

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

April 10, 2017

BEGA –ANC Ethical Standards

ADVISORY OPINION

The Director of Government Ethics, pursuant to the authority set forth in section 219(a-1)(2) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective February 22, 2014 (D.C. Law 20-75; D.C. Official Code § 1-1162.19(a-1)(2)) (“Ethics Act”), hereby gives notice that he intends to issue, on his own initiative, an advisory opinion that provides interpretive guidance to members of Advisory Neighborhood Commissions regarding the applicability of the District of Columbia Code of Conduct. Given recurring inquiries by members of the Commissions, the Director considers this topic to be a general question of law of sufficient public importance concerning the Code of Conduct over which the Ethics Board has primary jurisdiction.

All persons interested in commenting on this draft Advisory Opinion may do so not later than thirty (30) days after publication of this notice in the *D.C. Register* by sending comments electronically to bega@dc.gov or by filing comments in writing with Brian K. Flowers, General Counsel, Board of Ethics and Government Accountability, 441 4th Street, N.W., 830 South, Washington, D.C. 20001.

Advisory Opinion

Ethical Standards Applicable to Advisory Neighborhood Commissioners

Purpose of this Advisory Opinion

Among its several duties, the Board of Ethics and Government Accountability (“BEGA”) is charged with administering and enforcing the Code of Conduct.¹ However, since BEGA’s inception, numerous Advisory Neighborhood Commissioners (“ANCs”) have questioned whether certain parts of the Code of Conduct apply to them. The purpose of this opinion, then, is to

¹ See section 202(a)(1) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1162.02(a)(1)).

discuss what parts of the Code of Conduct apply to ANCs – in addition to specific provisions of the Ethics Act itself – and what parts of the Code of Conduct do not apply to them.²

Background

The Council enacted the Ethics Act in response to allegations at that time “of misconduct by several members of the Council of the District of Columbia and the Mayor”³ and sought, with the legislation, to “establish[] a framework with the ability to respond to future misconduct.”⁴ The Council’s ultimate goal was “to restore the public’s faith in its government, starting first with its public officials.”⁵

BEGA was seen as the centerpiece of the legislation. “Most importantly, the bill will establish a new entity charged exclusively with administering and enforcing the new and enhanced laws and the code of conduct.”⁶

Despite the Council’s clear intent in passing the Ethics Act, some ANCs began to question whether certain parts of the Code of Conduct applied to them. They pointed, in particular, to Chapter 18 of Title 6B of the District of Columbia Municipal Regulations.⁷ That chapter, often referred to as the District Personnel Manual (“DPM”), applies to the ethical responsibilities of District government employees pursuant to Chapter XVIII of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (“CMPA”).⁸ The ANCs contended, in short, that, inasmuch as they serve without compensation, they were not employees as defined by the CMPA and that, therefore, they were not subject to the DPM.⁹

When others in the government questioned the applicability of the whole of the Code of Conduct to them, the Council enacted the Universal Code of Conduct and BEGA Amendment Act of 2014

² The Code of Conduct is defined by section 101(7) of the Ethics Act (D.C. Official Code § 1-1161.01(7)), and its constituent parts are discussed in the text below.

³ Report of the Committee on Government Operations on Bill 19-511, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, at 2 (Council of the District of Columbia, December 5, 2011) (“Ethics Act Committee Report”).

⁴ *Id.*

⁵ *Id.* at 31.

⁶ *Id.* at 32. *See also* section 202(a) of the Ethics Act (D.C. Official Code § 1162.02(a)) (setting out BEGA’s core functions).

⁷ *See* section 101(7)(E) of the Ethics Act (D.C. Official Code § 1161.01(7)(E)).

⁸ Effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-618.01 *et seq.*). *See* DPM § 1800.1.

⁹ *See* section 301(7) of the CMPA (D.C. Official Code § 1-603.01(7)) (defining “employee” as “an individual who performs a function of the District government and who receives compensation for the performance of such services”).

