

Appendix K - Nassau County Board of Ethics Advisory Opinions

The following 17 Board of Ethics Advisory Opinions are consolidated into Appendix K, in the order shown below, as a separate attachment to the report.

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THE RECIPIENT HAS AUTHORIZED PUBLICATION OF THIS ADVISORY OPINION

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OPINION NO. 101-13

The Commissioner of the Department of Public Works ("DPW") requests an advisory opinion as to whether a prohibited conflict of interest arose by virtue of her familial relationship with the owner of an engineering firm that entered into a contract with DPW to provide professional services in the recovery efforts following the devastation of Super Storm Sandy, where the Commissioner did not expressly disclose the familial relationship to the Rules Committee of the County Legislature.

GOVERNING AUTHORITY

New York General Municipal Law section 800 (Definitions), provides, in pertinent part, that:

3. "Interest" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.

New York General Municipal Law section 801 (Conflicts of interest prohibited), provides, in pertinent part, that:

Except as provided in section eight hundred two of this chapter, (1) 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....

New York General Municipal Law section 803 (Disclosure of interest), provides, in pertinent part, that:

1. Any municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.

New York General Municipal Law section 809 (Disclosure in certain applications), provides, in pertinent part, that:

1. Every application, petition or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license or permit, pursuant to the provisions of any ordinance, local law, rule or regulation constituting the zoning and planning regulations of a municipality shall state the name, residence and the nature and extent of the interest of any state officer or any officer or employee of such municipality or of a municipality of which such municipality is a part, in the person, partnership or association making such application, petition or request (hereinafter called the applicant) to the extent known to such applicant.

2. For the purpose of this section an officer or employee shall be deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them (a) is the applicant, or (b) is an officer, director, partner or employee of the applicant, or (c) legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant....

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 1 (Definitions), in pertinent part, that:

"*Financial Interest*" shall mean (i) a foreseeable direct or indirect pecuniary or material

benefit accruing to a County officer or employee as a result of a financial or business dealing with the County; (ii) an ownership interest in any entity, except a publicly-traded corporation of which the County officer or employee owns less than five percent of the outstanding stock; or (iii) a position as officer, director, trustee, or partner of an entity. For the purpose of this section, the financial interests of an officer or employee's spouse, domestic partner, minor children and dependents shall be deemed financial interests of such officer or employee; provided, however, that a County officer or employee shall not be deemed to have a financial or other private interest in the employment, by the County, of his or her spouse, domestic partner, minor child or dependent.

"Ministerial act" shall mean an administrative act, including the issuance of a license, permit or other permission by the County, which is carried out in a prescribed manner and which does not involve substantial personal discretion.

"Relative" shall mean mother, father, son, daughter, sister, brother, stepmother, stepfather, stepson, stepdaughter, aunt, uncle, cousins in the first and second degree of consanguinity, domestic partner, mother-in-law, father-in-law, sister-in-law, brother-in-law and grandparents.

The Nassau County Code of Ethics provides at subdivision 2 (Conflicts of Interest

Prohibited), in pertinent part, that:

a. Except as provided in subdivision twelve of this section, no County officer or employee whether paid or unpaid, shall: (1) 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.

The Nassau County Code of Ethics provides at subdivision 4 (Recusal and Disclosure of

Interest), in pertinent part, that:

a. A County officer or employee, whether paid or unpaid, shall promptly recuse himself or herself from acting on any matter before the County in which he or she has (i) any direct or indirect financial or (ii) any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgments or take discretionary actions in the best interests of the County.

b. Any County officer or employee who recuses himself or herself pursuant to paragraph (a) of this subdivision shall be required to disclose such recusal in writing to the Board and the nature of his or her private interest.

The Nassau County Code of Ethics provides at subdivision 7 (Hiring and supervision of

relatives), in pertinent part, that:

No officer or employee of the County shall hire or induce others to hire a relative of such officer or employee nor shall any officer or employee of the County directly supervise or evaluate the work of any relative employed by the County except a) as required by the Civil Service Law or rules promulgated thereunder; b) pursuant to a supervisory arrangement that began prior to the effective date of this subdivision; or c) with the written approval of the Board of Ethics....

The Nassau County Code of Ethics provides at subdivision 9 (Pecuniary interest of officers, employees or agents in execution of contracts prohibited), in pertinent part, that:

No officer, employee, or agent of the County, whether he or she be such by election, appointment or contract shall directly or indirectly, either on his or her own behalf or for another person or corporation, make or participate in making, including the preparation of specifications or plans for, any contract or agreement in which said officer or employee or agent is interested directly or indirectly as principal or agent or as an officer or owner of stock in a corporation, nor shall an officer, employee or agent in any way influence the action of any other officer, employee or agent in relation to the making, or fail to recuse him or herself from the discussion and approval process of any County contract or agreement in which he or she has such an interest....

STATEMENTS AND MATERIALS CONSIDERED

In its review and consideration of this inquiry, the Board of Ethics reviewed the following statements and materials:

- Letter of Commissioner Shila Shah-Gavnoudias, dated April 26, 2013;
- Supplemental Letter of Commissioner Shila Shah-Gavnoudias, dated April 29, 2013;
- Letter of Minority Leader Kevan Abrahams, dated April 26, 2013;
- Letter of Legislator Wayne H. Wink, Jr. dated May 2, 2013;
- DPW Routing slip, CSM Engineering, P.C., annotated E-220-12;
- Comptroller Approval Form, CSM Engineering, P.C., dated November 15, 2012;
- Contract for Services, CSM Engineering, P.C., dated November 14, 2012;
- Rules Resolution No. [no number]-2012, CSM Engineering, P.C.;
- Transcript of Rules Committee meeting, November 20, 2012;
- DPW Consultant's, Contractor's and Vendor's Disclosure Stmtnt., dated April 25, 2013;
- Csmengineering.com, home page, "about" link, and "management" link;
- CSM Engineering Nassau County Project list, 2005 through 2017;
- DPW Inter-Departmental Memo, Project no. S35110M, dated June 30, 2009;
- DPW Inter-Departmental Memo, Project no. SB117, dated July 13, 2009;
- DPW Inter-Departmental Memo, Project no. S33990M, dated September 30, 2009;
- DPW Inter-Departmental Memo, Project no. S35110M, dated June 30, 2009;
- DPW Inter-Departmental Memo, RFP no. PW H670008C, dated June 4, 2010;
- DPW Inter- Dept. Memo, Cap. Proj. no. 63456, dated Sept. 6, 2011 (rev. Oct. 24, 2011);

- *Nassau awards contract to sister of agency chief*, Newsday, April 25, 2013;
- *Nassau pols request records from public works commission*, Newsday, April 26, 2013;
- *Nass. Publ. works chief should have recused herself from deal*, Newsday, April 27, 2013;
- *Nass. Commiss., after contract to her sister, seeks ethics ruling*, Newsday, May 1, 2013;

In addition, the Board of Ethics interviewed the Commissioner, Assistant to the Commissioner Kenneth Arnold, and Deputy County Attorney Jane M. Houdek. The Commissioner and her staff, and the assigned Deputy County Attorney were forthcoming, cooperative and credible.

STATEMENT OF FACTS

The Department of Public Works has exclusive charge and supervision of the design, construction, repair, maintenance and cleaning of all streets and bridges under the jurisdiction of the County. It has charge and supervision of the design and construction of County buildings, parks and grounds, drains and drainage structures, and of such sewers, sewage disposal plants, water system and other structures in the nature of Public Works as the County may construct. The Commissioner and her staff, assisted by support personnel, initiate plans, formulate policy and procedures, provide overall direction, coordinate operations and furnish a variety of support services to a department consisting of over 800 employees working within three subdivisions identified as: Administration, Engineering, and Operations.

The Commissioner was appointed as Commissioner of DPW on January 1, 2010. She resides in Nassau County with husband and three children. The Commissioner is a Leed Accredited, Licensed Professional Engineer, and holds a Master's Degree in Management and a Bachelor's Degree in Civil Engineering.

Super Storm Sandy struck the County and surrounding areas on Monday, October 29, 2012, with devastating impacts in many parts of the County. The storm was accompanied by a tidal surge that overcame vital electrical and mechanical components at the Bay Park Sewage Treatment Plant (the "Bay Park STP"), and left the facility without power and completely

inoperative. As a result, more than half a million residents faced an imminent health emergency. It was imperative that DPW immediately mobilize qualified contractors and consultants to restore power to the plant, effect emergency and temporary repairs, restore the plant to operation, and provide ongoing inspection services.

The Bay Park STP was constructed in 1949, at a capacity of 30 million gallons per day (MGD) and was upgraded in the 1980's and 1990's to a dry weather design capacity of 70 MGD. It serves about 550,000 residents in southwestern Nassau County. The plant is located adjacent to East Rockaway Channel and currently treats an average of approximately 50 MGD of wastewater that it discharges, through an outfall into Reynolds Channel. With a total of more than 50 buildings and structures, the Bay Park STP provides preliminary, primary and secondary treatment with sludge processing and disposal.

The Bay Park STP was among the many facilities in Nassau County that were severely affected by flooding, power loss, and high winds resulting from Super Storm Sandy. An eight to ten foot tidal surge submerged much of the Bay Park STP's electrical and mechanical equipment under several feet of seawater, rendering it inoperable. The efforts to return the Bay Park STP to service were complicated by the large quantity of mechanical and electrical equipment at the plant that was damaged. This equipment is necessary for the effective and continuous treatment of wastewater. The Department immediately mobilized County employees and a team of engineers and contractors to begin assessing the damage, triage critical needs, and restore basic plant functions. Plant flow was restored on November 1, 2012 at approximately 6:00 a.m.; influent and effluent pumping commenced relieving the collection system and eventually ceasing all street flooding resulting from the surcharged sewer system.

Despite daily challenges from the disaster, the Department achieved full permit

compliance by the middle of December. The plant will be maintained with emergency systems in place as well as all required backup system to maintain treatment and permit compliance until permanent repairs are implemented

Damage assessments for each process area and structure, detailing the condition of the mechanical, structural, and electrical equipment in each building immediately following Super Storm Sandy, were prepared. All work conducted at the Bay Park STP to return the plant to service, including temporary and permanent repairs, was documented in work orders and supporting documentation.

Super Storm Sandy also produced an unprecedented amount of debris, including felled trees, tree limbs, construction and demolition materials, and rubbish. DPW mobilized qualified contractors and consultants to meet the challenges of accomplishing and monitoring the clean-up efforts. DPW was also called upon to assist local municipalities in their own clean-up efforts.

To meet the extraordinary challenges produced by Super Storm Sandy, DPW initiated and amended numerous agreements with contractors and consultants. All available, qualified contractors were engaged in DPW's response to the emergency. Approximately 18 firms were engaged in these efforts, including CSM Engineering, P.C. ("CSM").

CSM is a professional engineering and construction firm specializing in water, wastewater, transportation and civil engineering projects. CSM was founded in 1999 and is based in Nassau County. CSM is a New York State certified Minority Owned Business Enterprise and Disadvantaged Business Enterprise. The CSM staff consists of electrical, mechanical and civil engineers, and certified construction inspectors.

In the years 2005 through 2011, CSM worked as a sub-consultant on twelve County projects, three of which are ongoing. CSM has also served as a sub-consultant for the New York

State Department of Transportation, the New York City Department of Environmental Protection, the MTA Bridges and Tunnels (Triborough Bridge and Tunnel Authority), the New York City Department of Design and Construction, the New York State Transit Authority, the Suffolk County Department of Public Works, Stony Brook University, the Town of North Hempstead, the Town of Hempstead, the Town of Oyster Bay, the Town of Babylon, the Incorporated Village of Island Park, and Bay Park City.

It is common knowledge among DPW staff and in the engineering industry that CSM is owned and managed by the Commissioner's sister, Carolyn Shah Moehringer. Neither the Commissioner nor her husband now have, or ever had any ownership interest in CSM. In the years 2004 and 2005 (i.e. approximately five years prior to her appointment as Commissioner of DPW), the Commissioner performed limited engineering services for CSM, amounting to 70 hours of work in the first instance and 46 hours of work in the second. The Commissioner has had no other direct or indirect financial relationship or business dealings with CSM.

At the time of Super Storm Sandy, CSM was already engaged as a sub-consultant on two County projects. The Commissioner did not participate on either of the technical review committees that ranked and selected the prime consultants who later selected CSM as a sub-consultant on the projects.

In the first of these two projects (Capital Project No. 3B117, Contract No. S3B117M – Influent Pumps), CSM placed ...[an employee] at the Bay Park Sewage Treatment Plant in 2009. When “all hands” were required for emergency storm recovery efforts, DPW Superintendent of Building Operations Michael Fasano reassigned ...[the CSM employee] to the emergency recovery efforts.

In the second project (Contract No. H670008CH, On-Call Nassau County

Highway/Bridges), CSM placed ...[an employee] as an inspector for DPW “requirements” work in 2010. When “all hands” were required for emergency storm recovery efforts, DPW Superintendent of Highway Construction Richard Iadevaio reassigned ...[the CSM employee] to perform emergency debris removal inspections. At Mr. Iadevaio’s request, CSM added ...[two other employees] as additional emergency debris removal inspectors.

The Commissioner received periodic reports on the status of all DPW projects, but did not exercise direct oversight in connection with either of the two projects on which CSM was engaged as a sub-consultant. The primary managers of the projects were the Assistant to the Commissioner, Kenneth Arnold, Superintendent of Building Operations Michael Fasano, and Superintendent of Highway Construction Richard Iadavaio.

DPW mobilized to secure the services of all available qualified contractors and consultants to meet the emergency, including CSM which had served as a sub-consultant in the aftermath of Hurricane Irene. Mr. Arnold, well aware that CSM was owned and managed by the Commissioner’s sister, chose the more transparent alternative of preparing a contract directly between DPW and CSM, rather than continuing CSM’s status as a sub-consultant.

Contracts were required immediately so that the contractors and consultants would receive the payments they needed to retain the necessary personnel, as the need for qualified professionals was far greater than the supply. The scope of work, contracts, and supporting documents for eighteen professional service contracts was prepared by Assistant to the Commissioner, Kenneth Arnold, who worked twelve hours a day to accomplish the urgent task. The DPW communications systems were inoperable yet, the extraordinary efforts of Mr. Arnold and the DPW staff met these and other equally daunting storm related emergencies.

Under these pressures Mr. Arnold inadvertently omitted the usual DPW Consultant’s,

packets that he prepared for the CSM contract and for another of the contracts. The one page Disclosure Form (1) sets forth the firm's name, address, tax identification number and type of business, (2) indicates the names and addresses of all principals and owners of the firm, and (3) identifies all companies affiliated with the firm. The Disclosure Form does not inquire as to the existence of any familial relationship between a firm principal or owner of the firm and any County officer or employee.

Although the packets were submitted to the Rules Committee at least seventeen days before meeting at which they were approved, Mr. Arnold was not advised by the Rules Committee staff that any of the document packets were incomplete. Mr. Arnold learned for the first time that the disclosure form was omitted from the CSM document packet on April 25, 2013, when the oversight was reported by Newsday.

The inadvertently omitted Disclosure Form, which was actually submitted on April 25, 2013, identifies Carolyn Shah Moehringer as a principal and owner of the firm. However, this information was prominently indicated on the contract and accompanying documents that were before the Rules Committee when it approved the contract. Ms. Shah Moehringer was a signatory to the executed contract submitted to the Rules Committee, and was listed, by her maiden name of Carolyn Shah, as the contact person for CSM on the Routing Slip that accompanied the contract to the Rules Committee. The Disclosure Form, had it been submitted to the Rules Committee on November 20, 2012, would not have revealed that Ms. Shah Moehringer is the Commissioner's sister.

