

Office of
The County Attorney
Montgomery County, Maryland

Opinion No.: 90.002
Date: March 30, 1990

TO: Edmond F. Rovner
Special Assistant to the County Executive

FROM: Clyde H. Sorrell
County Attorney *Clyde H. Sorrell*

RE: Appointment of County Employees to County Advisory
Committees

You have requested advice as to whether a County employee may be appointed as a paid member of a County created committee. You questioned whether a County employee can receive two County paychecks: one for services as a full-time County employee, and one for services as a paid member of a committee or other part-time employment. In our opinion, a County employee may receive two paychecks from the County; appropriate taxes (e.g., FICA, state and federal), must be deducted from such checks. However there may be certain consequences arising from the Fair Labor Standards Act which may deter such an arrangement.

In the fall of 1989 a County employee was appointed to the Taxicab Advisory Committee. The employee works full-time as a legislative intern. It is also our understanding that there are other employees of the County who either have been or wish to be appointed as paid members of County committees or who work part-time for other County agencies. Although employment by more than one County agency is ordinarily not prohibited by County or State law, each case must be examined for Fair Labor Standards Act implications.

The Fair Labor Standards Act ("FLSA") regulates wages and hours in the interstate commerce field. It has three bases of coverage: minimum-wage, equal-pay; overtime; and child labor standards. The overtime provisions of the Act generally require payment of time and one-half the employee's regular rate for all hours worked in excess of 40 in a week with certain exceptions. One exception is for a municipal employee who works occasionally, or sporadically for the municipality, in addition to that employee's full-time employment.

Title 29 U.S.C. §207(p)(2) provides:

If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

"Occasional or sporadic" has been interpreted by 29 CFR §553.30 as meaning "infrequent, irregular or occurring in scattered instances." Examples of this type of employment are work in public recreation and park facilities, and stadiums or auditoriums which utilize employees in occasional or sporadic work. In such circumstances employment may be considered occasional or sporadic for full-time employees of a local government even where the need can be anticipated because it occurs seasonally. An activity does not necessarily fail to be occasional merely because it is recurring such as part-time work at holiday concerts, a program of scheduled sports events, or assistance in processing returns at tax filing times. In contrast however if, in addition to his or her regular job, an employee also regularly works additional hours on a part-time basis, the additional work does not constitute infrequent and irregular employment and therefore the hours worked would be combined in computing any overtime compensation due.

Accordingly, it must be determined whether or not the part-time employment by the County employee is occasional or sporadic which would be exempted from FLSA requirements or whether it would be of such a nature as to require that overtime compensation be granted for any hours worked outside of the normal work week. In the situation which you presented, although there is no provision in the law as to how often the Taxicab Advisory Committee is required to meet, the committee generally meets monthly. Since the Committee meets on a regular

basis the exemption would not apply and the County could be liable for overtime.

It should be noted that prior opinions of the County Attorney's Office held that dual payment of employees is prohibited by the County Charter. These opinions were based on the provision which is now Article 4, §407.

Article 4, §407 of the Charter of Montgomery County, Maryland, provides that:

No . . . employee of the County whose salary is fixed, in whole or in part, by this Charter, the laws of the County, or its personnel regulations, shall be entitled, directly or indirectly, to any other salary, expenses, or compensation from the County for performance of public duty

Article 4, §407 was enacted in 1948 as Article 5, §5(a) in essentially the same form as it is today. Article 5, §5(a) was interpreted in previous County Attorney opinions to mean that a County employee could not receive dual compensation. This Office determined that the purpose of Article 5, §5(a) was to prohibit payment by the County government of two salaries to the same person for the performance of public duties. This office also determined that the prohibition covered additional compensation for one position as well as payment of compensation to an employee who held more than one position with the County. That interpretation was applied in County Attorney Opinions 2-24-66, 11-14-60 and 4-16-59. Upon review of the Maryland constitution and current Maryland law, we have concluded that Opinions 2-24-66, 11-14-60 and 4-16-58 should be overruled.

¹Each employee's situation would have to be evaluated on a case by case basis since there are other exemptions to the FLSA which could apply. In addition, the Personnel Regulations also set forth overtime requirements and exemptions.

Article III, §35 of the Maryland Constitution has a provision similar to Article 4, §407 which provides:

Extra compensation may not be granted or allowed by the General Assembly to any public Officer, Agent, Servant or Contractor, after the service has been rendered, or the contract entered into; nor may the salary or compensation of any public officer be increased or diminished during his term of office except those whose full term of office is fixed by law in excess of 4 years

The purpose of Article III, §35 is to prevent public officers from using their offices to put pressure on the General Assembly or some other authorized agency to award them additional compensation. 64 Op. Att'y Gen. 267 (1979). This section is violated where a public officer's salary is increased, directly or indirectly, by legislation enacted during his term of office. Marshall v. Director of Finance, 294 Md. 435, 450 A.2d 1300 (1982).

In our opinion, Article 4, §407 should be similarly interpreted to mean that a County employee cannot obtain additional compensation from the County for performance of the public duties of a particular position. However, Article 4, §407 would not preclude a County employee from holding two positions with the County as long as such positions are not incompatible. This view is consistent with Maryland case law.

The common law of Maryland prohibits the holding of incompatible offices and positions. Hetrich v. County Commissioners, 222 Md. 304, 159 A.2d 642 (1960). In finding that the positions of Anne Arundel County business manager and Anne Arundel County commissioner were incompatible the Court in Hetrich set forth the test of incompatibility:

The fundamental test of incompatibility at common law was whether there is a present or prospective conflict of interest, as where one office is subordinate to the other or subject to supervision by the other, or where the incumbent of one office has the power to

appoint or remove or set the salary of the other.

222 Md. at 308.

In the situation which you presented to us, the employee does not have supervisory power as a member of the Advisory Committee over her full-time position as a legislative intern. Therefore, the incompatibility doctrine has not been violated.

In all cases, however, in which a County employee wishes to be appointed as a paid member of a committee or perform other part-time work for the County, advice should be sought from this office on whether the two positions are incompatible.

In summary, a County employee may work in more than one capacity, e.g. full-time and part-time employment, and may receive two paychecks as long as one position is not incompatible with the other position. All appropriate deductions will be taken from the employee's pay.² The County may be liable for overtime depending on the employee's grade, position and whether a FLSA exemption applies. Additionally, the employee should obtain advice from the County Attorney's Office prior to commencing the second employment.

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²There may be administrative difficulties in the issuance of two paychecks which may make dual employment burdensome. Accordingly, the Payroll Section should be consulted prior to the appointment of an employee to a paid committee or position.

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