(“Ethics Amendment Act”).¹⁰ For present purposes, two provisions of the Ethics Amendment Act are noteworthy. First, section 201a was added to the Ethics Act.¹¹ That sections provides as follows:

[The Ethics Act] and the Code of Conduct shall apply to all employees and public officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council of the District of Columbia, boards and commissions, and *Advisory Neighborhood Commissions*, but excluding the courts. (Emphasis added.)

Second, the part of the definition of the Code of Conduct incorporating the DPM¹² was amended to provide “[f]or employees and public officials who are not members or employees of the Council, Chapter 18 of Title 6B of the District of Columbia Municipal Regulations.” (Emphasis added.)¹³

Discussion

Based on the foregoing background, especially the express language of section 201a of the Ethics Act, I conclude that ANCs are subject to the Ethics Act and to the Code of Conduct. Any argument to the contrary fails to appreciate that the Council’s overriding intent in passing the Ethics Act, and later clarified by the Ethics Amendment Act, was to restore the public’s trust in the District government, not just parts of it.

Those provisions of the Ethics Act and the Code of Conduct that are most applicable to ANCs are outlined in Sections A and B of the following discussion.

A. The Ethics Act

The Ethics Act applies to ANCs in a number of respects. In fact, I have previously determined that ANCs are subject to the all-important conflict of interest provisions of the Ethics Act due to their being elected officials.¹⁴

¹⁰ Effective July 15, 2014 (D.C. Law 20-122; 61 DCR 5688). See Report of the Committee on Government Operations on Bill 20-412, the Comprehensive Code of Conduct and BEGA Amendment Act of 2014, at 4 (Council of the District of Columbia, March 25, 2014) (“Although the Committee believes and has operated under the understanding that the Code of Conduct covers excepted service employees and all agencies – independent or otherwise – it is now necessary to clarify that understanding.”).

¹¹ Section 201a of the Ethics Act is codified at D.C. Official Code § 1-1162.01a.

¹² Section 101(7)(E) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(E)).

¹³ Both the Ethics Act and the CMPA define “public official” to include ANCs. See section 101(47)(E) of the Ethics Act (D.C. Official Code § 1-1161.01(47)(E)); section 301(14A)(E) of the CMPA (D.C. Official Code § 1-603.01(14A)(E)).

¹⁴ See Advisory Opinion #1075-001 (July 10, 2013) (available at <https://tinyurl.com/BEGA-1075-001>).

Section 223(c)(1)(B) of the Ethics Act¹⁵ provides that:

(c)(1) Any elected official who, in the discharge of the elected official's official duties, would be required to act in any matter prohibited under [section 223(a)]¹⁶ shall make full disclosure of the financial interest, prepare a written statement describing the matter and the nature of the potential conflict of interest, and deliver the statement to:

...

(B) In the case of an elected official other than a member of the Council, the Ethics Board.

Furthermore, during a proceeding in which an elected official would be required to take action in any matter that is prohibited under section 223(a), the Chairman is required to read the statement provided in section 223(c)(1)(B) into the record of proceedings and excuse the elected official from votes, deliberations, and other actions on the matter.¹⁷

Section 224(a)(3)(A) of the Ethics Act¹⁸ also applies to ANCs. That provision requires an ANC who is not otherwise required to file a public financial disclosure statement (by virtue of holding another District government position) to file a certification for the preceding year containing the information in section 224(a)(1)(G).¹⁹ The certification requires the filer to certify, for example, that he or she has filed and paid income and property taxes and has reported known illegal activity to the appropriate authorities, and that he or she not accepted any bribes or placed title to property in another's name to avoid having to make disclosure.

B. The Code of Conduct

The CMPA

Two sections of Chapter XVIII of the CMPA – sections 1801 and 1802 – are incorporated into the Code of Conduct.²⁰ Section 1801(a) provides as follows:

¹⁵ D.C. Official Code § 1-1162.23(c)(1).

¹⁶ Section 223(a) of the Ethics Act (D.C. Official Code § 1-1162.23(a)) provides that “[n]o employee shall use his or her official position or title, or personally and substantially participate, [in a] particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee’s financial interests or the financial interests of a person closely affiliated with the employee.”

¹⁷ See section 223(c)(3) of the Ethics Act (D.C. Official Code § 1-1162.23(c)(3)).

