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BALTIMORE CITY BOARD OF ETHICS

Advisory Opinion

#24-0001

(February 29, 2024)

The Baltimore City Board of Ethics (“Board”) received a request for an advisory opinion regarding the applicability of the City's Ethics Law to campaign contributions made by members of the Baltimore City Fair Election Fund Commission in their private capacities. Specifically, the issue is whether the City's Ethics Law limits the ability of FEF Commission members as private individuals to donate to or volunteer for candidates/campaigns who may qualify for FEF funds.

For the reasons outlined below, the Board advises that:

- members of the FEF Commission may make monetary and in-kind contributions (“independent expenditures”)¹ to candidates and/or campaigns receiving FEF funds; however,
- compensated work for or on behalf of a candidate or campaign receiving FEF funds creates an impermissible conflict of interest under City Code Art. 8, § 6-11.

I. BACKGROUND

Pursuant to Maryland Election Law § 13-505, any county in the State may elect to establish a system of public campaign financing for elective offices in the executive and legislative branches of the local government. Any program established under this provision must be administered by the Chief Financial Officer of the local government (in Baltimore City, the Director of Finance) and is subject to regulation and oversight by the Maryland State Board of Elections.

¹ Political contributions or “independent expenditures”, i.e., lawful monetary or in-kind donations to a candidate or political campaign by a qualifying natural or legal person, have long been considered political speech protected by the First Amendment. (“By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” *See, Buckley v. Valeo*, 424 U.S. 1, at 46, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).) Any limitation on a Commissioner’s right to freely exercise constitutionally protected political speech (including making independent expenditures) by the Ethics Law would likely be unconstitutional under *Buckley* and progeny. *See also*, 5 USCS § 7322 (D).

The State defers the determination of certain candidate eligibility criteria to the municipality, as well as the formulation of local criteria concerning campaign financing, contributions, expenditures, local government reporting, and campaign material related to the program that may be more strict than those of the State. Only candidates for qualifying local elective office are eligible to apply for and receive funds.

The City established the Fair Election Fund (“FEF”) under this State enabling law to provide matching City funds to eligible candidates for City elective office. It is governed by State and City law. To participate in the FEF, a candidate must be a City resident who is running for Mayor, Comptroller, City Council President, or City Council in a contested primary and/or general election and must be certified for public funding by the State Board of Elections. Eligibility depends, *inter alia*, on receiving a minimum number of qualifying contributions (up to \$150) from City residents.

(1.) The City’s FEF Commission

State law vests the City’s Director of Finance with the ultimate authority for the administration of the Fund. City law also establishes a City Fair Election Fund Commission (“Commission”). See Baltimore City Charter², Article I, § 15 (b) and City Code, Article 5³, § 11-7.

Baltimore City Code Art. 5, § 11-8 (a) {Fund administration; Commission duties} vests the City’s Director of Finance (“Director”) with the following:

- (1) The Director, in consultation with the Commission, must administer the Fund and ensure that the funds are dispersed [*sic*] in an equitable basis.
- (2) The Director may not disperse [*sic*] any funds from the Fund without prior Commission consultation.

The Commission consists of 11 members (herein, “Commissioners”), including: six members appointed by the Mayor, three of whom must represent organizations focused on government reform and one of whom must represent an organization advocating for the interests of City business owners; and five members appointed by the President of the City Council.

Each Commissioner must be a City resident, be a registered voter, and be confirmed by the City Council. A Commissioner may not be a candidate for public office; not be a lobbyist required to register with the City; and not be the chair or treasurer for an open campaign account.

The Commission’s responsibilities, under Art. 5, § 11-8 (c) include meeting “at least once every 90 days during the 12 months preceding a primary election; and ... at least twice a year

² [https://legislative.baltimorecity.gov/sites/default/files/01%20-%20Charter%20\(rev%2008DEC22\).pdf](https://legislative.baltimorecity.gov/sites/default/files/01%20-%20Charter%20(rev%2008DEC22).pdf) (Last access: Feb. 29, 2024.)

³ [https://legislative.baltimorecity.gov/sites/default/files/Art%2005%20-%20Finance_\(rev%2004-26-22\).pdf](https://legislative.baltimorecity.gov/sites/default/files/Art%2005%20-%20Finance_(rev%2004-26-22).pdf) (Last access: Feb. 29, 2024.)

otherwise.” Subsection (b) summarizes other duties of the commission, which include issuing an annual report to the Mayor and City Council before Jan. 1, containing:

- (1) an estimate of the funds necessary to implement the public campaign finance system for the following fiscal year;
- (2) a recommendation for an appropriation to the Fund for the following fiscal year; and
- (3) if necessary, any recommendations for dedicated sources of funding.

Art. 5, § 11-9 {Rules and regulations} further states that

Subject to Title 4 {“Administrative Procedure Act – Regulations”} of the City General Provisions Article, the Director, in consultation with the Commission, must adopt rules and regulations to carry out the provisions of this subtitle, including specifying:

- (1) how and when receipts for qualifying contributions from contributors must be submitted to the State Board;
- (2) the documents that must be filed with the State Board for certification;
- (3) when disbursements from the Fund are made to a participating candidate and the amounts disbursed;
- (4) procedures for handling impermissible uses of public contributions; and
- (5) other policies necessary to implement this subtitle.

