

STATE OF NEW YORK: COUNTY SUFFOLK
COUNTY BOARD OF ETHICS
Advisory Opinion 2017-15
December 6, 2017

**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.

Summary: Under the facts presented to the Board, and pursuant to Suffolk County Code §77-4 (B), “Prohibition of Dual Office-Holding”, a County Legislator “cannot hold another paid position of employment with the County or a paid position of employment with any department, office, commission, board or agency of the United States of America, New York State, any town or village government, or public benefit corporation created under the provisions of New York State law.”

Accordingly, an elected official cannot be employed with any Fire District or the Suffolk County Fire Academy.

As to the unpaid volunteer fire coordinator position presented, the Board does not find an impermissible conflict; however, recusal may be required in accordance with Suffolk County Code §77-7.

Analyzed Laws and Rules: The Laws of Suffolk County, Suffolk County Administrative Code XXX, the Suffolk County Board of Ethics Rules, Suffolk County Code §77-4(B), SCBE Advisory Opinion #2013-17, and SCBE Advisory Opinion #2013-20.

Procedural History: In considering this inquiry, the Board employed the following three-step analysis:

- 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 a conflict of interest exists requiring declination of the outside income?

This Advisory Opinion Standing vote occurred on November 15, 2017. Since the Requestor has yet to take the oath of office, the request is regarding proposed future conduct and thus, within the Board’s jurisdiction. Further, the Board determined that the requestor is a “prospective public servant” elected to the Suffolk County Legislature and bound to the Suffolk County Ethics Laws upon taking office. See Suffolk Cnty. Admin. Code §A30-1; Suffolk Cnty. Code §77-1.

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Introductory Comments:

The Requestor was elected to the Suffolk County Legislature on November 7, 2017. He is scheduled to be sworn into this office at an organizational meeting on January 2, 2018 at 11:00 a.m. At such time, the Requestor is expected to take an oath of office and commence the performance of the duties of the office¹.

The Requestor is currently employed in the following positions: 1) Fire District Manager of the Centereach Fire District earning \$140,000 per year; 2) District Secretary of the Center Moriches Fire District earning \$22,500 a year; and 3) a per diem instructor at the Suffolk County Fire Academy which is administered by the Vocational Education and Extension Board of the County of Suffolk. The Requestor is also a Volunteer Fire Coordinator.

Generally, in the absence of a constitutional or statutory prohibition against dual office-holding, one person may hold two offices simultaneously unless they are incompatible². New York law holds that the principle of compatibility equally covers an office and a position of employment or two positions of employment. See Inf. Op. Atty. Gen. 95-35. However, as a threshold matter, this Board need not reach the issue of the compatibility of the office of County Legislator and the aforementioned employment since there is a statutory prohibition in place set forth in Suffolk County Code §77-4(B). This local law was adopted by the Suffolk County Legislature upon the abolition of the predecessor Suffolk County Ethics Commission and upon the creation of this Board.

State law provides that local government may enact a code of ethics and regulate or proscribe conduct which is not expressly prohibited by the General Municipal Law. In large measure, Section 800 et. seq. of the General Municipal Law addresses conflicts that arise in the exercise of governmental authority that may affect the financial interests of a governmental officer or employee. Certain other matters are addressed by this state law notable among which is expression of the duty of confidentiality. N.Y. Gen. Mun. Law §806.

Although County Law provides that the term of an elective office shall commence on the first day of January next after his election, Public Officers Law requires every officer take and file an oath of office “before he shall be entitled to enter upon the discharge of any of his official duties. N.Y. Pub. Officers Law §10. It is well-established that an affirmative act is required by an elected official to “accept” a second office before a court will find that there has been an incompatibility between the two positions that is barred by common law or by local statute. Thus, Courts have required a showing that the elected official has accepted the second office,

¹ “Every officer shall take and file the oath of office required by law ...before he shall be entitled to enter upon the discharge of any of his official duties”. N.Y. Pub. Officers Law §10, SCBE Advisory Opinion #2013-17.