¹⁸ D.C. Official Code § 1-1162.24(a)(3)(A).

¹⁹ D.C. Official Code § 1-1162.24(1)(G).

²⁰ See section 101(7)(B) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(B)). To conform to their incorporation into the Code of Conduct, CMPA sections 1801 and 1802 (D.C. Official Code §§ 1-618.01 and 1-618.02) were amended by the Ethics Act “to subject public officials and members of boards and commissions to the standards of conduct provisions” contained in Chapter XVIII. See Ethics Act Committee Report at 41.

(a) Each employee, member of a board or commission, or a public official of the District government must at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government.

CMPA Section 1801(a-1) operates as a public policy statement, encouraging ANCs, as public officials, to report “any violation of a law or rule, or the misuse of government resources, as soon as the employee, member of a board or commission, or a public official becomes aware of the violation or misuse of resources,” and section 1801(a-2) imposes on ANCs certain ethics training requirements.

Section 1802 of the CMPA reinforces the application of the conflicts of interest provisions in section 223 of the Ethics Act, providing that:

No employee, member of a board or commission, or a public official of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts *or would appear to conflict with* the fair, impartial, and objective performance of officially assigned duties and responsibilities. (Emphasis added.)

The standard in section 1802 of avoiding appearances of conflicts of interest is also reflected in DPM § 1800.3 (n), which provides that “[e]mployees shall not take actions creating the appearance that they are violating the law or the ethical standards set forth in [the DPM].”²¹ Whether particular circumstances create an appearance that the law or the DPM standards have been violated is determined from the perspective of a reasonable person with knowledge of the relevant facts.

The DPM

Given the background discussion above, I can avoid redundancy and simply say here that the express language of section 101(7)(E) of the Ethics Act²² – that “[f]or employees and public officials who are not members or employees of the Council, Chapter 18 of Title 6B of the District of Columbia Municipal Regulations” – subjects ANCs to the DPM as part of the Code of Conduct.

The Correspondence Act

The Correspondence Act²³ was enacted to set the standards for using the District’s “official mail,” which is defined as mail “which is either prepaid or postpaid by any branch, division, or other

²¹ On a similar note, the nepotism prohibitions in section 1804 of the CMPA (D.C. Official Code § 1-618.04), while not themselves express components of the Code of Conduct, apply to ANCs by operation of their implementation in DPM § 1806.

²² D.C. Official Code § 1-1161.01(7)(E).

²³ Enacted as the Official Correspondence Regulations, effective April 7, 1977 (D.C. Law 1-118; D.C. Official Code § 2-701 *et seq.*). See Report of the Committee on Government Operations on Bill 1-341, the Official Correspondence Regulations (Council of the District of Columbia, November 9, 1976).

agency of the government of the District of Columbia.”²⁴ The term “agency” is defined, in turn, as including “all departments, entities, agencies, offices, or other subdivisions of the executive and legislative branches of the government of the District of Columbia as well as all independent boards, commissions, agencies, or other independent entities.”²⁵ That definition is broad enough, especially when viewed in light of the purpose of the Correspondence Act itself, to encompass Advisory Neighborhood Commissions. By logical extension, then, I conclude that ANCs, serving within the Advisory Neighborhood Commissions, are subject to the Correspondence Act as part of the Code of Conduct.²⁶

Penalties under the Correspondence Act include, for willful violations, a fine not exceeding \$1,000 or confinement for a term not exceeding one year, plus double the amount of money incidental to the unlawful mailing.²⁷ These penalties are separate from any that may be imposed under the Ethics Act for violation of the Code of Conduct.²⁸

C. Inapplicable Code of Conduct Provisions

The following provisions of the Code of Conduct do not apply to ANCs:

The Council Code of Official Conduct²⁹

For the current Council Period, the Council Code of Official Conduct was adopted pursuant to section 3 of the Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 22, Resolution of 2017.³⁰ Section 3 of the resolution provides that “[t]he document entitled ‘Council of the District of Columbia, Code of Official Conduct, Council Period 21,’ attached and made a part of this resolution shall be the Code of Official Conduct of the Council of the District of Columbia.” Based on its title and its text, which refers throughout to Councilmembers and their staffs, the Council Code of Official Conduct clearly does not apply to ANCs.

