

**City of Salisbury Ethics Commission
Advisory Opinion**

Opinion Request Number: 2023-03

Date of Opinion: March 8, 2024

Issue & Answer:

1. Can a command-level fire department employee hold secondary employment as a salesperson of a vendor of the City, who sells, services, and maintains fire engines and apparatus to and for the City?

Facts:

A longstanding command-level fire department employee began working for a vendor of the City of Salisbury, who sells, services, and maintains fire engines and apparatus to and for the City. The vendor is an authorized Pierce dealer for Delaware, the District of Columbia, Kentucky, Maryland, North Carolina, Ohio, Virginia, and West Virginia; its corporate office is in Manassas, Virginia and it employs more than 400 professionals who offer sales, support, and comprehensive parts and service capabilities.

The employee was recently hired by the vendor as a salesperson. His sales territory does not include the City of Salisbury, although it does include much of the Eastern Shore. The employee will, at some point, receive commission on sales he makes, although none of those sales will be to the City of Salisbury.

The City's fire department fleet is comprised entirely of Pierce apparatus and equipment. On average, the City purchases three ambulances every five years and an engine every ten years. For a number of years, the City has purchased the ambulances and engines, pursuant to City Charter § SC16-3A(9), which provides an exception to the general policy of competitive bidding for contracts in which the City receives a contract price negotiated by the State, County, or other governmental entity pursuant to a valid contract.

The City has utilized the cooperative contract purchasing authority authorized by §SC16-3A(9) to access HGACBuy contracts. The Houston-Galveston Area Council (HGAC) is the largest of 24 Councils of Government in Texas, and is a political subdivision of the State of Texas. It has been serving local governments for more than 40 years. HGAC's Cooperative Purchasing Program is known as "HGACBuy." HGACBuy contracts are established based on the requirements of Texas law. Products and services are contracted after having been subjected to either a competitive bid (IFB) or competitive proposal (RFP) process. Contracts are blanket type, usually for a term of two or three years. Use of HGACBuy for purchases by any End Users is strictly at the discretion of that

entity. End Users issue their purchase orders to and pay directly the HGACBuy Contractor.

The vendor is a HGACBuy Contractor and the City has purchased ambulances, engines, and fire apparatus from the vendor using HGACBuy and following all procurement procedures.

Analysis:

The purposes of the Public Ethics Law and, specifically, Chapter 2.04 of the City Code¹ are to avoid conflicts of interest, ensure impartiality and independence of judgment and avoid the appearance of conflicts of interest.

The State Ethics Commission has addressed the issue of dual or secondary employment in multiple advisory opinions because the State Ethics Law restricts secondary employment by officials and employees of the State. For purposes of the State Ethics Law, the State position is primary employment and all other employment is secondary employment. Types of “secondary employment” include compensated employment with an entity and non-compensated service involving a fiduciary relationship such as service on a board of directors. The State Ethics Law includes three provisions which may restrict secondary employment:

- Section 5-502(b)(1) prohibits an official or employee from having secondary employment with an entity that does business with, is regulated by, or is under the authority of the State department or agency with which the official or employee is affiliated. The Ethics Law authorizes the Commission to grant exceptions to this restriction under very limited circumstances. The Commission’s exception regulations are published in COMAR Title 19A and delineate specific requirements for an exception. Generally, the Commission will not grant an exception if the employee or official has State duties relating to the private employer, is affiliated with the unit of the State agency that has duties relating to the private employer, or has duties with the private employer relating to the State department or agency with which the official or employee is affiliated.
- Section 5-502(b)(2) of the Ethics Law prohibits secondary employment that would impair the impartiality and independent judgment of the official or employee.

¹ City’s Ethics Code codified in Chapter 2.04 of the City Code shall be referred to as the “Ethics Code.”

- Section 5-503(b) prohibits an official or employee who has duties relating to a contract from being employed by an entity that is a party to that contract.

