

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

MEMORANDUM

TO: Robert J. Spagnoletti, Chairman
Board of Ethics and Government Accountability

Deborah Lathen
Board Member

Carol Schwartz
Board Member

FROM: Darrin P. Sobin 
Director of Government Ethics

DATE: June 7, 2016

RE: D.C. Department of Public Works Request for Opinion Regarding
Potential Conflict of Interest and Request for Waiver of Any Potential
Conflict of Interest

This responds to the June 2, 2016 correspondence of Christine V. Davis, Esquire, General Counsel to D.C. Department of Public Works ("Correspondence"), in which she requests a determination with regard to whether a conflict of interest exists under D.C. Official Code § 1-1162.23(a), regarding the award of a grant administered by the Department of Housing and Community Development ("DHCD") to the Department of Public Works ("DPW"), where a husband and wife (Employee A and Employee B), worked on the matter for their respective agencies. If a conflict of interest is determined to exist, then she requests a waiver of that conflict of interest pursuant to D.C. Official Code § 1-1162.23(b).

Based upon the information provided to me from Ms. Davis, I conclude that while the DPW and DHCD employees have participated personally and substantially in a particular matter, their participation is not likely to have a direct and predictable effect on the financial interests of the employees and/or a person closely affiliated with the employees. Therefore, I recommend that the Board find that there is no conflict of interest caused by the participation of the husband and wife in the award of the grant from DHCD to DPW.

Background

The Correspondence states that DPW's mission is to provide environmentally healthy municipal services that are both ecologically sound and cost effective. DPW is comprised of three primary service delivery areas: Solid Waste Management Administration (SWMA), Parking Enforcement Management Administration (PEMA), and Fleet Management Administration (FMA). Employee A heads SWMA. The SWMA is responsible for residential trash and recycling collection, street and alley cleaning, solid waste disposal, and the enforcement of public space regulations under the Litter Control Administration Amendment Act. Employee B is a Program Manager at DHCD. The Correspondence states further that DHCD's mission is to produce and preserve opportunities for affordable housing and economic development and to revitalize underserved communities of the District of Columbia. The grant for which DPW/SWMA is being considered is the Community Development Block Grant ("CDBG"). It is represented that this would be the first such grant award for DPW/SWMA.

In or around March of 2016, employees of DPW/SWMA, including Employee A, and employees of DHCD, including Employee B, agreed to have their respective agencies work collaboratively in order to clear and clean alleys in Ward 7 and Ward 8. In order to do so, DPW/SWMA was to receive \$2.4 million from DHCD from the CDBG. Ultimately, the grant would allow DPW/SWMA to perform a vital function for an "underserved and economically challenged portion of the District" as well as possibly "assist [in] bringing additional housing opportunities and development in Wards 7 and 8."

Ms. Davis indicates that Employee B was very involved in the pursuit and award of the grant. Employee B had spoken directly with the Director of DPW regarding the grant, had advocated to her supervisor to award the grant to DPW, and had communicated with Employee A's staff regarding the grant. Additionally, Employee A, by virtue of his position with DPW/SWMA, was necessarily involved with the application for and receipt of the grant from DHCD, and, in fact, the attachments to the Correspondence establish that Employee A was personally and substantially involved in the process.

In mid-April 2016, after the agencies agreed to move forward with the collaborative effort, Ms. Davis reviewed the grant for legal sufficiency. She received information regarding the grant detailing the involvement of Employee A and Employee B. Ms. Davis indicated that she later learned that Employee A and Employee B were married to each other. As a result of the relationship between Employee A and Employee B and their involvement in the cooperative effort between their agencies, Ms. Davis believes there appears to be a violation of the conflict of interest provision, because although Employee A and Employee B's involvement may not have a direct and predictable effect on each other's financial interests, a financial benefit is "plausible." As a result, and to the extent there is a conflict of interest, Ms. Davis requests that the Board waive the conflict of interest in accordance with D.C. Official Code § 1-1162.23(b).

