



Montgomery County Government

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May 17, 1995

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Opinion No. 95.002
Retirement Incentive Program:
Member of retirement plan who retires
under Retirement Incentive Program may
participate in a County contract awarded
under the procurement process.

Dear Mr. Tracy:

We have reviewed your letter in which you ask whether, as a recent retiree under the Retirement Incentive Program, you may contract with the County or do work for a business that contracts with the County.¹

In our view, the Retirement Incentive Program does not prohibit you from entering into a contract awarded under the County procurement process; nor does the Retirement Incentive Program prohibit you from entering into a subcontract or employment relationship with a County contractor.²

BACKGROUND

In your letter you indicate that you retired on August 1, 1994, as the Chief, Division of Parking, Department of Transportation. You retired under the Retirement Incentive Program; Section 2(e)(4) of the Retirement Incentive Program states that a member of the

¹The Retirement Incentive Program is authorized by Ch. 2 LMC 1993, §2.

²We call your attention to Section 19A-13, Montgomery County Code (1994). Section 19A-13(a) prohibits a former County employee from accepting employment or assisting any party, other than the County, in a specific matter for ten years after the last date the employee significantly participated in the matter as an employee. Section 19A-13(b) prohibits a former employee, for a period of one year, from entering into any employment relationship with a business that is contracting with the County if the employee: (1) significantly participated in regulating that business; or (2) had official responsibility concerning a contract with that business (except a nondiscretionary contract with a regulated public utility). If you believe that Section 19A-13 may apply to a specific undertaking in which you may become involved, you should contact the Montgomery County Ethics Commission for an advisory opinion and, if necessary, an appropriate waiver.

retirement plan who retires under the Retirement Incentive Program "must not be reemployed by the County, either on a permanent, temporary, or contractual basis"

You indicate that you have formed a business, JT Associates, to provide consulting services concerning parking and other transportation matters primarily to local governments and those who contract with local governments. You ask if Section 2(e)(4): (1) precludes you from contracting with Montgomery County under the regular procurement process; or (2) prohibits a subcontractor or employment relationship between you and another business which contracts with the County.

DISCUSSION

Section 2(e)(4) states:

A member who participates in the retirement incentive program must not be **reemployed** by the County, either on a permanent, temporary, or contractual basis, unless:

A) the Chief Administrative Officer (or the County Council Staff Director for a member **reemployed** by the legislative branch) determines that the member's **reemployment** is necessary to complete a specific project on which the member worked before retirement; and

(B) the member's **reemployment** is limited to a maximum of 6 months immediately following the member's retirement.

If the County **reemploys** a member who participates in the Retirement Incentive Program, the member's salary from the **reemployment** is limited to an amount equal to 120% of the maximum salary for the position less the member's county pension. The member must not receive any other compensation or benefits from the **reemployment**. (Emphasis added).

The Court of Appeals has stated, "Again and again, we have said that the cardinal rule of statutory construction is to ascertain and effectuate the legislative intention." *Maryland State Police, et al. v. Warwick Supply & Equipment Co., Inc.* 330 Md. 747, 483, 624 A.2d 1238 (1993). In *Warwick*, the Court of Appeals noted that the language of the

statute itself is the primary source for determining legislative intent, although the plain language of the statute is not always controlling. The Court noted that a statute is to be construed in light of the purposes of the legislative body as reflected in the statute. *Id.* at 483. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628 (1987).

The language of Section 2(e)(4), taken in its ordinary meaning, prohibits the reemployment of a participant in the Retirement Incentive Program; the language of Section 2(e)(4) does not prohibit a Retirement Incentive Program participant from entering into a contract awarded under the procurement process. Use of the term "reemployment" clearly indicates an intention to prohibit the County from restoring a participant in the Retirement Incentive Program to a previously held employment relationship. Entering into a contract which creates an independent contractor relationship with the County is far removed from an employment relationship.

There is a well understood distinction between an employment relationship and an independent contractor relationship. An independent contract performs work for another according to the means and methods dictated by the contractor; the independent contractor controls the details connected with the performance of the work. *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 331 A.2d 55, 74 (1975). An employment relationship is created when an employer has the right to control the details of how a worker accomplishes the work. *Id.* While the right to control a worker in the details of performance of the work is the most decisive test, other criteria may be considered in determining if a worker is an employee or an independent contractor. These criteria include: (1) is the worker integrated into the employer's general business; (2) may the worker be dismissed; (3) does the worker have the right to delegate work to others; (4) does the worker have the independent authority to hire, supervise and pay assistants; (5) does the worker supply his or her own tools of the trade; (6) do the parties to the relationship believe they are creating an employment relationship or an independent contractor relationship³. *Thompson v. Thompson & Sons Anderson*, 258 Md. 391, 265 A.2d 915, 917-18 (1970); IRS Revenue Ruling 87-41.

