

STATE OF NEW YORK: COUNTY OF SUFFOLK
SUFFOLK COUNTY BOARD OF ETHICS

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In the Matter of the Inquiry of

██████████

ADVISORY OPINION

No. AO-2015-12

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NOTICE: THIS ADVISORY OPINION IS SUBJECT TO REVISION OR WITHDRAWAL. Applications requesting its modification, clarification, or withdrawal must be made in accordance with Suffolk County Board of Ethics rules. Unless an application for the revision or withdrawal of an advisory opinion is timely received, it shall become final. Nothing shall prohibit the Suffolk County Board of Ethics, on its own motion, from reconsidering, revising or withdrawing an advisory opinion at any time.

ADVISORY OPINION REQUEST

1. **Question:** Would per diem work that occurs within the two year period after one's separation from County service be a violation of the Suffolk County post-employment laws?

Answer: Without a specific exemption in the County laws, appearances before the Department ██████████ by former Department ██████████ employees pursuant to per diem contracts within two years from the former employees' separation from County service would violate the terms of the Suffolk County Code §§ 77-6(B) and (C).

GOVERNING AUTHORITY

2. The Laws of Suffolk County; Suffolk County Administrative Code XXX, Advisory Opinions; and Suffolk County Code Chapter 77, Section 77-6 (B), Section 77-6(C).

PROCEDURAL HISTORY

3. This Advisory Opinion was requested 8/28/2015.

4. Standing was voted and approved on 9/2/2015.
5. Fact finding was concluded on 9/17/2015.
6. The Board voted on this Advisory Opinion request on 10/7/15.

INFORMATION PRESENTED TO THE BOARD

7. The Requestor is a current an [REDACTED] at the Suffolk County Department [REDACTED].

8. The Requestor is inquiring about future contracts that the County may wish to enter into with former employees on a per diem basis.

9. The Requestor asserts that the contracts would be between the County and the former employees directly, not a private employer or private firm. In addition, the Requestor asserts that the contracts would be with [REDACTED] [REDACTED] who have specialized skills, education, training and licenses and/or certifications required by the Department [REDACTED]. Moreover, the Department [REDACTED] has a need for such services to respond to unexpected spikes in demand for services with the Department and to assist in coverage during staff shortages. The proposed contract rates have been approved by the Suffolk County Department of Labor Relations and are well below market rates for such services. Lastly, the Suffolk County Executive's RFP Waiver Committee has granted the Department [REDACTED] [REDACTED] a waiver of formal bid solicitations or request for proposals under Suffolk County Code Section 708-6(B) of Article III, Consultant Services Procurement.

OPINION AND ANALYSIS

10. In considering this inquiry, the Board employed the following three-step analysis

to determine whether a prohibited conflict of interest would exist:

- a) Does the Requestor have standing to obtain an Advisory Opinion from the Suffolk County Board of Ethics;
- b) Is the Requestor seeking advice on proposed future conduct;
- c) Whether the Department [REDACTED] may contract with former employees, specifically [REDACTED], for per diem work with the Department?

STANDING

11. The Board determined that standing exists for this Advisory Opinion request due to the Requestor's position as a County employee¹ (*Suffolk County Administrative Code §A30-1, §A30-3, Suffolk County Code Chapter 77, §77-1, NYC COIB Advisory Opinion 2009-4*).

PROPOSED FUTURE CONDUCT

12. The Law States in Pertinent Part²:

§ A30-3(B). ADVISORY OPINIONS:

Advisory opinions shall be issued only with respect to proposed future conduct or action by a public servant. A public servant whose conduct or action is the subject of an advisory opinion shall not be subject to penalties or sanctions by virtue of acting or failing to act due to reasonable reliance on the opinion, unless material facts were omitted or misstated in the request for an opinion. The Board may amend a previously issued advisory opinion after giving reasonable notice to the public servant that it is reconsidering its opinion.

13. The Requestor seeks guidance regarding the subject future conduct. The Board has determined that since the proposed contracts have not yet been issued or signed, the request is within the Board's jurisdiction.

ANALYZED LAWS

14. § 77-6. POST-EMPLOYMENT RESTRICTIONS.

B. No former public servant shall appear, within a two-year period after his or her separation from County service, before the County agency served by such public servant. This prohibition shall not apply to a former public servant who appears before a County agency on behalf of another government entity as an elected representative or employee.

C. No person who has served as a public servant shall appear before the County, or receive compensation for any services rendered, in relation to any particular matter in which such person had participated personally and substantially as a public servant.