Section 416 of the Procurement Practices Reform Act³¹

²⁴ Section 2(6) of the Correspondence Act (D.C. Official Code § 2-701(6)). *Cf.* 39 U.S.C. § 3210 (federal franking law defining “official mail” in similar terms).

²⁵ Section 2(1) of the Correspondence Act (D.C. Official Code § 2-701(1)).

²⁶ *See* section 101(7)(C) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(C)).

²⁷ *See* section 9 of the Correspondence Act (D.C. Official Code § 2-708).

²⁸ *See* section 221 of the Ethics Act (D.C. Official Code § 1-1162.21).

²⁹ *See* section 101(7)(A) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(A)).

³⁰ Effective January 2, 2017 (Res. 22-1; 64 DCR 188).

³¹ *See* section 101(7)(D) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(D)).

Section 416(c) of the Procurement Practices Reform Act of 2010 (“PPRA”)³² provides that “[a] District employee shall not solicit or secure, or offer to solicit or secure, a contract for which the employee is paid or is to be paid any fee or other consideration contingent on the making of the contract between the employee and any other person.” However, Advisory Neighborhood Commissions are exempt from the PPRA,³³ and, by extension, ANCs are exempt as well. Therefore, ANCs are not subject to section 416 of the PPRA as part of the Code of Conduct.

The Local Hatch Act³⁴

The Prohibition on Government Employee Engagement in Political Activity Act of 2010 (“Local Hatch Act”)³⁵ governs the political activities of District government employees. However, the Local Hatch Act defines “employee” to exclude from its scope ANCs who are not otherwise employed by the District.³⁶ Therefore, ANCs are not generally subject to the Local Hatch as part of the Code of Conduct. Nonetheless, ANCs must be mindful of the parallel provisions of DPM § 1808.1 and section 336(a) of the Campaign Finance Act of 2011, which, respectively, prohibit the use of District government resources for unauthorized or campaign-related activities.³⁷

The Donations Act³⁸

The Donations Act³⁹ authorizes an entity of the District government to accept and use gifts or donations, if the Mayor approves the acceptance and use of the gift or donation and the entity uses the gift or donation to carry out its authorized functions or duties. However, the acceptance and use of gifts by Advisory Neighborhood Commissions is governed by other statutory authority,⁴⁰

³² Effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-354.16(c)).

³³ See section 105(c)(6) of the PPRA (D.C. Official Code § 2-351.05(c)(6)).

³⁴ See section 101(7)(E-i) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(E-i)).

³⁵ Effective March 31, 2011 (D.C. Law 18-355; D.C. Official Code § 1-1171.01).

³⁶ See section 2(3)(A)(v) of the Local Hatch Act (D.C. Official Code § 1-1171.01(3)(A)(v)).

³⁷ DPM § 1808.1 provides that “[a]n employee has a duty to protect and conserve government property and shall not use such property, or allow its use, for other than authorized purposes.” Section 336(a) of the Campaign Finance Act of 2011 (D.C. Official Code § 1-1163.36(a)) provides that “[n]o resources of the District of Columbia government ... shall be used to support or oppose any candidate for elected office, whether partisan or nonpartisan, or to support or oppose any initiative, referendum, or recall measure, including a charter amendment referendum conducted in accordance with [D.C. Official Code] § 1-203.03.”

³⁸ See section 101(7)(G) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(G)).

³⁹ Enacted as section 4602 of the Acceptance and use of gifts by District Entities Act of 2000, effective October 19, 2000 (D.C. Law 13-172; D.C. Official Code § 1-329.01).

⁴⁰ See section 738(c)(2) of the District of Columbia Home Rule Act, approved Dec. 24, 1973 (87 Stat. 801; D.C. Official Code § 1-207.38(e)(c)(2)) (authorizing each Advisory Neighborhood Commission to “employ staff and expend, for public purposes within its neighborhood, public funds and other funds donated to it”); see also section 13(l) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-58; D.C.

and the Office of the Attorney General (“OAG”) has specifically opined that Advisory Neighborhood Commissions are not subject to the Donations Act.⁴¹ Therefore, by extension, ANCs not subject to the Donation Act as part of the Code of Conduct.

