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ADVISORY OPINION NO. 2017-09

The County Attorney requests a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit a [REDACTED] upon termination of his County employment, to accept employment with a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy.

GOVERNING AUTHORITY

The Code of Ethics provides at subdivision 2 (Conflicts of Interest Prohibited), in pertinent part, that:

- a. Except as provided in subdivision twelve of this section, no County officer or employee whether paid or unpaid, shall:
  - ... (2) Participate as attorney, agent, broker, representative or employee in a business or professional transaction with... the County or any agency

thereof for any person or entity directly or indirectly in any manner whatsoever or fail to ensure that adequate measures are taken to prevent his or her participating in any manner in any such transaction where a law firm or other entity in which such person is an owner, member or employee becomes involved as attorney, agent, broker or representative in such a transaction with... the County.

(3) Accept or retain other employment... 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....
- c. No County officer or employee shall receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter that is before the agency served by such officer or employee, or any agency over which he or she has supervisory control or to which he or she has the power to appoint any member, officer or employee.

The Code of Ethics provides at subdivision 8 (Post-employment restrictions), in pertinent part,

that:

- a. No person who has served as a paid officer or employee of the County shall, within a period of two years after the termination of such service or employment, appear<sup>1</sup> before any Board, agency, officer or employee of the County, except on behalf of the State, or a political subdivision or instrumentality thereof, or in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- b. No person who has served as a paid or unpaid officer or employee of the County shall receive compensation or render any services in relation to any case, proceeding, application or particular matter which such person was directly concerned with, personally participated in, or actively considered during the period of his or her service or employment, except in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- c. No former paid or unpaid officer or employee of the County 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

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<sup>1</sup> "Appear" is broadly defined by Code of Ethics subdivision 1 to mean "to make a communication in any form, personally or through another person, including, but not limited to, by letter, telephone, by e-mail or by facsimile, on behalf of a person or entity from whom one receives income or compensation."

public, nor shall he or she use such information to advance the financial or other private interest of himself or himself or others.

The Code of Ethics provides at subdivision 12 (Exemptions), in pertinent part, that:

- a. No employee may have any interests or take any action prohibited by subdivisions two through six of this section without the approval of the Board; provided that the provisions of this section shall not prohibit, or require recusal or transactional disclosure as a result of:

... (7) County officers or employees appearing or participating before the County or receiving compensation for working on a matter before the County after termination of their County service or employment... where they are appearing in an official capacity as an officer or employee of another governmental agency.

## DISCUSSION

The U.S. Department of Housing and Urban Development (“HUD”) has allocated and distributed funds to the State of New York for recovery from Hurricane Irene, Tropical Storm Lee and Superstorm Sandy. Specifically, the funds are allocated through HUD's Community Development Block Grant Disaster Recovery (“CDBG-DR”) program to be distributed to sub-recipients with infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy. New York State selects the sub-recipients.

New York State's Office, *the Governor's Office of Storm Recovery* (“GOSR”), through various employment agencies, employs staff to help complete the “New York Rising” project toward the goal of implementation and oversight of the repair and rebuild initiatives.

Penda-Aiken, Inc. (“Penda-Aiken”) is a Brooklyn, New York-based employment and staffing firm with experience in disaster recovery. Penda-Aiken is working with an engineering firm selected by HUD to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy. Additionally, Penda-Aiden is working with and in support of New York State on its oversight of a number of sub-recipient projects, including infrastructure projects in Nassau County, Suffolk County and other areas throughout New York State. Neither the [REDACTED] nor the County of Nassau played any role in the selection of Penda-Aiken; rather, Penda-Aiken was selected by New York State.



The [REDACTED] has been employed by Nassau County since [REDACTED], and was working in the County's Department of [REDACTED] on [REDACTED] projects and other [REDACTED] related matters.