The Commissioner signed the DPW Routing Slip, an intra-County transmittal form, indicating by her signature that the contract had been approved for entry in the Nassau Integrated Finance System. Assistant to the Commissioner Kenneth Arnold also signed the DPW Routing

Slip, indicating that the contract had been approved for funding by the DPW Capital Fund.

In addition, the Commissioner signed the Comptroller Approval Form for Personal, Professional or Human Services Contracts, indicating that the contract was a renewal, extension or amendment of an existing contract (referring to the 2009 contract with the prime consultant pursuant to which CSM was serving as a sub-consultant) and that the original contract was entered into after a request for proposals and ranking of the responding consultants.

The Commissioner and Assistant to the Commissioner Kenneth Arnold appeared before the Rules Committee on November 20, 2012 to present the sixteen contracts for engineering firms participating in the emergency response to Super Storm Sandy, and the continuing efforts of DPW to remedy the damage and collect the debris resulting from the storm. At the meeting, Legislator Jacobs inquired whether the contracts were eligible for FEMA funding, and the Commissioner responded that they were. The Commissioner acknowledged that certain modifications noted by various Legislators would be made. The Commissioner was not asked by the Rules Committee to comment, and did not comment on the CSM contract. The Rules Committee unanimously approved the sixteen contracts, as modified.

DISCUSSION

In considering this inquiry, the Board employed a three step analysis to determine whether a prohibited conflict of interest arose by virtue of her familial relationship with the owner of an engineering firm that entered into a contract with DPW to provide professional services in the recovery efforts following the devastation of Super Storm Sandy, where the Commissioner did not expressly disclose the familial relationship to the Rules Committee of the County Legislature.

The Board considered: (i) whether the Commissioner's conduct violated New York

General Municipal Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the Commissioner's conduct violated the Nassau County Code of Ethics, and (iii) whether the Commissioner's conduct created a prohibited appearance of impropriety under common law principles.

Article 18 of the New York General Municipal Law ("GML") establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City (*see*, N.Y. Gen. Mun. Law sec. 800(4)).

GML section 801 prohibits a municipal officer or employee from having an "interest" in certain contracts with the municipality. The statute is violated if all of the following three elements are established. The first element is the existence of a contract with the municipality. The term "contract" is broadly defined to include claims against the municipality. The second element is a benefit accruing to an officer or employee of the municipality as a result of the contract. The third element is the power or duty of the officer or employee to negotiate, prepare, authorize or approve the contract, either individually or as a member of a voting body.¹

For purposes of GML section 801, the term "interest" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. A municipal officer or employee is be deemed to have an interest in the contract of her spouse, minor children and dependents². A municipal officer or employee is not deemed to have an interest in the contracts of her non-dependent siblings or the firms that they own and manage.

¹ It is immaterial whether the officer or employee actually negotiates, prepares, authorizes or approves the contract; she need only have the power or duty to do so. Therefore, recusal will not cure a violation of GML section 801. *See*, 2000 N.Y. St. Comp. 2; 1987 St. Comp. 75; 1983 N.Y. St. Comp. 180; 1981 N.Y. St. Comp. 116; 1977 N.Y. St. Comp. 714.

² A municipal officer or employee is not deemed to have an interest in a family member's contract of employment with the municipality. *See*, GML section 800.

Here, the Commissioner had no interest in the contract between DPW and CSM and, thus, the Commissioner's conduct did not violate GML section 801. Further, because the Commissioner had no interest in the contract between DPW and CSM, there was no interest for the Commissioner to disclose under GML section 803. Thus, the Commissioner's conduct did not violate GML section 803.

By contrast, GML section 809 requires applicants in land use applications to disclose the identity of any municipal officer or employee that has an interest in the applicant. For the purpose of GML section 809, an officer or employee is deemed to have an interest in the applicant when she, her spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them is the applicant, is an officer, director, partner or employee of the applicant, or is a stockholder or member of the corporate applicant. GML section 809 imposes this disclosure requirement in land use applications on the applicant; it does not impose the disclosure requirement on the municipal officer or employee.

Here, however, CSM was not an applicant in a land use application. Rather, CSM was a professional engineering firm engaged to provide professional engineering services. Thus, the GML section 809 did not apply. Neither the conduct of the Commissioner nor the conduct of CSM violated GML section 809.

Local municipalities are authorized by GML Article 18 to adopt their own codes of ethics.³ A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18; it may prohibit conduct that Article 18 would allow.⁴

Nassau County Code of Ethics, subdivision 2(a)(1), prohibits a County officer or employee from having a financial interest in any business or professional dealings with the

³ See, Gen. Mun. Law §806.

⁴ See, Davies, *Enacting a Local Ethics Law – Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4-8.

County, or from having a financial interest in any entity which has business or professional dealings with the County.

For purposes of the Nassau Code of Ethics, the term “*Financial Interest*” means (i) a foreseeable direct or indirect pecuniary or material benefit accruing to a County officer or employee as a result of a financial or business dealing with the County; (ii) an ownership interest in any entity, except a publicly-traded corporation of which the County officer or employee owns less than five percent of the outstanding stock; or (iii) a position as officer, director, trustee, or partner of an entity.

As in the case of GML section 800, for the purpose of the Nassau County Code of Ethics, the financial interests of an officer or employee’s spouse, domestic partner, minor children and dependents shall be deemed financial interests of such officer or employee; provided, however, that a County officer or employee shall not be deemed to have a financial or other private interest in the employment, by the County, of his or her spouse, domestic partner, minor child or dependent. A municipal officer or employee is not deemed to have an interest in the contracts of her non-dependent siblings or the firms that they own and manage.⁵

As previously stated, here the Commissioner had no interest in the contract between DPW and CSM and, thus, the Commissioner’s conduct did not violate Nassau County Code of Ethics, subdivision 2(a)(1).

Nassau County Code of Ethics, subdivision 4, requires a County officer or employee to recuse herself from acting on any matter before the County in which she has any direct or indirect financial interest, or in which she has “any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgments or take

⁵ Compare Nassau County Code of Ethics, subdivision 7, which prohibits a County officer or employee from “hiring” a relative for County employment. There, siblings are among the regulated class of relatives.

discretionary actions in the best interests of the County”, and to file a written notice of such recusal with the Board of Ethics.

In 1991, the former New York State Ethics Commission considered a similar set of facts, and concluded that:

...[T]he Commission hereby renders its opinion⁶ that it is not a violation of Public Officers Law §74⁷ for an agency to award a no-bid consulting contract to a firm owned and operated by the sibling of a senior manager of that agency, designated as a policy-maker, as long as (1) the manager has no interest, financial or otherwise, in the sibling’s firm; (2) the manager’s regular job duties do not encompass the selection of the consultant or the review or oversight of the consultant contract or, if the job duties involved encompass such involvement, the manager is completely screened out from the consideration and appointment of such a firm or contract; (3) the manager makes full disclosure to [the State agency’s] staff of her relationship to the firm’s principals and recuses herself from any role in consideration or approval of a contract to the firm; and (4) should the firm be selected for a contract, the manager’s supervisor approves the selection of the contract on its merits.

In rendering this opinion, the State Ethics Commission concluded that:

... absent circumstances beyond that of a sibling relationship, the fact that the [employee] has no interest in and receives no compensation from the firm, she plays no role in the selection process where this firm is a contender and in light of the [agency’s] contracting guidelines in place, no reasonable basis can be found for the impression that the [employee] would use her official position to obtain a contract for her brother or that she conducted herself in violation of her trust.

Similarly here, the Commissioner has no interest in and receives no compensation from CSM, and she played no role in the selection process where this firm was a contender. In light of the fact that, in the years 2005 through 2011, CSM worked as a sub-consultant on twelve County projects, three of which are ongoing, and in light of the fact that CSM was engaged here in an

⁶ Advisory Opinion No. 91-21.

⁷ Public Officers Law section 74(2) provides that “[n]o officer or employee of a state agency... should have any interest, business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties on the public interest.” Public Officers Law section 72(3) provides, in pertinent part, that “...f. [a]n officer or a state agency... should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person”...[; and] h. [a]n officer or employee of a state agency, ... should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.”

emergency, when all available qualified engineering firms were similarly engaged, there is no reasonable basis for the impression that the Commissioner used her official position to obtain a contract for her sister's firm, or that she conducted herself in violation of her trust.

The same circumstances, the long history of professional dealings between DPW and CSM dating well before the Commissioner's appointment, the emergency, and the open call for contractors and consultants, eliminates any reasonable possibility that the DPW staff involved in the selection of CSM was influenced by the Commissioner's familial relationship with the firm's owner and manager.

Simply stated, the Commissioner satisfied all prongs of the test employed by the State Ethics Commission in analyzing a case that presented similar facts: (1) the Commissioner had no interest, financial or otherwise, in CSM; (2) the Commissioner was not a part of the technical review committee that approved the selection of CSM; (3) the Commissioner's familial relationship to the CSM's owner and manager was fully disclosed to the DPW staff and the Commissioner recused herself from any role in consideration or approval of a contract to CSM; and (4) the selection of CSM was approved by appropriate DPW personnel on its merits.

Under these circumstances, and for the foregoing reasons, the Commissioner did not have "any direct or indirect financial or... other private interest in the contract between DPW and CSM that a reasonable person would perceive to compromise... her ability to make impartial judgments or take discretionary actions in the best interests of the County." That being the case, there was no requirement under subdivision 4 of the Nassau County Code of Ethics that the Commissioner recuse herself, or file a written notice of recusal with the Board of Ethics.⁸ The Commissioner's conduct did not violate Nassau County Code of Ethics, subdivision 4.

⁸ Had there been a requirement that the Commissioner file a notice of recusal with the Board of Ethics, her request for an advisory opinion herein would have satisfied that requirement.

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 implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated. *See, Zagoreos v. Conklin*, 109 A.D. 2d 281 (2d Dept. 1985); *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D. 2d 320 (2d Dept. 1979).

Courts have vacated municipal actions where decision-making officials with conflicts of interest failed to recuse themselves. A disqualifying interest is one that is personal or private. It is not an interest that an official shares with all other citizens or property owners. A prohibited appearance of impropriety will not be found where the improper appearances are speculative or trivial. Not every personal or private relationship between a municipal officer or employee and parties interested in a matter before the municipality will give rise to a disqualifying conflict of interest. For example, a mere social relationship between an official and an applicant will not give rise to a disqualifying conflict of interest where the official will derive no benefit from the approval of the application.⁹

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in 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.¹⁰

Here, the Commissioner did not participate in the selection of CSM as a DPW consultant.

⁹ *Ahearn v. Zoning Bd. of Appeals*, 158 A.D.2d 801(3d Dept. 1990), lv. den. 76 N.Y.2d 706 (1990).

¹⁰ For a more comprehensive discussion of common law conflicts of interest, see Leventhal, *How to Analyze an Ethics Problem: Recognizing Common Law Conflicts of Interest*, NYSBA/MLRC Municipal Lawyer, Spring 2011, Vol. 25, No. 2, pp. 11-15.

CSM was selected by a technical review committee that did not include the Commissioner. The Commissioner receives periodic reports on the status of all DPW projects, but did not exercise direct oversight in connection with either of the two projects on which CSM was engaged as a sub-consultant.

There is an important distinction to be made between the subjective, discretionary decision to select a consultant for employment on a DPW project, and the administrative function of processing a contract through the County bureaucracy. In an advisory opinion issued in 1996¹¹, the New York Attorney General advised that a Town Supervisor must recuse herself from taking actions that affect the terms of her son's employment as a sergeant in the Town Police Department, but was not required to recuse herself from taking other actions that affected the Department, including deliberating on other aspects of the Police Department budget. The Attorney General distinguished between matters in which an official has a personal interest, and those in which an official has an interest that is governmental.

Here, the Commissioner's involvement in the professional dealings between CSM and the County was limited to the administrative acts of signing the Routing Slip, an intra-County transmittal form, indicating by her signature that the contract had been approved for entry in the Nassau Integrated Finance System; signing the Comptroller Approval Form for Personal, Professional or Human Services Contracts, an informational form indicating that the contract was a renewal, extension or amendment of an existing contract and that the original contract was entered into after a request for proposals and ranking of the responding consultants; and appearing before the Rules Committee of the County Legislature when sixteen contracts for engineering firms participating in the emergency response to Super Storm Sandy, and the continuing efforts of DPW to remedy the damage and collect the debris resulting from the storm

¹¹ Informal Opinion No. 96-17

were submitted to the Rules Committee for approval. The Commissioner was not asked by the Rules Committee to comment, and did not comment on the CSM contract.

The Commissioner did not take decisive actions in connection with the CSM contract. Rather, she facilitated the administrative processing of this contract, along with sixteen others. The limited acts by the Commissioner were ministerial in nature as they related to the CSM contract (i.e., administrative acts carried out in a prescribed manner and which did not involve substantial personal discretion), particularly in view of the fact that, she did not participate in the selection of CSM, in the years 2005 through 2011, CSM worked as a sub-consultant on twelve County projects, three of which are ongoing, and in light of the fact that CSM was engaged here in an emergency, when all available qualified engineering firms were similarly engaged.

In summary, the salient facts here are that: (1) the Commissioner has no financial interest in CSM; (2) the Commissioner did not participate in the selection of CSM as a DPW consultant; (3) CSM has performed consulting services for the County since 2005, long before the Commissioner was appointed; (4) CSM was currently providing consulting services to DPW at the time Super Storm Sandy struck; (5) it is common knowledge among DPW staff and in the engineering industry that CSM is owned and managed by the Commissioner's sister; (6) all available, qualified engineering firms were engaged to meet the extraordinary storm recovery challenges; and (7) the Commissioner does not exercise direct oversight in connection with the projects on which CSM is employed.

Because there is no reasonable basis for the impression that the Commissioner used her official position to obtain a contract for her sister's firm, or that she conducted herself in violation of her trust, there is no reason to conclude that her ministerial acts would tend to undermine public confidence in County government. Accordingly, the Commissioner's actions

did not give rise to a prohibited appearance of impropriety under common law principals.

The Commissioner has informed the Board of Ethics that she will continue to recuse herself from the selection process in projects involving proposals by CSM. To avoid even unwarranted criticism, the Board recommends that the Commissioner also refrain from engaging in the ministerial acts of signing the routing slip or the Comptroller Approval Form, and appearing before the Rules Committee in connection with any future contracts between DPW and CSM.

The Commissioner and staff of DPW should be commended for their extraordinary efforts in meeting the unprecedented challenges resulting from the natural catastrophe of Super Storm Sandy.

CONCLUSION

Based on the facts presented, a prohibited conflict of interest did not arise by virtue of the Commissioner's familial relationship with the owner of an engineering firm that entered into a contract with DPW to provide professional services in the recovery efforts following the devastation of Super Storm Sandy, where the Commissioner did not expressly disclose the familial relationship to the Rules Committee of the County Legislature.

The foregoing constitutes the opinion of the Board.¹²

Dated: Mineola, New York
May 10, 2013



Owen Smith, Chair

¹² Board member Albert A. D'Agostino recused himself, and did not participate in the discussions, deliberations or vote in this matter.