Illustrative Examples

The following examples are offered to illustrate the guidance in this opinion:

Example #1

ANC Commissioner John Doe, who is also a student at a private university located in his ANC area, is a resident assistant in one of the on-campus dorms. As a resident assistant, he receives a \$5,000 stipend for the academic year and a furnished room (valued at \$10,000) in the dorm. For its part, aside from teaching and research activities, the university owns commercial property in the Commissioner’s ANC area. The Commissioner wants to know if he has to recuse himself from any matters relating to the university that may come before his ANC.

Answer: Commissioner Doe has to recuse himself from any university-related matters because, as an elected official, he is prohibited from personally and substantially participating in any matter that he knows is likely to have a direct and predictable effect on his financial interests or the financial interests of a person closely affiliated with him.⁴² Here, the Commissioner’s position as a resident assistant essentially amounts to his having outside employment with a private entity, and the performance of his official duties as an ANC Commissioner could likely have a direct and predictable effect on the university’s financial interests.

Example #2

The wife of ANC Commissioner Tom Jones serves as the treasurer of a non-profit entity headquartered in the Commissioner’s ANC area. The Commissioner requests advice from BEGA on whether he can participate in deliberations and voting on a grant application that the non-profit is considering submitting to the ANC.

Official Code § 1-309.10(l) (limiting authority of Advisory Neighborhood Commissions to solicit and receive contributions).

⁴¹ The OAG opinion is available at <http://app.occ.dc.gov/documents/2005/20050817.pdf>.

⁴² See section 223(c)(1) and (c)(3) of the Ethics Act (D.C. Official Code § 1-1162.23(c)(1) and (c)(3)); section 1801 of the CMPA (D.C. Official Code § 1-618.01) (prohibiting public officials from, among other things, having “any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities”). See also section 101(43) of the Ethics Act (D.C. Official Code § 1-1161.01(43) (defining “person closely affiliated with the employee” as meaning “a spouse, dependent child, general partner, a member of the employee’s household, or an affiliated organization”); section 101(3)(A)(i) of the Ethics Act (D.C. Official Code § 1-1161.01(3)(A)(i) (defining “affiliated organization” to include organization or entity in which employee serves as officer, director, trustee, general partner, or employee).

*Answer: Commissioner Jones has to recuse himself from deliberating and voting on the application because, if he did not, he would impermissibly participate in a matter that he knows is likely to have a direct and predictable effect on the financial interests of the non-profit entity, an affiliated organization.*⁴³

Example #3

Commissioner Jones in Example #2 reviews the grant applications that have been submitted prior to the ANC's consideration of them. He tells his wife which other non-profits have already applied and discusses with her what he considers to be the strong points of some of the better submissions.

*Answer: The Commissioner's discussion with his wife violates the prohibition against using information that is not available to the public so as to further any private interest.*⁴⁴

Example #4

Shortly after winning office for the first time, an ANC Commissioner-elect wonders what, if any, financial disclosures she may have to make and calls BEGA for guidance.

*Answer: An ANC Commissioner who does not otherwise have to file an annual public financial disclosure statement is required, instead, to file an annual financial certification.*⁴⁵ *The certification calls for the filer to certify, for example, that he or she has filed and paid income and property taxes and has reported known illegal activity to the appropriate authorities, and that he or she has not accepted any bribes or placed title to property in another's name to avoid having to make disclosure.*⁴⁶ *The certification has to be filed before May 15th each year, but covers the preceding year.*

Example #5

An ANC votes not to protest the alcoholic beverage license application of a restaurant located in the ANC area. A week later, an ANC Co-Chair receives a fruit basket from the restaurant owner

⁴³ See section 101(3)(A)(ii) of the Ethics Act (D.C. Official Code § 1-1161.01(3)(A)(ii)) (defining "affiliated organization" to include organization or entity in which member of employee's household serves as officer, director, trustee, general partner, or employee).

