

Opinions, Advice, and Legislation Quarterly News

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OPINIONS

ASSESSMENTS AND TAXATION

Question: Tax-Property Article §2-110(a) requires that the salary schedules for tax assessors include an “appropriate” incentive for assessors to achieve the certified assessment evaluator (“CAE”) designation. Does the statute mandate a salary increment for assessors who achieve that designation?

Answer: The Secretary of Budget & Management has discretion under the statute to determine an “appropriate” incentives. The Secretary must follow a rational process to determine an appropriate incentive but the statute does not require any particular salary increment, however minimal.

*Opinion No. 00-015
June 16, 2000*

COUNTIES

Question: The Harford County Executive has proposed to condition portions of the County budget for the Board of Education on: 1) the creation of auditor positions and the conduct of performance audits; 2) the study of alternative methods of fleet maintenance and the submission of a report to the County; and 3) agreement by the Board to a health care benefits package mutually bid with the County. Are these three conditions legal?

Answer: The conditions proposed for the Harford County budget are permissible, with one exception. The portion of the first condition requiring the creation of auditor positions is beyond the authority of the County; however, the remainder of that condition and the other conditions are consistent with State law governing the relationship between counties and local boards of education.

*Opinion No. 00-013
May 26, 2000*

ELECTIONS

Question: With respect to a petition to bring to referendum a public local law enacted by the General Assembly, is the sufficiency of the petition determined at the State level with the advice of the Attorney General or by the local board of elections with the advice of the county attorney?

Answer: The determination of the sufficiency of a petition is to be made at the State level by the State Board of Elections with the assistance of the Attorney General.

*Opinion No. 00-011
May 19, 2000*

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FAMILY LAW

Question: 1. Is it a crime for a person to violate an out-of-state protective order by conduct within Maryland? 2. What guidance should be given to law enforcement officers who may be presented with a copy of an out-of-state protective order, and how are copies authenticated?

Answer: 1. Maryland law provides for criminal enforcement of out-of-state protective orders to the same extent as it provides for criminal enforcement of protective orders issued by Maryland courts. Thus, if the procedural requirements of the State Domestic Violence Law are satisfied, an individual who violates an out-of-state protective order in Maryland may be arrested and prosecuted criminally under Maryland law, when a similar violation of a Maryland protective order would be a criminal offense.

2. If a law enforcement officer is presented with a copy of an out-of-state protective order and a request for criminal enforcement of the order, the officer should first determine from the face of the order the identity of the respondent and whether the order remains effective. The officer should assess whether there is probable cause to believe that the respondent has violated the order and, if so, whether a similar violation of a Maryland protective order could furnish the basis for a criminal prosecution. Before making an arrest, the officer should also make a preliminary determination as to whether the copy is authenticated under either federal law or the law of the state in which it was issued.

Under federal law, a copy of an order is properly authenticated if it contains or is accompanied by an attestation of the clerk of the issuing court, the seal of the court (if one exists), and a certification by the court. The law of the state in which the order was issued may also permit other forms of authentication.

*Opinion No. 00-009
April 11, 2000*

INSURANCE

Question: What is the relationship between the Maryland Insurance Administration and its head, the Insurance Commissioner, on the one hand, and the Maryland Automobile Insurance Fund ("MAIF"), on the other hand, in four areas:

1. Does the Unfair Claim Settlement Practices Act apply to MAIF, and may the Commissioner

sanction MAIF for violations of that Act?

2. May the Commissioner review a MAIF decision to cancel a policy prospectively?

3. May the Commissioner reverse or modify a MAIF decision to void a policy *ab initio*?

4. May the Commissioner order MAIF or its producers to pay restitution or fines for other violations of the Insurance Article, such as those related to rating or underwriting?

Answer: 1. The Unfair Claim Settlement Practices Act applies to MAIF. If the Commissioner finds that MAIF has violated the Act, the Commissioner may order MAIF to discontinue the unfair practice. The Commissioner may also order restitution to a claimant based on a violation of the Insurance Article related to MAIF's failure to abide by contractual obligations in an insurance policy. Other remedies ordinarily available to the Commissioner under the Act) such as revocation of an insurer's certificate of authority – do not pertain to MAIF.

2. The MAIF statute provides the exclusive procedure for administrative review of a MAIF cancellation decision. That statute assigns to MAIF, and a special appeal board, the application of the statutory eligibility criteria for MAIF coverage; the Commissioner has no independent review authority.

3. The Commissioner ordinarily has no authority to review a MAIF decision to void a policy *ab initio* on grounds that the insured deliberately misrepresented eligibility for MAIF insurance. However, when MAIF rescinds a policy *after* a claim has been filed, the Commissioner has authority under the Unfair Claim Settlement Practices Act to review MAIF's finding of deliberate misrepresentation, unless MAIF has obtained court approval for the retroactive cancellation of the policy.

