



**COUNTY OF NASSAU
BOARD OF ETHICS**
One West Street
Mineola, New York 11501-4820
516-571-3056

BOARD OF ETHICS

KENNETH L. GARTNER
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JARED A. KASSCHAU
COUNTY ATTORNEY

MICHAEL PERNICK
MEMBER

STEVEN G. LEVENTHAL
COUNSEL

KEVIN HARDIMAN
SECRETARY

ADVISORY OPINION 104-20

The Vice President for Administration and Planning of the Nassau Community College (“NCC”) requests a waiver of the post-employment restrictions set forth at Nassau County Charter section 2218 (the “Code of Ethics”) subdivision 8 (Post-employment restrictions) so as to permit NCC to procure the services of a project manager (the “Project Manager”) through a construction management firm (the “Construction Management Firm”), where the Project Manager retired on August 31, 2019 from employment as a project manager in the NCC Department of Design and Construction.

GOVERNING AUTHORITY

Code of Ethics subdivision 8 (Post-employment restrictions) provides, 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, appear¹ 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 [of Ethics] upon application of a County agency....

DISCUSSION

The Vice President for Administration and Planning states as follows:

... [The Project Manager], was employed by Nassau Community College as a project manager in the Department of Design and Construction from September 1, 2017 until his

¹ “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.”

retirement from New York State employment on August 31, 2019. Nassau Community College manages it[s] own Capital Construction Projects with a staff consisting of a Director, three project managers (employees) for construction projects and one project manager (employee) for IT projects. Additionally, this staff is augmented by qualified personnel hired through one of the College's Architect Engineer or Construction Management firms. In recent months, two of the three NCC project managers (employees) have left the College, leaving only employee of the College and one contracted project manager (who is preparing to retire) to oversee the extensive NCC Capital Program. NCC has been able to keep... [the Project Manager] on a part time employee contract until recently, but his contract has expired and cannot be renewed as he would exceed his maximum compensation allowed a retired New York State retiree. Most importantly, the departure of the NCC employee project managers has left the College in the position of not having sufficient staff capable of working with the County and State automated project management system or having experience working with County/College Capital Project processes. Due to the current uncertainty in funding, NCC does not wish to hire any replacement full time employees but rather would prefer to engage one of the College's Construction Management firms to provide a contract employee as a project manager. Pursuant to that goal, NCC developed a task order to fill this position and sent it to all of the Construction Management firms on contract with the College. Upon receipt of proposals from six Construction Management firms, the proposals were rated by a selection committee composed of the department head, the two remaining employee project managers in the department and the Vice President to whom the department head reports. The Committee reviewed the proposals and found that few of the firms proposed personnel that actually met the requirements of the task order, specifically the categories of "experience with NCC and Nassau County". These were essential requirements for the extension of staff member as the Department needs the new project manager to become an instant asset to the College, with little training and hands-on management. The only proposed staff member that did meet this requirement was submitted by Jacobs Engineering. This was... [the Project Manager] who was employed by NCC until he retired in August 2019. ... [The Project Manager] was the only project manager proposed by any of the Construction Management firms that was experience both in working on County/College Capital Projects and in operating the County's automated project management system, an essential qualification for this position. The rate proposed by... the [Construction Management Firm] is comparable to the rates proposed by the other CM firms. NCC therefore requests that... [the Project Manager] be granted a waiver to work as a contract project manager for the College.

ANALYSIS

The Board of Ethics employed a three-step analysis to determine whether, under the circumstance presented, it should grant a waiver of the post-employment restrictions set forth at Code of Ethics subdivision 8, so as to permit NCC to procure the services of the Project Manager. The Board of Ethics considered: (i) whether the proposed post-employment activities, 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, under the circumstances presented, the proposed post-employment activities would further the interests of the County, 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.² All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.³ However, the statute does not regulate post-employment activities. Accordingly, the proposed post-employment activities of the Project Manager would not violate N.Y. Gen. Mun. Law Article 18.

2. Nassau County Code of Ethics

The Nassau County Code of Ethics prohibits a County officer or employee from appearing before (i.e. communicating with) any Board, agency, officer or employee of the County for a period of two years after separation from County employment, except on behalf of another government agency or instrumentality. The Board of Ethics is authorized to waive this post-employment restriction upon the request of a County agency, if a waiver would further the interests of the County.

Here, the Vice President for Administration and Planning reports that “a selection committee composed of the department head, the two remaining employee project managers in the department and the Vice President to whom the department head reports... [determined that the Project Manager] was the only project manager proposed by any of the Construction Management firms that was experience both in working on County/College Capital Projects and in operating the County's automated project management system, an essential qualification for this position”, and that the rate of compensation proposed for the project manager’s services is comparable to the rates charged by other construction management firms.

Accordingly, based on the representations of the Vice President for Administration and Planning, and the particular circumstances presented, the Board of Ethics finds that a waiver of the post-employment restrictions set forth at Code of Ethics subdivision 8 (Post-employment restrictions) so as to permit NCC to procure the services of the Project Manager through the Construction Management Firm, would further the interests of the County.

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.⁴

² N.Y. Gen. Mun. Law §800(4).

³ 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).

⁴ 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).

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.

Based on the representations of the Vice President for Administration and Planning, and the particular circumstances presented, the Board of Ethics finds that the proposed post-employment activities would not give rise to a prohibited appearance of impropriety under common law principles nor create circumstances that would undermine public confidence in County government.

CONCLUSION

Based on the facts presented, the Board of Ethics hereby grants a waiver of the post-employment restrictions set forth at Code of Ethics subdivision 8 (Post-employment restrictions) so as to permit NCC to procure the services of the Project Manager through the Construction Management Firm.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
October 19, 2020



Kenneth L. Gartner, Chair