(2.) The Commission’s duties and responsibilities

In brief, the Director of Finance must consult with the Commission regarding the administration of the Fund before any funds are disbursed, on establishing processes and policies, and outlining potential legislative changes. Section 11-11 makes outreach, education, training, etc. the sole responsibility of the Commission. On or before January 1st of each year, the Commission must issue a report to the Mayor and City Council containing an estimate of the funds necessary to implement the public campaign finance system for the following fiscal year; recommend an appropriation to the fund for the following fiscal year; and make recommendations for dedicated sources for funding (if necessary).

The Commission itself does not determine which qualifying candidates will receive specific amounts of public funding. Indeed, it is the State Board that must determine the amount of a public contribution that each qualifying candidate is to receive, based on the amount reflected in the receipts as presented to the Board and the formula for the respective City elective office.

After a review of the submission by the State Board, the Director of Finance for Baltimore City is then notified to deposit the authorized matching publicly funded campaign contribution into the certified candidate’s publicly funded campaign account. The Director must promptly deposit the funds, after consultation with the Commission.

II. ANALYSIS

Article 8 of the City Code (“the Ethics Law”), in pertinent part, provides the following definition:

§ 2-21. “Official”.

(a) In general. “Official” means ...

(4) any other individual in a unit of City government who, whether acting alone or as a member of a board acting jointly with other board members:

- (i) has authority comparable to that of the head of a department or the head of a bureau or division;
- (ii) has decision-making authority in making City policy;
- (iii) has decision-making authority in the exercise of quasi-judicial, regulatory, licensing, inspecting, or auditing functions; or
- (iv) acts as a principal advisor to one who has authority of the type listed.

FEF Commissioners advise the Department of Finance and other City officials on Fair Election Fund-related policy, thus qualify as “officials” under the Ethics Law, and therefore are subject to its provisions.

A. Potential Conflicts for FEF Commissioners under Art. 8

(1.) § 6-6. Prohibited participation

Section 6-6 {Prohibited participation}, *inter alia*, prohibits a public servant from participating in any matter that the public servant or a disqualifying relative has an interest in of which the public servant might reasonably be expected to know.¹

Section 2-19 (a) defines “Interest” (except as specified in subsection (b) of that section), as any legal or equitable economic interest, whether or not subject to an encumbrance or a condition, that is owned or held wholly or partly, jointly or severally, or directly or indirectly.

Maryland State Election Law Article, Title 13, § 13–226 (e) (1), defines “business” more narrowly:

In this subsection, “business entity” includes a corporation, a sole proprietorship, a general partnership, a limited partnership, a limited liability company, a real estate investment trust, or other entity.

Any campaign contributions made by FEF Commissioners, monetary and/or in-kind, is not made to the elected/incumbent officials, candidates, or any third-party business entity, but to their State-

regulated campaign finance entities. Under Title 13’s definition, a political campaign may well be an “other entity,” but it also appears clear that making a campaign contribution does not give the contributor a financial or other cognizable “interest” (in the meaning of Art. 8) in the campaign or the candidate.

The Baltimore City Charter §15 (b) (3) {Special fund for fair elections} provides that each member of the Commission must:

- (i) be a resident of the City of Baltimore;
- (ii) not be a candidate for public office;**
- (iii) not be a lobbyist required to register with the City;
- (iv) not be the chair or treasurer for an open campaign account;**
- (v) be a registered voter; and
- (vi) be confirmed by the City Council.

(Emphasis supplied.)

Even if an “interest” under the Ethics Law could be construed based on a candidate’s, campaign chair’s, or treasurer’s relationship to and with the underlying campaign, the express exclusion of Commissioners from holding such positions contemporaneously with their role on the Commission precludes them from holding such “interest”.

Because, for purposes of the Ethics Law, a donor has no cognizable private “financial interest” in that campaign, the Ethics Board determines that neither monetary nor in-kind campaign donations constitute a conflict under Art. 8, § 6-6 {Prohibited participation}.

(2.) § 6-11. Prohibited employment, interests.

Section 6-11 prohibits a Commissioner from (1) being employed by or having 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) being employed by or having a financial interest in any person that is negotiating or, under certain conditions, has entered into a contract with the City or an agency of the City, and from (3) holding any other employment relationship that would impair the impartiality and independent judgment of the public servant. ⁱⁱ

A Commission member contemplating “employment” by a campaign applying for FEF public funding (e.g., by working in a compensated position) may raise an apparent conflict under § 6-11.

While contributions of unpaid personal services to a campaign are protected political speech and do not create an economic interest in the campaign entity for purposes of § 6-6 (*see, supra*), the

Commission could be seen as having an "approval" role in disbursing funds under the Charter language such that a Commissioner's employment by a campaign violates § 6-11. That is, a Commissioner may appear to be vested with some regulatory authority over how public campaign funds are allocated and whether and when public funds are disbursed to a candidate's campaign, creating an impermissible conflict under the plain language of § 6-11 (1) and (3) if that Commissioner was employed by the campaign entity receiving FEF funds.

