

# Opinions, Advice, and Legislation Quarterly News

Office of the  
Maryland Attorney General



October – December 2008

## OPINIONS

### CIVIL RIGHTS AND DISCRIMINATION

#### CODE REVISION – WHETHER 1964 STATUTE PROHIBITING RECEIPT OF REMUNERATION FOR PARTICIPATION IN A “RACIAL DEMONSTRATION” IS CONSTITUTIONAL

**Question:** Article 49B, §6 of the Annotated Code of Maryland, makes it a crime for an individual to receive “any remuneration of any kind whatsoever” for participating in a “racial demonstration.” Is it constitutional? Would its repeal would have any substantive effect?

**Answer:** A court would likely hold that an attempt to enforce the statute would violate the First Amendment of the United States Constitution, as well as Article 40 of the Maryland Declaration of Rights.

*93 Opinions of the Attorney General* 154  
November 14, 2008

\* \* \* \* \*

### PUBLIC DEFENDER

#### CRIMINAL PROCEDURE – PUBLIC INFORMATION ACT – WHETHER A STATE’S ATTORNEY OR OTHER STATE AGENCY MAY CHARGE A FEE TO THE PUBLIC DEFENDER FOR PROVIDING DISCOVERY OR OTHER MATERIALS IN CONNECTION WITH A CRIMINAL CASE

**Question:** May a State’s Attorney or other State agency charge the Office of the Public Defender “processing” or other fees for producing discovery in cases involving indigent defendants?

**Answer:** A State’s Attorney or other State agency may not charge a criminal defendant for the cost of providing access to, or copies of, written discovery provided pursuant to the Maryland Rules. An agency may charge for copying discovery materials as an accommodation to a defendant when the rules do not require that the party making discovery provide a

copy. In addition, an agency may charge for providing materials outside the discovery process pursuant to the Public Information Act.

To the extent that a State’s Attorney or other State agency may charge fees, the Office of the Public Defender is not necessarily entitled to a waiver of those fees. It is true that the State has a constitutional obligation to cover the reasonable expenses associated with the defense of an indigent person – such as a client of the Public Defender. However, that obligation, like the obligation to provide counsel for such defendants, may be satisfied through the payment of those costs from the resources of the Office of the Public Defender, which is itself a State entity.

*93 Opinions of the Attorney General* 138  
October 3, 2008

\* \* \* \* \*

### RETIREMENT SYSTEMS

#### WHETHER LAW REQUIRING RETIREMENT SYSTEM TO DIVEST INTERESTS IN COMPANIES DOING BUSINESS IN IRAN OR SUDAN MAY BE IMPLEMENTED CONSISTENT WITH BOARD OF TRUSTEES’ FIDUCIARY DUTIES

A 2008 law passed by the General Assembly (“Divestiture Law”) required the State Retirement & Pension System (“SRPS”) to consider a possible divestiture of investments in companies that do business in Iran or Sudan.

**Question 1:** To what extent do the provisions of the Divestiture Law conflict with the fiduciary responsibilities of the Trustees and other SRPS fiduciaries?

**Answer:** The Divestiture Law does not conflict with the fiduciary duties of the Trustees and other SRPS fiduciaries. In particular, that law specifically provides that it does not require the Board of Trustees to take divestment action unless the Board determines, in good faith, that such action is consistent with its other fiduciary duties.

Moreover, divestment of interests in companies doing business in Iran or Sudan can be accomplished consistent with the SRPS's other longstanding fiduciary responsibilities if:

- The System receives fair market value for the interests divested.
- The costs of divestment are *de minimis* as compared to total fund assets.
- Substitute investments are available that will yield competitive returns at a comparable level of risk.
- The fiduciaries exercise their discretion regarding the timing and manner of divestment so that they are able to avoid imprudent transactions.
- The fiduciaries otherwise act in accordance with the duties of loyalty and prudence – *i.e.*, ascertain relevant facts, investigate alternatives, obtain appropriate expert analysis, diversify appropriately, and act for the benefit of the beneficiaries.

Finally, because the Divestiture Law is one of the laws governing the SRPS, the Trustees have a fiduciary duty to implement that law.

**Question 2:** What, if any, liability would the Trustees and other SRPS fiduciaries have if compliance with the Divestiture Law impedes investment performance? To what extent do the immunity provisions of the Divestiture Law, the indemnification provisions of the State Pension Law, and the general immunities enjoyed by State officials and employees protect the SRPS's fiduciaries if they act in good faith in carrying out the Divestiture Law?