The Hydrogeologist has been offered a position to work for Penda-Aiken to serve as a Subject Matter Expert. His job responsibilities would include working with GOSR in making recommendations on drainage improvements, coastal resiliency projects and flood mitigation projects, which include projects located in Nassau County.

The County Attorney has opined that approval of the proposed employment would further the interest of Nassau County, as the [REDACTED] will immediately enhance the ability of GOSR to meet its goals and obligations in protecting Nassau County residents through the repair and rebuilding of vital infrastructure. Approval is also consistent in spirit with the exception under the Code of Ethics extended to those working with New York State or its political subdivisions or instrumentalities.

The [REDACTED] post-employment services would include services rendered in connection with projects in Nassau County, and elsewhere. Further, it is anticipated that he will communicate with County officers and employees in connection with his post-employment services as a Subject Matter Expert working with GOSR. It is not anticipated that the [REDACTED] will work on any particular matters that he handled while employed by the County.

In considering this inquiry, the Board of Ethics employed the following three step analysis to determine whether to grant the [REDACTED] a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics: (i) whether the proposed post-employment activities within two years of the termination of the [REDACTED] county employment would violate N.Y. Gen. Mun. Law Article 18 (Conflicts of Interest of Municipal Officers and Employees) or the Code of Ethics, (ii) whether the proposed post-employment activities within two years of the termination of the [REDACTED] county employment would further the interests of the County, and (iii) whether the proposed post-employment activities within two years of the termination of the [REDACTED] county employment would create a prohibited appearance of impropriety under common law principles.



Article 18 of the New York General Municipal Law establishes standards of ethical conduct that are mandatory for officers and employees in every municipality within the State of New York, other than New York City.<sup>2</sup> However, the statute does not regulate post-employment activities. The Code of Ethics imposes three distinct restrictions on the post-employment activities of former county officers and employees. The first restriction is a two-year ban on compensated appearances before any board, agency, officer or employee of the County. However, the Code of Ethics expressly exempts appearances that further the interests of the County and are made with the approval of the Board of Ethics upon application of a county agency.

Here, the County interests would be advanced by a waiver of the two-year ban on compensated appearances before any board, agency, officer or employee of the County. The unique knowledge and experience of the [REDACTED] in issues related to storm disaster recovery will immediately enhance the ability of GOSR to meet its goals and obligations in protecting Nassau County residents through the repair and rebuilding of vital infrastructure. Approval is also consistent in spirit with the exception extended to those working with New York State, its political subdivisions or instrumentalities since Penda-Aiden is working with and in support of New York State on its oversight of sub-recipient projects.

The second post-employment restriction imposed by the Code of Ethics is a permanent ban on the receipt of compensation or the rendering of services in connection with particular matters handled by a former county officer or employee during the period of his or her county service. Here, it is not anticipated that the [REDACTED] will work on any particular matters that he handled while employed by the County.

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<sup>2</sup> N.Y. Gen. Mun. Law §800(4).

The third post-employment restriction imposed by the Code of Ethics is a permanent ban on the disclosure or private use of confidential government information.

The Board of Ethics is not empowered to waive the permanent ban on the disclosure or private use of confidential government information.

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government.<sup>3</sup> The post-employment restrictions imposed by the Nassau County Code of Ethics help foster public confidence in government by avoiding situations where it might appear that a former officer or employee may have improperly exchanged official favors to obtain post-employment compensation; that the former officer or employee enjoys a special relationship with his or her former colleagues and thus has an unfair advantage over other persons seeking similar benefits; or that the former county officer or employee may be in a position to use confidential government information to the unfair advantage of a private sector employer or to the disadvantage of the County.

When considering an application for waiver of the post-employment restrictions, the Board of Ethics should consider the value of the county interest that would be advanced, the availability of alternative sources of the proposed services, and the means by which any appearance of impropriety might be mitigated.

