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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