

LEGAL ETHICS OPINION 1538

CONFIDENCES AND SECRETS –
CONFLICT OF INTEREST – PERSONAL
INTEREST AFFECTING
REPRESENTATION - FORMER CLIENT:
COMMONWEALTH'S ATTORNEY
MAKING DETERMINATION ON
COMMUNITY SERVICES BOARD
GRIEVANCE AFTER
COMMONWEALTH'S ATTORNEY HAS
SERVED ON BOARD.

You have presented a hypothetical situation in which an elected Commonwealth's Attorney ("Prosecutor") has been petitioned pursuant to Virginia Code § 2.1-114.5:1(D)(4)(d) /1 to determine whether a decision of an employee grievance panel hearing a matter related to the termination of a local government agency employee is appropriate as consistent with written policy. You indicate that the panel voted 2 to 1 to reinstate the chief financial officer of a governmental agency finding that, although there may have been deficiencies in the previously highly-rated grievant's level of job training and performance, there was compelling evidence to believe that his termination was retaliatory because he and other employees were "whistle blowers". You comment that it appears that the statute in question requires that the prosecutor serve in a quasi-judicial capacity.

You further indicate that, ten years earlier, when the prosecutor was in private practice, he served as a member of the agency's governing board and worked closely with the grievant in a board-ordered secret audit of agency accounts which led to the resignation of the agency's former executive director. The present grievant acted as a whistle blower in that situation on the board's assurance that he would be protected from retaliation. You advise that, at the conclusion of that case and of the prosecutor's service as a director, the prosecutor and others recommended that the agency financial officer report directly to the board rather than to the executive director of the agency. This change was never made.

After the inception of the current dispute, the grievant and two other grievants who had been high-ranking employees of the agency protested to the prosecutor that a member of the grievance panel chosen by them and the agency-named panel member to serve as a third member of the panel was not an appropriate person, since he had served as board chairman of the agency during some of the period touched on in the grievances, and was himself head of an agency which had been employed by the grievant's agency. As a result of this protest, the prosecutor recommended to the former chairman that he decline to serve and he did not so serve. In addition, the grievant was in part accused of harassment of a co-worker in these proceedings. With regard to that allegation, the prosecutor was approached by that co-worker about initiating criminal prosecution of the grievant and others for "stalking". The prosecutor felt prosecution was not merited under the circumstances.

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Finally, you advise that the prosecutor has had close contact with this case as it developed, and has been a friend to several of the persons involved, including the current chairman of the agency board.

You have asked the committee to opine whether, under the facts of the inquiry, it is proper for the prosecutor to serve in this quasi-judicial capacity in light of his professional obligations and his past close dealings with the parties and the agency involved.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:5-101(A) which in pertinent part precludes a lawyer from accepting employment if the exercise of his professional judgment on behalf of his client may be affected by his own personal interest, except with the consent of his client after full and adequate disclosure under the circumstances. In addition, DR:5-105(D), prohibiting a lawyer from subsequently representing a client adverse to a former client (unless the former client consents after full disclosure), and DR:4-101, requiring a lawyer to preserve the confidences and secrets of a client, would be applicable should the prosecutor's prior association with the local government agency have risen to the level of an attorney-client relationship.

The committee notes that your inquiry deals with "quasi-judicial" responsibilities of the prosecutor. Although it is beyond the purview of the committee to interpret the Canons of Judicial Conduct, your attention is directed to Canon 2(B) which exhorts a judge not to "allow his family, social or other relationships to influence his judicial conduct or judgment".

The committee has previously opined that it would be improper for an attorney to represent clients in administrative hearings when the attorney or other attorneys in his firm, on other occasions, sits as a hearing officer in matters involving the same agency. See LE Op. 617, LE Op. 826. In addition, the committee has previously opined that, in certain circumstances, it would be improper for an attorney to serve on a board or committee of a local government agency while simultaneously representing clients in matters related to the operations of that board or committee. See LE Op. 409 (service on school board's handicapped education committee while representing handicapped children in special education matters) and LE Op. 1195 (service on housing board while attorney's firm represents clients in eviction actions brought by the housing authority).

In the facts you present, the committee believes that a conflict of interest as contemplated by the language of DR:5-101(A) has arisen as the cumulative effect of the prosecutor's prior service as a director on the agency board, his close personal relationship with several of the persons involved, and his previous involvement in the events leading to the current grievance. Furthermore, since the statute under which the prosecutor's services are requested does not establish any attorney-client relationship, the committee is of the opinion that it would be improper for the prosecutor to serve in a quasi-judicial capacity hearing the grievant's appeal to the panel decision since the

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requisite client consent cannot be obtained. Finally, the committee believes that a heightened sensitivity to public perception regarding the duties of a public official requires that a substitute prosecutor be appointed. See LE Op. 1241, LE Op. 1243, LE Op. 1250.