Here, the [REDACTED] possesses uniquely valuable knowledge and highly relevant experience in designing and implementing storm emergency response programs. The County's important interest in a coordinated government response to the ongoing effects of recent natural disasters would be advanced by the post-employment service of the [REDACTED] as a Subject Matter Expert for a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development

<sup>3</sup> In some cases, courts have found that government officials have an implied duty to avoid conduct that violates the spirit and intent of ethics regulations, even where no specific statute is violated. See, *Zagoreos v. Conklin*, 109 A.D. 2d 281 (2d Dept., 1985); *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Tuxedo*, 69 A.D. 2d 320 (2d-Dept., 1979); *Conrad v. Hinman*, 122 Misc. 2d 531 (Onondaga Co., 1984).

to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy.

Approval is also consistent in spirit with the exception extended to those working with New York State, its political subdivisions or instrumentalities. Accordingly, there is no reason to conclude that the proposed post-employment of the [REDACTED] could reasonably be viewed as having resulted from any official favor, or that the proposed post-employment activities would give rise to any actual or perceived conflict of interest.

The County Attorney further inquires, in the alternative, whether a prohibited conflict of interest would exist if the [REDACTED] were to accept such employment while on a leave of absence from his employment with the County.

Article 18 of the New York General Municipal Law does not regulate the outside employment activities of municipal officers and employees.

The Code of Ethics prohibits a County officer or employee from accepting outside employment that directly or indirectly creates a conflict with his or her official duties. Long established common law principles and opinions of the New York 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. 1982 N.Y. Op. Atty. Gen (Inf.) 148. The leading case on compatibility of offices is People ex rei. Ryan v. Green, 58 N.Y. 295 (1874). 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 in the private sector. *See*, 1982 N.Y. Op. Atty. Gen (Inf.) 148. 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, the [REDACTED] post-employment activities would involve services rendered in connection with projects in Nassau County, and elsewhere. It is anticipated that he will communicate with County officers and employees in connection with his post-employment services as a Subject Matter Expert working with HGA; however, it is not anticipated that the [REDACTED] will work on any particular matters that he handled while employed by the County.

Based on the unique qualifications of the [REDACTED] and his ability to provide important disaster response services for the ultimate benefit of Nassau County residents, and based on the absence of an actual conflict of interest, the Board of Ethics concludes that a waiver of the restrictions on secondary employment and appearances by County employees before County agencies on behalf of their outside employers should be waived in the event the proposed activities are conducted while the [REDACTED] is on a leave of absence from his County employment. This conclusion is consistent with the spirit of the "government to government" exception found at Code of Ethics Section 12, subsection 8.

Here, there is no reason to conclude that the [REDACTED] proposed employment with a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy would create an appearance of impropriety whether occurring after termination of his County employment or while on a leave of absence.

The Hydrogeologist must refrain from the use or disclosure of confidential County information or the use of other County resources in his employment as a Subject Matter Expert.

## CONCLUSION


Based on the facts presented, the Board of Ethics hereby grants a waiver pursuant to the Code of Ethics, subdivision 8 (Post-employment restrictions) so as to permit a [REDACTED] upon termination of his County Employment, to accept employment with a staffing employment agency working with an engineering firm selected by the U.S. Department of Housing and Urban Development to provide advice in connection with the allocation and distribution of funds to the State of New York and, ultimately, to sub-recipients for the repair of infrastructure damaged by Hurricane Irene, Tropical Storm Lee and Superstorm Sandy.

In the alternative, the Board of Ethics hereby grants a waiver of the restrictions on secondary employment and appearances by County employees before County agencies on behalf of their outside employers in the event the proposed activities are conducted while the [REDACTED] is on a leave of absence from his County employment.

The foregoing constitutes the opinion of the Board of Ethics.<sup>4</sup>

Dated: Mineola, New York

Sept. 15, 2017

Owen Smith   
Owen Smith, Chair

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<sup>4</sup> The County Attorney recused himself from the discussions, deliberation and vote in this matter.