Baltimore City Board of Ethics
Ethics Opinion 21-004
(June 28, 2021)

Based on recent complaints and questions, the Ethics Board has realized there is a need for guidance on the Ethics Law's provisions limiting a City public servant's[1] secondary employment options. For purposes of this opinion, secondary employment means any employment outside of a public servant's City duties. We will examine the meaning of the term "employment" below, as well as certain scenarios in which secondary employment raises an impermissible conflict of interest.

In pertinent part, unless an exception applies, the Ethics Law prohibits a public servant from being employed by—or having a "financial interest"[2] in—"any person that is negotiating or has entered into a contract with the City or an agency of the City, if the contract is with, for the benefit of, or to be administered by the agency with which the public servant is affiliated." § 6-11(2)(i)(A).[3] Section 6-11 also prohibits secondary employment and financial interest in other scenarios, but this opinion will focus on the subsection just quoted.[4]

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[1] The term "public servant" includes all City officials and employees. City Code, Art. 8, § 2-23.

[2] "Financial interest" means ownership of:
(1) more than 3% of a business entity;
(2) securities of any kind that represent or are convertible into ownership of more than 3% of a business entity; or
(3) any interest as the result of which the owner:
(i) received more than $1,000 in any 1 of the preceding 3 calendar years; or
(ii) is entitled to receive more than $1,000 in the current or any subsequent calendar year.
City Code, Art. 8, § 2-16.

[3] Unless otherwise indicated, all citations are to the Baltimore City Public Ethics Law, contained in Article 8 of the City Code.

[4] Section 6-11, in full, provides as follows:
Except as otherwise provided in this Part III [of Article 8, Subtitle 6], a public servant may not:
(1) be employed by or have a financial interest in any person that is subject to the authority of that public servant or of the City agency with which the public servant is affiliated;
(2) be employed by or have a financial interest in any person that is negotiating or has entered into:
(i) a contract with the City or an agency of the City, if:
(A) the contract is with, for the benefit of, or to be administered by the agency with which the public servant is affiliated;
(B) the public servant's duties for the City include matters substantially relating to or affecting the subject matter of the contract and the contract binds or purports to bind the City to pay more than $1,000; or

What is meant by secondary "employment"?

One of the primary purposes of the Ethics Law is "[t]o guard against improper influence or even the appearance of improper influence." § 1-2. To that end, the Ethics Law sets "minimum ethical standards of conduct for City officials and employees," Section 1-2, which includes restrictions on possible conflicts of interest, including those posed by secondary employment. *See* Subtitle 6.

The Ethics Law does not define the term "employment." According to Black's Law Dictionary, "employment" means, in relevant part, "[t]he quality, state, or condition of being employed; the condition of having a paying job," and "[w]ork for which one has been hired and is being paid by an employer." Black's Law Dictionary (11th ed. 2019). To be sure, a public servant's traditional, compensated employment relationship with an outside employer might raise a conflict of interest—or the appearance of a conflict of interest—if that employer has entered or is negotiating a contract with the public servant's agency; in that scenario, a perception could arise that the employer is benefitting from the public servant's "inside connections" with the agency. Hence the "conflict"—between the public servant's City position and their secondary employment.

However, a public servant's other substantial affiliations with an outside entity might raise the same specter of conflict, even if the affiliation does not constitute a traditional, compensated employment relationship. Moreover, because the Ethics Law's provisions are to "be liberally construed to accomplish their purposes," Section 2-35, we think the term "employment" in Section 6-11 should encompass any substantial affiliation between a public servant and an outside entity—both compensated and uncompensated—that could raise a conflict of interest. We thus follow the State Ethics Commission's interpretation of "employment" in the State Ethics Law's substantially similar secondary employment provisions.[5] *See, e.g.,* State Ethics Commission Opinion No. 80-4 (explaining that the existence of an employment relationship should be determined by "relying on the substance of the [public servant's] relationship with the outside entity, rather than the existence or amount of compensation[.]").

This broad definition of employment requires us to examine whether the public servant's affiliation with an outside entity "would reasonably be expected to require a personal loyalty or commitment to the goals of the entity." *See id.* Under this test, official positions of leadership or trust with an outside entity—whether or not compensated—are presumed to constitute an employment relationship with that entity. *See, e.g.,* State Ethics Commission Opinion No. 92-10 ("we have consistently advised that service in a fiduciary capacity on the operational or management boards of . . . organizations, whether or not compensated, would be employment for purposes of [the Ethics Law's secondary employment provisions]."); State Ethics Commission Opinion No. 80-4 ("[w]here the [public servant] holds an office, directorship, or other position of trust with an entity . . . then holding the position would be prohibited by

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(C) for any other contract, the public servant fails to timely disclose to the Ethics Board and the procuring agencies, as required by rule or regulation of the Ethics Board, his or her employment by or financial interest in the person who is negotiating or has entered into the contract; or

(ii) a subcontract on a contract described in this item (2); or

(3) hold any other employment relationship that would impair the impartiality and independent judgment of the public servant.