² The leading case on compatibility of office is People ex rel. Ryan v. Green, 58 N.Y.295 (1874). The Court held that two offices are incompatible if one is subordinate to the other or if there is an inherent inconsistency between the two offices.

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either by entering upon the performance of the duties of that office or that he has performed a less than official act such as the taking and filing of an oath of office. Sulzer v. Sohmer, 211 N.Y. 565 (1914); Held v. Hall, 191 Misc. 2d 427, 741 N.Y.S.2d 648 (Sup. Ct., Westchester Co. 2002); Fauci v. Lee, 38 Misc.2d 564, 237 N.Y.S.2d 469 (Sup. Ct., Broome Co. 1963) (acceptance of the second elective office is required before a court will find that there has been an incompatibility with another office); see also Smith v. Dillon, 267 A.D.39, 44 N.Y.S.2d 719 (3d Dep't 1943) (appointee has to "accept" and qualify for second position before the Court will find that there has been any incompatibility between the offices).

Thus, even though the Requestor's term of office may begin on January 1, 2018, there can be no violation of Section 77-4(B) until the Requestor accepts the Legislative position, either by entering upon the performance of official legislative duties or by taking the oath of office. Some positive showing of acceptance of the Legislative office must be made before the Requestor can be deemed an "elected official" pursuant to Section 77-4(B) and New York law³.

The issue here is whether the Requestor's continued paid employment in the three aforementioned positions, after being sworn into office as a Suffolk County Legislator, would violate Suffolk County Code §77-4(B).

Employment with Fire Districts

Exercising the broad authority granted to it by the General Municipal Law, the Suffolk County Legislature expansively provided in the County Code:

Suffolk County Code §77-4. Prohibition on Dual Office-Holding; Other Provisions Relating to Political Party Officials

B. No elected official shall hold another paid position of employment with the County or a paid position of employment with any department, office, commission, board or agency of the United States of America, New York State, any town or village government, or public benefit corporation created under the provisions of New York State law. This provision shall not apply to an elected official who also holds a position as a teacher in a public school district or a professor at a public university or college.

First, a fire district is statutorily characterized as a "political subdivision" of the State of New York located within one or more towns. Fire Districts are also characterized as district corporations, which constitutes a type of public corporation⁴. N.Y. Town Law §174(7). A Fire

³ SCBE Advisory Opinion 2013-17.

⁴ The term district corporation is defined as "any territorial division of the state, other than a municipal corporation, heretofore or hereafter established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the

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District is governed by a board of fire commissioners initially appointed by the town board and subsequently elected by resident voters. See N.Y. Town Law §§174-175. The subject local law expressly bars employment of an elected County official by "... any board... [of]...New York State..."⁵

Second, a fire district is dependent upon the parent town for its initial creation, extension and dissolution. See N.Y. Town Law §170 et seq. The subject local law expressly bars employment of an elected County official by "... any board...[of]... any town..." By way of background, the law sets forth two mechanisms for the creation or extension a fire district: 1) by petition of the persons who own 50% of the assessed valuation of the real property to be located in the proposed district; or 2) upon motion without petition by the town board. See N.Y. Town Law §§170-171. Following a public hearing, the town board is required to make the following determinations: 1) whether the petition is properly executed and contains the requisite number of signatures; 2) whether all the property and property owners located within the proposed fire district benefit by its creation; 3) whether all the property owners who will benefit from the creation of a fire district are included within the proposed limits; and 4) whether it is in the public interest to form the fire district. N.Y. Town Law §171(3). Once the town board determines that the foregoing has been met, it may adopt a resolution establishing a fire district. Id. The statute further sets forth a filing and application requirement with the Office of the State Comptroller. N.Y. Town Law §173. Ultimately, once approved by the Comptroller, the town board may adopt a final order establishing the fire district. Id.

