

STATEMENT OF COMMISSIONER C. PAUL SMITH
REGARDING FREDERICK COUNTY ETHICS COMMISSION ADVISORY OPINION 12-04
August 15, 2012

On August 13, 2012 the Frederick County Ethics Commission issued Advisory Opinion 12-04. Although the Opinion does not state or explain the particular set of facts that led to issuance of the Opinion, the August 14th front page *The Frederick NewsPost* article indicates that the Opinion was issued in response to the Commission's consideration of a complaint lodged against BOCC President Blaine Young for some disparaging statement that he made in opposition to the Affordable Care Act (Obamacare) and which statement was found somewhere on the County web site. Part of Advisory Opinion 12-04 is troublesome (1) because of its overbreadth, and (2) because it fails to distinguish legislative and executive actions of County Commissioners. The problem with Advisory Opinion 12-04 is that the shortcomings in that opinion constitute a limitation on the exercise of commissioners' freedom of speech and on their legislative duties and responsibilities. The opinion was not narrowly tailored to the specific issue before the Ethics Commission. Because of this significant flaw, it is my opinion that Advisory Opinion 12-04 should be withdrawn or revised.

First, Advisory Opinion 12-04 is overly broad in counseling that when using County property communications by commissioners should avoided giving "personal opinions on matters of public interest" and on "one's political philosophy." While the wording is couched in advice rather than strict prohibitions, the content restriction is still too broad. If the ethics principle that drives Opinion 12-04 is to avoid conflicts of interest, then the explanation and analysis should stick to what are conflicts of interest. An ethical problem does not arise from the expression of a personal opinion or a political philosophy—it is only when there is a conflict of interest connected with such statements.

Second, Advisory Opinion 12-04 does not distinguish between legislative and executive communications from commissioners. The Opinion makes the implicit assumption that only executive communications from commissioners can be made either on County stationery or on the County's website. Failure to address this distinction is a fatal flaw to the helpfulness of the Advisory Opinion. In fact the Opinion seems to prohibit any statements from a commissioner that would be advocating a point of view that is not the majority, official point of view of the BOCC. Such a position is neither historically correct, nor practicable, nor the wisest policy.

Statements of official County positions are different from the personal opinions of individual commissioners. But County properties (including computers and desks) are regularly involved in both. Heretofore there has never been a strict prohibition against a commissioner's use of County property to advocate a personal opinion. County computers and telephones are regularly used for opinions. The County website has a lot of material, some of which is (and has been) personal opinions of commissioners—and appropriately so. In responding to emails, each commissioner states his/her opinions on legislative issues. Each commissioner has letterhead—until now no one has monitored all commissioners' letters to make sure that only "official" County positions are stated in such letters. Until now, a commissioner was regarded as having the liberty to advocate a personal point of view in a letter on his/her County letterhead. Each of

the current commissioners understands the difference between personal advocacy and stating the official position of the BOCC. To my observation, all of us seek to maintain this distinction. But, historically, the use of County property has been regularly used by commissioners as legislators to do their legislative duty. And that duty includes full and robust discussion of many issues (using County property in doing so), and making this information available to County citizens in order to help as many citizens as possible become informed on the various issues which are first debated, and then voted on by the BOCC. Implicit in the legislative function of commissioners is the authorization for the commissioners to use County property to fulfill this function.

On the County website there are links to a section for each of the five commissioners. At those links it is customary for commissioners to put multiple statements that include their personal opinions. According to 12-04, if a commissioner were to put a statement that “the Affordable Care Act [Obamacare] is a terrible piece of legislation that will increase taxes and undermine our national health care system,” such a statement would be an ethics violation because it is a personal opinion on a matter of public interest and because it is that commissioner’s political philosophy. However, Opinion 12-04 attempts to make the distinction that if the BOCC voted to support such a position, then the statement would be okay because at that point it became the official, County position. I understand this distinction, but the problem is that our Ethics laws do not make such a distinction, and the Ethics Commission erred in 12-04 in its new interpretation that now creates such a distinction. To repeat, this new distinction is overly broad and it would totally undermine the important legislative function of a county commissioner.

One implication of Advisory Opinion 12-04 that is also troublesome is that it seems to prohibit a commissioner from stating a personal opinion on a national issue (e.g., the Affordable Care Act) because it is a personal opinion on a matter of public interest and because the statement also pertains to a political philosophy. The implicit message in 12-04 is that county commissioners should not make statements about national political issues. (Now if I am making an inference that the Ethics Commission did not intend to imply, perhaps they can correct this.) But this implication is seriously flawed. Virtually all politics are local, and national laws and policies invariably affect the states and counties. To deny this would be ignorant. Neither should it be necessary to require a commissioner to overtly state the connection between a national issue and the impact on his/her county in order to legitimize commenting on a national issue. Again, to the extent that Advisory Opinion 12-04 intended to prohibit commissioners from daring to make a comment on a national issue when using County property—to that extent the Advisory Opinion is too broad, and as such is attempting to prohibit a legitimate and valuable exercise of free speech that should be protected rather than prohibited. And again, while such speech may be political and opinionated, there is no inherent conflict of interest in it that would violate one of our ethics laws.

I recently sent out two thank you letters on County letterhead—one to Fredericktowne Players, congratulating them on their excellent production and performance of Rodgers and Hammerstein’s *Carousel* ; and another to the Spires Brass Band, thanking them for their superb concert on July 4th at the Bandshell, where they performed Tchaikowsky’s *1812 Overture* and other numbers. Advisory Opinion 12-04 would prohibit this because it represented my

personal opinion on matters of public interest and because it was not the official Board opinion, and yet it went out on my County Commissioner letterhead and was typed on a County computer as I sat at a County desk on a County chair. I don't think that someone would complain that these letters violated our Ethics laws. But the "guidance" provided in 12-04 would prohibit them. In fact, the very posting of this letter on the County website would violate the new interpretation given in Advisory Opinion 12-04 because it is my personal opinions on a matter of public interest and because it also pertains to my personal political philosophy.

I believe that these examples illustrate the flaw in Advisory Opinion 12-04; they illustrate that the "guidance" language is much too broad. And again, the guidance does not address the legitimate and important "legislative" function of county commissioners, and the important public need for them to make their personal opinions known on the many varied issues that need to be thoroughly debated by the Commissioners and the public as a part of the legislative processes.