

HOWARD COUNTY ETHICS COMMISSION

3430 Courthouse Drive
Ellicott City, Maryland 21043

February 1, 2022

ADVISORY OPINION NO. 2022-02

The Howard County Ethics Commission (“Commission”) has received a request from a member (the “Requestor”) of the Howard County Council (the “County Council”) seeking an advisory opinion on whether the Howard County Ethics Law, Howard County Code Section 22.200 et seq. (the “Ethics Law”), prohibits the Requestor from voting on legislation pending before the County Council, to clarify the Citizens Election Fund (the “CEF”) law, due to the Requestor’s intention to participate in the CEF as a candidate in the 2022 election. For the reasons set forth herein, the Commission has determined that a conflict does not exist under the Ethics Law which would prohibit the Requestor from voting on the legislation pending before the Council related to the CEF.

I. BACKGROUND

A. The Citizens Election Fund

In April 2013, the Maryland General Assembly passed the Campaign Reform Act, which authorized Maryland counties to establish a campaign finance system for County Executive and County Council races. On April 5, 2016, the Howard County Council passed a resolution to amend the County Charter to establish a Citizens’ Election Fund. The proposed Charter amendment was placed on the ballot and on November 4, 2016, Howard County residents voted to adopt the amendment. Thereafter, on June 5, 2017, the Howard County Council passed a bill to create a public finance system for candidates. On July 3, 2017, the Citizens Election Fund (“CEF”) and the Citizens Election Fund Commission (“CEF Commission”) were established. *See* Howard County Code, Title 10, Subtitle 3.

The CEF provides public campaign financing to Howard County candidates for County Executive and County Council who agree to participate in the program and abide by the enumerated requirements. Specifically, a candidate participating in the CEF may only accept contributions from individuals in an amount not to exceed \$250.00. If the candidate receives the required number and dollar amount of qualified contributions and is running for a seat which is contested, such candidate is eligible for matching funds from the CEF per the CEF law, Howard County Code Section 10.300 et. seq. (the “CEF Law”).

See also <https://www.howardcountymd.gov/finance/resource/citizens-election-fund-faq>.

In October 2021, the CEF Commission notified the County Council and the County Executive that the CEF Law included a provision that needed immediate correction. Specifically, Section 10.306(a)(3)(i) of the CEF Law, which deals with distribution of CEF public funds, states “[f]or purposes of this paragraph, whether an election is contested shall be determined on the

first Tuesday in August preceding the election.” For the 2022 primary and general elections, that date was August 3, 2021, and will be August 2, 2022, respectively. As of August 3, 2021, there were no certified candidates in the CEF program in a contested election and therefore without a revision, no certified candidate in a contested 2022 primary election would be eligible to receive a CEF distribution.

B. Legislation Before the Council and Requestor’s Status with Respect to the CEF

Pending before the Council are two bills, Council Bill 6-2022 and Council Bill 11-2022, both of which propose to delete Section 10.306(a)(3)(i) of the CEF Law (the latter bill has been filed as an emergency bill). If either bill comes law, this revision will allow the Director of Finance to distribute funds to a candidate participating in the CEF upon certification from the State Board of Elections and when a race becomes “contested,” rather than making such determination on the first Tuesday in August preceding an election. Pursuant to the CEF Law, a “[c]ontested election means any election, including a special election, in which there are more candidates for office than the number who can be elected to that office.” CEF Law, §10.300(h).

As of the date of the request for this Advisory Opinion, the Requestor had noted an intention to utilize the CEF for the Requestor’s political campaign but is not a certified candidate.

II. THE LAW

A. The Ethics Law

1. Purpose of the Ethics Law

The Ethics Law is established to ensure that the public may maintain “the highest trust in their public officials and employees” and “be assured that the impartiality and independent judgment of public officials and employees will be maintained.” Ethics Law, §22.201(a). The Ethics Law requires an “elected official, an employee of the County, or a person appointed to or employed by the County or any County agency, board, commission, or similar entity” to abide by “minimum standards for the conduct of local government business.” Ethics Law, §§22.202(n) & 22.201(b).

The Commission is charged with ensuring that the public is protected from improper influence as it relates to public business and that public officials refrain from actions that arise to a conflict of interest, or the appearance of a conflict of interest. Officials must refrain from activities which impair their impartiality or independence of judgment.