³With regard to this last criterion, we note that paragraph 18 of the General Conditions of Contract Between County & Contractor provides, "The contractor is an independent contractor. The contractor and the contractor's employees or agents are not agents of the County." The General Conditions must be used in County contracts unless waived by the County Attorney. See Sections 1.7 and 2.4.59, Montgomery County Procurement Regulations.

Drawing a distinction between an employment relationship and an independent contractor relationship in the context of Section 2(e)(4) is consistent with the legislative history of the Retirement Incentive Program. On March 19, 1993, the County Executive requested the Council President to introduce legislation to implement a retirement incentive program. The County Executive stated, "This program is one of the methods which will assist the County in restructuring the County Government and down-sizing its workforce." (Emphasis added). The legislation requested by the County Executive was introduced by the County Council on March 30, 1993, and designated as Bill 13-93. Bill 13-93 was referred to the Management Fiscal Policy Committee (MFP) for detailed review.

The Council staff in a memorandum to the MFP dated April 16, 1993, asked whether Bill 13-93 should prohibit the County from rehiring or contracting with program participants. The staff memorandum explains that "the rehiring or contracting with program participants to do the work they did before retiring" would undercut the purpose of the legislation." (Emphasis added). The minutes for the June 16, 1993, MFP meeting reflect that Council staff explained that the goal of the retirement incentive program is to create savings for the County by (1) freeing the County to hire new employees at salaries lower than the salaries paid to the employees who retire; and (2) reducing the number of employees by not replacing all who retire. MFP recommended language substantially similar to that which now appears in Section 2(e)(4).

On June 29, 1993, the County Council approved Bill 13-93. The June 29th Council minutes indicate that there was considerable discussion on whether a limitation should be placed on the rehiring of participants in the incentive program. The Council decided to broaden the prohibition against reemployment recommended by MFP to include a prohibition against the rehiring of participants to an appointed position. The Council, however, did not discuss whether the reemployment prohibition should be so broad as to preclude paying a participant to do work for the County as an independent contractor.

Entering into a contract with a Retirement Incentive Program participant does not undercut the purpose of Section 2(e)(4) if the contract creates an independent contractor relationship. An independent contractor does not increase the County workforce; hence, the creation of an independent contractor does not hinder the down-sizing of County

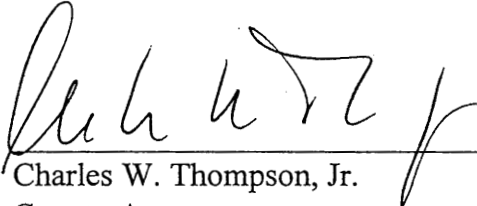
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Government.⁴ A contract with an independent contractor does not preclude the County from hiring a replacement employee at reduced costs.


CONCLUSION

We believe the language of Section 2(e)(4) and its legislative history are consistent with our conclusion that you may enter into a contract with the County if the contract is awarded under the procurement process and does not create an employment relationship. In short, you must retain under the contract your status as an independent contractor. Section 2(e)(4) does prohibit you, however, from entering into a contract which creates an employment relationship with the County. It follows, we believe, that Section 2(e)(4) does not preclude you from subcontracting or establishing an employment relationship with a County contractor.

We trust that you will find this letter responsive to your inquiry.



Charles W. Thompson, Jr.
County Attorney



Marc P. Hansen
Senior Assistant County Attorney

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⁴An employee is covered by the merit system and may be dismissed only with cause. Charter Section 401. A contract with an independent contractor may be terminated by failing to renew the contract or terminating the contract for convenience under paragraph 26 of the General Conditions Of Contract Between County & Contractor.

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cc: Derick Berlage, Council President
Bruce Romer, Chief Administrative Officer
Dr. Beatrice P. Tignor, Director, Office of Procurement
Marta B. Perez, Director, Office of Human Resources
Jerry Pasternak, Special Assistant to the County Executive
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