15. Chapter 77 of the Suffolk County Code contains a number of provisions governing the conduct of public servants who are considering leaving County service or who have left County service. *See Suffolk County Code §§ 77-6(A) – (I)*. The purpose of those post-employment restrictions is to prevent public servants and former public servants from exploiting public office for personal gain, subordinating the interests of the County to those of a prospective employer, or exerting undue influence on government decision – making, either through contact with former colleagues or access to confidential information. *See NYC COIB Advisory Opinion 93-12*. Thus, the code provides that “[n]o former public servant shall appear, within a two-year period after his or her separation from County service, before the County agency served by such public servant...” *Suffolk County Code §77-6(B)*. Pursuant to Chapter 77 section 77-1 “Definitions,” the statute defines an appearance as “. . . any communication, for compensation, other than those involving a ministerial matter;” ministerial matters is defined as, “. . . an administrative act, including the issuance of a license, permit or other permission of the County, which is carried out in a prescribed manner and which does not involve substantial personal discretion” (*see NYC COIB Advisory Opinion 94-15*).

Code Section 77-6(C) provides that no person who has served as a public servant shall

appear before the County, or receive compensation for any services rendered, in relation to any particular matter in which such person had participated personally and substantially as a public servant. *Suffolk County Code §77-6(C)*. In addition, Code Section 77-6(E) provides that no former public servant may disclose or use for private advantage any confidential information gained from County service which is not otherwise available to the public. *Id.* at §77-6(E).

The nature of the work proposed by the Department [REDACTED] in this Request to be performed by [REDACTED] would, by necessity, require the former public servants to appear before the Department [REDACTED] less than two years after the termination of their County employment, even if the [REDACTED] do not serve any clients with whom they worked while employed by the County. Thus, these acts would constitute “appearances” for purposes of Code Section 77-6(B) and that section would therefore appear to prohibit these [REDACTED] from providing services to the Department under the proposed contracts.

The exception outlined in Section 77-6(B) - - that the “prohibition shall not apply to a former public servant who appears before a County agency on behalf of another government entity as an elected representative or employee” - - does not by its terms apply here because the [REDACTED] at issue would be entering appearances with the *same* government entity, not “*another*” government entity. Compare *NYC COIB Advisory Opinion 93-12* (New York City charter exception to post-employment restrictions includes positions “on behalf of any local, state or federal agency”; thus, although consulting contract with former employee would violate post-employment restrictions by its terms, the exception covers services as a consultant in these circumstances). The Suffolk County Code exception for appearances on behalf of “another government entity” (*Suffolk Co. Code § 77-6(B)(emphasis added)*) is not as broad as the New York City statute exempting appearances on behalf of “any local, state or federal agency.”

N.Y.C. Charter, Cha. 68 § 2601 et. seq.

In addition, the Suffolk ethics law – in contrast to the New York City statute – contains no provision for the Board to “waive” an apparent Code violation when the proposed conduct is not in conflict with the spirit of the law. *See NYC COIB Advisory Opinion 95-1* (finding that a former public servant could contract directly with his former agency in his personal capacity but not with his private firm and discussing City Charter Section 2604(e) which contains a “waiver” provision when the Board determines that the position would not be in conflict with the purposes and interests of the City and the Agency head has provided written approval). Here, however, the Suffolk County Code grants the Board no similar “waiver” authority by the express terms of the statute. *See generally Suffolk Co. Charter §§ C30-1-5.*

The Board has considered the fact that the Department of Labor Relations has approved the proposed contract rates and that the RFP Waiver Committee has granted a waiver of RFP requirements. The Board has also considered that the County would secure a benefit from the proposed contracts in the form of below-market services from professionals who have specialized skills that the Department needs. However, despite these laudable benefits, the proposed contracts would be in violation of the plain language of Section 77-6(B) of the Code and the governmental exception does not appear to apply in these circumstances.

Accordingly, because the Legislature did not grant authority to the Board to issue waivers in particular cases, the Board has no authorization to do so in this matter. It bears important mention, however, that nothing in this Advisory Opinion prevents the Department [REDACTED] [REDACTED] from re-hiring these [REDACTED] on a part-time basis. *See Suffolk County Board of Ethics Advisory Op. 2014-12.* Lastly, this opinion does not address the rights and/or obligations regarding the employment of retired persons under the Retirement and Social

Security Law, N.Y. Retirement and Soc. Sec. Law §§ 211-212, or any tax implications of any such arrangement.

CONCLUSION

16. As set forth above, the Board finds that without a specific exemption in the County laws, appearances before the Department [REDACTED] by former Department [REDACTED] employees pursuant to per diem contracts within two years from the former employees' separation from County service would violate the terms of the Suffolk County Code §§ 77-6(B) and (C).

17. Pursuant to Suffolk County Board of Ethics Resolution 004/2013 passed on January 30, 2013, the Requester shall have 15 business days from the time this Advisory Opinion has been rendered (excluding Saturday, Sunday, or a legal holiday) to file a request for reconsideration supported by new material facts submitted to the Board.

18. The forgoing is the opinion of the Board.

Dated: Great River, New York
10/7/15

Linda A. Spahr, Esq. – Chair

¹ N.Y. Gen Mun. Law § 810 (6). Additional definitions; Suffolk County §77-1 definitions

² N.Y. Gen Mun. Law § 800: Article 18 of the New York General Municipal Law establishes standards of ethical conduct that are mandatory for officers and employees within the State of New York.