2. Prohibited Conduct and Interests Under the Ethics Law

The principal provisions of the Ethics Law, which define prohibited conduct and interests of employees, are set forth in Section 22.204. Section 22.204(a) of the Ethics Law, titled “Participation Prohibitions”, provides:

(a) Participation Prohibitions.

(1) Except as permitted by Commission regulation or opinion, an official or employee may not participate in:

(i) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision of the matter, any matter in which, to the knowledge of the official or employee, the official or employee or a qualified relative of the official or employee has an interest.

(ii) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision with respect to the matter, any matter in which any of the following is a party:

a. A business entity in which the official or employee has a direct financial interest of which the official or employee may reasonably be expected to know;

b. A business entity for which the official, employee, or a qualified relative of the official or employee is an officer, director, trustee, partner, or employee;

c. A business entity with which the official or employee or, to the knowledge of the official or employee, a qualified relative is negotiating or has any arrangement concerning prospective employment;

d. If the contract reasonably could be expected to result in a conflict between the private interests of the official or employee and the official duties of the official or employee, a business entity that is a party to an existing contract with the official or employee, or which, to the knowledge of the official or employee, is a party to a contract with a qualified relative;

e. An entity, doing business with the County, in which a direct financial interest is owned by another entity in which the official or employee has a direct financial interest, if the official or employee may be reasonably expected to know of both direct financial interests; or

f. A business entity that:

1. The official or employee knows is a creditor or obligee of the official or employee or a qualified relative of the official or

employee with respect to a thing of economic value; and
2. As a creditor or obligee, is in a position to directly and substantially affect the interest of the official or employee or a qualified relative of the official or employee.

- (2) A person who is disqualified from participating under paragraph 1. of this subsection shall disclose the nature and circumstances of the conflict and may participate or act if:
- (i) The disqualification leaves a body with less than a quorum capable of acting;
 - (ii) The disqualified official or employee is required by law to act; or
 - (iii) The disqualified official or employee is the only person authorized to act.

Section 22.204(e) of the Ethics Law, titled “*Use of Prestige of Office*”, provides that:

- (1) An official or employee may not intentionally use the prestige of office or public position for the private gain of that official or employee or the private gain of another.
- (2) This subsection does not prohibit the performance of usual and customary constituent services by an elected official without additional compensation.

B. *The County Charter*

Article II of the Howard County Charter (the “Charter”) establishes the County’s legislative branch and the power and duties of the Council. Section 202 states that “[t]he legislative power of the County is vested in the County Council of Howard County which shall consist of five members who shall be elected from the Councilmanic Districts.” The legislative power of the Council is further described in Section 207 of the Charter which states that “[t]he Council is vested with the law-making power of the County, including all such powers as heretofore have been exercised by the General Assembly of Maryland and transferred to the people of the County by the adoption of this Charter. The Council shall also have and may exercise such legislative powers as may be bestowed upon counties by the Constitution and laws of this State from time to time.”

III. ISSUE

Is it a conflict of interest or an abuse of prestige of office under the Ethics Law for Requestor, as a member of the County Council who has indicated the intention to utilize the CEF for the Requestor’s political campaign, to vote on the legislation (Council Bill 6-2022 and Council

Bill 11-2022) pending before the County Council related to the CEF?

IV. DISCUSSION

The Requestor has explained that should Council Bill 6-2022 or Council Bill 11-2022 become law, the Requestor's campaign entity could be eligible to receive CEF matching funds in the primary election if she becomes a certified candidate in a contested election. The Requestor acknowledges that the Ethics Law prohibits elected officials from participating in any matter that involves an entity doing business with the County in which that official has a direct financial interest and from using her public position for private gain or the gain of another.

Because the County's Ethics Law is required to be substantially similar to the State Ethics Laws, the Commission often looks to State law and State Ethics Commission decisions for guidance. *See* Advisory Opinion 09-02. The State Ethics Commission has recognized the general rule that there is no prohibition against an employee from running for political office. *See* State Opinions 00-2 and 80-2. However, the Attorney General has concluded that the State's support of an employee's ability to engage in political activity does not "prevent the Board from ever finding that a State employee has violated the Code of Ethics just because that employee is engaging in political activity." *See* State Opinion 80-2 (*quoting* 62 OAG 425 (1977)). Therefore, elected officials are covered by the Ethics Law when engaging in political activity.

