

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 office 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 of 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.