

LEVENTHAL, MULLANEY & BLINKOFF, LLP
ATTORNEYS AT LAW
15 REMSEN AVENUE
ROSLYN, NEW YORK 11576
TELEPHONE: (516) 484-5440
FACSIMILE: (516) 484-2710

TO: Hon. Jared Kasschau, County Attorney
FROM: Steven G. Leventhal
DATE: February 26, 2018
RE: Advisory Opinion: [REDACTED]

Questions Presented

Whether a prohibited conflict of interest would arise if an administrative aide employed in the Nassau County [REDACTED] were to serve as Executive Director of a voluntary not-for-profit corporation that receives funding from the County.

Whether the Office of Housing may process a voucher for disbursement to the corporation of funds for the payment of the cost of events and services for veterans (exclusive of staff salaries) for the period ended December 31, 2018 pursuant to a County contract entered into before the administrative aide was appointed as a County employee.

Whether the corporation may receive funding from the 2018 NYCB Nassau County 5K/10K Veterans Run Marathon administered by the Nassau County Veterans Services Agency, now that administrative aide is employed by the County.

Conclusions

A prohibited conflict of interest would not arise if an administrative aide (the "Administrative Aide") employed in the Nassau County [REDACTED] were to serve as Executive Director of a voluntary not-for-profit corporation (the "Corporation") that receives funding from the County, provided he receives no compensation from the not-for-profit corporation other than reimbursement for expenses actually and necessarily incurred in the performance of his duties.

If the Administrative Aide receives reimbursement from the Corporation for expenses, he must report the reimbursements to the Board of Ethics on an annual statement of financial disclosure.

The Administrative Aide must:

- Recuse himself from acting in his official capacity on any matter affecting the Corporation.

The Administrative Aide may not:

- Make personal use nor disclose any confidential County information;
- Communicate on behalf of the Corporation with any County board, agency, officer or employee, unless authorized to do so by the Board of Ethics; or
- Work on any matter on behalf of the Corporation that he has participated in his capacity as a County employee.

The Office of Housing may process a voucher for disbursement to the Corporation of funds for the payment of the cost of events and services for veterans (exclusive of staff salaries) for the period ended December 31, 2018 pursuant to a County contract entered into before the Administrative Aide was appointed as a County employee.

The Corporation may receive funding from the 2018 NYCB Nassau County 5K/10K Veterans Run Marathon administered by the Nassau County Veterans Services Agency, now that Administrative Aide is employed by the County employee.

Governing Authority

Article 18 of the New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees) provides at Section 801 (Conflicts of interest prohibited), that:

Except as provided in section eight hundred two of this chapter, ... no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above....

N.Y. GML Section 802 (Exceptions) provides, in pertinent part, that:

The provisions of section eight hundred one of this chapter shall not apply to:

1.... f. A contract with a membership corporation or other voluntary nonprofit corporation or association....;

... h. A contract in which a municipal officer or employee has an interest if such contract was entered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of any such contract;...

Nassau County Charter section 2218 (the “Code of Ethics”) subdivision 2 (Conflicts of Interest Prohibited) provides, in pertinent part, that:

Except as provided in subdivision twelve of this section, no County officer or employee whether paid or unpaid, shall:

...Have a financial interest, except by operation of law, in any business or professional dealings with the County or any agency thereof or a financial interest in any entity which has business or professional dealings with the County....

Code of Ethics subdivision 12(c) (Exemptions) provides, in pertinent part, that:

Notwithstanding the foregoing provisions of this section, a County officer or employee may be an officer, director or trustee of a membership corporation or other nonprofit corporation or association..., or hold a policy making position with such entity, and participate in all activities and transactions of such entity, provided he or she receives no financial remuneration either directly or indirectly from such entity other than expenses actually and necessarily incurred in the performance of his or her duties.

Any officer or employee receiving such remuneration for expenses shall, for each year in which such remuneration is received, be required to complete and file the financial disclosure statement promulgated pursuant to the provisions of §22.4.3 of the Administrative Code.

A County officer or employee serving a membership corporation or other nonprofit corporation or association pursuant to this paragraph, other than in an ex-officio capacity, shall recuse himself or herself from acting, in his or her capacity as County officer or employee, on any matters directly affecting such entity, shall not use any confidential County information nor, without the approval of the Board [of Ethics], communicate with any County Board, agency, officer or employee in furtherance of the interests of such corporation or entity nor work on any case, proceeding, application or particular matter which such person has been directly concerned with, personally participated in, or actively considered as a County officer or employee.

Discussion

The inquiring Administrative Aide is employed full time at [REDACTED]. His employment commenced in January 2018.

[REDACTED]

The Administrative Aide is an honorably discharged US Marine, service connected disabled veteran, who is the recipient of the Nassau County Distinguished Service Veterans Award. He is the Founder and Executive Director of [REDACTED], a domestic not-for-profit corporation, incorporated in [REDACTED]. According to the information posted on its website, the Corporation provides assistance to Long Island veterans and military families in need of urgent rental assistance, urgent utility bill payments, transportation fees, employment, referrals, food, clothing, and other necessary expenses. The Corporation has a long standing relationship with the Nassau County Veterans Services Agency.

[REDACTED] is engaged in business dealings with the County in connection with two matters. First, the Corporation has a contract with the County to provide veterans services. It is the recipient of a \$45,000 grant for this purpose under the Federal Housing and Urban Development (HUD) Community Development Block grant program (CDBG). CDBG regulations permit funding directly to sub-recipients that undertake eligible activities. Funding recipients are selected by the Nassau County Office of Housing and Community Development. A contract for the period through August 31, 2019 was previously approved. The Corporation will soon process vouchers for disbursement of the funds for the payment of staff salaries, and of the cost of events and services for veterans.