The Suffolk County Code states in pertinent part that "[n]o elected official shall hold another...paid position of employment with any department, office, commission, board or agency of the United States of America, New York State, any town or village government, or public benefit corporation created under the provisions of New York State law." Suffolk County Code § 77-4(B). The Town of Brookhaven was the municipal entity that created both the Centreach and Center Moriches Fire Districts in accordance with law. In the event the boundaries of those Fire Districts are to be expanded or dissolved, the Town of Brookhaven will once again be integral to that process. The applicable Code provision is a jurisdictional classification that establishes broad parameters of who is subject to Code requirements and limitations, including both political subdivisions of the State and the progeny of town

creation of such territorial division." N.Y. Gen. Const. Law §66(3). A public corporation includes a district corporation. N.Y. Gen. Const. Law §66(1).

⁵ It is most notable that the above Code Section 77-4 specifically states, in pertinent part, "This provision shall not apply to an elected official who also holds a position as a teacher in a public school district or a professor at a public university or college." The introductory portion of §77-4 broadly prohibits employment by political subdivisions of New York State without specifically identifying the various categories of political subdivisions, such as a school district, that comprise the extensive universe of New York state political subdivisions. Yet, the very same section does expressly identify that school districts are "covered" by its terms since it provides a specific exemption for faculty employed by a school district or public college or university. This evinces the intention of the Suffolk County Legislature in enacting §77-4 to apply to entirety of political subdivisions of New York State, including fire districts.

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government. Accordingly, the Board finds that Requestor's continued employment as Fire District Manager of the Centereach Fire District and Fire District Secretary of the Center Moriches Fire District would constitute an impermissible conflict under the Suffolk County Code upon taking office as a County Legislator⁶.

Employment with Suffolk County Fire Academy

Pursuant to Education Law §1101, "[t]he board of supervisors or other governing elective body of any county may adopt a resolution by a majority vote of the members of the board establishing a county vocational education and extension board..." The Vocational Education and Extension Board of the County of Suffolk ("VEEB"), otherwise known as the Suffolk County Fire Academy, was created by resolution by the then-existing Board of Supervisors in 1943. VEEB is funded by Suffolk County and New York State to provide training for volunteer firefighters. See N.Y. Ed. Law §1104. Upon information and belief the VEEB is funded by County monies appropriated by the County Legislature.

The Requestor is a per diem instructor with the Suffolk County Fire Academy and thus is employed and paid by the County. Suffolk County Code §77-4(B) prohibits an elected official from holding another paid position of employment with the County and thus, Requestor's continued employment as an instructor with the Fire Academy would constitute an impermissible conflict upon taking office as a County Legislator.

Volunteer Fire Coordinator

The Board does not find an impermissible conflict in regard to Requestor's continued participation as an unpaid Volunteer Fire Coordinator upon taking office as a County Legislator. However, recusal may be required in accordance with Suffolk County Code §77-7.

Conclusion: Upon review of the facts presented, the proposed future conduct of continued employment with the Centereach and Center Moriches Fire Districts, as well as the Suffolk County Fire Academy, would violate Suffolk County Code §77-4(B) and constitute an impermissible conflict of interest.

⁶ This Board was previously presented with the argument, based upon the legislative history of §77-4, that the Code was not applicable to employment by school districts and fire districts.. See SCBE Advisory Opinion 2013-20. In the request for AO 2013-20, the Requestor argued that during the debate of the bill, Counsel to the Legislature, George Nolan, stated that the law "does not extend out to [school, fire and library] districts." The Board determined that this section of legislative history referred to by the Requestor concerned Resolution Number 1372 which became Section A30-8 of the County's prior Ethics Law. Thus, the "legislative history" cited by the Requestor involved debate on the Ethics statute in effect prior to the adoption of the current Suffolk County Code. The Board concluded that there was no published legislative history concerning the specific section implicated in the advisory opinion request.

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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.

The forgoing is the opinion of the Board.

Dated: Great River, New York
December 6, 2017

Linda A. Spahr, Esq. - Chair