⁴⁴ See DPM § 1800.3(c); cf. Rule VII(2), Council Code of Official Conduct (prohibiting divulgement of information "in advance of the time prescribed for its authorized issuance or otherwise make use of or permit others to make use of information not available to the general public").

⁴⁵ See section 224(a)(3) of the Ethics Act (D.C. Official Code § 1-1162.24(a)(3)).

⁴⁶ See section 224(a)(1)(g) of the Ethics Act (D.C. Official Code § 1-1162.24(a)(1)(g)).

and decides to keep it, thinking no reasonable person would consider the basket to have been given to influence her vote.

Answer: The Co-Chair's keeping the fruit basket violates the prohibition against accepting gifts from prohibited sources or those given because of one's official position or duties.⁴⁷ Rather than keeping the basket, the Co-Chair should have returned it to the restaurant owner or taken one of several other alternative actions, including sharing it with ANC staff.⁴⁸

Example #6

ANC Commissioner Sally Sue drops by the ANC office on a Sunday afternoon to catch up on some official business. Before leaving, she makes 100 color copies of a flier for a bake sale that she is organizing as the Treasurer of her child's travel soccer team.

Answer: Commissioner Sue's copying of the flier is impermissible because it violates the duties to protect and conserve government property and to use such property, or allow its use, only for authorized purposes.⁴⁹

Example #7

Commissioner Sue in Example #6 later attaches an e-copy of the flier to an email message addressed to constituents in her SMD. She sends the email from her personal laptop computer, but uses her ANC signature block, which includes her title as an ANC Commissioner, in the body of the message.

Answer: Commissioner Sue's sending the email over her ANC signature block creates at least the appearance of her impermissibly using her public office or position for the private gain of the soccer team.⁵⁰

Example #8

ANC Commissioner Betsy Ross serves as the Secretary of her neighborhood civic association and, together with a majority of those members voting at a meeting, votes to send a letter protesting the alcoholic beverage license application of a restaurant located in the Commissioner's ANC area.

⁴⁷ See DPM § 1803.2; see also section 101(46) of the Ethics Act (D.C. Official Code § 1-1161.01(46)) (defining "prohibited source" to include a person or entity "[conducting] operations or activities that are subject to regulation by the District government").

⁴⁸ See DPM § 1803.7.

⁴⁹ See DPM § 1808.1; see also DPM § 1807.1(b) (prohibiting outside activities that use government time or resources "for other than official business, or government approved or sponsored activities").

⁵⁰ See DPM § 1800.3(g); see also DPM § 1800.3(a) ("Government service is a public trust, requiring employees to place loyalty to the laws and ethical principles above private gain.").

Anticipating that the application will later become a matter before the ANC and that, when it does, the civic association will urge the ANC to protest the license application as well, the Commissioner asks BEGA for guidance.

Answer: Commissioner Jones should recuse herself from deliberations and voting on the application because, under the circumstances, her service as an officer of the civic association is not compatible with the full and proper discharge of her duties as an ANC Commissioner.⁵¹ The concern here, especially given Commissioner Jones' earlier vote, is the avoidance of the appearance of partiality.⁵²

Example #9

Commissioner Ross in Example #8 recuses herself from deliberations and voting on a decision by her civic association to apply to the ANC for a grant. The Commissioner thinks that by recusing herself on the civic association side, and therefore not taking a position on the grant application, she can avoid any appearance of partiality when voting in the ANC. She asks if this would be permissible.

Answer: Commissioner Ross's vote on the application is impermissible. The vote reflects her participation in a matter that she knows is likely to have a direct and predictable effect on the financial interests of the civic association, an affiliated organization,⁵³ and, therefore, amounts to a conflict of interest.

On the other hand, Commissioner Ross could have voted in the civic association, but she would have then had to recuse herself on the vote by the ANC, so as to avoid the conflict of interest. IMPORTANT NOTE: Commissioner Ross's name must not appear on any documentation (i.e., the grant application) from the civic association submitted to the ANC, inasmuch as this would constitute an improper representation by the Commissioner before the ANC.