4. The Commissioner may impose administrative sanctions on MAIF or its producers for other violations of the State insurance law if, under the principles outlined in the opinion, the relevant provision of the Insurance Article explicitly or implicitly grants the Commissioner administrative authority over MAIF or its producers.

*Opinion No. 00-012
May 24, 2000*

MUNICIPALITIES

Question: 1. Does the State anti-Hatch Act preempt a local prohibition – such as formerly appeared in the Town Charter – against Town employment of a Town Council member?

2. If the Town were to restore that prohibition to the Charter, could a member of the Town Council who is currently a Town employee continue to serve on the Council?

3. Does the common law doctrine of incompatible positions preclude the Town's Supervisor of Streets from serving on the Town Council?

Answer: 1. The anti-Hatch Act preserves the right of Town employees to run for office, but does not preempt a local prohibition against *employment* of elected officials.

2. The Council member would have to choose between continued service on the Council and continued town employment.

3. No.

*Opinion No. 00-014
June 12, 2000*

SOCIAL SERVICES

Question: Is the Department of Social Services permitted to disclose information about a confidential report regarding child abuse by a public school bus driver who is not employed directly by the public school system?

Answer: No.

*Opinion No. 00-008
April 3, 2000*

**ZONING AND
PLANNING**

Question: Are buildings on State property leased by the House of Ruth to operate a domestic violence shelter exempt from Baltimore City zoning regulations? Would they remain exempt if used by another non-profit entity?

Answer: State property used for a public purpose is exempt from local zoning requirements. The property, as the House of Ruth currently uses it, is exempt and it would remain exempt if leased to another non-profit entity, so long as it was employed for a "public purpose." However, the mere fact that a lessee happens to be a non-profit entity is insufficient to exempt the property from the zoning laws.

*Opinion No. 00-010
April 27, 2000*

ADVICE LETTERS

ADOPTION

Question: May unmarried couples, including homosexual couples, adopt a child under Maryland law?

Answer: While no appellate case has addressed the issue in Maryland, cases on custody and visitation suggest that there is no bar to such an adoption. This question may arise in two possible scenarios: adoption of a child who is not related to either partner, and adoption of the natural child of one of the partners by the other. Maryland law permits the adoption of a child by two unmarried persons who make up a household, and therefore does not prevent adoption by homosexual couples. Maryland law also permits a couple, by petitioning jointly, to adopt the natural child of one partner without terminating that partner's parental rights.

Letter to

*Delegate Sharon Grosfeld
June 9, 2000*

**ASSESSMENT AND
TAXATION**

Question: Chapter 80, Laws of Maryland 2000, the “Truth in Taxation Act,” raises the property assessment ratio from .4 to 1 and provides for an offsetting reduction in tax rates.

1. Assuming that a formula contained in a county ordinance for computation of a maximum “special tax” already takes account of a change in assessment ratio, would Tax Property Article §8-422 require a second adjustment that would effectively overcompensate for the change in assessment ratio?

2. Would the former or revised definition of “tax increment” in the Act apply with respect to tax increment financing bonds issued before July 1, 2000?

Answer: 1. No. The statute requires an adjustment only “if necessary.”

2. The new definition of “tax increment” will apply for computations relating to tax years commencing July 1, 2001 or later.

*Letter to
Senator Robert R. Neall
May 19, 2000*

BUSINESS TRUSTS

Question: What would be the legal effect of a proposal that Maryland adopt laws to establish standards for business trusts and to exempt those trusts from the operation of the rule against perpetuities?

Answer: While Maryland law recognizes the validity of business trusts and Maryland courts will enforce them according to their terms, there are no statutes controlling or regulating their formation or attributes. The common law rule against perpetuities does not apply to business trusts, but if it did, a recent amendment to Estates and Trusts Article §11-102(e), creating an express exemption to the rule against perpetuities would allow existing trusts to bring themselves within the exemption.

*Letter to
Senator Thomas V. Mike Miller
April 17, 2000*

CAPITAL PROJECT FUNDING

Question: Under the 2000 Capital Budget Bill, expenditure of funds for an adult day care project and for a building to house both the project and an addictions program is contingent on the support of the individuals and families who will be served by the adult day care center and on the filing of a report by the Department of Health & Mental Hygiene. The report, to be filed with the legislative budget committees, must demonstrate willingness of those who benefit from the adult day care program to share a facility with

persons who are receiving drug treatment. Does this contingency violate the Americans with Disabilities Act (“ADA”)?