**Answer:** The Divestiture Law itself provides that the fiduciaries of the SRPS are not liable for actions taken or decisions made in good faith to carry out the Divestiture Law. That immunity would cover claims related to investment performance. In addition, in the absence of a finding of gross negligence or willful misconduct, the State Pension Law provides for indemnification of attorney's fees, judgments, fines, and other expenses reasonably incurred by a SRPS fiduciary with respect to any investigation or proceeding related to the individual's service on behalf of SRPS. The indemnification provisions

would cover actions taken by SRPS fiduciaries in good faith to carry out the Divestiture Law.

*93 Opinions of the Attorney General 168*  
December 23, 2008

\* \* \* \* \*

## TOBACCO REGULATION

### BALTIMORE CITY – WHETHER BALTIMORE CITY HEALTH CODE REGULATION CONCERNING SALES OF CHEAP CIGARS IS PREEMPTED BY STATE LAW

**Question:** Would a proposed Baltimore City regulation prohibiting the sale of cigars in packages of less than five be preempted by State law?

**Answer:** The proposed regulation is not preempted by State law.

*93 Opinions of the Attorney General 149*  
October 8, 2008

\* \* \* \* \*

---

---

## ADVICE LETTERS

### ALCOHOLIC BEVERAGES – LICENSES

**Question:** Do police officers have authority to supplement the work of liquor inspectors and do they have authority to issue on-site citations?

**Answer:** Yes. The State Alcoholic Beverages Law imposes a duty on police officers to enforce its provisions. Police have authority to issue criminal citations and to file complaints with the Liquor Board to initiate a licensing action.

*Letter to*  
**Stephanie Rawlings-Blake**  
*President, Baltimore City Council*  
December 8, 2008

\* \* \* \* \*

### CLEAN INDOOR AIR ACT – VOLUNTEER FIRE COMPANIES

**Question:** The Clean Indoor Air Act provides that a person may not smoke in an indoor area open to the public or in an indoor place of employment. Is the Clinton Volunteer Fire Department subject to the State Clean Indoor Air Act?

**Answer:** Yes. So long as the fire department permits members of the public into its building by invitation, it is an indoor area “open to the public” and is subject to the Clean Indoor Air Act.

*Letter to  
Senator Thomas V. Mike Miller, Jr.  
October 24, 2008*

\* \* \* \* \*

#### **CRITICAL AREAS PROTECTION PROGRAM – PROPERTY TRANSFER**

**Question:** Would a transfer of a portion of an owner’s property to the owner and a member of the owner’s immediate family as tenants in common qualify as a bona fide intrafamily property transfer permitted by the Chesapeake Bay and Atlantic Coastal Bays Critical Area Protection Program?

**Answer:** Yes. The conveyance would qualify as a bona fide intrafamily transfer under the Program and would be permitted if it met the Program’s other requirements.

*Letter to  
Delegate Michael E. Busch  
Speaker of the House  
December 4, 2008*

\* \* \* \* \*

#### **EDUCATION PUBLIC SCHOOLS – BUDGET AND MANAGEMENT – DEPARTMENT OF INFORMATION TECHNOLOGY**

**Question:** Are the Montgomery County Public Schools (“MCPS”) subject to the Maryland Funding Accountability and Transparency Act of 2008 (“2008 Act”), and if not, could State or local legislation impose similar obligations on MCPS?

**Answer:** The 2008 Act does not apply to MCPS. State legislation would be necessary to impose similar obligations on MCPS.

*Letter to  
Senator Jamie Raskin  
Delegate Alfred C. Carr, Jr.  
November 3, 2008*

\* \* \* \* \*

#### **MINIMUM WAGE – EMPLOYEE HEALTH INSURANCE**

Under a legislative proposal currently known as “Fair Share II,” the State of Maryland would create a two-tiered minimum wage law providing Maryland employers two options to pay certain amounts for their employees’ qualified health insurance coverage.

**Question:** Would this proposal be preempted by the federal Employment Retirement Income Security Act (ERISA) or violate any applicable State law?

**Answer:** If carefully calibrated to present a “fair option” for employers, the Fair Share II proposal, as currently drafted, would not be preempted by ERISA and would not violate any other law.

*Letter to  
Senator Paul G. Pinsky  
December 9, 2008*

\* \* \* \* \*

#### **MUNICIPALITIES – EMINENT DOMAIN**

The Town of Leonardtown raised several questions regarding its authority to take certain actions in connection with a waterfront revitalization project.