Example #10

ANC 99Z meets to decide on which of two candidates should be hired to fill a part-time staff position. Both candidates appear by their resumes to be equally qualified, but Candidate A gets

⁵¹ See DPM § 1807.1(d) (providing, as an example of activities or actions that are not compatible with government service, “[m]aintaining financial or economic interest in or serving (with or without compensation) as an officer or director of an outside entity if there is any likelihood that such entity might be involved in an official government action or decision taken or recommended by the employee”).

⁵² Cf. 5 C.F.R. § 2635.502(b)(1)(iv) (defining “covered relationship,” for purposes of impartiality in performing official duties, any person or organization for whom or for which “the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee”).

⁵³ See section 101(3)(A)(i) of the Ethics Act (D.C. Official Code § 1-1161.01(3)(A)(i)) (defining “affiliated organization” to include organization or entity in which employee serves as officer, director, trustee, general partner, or employee).

the job on a 4-3 vote. It later turns out that Commissioner Tom Brown, who voted for Candidate A, failed to disclose that the candidate is the wife of one of his business associates.

*Answer: Commissioner Brown should have disclosed Candidate A's relationship to his associate, even if he may be able to claim having no close personal relationship with her. His vote creates at least the appearance that he failed to act impartially and that he gave preferential treatment to Candidate A.*⁵⁴

Example #11

Same facts as Example #10, except that Candidate A is Commissioner Brown's niece.

Answer: Because Candidate A is his relative,⁵⁵ Commissioner Brown should have recused himself,⁵⁶ and his vote operates as a hiring decision in violation of the prohibition against nepotism.⁵⁷ Furthermore, his niece's employment must be rescinded,⁵⁸ and, in addition to any other penalties, the Commissioner has to pay restitution to the District for any salary his niece may have received.⁵⁹

Example #12

ANC Commissioner Buck Rogers is an attorney. Before leaving office at the end of his term, he participates in the deliberations and voting on a grant application awarded to a non-profit entity in the ANC area. Several months later, he enters into a legal services contract with the non-profit and requests advice from BEGA on whether he can appear back before the ANC on behalf of the entity on any matters related to the grant.

*Answer: Mr. Rogers cannot appear back before the ANC because he is permanently prohibited from acting as an attorney (or otherwise as a representative) in a formal or informal appearance as to any particular matter involving a specific party, in which matter he participated personally and substantially as an ANC Commissioner.*⁶⁰

⁵⁴ See DPM § 1800.3(h) ("Employees shall act impartially and not give preferential treatment to any private organization or individual.").

⁵⁵ See DPM § 1899.1 (defining "relative" to include niece).

⁵⁶ See DPM § 1806.6 ("When the agency contemplates making a hiring decision concerning a relative of a public official within the same agency, the public official must file a written recusal, which shall be included in the relative's official personnel file along with the subject personnel action.").

⁵⁷ See DPM § 1806.3 (providing, in pertinent part, that "[a] public official may not directly or indirectly make a hiring decision regarding a position within his or her own agency with respect to a relative").

⁵⁸ See DPM § 1806.4.

⁵⁹ See DPM § 1806.5.

⁶⁰ See DPM § 1811.3.

Example 13

A government employee who works in the Office the City Administrator (OCA) and is also an Advisory Neighborhood Commissioner asks whether he can work on homeless shelter issues on both sides – in his day job at the OCA and in his ANC activities. He also wishes to know whether he would be prohibited from voting on a specific matter on the ANC side if he worked on the same matter as a government employee.

Because each role – employee and ANC Commissioner – involves government to government contact and not an outside private entity, the Financial Conflict of Interest rule technically would not apply. However, for appearance sake with respect to impartiality, the government employee should choose one side or the other with recusal being the proper remedy whenever a specific matter that he has worked on for the government comes up for a vote before his ANC.

The foregoing examples are meant to be illustrative only, and they certainly are not exhaustive. The analysis for determining the permissibility of conduct in a given situation is entirely fact-driven, and small details can make a big difference. Accordingly, I strongly recommend that ANC Commissioners contact this Office with any questions about whether their future conduct might violate a provision of the Ethics Act or the Code of Conduct.

_____/s/_____
DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

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