



**COUNTY OF NASSAU
BOARD OF ETHICS**

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ADVISORY OPINION 102-22

A Senior [REDACTED] Examiner employed part-time in the [REDACTED] (the "Senior [REDACTED] Examiner") requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to concurrently serve in a similar part-time position as an employee of the Metropolitan Transit Authority (the "MTA"), focusing solely on the cost analysis.

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....

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 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 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 position of Senior [REDACTED] Examiner has no associated civil service job description. The Senior [REDACTED] Examiner describes his official duties as follows:

I have been employed by the [REDACTED] since October 2018. My title is Senior [REDACTED] Examiner and I serve on a part-time basis. My principal responsibility is to provide technical analysis and strategic input for the current round of labor negotiations. In particular, I am responsible for the cost analysis of management and labor bargaining proposals, measuring the impact on the County's financial plan, and ensuring conformance to the County's bargaining pattern.

I am seeking a similar position with the Metropolitan Transportation Authority. This position too will also be on a part-time basis focusing solely on the cost analysis portion of my current tasks.

The Metropolitan Transportation Authority is a public benefit corporation responsible for public transportation in the New York metropolitan area. The MTA serves 12 counties in the state of New York and two counties in the commonwealth of Connecticut. Its subsidiary agencies include the Long Island Rail Road, the Metro-North Railroad, the Staten Island Railway, MTA Construction and Development, and MTA Regional Bust Operations. Its affiliated agencies include MTA Bridges and Tunnels, and New York City Transit.

ANALYSIS

The Board of Ethics employed a three-step analysis to determine whether a prohibited conflict of interest would arise if a Senior [REDACTED] Examiner employed part-time in the Office of Management and Budget were to concurrently serve in a similar part-time position as an employee of the MTA, focusing solely on the cost analysis. The Board considered: (i) whether the contemplated 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 contemplated secondary employment, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether the contemplated 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 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 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 officer or employee.

In the absence of a specific constitutional or statutory prohibition, one person may simultaneously hold two public offices or positions of 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 a Senior [REDACTED] Examiner employed part-time in the [REDACTED] and those of a part-time employee serving in a similar part-time position with the MTA, focusing solely on the cost analysis.

While there is no inherent incompatibility between the respective duties of the two positions, conflicts of interests may nevertheless arise from time to time. In the absence of a waiver from the Board of Ethics, the Senior [REDACTED] Examiner must recuse himself from acting in his official capacity on any matter affecting the MTA. He may not disclose or make unauthorized personal use of confidential County information; or communicate on behalf of the MTA with any County board, agency, officer or employee, unless authorized to do so by the Board of Ethics.

In the unlikely event that the Senior [REDACTED] Examiner finds that he is frequently and inevitably required to recuse himself, or if his service as a part-time employee of the MTA involves him in making public statements that could reasonably be expected to prejudice the interests of the County, that may be an indication that the position of secondary employment has

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).

become incompatible with his official duties and he should, under those circumstances, seek a further advisory opinion from the Board of Ethics.

The Senior [REDACTED] Examiner must refrain from making unauthorized use of County resources, including County compensated time, in connection with his secondary employment. The compensation earned by the Senior [REDACTED] Examiner in connection with his employment by the MTA, and any reimbursement that he may receive from the MTA for expenses incurred in connection with his secondary employment activities, he must disclose the compensation and reimbursement, if any, on an annual statement of financial disclosure filed pursuant to §22.4.3 of the Administrative Code for each year in which such compensation or reimbursement is received.

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 a 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.

Having concluded for the reasons set forth above that serving as a part-time employee of the MTA, performing services similar to those performed position as Senior [REDACTED] Examiner focusing solely on the cost analysis, would not involve duties that are inherently incompatible with the official duties of a Senior [REDACTED] Examiner serving in the [REDACTED], and noting that the Senior [REDACTED] Examiner will recuse himself in any matter affecting [REDACTED],

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).

the MTA, a reasonable person would not conclude that the Senior [REDACTED] Examiner's concurrent service as a part-time employee of the MTA, performing services similar to those performed position as Senior [REDACTED] Examiner focusing solely on the cost analysis would tend to undermine public confidence in County government or create a prohibited appearance of impropriety under common law principles.

The Senior [REDACTED] Examiner must refrain from making unauthorized use of County resources, including County compensated time, in connection with his secondary employment activities. The compensation earned by the Senior [REDACTED] Examiner in connection with his employment by the MTA, and any reimbursement that he may receive from the MTA for expenses incurred in connection with his secondary employment activities, he must disclose the compensation and reimbursement, if any, on an annual statement of financial disclosure filed pursuant to §22.4.3 of the Administrative Code for each year in which such compensation or reimbursement is received.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the dual office holding contemplated here would not give rise to 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 s Senior [REDACTED] Examiner were to concurrently serve in a similar part-time position as an employee of the Metropolitan Transit Authority, focusing solely on the cost analysis.

The Senior [REDACTED] Examiner must refrain from disclosing or making unauthorized use of confidential County information, and may not use compensated County time or other County resources in connection with his secondary employment.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
April 7, 2022

Kenneth L. Gartner, Chair