

**RULES REGARDING DOUBLE EMPLOYMENT
EFFECTING HEALTH PROFESSIONALS IN DHMH FACILITIES
PERSONNEL AND ETHICS
A QUICK REVIEW**

TO: Department of Health and Mental Hygiene Facility Directors
FROM: Barbara Hull Francis, Assistant Attorney General, Counsel
DATE: Thursday, March 17, 2005

INTRODUCTION

As a result of many meetings, Suzanne Fox, Executive Director, Ethics Commission, Thomas Russell, Director, Office of the Inspector General (“OIG”), Department of Health and Mental Hygiene (“DHMH”), Janet Nugent, Director, Personnel, DHMH, and I met on Thursday, January 27, 2005. We thought that some quick rules regarding secondary employment of health providers employed in DHMH facilities.¹

TERMS

There are a few special terms of art that will help in understanding the following.

- ☞ Special Payment Payroll (“SPP”). Being on SPP is the same as being a contractual employee as authorized under St. Personnel and Pensions (St.Per.&Pen.) §§13-201 and following. Monies for these positions are a budgeted. In these positions there are no benefits and the rate of pay is comparable to the rate of pay to employees in position that involve comparable duties, responsibilities, experience, and authority.²

¹This is not an extensive legal analysis and does not account for both federal (STARK, 42 USC 1395nn and Code of Federal Regulations) and state law, (Health Occupations, §§1-301 and following) regarding patient referrals. Understanding these laws are the responsibility of the health professional.

²Code of Maryland Regulations (“COMAR”) 17.04.03.13 states that a contractual employee is an individual providing personal services and the services and remuneration are specified in a written agreement, there is an employer-employee

- 👉 Third Party Contracts (“TPC”). These are contracts which a unit enters into after a procurement, which could be by a request for proposal (“RFP”) or a invitation for bid (“IFB”). These contracts are with agencies that supply health care workers under the terms of the contract. The health care worker is paid by the agency and not the state.
- 👉 Personal Service Contract (“PSC”). This is a contract with an individual entered into after a procurement, either RFP or IFB. The duties and terms of payment are set forth under the contract. These are entered into when the state cannot find a state employee to perform the function in a state operated facility. St.Per.&Pen. §§13-401 and following.

LAWS AND POLICIES

The laws that constrain health professionals working in state facilities from having secondary employment, are found in

Health Gen'l §2-103.

All personnel in the Department, **Grade 18 and above**, who **administer** or **direct** a program, shall disclose all other employment and compensation **outside** the Department to the Secretary. An individual under this paragraph may not be employed or receive compensation **outside** the Department that would create a conflict of interest, an appearance of a conflict of interest, or impair the impartiality and independence of judgement of the individual.³

Additionally, COMAR 17.04.02.15 states:

A. An individual may be employed in **TWO** separate capacities in **State**

relationship, the individual is NOT employed in a budgeted position, unless approved as secondary employment; and except as provided by law, fringe benefits are not provided.

³Apparently there was some confusion in the past as to who had to respond to the OIG's request for information on secondary employment. The OIG will clarify as to who is an administrator, or a program director, as it relates to those in classifications 18 and above. This relates only to outside employment, and includes other Departments.

government ONLY WITH the agreement, before the second employment begins, of the appointing authorities of the units that will employ the individual.

Title 15 of the State Government Article, subtitles 1-9 governs Public Ethics.⁴ The principle of the public ethics laws is set forth in SG §15-101.

Our system of representative government is dependent upon the people maintaining the highest trust in their government officials and employees, finds and declares that the people have a right to be assured that the **impartiality and independent judgment** of those officials and employees will be maintained.

It is evident that this confidence and trust is eroded when the conduct of the State's business is subject to improper influence or even the appearance of improper influence.

As it relates to employment, the rules that govern, are the Conflict Rules, subtitle 5, and the Ethics Commission's advisory opinions; and

For physicians, DHMH Policy 02.09.10 - Physician's On-duty/off-Duty Compensation, 1999. This policy permits a facility to pay its physicians for off duty coverage if they come in either monetary or compensatory, but not for being on call. (Basically under a SPP.) On duty rates are negotiated by each facility and approved in the budget process.

BASICS

The first and most important rule is that all should be revealed on the financial disclosure form, and when in doubt check with OIG who will funnel to Ethics. Of course, you may check with ethics your self.⁵

⁴Subtitle 1. Findings: Definitions; General Provisions; Subtitle 2. State Ethics Commission; Subtitle 3. Advisory Opinions; Subtitle 4. Procedures for Complaint of Violation of Title; Subtitle 5. Conflicts of Interest; Subtitle 6. Financial Disclosure; Subtitle 7. Lobbying; Subtitle 8. Local Government Provisions; and Subtitle 9. Enforcement.

⁵Ms. Fox will say that when you call the Ethics Commission you are asking for advice. When the Ethics Commission calls you generally it is in response to allegations of possible wrongdoing.

MAY DOs

1. Being a health professional in a state facility does NOT rule out secondary employment.
2. A health professional in a state facility must work the hours for which they are being paid. Secondary employment may not interfere with this.
3. A health professional from one state facility, e.g. Spring Grove, can be hired on SPP by another state facility, e.g. by Springfield or Deer's Head, as long as the secondary employment is not inconsistent with the primary employment.
4. A health professional may be paid either over time - if subject to overtime rule, or hired on SPP to work additional hours for the same state facility. If the employee is subject to the overtime rule at one facility, the employee **CANNOT** be a SPP at the same facility. The employee could be a SPP employee at another facility. E.G., there is a difference between physicians who do not get overtime and nurses who do.
5. In situations where the facility is unable to find individuals to provide necessary services, and it may issue a IRB/RFP for a PSC. The resulting contract could pay for being off call, unlike a SPP. ⁶
6. Under a TPC, an employee may have secondary employment with an outside company that provides contract health professionals to other entities. However, an employee **CANNOT BE EMPLOYED** by a company that provides contract labor to DHMH. This is an ethics rule, see #7.

MAYBEs

7. A health professional from a state facility, may be able to be hired by an private health care provider, depending on the circumstances. The circumstances are such that there is **NO** conflict which involves the employment possibly or giving the appearance of enriching the private facility. Questions regarding such employment

⁶In rare situations the facility may award the contract to employees of the facility in order to ensure that necessary services are available. This must be cleared with personnel and ethics.

should go to the OIG, who will coordinate a response with Ethics Commission.

MAY NOT

7. A health professional who is a DHMH employee may not be hired to perform services for a DHMH facility under a TPC.

8. A health professional who has decision making authority for referrals may not be employed by a private entity that accepts those referrals.

We hope this is helpful. Remember in this area, it is best to be safe rather than sorry. Meanwhile we exploring other options to address these issues, such as what is known as the Gallo provisions applicable to University of Maryland, State Government Article, §15-523.

ADVICE OF COUNSEL AND NOT

AN OPINION OF THE ATTORNEY GENERAL

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BHF/s