Secondly, the Corporation partners with the Nassau County Veterans Services Agency for the NYCB Nassau County 5K/10K Veterans Run. [REDACTED] Plans are underway for the 2018 Veterans Run. This relationship is not memorialized in a written agreement. Nevertheless, for the purpose of this analysis, it is deemed to be a contractual relationship.

Analysis

A three step analysis was used to determine whether, under the circumstance presented, a prohibited conflict of interest would arise if an administrative aide employed in the Nassau County [REDACTED] were to serve as Executive Director of a voluntary not-for-profit corporation that receives funding from the County. The following questions were considered: (i) whether the secondary employment, under the circumstances presented, would violate Article 18 of the New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the secondary employment, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether

the secondary employment, under the circumstances presented, would create a prohibited appearance of impropriety under common law principles.

1. N.Y. Gen. Mun. Law Article 18

Article 18 of the New York General Municipal Law establishes minimum standards of conduct for the officers and employees of all municipalities within the State of New York, other than New York City.¹ All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.² Article 18 does not regulate secondary employment.

However, N.Y. GML Section 801 prohibits a County officer or employee from having an interest in a County contract if the interested officer or employee has the power or duty, either individually or as a member of a board or commission, to approve the contract, authorize payments of bills rendered pursuant to the contract, audit those bills, or hire or fire anyone who has the power to do any of those things.

Here, the first two elements are met: there is a County contract and the Administrative Aide, as Executive Director of the Corporation, has an interest in the contract. However, the third element is absent. The Administrative Aide has no power or duty to control the contract.

Furthermore, even if all three elements were present here, two statutory exceptions would apply. The statute excludes municipal contracts with not-for profit corporations (the contract to provide veterans services under the CDBG program, and any prospective agreement with the County related to the 2018 Veterans Marathon), and grandfathers contracts that were entered into before the municipal officer or employee was elected or appointed (the contract to provide veterans services under the CDBG program).

Accordingly, the secondary employment, under the circumstances presented, would not violate Article 18 of the New York General Municipal Law.

2. Nassau County Code of Ethics

The Nassau County Code of Ethics prohibits a County officer or employee from having a financial interest in business or professional dealings with the County. However, the prohibition excludes interests in not-for-profit corporations doing business with the County, provided the interested officer or employee derives no compensation from the not-for-profit corporation other than reimbursement for expenses actually and necessarily incurred.

¹ N.Y. Gen. Mun. Law §800(4).

² Volunteer firefighters and civil defense volunteers, other than fire chiefs and assistant fire chiefs, are not “officers” or “employees” within the meaning of GML Article 18. N.Y. Gen. Mun. Law §800(5).

The Nassau County Code of Ethics also prohibits a County officer or employee from engaging in secondary employment activities that conflict with his or her official duties.

Long established common law principles and opinions of the New York Comptroller and Attorney General offer useful guidance in determining whether a position of outside employment would create a conflict with the official duties of a municipal office or employee.

In the absence of a specific constitutional or statutory prohibition, one person may simultaneously hold a public office and a position of outside employment unless they are incompatible.³ The leading case on compatibility of offices is People ex rel. Ryan v. Green.⁴ In that case, the Court of Appeals held that two offices are incompatible if one is subordinate to the other (i.e., you cannot be your own boss) or if there is an inherent inconsistency between the two offices. Although the Ryan case involved two public offices, the same principle applies to the compatibility of a public office and a position of employment. To determine whether two positions are inherently inconsistent, it is necessary to analyze their respective duties. An obvious example of two offices with inconsistent duties is those of auditor and director of finance. *Id.*

Here, there is no inherent incompatibility between the duties of an administrative aide employed at [REDACTED], and those of the executive director of a not-for-profit corporation organized to assist veterans and their families. While there is no inherent incompatibility between the respective duties of the two positions, conflicts of interest may nevertheless arise from time to time. The Administrative Aide must recuse himself from acting in his official capacity on any matter affecting the Corporation. He may not disclose or make unauthorized personal or confidential County information; communicate on behalf of the Corporation with any County board, agency, officer or employee, unless authorized to do so by the Board of Ethics; or work on any matter on behalf of the Corporation in which he has participated in his capacity as a County employee.

If the Administrative Aide finds that he is frequently and inevitably required to recuse himself, that may be an indication that the position of secondary employment has become incompatible with his official duties and he should, under those circumstances, seek a further advisory opinion.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the secondary employment would not violate the Nassau County Code of Ethics.

3. Common Law Principles

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an

³ 1982 N.Y. Op. Atty. Gen (Inf.) 148.

⁴ 58 N.Y. 295 (1874).

implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.⁵

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter, but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official will tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in or influenced decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or partiality. A prohibited appearance of impropriety should not be found where a conflict is speculative or immaterial.

Here, having concluded for the reasons set forth above that the secondary employment does not involve duties that are inherently incompatible with the official duties of the Administrative Aide, it would not be reasonable to conclude that the secondary employment would tend to undermine public confidence in County government or create a prohibited appearance of impropriety under common law principles, particularly in view of the conditions imposed by the Code of Ethics and incorporated in this opinion.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the secondary employment would not create a prohibited appearance of impropriety under common law principles.

⁵ See, e.g., Matter of Zagoreos v. Conklin, 109 A.D.2d 281 (2d Dept. 1985); Matter of Tuxedo Conservation & Taxpayer Assn. v. Town. Board of Town of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979).