**Question 1:** Can a municipality condemn property for economic development purposes?

**Answer:** Yes.

**Question 2:** If so, what are the ramifications for the future use of the property? Can the property be sold or leased?

**Answer:** So long as the taking is for a valid public purpose, the property may be sold or leased if it will result in a benefit to the public. This includes a sale or lease to a private party. However, before entering into such a transaction, the Town may wish to consider including certain covenants to ensure that any private use is consistent with the Town’s goals for the property.

**Question 3:** Can the municipality build on the property and generate its own business/income?

**Answer:** Yes, but even when a municipality is engaged in proprietary functions, there must be a public purpose. Furthermore, the Town would need to identify appropriate authority to impose charges in connection with any enterprise.

**Question 4:** Can a municipality condemn riparian rights?

**Answer:** Yes. A municipality’s condemnation authority under Article 23A, §2(b)(37) extends not only to interests in land, but to “property of every kind.”

**Question 5:** What must the Town do to exercise its power of eminent domain?

**Answer:** The type of ordinance required depends in part upon what authority under Article 23A the Town relies. For example, in some cases it may be

necessary to adopt an authorizing ordinance specific to each property to be acquired.

*Letter to  
**The Honorable J. Harry Norris**  
Mayor and Commissioners of Leonardtown  
December 2, 2008*

\*\*\*\*\*

**RETIREMENT SYSTEMS  
LAW ENFORCEMENT OFFICERS –  
FIRE MARSHAL**

**Question 1:** Are employees of the Worcester County Fire Marshal eligible to participate in the Law Enforcement Officers Pension System (“LEOPS”)?

**Answer:** Yes, if the County participates in that System. The employees of the Worcester County Fire Marshal who have been certified as law enforcement officers by the Maryland Police Training Commission are eligible to become members of LEOPS, if they otherwise satisfy the conditions of the State Retirement Law.

**Question 2:** If they are eligible to participate, does the County have to include that individual?

**Answer:** If an eligible individual elects to become a member of LEOPS, the County must include them.

**Questions 3:** If the County has to include them, do they have to be included immediately or can it wait until the next budget year, starting in July 2009?

**Answer:** Law enforcement officers who were current employees as of July 1, 2008, who elect to become members of LEOPS would be considered members as of July 1, 2008. The timing and amount of the County’s payment with respect to LEOPS are determined under the State Retirement Law.

*Letter to  
**John E. Bloxom, Esquire**  
County Attorney for Worcester County  
October 2, 2008*

\*\*\*\*\*

**SPEED CAMERAS – MONTGOMERY COUNTY**

Uncodified provisions of the law authorizing speed cameras in Montgomery County direct how revenues generated by the program may be used. See Chapter 15, §2, Laws of Maryland 2006.

**Question:** Does the law permit a portion of the revenue generated by speed cameras to be used to finance ambulance service in the County?

**Answer:** No. Such use of funds would not meet all the requirements of the law. Operation of an ambulance service is a “public safety” expenditure as required by the law. However, the law further specifies that allowed public safety expenditure “shall be used to supplement and may not supplant existing local expenditures for the same purpose.” Because Montgomery County currently finances ambulance services in the County, use of speed camera revenues to finance ambulance service would supplant existing spending. Therefore, such use of revenues would not be permitted.

*Letter to  
**Delegate William A. Bronrott**  
November 26, 2008*

\*\*\*\*\*

**TEACHERS PENSION AND  
RETIREMENT – COUNTIES**

**Question:** Currently, under SPP §21-304, the State pays the full contribution for the Teacher’s Pension and Retirement Systems. Does the General Assembly have the authority to require the counties to pay all or part of the retirement contributions for the Teachers’ Pension and Retirement Systems?

**Answer:** Yes.

*Letter to  
**Senator Richard S. Madaleno, Jr.**  
October 24, 2008*

\*\*\*\*\*

The Opinions, Advice and Legislative Quarterly News summarizes formal opinions of the Attorney General. Also included are letters of advice by Assistant Attorneys General that have been issued on the understanding that they may be made public. (Other advice provided by the OAG may be confidential under the attorney-client privilege.)

Copies of opinions may be obtained from the Attorney General’s website at [www.oag.state.md.us/opinions/index.htm](http://www.oag.state.md.us/opinions/index.htm). There is a direct link to each advice letter at the end of its description in the electronic version of this newsletter. You may also obtain a print copy of any item by contacting Kathy Izdebski by phone, (410) 576-6327, or e-mail, [opinions@oag.state.md.us](mailto:opinions@oag.state.md.us).