

Response to referral to Board of Ethics of Resolution 2007-252 - Town Supervisor's relationship with the University of Buffalo and future voting conduct.

The following advisory opinion of the Town of Amherst Board of Ethics ("Board of Ethics") is issued in response to Amherst Town Board Resolution 2007-252, adopted on June 4, 2007 ("the Resolution"). The Resolution seeks an advisory opinion addressing the ethical implications of Town Supervisor's continued employment relationship with the University of Buffalo ("the University") and, in particular, whether his future voting conduct constitutes an impermissible conflict or breach of ethics. The Resolution further requests an opinion addressing the circumstances under which the Town Supervisor should be required to abstain.

For the following reasons, it is the opinion of the Board of Ethics that the Town Supervisor must recuse himself and abstain from any and all participation in matters before the Town Board in which the University is an applicant, petitioner, complainant, respondent, participant, objectant or where the University has otherwise taken a position in a matter pending before the Town Board.

The Town of Amherst Code of Ethics prohibits certain Town officers or employees from engaging in activities having a conflict of interest, or an appearance of a conflict, relative to his or her public responsibilities.

Section 19-2 of the Town of Amherst Code of Ethics states, in pertinent part:

§19-2. Statutory authority; intent.

This code is enacted pursuant to Article 18 of the General Municipal Law and in recognition of the policy of the State of New York and the Town of Amherst to maintain the highest standards of integrity and public service. *It is intended to afford town officers and employees guidance in conforming to ethical standards, to promote public confidence in the integrity of town government, to require public disclosure of financial interests that may influence or be perceived as influencing actions of town officers and employees, to minimize unwarranted suspicion and to provide for fair and effective administration of this code. This code shall be in addition to all of the restrictions, standards and provisions pertaining to the conduct of town officers and employees. (Emphasis added).*

With this in mind, the Board of Ethics analyzes the ethical issues implicated by the Town Supervisor's continued employment relationship with the University. As a preliminary matter, we note this relationship was previously the subject of an advisory opinion issued by the New York State Ethics Commission ("State Ethics Commission") on July 17, 2006. The opinion of the State Ethics Commission was issued in response to a request from the University's Human Resource Department regarding the Town Supervisor's election to his current position and how the University might "appropriately interact with the Supervisor regarding matters the University has before the

Town.” The opinion of the State Ethics Commission addressed the ethical obligations of the Town Supervisor as both a “State employee” and as the Town Supervisor. Initially, the State Ethics Commission declined to adopt a *per se* prohibition from [the State employee] simultaneously serving as Town Supervisor while also retaining his status as a State employee.

Nevertheless, the potential for actual or apparent conflicts of interest was clearly recognized by the State Ethics Commission when it noted the following:

[The State employee] may not use his position as Town Supervisor to secure unwarranted privileges or exemptions for himself or others from the University. This might include extending preferential treatment to the University in the form of legislative actions or economic incentives, in an effort to secure unwarranted promotions and/or monetary benefits from the University during or after his leave.

In addressing the ethical obligations under the Public Officers Law, the State Ethics Commission concluded that “[the State employee] must recuse himself as Town Supervisor with regard to issues in which the interests of the Town and the University *diverge*.” (Emphasis added)<sup>1</sup>. Attached as **Exhibit “A”**, and incorporated as if fully set forth herein, is the July 17, 2006 opinion of the State Ethics Commission.

While the State Ethics Commission’s opinion primarily addressed the Town Supervisor’s ethical obligations as a State employee, the ethical principals implicated are equally applicable to his position as Town Supervisor. Consistent with the opinion of the State Ethics Commission, this Board of Ethics similarly declines to adopt a *per se* prohibition against the Town Supervisor’s continued employment relationship with the University. Nevertheless, it is the opinion of this Board of Ethics that the Town Supervisor’s recusal or abstention is required in all situations where the University is an applicant, petitioner, complainant, respondent, participant, objectant or where the University has otherwise taken a position in a matter pending before the Town Board.

