



**COUNTY OF NASSAU  
BOARD OF ETHICS**

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**ADVISORY OPINION 103-21**

An Associate Vice President [REDACTED]

[REDACTED] employed in the Office of [REDACTED] of Nassau Community College requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to serve without compensation as Project Director of a not-for-profit organization engaged in two projects: (i) fundraising in support of research and data literacy, and (ii) research and data analysis for volunteer organizations working to help strengthen good governance in sub Saharan Africa.

**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.

Code of Ethics subdivision 12 (Exemptions), provides, 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, 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 Associate Vice President [REDACTED]

[REDACTED] and provides training in the effective use of data to faculty, staff and administrators.

The Associate Vice President and his spouse co-founded a research and data literacy not-for-profit organization with 501(c)(3) tax exempt status. The Associate Vice President serves without compensation as the organization's Project Director. The activities of the organization, including meetings of its Board of Directors, take place on Saturdays or in the evenings.

The Associate Vice President wishes to assist in raising financial support and in developing and implementing programs to promote research and data literacy through workshops, webinars and seminars. The Associate Vice President also wishes to utilize his training [REDACTED] in connection with a research and data analysis project providing information to volunteer organizations working to help strengthen good governance in sub Saharan Africa.

Organizations described in section 501(c)(3) Internal Revenue Code are commonly referred to as charitable organizations. To be tax-exempt under section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated exclusively for purposes that

are, among others, charitable, religious, educational, scientific, or literary. None of the earnings of the organization may inure to any private shareholder or individual. In addition, it may not attempt to influence legislation as a substantial part of its activities and it may not participate in any campaign activity for or against political candidates.

## ANALYSIS

The Board of Ethics employed a three step analysis to determine whether a prohibited conflict of interest would arise if he were to serve without compensate as Project Director of a not-for-profit organization engaged in two projects: (i) fundraising in support of research and data literacy, and (ii) research and data analysis for volunteer organizations working to help strengthen good governance in sub Saharan Africa. The Board considered: (i) 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.<sup>1</sup> All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.<sup>2</sup> 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 a public office and a position of outside employment unless they are incompatible.<sup>3</sup> The leading case on compatibility of offices is People ex rel. Ryan v. Green.<sup>4</sup> 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

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<sup>1</sup> N.Y. Gen. Mun. Law §800(4).

<sup>2</sup> 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).

<sup>3</sup> 1982 N.Y. Op. Atty. Gen (Inf.) 148.

<sup>4</sup> 58 N.Y. 295 (1874).

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 Associate Vice President and those of an uncompensated Project Director for a not-for-profit organization engaged in fundraising in support of research and data literacy, and research and data analysis for volunteer organizations working to help strengthen good governance in sub Saharan Africa.

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 Associate Vice President must recuse himself from acting in his official capacity on any matter affecting the not-for-profit organization that he serves as Project Director. He may not disclose or make unauthorized personal use of confidential County information; or communicate on behalf of the not-for-profit organization that he serves with any County board, agency, officer or employee, unless authorized to do so by the Board of Ethics.

In the unlikely event that the Associate Vice President finds that he is frequently and inevitably required to recuse himself, or if his service as an uncompensated Project Director 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 become incompatible with his official duties and she should, under those circumstances, seek a further advisory opinion from the Board of Ethics. If the Associate Vice President is reimbursed by the not-for-profit organization for his expenses incurred in his activities as Project Director, for each year in which such reimbursement is received, he must complete and file an annual statement of financial disclosure pursuant to §22.4.3 of the Administrative Code.

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.<sup>5</sup>

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.

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<sup>5</sup> 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).

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 an uncompensated Project Director for a not-for-profit organization engaged in fundraising in support of research and data literacy, and research and data analysis for volunteer organizations working to help strengthen good governance in sub Saharan Africa would not involve duties that are inherently incompatible with the official duties of the Associate Vice President, and noting that the Associate Vice President will recuse himself in any matter affecting the not-for-profit organization that he serves, a reasonable person would not conclude that the Associate Vice President's concurrent service as an uncompensated Project Director for the not-for-profit organization would tend to undermine public confidence in County government or create a prohibited appearance of impropriety under common law principles.

The Associate Vice President must refrain from making unauthorized use of County resources, including County compensated time in connection with his services as an uncompensated Project Director for the not-for-profit organization. If the Associate Vice President is reimbursed by the not-for-profit organization for his expenses incurred in his activities as Project Director, for each year in which such reimbursement is received, he must complete and file an annual statement of financial disclosure pursuant to §22.4.3 of the Administrative Code.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the concurrent service of the Associate Vice President as an uncompensated Project Director for a not-for-profit organization engaged in fundraising in support of research and data literacy, and research and data analysis for volunteer organizations working to help strengthen good governance in sub Saharan Africa 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 an Associate Vice President [REDACTED] employed in the Office of [REDACTED] of Nassau Community College were to serve without compensation as Project Director of a not-for-profit organization engaged in fundraising in support of research and data literacy, and in research and data analysis for volunteer organizations working to help strengthen good governance in sub Saharan Africa. The Associate Vice President 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  
October 27, 2021

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Kenneth L. Gartner, Chair