Accordingly, the Board determines that if a Commissioner were to accept compensated employment by or on behalf of a candidate or campaign receiving FEF funds, such compensated employment would represent a "financial interest" under the Ethics Law and thus constitute a violation of the conflict-of-interest provisions of Art. 8, § 6-11.

(3.) § 6-36. {Prestige of office.}

Section 6-36 {Prestige of office} prohibits a public servant from intentionally using the prestige of his or her office or position for his or her own private gain or that of another.ⁱⁱⁱ

In its Advisory Opinion No. 2021-04 from Dec. 16, 2021, the Howard County Ethics Commission, addressing a similar question to the one here as applied to the Howard County Citizens' Election Fund Commission ("CEF"), determined that under Howard County Code's equivalent of Baltimore City's Art. 8's § 6-36, "the term 'private gain'. . . applies solely to economic or contractual gain. (...) A direct donation [by a Commissioner] to a participating candidate would amount to 'private gain of another'" and "that the conflict cannot be cured by recusal or non-participation because it does not cure the likely perception by the public that a CEF Commission member who donates directly to a participating candidate may have impaired impartiality or lack independence of judgment."⁴

The Board, however, finds that Commissioners who make a *private* campaign contribution are not using their "official position" for anyone's private gain (even if a contribution results in a *de facto* "gain" for the State-regulated campaign entity). Also, as discussed above, a Commissioner's private contribution does not create a cognizable "interest" in that campaign entity for purposes of the Ethics Law.

Thus, the Board determines that a lawful campaign contribution made by a Commissioner pursuant to State Election Law Article, Title 13, *does not* constitute a violation of the Ethics Law's prestige-of-office provisions.

Board Determination

⁴ See, <https://www.howardcountymd.gov/sites/default/files/2022-02/Opinion%202021-04.pdf>

The Ethics Board has determined that a member of the FEF Commission may make monetary and in-kind contributions (“independent expenditures”) to candidates and/or campaigns receiving FEF funds. However, accepting or engaging in compensated employment by or on behalf of a candidate or campaign receiving FEF funds creates an impermissible conflict of interest under Art. 8.

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§ 6-6. Prohibited participation.

(a) *“Business entity” limited.*

In this section, “business entity” does not include Baltimore City or any instrumentality, unit, or agency of Baltimore City.

(b) *When participation prohibited.*

Except as otherwise provided in this Part II, a public servant may not participate in and must disqualify himself or herself from any matter if:

- (1) the public servant has an interest in the matter of which the public servant might reasonably be expected to know;
- (2) to the public servant’s knowledge, a disqualifying relative has an interest in the matter; or
- (3) any of the following is a party to the matter:
 - (i) any business entity in which:
 - (A) the public servant has a financial interest of which the public servant might reasonably be expected to know; or
 - (B) to the public servant’s knowledge, a disqualifying relative has a financial interest;
 - (ii) any business entity in which:
 - (A) the public servant is a partner, officer, director, trustee, employee, or agent; or
 - (B) to the public servant’s knowledge, a disqualifying relative is a partner, officer, director, trustee, employee, or agent;
 - (iii) any business entity with which:
 - (A) the public servant has applied for a position, is negotiating employment, or has arranged prospective employment; or
 - (B) to the public servant’s knowledge, a disqualifying relative has applied for a position, is negotiating employment, or has arranged prospective employment;
 - (iv) any business entity that is a party to a contract with:
 - (A) the public servant, if the contract could reasonably be expected to result in a conflict between the private interests of the public servant and the public servant’s official City duties; or
 - (B) to the public servant’s knowledge, a disqualifying relative, if the contract could reasonably be expected to result in a conflict between the private interests of the public servant or disqualifying relative and the public servant’s official City duties;

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- (v) any business entity in which a financial interest is held by another business entity in which the public servant has a financial interest, if the public servant might reasonably be expected to know of both financial interests;
 - (vi) any business entity in which a financial interest is held by another business entity in which a disqualifying relative has a financial interest, if the public servant knows of both financial interests;
 - (vii) any business entity that has a financial interest in another business entity in which the public servant also has a financial interest, if the public servant might reasonably be expected to know of both financial interests;
 - (viii) any business entity that has a financial interest in another business entity in which a disqualifying relative also has a financial interest, if the public servant knows of both financial interests; or
 - (ix) any business entity that, to the public servant's knowledge, is a creditor or obligee of the public servant or a disqualifying relative and that, as a creditor or obligee, is in a position to affect directly and substantially the interest of the public servant or disqualifying relative.

ii § 6-11. Prohibited employment, interests. Except as otherwise provided in this Part III, 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
 - (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.

iii § 6-36. Prestige of office.

- (a) In general. A public servant may not intentionally use the prestige of his or her office or position for his or her own private gain or that of another.
- (b) Constituent services. The performance of usual and customary constituent services, without additional compensation, is not prohibited by this section.