Discussion

Section 223(a) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012 (D.C. Law 19-24; D.C. Official Code § 1-1162.23(a)), provides:

No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a *direct and predictable effect on the employee’s financial interests or the financial interests of a person closely affiliated with the employee*. (Emphasis added).

A “person closely affiliated with the employee” is defined to include a spouse.¹ While it is clear that both Employee A and Employee B both “act[ed] in [their] official capacity, and personally and substantially participated in the application and decision making process regarding the CDBG grant for DPW,” their conduct must have a direct and predictable effect on each other’s financial interests for a conflict of interest to exist. The question, then, turns on the phrase “direct and predictable effect.”

A direct and predictable effect has been defined as having:

- (A) A close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest;
- (B) A real, as opposed to a speculative possibility, the matter will affect the financial interest; and
- (C) The effect is more than *de minimis*.²

As it pertains to the conduct of Employee A and Employee B, Ms. Davis posits that their conduct may have a direct and predictable effect on their individual and collective financial interests in terms of “promotions, bonuses and other awards.” However, even assuming that the Financial Conflict of Interest provisions of the Ethics Act were intended to apply to government agency to agency transactions (unclear), I do not believe there to be a direct and predictable effect on the financial interests of Employee A and Employee B given the information available to us. Regarding bonuses, Employee A and Employee B generally are statutorily prohibited from receiving bonuses.³

¹ D.C. Official Code § 1-1162.01(43).

² D.C. Official Code § 1-1162.01.

³ See, the Bonus and Special Pay Limitation Act of 2015, effective October 22, 2015 (D.C. Law 21-36; 62 DCR 10910-11) (Except for circumstances not relevant to this analysis, “[f]or Fiscal Year 2016, no funds shall be used to support the categories of special awards pay,” including “an assistant or deputy agency head”).

As it pertains to promotions and “other awards,” the possible effect of the award of the CDBG grant from DHCD to DPW/SWMA is too speculative. Promotions and the like usually depend on factors such as favorable performance evaluations. Those evaluations measure many different skills and achievements. First, it is not even clear whether something like a grant award would appear on the employees’ evaluations given the number of people who were involved in the grant process in this case (the attachments provided establish that other persons involved in both agencies, some of whom who are higher in each agency’s respective chain of command, were actively involved in this process). Moreover, to find a direct and predictable effect, one would essentially have to assume that the grant was steered to one agency rather than to another for the purpose of boosting the recipient spouse’s annual performance rating. That itself appears speculative. And, even then, a favorable performance rating is no guarantee of a promotion.

Given these considerations, a causal link between the employees’ official actions and a direct and predictable effect on the finances of these employees is lacking.

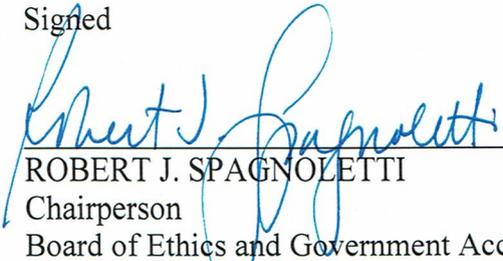
Notwithstanding that there is no violation of the Conflicts of Interest provision, we encourage government employees always to be mindful of how their actions may appear to those outside of the government.⁴ If reasonable people might question the impartiality or professional judgment of an employee because a matter involves the employee’s government spouse, then some consideration should be given to perhaps reduced involvement by one or both especially if doing so would not hamper the overall goals of the agency or the District government.

If you have any questions or wish to discuss this matter further, I can be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

⁴ DPM § 1800.3(n) (“Employees shall not take actions creating the appearance that they are violating the law or the ethical standards set forth in this chapter.”).

Agreed:

Signed



ROBERT J. SPAGNOLETTI
Chairperson
Board of Ethics and Government Accountability



DEBORAH LATHEN
Member
Board of Ethics and Government Accountability



CAROL SCHWARTZ
Member
Board of Ethics and Government Accountability

#1043-005

DS/BF/RC