[5] *See* Md. Code Ann., General Provisions Article, § 5-502.

[the Ethics Law's secondary employment provisions], if the entity is subject to the authority of or has contractual dealings with the employee's agency.").

Accordingly, even uncompensated service on an entity's board of directors can be considered "employment" under the Ethics Law's secondary employment restrictions. Moreover, it does not matter whether the entity is for-profit or not-for-profit: service on any entity's governing board would fall under this definition of employment—be it a publicly-traded corporation or a community association.[6]

What counts as entering or negotiating a contract?

Unless an exception applies,[7] Section 6-11 prohibits a public servant from being employed by "any person that is negotiating or has entered into a contract with the City or an agency of the City, if the contract is with, for the benefit of, or to be administered by the agency with which the public servant is affiliated." § 6-11(2)(i)(A).[8] It is typically easy enough to determine whether a contract or potential contract "is with, for the benefit of, or to be administered by" a particular agency. But what counts as entering or negotiating a contract in the first place, and is the provision limited to traditional procurement contracts or similar devices wherein the City agrees to pay an entity for goods or services? We think such a narrow interpretation would be insufficient to "guard against influence or even the appearance of improper influence." *See* § 1-2. Instead, as with the definition of employment discussed above, what is meant by entering or negotiating a contract should be interpreted broadly so as to encompass a wide range of potential conflicts of interest between a public servant's City position and their secondary employer.

For example, we were recently presented with the question whether a public servant who privately served as an officer of a community association was permitted to hold that position while the community association was considering entering into a memorandum of understanding ("MOU") with the public

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[6] Section 6-11 refers to employment by any "person," and the term "person" means: "(1) an individual; (2) a partnership, firm, association, corporation, or other entity of any kind; (3) a receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind; or (4) . . . a governmental entity or an instrumentality or unit of a governmental entity." § 2-22.

[7] *See* Sections 6-12 through 6-16. One of these exceptions applies to a public servant who serves as an entity's trustee or board member on behalf of the City, *i.e.*, in an *ex officio* capacity. § 6-15. That exception only applies if the City has an economic or programmatic interest in the entity, if the public servant serves *as part of his or her official duties, at the direction of his or her agency*, if the public servant does not receive any compensation for the service, and if the public servant otherwise recuses themselves from any matter in which they or a disqualifying relative have a financial interest. *See* §§ 6-15 and 6-9 (emphasis added). There is also an exception for new members of a City board or commission who publicly disclose to their appointing authority and to the Ethics Board what would otherwise constitute conflicting secondary employment. § 6-14. Additionally, in other scenarios, the Ethics Board is authorized to grant a waiver for secondary employment that would otherwise be prohibited, subject to certain criteria. § 6-12 and Regulation R 06.12.1.

[8] The Ethics Law's secondary employment provisions should not be confused with its recusal provisions, which, in pertinent part, require a public servant to recuse—or disqualify—themselves from participating in a City matter if they are a "partner, officer, director, trustee, *employee*, or agent" of any entity that is a party to the matter. *See* § 6-6(b)(3)(ii)(A) (emphasis added). In a recusal scenario under Section 6-6, if a public servant's secondary employer is involved in, impacted by, or is otherwise a "party to" a City matter that does not involve a contract with that entity, the public servant would be required to recuse themselves from working on that matter for the City. *See* § 6-6. In contrast, under Section 6-11's prohibition on secondary employment, if a public servant's secondary employer is negotiating or has entered into a contract with the public servant's agency, the public servant would be prohibited from continuing to hold that secondary employment, regardless whether or not they recused themselves from the matter. Obviously, the analysis depends on the circumstances, including whether an exception might apply.

servant's agency. The MOU set forth the parties' agreement related to certain projects to be undertaken in the community; City funds were not involved, but the MOU was required to be signed by the public servant's agency head and the head of the community association. The public servant's agency duties were entirely unrelated to the MOU.

We determined that the MOU in that scenario constituted a "contract" for purposes of Section 6-11 because it set forth a formal agreement between the parties and called for official ratification. Moreover, even though the parties had not yet entered the MOU when the question was presented to us, we found the circumstances surrounding the community association's consideration of the MOU amounted to "negotiating" the contract. Accordingly, we concluded that Section 6-11 prohibited the public servant from serving as an officer of the community association while the association was negotiating the MOU with the public servant's agency, notwithstanding that the public servant's own agency duties had nothing to do with the MOU process.

In sum, a liberal interpretation of the terms "employment" and "contract" is necessary to effectuate the purpose of the Ethics Law's restrictions on secondary employment, which is to guard against even the appearance of a conflict of interest between a public servant's City position and their outside affiliations.

Baltimore City Board of Ethics

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