EDWARD P. MANGANO
COUNTY EXECUTIVE



**COUNTY OF NASSAU
BOARD OF ETHICS**

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CHAIR

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COUNSEL

ADVISORY OPINION NO. 101-17

A [REDACTED] who is also Chief Executive Officer and part owner of a [REDACTED] company, requests an advisory opinion as to whether a prohibited conflict of interest would exist if the [REDACTED] company were engaged in various hypothetical transactions.

GOVERNING AUTHORITY

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

- a. ... [N]o County officer or employee whether paid or unpaid shall...
- (1) Have a financial interest... 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....
 - (3) Accept or retain other employment, engage in any business transactions, or make or retain any investments, have any financial interest, or engage in other activities that directly or indirectly create a conflict with his or her official duties....

The Nassau County Code of Ethics provides at subdivision 4 (Recusal and Disclosure of Interest), in pertinent part, that:

- a. A County officer or employee, whether paid or unpaid, shall promptly recuse himself or herself from acting on any matter before the County in which he or she has (i)

any direct or indirect financial or (ii) any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgment or take discretionary actions in the best interest of the County.

b. Any County officer or employee who recuses himself or herself pursuant to paragraph (a) of this subdivision shall be required to disclose such recusal in writing to the Board [of Ethics] and the nature of his or her private interest...

DISCUSSION

[REDACTED] company is an [REDACTED]
[REDACTED]
[REDACTED]

In considering a request for ethics advice, the Board generally employs a three step analysis to determine whether a prohibited conflict of interest would exist if a County officer or employee were to engage in particular proposed conduct that is sufficiently described. The Board considers: (i) whether the proposed conduct would violate New York General Municipal Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed conduct would violate the Nassau County Code of Ethics, and (iii) whether the proposed conduct would create a prohibited appearance of impropriety under common law principles.

In order to properly analyze an ethics inquiry, the Board of Ethics must have the ability to apply these laws and principles to a particular set of facts. The Board of Ethics is unable to render advisory opinions based on hypothetical facts that are not fully developed.

CONCLUSION

The Board of Ethics is available to provide ethics advice to County officers and employees based on a fully developed set of facts. [REDACTED] may renew this request in connection with a particular title transaction or proposed legislative act.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
March , 2017

31st

A handwritten signature in black ink, consisting of a large, stylized 'O' followed by 'S' and 'M', with a horizontal line underneath.

Owen Smith, Chair



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ADVISORY OPINION 101-18

The Chief Contract Officer in the Office of the Nassau County [REDACTED] (the “Chief Contract Officer”) requests an advisory opinion as to:

- Whether a prohibited conflict of interest would arise if the Chief Contract Officer in the Office of the Nassau County [REDACTED] (the “Chief Contract Officer”) were to perform compensated per diem work as an instructor for the Nassau County Vocational Education and Extension Board (“VEEB”), and
- Whether a prohibited conflict of interest would arise if the Chief Contract Officer were to approve the county contract that funds VEEB programs and expenditures, including his compensation as a per diem employee of VEEB.

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...;

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

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

(1) 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 4 (Recusal and Disclosure of Interest), provides, in pertinent part, that:

a. A County officer or employee, whether paid or unpaid, shall promptly recuse himself or herself from acting on any matter before the County in which he or she has (i) any direct or indirect financial or (ii) any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgments or take discretionary actions in the best interest of the County.

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

a. No employee may have any interests or take any action prohibited by subdivisions two through six of this section [the Code of Ethics] without the approval of the Board [of Ethics]....

c. 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 Nassau County Vocational Education and Extension Board (“VEEB”). VEEB is a not-for-profit, quasi-governmental corporation, organized by the Board of Supervisors in 1928 pursuant to New York Education Law Article 23, Section 1101. VEEB is licensed by the New York State Department of Education to conduct courses in occupational skills and related topics. Its operating divisions include a School of Practical Nursing, the Nassau County Emergency Medical Services Academy, a Public Fire Safety Education Division and the Nassau County Fire Service Academy. VEEB is an exempt organization under Section 501(c)(3) of the Internal Revenue Code.

Among his other official duties, the Chief Contract Officer is responsible for approving the contract by which the County provides funding for VEEB programs and expenditures. The Chief Contract Officer wishes to engage in per diem, secondary employment as a VEEB instructor. His compensation as a per diem employee of VEEB, would be funded, in whole or in part, by the County contract.

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether, under the circumstance presented, a prohibited conflict of interest would arise if the Chief Contract Officer were to perform compensated per diem work as an instructor for VEEB, and if the Chief Contract Officer were to approve the county contract that funds VEEB programs and expenditures, including his compensation as a per diem employee of VEEB. The Board 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; and (iv) whether the Chief Contract Officer's approval of the contract, under the circumstances presented, would violate Article 18 of the New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), (v) whether the Chief Contract Officer's approval of the contract, under the circumstances presented, would violate the Nassau County Code of Ethics, and (vi) whether the Chief Contract Officer's approval of the contract, 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

N.Y. Gen. Mun. Law §805-a-1(c) prohibits a county officer or employee from receiving any compensation for services to be rendered in connection with a matter pending before his or her own agency. Here, VEEB is licensed by the State Educational Department to provide educational services. These independently licensed activities are not matters that are pending before the Office of the Nassau County [REDACTED] as contemplated by N.Y. Gen. Mun. Law §805-a-1(c). Accordingly, the secondary employment, under the circumstances presented, would not violate Article 18 of the New York General Municipal Law.

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. Recusal does not cure a violation of GML Section 801. A contract

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).

willfully entered into in violation of Section 801 is void. A knowing and willful violation of Section 801 is a class A misdemeanor.

Although this would otherwise be a contract prohibited by New York General Municipal Law Section 801 (i.e., a county contract in which an officer or employee with the authority to approve the contract will derive a benefit from the contract), because VEEB is a not-for-profit organization, the contract would fall within the exception to Section 801 for contracts with not-for-profit organizations (see GML Section 802(f)). Therefore, the contract would not be prohibited by GML 801.

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. The Code of Ethics requires recusal in such cases. However, the Board of Ethics has the authority to waive the provisions of Subdivision 2. In considering whether to grant a waiver, the Board of Ethics will consider, among any other relevant factors, whether a waiver would advance the best interests of the County, and whether a waiver would have the effect of undermining public confidence in County government.

Here, the educational services provided by VEEB promote public health and welfare by enhancing the occupational skills, and opening career paths, for practitioners in the vital fields of practical nursing, emergency medical services and fire safety.

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 the Chief Contract Officer in the Office of the Nassau County [REDACTED] and those of an instructor for VEEB. While there is no inherent incompatibility between the respective duties of the two positions,

³ 1982 N.Y. Op. Atty. Gen (Inf.) 148.

⁴ 58 N.Y. 295 (1874).

conflicts of interest may nevertheless arise from time to time. In the absence of a waiver from the Board of Ethics, the Chief Contract Officer must recuse himself from acting in his official capacity on any matter affecting VEEB. He may not disclose or make unauthorized personal use of confidential County information; communicate on behalf of VEEB 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 VEEB in which he has participated in his capacity as a County employee.

If the Chief Contract Officer 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.

Nassau County Code of Ethics Subdivision 9 prohibits an officer or employee from “either on his own behalf or for another person or corporation” participating in the making of a county contract in which the officer or employee has an interest “as principal or agent or as an officer of or owner of stock in a corporation.” The Board of Ethics does not have the authority to waive the provisions of Subdivision 9. Here, since the Chief Contract Officer would be acting on behalf of the County when he approves the County contract, and since he does not have an interest of the type described, this prohibition would not apply.

Code of Ethics Subdivision 9 continues “... nor shall an officer, employee or agent... fail to recuse him or herself from the discussion and approval process of any County contract or agreement in which he or she has such an interest”. The phrase “such an interest” relates back to an interest “as principal or agent or as an officer of or owner of stock in a corporation.” Conspicuously absent from the lists of prohibited interests is an interest as an employee of the corporation. The question then becomes whether the Chief Contract Officer’s per diem employment would make him an “agent” of VEEB.

Following the Restatement definition, "Agency" is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. Agency requires the contemporaneous existence of a principal; there is no agency unless one is acting for and on behalf of another. An agent is a person who consents to a fiduciary relationship resulting from another's consent to allow the person to act on the other's behalf and subject to the other's control. The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority in the transaction of some business or the management of some affairs on the principal's account. The agent is a substitute or deputy appointed by the principal with power to do the things which the principal may or can do and primarily to bring about business relations between the principal and third persons. It is generally understood that a "manager" is an agent.

NY Jur 2d, Agency and Independent Contractors, Section 1.

Here, absent facts and circumstances not presented, the Chief Contract Officer’s per diem employment as a VEEB instructor would not create an agency and, therefore, Code of Ethics Subdivision 9 would not apply.

Based on common law principles discussed in the section that follows, the Chief Contract Officer's approval of the County contract that will fund VEEB programs and expenditures would advance the best interests of the County and the health and welfare of its residents. For this reason, and because he is compensated, secondary employment as a VEEB instructor will be pursuant to a waiver granted by this Board based on its consideration of the best interests of the County and the effect, if any, on confidence in County government, a reasonable person would not conclude that his secondary employment as a VEEB instructor would compromise his ability to make impartial judgments or take discretionary actions in the best interest of the County.

For the foregoing reasons, the Chief Contract Officer's request for a waiver of the prohibition set forth at Code of Ethics Subdivision 2 is granted to the extent that the Chief Contract Officer may approve the County contract that will fund VEEB programs and expenditures. Accordingly, the Chief Contract Officer's approval of the contract that would provide funding for VEEB programs 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 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 could 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 would not involve duties that are inherently incompatible with the official duties of the Chief Contract Officer, and that the educational services provided by VEEB promote public health and welfare by enhancing the occupational skills, and opening career paths, for practitioners in the vital fields of practical nursing, emergency medical services and fire safety, a reasonable person would not conclude that the Chief Contract Officer's 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

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).

Code of Ethics and incorporated in this opinion.

For the same reasons, the best interests of the County and its residents would be advanced by the continuation of the County's nearly century-long support of VEEB.

Based on the facts presented, and subject to the conditions set forth herein, neither the Chief Contract Officer's secondary employment as a VEEB instructor, nor his approval of the County contract that would provide funding for VEEB programs, would create a prohibited appearance of impropriety under common law principles.

CONCLUSION

Based on the facts presented, a prohibited conflict of interest would not arise if the Chief Contract Officer were to perform compensated per diem work as an instructor for VEEB.

In the absence of a waiver from the Board of Ethics, the Chief Contract Officer must recuse himself from acting in his official capacity on any matter affecting VEEB. He may not disclose or make unauthorized personal use of confidential County information; communicate on behalf of VEEB 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 VEEB in which he has participated in his capacity as a County employee.

The Chief Contract Officer's request for a waiver of the prohibition set forth at Code of Ethics Subdivision 2 is granted to the extent that the Chief Contract Officer may approve the County contact that will fund VEEB programs and expenditures.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
June 29, 2018


Kenneth L. Gartner, Chair

EDWARD P. MANGANO
COUNTY EXECUTIVE



BOARD OF ETHICS

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STEVEN G. LEVENTHAL
COUNSEL

ADVISORY OPINION NO. 105-17

██████████ requests an advisory opinion answering the following questions:

1. How does the Board [of Ethics] determine whether a use of public resources by a County officer or employee, which advances their political interests or activities, violates the Nassau County Code of Ethics? What are the standards, rules or regulations that govern how the Board evaluates such uses of County resources?
2. Would it violate the Nassau County Code of Ethics for an elected County official to use their offices and the resources of the county to send or distribute a partisan mailing or flyer in furtherance of her/his political interest or activities?
3. What standards should guide an elected County official to ensure that taxpayer-funded mailings, or flyers distributed door-to-door by County employees, do not improperly further their political activities in violation of the Nassau County Code of Ethics?
4. To avoid violations of the Nassau County Code of Ethics, under what circumstances should elected officials seek a finding from the Board of Ethics that a taxpayer-funded mailing or flyer, which may benefit the official politically, furthers the interest of the County?
5. If a County official sends a mailing, utilizes County staff, or prepares County-paid flyers for distribution to constituents that improperly furthers their political interest or activities, what sanctions or penalties can the Board of Ethics impose?

GOVERNING AUTHORITY

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 6 (Misuse of County Resources) that:

No officer or employee of the County shall use the resources of the County in furtherance of his or her business, professional or political interests or activities, or in furtherance of the interests or activities of any outside entity other than pursuant to a County contract with such entity, without the approval of the head of his or her agency and the approval of the Board of Ethics upon a finding by the Board that such activity is in furtherance of the interests of the County.

DISCUSSION

- Q. How does the Board [of Ethics] determine whether a use of public resources by a County officer or employee, which advances their political interests or activities, violates the Nassau County Code of Ethics? What are the standards, rules or regulations that govern how the Board evaluates such uses of County resources?
- A. The Board of Ethics interprets applicable laws enacted by the State and County Legislatures, precedents announced by courts of competent jurisdiction, and administrative opinions, and applies those laws and opinions to the facts presented in a particularized inquiry or complaint. In considering a request for ethics advice, the Board generally employs a three step analysis to determine whether a prohibited conflict of interest would exist if a County officer or employee were to engage in a particular proposed conduct that is sufficiently described. The Board considers: (i) whether the proposed conduct would violate New York General Municipal Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed conduct would violate the Nassau County Code of Ethics, and (iii) whether the proposed conduct would create a prohibited appearance of impropriety under common law principles. The Board generally employs the same three step analysis to determine whether an ethics violation has occurred.

Additional guidance may be found in cases interpreting the Gift and Loan Clause of the New York Constitution (Article VIII, Section 1), and in opinions of the Attorney General and State Comptroller, which have consistently held that an incidental private benefit resulting from a municipal expenditure does not result in an unconstitutional gift of public funds if the primary purpose of the expenditure is to advance a public purpose. *See eg.*, Schultz v. Warren Cnty. Bd. of Supervisors, 179 A.D.2d 118 (3d Dept. 1992) (quoting Sun Printing & Pub. Ass'n v. Mayor of City of N.Y., 152 N.Y. 257 (1897); Denihan Enterprises V. O'Dwyer, 302 N.Y. 451 (1951); Op. State Compt. (Inf.) No. 2002-4; Op. State Compt. (Inf.) No. 89-50; Op. State Compt. (Inf.) No. 89-20; Op. State Compt. (Inf.) No. 90-59;

In order to properly analyze an ethics inquiry, the Board of Ethics must have the ability to apply these laws and principles to a particular set of facts. By tethering its interpretations to particular facts, the Board of Ethics avoids unanticipated applications of its opinions and determinations. Accordingly, the Board of Ethics is unable to render advisory opinions based on hypothetical facts that are not fully developed. This is particularly so in connection with your inquiry, as the State's

highest court stated in a recent decision cited in your inquiry that such a determination must be based on a consideration of all of the circumstances: "... [W]e clarify that the same act may be authorized in some cases, but not authorized in others, based on a consideration of all the surrounding circumstances. Evidence of these circumstances may include, among other things, the manner in which the act was undertaken, the governing guidelines, rules, and protocols, as well as the actor's motive." People v. Flanagan, 28 N.Y.3d 644 (2017).

