The Commission sees the advisory opinion process as a way that a person may seek prospective guidance as to whether that person’s potential future conduct may result in a violation of the Ethics Code. The Commission does not view the advisory opinion process as a means by which a person may bring to the attention of the Commission past alleged ethical misconduct by others.

The person who submitted the request for advisory opinion is a County Commissioner (“Requestor”). The Requestor did not provide the Commission with facts supporting the request. However, the Commission has become aware of some relevant facts as stated in this opinion. These facts were provided to the Commission by others or are public knowledge. The Commission assumes the truth of such facts. This opinion is based only on facts known to the Commission as referred to in this opinion. A change in material facts, or the addition of other material facts, may alter the views of the Commission as set forth in this advisory opinion.

Background

For more than four years members of the Board of County Commissioners (“Board”) have been engaged in a dispute regarding a County personnel matter. This dispute resulted in a lawsuit being filed in the Circuit Court for Charles County by two Commissioners against the remaining three Commissioners and the Board to establish the rights and obligations of the various parties (“Lawsuit”). The Requestor filed a counterclaim and cross claim against the other parties. The Lawsuit resulted in two appeals. The first appeal, an “interlocutory” appeal, was dismissed by the Appellate Court of Maryland. The second appeal, the “direct appeal,” is still pending in the Appellate Court of Maryland.

The various County Commissioners and the Board engaged separate legal counsel to represent them in the Lawsuit. For reasons unknown to the Commission, the Board authorized the payment of the legal fees for all parties except for the Requestor's appeals. The Requestor is seeking to have the Board authorize the payment of the Requestor's legal fees incurred to date for the interlocutory appeal, and legal fees to be incurred in the future for the direct appeal.

Requestor has been represented by two law firms. The Commission reviewed the engagement letter between the first law firm and the Requestor. This letter was not signed by Requestor but was addressed to Requestor. The terms of the engagement letter obligated the Requestor to pay the law firm's costs and expenses associated with the lawsuit. However, it appears, but is not clear whether, the County Attorney committed the County to paying Requestor's litigation costs for the first law firm.

The Commission also obtained a copy of the engagement letter with Requestor's second law firm. The engagement letter with the second law firm was directed to Requestor and was limited to representation of Requestor in the injunction litigation in the Circuit Court. This second engagement letter expressly stated that "At this juncture, the Board of County Commissioners for Charles County will need to authorize the payment of any attorney fees in litigating this matter in the Appellate Court of Maryland and/or the Supreme Court of Maryland...." Requestor did not sign this engagement letter. Rather, this engagement letter was "AGREED TO AND ACCEPTED" by the Deputy County Attorney.

Questions Presented

The Requestor presented two questions for the Commission's advisory opinion¹:

Would it be violative of any applicable ethical rules for [Requestor] to vote on whether the litigation costs associated with [the] interlocutory appeal in the Lawsuit [Redacted] should be borne by the Board given that the Board has already paid the litigation costs incurred by the appellees to that appeal?

Would it be violative of any applicable ethical rules for [Requestor] to vote on whether the litigation costs associated

¹ The Requestor posed two additional questions that the Commission declined to consider because they involved past conduct by others, inappropriate subjects for an advisory opinion.

with [Requestor's] direct appeal of the final order entered in the Lawsuit [Redacted] should be borne by the Board?

So, the only issue before the Commission is whether the Requestor would violate the Charles County Ethics Code if the Requestor votes on the questions of whether the Board should pay Requestor's litigation costs for the two appeals. The questions before the Commission do not go to the ultimate issues of whether the Board should, or must, pay Requestor's litigation costs for either or both of the appeals. Those questions are for the Board to decide, with or without Requestor's vote.

Discussion

The Commission is mindful of the policy and purpose of the County's Ethics Code, as established by the Board of County Commissioners and set forth in Section 170-2:

- A.** The Board of County Commissioners of Charles County, Maryland, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and employees will be maintained.
- B.** It is evident that this confidence and trust is eroded when the conduct of the County's business is subject to improper influence and even the appearance of improper influence.
- C.** For the purpose of guarding against improper influence, the Board of County Commissioners of Charles County enacts this Code of Ethics to require County elected officials, officials, employees, and individuals appointed to boards and commissions to disclose their financial affairs and to set minimum standards for the conduct of local government business.
- D.** It is the intention of the Board of County Commissioners of Charles County that this chapter, except its provisions for criminal sanctions, be liberally construed to accomplish this purpose.

