

EDWARD P. MANGANO
COUNTY EXECUTIVE



BOARD OF ETHICS

OWEN SMITH
CHAIR

CARNELL T. FOSKEY
COUNTY ATTORNEY

JOHN E. RYAN

**COUNTY OF NASSAU
BOARD OF ETHICS**

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

STEVEN G. LEVENTHAL
COUNSEL

ADVISORY OPINION NO. 105-17

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

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

GOVERNING AUTHORITY

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

CONCLUSION

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

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
October 16, 2017


Owen Smith, Chair