- Q. Would it violate the Nassau County Code of Ethics for an elected County official to use their offices and the resources of the county to send or distribute a partisan mailing or flyer in furtherance of her/his political interest or activities?
- A. As noted above and as cited in your inquiry, the State's highest court has stated that such a determination must be based on a consideration of all of the surrounding circumstances. *See, People v. Flanagan, Id.* Accordingly, applying the principle announced by the New York Court of Appeals in Flanagan, without the ability to evaluate the facts and circumstances of a particular case, the Board of Ethics is unable to answer your question. Of course, you may, if you wish, submit a particular mailing or flyer for review and consideration by the Board of Ethics
- Q. What standards should guide an elected County official to ensure that taxpayer-funded mailings, or flyers distributed door-to-door by County employees, do not improperly further their political activities in violation of the Nassau County Code of Ethics?
- A. County officials should be guided by the Nassau County Code of Ethics, the Plain Language Guide to Government Ethics prepared by the Board of Ethics and distributed to all County officers and employees, and ethics training programs conducted from time to time by the Board's counsel. The Board of Ethics encourages county officers and employees to request advisory opinions whenever they are uncertain of their obligations under the Nassau County Code of Ethics or related authorities. Upon the request of an authorized person, the Board of Ethics will evaluate the content of a proposed mailing or flyer in light of the applicable state and local laws.
- Q. To avoid violations of the Nassau County Code of Ethics, under what circumstances should elected officials seek a finding from the Board of Ethics that a taxpayer-funded mailing or flyer, which may benefit the official politically, furthers the interest of the County?
- A. The primary purpose of the County ethics program is to assist honest officers and employees to avoid unintended ethics violations before they occur. This is accomplished through ethics training and through ethics advice that is clear and specific because it is based on a particular set of facts. The Board of Ethics encourages county officers and employees to request advisory opinions whenever they are uncertain of their obligations under the Nassau County Code of Ethics or

related authorities. Upon the request of an authorized person, the Board of Ethics will evaluate the content of a proposed mailing or flyer in light of the applicable state and local laws.

Q. If a County official sends a mailing, utilizes County staff, or prepares County-paid flyers for distribution to constituents that improperly furthers their political interest or activities, what sanctions or penalties can the Board of Ethics impose?

A. Nassau County Code of Ethics, subdivision 11 (Penalties) provides that:

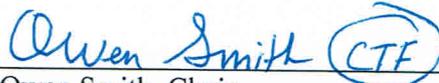
“A violation of any of the provisions of this section shall constitute cause for forfeiture of pay, suspension, imposition of fines of up to \$10,000 per violation or removal from office or employment, as may be imposed by the Board [of Ethics], after providing an opportunity to be heard in a proceeding conducted in accordance with due process.... Nothing in this section shall limit the imposition of any other penalties, fines and/or sanctions which may be provided by law or prevent the County Executive or other appropriate supervisory officer from taking disciplinary action based on the findings of a separate inquiry or investigation.”

CONCLUSION

The Board of Ethics is available to provide ethics advice to County officers and employees based on a fully developed set of facts. [REDACTED] may renew this inquiry in connection with a particular taxpayer-funded mailing or flyer.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
October 16, 2017


Owen Smith, Chair



KENNETH L. GARTNER
CHAIR

JARED A. KASSCHAU
COUNTY ATTORNEY

MICHAEL PERNICK
MEMBER

STEVEN G. LEVENTHAL
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**COUNTY OF NASSAU
BOARD OF ETHICS**
One West Street
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ADVISORY OPINION 110-18

The Commissioner (the "Commissioner") of the [REDACTED] (the "[REDACTED]") requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to also serve as an elected [REDACTED] (the "[REDACTED]").

GOVERNING AUTHORITY

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

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

... (3) Accept or retain other employment, engage in any business transactions, or make or retain any investments, have any financial interest, or engage in other activities that directly or indirectly create a conflict with his or her official duties....

b. A County officer or employee shall not appear before any agency or officer of the County except on behalf of the County, provided, however, that for County officers or employees serving in an unpaid capacity, this prohibition shall apply only to appearances before the agency served by such officer or employee.

Code of Ethics subdivision 4 (Recusal and Disclosure of Interest), provides, in pertinent part, that:

a. A County officer or employee, whether paid or unpaid, shall promptly recuse himself or herself from acting on any matter before the County in which he or she has (i) any direct or indirect financial or (ii) any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgments or take discretionary actions in the best interest of the County.

Code of Ethics subdivision 5 (Disclosure of Confidential Information), provides that:

No officer or employee of the County, whether paid or unpaid shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County

employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such information to advance the financial or other private interest of himself or herself or others.

Code of Ethics subdivision 6 (Misuse of County resources), provides that:

No officer or employee of the County shall use the resources of the County in furtherance of his or her business, professional or political interests or activities, or in the furtherance of the interests or activities of any outside entity other than pursuant to a County contract with such entity, without the approval of the head of his or her agency and the approval of the Board of Ethics upon a finding by the Board that such activity is in furtherance of the interests of the County.

DISCUSSION

The Nassau County [REDACTED] is responsible for [REDACTED]

[REDACTED]

Commissioner of [REDACTED] as the [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] was established pursuant to [REDACTED]

[REDACTED]

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether, under the circumstance presented, a prohibited conflict of interest would arise if [REDACTED] were to also serve as an [REDACTED]. The Board considered: (i) whether holding the dual offices, 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 holding the dual offices, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether holding the dual offices, 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 However, GML Article 18 does not regulate dual office holding. Accordingly, under the circumstances presented, the dual office holding contemplated here would not violate Article 18 of the New York General Municipal Law

2. *Nassau County Code of Ethics*

The Nassau County Code of Ethics prohibit 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 [REDACTED]

While there is no inherent incompatibility between the respective duties of the two positions, conflicts of interest may nevertheless arise from time to time. In the absence of a waiver from the Board of Ethics, [REDACTED] must recuse himself from acting in his official capacity on any matter affecting [REDACTED]

[REDACTED] He may not disclose or make unauthorized personal use of confidential County information; communicate on behalf of the [REDACTED] 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 [REDACTED] in which he has participated in his capacity as a County employee.

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).

³ 1982 N.Y. Op. Atty. Gen (Inf.) 148.

⁴ 58 N.Y. 295 (1874).

If the Commissioner 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.

In his service as an [REDACTED] the Commissioner must refrain from making unauthorized use or disclosure of confidential County information. In the event the Commissioner is uncertain whether particular information is confidential within the meaning of the Code of Ethics, he may seek the advice of this Board. Further, in his service on behalf of the [REDACTED] the Commissioner must refrain from misuse of County resources including, without limitation, compensated County time.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the dual office holding contemplated here 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 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 could 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 serving as Commissioner of a [REDACTED] would not involve duties that are inherently incompatible with the official duties of the Commissioner [REDACTED] the Commissioner's concurrent service as an [REDACTED] 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.

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 Tuxedo, 69 A.D.2d 320 (2d Dept. 1979).

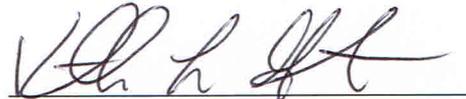
For the same reasons, the best interests of the County and its residents would be advanced by the Commissioner's concurrent service as an [REDACTED]. Accordingly, based on the facts presented, and subject to the conditions set forth herein, the concurrent service of the Commissioner [REDACTED] as an [REDACTED] within the County would not create a prohibited appearance of impropriety under common law principles.

CONCLUSION

Based on the facts presented, a prohibited conflict of interest would not arise if the Commissioner of the [REDACTED] were to also serve as an [REDACTED].

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
June 20, 2018


Kenneth L. Gartner, Chair



KENNETH L. GARTNER
CHAIR

JARED A. KASSCHAU
COUNTY ATTORNEY

MICHAEL PERNICK
MEMBER

STEVEN G. LEVENTHAL
COUNSEL

**COUNTY OF NASSAU
BOARD OF ETHICS**

One West Street
Mineola, New York 11501-4820
516-571-3056

ADVISORY OPINION 111-18

The [redacted] Commissioner [redacted] (the "Commissioner") requests an advisory opinion as to whether a prohibited conflict of interest would arise if her [relative] [redacted] were to be employed by the Nassau County [redacted] to perform services in connection with the [redacted]

GOVERNING AUTHORITY

Nassau County Charter section 2218 (the "Code of Ethics") subdivision 7 (Hiring and supervision of relatives) provides, in pertinent part, that:

No officer or employee of the County shall hire or induce others to hire a relative of such officer or employee nor shall any officer or employee of the County directly supervise or evaluate the work of any relative employed by the County except: a) as required by the Civil Service Law or rules promulgated thereunder; b) pursuant to a supervisory arrangement that began prior to the effective date of this subdivision; or c) with the written approval of the Board of Ethics....

The "Code of Ethics" subdivision 1 (Definitions) provides, in pertinent part, that:

"Relative" shall mean mother, father, son, daughter, sister, brother, stepmother, stepfather, stepson, stepdaughter, aunt, uncle, cousins in the first and second degree of consanguinity, domestic partner, mother-in-law, father-in-law, sister-in-law, brother-in-law and grandparents.

DISCUSSION

In her inquiry to the Board of Ethics, the Commissioner stated that

[relative]

My [redacted]... has applied for a position with the Nassau County [redacted] through the Supplemental Staffing Contract. This [redacted] position involves work with their [redacted] is highly technical in nature, and has been vacant for some time due to the lack of identifying a qualified candidate. [My [redacted] [relative] has recently retired from the [redacted] as an Assistant Commissioner and has over 30 years of experience in [redacted]

I am not currently involved in any matters related to the [REDACTED]
[REDACTED] If [My [REDACTED] ... is selected for this position, and if by chance a matter does
come to my attention that is related to the [REDACTED] I will
recuse myself on any such matters.

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether, under the circumstance presented, a prohibited conflict of interest would arise if the brother of the Commissioner [REDACTED] were to be employed by the Nassau County [REDACTED] to perform services in connection with the [REDACTED]. The Board considered: (i) whether the proposed 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 proposed employment, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether the proposed 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. GML Article 18 does not prohibit nepotism. To the extent the employment of a relative is addressed by GML Article 18, it is to exclude the employment contract of a spouse from those in which an officer or employee is deemed to have a prohibited interest.² Accordingly, under the circumstances presented, the proposed employment of the Commissioner's [REDACTED] by [REDACTED] would not violate Article 18 of the New York General Municipal Law [relative]

2. Nassau County Code of Ethics

The Nassau County Code of Ethics prohibit a County officer or employee from participating directly or indirectly in the decision to employ a relative, as that term is defined by the Code of Ethics, or from directly supervising or evaluating a relative employed by the County, except as required by the Civil Service Law or with the approval of the Board of Ethics.³

Here, the Commissioner has no involvement in matters involving the [REDACTED] and states that she will recuse herself in any such matter that may arise. Further, the Commissioner must refrain from influencing [REDACTED] in its decision with respect to her [REDACTED] application for employment.
[relative's]

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the proposed employment of the Commissioner's [REDACTED] by [REDACTED] would not violate the Nassau County Code of Ethics. [relative]

¹ N.Y. Gen. Mun. Law §800(4).

² See N.Y. Gen. Mun. Law §800(3), 801.

³ The Code of Ethics also "grandfathers" supervisory arrangements that preexisted the effective date of the Code of Ethics, January 1, 1996.

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 implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.⁴

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 could 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.

[relative]

Here, the Commissioner's [redacted] seeks employment in a department other than the one in which the Commissioner is employed. The Commissioner has no involvement in matters involving the [redacted] will recuse herself in any such matter that may arise, and is prohibited from influencing [redacted] in its decision with respect to her [relative] [redacted] application for employment. Under these circumstances, the proposed employment of the Commissioner's brother could not reasonably be expected to undermine public confidence in County government.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the proposed employment of the Commissioner's [redacted] by [redacted] would not create a prohibited appearance of impropriety under common law principles.

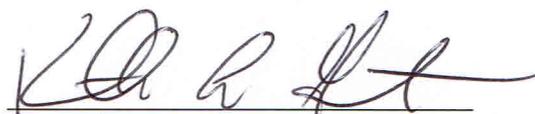
CONCLUSION

Based on the facts presented, and subject to the conditions set forth herein, a prohibited conflict of interest would not arise if the [redacted] of the Commissioner [redacted] were to be employed by the Nassau County [redacted] to perform services in connection with the [redacted]

⁴ 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).

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
June 29, 2018

A handwritten signature in black ink, appearing to read 'K. L. Gartner', written over a horizontal line.

Kenneth L. Gartner, Chair



KENNETH L. GARTNER
CHAIR

JARED A. KASSCHAU
COUNTY ATTORNEY

MICHAEL PERNICK
MEMBER

STEVEN G. LEVENTHAL
COUNSEL

**COUNTY OF NASSAU
BOARD OF ETHICS**

One West Street
Mineola, New York 11501-4820
516-571-3056

ADVISORY OPINION 112-18

The [REDACTED] requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to serve as an uncompensated board member or trustee for two not-for-profit entities, neither of which is funded by the County.

GOVERNING AUTHORITY

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

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

(1) Accept or retain other employment, engage in any business transactions, make or retain any investments, have any financial interest, or engage in other activities that directly or indirectly create a conflict with his or her official duties.

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 12

(Exemptions), in pertinent part, that:

c. ... [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 [b]oard, 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

██████████ wishes to continue his service to two not-for-profit entities as a board member and trustee, respectively. Neither position is compensated. One of the not for profit entities operates the ██████████ in the City of New York. The other operates and maintains ██████████ in the City of ██████████. Neither not for profit entity is funded by the County of Nassau.

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether, under the circumstance presented, a prohibited conflict of interest would arise if the ██████████ were to serve as an uncompensated board member and uncompensated trustee, respectively, of two not-for-profit entities, neither of which is funded by the County. The Board considered: (i) whether the proposed service as a board member or trustee of a not for profit entity, 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 proposed service as a board member or trustee of a not for profit entity, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether the proposed service as a board member or trustee of a not for profit entity, 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. GML Article 18 does not regulate the secondary employment of municipal officers and employees. Accordingly, under the circumstances presented, the proposed service as a board member or trustee of a not for profit entity would not violate Article 18 of the New York General Municipal Law

2. Nassau County Code of Ethics

The Nassau County Code of Ethics prohibit 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.² The leading case on compatibility of offices is People ex rel. Ryan v. Green.³ In that case, the Court of Appeals held that two offices are incompatible if one is subordinate to the

¹ N.Y. Gen. Mun. Law §800(4).

² 1982 N.Y. Op. Atty. Gen (Inf.) 148.

³ 58 N.Y. 295 (1874).

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 the [REDACTED] and those of a board member and trustee, respectively, of two not for profit entities, one of which operates the public hospitals in the City of New York, the other of which operates and maintains a park in the City of [REDACTED], and neither of which is funded by the County.

While there is no inherent incompatibility between the respective duties of the two positions, conflicts of interest may nevertheless arise from time to time. In the absence of a waiver from the Board of Ethics, the [REDACTED] must recuse himself from acting in his official capacity on any matter affecting the not for profit entities. He may not disclose or make unauthorized personal use of confidential County information; make unauthorized use of County resources including, without limitation, compensated County time; communicate on behalf of the not for profit entities 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 not for profit entities in which he has participated in his capacity as a County employee.

If the [REDACTED] 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 proposed service as a board member or trustee of a not for profit entity, under the circumstances presented, would 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 implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.⁴

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 could 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

⁴ 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).

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 determined that there is no inherent incompatibility between the duties of the [REDACTED] and those of a board member and trustee, respectively, of two not for profit entities, one of which operates the [REDACTED] in the City of New York, the other of which operates and maintains [REDACTED] in the City of [REDACTED] and neither of which is funded by the County, there is no reason to conclude that the proposed activities would undermine public confidence in County government.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the proposed service of [REDACTED] as a board member and trustee, respectively, of the two not for profit entities would not create a prohibited appearance of impropriety under common law principles.