While these policies and purposes do not, in and of themselves, create a standard of conduct for County officials and employees, they provide a context for evaluating

and interpreting the specific minimum standards of conduct set forth in the remainder of the Ethics Code.

The Commission has reviewed Section 170-5 of the Ethics Code, “Prohibited conduct and interests.” This is the part of the Ethics Code that addresses conduct that would be broadly considered to be conflicts of interest. The Commission concludes that several provisions of Section 170-5, if any, may address Requestor’s questions:

A. Participation prohibitions.

(1) Except as permitted by Commission regulation or opinion, an official or employee may not participate in:

(a) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision of the matter, any matter in which, to the knowledge of the official or employee, the official or employee or a qualified relative of the official or employee has an interest.²

(3) The prohibitions of Subsection **A(1)** and **(2)** of this section do not apply if participation is allowed by regulation or opinion of the Commission.

D. Use of prestige of office.

(1) An official or employee may not intentionally use the prestige of office or public position for the private gain of that official or employee or the private gain of another.

We have given due consideration to the foregoing provisions of the Ethics Code. We also are cognizant of the policies and purposes of the Ethics Code and that the Ethics Code is to be liberally construed. We conclude that the Requestor’s participation in a vote on the question whether the Board should authorize the payment of Requestor’s appeal costs that may be the legal responsibility of the Requestor to pay would violate the Ethics Code, and we encourage the Requestor not to do so.

² As relevant to this opinion, Section 170-3 defines “interest” as “[a] legal or equitable economic interest, whether or not subject to an encumbrance or a condition, that is owned or held, in whole or in part, jointly or severally, directly or indirectly.”

As stated in Section 170-2.A. of the Ethics Code, people have a right to be assured that the impartiality and independent judgment of public officials and employees will be maintained. We believe that Section 170-5.A.(1)(a) would proscribe Requestor's participation in a vote. Our interpretation of that provision is guided by our belief that Requestor's participation in a vote that might have the effect of absolving Requestor from a possible personal contractual financial obligation would compromise the public trust. However, our opinion is tempered by uncertainties as to whether Requestor has any legal obligation for payment of litigation costs to the first law firm or the second law firm under their respective engagement letters. It is not within the scope of the Commission's duties and responsibilities to draw conclusions regarding legal matters other than those involving interpretations of the Ethics Code.

Requestor's first question alludes to the fact that the Board previously authorized the payment of attorney fees incurred by certain parties for the interlocutory appeal. We do not know the circumstances of that authorization, the specific party or parties benefitted by such action, and whether Requestor participated in that authorization. Regardless of the answers to these questions, the Commission was not asked for guidance on such past authorizations and deem these matters not to be relevant to the present inquiries.

The Commission also has considered whether Requestor's ability to vote should be authorized by opinion of this Commission as provided in Section 170-5.A.(3). The Commission concludes that there is no sufficient justification to authorize Requestor to participate in a vote.

Finally, in light of the interpretation and guidance the Commission gives under Section 170-5.A.(1)(a), the Commission need not determine whether Section 170-5.D. (use of prestige of office), also would proscribe Requestor from participating in a vote.

Conclusion

The Commission concludes, and so advises the Requestor, that the Requestor should not vote on any matter that could result in the Board assuming any of Requestor's obligations to pay litigation expenses for either or both of the appeals. However, Requestor would not violate the Ethics Code by voting on a matter that would result in the Board authorizing the payment of Requestor's litigation expenses for the appeals that the Board, but not the Requestor, is legally obligated to pay.

Thank you for seeking our guidance.

CHARLES COUNTY
ETHICS COMMISSION

Shara Hendler

Shara Hendler (Jan 31, 2024 14:43 EST)

Shara Hendler, Esq., Chair

Christopher L. Nickerson

Christopher Nickerson, Vice Chair

Cecelia Miller

Cecelia Miller (Jan 31, 2024 11:47 EST)

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Sarah Hazeltine

Sarah Hazeltine (Jan 31, 2024 16:24 EST)

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