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ADVISORY OPINION 110-18

The Commissioner (the "Commissioner") of the [REDACTED] (the "[REDACTED]") requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to also serve as an elected [REDACTED] (the "[REDACTED]").

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....

b. A County officer or employee shall not appear before any agency or officer of the County except on behalf of the County, provided, however, that for County officers or employees serving in an unpaid capacity, this prohibition shall apply only to appearances before the agency served by such officer or employee.

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 5 (Disclosure of Confidential Information), provides that:

No officer or employee of the County, whether paid or unpaid shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County

employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such information to advance the financial or other private interest of himself or herself or others.

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 the 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 Nassau County [REDACTED] is responsible for [REDACTED]

[REDACTED]

Commissioner of [REDACTED] as the [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] was established pursuant to [REDACTED]

[REDACTED]

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 [REDACTED] were to also serve as an [REDACTED]. The Board considered: (i) whether holding the dual offices, 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 holding the dual offices, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether holding the dual offices, 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 prohibit 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 [REDACTED]

While there is no inherent incompatibility between the respective duties of the two positions, conflicts of interest may nevertheless arise from time to time. In the absence of a waiver from the Board of Ethics, [REDACTED] must recuse himself from acting in his official capacity on any matter affecting [REDACTED]

[REDACTED] He may not disclose or make unauthorized personal use of confidential County information; communicate on behalf of the [REDACTED] 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 the [REDACTED] in which he has participated in his capacity as a County employee.

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).

If the Commissioner 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.

In his service as an [REDACTED] the Commissioner must refrain from making unauthorized use or disclosure of confidential County information. In the event the Commissioner is uncertain whether particular information is confidential within the meaning of the Code of Ethics, he may seek the advice of this Board. Further, in his service on behalf of the [REDACTED] the Commissioner must refrain from misuse of County resources including, without limitation, compensated County time.

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 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 serving as Commissioner of a [REDACTED] would not involve duties that are inherently incompatible with the official duties of the Commissioner [REDACTED] the Commissioner's concurrent service as an [REDACTED] 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 Code of Ethics and incorporated in this opinion.

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 Tuxedo, 69 A.D.2d 320 (2d Dept. 1979).

For the same reasons, the best interests of the County and its residents would be advanced by the Commissioner's concurrent service as an [REDACTED]. Accordingly, based on the facts presented, and subject to the conditions set forth herein, the concurrent service of the Commissioner [REDACTED] as an [REDACTED] within the County would not 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 Commissioner of the [REDACTED] were to also serve as an [REDACTED].

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
June 20, 2018



Kenneth L. Gartner, Chair