CONCLUSION

Based on the facts presented, and subject to the conditions set forth herein, a prohibited conflict of interest would not arise if the [REDACTED] were to serve as an uncompensated board member or trustee for two not-for-profit entities, neither of which is funded by the County.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
June 30, 2018



Kenneth L. Gartner, Chair



KENNETH L. GARTNER
CHAIR

JARED A. KASSCHAU
COUNTY ATTORNEY

MICHAEL PERNICK
MEMBER

STEVEN G. LEVENTHAL
COUNSEL

**COUNTY OF NASSAU
BOARD OF ETHICS**

One West Street
Mineola, New York 11501-4820
516-571-3056

ADVISORY OPINION 114-18

The County Attorney's Office requests a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit a recently retired Deputy County Attorney (the "DCA") to provide compensated legal services to the County through the law firm by which he is now employed.

GOVERNING AUTHORITY

Nassau County Charter section 2218 (the "Code of Ethics") subdivision 8 (Post-employment restrictions) provides, in pertinent part, that:

- a. No person who has served as a paid officer or employee of the County shall, within a period of two years after the termination of such service or employment, appear¹ before any Board, agency, officer or employee of the County, except on behalf of the State, or a political subdivision or instrumentality thereof, or in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- b. No person who has served as a paid or unpaid officer or employee of the County shall receive compensation or render any services in relation to any case, proceeding, application or particular matter which such person was directly concerned with, personally participated in, or actively considered during the period of his or her service or employment, except in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- c. No former paid or unpaid officer or employee of the County shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such information to advance the financial or other private interests of himself or herself or others.

¹"Appear" is broadly defined by Code of Ethics subdivision 1 to mean "to make a communication in any form, personally or through another person, including, but not limited to, by letter, telephone, by e-mail or by facsimile, on behalf of a person or entity from whom one receives income or compensation."

DISCUSSION

The DCA separated from County employment on October 23, 2017. In support of the request for a waiver, the Chief Deputy County Attorney informed the Board of Ethics that:

During his tenure at the County, [the] DCA... served in two County departments, [REDACTED] and [REDACTED]. In the County Attorney's Office [the] DCA... was assigned to [REDACTED] Bureau and [REDACTED] Division from 2014 to 2016. In 2016 he was assigned to act a counsel to the Department of [REDACTED].

[The] former DCA... provided day to day counsel to the Department of Assessment and specifically worked on the implementation and administration of the Department's requirement by [REDACTED] to file [REDACTED]. [The] DCA... assisted the Department of [REDACTED] with over 600 due process hearings for 2013 and 2014 [REDACTED] filers who requested such hearings. He provided legal counsel to the Department when the [REDACTED] law was passed in 2017 by the Nassau County Legislature.

[The] DCA... represented the County in the trial court portion [REDACTED] after the case was reassigned from outside counsel. [The] DCA's... effective representation while working for the County should be continued as it is important for the County's success in the [REDACTED] Litigation. [The] DCA... prepared all County witnesses that testified in the 2017 hearing and he is able to prepare Department of [REDACTED] witnesses again for court ordered discovery in the [REDACTED] litigations in 2018.

The County will be saving the expense of reassigning the matter to another attorney that would need to familiarize themselves with the case. The [REDACTED] litigation commenced in 2014 and it has continued to present. The County's ability to collect [REDACTED] data is essential to the Department of [REDACTED]'s effort to produce [REDACTED] in Nassau County. [The] former DCA's... extensive work to date has helped this process and it is the request of the County Attorney's office that DCA [REDACTED] continue with his efforts. To bring a new attorney/in-house counsel on board at this point will significantly decelerate the process at a critical point in the [REDACTED] litigation.

Because of [the] DCA's... express knowledge of the [REDACTED] requirements and his strong litigation skills, [the] former County Attorney... in consultation with the Nassau County Legislature, retained [the] former DCA's... firm to continue in representing the County in the [REDACTED] litigations. Due to the efforts of counsel, the [REDACTED] law has been upheld as constitutional; however, enforcement of penalties is still being contested in the courts and it is under appeal. [The] former DCA's... intimate understanding of the 2013 [REDACTED] law as well as knowledge of the Department of [REDACTED]'s operations, will enable the County to continue to effectively apply the local law.

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether to grant a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit the recently retired DCA to provide compensated legal services to the County through the law firm by which he is now employed. The Board considered: (i) whether the proposed post-employment activities of the DCA would violate N.Y. Gen. Mun. Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed post-employment activities of the DCA would further the interests of the County, and (iii) whether the proposed post-employment activities of the DCA 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.² All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.³ However, the statute does not regulate the post-employment activities. Accordingly, the proposed post-employment activities of the DCA would not violate N.Y. Gen. Mun. Law Article 18.

2. Nassau County Code of Ethics

The Nassau County Code of Ethics imposes three post-employment restrictions. First, it prohibits a County officer or employee from communicating with any Board, agency, officer or employee of the County, except on behalf of another government agency or instrumentality. The Board of Ethics is authorized to waive this post-employment restriction upon the request of a County agency, if a waiver would further the interests of the County. Secondly, the Code of Ethics prohibits former County officers and employees from performing compensated services in connection with any case, proceeding, application or particular matter with which the former officer or employee was materially involved while employed by the County. This second prohibition may also be waived by the Board of Ethics upon the request of a County agency, if a waiver would further the interests of the County. Finally, a former officer or employee may not disclose or make unauthorized use of confidential information of an official character obtained as a result of County employment. The Board of Ethics is not authorized to grant a waiver of this third prohibition.

In Advisory Opinion 119-10, the Board of Ethics granted a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former Deputy County Attorneys to appear in matters before the County within two years of the termination of their employment. The Board of Ethics further determined that a former Deputy County Attorney may not appear as counsel in a matter on behalf of a private sector client in which the attorney was directly concerned, personally participated in, or actively considered as a County employee; and a former Deputy County Attorney may not disclose nor make private use of confidential County information obtained by the former Deputy County Attorney as a result of his or her County employment.

² N.Y. Gen. Mun. Law §800(4).

³ 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 Board of Ethics reasoned that:

...[A] waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former Deputy County Attorneys appear as counsel in matters before the County within two years of the termination of their respective employments would further the interests of the County. Full time and part time attorneys employed by the Unified Court System are not prohibited from appearing in their respective courts upon separation from service. Assistant District Attorneys are not prohibited from appearing as defense counsel in matters adverse to the District Attorney's Office upon termination of their County employment; and attorneys employed by the Nassau County Traffic and Parking Violations Agency are not prohibited from appearing as defense counsel before that agency upon termination of their County employment. Viewed in this context, the imposition of a two year post-employment ban on appearances in matters before the County by former Deputy County Attorneys burdens those attorneys with an unfair economic disadvantage, and could chill the ability of the County Attorney's Office to hire and employ qualified attorneys to serve public.

The second post-employment restriction imposed by the Nassau County Code of Ethics is a permanent ban on the receipt of compensation or the rendering of services in connection with particular matters handled by a former county officer or employee during the period of his or her county service. Similarly, Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) of the New York Rules of Professional Conduct prohibit an attorney who has formerly served as an employee of the government from representing a client in connection with a matter in which the attorney participated personally and substantially as a government employee without the informed written consent of the government employer. Thus, by virtue of Rule 1.11 of the New York Rules of Professional Conduct, and by virtue of Code of Ethics subdivision 8(b), a former Deputy County Attorney would be precluded from handling a matter on behalf of a private sector client in which the attorney was directly concerned, personally participated in, or actively considered as a County employee.

The third post-employment restriction imposed by the Nassau County Code of Ethics is a permanent ban on the disclosure or private use of confidential government information. Further, the confidentiality of government information disclosed to former Deputy County Attorneys is protected by New York Civil Practice Law and Rules section 4503, which codifies the attorney client privilege, prohibits an attorney from disclosing the confidential communications made between the attorney and his or her client, absent a waiver by the client and by Rule 1.6 (Confidentiality of Information) of the New York Rules of Professional Conduct which prohibits an attorney from revealing confidential information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege or that the client has requested be kept confidential. Also, Rule 1.11 prohibits a former government attorney from representing a client where confidential government information (as defined by Rule 1.11) acquired by the attorney while employed by the government could be used to the material disadvantage of an adverse party. Rule 1.12 provides that an attorney shall not accept private employment in a matter upon the merits of which the attorney acted in a judicial capacity.

The foregoing references to the New York Rules of Professional Conduct are made for informational purposes only. The Board expresses no opinion as to their interpretation or

application here, or in any particular case.

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government. The post-employment restrictions imposed by the Nassau County Code of Ethics help foster public confidence in government by avoiding situations where it might appear that a former officer or employee may have improperly exchanged official favors to obtain post-employment employment; that the former officer or employee enjoys a special relationship with his or her former colleagues and thus has an unfair advantage over other persons seeking similar benefits; or that the former county officer or employee may be in a position to use confidential government information to the unfair advantage of a private sector employer or to the disadvantage of the County.

When considering an application for waiver of the post-employment restrictions, the Board should consider the value of the County interest that would be advanced, the availability of alternative sources of the proposed services, and the means by which any appearance of impropriety might be mitigated.

As previously stated, because attorneys employed by the Unified Court System are free to appear in the Courts of this State upon separation from government employment, former Assistant District Attorneys are free to appear as defense counsel in matters adverse to the District Attorney's Office upon termination of their County employment, and attorneys formerly employed by the Traffic and Parking Violations Agency are free to appear as defense counsel before that agency upon termination of their County employment, the imposition of a two year post-employment ban on appearances as counsel in matters before the County would burden those attorneys with an unfair economic disadvantage, and could chill the ability of the County Attorney's Office to hire and employ qualified attorneys to serve the public.

Thus, a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former County Attorneys to appear as counsel in matters before the County within two years of the termination of their County employment could not reasonably be viewed as having resulted from any official favor granted to the former Deputy County Attorney. Further, since the requested waiver would place former Deputy County Attorneys on the same footing as other government attorneys, it could not reasonably be concluded that any special relationship with their former colleagues resulted in a special advantage for them in the granting of this waiver.

The Board of Ethics adheres to the reasoning and conclusions that it reached in Advisory Opinion 119-10. Further, here, it is not proposed that the former DCA will represent private sector clients in matters adverse to the County. Rather, it is proposed that the former DCA continue his previous representation of the County in matter in which he has developed a unique expertise the use of which will further the interests of the County.

Accordingly, on the facts presented, the grant of a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit the DCA to provide compensated legal services to the County through the law firm by which he is now employed would further in the interests of the County.

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 implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.⁴

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 could 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.

For the reasons set forth above and in Advisory Opinion 119-10, the proposed post-employment activities of the DCA would not be likely to undermine public confidence in County government nor give rise to a prohibited appearance of impropriety under common law principles.

CONCLUSION

Based on the facts presented, the Board of Ethics grants a waiver pursuant to Code of Ethics subdivision 8 (Post-employment restrictions) so as to permit the DCA to provide compensated legal services to the County through the law firm by which he is now employed.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
July 23, 2018



Kenneth L. Gartner, Chair

⁴ 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).



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ADVISORY OPINION 115-18

The County Attorney's Office requests a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit a recently retired Deputy County Attorney (the "DCA") to provide compensated legal services to a private sector client in a matter adverse to the County.

GOVERNING AUTHORITY

Nassau County Charter section 2218 (the "Code of Ethics") subdivision 8 (Post-employment restrictions) provides, in pertinent part, that:

- a. No person who has served as a paid officer or employee of the County shall, within a period of two years after the termination of such service or employment, appear¹ before any Board, agency, officer or employee of the County, except on behalf of the State, or a political subdivision or instrumentality thereof, or in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- b. No person who has served as a paid or unpaid officer or employee of the County shall receive compensation or render any services in relation to any case, proceeding, application or particular matter which such person was directly concerned with, personally participated in, or actively considered during the period of his or her service or employment, except in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- c. No former paid or unpaid officer or employee of the County shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such information to advance the financial or other private interests of himself or herself or others.

¹ "Appear" is broadly defined by Code of Ethics subdivision 1 to mean "to make a communication in any form, personally or through another person, including, but not limited to, by letter, telephone, by e-mail or by facsimile, on behalf of a person or entity from whom one receives income or compensation."

DISCUSSION

The DCA is the former Chief of the [REDACTED] Bureau. He separated from County employment on [REDACTED].

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether to grant a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit the recently retired DCA to provide compensated legal services to a private sector client in a matter adverse to the County. The Board considered: (i) whether the proposed post-employment activities of the DCA would violate N.Y. Gen. Mun. Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed post-employment activities of the DCA would further the interests of the County, and (iii) whether the proposed post-employment activities of the DCA 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.² All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.³ However, the statute does not regulate the post-employment activities. Accordingly, the proposed post-employment activities of the DCA would not violate N.Y. Gen. Mun. Law Article 18.

2. Nassau County Code of Ethics

The Nassau County Code of Ethics imposes three post-employment restrictions. First, it prohibits a County officer or employee from communicating with any Board, agency, officer or employee of the County, except on behalf of another government agency or instrumentality. The Board of Ethics is authorized to waive this post-employment restriction upon the request of a County agency, if a waiver would further the interests of the County. Secondly, the Code of Ethics prohibits former County officers and employees from performing compensated services in connection with any case, proceeding, application or particular matter with which the former officer or employee was materially involved while employed by the County. This second prohibition may also be waived by the Board of Ethics upon the request of a County agency, if a waiver would further the interests of the County. Finally, a former officer or employee may not disclose or make unauthorized use of confidential information of an official character obtained as a result of County employment. The Board of Ethics is not authorized to grant a waiver of this third prohibition.

In Advisory Opinion 119-10, the Board of Ethics granted a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former Deputy County Attorneys to appear in matters before the County within two years of the termination of their employment. The Board of Ethics further determined that a former Deputy

² N.Y. Gen. Mun. Law §800(4).

³ 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).

County Attorney may not appear as counsel in a matter on behalf of a private sector client in which the attorney was directly concerned, personally participated in, or actively considered as a County employee; and a former Deputy County Attorney may not disclose nor make private use of confidential County information obtained by the former Deputy County Attorney as a result of his or her County employment.

The Board of Ethics reasoned that:

...[A] waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former Deputy County Attorneys appear as counsel in matters before the County within two years of the termination of their respective employments would further the interests of the County. Full time and part time attorneys employed by the Unified Court System are not prohibited from appearing in their respective courts upon separation from service. Assistant District Attorneys are not prohibited from appearing as defense counsel in matters adverse to the District Attorney's Office upon termination of their County employment; and attorneys employed by the Nassau County Traffic and Parking Violations Agency are not prohibited from appearing as defense counsel before that agency upon termination of their County employment. Viewed in this context, the imposition of a two year post-employment ban on appearances in matters before the County by former Deputy County Attorneys burdens those attorneys with an unfair economic disadvantage, and could chill the ability of the County Attorney's Office to hire and employ qualified attorneys to serve public.

The second post-employment restriction imposed by the Nassau County Code of Ethics is a permanent ban on the receipt of compensation or the rendering of services in connection with particular matters handled by a former county officer or employee during the period of his or her county service. Similarly, Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) of the New York Rules of Professional Conduct prohibit an attorney who has formerly served as an employee of the government from representing a client in connection with a matter in which the attorney participated personally and substantially as a government employee without the informed written consent of the government employer. Thus, by virtue of Rule 1.11 of the New York Rules of Professional Conduct, and by virtue of Code of Ethics subdivision 8(b), a former Deputy County Attorney would be precluded from handling a matter on behalf of a private sector client in which the attorney was directly concerned, personally participated in, or actively considered as a County employee.

