

THE RECIPIENT HAS AUTHORIZED PUBLICATION OF THE UNREDACTED
VERSION OF THIS ADVISORY OPINION

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ADVISORY OPINION 111-19

A Deputy County Attorney (the "DCA") requests an advisory opinion as to whether a prohibited conflict of interest would arise if she were to serve as a village prosecutor for a village located in the County of Nassau (the "Village").

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.

DISCUSSION

The DCA inquires as follows:

I recently started as a Deputy County Attorney as Counsel to the Office of Consumer Affairs where I am handling the administrative hearings on violations issued to vendors as well as consumer complaints. I am requesting approval to continue my current outside position with the Village of Malverne as an evening Prosecutor while simultaneously being employed by the County as a Deputy County Attorney. I am on the Traffic Court Schedule at Malverne Village Hall approximately one Tuesday evening per month from about 6:30 pm -9:30 pm. No County resources are being utilized during the course of my employment with the Village of Malverne. Moreover, my employment with the Village will not be conducted on County time as Court is only in session on Tuesday evenings. My hours with the County are 9am-4:45 pm.

ANALYSIS

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 DCA were to also serve as a village prosecutor for a village located in the County of Nassau. 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.

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).

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.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 DCA, and those of a prosecutor for a village located in the County of Nassau. .

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, the DCA must recuse herself from acting in her official capacity on any matter affecting the Village. She may not disclose or make unauthorized personal use of confidential County information; or communicate on behalf of the Village with any County board, agency, officer or employee, unless authorized to do so by the Board of Ethics.

In the unlikely event that the DCA finds that she is frequently and inevitably required to recuse herself, or if her service as a village prosecutor involves her 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 her official duties and she should, under those circumstances, seek a further advisory opinion.

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

³ 1982 N.Y. Op. Atty. Gen (Inf.) 148.

⁴ 58 N.Y. 295 (1874).

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 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.

The potential for an appearance of impropriety is not limited to matters in which the County and the Village are adversaries. The DCA must ensure that the Village will neither receive nor appear to receive an unwarranted County benefit as a result of her concurrent service as a DCA and as a village prosecutor. She must recuse herself from acting in her official capacity on any matter affecting the Village.

Having concluded for the reasons set forth above that serving as a village prosecutor would not involve duties that are inherently incompatible with the official duties of the DCA, and noting that the DCA will recuse himself in any matter affecting the Village, a reasonable person would not conclude that the DCA's concurrent service as a village prosecutor 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 duties owed by the DCA pursuant to the Code of Ethics and New York Rules of Professional Conduct.⁶

The DCA must refrain from making unauthorized use of County resources, including County compensated time in connection with her services as a village prosecutor. The DCA must comply with the outside practice policies of the County Attorney's Office. The DCA must report the income derived from her outside employment on her annual statement of financial disclosure.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the concurrent service of the DCA as a village prosecutor would not create a prohibited appearance of impropriety under common law principles.

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).

⁶ The scope of this opinion is limited to the application of the principles of local government ethics to the facts presented. The Board of Ethics expresses no opinion as to the application of the principles of professional ethics set forth in the New York Rules of Professional Conduct.

CONCLUSION

Based on the facts presented, and subject to the conditions set forth herein, a prohibited conflict of interest would not arise if a Deputy County Attorney were to concurrently serve as a village prosecutor for a village within the County of Nassau.

The foregoing constitutes the opinion of the Board of Ethics.⁷

Dated: Mineola, New York
October 10, 2019


Kenneth L. Gartner, Chair

⁷ Mr. Kasschau did not participate in the Board's discussions, deliberations or vote in this matter.