Answer: Such a requirement is facially invalid under the ADA. However, since the contingency does not affect funds provided in the budget items for other projects and is not necessary to the accomplishment of the grant’s purposes, it is severable from the grant. Although the condition, as written, is both unenforceable and severable, DHMH might take steps toward meeting the apparent legislative objective by submitting a report that addresses security and operational matters bearing on the shared use of the facility. To comply with the ADA, however, the report may not be based on interviews with, or reflect the opinions of, users of the day care facility.

*Bill Review Letter to
Hon. Parris N. Glendening
May 15, 2000*

COUNTY COMMISSIONERS

Question: State law provides that, if a local taxing authority intends to set a property tax rate that exceeds the constant yield rate, it must give notice to the public and provide a hearing at which “public testimony is encouraged.” Must a quorum of county commissioners be present for that hearing?

Answer: Although it is advisable that there be a quorum present, the holding of a hearing at which members of the public present their views to a public body is not the “transaction of business,” and therefore does not necessitate the presence of a quorum.

*Letter to
Senator Richard F. Colburn
June 14, 2000*

CRIMINAL RECORDS

Question: What are the procedures for obtaining expungement of records related to a criminal conviction?

Answer: A person who has been convicted of a crime may file a petition in court to have records expunged if three conditions are satisfied: 1) the person was convicted of only one criminal act; 2) the crime was *not* a crime of violence; and 3) the person has been granted a full and unconditional pardon by the Governor.

*Letter to
Del. Salima Siler Marriott
June 1, 2000*

EDUCATION

Question: 1. What is the obligation of a local public school system to provide alternative educational services to a child under 16 years of age who has been expelled from the public schools?

2. Can action be taken against an expelled child's parent for failure to comply with the compulsory education law?

Answer 1: Maryland law requires that each child residing in the State who is between the ages of 5 and 16 attend a public school regularly during the entire school year, unless the child is receiving equivalent instruction elsewhere. Nevertheless, Education Article §7-301(a) does not require that a local school system provide alternative educational services to a child who has been expelled.

2. A child's parent cannot be prosecuted under the compulsory education law when the child's failure to attend school results from the failure of the school system to provide alternative educational services.

*Letter to
Delegate Dana Lee Dembrow
June 15, 2000*

EMPLOYEE DRUG AND ALCOHOL BREATH TESTING

Question: Does the law prevent the use of breath testing devices to test employees for the use of alcohol?

Answer: The ability of an employer to test an employee for the presence of drugs or alcohol has not been restricted either by the original enactment of Health-General Article §17-214, regulating laboratories that perform certain tests, or by subsequent amendment concerning blood and urine specimens. Therefore, there is no legal obstacle to the use of breath testing devices by employers.

*Letter to
Senator Paula C. Hollinger
May 17, 2000*

The advice provided in this letter was qualified in a subsequent memorandum:
[breath testing memo](#)

PUBLIC OFFICERS

Question: Does the two-year local residency requirement for a person who is elected State's Attorney apply to a person who is appointed State's Attorney for the remainder of a term?

Answer: The durational residency requirement is equally applicable to a State's Attorney appointed under the State Constitution.

*Letter to
Senator Richard F. Colbunn
.June 23, 2000*

SOLICITATIONS ACT

Question: The Maryland Solicitations Act, Chapter 500, Laws of Maryland 2000, creates a system of regulation, including penalties, for professional solicitors who raise money for public safety organizations (such as fire fighting, ambulance, rescue, police, fraternal, or other law enforcement organizations). Does it raise constitutional questions?

Answer: The Act largely parallels existing regulations applied to professional solicitors who raise money for other charitable organizations. The provision that an applicant for registration as a public safety solicitor provide “any other nonproprietary information that the Secretary of State requires” would likely be found to be unconstitutionally vague and to vest unbridled discretion in the licensing authority to limit the speech of the applicant. Therefore, it should not be given effect. However, it is severable from the remainder of the bill.

While some courts have also found First Amendment objections to provisions like the Act’s bond posting requirements, other courts have found these requirements narrowly tailored to serve the state’s interests in protection of the public. The bill’s penalty provisions while not facially unconstitutional, should be applied carefully to avoid constitutional problems.

*Bill Review Letter to
Hon. Parris N. Glendening
May 5, 2000*

VEHICULAR CHECKPOINTS

Question: Is there any constitutional objection to the establishment in a public road of a vehicular checkpoint, where law enforcement personnel stop all motor vehicles to determine if the occupants are complying with the seat belt law?

Answer: There is no constitutional objection to such checkpoints, provided that certain guidelines are followed. The guidelines must limit the discretion of government officials to protect the privacy and security of individuals against arbitrary acts. Assuming that adequate guidelines are established and complied with, the checkpoints may satisfy the reasonableness standard as applied to “seizures” under the Fourth Amendment.

*Letter to
Senator Leo Green
April 6, 2000*