With respect to prohibitions against involvement in matters related to entities doing business with the County, a political campaign entity does not fall under the Ethics Law definition of an entity "doing business" with the County. Specifically, the Ethics Law provides that "doing business" with the County means "(1) having or negotiating a contract that involves the commitment, either in a single or combination of transactions, of \$5,000.00 or more of County controlled funds; or (2) being regulated by or otherwise subject to the authority of the County; or (3) being registered as a lobbyist." Ethics Law, §22.202(e). A political campaign entity does not contract with the County, is not regulated by the County, and is not registered as a lobbyist. Though a political campaign entity may receive public funds from the CEF, that does not cause it to become an entity doing business with the County.

Further, "[a]n official or employee may not intentionally use the prestige of office or public position for the private gain of that official or employee or the private gain of another." Ethics Law, §22.204(e). Under prior decisions of the Commission, the Commission has determined that the term "private gain", as used in Section 22.204(e), applies solely to economic or contractual

gain. *See* Op. No. 2011-01; 2012-05. There is no contract in this case and the legislation does not provide for an economic gain to the Requestor. At the most, if one of the pending bills become law, the Requestor's political campaign entity may be eligible to get matching CEF funds during the primary race if she is certified by the State and an opponent files a certificate of candidacy for the same seat. The proposed legislation does not expand the use of the CEF or change the requirements to participate in the CEF, but rather allows the Director of Finance to disburse public contributions to a certified candidate when an election becomes contested instead of utilizing the first Tuesday in August preceding the election as the time for such determination. The pending legislation aims to fix a technical error and ambiguity in the CEF Law as requested by the CEF Commission. It does not only affect one legislator but anyone participating in the program. In fact, each legislator who plans to run for office in 2022 could seek to become eligible to use the CEF.

The County Council is vested with the law-making power of the County and was directly notified by the CEF Commission that the CEF Law required an immediate revision. *See* Charter Section 207. The Commission researched the issue of legislation passed in other counties with similar CEF programs and noted that participating officials in fact did vote on legislation related to their county CEF program.¹ Further, the Commission considered the Maryland General Assembly's 2021 Ethics Guide from the Joint Committee on Legislative Ethics, which applies State law and the State ethics law, to examine how another legislative body has addressed the issue of a legislator's duties and recusal for conflicts of interest. *See* <https://mgaleg.maryland.gov/Pubs/LegisLegal/2021rs-ethics-guide.pdf>. While not specifically applicable to the County Council, the guide explained that a legislator's recusal from participation in legislative action is narrow and only necessary if such action rises to a presumed or apparent conflict that is "direct and personal" to the legislator. *See Id.* at 3.

Similarly, under the County Ethics Law, an abuse of the prestige of office would have to rise to the level where a legislator is proposing or voting on legislation that if enacted would result in a direct and personal financial gain for recusal to be necessary. Any legislator who may or could use the CEF would have to recuse themselves and make amending the law an impossibility.² The CEF Law was supported by the citizens of Howard County and use of the CEF will always have a potential impact on incumbent elected officials. However, this does not negate their responsibility as the law makers of the County.

¹ *See* Montgomery County, Maryland Bill Nos. 25-17, 31-17 and 31-20.

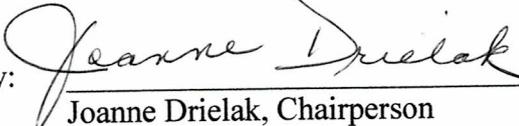
² Section 22.204(a)(2) of the Ethics Law provides that if disqualification due to a conflict leaves a body with less than a quorum capable of acting, such member may vote after disclosing the nature and circumstances of the conflict.

V. CONCLUSION

For the reasons outlined herein, the Requestor is not prohibited by the Ethics Code from voting on pending legislation, Council Bill 6-2022 or Council Bill 11-2022, regarding the CEF.

HOWARD COUNTY ETHICS COMMISSION

By:


Joanne Drielak, Chairperson
Howard County Ethics Commission

Joanne Drielak, Chairperson
Jonathan Kromm, Vice Chairperson
Charles Fuller
Joseph Markwordt*
Jean Xu

*Commission Member Markwordt did not concur in this decision.