The third post-employment restriction imposed by the Nassau County Code of Ethics is a permanent ban on the disclosure or private use of confidential government information. Further, the confidentiality of government information disclosed to former Deputy County Attorneys is protected by New York Civil Practice Law and Rules section 4503, which codifies the attorney client privilege, prohibits an attorney from disclosing the confidential communications made between the attorney and his or her client, absent a waiver by the client and by Rule 1.6 (Confidentiality of Information) of the New York Rules of Professional Conduct which prohibits an attorney from revealing confidential information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege or that the client has requested be kept confidential. Also, Rule 1.11 prohibits a former government attorney from representing a client where confidential government information (as defined by Rule 1.11) acquired by the attorney while employed by the government could be used to the

material disadvantage of an adverse party. Rule 1.12 provides that an attorney shall not accept private employment in a matter upon the merits of which the attorney acted in a judicial capacity.

The foregoing references to the New York Rules of Professional Conduct are made for informational purposes only. The Board expresses no opinion as to their interpretation or application here, or in any particular case.

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government. The post-employment restrictions imposed by the Nassau County Code of Ethics help foster public confidence in government by avoiding situations where it might appear that a former officer or employee may have improperly exchanged official favors to obtain post-employment employment; that the former officer or employee enjoys a special relationship with his or her former colleagues and thus has an unfair advantage over other persons seeking similar benefits; or that the former county officer or employee may be in a position to use confidential government information to the unfair advantage of a private sector employer or to the disadvantage of the County.

When considering an application for waiver of the post-employment restrictions, the Board should consider the value of the County interest that would be advanced, the availability of alternative sources of the proposed services, and the means by which any appearance of impropriety might be mitigated.

As previously stated, because attorneys employed by the Unified Court System are free to appear in the Courts of this State upon separation from government employment, former Assistant District Attorneys are free to appear as defense counsel in matters adverse to the District Attorney's Office upon termination of their County employment, and attorneys formerly employed by the Traffic and Parking Violations Agency are free to appear as defense counsel before that agency upon termination of their County employment, the imposition of a two year post-employment ban on appearances as counsel in matters before the County would burden those attorneys with an unfair economic disadvantage, and could chill the ability of the County Attorney's Office to hire and employ qualified attorneys to serve the public.

Thus, a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former County Attorneys to appear as counsel in matters before the County within two years of the termination of their County employment could not reasonably be viewed as having resulted from any official favor granted to the former Deputy County Attorney. Further, since the requested waiver would place former Deputy County Attorneys on the same footing as other government attorneys, it could not reasonably be concluded that any special relationship with their former colleagues resulted in a special advantage for them in the granting of this waiver.

The Board of Ethics adheres to the reasoning and conclusions that it reached in Advisory Opinion 119-10. Accordingly, on the facts presented, the grant of a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit the DCA to provide compensated legal services to a private sector client in a matter adverse to the County would further in the interests of the County.

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 implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.⁴

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 could 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.

For the reasons set forth above and in Advisory Opinion 119-10, the proposed post-employment activities of the DCA would not be likely to undermine public confidence in County government nor give rise to a prohibited appearance of impropriety under common law principles.

CONCLUSION

Based on the facts presented, the Board of Ethics grants a waiver pursuant to Code of Ethics subdivision 8 (Post-employment restrictions) so as to permit the DCA to provide compensated legal services to private sector clients in a matters adverse to the County. Notwithstanding the foregoing, the DCA may not perform compensated services in connection with any case, proceeding, application or particular matter with which the DCA was materially involved while employed by the County; nor may the DCA disclose or make unauthorized use of confidential information of an official character obtained as a result of County employment.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
July 24, 2018


Kenneth L. Gartner, Chair

⁴ 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 Tuxedo, 69 A.D.2d 320 (2d Dept. 1979).

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ADVISORY OPINION NO. 2017-09

The County Attorney requests a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit a [REDACTED] upon termination of his County employment, to accept employment with a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy.

GOVERNING AUTHORITY

The Code of Ethics provides at subdivision 2 (Conflicts of Interest Prohibited), in pertinent part, that:

- a. Except as provided in subdivision twelve of this section, no County officer or employee whether paid or unpaid, shall:
 - ... (2) Participate as attorney, agent, broker, representative or employee in a business or professional transaction with... the County or any agency

thereof for any person or entity directly or indirectly in any manner whatsoever or fail to ensure that adequate measures are taken to prevent his or her participating in any manner in any such transaction where a law firm or other entity in which such person is an owner, member or employee becomes involved as attorney, agent, broker or representative in such a transaction with... the County.

(3) Accept or retain other employment... that directly or indirectly create a conflict with his or her official duties.

- b. A County officer or employee shall not appear before any agency or officer of the County except on behalf of the County....
- c. No County officer or employee shall receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter that is before the agency served by such officer or employee, or any agency over which he or she has supervisory control or to which he or she has the power to appoint any member, officer or employee.

The Code of Ethics provides at subdivision 8 (Post-employment restrictions), in pertinent part,

that:

- a. No person who has served as a paid officer or employee of the County shall, within a period of two years after the termination of such service or employment, appear¹ before any Board, agency, officer or employee of the County, except on behalf of the State, or a political subdivision or instrumentality thereof, or in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- b. No person who has served as a paid or unpaid officer or employee of the County shall receive compensation or render any services in relation to any case, proceeding, application or particular matter which such person was directly concerned with, personally participated in, or actively considered during the period of his or her service or employment, except in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- c. No former paid or unpaid officer or employee of the County shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County employment except when disclosure is required by law or when such information is otherwise available to the

¹ "Appear" is broadly defined by Code of Ethics subdivision 1 to mean "to make a communication in any form, personally or through another person, including, but not limited to, by letter, telephone, by e-mail or by facsimile, on behalf of a person or entity from whom one receives income or compensation."

public, nor shall he or she use such information to advance the financial or other private interest of himself or himself or others.

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

- a. No employee may have any interests or take any action prohibited by subdivisions two through six of this section without the approval of the Board; provided that the provisions of this section shall not prohibit, or require recusal or transactional disclosure as a result of:

... (7) County officers or employees appearing or participating before the County or receiving compensation for working on a matter before the County after termination of their County service or employment... where they are appearing in an official capacity as an officer or employee of another governmental agency.

DISCUSSION

The U.S. Department of Housing and Urban Development (“HUD”) has allocated and distributed funds to the State of New York for recovery from Hurricane Irene, Tropical Storm Lee and Superstorm Sandy. Specifically, the funds are allocated through HUD's Community Development Block Grant Disaster Recovery (“CDBG-DR”) program to be distributed to sub-recipients with infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy. New York State selects the sub-recipients.

New York State's Office, *the Governor's Office of Storm Recovery* (“GOSR”), through various employment agencies, employs staff to help complete the “New York Rising” project toward the goal of implementation and oversight of the repair and rebuild initiatives.

Penda-Aiken, Inc. (“Penda-Aiken”) is a Brooklyn, New York-based employment and staffing firm with experience in disaster recovery. Penda-Aiken is working with an engineering firm selected by HUD to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy. Additionally, Penda-Aiden is working with and in support of New York State on its oversight of a number of sub-recipient projects, including infrastructure projects in Nassau County, Suffolk County and other areas throughout New York State. Neither the [REDACTED] nor the County of Nassau played any role in the selection of Penda-Aiken; rather, Penda-Aiken was selected by New York State.

The [REDACTED] has been employed by Nassau County since [REDACTED], and was working in the County's Department of [REDACTED] on [REDACTED] projects and other [REDACTED] related matters.

The Hydrogeologist has been offered a position to work for Penda-Aiken to serve as a Subject Matter Expert. His job responsibilities would include working with GOSR in making recommendations on drainage improvements, coastal resiliency projects and flood mitigation projects, which include projects located in Nassau County.

The County Attorney has opined that approval of the proposed employment would further the interest of Nassau County, as the [REDACTED] will immediately enhance the ability of GOSR to meet its goals and obligations in protecting Nassau County residents through the repair and rebuilding of vital infrastructure. Approval is also consistent in spirit with the exception under the Code of Ethics extended to those working with New York State or its political subdivisions or instrumentalities.

The [REDACTED] post-employment services would include services rendered in connection with projects in Nassau County, and elsewhere. Further, it is anticipated that he will communicate with County officers and employees in connection with his post-employment services as a Subject Matter Expert working with GOSR. It is not anticipated that the [REDACTED] will work on any particular matters that he handled while employed by the County.

In considering this inquiry, the Board of Ethics employed the following three step analysis to determine whether to grant the [REDACTED] a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics: (i) whether the proposed post-employment activities within two years of the termination of the [REDACTED] county employment would violate N.Y. Gen. Mun. Law Article 18 (Conflicts of Interest of Municipal Officers and Employees) or the Code of Ethics, (ii) whether the proposed post-employment activities within two years of the termination of the [REDACTED] county employment would further the interests of the County, and (iii) whether the proposed post-employment activities within two years of the termination of the [REDACTED] county employment would create a prohibited appearance of impropriety under common law principles.

Article 18 of the New York General Municipal Law establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City.² However, the statute does not regulate post-employment activities. The Code of Ethics imposes three distinct restrictions on the post-employment activities of former county officers and employees. The first restriction is a two-year ban on compensated appearances before any board, agency, officer or employee of the County. However, the Code of Ethics expressly exempts appearances that further the interests of the County and are made with the approval of the Board of Ethics upon application of a county agency.

Here, the County interests would be advanced by a waiver of the two-year ban on compensated appearances before any board, agency, officer or employee of the County. The unique knowledge and experience of the [REDACTED] in issues related to storm disaster recovery will immediately enhance the ability of GOSR to meet its goals and obligations in protecting Nassau County residents through the repair and rebuilding of vital infrastructure. Approval is also consistent in spirit with the exception extended to those working with New York State, its political subdivisions or instrumentalities since Penda-Aiden is working with and in support of New York State on its oversight of sub-recipient projects.

The second post-employment restriction imposed by the Code of Ethics is a permanent ban on the receipt of compensation or the rendering of services in connection with particular matters handled by a former county officer or employee during the period of his or her county service. Here, it is not anticipated that the [REDACTED] will work on any particular matters that he handled while employed by the County.

² N.Y. Gen. Mun. Law §800(4).

The third post-employment restriction imposed by the Code of Ethics is a permanent ban on the disclosure or private use of confidential government information.

The Board of Ethics is not empowered to waive the permanent ban on the disclosure or private use of confidential government information.

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government.³ The post-employment restrictions imposed by the Nassau County Code of Ethics help foster public confidence in government by avoiding situations where it might appear that a former officer or employee may have improperly exchanged official favors to obtain post-employment compensation; that the former officer or employee enjoys a special relationship with his or her former colleagues and thus has an unfair advantage over other persons seeking similar benefits; or that the former county officer or employee may be in a position to use confidential government information to the unfair advantage of a private sector employer or to the disadvantage of the County.

When considering an application for waiver of the post-employment restrictions, the Board of Ethics should consider the value of the county interest that would be advanced, the availability of alternative sources of the proposed services, and the means by which any appearance of impropriety might be mitigated.

Here, the [REDACTED] possesses uniquely valuable knowledge and highly relevant experience in designing and implementing storm emergency response programs. The County's important interest in a coordinated government response to the ongoing effects of recent natural disasters would be advanced by the post-employment service of the [REDACTED] as a Subject Matter Expert for a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development

³ In some cases, courts have found that government officials have an implied duty to avoid conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated. See, *Zagoreos v. Conklin*, 109 A.D. 2d 281 (2d Dept., 1985); *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D. 2d 320 (2d-Dept., 1979); *Conrad v. Hinman*, 122 Misc. 2d 531 (Onondaga Co., 1984).

to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy.

Approval is also consistent in spirit with the exception extended to those working with New York State, its political subdivisions or instrumentalities. Accordingly, there is no reason to conclude that the proposed post-employment of the [REDACTED] could reasonably be viewed as having resulted from any official favor, or that the proposed post-employment activities would give rise to any actual or perceived conflict of interest.

The County Attorney further inquires, in the alternative, whether a prohibited conflict of interest would exist if the [REDACTED] were to accept such employment while on a leave of absence from his employment with the County.

Article 18 of the New York General Municipal Law does not regulate the outside employment activities of municipal officers and employees.

The Code of Ethics prohibits a County officer or employee from accepting outside employment that directly or indirectly creates a conflict with his or her official duties. Long established common law principles and opinions of the New York 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. 1982 N.Y. Op. Atty. Gen (Inf.) 148. The leading case on compatibility of offices is People ex rei. Ryan v. Green, 58 N.Y. 295 (1874). 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 in the private sector. *See*, 1982 N.Y. Op. Atty. Gen (Inf.) 148. 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, the [REDACTED] post-employment activities would involve services rendered in connection with projects in Nassau County, and elsewhere. It is anticipated that he will communicate with County officers and employees in connection with his post-employment services as a Subject Matter Expert working with HGA; however, it is not anticipated that the [REDACTED] will work on any particular matters that he handled while employed by the County.

Based on the unique qualifications of the [REDACTED] and his ability to provide important disaster response services for the ultimate benefit of Nassau County residents, and based on the absence of an actual conflict of interest, the Board of Ethics concludes that a waiver of the restrictions on secondary employment and appearances by County employees before County agencies on behalf of their outside employers should be waived in the event the proposed activities are conducted while the [REDACTED] is on a leave of absence from his County employment. This conclusion is consistent with the spirit of the "government to government" exception found at Code of Ethics Section 12, subsection 8.

Here, there is no reason to conclude that the [REDACTED] proposed employment with a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy would create an appearance of impropriety whether occurring after termination of his County employment or while on a leave of absence.

The Hydrogeologist must refrain from the use or disclosure of confidential County information or the use of other County resources in his employment as a Subject Matter Expert.

CONCLUSION

Based on the facts presented, the Board of Ethics hereby grants a waiver pursuant to the Code of Ethics, subdivision 8 (Post-employment restrictions) so as to permit a [REDACTED] upon termination of his County Employment, to accept employment with a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy.

In the alternative, the Board of Ethics hereby grants a waiver of the restrictions on secondary employment and appearances by County employees before County agencies on behalf of their outside employers in the event the proposed activities are conducted while the [REDACTED] is on a leave of absence from his County employment.

The foregoing constitutes the opinion of the Board of Ethics.⁴

Dated: Mineola, New York

Sept. 15, 2017

Owen Smith (CS)
Owen Smith, Chair

⁴ The County Attorney recused himself from the discussions, deliberation and vote in this matter.



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CHITRA ANBALAGAN

TO: Hon. Carnell T. Foskey, County Attorney
FROM: Steven G. Leventhal
DATE: April 6, 2015
RE: Advisory Opinion [REDACTED]

I. Question Presented

A [REDACTED] employed in the [REDACTED]

Works inquires whether he may serve as an uncompensated member of the board of directors of a local not-for-profit corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties.

II. Conclusion

Based on the facts presented and the conditions set forth herein, a prohibited conflict of interest would not exist if a [REDACTED] employed in the [REDACTED] [REDACTED] were to serve as an uncompensated member of a local not-for-profit [REDACTED]

corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties.

