



FREDERICK COUNTY GOVERNMENT

FREDERICK COUNTY ETHICS COMMISSION

Office of the County Attorney

Jan H. Gardner
County Executive

Brian Duncan, Chair

DECISION ON COMPLAINT

I. Introduction

In June 2015, the Complainant filed a complaint with the County's Chief Administrative Officer and the Ethics Commission. The complaint was brought against a former member of the Board of County Commissioners for actions taken in April 2014 while the subject of the complaint was still a County Commissioner. The complaint alleged that County Commissioner violated § 5-859(b) of the Public Ethics Law, found in the General Provisions Article of the Maryland Annotated Code, by failing to disclose ex parte communications related to a land use application that was pending before the Board of County Commissioners.

II. Initial Action Taken by the Ethics Commission

The Ethics Commission's Standard Operating Procedures state that if the allegations in the complaint suggest that criminal conduct may have occurred, the Commission has the discretion to refer the matter to the State's Attorney, the Office of the Attorney General or the State Prosecutor for a determination as to whether a criminal investigation is warranted. After receiving the complaint, the Ethics Commission determined that a referral was appropriate because the Public Ethics Law contains criminal penalties for knowing and willful violations of that Law's provisions. The fact that the referral was made should not be read to imply that the Ethics Commission concluded that a criminal act occurred. That determination is best left to an office with knowledge and experience in criminal law. The Commission referred the complaint to the Frederick County State's Attorney in July 2015.

The Ethics Commission's Standard Operating Procedures also state that once a referral for possible criminal prosecution is made, the Commission will not act on the complaint until the referral is resolved. Accordingly, the Commission held the complaint in abeyance while waiting for the State's Attorney's Office to complete its review. The Ethics Commission received notice in May 2016 that "the referral lacks sufficient evidence to warrant prosecution" and that no charge would be filed. With that decision, the matter is once again before the Ethics Commission.

It should also be noted that, in accordance with the Commission's Standard Operating Procedures and the recommendation of the State's Attorney, the Ethics Commission did not provide notice of the complaint to the former County Commissioner who is the subject of the complaint. This was done so that the Ethics Commission would not inadvertently prejudice any potential criminal investigation or prosecution. For the same reason, the Complainant was not advised of the referral to the State's Attorney's Office.

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III. The Public Ethics Law

The Public Ethics Law, §§ 5-857 through 5-862, is a State Law applicable only to Frederick County. The Law applies when one of five defined types of land use applications are pending before the County's governing body. In April 2014, the governing body was the Board of County Commissioners.

There are two key provisions in the Public Ethics Law. One provision, which is not applicable here, restricts the ability of a person with one of these pending land use applications to make contributions of \$100 or more to members of the County governing body while that person's application is pending. The other key provision in the Public Ethics Law, which is the one relied upon in the present complaint, concerns what are known as "ex parte communications." An ex parte communication in this context means a communication between a County Commissioner and another person or entity regarding a covered pending land use application in which not all of the parties to the land use application are present. Section 5-859(b) states as follows: "A member of the governing body who communicates ex parte with an individual concerning a pending application during the pendency of the application shall file with the Chief Administrative Officer a separate disclosure for each communication within the later of 7 days after the communication was made or received."¹

Persons who violate this mandatory disclosure provision are subject to the remedies and penalties contained in § 5-862. The Ethics Commission has the authority to assert the violation as a procedural error in an action for judicial review of the land use application.² Should the Ethics Commission or an aggrieved party of record in the pending application take this step and the court finds that there was a violation of the disclosure requirement, the court is directed to remand the case to the governing body for reconsideration. A person violating the Public Ethics Law is also potentially subject to criminal sanctions. Section 5-862(b) provides that a person who knowingly and willfully violates this Law can be charged with a misdemeanor offense. If convicted, the person could be subject to imprisonment not exceeding six months or a fine not exceeding \$1,000 or both.

IV. Relevant Facts Alleged in the Complaint

The Complainant attached an affidavit to his complaint. The affidavit stated that the subject of the complaint had been a member of the Board of County Commissioners while a certain land use application was pending before that Board. The land use application was one of the types of applications covered by the Public Ethics Law. In April 2014, the Commissioner attended a meeting of a Committee that is comprised of public and private sector individuals who meet regularly to work toward transportation improvements in Frederick County and the City of Frederick. At the meeting, the Commissioner commented on the pending land use application. The Commissioner also acknowledged having an additional communication with one of the

¹ Before the change to a Charter form of government, the disclosures were made to the County Manager.

