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**ADVISORY OPINION 103-20**

The [REDACTED] employed in the Office of the County Comptroller (the [REDACTED]) requests an advisory opinion as to whether a prohibited conflict of interest would arise if he were to serve as an uncompensated member of the Supervisory Committee of a local credit union whose members are county employees (the "Credit Union").

**GOVERNING AUTHORITY**

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 2 (Conflicts of Interest Prohibited), in pertinent part, that:

- a. ... [N]o County officer or employee whether paid or unpaid shall ...
  - (2) 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....

The Nassau County Code of Ethics provides at subdivision 4 (Recusal and Disclosure of Interest), 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 judgment or take discretionary actions in the best interest of the County.
- b. Any County officer or employee who recuses himself or herself pursuant to paragraph (a) of this subdivision shall be required to disclose such recusal in writing to the Board [of Ethics] and the nature of his or her private interest.....

Nassau 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.

Nassau 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.

Nassau County Code of Ethics subdivision 12 (Exemptions) provides, in pertinent part, that:

a. 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, public authority, or public benefit corporation, 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, 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 [REDACTED] supervises the [REDACTED] Division of the Office of the County Comptroller.

The Nassau Financial Federal Credit Union was organized pursuant to Article 11 of the New York Banking Law. It is a non-profit financial cooperative providing services to its members only. The Credit Union was founded in 1936. It was originally chartered to serve employees of the Nassau County Courthouse. Over the years, its charter was amended to authorize services to anyone who lives, works, worships, attends school or volunteers in Nassau County. The Credit Union has over \$400 Million in assets and serves over 23,000 members. It offers a full range of retail banking products, and financial services for consumers and small businesses. As a financial cooperative, the Credit Union is able to provide its members with higher rates on savings and lower rates on loans.

The Supervisory Committee of the Credit Union is appointed by the Credit Union's Board of Directors from among the membership. The Supervisory Committee members are volunteers and do not receive compensation. Pursuant to Banking Law Section 475, the Supervisory Committee is charged with the duty, among other things:

(a) To inspect the securities, cash and accounts of the credit union and supervise the acts of its board of directors, officers and credit committee; and

(d) Once each fiscal year, at the close of any quarter and not less than six months after the date of the previous such audit, to make an audit of the books and records of the credit union for the period following the most recent audit; to examine fully its business and affairs and into such other matters as the superintendent may require; upon the completion of such audit and examination to make full report thereof in writing, and sworn to by each member of the supervisory committee, to the board of directors at their next regular meeting after the completion of such audit and examination, to cause such report to be filed in the office of the credit union and to give notice to each member of the board of directors that such report has been filed, to cause a duplicate of such report to be filed in the office of the superintendent within ten days after the next regular meeting of the board of directors, and which report to the board of directors shall include a statement of the assets and liabilities, receipts and disbursements of the credit union based upon such audit and examination and to cause such report to be read at the annual meeting of shareholders and filed with the records of the credit union; and to keep full and complete minutes of all business transacted at each of its meetings. In no case shall a member of the supervisory committee serve as a loan officer or as a member of the credit committee or as a member of the board of directors....

This credit union currently does not have a purchase order pending, nor a contract with the County for goods or services. It provides services to county employees who may choose it as a remittance recipient for their paychecks or other payments. Direct deposit transactions are not supervised by [REDACTED] Division of the Comptroller's Office in which the [REDACTED] is employed. They are supervised by a separate division.

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 [REDACTED] were to serve as an uncompensated member of a local credit union whose members are county employees. 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.

### *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.<sup>1</sup> All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.<sup>2</sup> However, GML Article 18 does not regulate secondary employment. Accordingly, under the circumstances presented, the secondary employment 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 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 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.<sup>3</sup> The leading case on compatibility of offices is People ex rel. Ryan v. Green.<sup>4</sup> 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 [REDACTED] and those of a member of the Supervisory Committee of the Credit Union. The only county transactions in which the Credit Union is currently engaged, direct deposit of paychecks and other payments due the county employees who are members of the credit union and who specify the Credit Union as their remittance recipient. These transactions are supervised by division of the Comptroller's Office other than the one in which the [REDACTED] is employed. Further, Code of Ethics subsection 12 (Exemptions) expressly permits county officers and employees to hold policy making positions in membership corporations and other nonprofit corporation or association.

However, while the duties of the proposed secondary employment is not inherently incompatible with the [REDACTED] official duties, conflicts of interest may nevertheless arise from time to time. The [REDACTED] must recuse himself from participating in any official

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<sup>1</sup> N.Y. Gen. Mun. Law §800(4).

<sup>2</sup> 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).

<sup>3</sup> 1982 N.Y. Op. Atty. Gen (Inf.) 148.

<sup>4</sup> 58 N.Y. 295 (1874).

matter involving the Credit Union or its interests, including but not limited to the processing or audit of any vendor claims that the Credit Union may present. In the event the [REDACTED] recusal is frequently and inevitably required, it may be an indication that the two positions are incompatible and, under those circumstances, the [REDACTED] should request further advice from the Board of Ethics. The [REDACTED] should also seek further advice from the Board of Ethics if there is a material change in the relationship between the County and the Credit Union.

The [REDACTED] must refrain from disclosing or making unauthorized use of confidential County information, and from using compensated County time or other County resources in connection with his secondary employment.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the proposed secondary employment 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.<sup>5</sup>

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.

Here, having concluded for the reasons set forth above that there is no inherent incompatibility between the duties of the [REDACTED] and those of a member of a member of the Supervisory Committee of the Credit Union, there is no reason to conclude that the proposed secondary employment, under the circumstances presented and subject to the conditions set forth herein, would tend to undermine public confidence in County government or create a prohibited appearance of impropriety under common law principles.

The [REDACTED] may neither disclose nor make personal use of confidential County

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<sup>5</sup> 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).

information; and may not use compensated County time or other County resources in connection with his secondary employment activities.

### CONCLUSION

Based on the facts presented and subject to the conditions set forth herein, a prohibited conflict of interest would not arise if the [REDACTED] employed in the Office of the County Comptroller were to serve as an uncompensated member of the Supervisory Committee of a local credit union whose members are county employees.

The [REDACTED] must recuse himself from participating in any official matter involving the Credit Union or its interests, including but not limited to the processing or audit of any vendor claims that the Credit Union may present. In the event the [REDACTED] recusal is frequently and inevitably required, it may be an indication that the two positions are incompatible and, under those circumstances, the [REDACTED] should request further advice from the Board of Ethics.

The [REDACTED] must refrain from disclosing or making unauthorized use of confidential County information, and from using compensated County time or other County resources in connection with his secondary employment.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York  
June 29, 2020

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Kenneth L. Gartner, Chair