III. Discussion

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 12 (Exemptions), in pertinent part, that:

- c. 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 public authority, or public benefit corporation, 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 participate in, or actively considered as a County officer or employee.

In considering this inquiry, I have employed a three step analysis to determine whether a prohibited conflict of interest would exist if a [REDACTED] employed in [REDACTED] [REDACTED] were to serve as an uncompensated member of the board of directors of a local not-for-profit corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties. I considered: (i) whether the proposed service as an uncompensated member of the board of directors of a local not-for-profit corporation would violate New York General Municipal Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed service as an

uncompensated member of the board of directors of a local not-for-profit corporation would violate the Nassau County Code of Ethics, and (iii) whether the proposed service as an uncompensated member of the board of directors of a local not-for-profit corporation would create a prohibited appearance of impropriety, or otherwise violate common law principles of local government ethics.

Article 18 of the General Municipal Law establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City.¹ All County officers and employees are subject to the provisions of N.Y. Gen. Mun. Law Article 18. However, the statute neither prohibits nor regulates the membership of municipal officers and employees on not-for-profit boards.

Article 18 expressly exempts contracts with membership corporations or other voluntary nonprofit corporations or associations from its ban on municipal contracts that confer benefits on municipal officers and employees who have control over such contracts. *See* N.Y. Gen. Mun. Law §802. Here, the not-for-profit corporation is newly organized, and has no contractual relationship with the County. Nevertheless, for the reason stated, such a contact would not be prohibited by Article 18.

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.² A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18; it may prohibit conduct that Article 18 would allow.³

Among other things, Nassau County Code of Ethics, subdivision 2 prohibits a County officer or employee from having a financial interest in any entity that has business or

¹ N.Y. Gen. Mun. Law §800(4).

² *See* N. Y. Gen. Mun. Law §806.

³ *Id.*

professional dealings with the County, or from accepting or retaining other employment, or engaging in other activities that directly or indirectly create a conflict with his or her official duties. For reasons that will follow, there is no indication here that the proposed service as a member of the board of directors of a local not-for-profit corporation would create a conflict of interest with [REDACTED] official duties. Nevertheless, the Nassau County Code of Ethics expressly provides in subdivision 12 (Exemptions), that a County officer or employee may be a director of a nonprofit corporation, 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.

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. Long established common law principles and opinions of the New York 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. 1982 N.Y. Op. Atty. Gen (Inf.) 148. The leading case on compatibility of offices is People ex rel. Ryan v. Green, 58 N.Y. 295 (1874). 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. *See* 1982 N.Y. Op. Atty. Gen (Inf.) 148. 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 the [REDACTED] and those of a member of the board of directors of a local not-for-profit corporation engaged in community renewal, primarily through acquiring, improving and leasing distressed residential properties. The Civil Service Class Specification for [REDACTED] provides, generally, that a person employed in that title:

[REDACTED]

The Civil Service Class Specification further provides that a person employed as a

[REDACTED]

Among other duties, the [REDACTED]

[REDACTED]



The [redacted] has been invited to be a member of the board of directors of a newly organized⁴ charitable and educational not-for-profit corporation serving the Greater Uniondale Area. The corporate by-laws provide that the board of directors shall be composed of representatives from various specified segments of the community, with one seat on the board designated for a member to represent “agencies [redacted] [redacted] core area interest”. The [redacted] has been invited to fill this seat.

The purpose and mission of the not-for-profit corporation, as set forth in the corporate by-laws, include “community renewal, revitalization, integration and community empowerment.” The not-for-profit corporation utilizes cooperative models of leadership and ownership to develop sustainably affordable properties for the benefit of local community stabilization, well-being and improvement with an emphasis on stabilizing homeownership and economic opportunity. According to a director of the not-for-profit corporation, these purposes are typically accomplished by the acquisition of title to distressed residential properties, improvement of the properties and leasing of the improved properties to qualifying members of the public.

Based on the foregoing, it is reasonable to conclude that the duties of [redacted] and those of director of the not-for-profit are complimentary and not inherently incompatible,

⁴ The not-for-profit corporation was incorporated on June 10, 2010 but, according to the March 7, 2014 letter of its President, is still in the process of developing its full board of directors.

and that no prohibited appearance of impropriety would arise from the proposed service on the not-for-profit board of directors.

IV. Conditions to be Observed While Serving on Not-For-Profit Board

Even where the duties of two positions are compatible, a conflict of interest may nevertheless arise from time to time. In such an event, a County officer or employee must promptly recuse himself or herself from acting in the matter, and must file with the Board of Ethics a written notice of recusal stating the nature of the private interest, pursuant to Nassau County Code of Ethics, subdivision 4. Here, the [REDACTED] must recuse himself from acting, in his or her capacity as County employee, on any matter directly affecting the not-for-profit corporation.

Further, reimbursement of expenses made by the not-for-profit corporation to the [REDACTED] must be disclosed on an annual statement of financial disclosure filed with the Board of Ethics pursuant to §22-4.3 of the Administrative Code.

In his activities as a member of not-for-profit board of directors, the [REDACTED] may not: (i) use or disclose any confidential County information, (ii) communicate with any County board, agency, officer or employee on behalf of the not-for-profit corporation without first obtaining a waiver from the Board of Ethics, or (iii) work on any application or particular matter that he handled or otherwise participated in as a County officer or employee without first obtaining a waiver from the Board of Ethics.



County of Nassau Inter-Departmental Memo

To:



From: Chris Leimone, Deputy County Attorney

Date: April 17, 2017

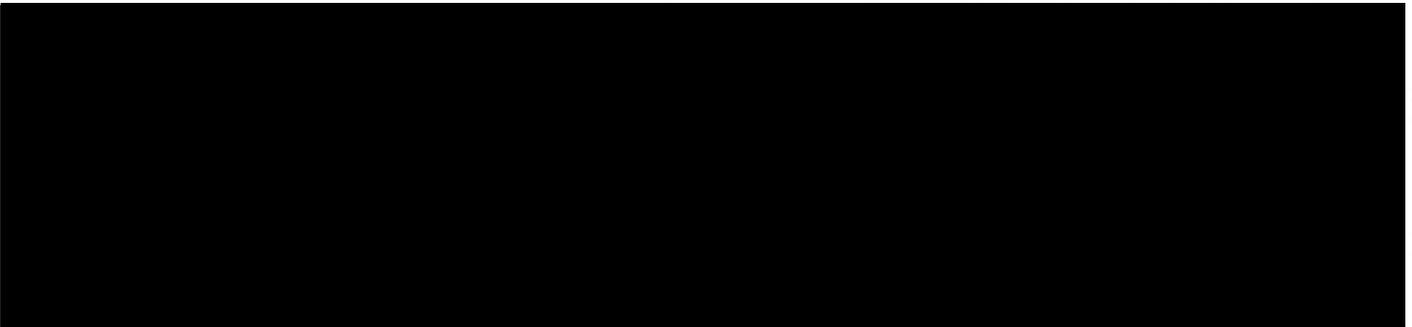
Subject: Ethics Opinion

ISSUE

You have requested that the Board of Ethics ("Board") opine as to whether you may serve as both the [redacted] Nassau County [redacted] and as a licensed real estate broker selling residential and commercial real estate.

Please note that this matter was heard by the Board and the Board concluded that no conflict exists. As such, I have prepared this opinion of counsel.

FACTUAL BACKGROUND



As an associate broker with a real estate company, you will be paid to sell residential and commercial real estate throughout New York State. You indicated that no County time or resources will be used to conduct this business.

ANALYSIS

In order to properly address your inquiry, it is necessary to analyze (1) New York General Municipal Law Article 18; (2) Nassau County Charter section 2218 (i.e. The Nassau County Code of Ethics); (3) the relevant case law and; (4) whether your potential dual roles would create a prohibited appearance of impropriety under common law principles.

New York General Municipal Law Article 18 establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, with the exception of New York City.² Please be advised that all County officers and employees are subject to the provisions of Article 18. However, Article 18 does not regulate the outside employment of municipal officers and employees.

Municipalities in New York State are permitted by Article 18 to adopt their own codes of ethics.³ A local government's code of ethics cannot permit activity that is prohibited by Article 18; however, a local government's code of may be stricter than Article 18 (i.e. it can prohibit conduct that Article 18 permits).⁴

Nassau County's Code of Ethics ("Code") is codified in section 2218 of the Nassau County Charter ("Charter") and sets forth the specific ethical standards that apply to County employees. Similar to Article 18, there is no blanket prohibition against outside employment in section 2218. However, section 2218 does contain certain restrictions that can apply to outside employment. In that regard, section 2218, subdivision 2(a)(3) sets forth as follows:

No County officer or employee shall accept or retain other employment, engage in any business transaction, make or retain any investments, have any financial interest, or engage in other activities that directly or indirectly create a conflict with his or her official duties.

In order to determine whether a position of outside employment would create a conflict with the duties of a municipal officer or employee, it is necessary to analyze New York case law and opinions from the New York Attorney General.

First, there does not appear to be a statute prohibiting you from holding both positions. Under New York law, where there is no constitutional or statutory prohibition against holding dual-offices, one person may hold two offices simultaneously unless they are incompatible. 1989 N.Y. Op. Atty. Gen. (Inf.) 163. The leading case on compatibility of offices is People ex rel. Ryan v. Green, 58 N.Y. 295 (1874). In that case, the Court 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. In order to determine whether two positions are inherently inconsistent, one must analyze the duties of the two offices (i.e. auditor and the office of director of finance). 1989 N.Y. Op. Atty. Gen. (Inf.) 163. However, please be advised that even if the positions are compatible, a situation may arise where an employee has a conflict of interest created by the simultaneous holding of the two positions. Id. In such a situation, the conflict can be avoided if the employee recuses himself/herself from acting in the matter. Id. Pursuant to section 2218, subdivision 4, a written recusal must be filed with the Board setting forth the nature of the outside interest.

In the case at bar, the positions of [REDACTED] and associate real estate broker are not subordinate to one another. There is no overlap between the two positions and neither position requires oversight over the other. Additionally, the two positions are not inherently inconsistent. Your role as [REDACTED] primarily requires you to [REDACTED]. As a real estate broker, you will sell residential and commercial real estate in New York State. Accordingly, it is highly unlikely that your duties as [REDACTED] will interfere or conflict with your duties as a real estate broker.

Finally, a review is needed to determine if your potential dual roles would create a prohibited appearance of impropriety under common law principles. Courts have held that government employees/officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated. See, Zagoreos v. Conklin, 109 A.D.2d 281 (2d Dept. 1985); Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. Of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979). In other words, if a proposed action by a government official/employee has the potential to create an appearance of impropriety, said official/employee should abstain from acting.

Again, considering that it is unlikely that your duties as [REDACTED] will interfere or conflict with your duties as an associate real estate broker, that the positions are not subordinate to one another and that there is no overlap between the offices, it would be unreasonable to assume that generally holding both positions would create an appearance of impropriety.

Finally, although it is unlikely, a situation may arise where you have to seek approval from the Board or you have to recuse yourself from acting on a particular matter because of the conflict created by being both [REDACTED] and an associate real estate broker. If and when this occurs, you should seek guidance from the Board as to whether recusal, or some other form of action, is required. For your reference, examples of prohibited activity include, but are not necessarily limited to, conducting real estate business on County time; using County resources to perform said business and; using your position [REDACTED] as a way to recruit real estate clients. If you are uncertain as to the consequences of a particular action or activity, you should contact the Board for further direction.

CONCLUSION

Based on the facts presented and the applicable laws cited above, you are permitted to serve as both [REDACTED] and as an associate real estate broker.

In addition, although unlikely, if a situation arises where you believe recusal may be required due to your dual positions or you are uncertain as to whether recusal or some other form of action is required, you should contact the Board for further guidance.

¹ <https://www.nassaucountyny.gov> [REDACTED]

² N.Y. Gen. Mun. Law §800(4)

³ See N.Y. Gen Mun. Law §806

⁴ *Id.*

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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).

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THOMAS J. MULLANEY
JEFFREY L. BLINKOFF

TO: Hon. Carnell T. Foskey, County Attorney
FROM: Steven G. Leventhal
DATE: January 10, 2017
RE: Advisory Opinion: [REDACTED]

Question Presented

Whether a prohibited conflict of interest would arise if a county employee holding the title of [REDACTED] were, while off duty, to appear in uniform, in an uncompensated, non-speaking role, on a situation comedy filmed for broadcast on network television.

Conclusion

Based on the facts presented, a prohibited conflict of interest would not arise if a county employee holding the title of [REDACTED] were, while off duty, to appear in uniform, in an uncompensated, non-speaking role, on a situation comedy filmed for broadcast on network television.

Governing Authority

Nassau County Charter §2218 (“Code of Ethics), subsection 6, provides that:

No officer or employee of the County shall use the resources of the County in furtherance of his or her business, professional or political interests or activities, or in furtherance of the interests or activities of any outside entity other than pursuant to a County contract with such entity, without the approval of the head of his or her agency and the approval of the Board of Ethics upon a finding by the Board that such activity is in furtherance of the interests of the County.

Discussion

The duties associated with the civil service title of [REDACTED] are performance of inspections and investigations to ensure the enforcement of fire prevention and arson laws, and to determine the cause and origin of fires; promotion of the development and use of effective fire prevention methods, response to hazardous materials incidents, and related duties.

The producers of the television series “Kevin Can Wait” have planned an episode in which a fictitious Nassau County Fire Fighter is interviewed at the scene of a fire concerning his rescue of a cat that jumped from a window to avoid the fire. Neither the fire nor the burning building will be depicted. The scene and interview will take place after the fire has been extinguished.

A county employee holding the civil service title of [REDACTED] has, in the course of his official duties, provided oversight regarding fire safety issues at the scene of filming. The producers have invited him to appear in the program in an uncompensated, non-speaking role. The county employee would appear while off duty. For authenticity, the producers have requested that he appear in uniform.

In a letter submitted in support of this request, the producers stated that:

As you may know, Kevin James, Long Island born and raised, is very supportive of the Nassau County community, specifically the Fire and Police Departments, as well as local businesses. We take this very seriously, and saw this scene as an opportunity to say Thank You to Nassau County.

The [REDACTED] has concluded that the appearance under the facts presented would further the interests of the County by fostering public understanding of the role of the [REDACTED] Office, and has approved the request subject to the further approval of the Board of Ethics.

A three step analysis was used to determine whether a prohibited conflict of interest would arise if a county employee holding the title of [REDACTED] were, while off duty, to appear in uniform, in an uncompensated, non-speaking role, on a situation comedy filmed for broadcast on network television. The following questions were considered: (i) whether the television appearance would violate New York General Municipal Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the television appearance would violate the Nassau County Code of Ethics, and (iii) whether television appearance 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 the “NYGML”) establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the

State of New York, other than New York City.¹ NYGML Article 18 does not regulate the outside business, personal or political activities of municipal officers and employees. Accordingly, based on the facts presented, the television appearance would not violate New York General Municipal Law Article 18 (Conflicts of Interest of Municipal Officers and Employees).

2. Nassau County Code of Ethics

The only county resource that would be used in the filming of the television appearance would be the uniform worn by the [REDACTED]. This minimal use of a county resource would be justified by the benefit of public education that is expected to accrue from the television appearance.

Accordingly, based on the facts presented, the television appearance would not violate the Nassau County Code of Ethics.

3. Common Law Principles

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government.² The restrictions against misuse of county resources help to foster public confidence in government by avoiding situations in which the integrity of an officer or employee may be called into question.