By comparison, the Ethics Code does not specifically or explicitly prohibit secondary or dual employment. Rather, Chapter 2.04.050(b) of the Ethics Code addresses employment and financial interest “restrictions” and provides:

(1) Except as permitted by regulation of the Commission when the interest is disclosed or when the employment does not create a conflict of interest or appearance of conflict, an official or employee may not:

(i) Be employed by or have a financial interest in any entity:

(A) Subject to the authority of the official or employee or the City agency, board, or commission with which the official or employee is affiliated; or

(B) That is negotiating or has entered a contract with the agency, board, or commission with which the official or employee is affiliated; or

(ii) Hold any other employment relationship that would impair the impartiality or independence of judgment of the official or employee.

(2) The prohibitions of paragraph (1) of this subsection do not apply to:

(i) An official or employee who is appointed to a regulatory or licensing authority pursuant to a statutory requirement that persons subject to the jurisdiction of the authority be represented in appointments to the authority;

(ii) Subject to other provisions of law, a member of a board or commission in regard to a financial interest or employment held at the time of appointment, provided the financial interest or employment is publicly disclosed to the appointing authority and the Commission;

(iii) An official or employee whose duties are ministerial, if the private employment or financial interest does not create a conflict of interest or the appearance of a conflict of interest, as permitted and in accordance with regulations adopted by the Commission; or

(iv) Employment or financial interests allowed by regulation of the Commission if the employment does not create a conflict of interest or the appearance of a conflict of interest or the financial interest is disclosed.

Significantly, the City's Employee Handbook permits outside employment provided it will not adversely affect the employee's job-related function, the operation of City Government or create a conflict of interest or the appearance of a conflict of interest with City operations. Pursuant to the City's Employee Handbook, outside employment may be prohibited if, in the discretion of the Department Director:

- The work being performed is related to City Government operations;
- The employment adversely affects the quality or performance of the City's work requirements;
- The employment adversely affects the employee's individual work quality or performance;
- The employment brings discredit upon the City Government or creates the impression of impropriety; or
- The outside employment causes a violation of any other Federal, State or Local law, regulation or similar standard.

The Commission finds that sufficient safeguards are in place such the employees' employment with the vendor does not create an actual conflict of interest. Members of the Commission, however, are divided as to whether the employee's employment with the vendor gives the "appearance" of a conflict of interest. The Commission believes the Chief of the Salisbury Fire Department is best suited to determine whether employee's employment with the vendor creates an "appearance" of a conflict. The Committee further believes the process set forth in the City's Employee Handbook should be followed so that employee's employment with vendor is properly documented and the matter has been reviewed and ruled upon utilizing the guidance set forth in this Advisory Opinion. The Commission further recommends that the Fire Department adopt a policy on secondary employment that is in accordance with the Ethics Code and Employee Handbook.

Although the Commission finds that Chapter 2.04.050(b) addresses the issue squarely, Chapter 2.04.050(e)(1)(i), under different circumstances, may be relevant to secondary employment. Chapter 2.04.050(e)(1)(1) provides that an

official or employee may not intentionally use the prestige of office or public position:

(A) For the private gain of that official or employee or the private gain of another; or

(B) To influence, except as part of the official duties of the official or employee or as a usual and customary constituent service without additional compensation, the award of a state or local contract to a specific person.

Here, there is absolutely no evidence the employee has improperly used the prestige of his office for the private gain of himself or the vendor.

Application: The City Ethics Commission cautions that this Opinion is applicable only to the request described herein. This Opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of ethics generally or in changes of facts that could affect the conclusion of the Commission.

This Opinion is intended to serve as a general guide for persons subject to the Ethics Code and members of the public, but is not intended to address the innumerable factual possibilities which may arise in this area. Persons who are uncertain whether specific conduct regarding employment may be prohibited or not are strongly encouraged to seek an advisory opinion from the Commission and to follow the process set forth in the Employee Handbook.