² A Petition for Judicial Review is a legal action in which a Court is asked to review the decision of a governmental agency. In most cases, the Court makes its decision on the written record and does not take additional testimony or allow the introduction of new evidence.

Committee members regarding the land use application after the meeting. The Commissioner did not make a timely report of either ex parte communication, as required by the Public Ethics Law. The Commissioner also acknowledged working with one of the Committee members to prepare a letter to be sent by the Committee to the Board of County Commissioners in connection with the pending land use application.

After the Board of County Commissioners made a decision on the land use application, the Board's decision was the subject of a Petition for Judicial Review. The Complainant is an officer of an organization that was one of the parties seeking judicial review. The issue of the Commissioner's alleged ex parte communications and his failure to report those communications was brought to the Circuit Court's attention. In March 2015, the Court filed an Opinion and Order, which was included as an attachment to the Complainant's affidavit. The Court made the following findings:

1. The Commissioner attended the April 2014 Committee meeting.
2. The Commissioner commented on the pending land use application at this meeting.
3. The Public Ethics Law requires the disclosure of ex parte communications on covered pending land use applications.
4. The Public Ethics 2014 Annual Report to the Ethics Commission did not contain a disclosure of the Commissioner's comments.
5. The Committee incorporated the Commissioner's comments into a letter it sent to the Board of County Commissioners.
6. The Committee's letter was presented to the Board of County Commissioners with the intent to influence its vote on the land use application.
7. The Committee's letter was read into the record by the Board of County Commissioners.

Based on these factual findings, the Court stated as follows:

The Court finds the facts and circumstances hereinabove to be extreme, and that therefore Petitioners have met their burden of making a strong showing as to an extreme circumstance. Therefore, the Court cannot make a judgment based on the record as it currently exists because the letter, the timing, and the potential for reliance form an integral part of the decision to uphold the administrative decision. Therefore, as "extreme circumstances [...] occurred outside the scope of the administrative record," additional testimony is necessary. [citation omitted] Moreover, "even under such circumstances, circuit court discovery should not be permitted when a remand to the administrative agency is a viable alternative."

The Court remanded the matter to the County Council for further proceedings, including testimony, to resolve the issues raised by the Court.

V. Discussion and Decision

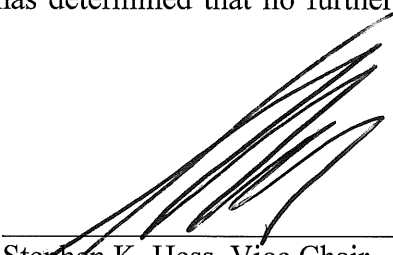
The Complainant asks the Ethics Commission to determine whether the former County Commissioner failed to comply with the disclosure requirements of the Public Ethics Law. That issue appears to have already been decided and addressed by the Circuit Court.

Under the Public Ethics Law, there are only two enforcement remedies available for such a violation. Section 5-862(a) allows the Ethics Commission or another aggrieved party of record to intervene in a Petition for Judicial Review. The Complainant has already done this, making such an action by the Ethics Commission unnecessary (as well as untimely). In the event of such an intervention, the Court has the statutory authority to remand the matter back to the governing body (the County Council). This has already been done. The only remaining remedy, found in § 5-862(b), is a criminal misdemeanor prosecution. The Ethics Commission does not have the authority to independently initiate a criminal action. The complaint was referred to the State's Attorney for his review and he has found that there is insufficient evidence to warrant a criminal prosecution. The Commission will not second guess that finding, particularly in light of the requirement in § 5-862(b) that the State prove that the violation was both knowing and willful in order to obtain a conviction and the higher level of proof required to obtain a conviction in a criminal case.

As the Ethics Commission lacks the authority under the Public Ethics Law to grant any additional relief to the Complainant or to take action against the former County Commissioner should it find a violation, the Ethics Commission has determined that no further action on the complaint is warranted.



Date



Stephen K. Hess, Vice Chair
Frederick County Ethics Commission

Note: Brian Duncan, the Ethics Commission Chair, recused himself from participating in this matter.