Here, having concluded for the reasons set forth above that the minimal use of a County resource (the wearing of the [REDACTED] uniform) would be justified by the benefit of public education that is expected to accrue from the television appearance, the it is reasonable to conclude that the television appearance under the circumstances presented would not create a prohibited appearance of impropriety under common law principles.

¹ N.Y. Gen. Mun. Law §800(4).

² In some cases, courts have found that government officials have an implied duty to avoid conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated. *See, Zagoreos v. Conklin*, 109 A.D. 2d 281 (2d Dept., 1985); *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D. 2d 320 (2d Dept., 1979); *Conrad v. Hinman*, 122 Misc. 2d 531 (Onondaga Co., 1984).



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TO: Hon. Carnell T. Foskey, County Attorney
FROM: Steven G. Leventhal
DATE: November 30, 2015
RE: Advisory Opinion: [REDACTED]

Questions Presented

Whether officers and employees of the Nassau County Police Department (the “Department”) would receive a prohibited gift by virtue of their local facilitation of a national retailer’s distribution of holiday gift cards to selected students in need, as part of a national program aimed at promoting public safety.

Conclusions

Officers and employees of the Department would not receive a prohibited gift by virtue of their local facilitation of a national retailer’s distribution of holiday gift cards to selected students in need, as part of a national program aimed at promoting public safety.

Governing Authority

New York General Municipal Law section 805-a provides, in pertinent part, that:

No municipal officer or employee shall... directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be

inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part...

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 3 (Gifts and Favors), in pertinent part, that:

No officer or employee of the County, whether paid or unpaid, shall accept gifts aggregating to seventy-five dollars or more during a twelve month period, nor solicit any gift of any value, whether in the form of services, loan, thing or promise of any other form, from any one person, firm or corporation which to his or her knowledge is interested directly or indirectly in any manner whatsoever in business or professional dealings with the County or any agency thereof.

Discussion

Target Brands, Inc. ("Target") is a national, multi-product retailer, with a store located in Westbury. Target sponsors an annual charitable event, called "Heroes & Helpers", described on its web site as follows:

Our annual Heroes & Helpers events pair public safety officials with community youth for holiday shopping sprees at our stores. Through our 2014 program, we donated more than \$150,000 to agencies in approximately 200 communities across the U.S.

As a part of its 2015 Heroes & Helpers event, Target wishes to distribute gift cards to students at the Drexel Avenue School in Westbury, and has asked the Nassau County Police Department to facilitate the program by delivering the gift cards to the school for distribution to student recipients selected by the school administration.

A three step analysis was used to determine whether a prohibited gift would be received by officers and employees of the Department by virtue of their local facilitation of Target's distribution of holiday gift cards to selected students in need, as part of a national program aimed at promoting public safety. The following questions were considered: (i) whether facilitation of Target's distribution of holiday gift cards under the circumstances presented would violate New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), (ii) whether facilitation of Target's distribution of holiday gift cards under the circumstances presented would violate the Nassau County Code of Ethics, and (iii) whether facilitation of Target's distribution of holiday gift cards 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 the "NYGML") establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the

State of New York, other than New York City.¹ Section 805-a of the NYGML prohibits a municipal officer or employee from requesting a gift, or accepting a gift (or aggregate gifts) worth \$75 or more, where it “might appear” that the gift was intended to reward or influence an official action.

Here, no reasonable inference could be drawn that the invitation to participate in Target’s distribution of holiday gift cards under the circumstances presented was intended to influence or reward the official action of any officer or employee of the Department. The Department will merely facilitate the distribution of the gift cards to students in need, selected by the school administration. No benefit will accrue to any officer or employee of the Department, either directly or indirectly.

Accordingly, the facilitation of Target’s distribution of holiday gift cards under the circumstances presented would not violate New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees).

2. Nassau County Code of Ethics

For the same reasons, the facilitation of Target’s distribution of holiday gift cards under the circumstances presented would not violate the Nassau County Code of Ethics.

3. Common Law Principles

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government.² The restrictions against solicitation or acceptance of prohibited gifts by municipal officers and employees help to foster public confidence in government by avoiding situations in which the integrity of an officer or employee may be called into question.

Here, having concluded for the reasons set forth above that the invitation to participate in Target’s distribution of holiday gift cards under the circumstances presented was intended to influence or reward the official action of any officer or employee of the Department, the facilitation of Target’s distribution of holiday gift cards under the circumstances presented would not create a prohibited appearance of impropriety under common law principles.

¹ N.Y. Gen. Mun. Law §800(4).

² In some cases, courts have found that government officials have an implied duty to avoid conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated. *See, Zagoreos v. Conklin*, 109 A.D. 2d 281 (2d Dept., 1985); *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D. 2d 320 (2d Dept., 1979); *Conrad v. Hinman*, 122 Misc. 2d 531 (Onondaga Co., 1984).



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TO: Hon. Carnell T. Foskey, County Attorney
FROM: Steven G. Leventhal
DATE: October 9, 2015
RE: Advisory Opinion: [REDACTED]

Questions Presented

Whether the [REDACTED] would receive a prohibited gift by virtue of her complimentary attendance, as an honoree, at a luncheon sponsored by a not-for-profit [REDACTED] doing business with the County; or if she were to purchase or sell tickets to the luncheon.

Conclusion

Under the Nassau County Code of Ethics, the [REDACTED] would receive a prohibited gift by virtue of her complimentary attendance at a luncheon sponsored by a not-for-profit [REDACTED] doing business with the County. The [REDACTED] would not receive a prohibited gift by virtue of her paid attendance at the luncheon, nor would a conflict of interest exist if she were to purchase or sell tickets to the event, provided she did not use her official position to induce vendors or co-workers to purchase the tickets.

Governing Authority

New York General Municipal Law section 805-a provides, in pertinent part, that:

No municipal officer or employee shall... directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part...

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 3

(Gifts and Favors), in pertinent part, that:

No officer or employee of the County, whether paid or unpaid, shall accept gifts aggregating to seventy-five dollars or more during a twelve month period, nor solicit any gift of any value, whether in the form of services, loan, thing or promise of any other form, from any one person, firm or corporation which to his or her knowledge is interested directly or indirectly in any manner whatsoever in business or professional dealings with the County or any agency thereof. For purposes of this subdivision, the value of a gift of a ticket or comparable authorization entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket or the cost of entrance to the general public, notwithstanding the fact that part of the cost of attending is a tax-deductible or political contribution.

Discussion

[REDACTED]

Other funding sources include the Federal Government and certain County municipalities. [REDACTED] are provided through independent not-for-profit agencies under contracts with the County.

One such agency, [REDACTED] has invited the [REDACTED] to be a guest at a luncheon that it will sponsor, and to serve as an honoree at the luncheon. In return, the [REDACTED] will be expected to purchase or sell seven tickets valued at \$85 each.

A three step analysis was used to determine whether the [REDACTED] would receive a prohibited gift by virtue of her complimentary attendance at a luncheon sponsored by a not-for-profit [REDACTED] organization doing business with the County. The following questions were considered: (i) whether complimentary attendance by the [REDACTED] at the luncheon, or her purchase or sale of tickets to the luncheon, would violate New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), (ii)

whether complimentary attendance by the [REDACTED] at the luncheon, or her purchase or sale of tickets to the luncheon, would violate the Nassau County Code of Ethics, and (iii) whether complimentary attendance by the [REDACTED] at the luncheon, or her purchase or sale of tickets to the luncheon, 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 (the “NYGML”) establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City. Section 805-a of the NYGML prohibits a municipal officer or employee from requesting a gift, or accepting a gift (or aggregate gifts) worth \$75 or more, where it “might appear” that the gift was intended to reward or influence an official action.

Here, no reasonable inference could be drawn that the complimentary attendance by the [REDACTED] at the luncheon was intended to influence or reward any official action. In return for a pecuniary benefit valued at \$85, the [REDACTED] will be expected to purchase or sell seven tickets having an aggregate value of \$595. Accordingly, attendance at the Dinner under the circumstances presented would not violate Article 18 of the New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees). Nor would the [REDACTED] purchase or sale of tickets to the luncheon violate the statute.

2. Nassau County Code of Ethics

[REDACTED] is under contract with the County to provide [REDACTED] services. Because Code of Ethics subdivision 3 absolutely prohibits a County officer or employee from accepting a gift having a value of \$75 or more from a corporation doing business with the County, even where no inference of impropriety may be drawn, the [REDACTED] complimentary attendance at the luncheon would constitute a prohibited gift in the amount of \$85, the face value of the ticket, notwithstanding that she will be expected to purchase or sell other tickets.

In her inquiry, the [REDACTED] indicated that she is willing to attend the luncheon at her own expense, and to pay for the tickets that she is expected to purchase or sell. The [REDACTED] would not receive a prohibited gift by virtue of her paid attendance at the luncheon, nor would a conflict of interest exist if she were to purchase or sell tickets to the event, provided she did not use her official position to induce vendors or co-workers to purchase the tickets.

3. Common Law Principles

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government. In some cases, courts have found that government

officials have an implied duty to avoid conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated.¹

The restrictions against solicitation or acceptance of prohibited gifts by municipal officers and employees help to foster public confidence in government by avoiding situations in which the integrity of an officer or employee may be called into question.

Here, a prohibited appearance of impropriety would not exist if the Executive Director were attend the luncheon at her own expense, or to purchase or sell tickets to the luncheon, provided the Executive Director did not use her official position to induce vendors or co-workers to purchase the tickets.

¹ See, Zagoreos v. Conklin, 109 A.D. 2d 281 (2d Dept., 1985); Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo, 69 A.D. 2d 320 (2d Dept., 1979); Conrad v. Hinman, 122 Misc. 2d 531 (Onondaga Co., 1984).

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TO: Hon. Carnell T. Foskey, County Attorney
FROM: Steven G. Leventhal
DATE: September 9, 2015
RE: Advisory Opinion: [REDACTED]

Questions Presented

Whether two members of the [REDACTED] would receive a prohibited gift by virtue of their complimentary attendance at a luncheon hosted by the [REDACTED] a not-for-profit organization that sponsors programs in the field of [REDACTED].

Conclusions

Two members of the [REDACTED] would not receive a prohibited gift by virtue of their attendance at a luncheon hosted by the [REDACTED] a not-for-profit that sponsors programs and projects [REDACTED].

Governing Authority

New York General Municipal Law section 805-a provides, in pertinent part, that:

No municipal officer or employee shall... directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part...

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 3

(Gifts and Favors), in pertinent part, that:

No officer or employee of the County, whether paid or unpaid, shall accept gifts aggregating to seventy-five dollars or more during a twelve month period, nor solicit any gift of any value, whether in the form of services, loan, thing or promise of any other form, from any one person, firm or corporation which to his or her knowledge is interested directly or indirectly in any manner whatsoever in business or professional dealings with the County or any agency thereof. For purposes of this subdivision, the value of a gift of a ticket or comparable authorization entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket or the cost of entrance to the general public, notwithstanding the fact that part of the cost of attending is a tax-deductible or political contribution.

Discussion

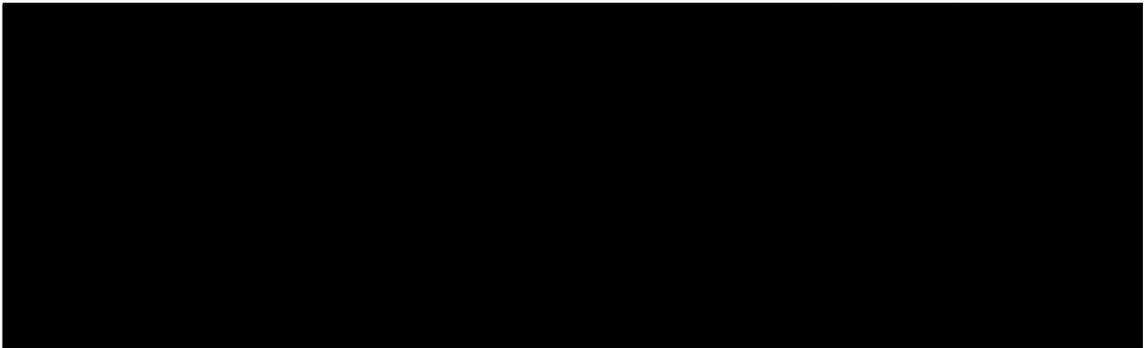
[REDACTED]

[REDACTED] is a not-for-profit organization. It is classified under IRC section 501(c)(6) as a professional association. Chapters in the U.S. are covered under Group Exemption #3110. Under the IRS Group Exemption program, subordinates are recognized as exempt based on this exemption of the parent.

[REDACTED]

According to its website, the [REDACTED] organizes and provides a number of services and events, which include, among others:

[REDACTED]



[REDACTED] has invited [REDACTED] to send two of its [REDACTED] to attend a luncheon hosted by the organization, where the [REDACTED] will be honored. The cost of attendance, \$75.00 per person, will be waived. The luncheon will take place during the organization's annual [REDACTED] featuring educational programs and networking opportunities.

A three step analysis was used to determine whether a prohibited gift would be received by two [REDACTED] if they were to accept tickets to attend the luncheon as guests of the sponsoring organization. The following questions were considered: (i) whether attendance by two [REDACTED] at the luncheon under the circumstances presented would violate New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), (ii) whether attendance by two [REDACTED] at the luncheon under the circumstances presented would violate the Nassau County Code of Ethics, and (iii) whether attendance by two [REDACTED] at the luncheon 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 (the "NYGML") establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City.¹ Section 805-a of the NYGML prohibits a municipal officer or employee from requesting a gift, or accepting a gift (or aggregate gifts) worth \$75 or more, where it "might appear" that the gift was intended to reward or influence an official action.

Here, no reasonable inference could be drawn that the not for profit organization's unsolicited offer of two tickets for attendance at the luncheon by two unspecified [REDACTED] was intended to influence or reward any official action of the [REDACTED] or its [REDACTED]. The invitation was made without specifying the particular recipients of the tickets. Further, the not for profit organization is not a County vendor. Neither the [REDACTED] nor its [REDACTED] have bestowed any official benefit on the not for profit organization.

¹N.Y. Gen. Mun. Law §800(4).

Accordingly, attendance at the luncheon under the circumstances presented would not violate New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees).

2. *Nassau County Code of Ethics*

The [REDACTED] transacts no business with the County. For that reason, and for the reasons set forth above, complimentary attendance at the luncheon by two members of the Department under the circumstances presented would not violate the Nassau County Code of Ethics. Rather, attendance by two members of the [REDACTED] at the luncheon and [REDACTED] is likely to advance the interests of the County by providing educational and networking opportunities.

3. *Common Law Principles*

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government.² The restrictions against solicitation or acceptance of prohibited gifts by municipal officers and employees help to foster public confidence in government by avoiding situations in which the integrity of an officer or employee may be called into question.

Here, having concluded for the reasons set forth above that no reasonable inference could be drawn that the offer of complimentary attendance at the luncheon by two unspecified members of the [REDACTED] was intended to influence or reward any official action of the [REDACTED] or its [REDACTED] attendance at the luncheon under the circumstances presented would not create a prohibited appearance of impropriety under common law principles.

² In some cases, courts have found that government officials have an implied duty to avoid conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated. *See, Zagoreos v. Conklin*, 109 A.D. 2d 281 (2d Dept., 1985); *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D. 2d 320 (2d Dept., 1979); *Conrad v. Hinman*, 122 Misc. 2d 531 (Onondaga Co., 1984).