The Board of Ethics recognizes the expansion of the required recusal or abstention beyond matters in which the interests of the Town and the University merely are “divergent.” Indeed, in

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<sup>1</sup>Inexplicably, the Town Supervisor failed to recuse himself or otherwise abstain from participating and voting on the so-called “Rensch Road re-zoning” – a matter in which the University and the Town clearly had divergent interests. Thereafter, the Town was named as a Respondent in a pending Article 78 proceeding commenced in New York State Supreme Court by the University seeking to annul the vote. The Article 78 proceeding commenced by the University alleges that the Town Supervisor’s participation in the matter was a violation of the State Ethics Commission opinion and an otherwise impermissible conflict of ethics.

order to avoid the mere appearance of a conflict of interest, the Town Supervisor must recuse himself from participation and voting on all matters before the Town Board in which the University is an applicant, petitioner, complainant, respondent, participant, objectant or where the University has otherwise taken a position in a matter pending before the Town Board. In circumstances where the interests of the Town and the University could be characterized as “unified”, recusal would nonetheless be warranted since the Town Supervisor’s participation in such matters could reasonably be viewed by some (especially by those who oppose the position of the Town/University) as an attempt to curry favor or otherwise influence the University through his official actions as Town Supervisor. Additionally, recusal would be required in circumstances in which the interests of the Town and the University are “divergent”, both pursuant the opinion of the State Ethics Commission as well as the Town of Amherst Code of Ethics’ prohibition against the appearance of conflicts of interest.

It is only through the Town Supervisor’s full and complete abstention from participation in any matter involving the University, that the appearance of conflict be eliminated. Further, complete recusal would ensure the elimination of any speculation as to the Town Supervisor’s motives on a particular matter in which the University is involved.

Finally, we observe that if the Town Supervisor’s continued recusal is required on the significant range of matters and issues in which the University and the Town are involved with, the Town Supervisor’s continued dual employment with the University would appear to be incompatible with his duties as Town Supervisor.

All concur:

John R. Condren  
Chair  
William Wutz,  
James Glogowski,  
Lee Nowak,  
Kathy Ball,  
Members

Dated: October 16, 2007



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Advisory Opinion No. 06-03

Limitations on a State employee on unpaid leave having contact with his State agency while serving as a public official.

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### Introduction

The following advisory opinion is issued in response to a request from [ ], Director of State Human Resource Services at the State University of New York - University at Buffalo ("University"), regarding [ ], an academic employee at the University elected in November 2005 to serve as Town Supervisor for the Town of Amherst ("Town"), New York. In February 2006, [the State employee] took an unpaid leave of absence from the University to serve as Town Supervisor, a full-time position. In a follow-up question to an informal advisory opinion issued on January 13, 2006, [the requesting individual] has asked the New York State Ethics Commission ("Commission") for guidance regarding how the University might appropriately interact with [the State employee] regarding matters the University has before the Town.

Pursuant to the authority vested in the Commission by §94(15) of the Executive Law, the Commission hereby renders its opinion that, pursuant to Public Officers Law §73(7), [the State employee] may not appear before the University on behalf of the Town with regard to those matters covered by the statute. Pursuant to Public Officers Law §74, [the State employee] and the University must take steps to insure that neither party conducts itself in such a way as to receive an unfair advantage or unwarranted benefit or to create the impression that they are in any way affected by [the State employee's] dual position. In addition, [the State employee] must recuse himself as Town Supervisor with regard to issues in which the interests of the Town and the University diverge.

### BACKGROUND

[The State employee] most recently served as a tenured Associate Professor in the Civil Structural and Environmental Engineering Department at the University. In this capacity, [the State employee] taught academic courses, engaged in on-going academic research, and provided "services to the community, government, and industry."

In November 2005, [the State employee] was elected to the full-time position of Town Supervisor<sup>1</sup> for a four-year term commencing January 1, 2006. [The State employee] was granted an unpaid leave of absence from the University until December 31, 2009, the expected end of his term.

The North Campus of the University is located within the boundaries of the Town. In a December 6, 2005 informal opinion request to the Commission, [the requesting individual] noted that, historically, there has been a working relationship between the Amherst Town Supervisor and the University. The University's Office of Governmental Affairs regularly meets with the Town Supervisor to discuss on-going legislation affecting the University. In addition, the University represents about 30 percent of the total tax base of the Town, including tax revenues collected from University employees living in the Town.

In his initial request, [the requesting individual] asked whether [the State employee's] continued employment with the University would prohibit his holding elective office as Town Supervisor, and, if not, whether the University could take discretionary employment action involving [the State employee] (e.g., grant promotion and/or discretionary salary increases) while he holds elective office.

In the informal opinion, the Commission concluded that, “[w]hile there does not appear to be a per se prohibition from [the State employee] serving as Town Supervisor for the Town of Amherst while also retaining his status as a State employee, there exists statutory prohibitions which could make active dual government employment problematic.” The informal opinion went on to note that as an employee on an approved leave of absence, [the State employee] would still be considered a State employee covered by the provisions of Public Officers Law §§73 and 74. Accordingly, his service as Town Supervisor would be viewed as an “outside activity” for purposes of ethics laws and regulations (see, Advisory Opinion No. 90-1). Public Officers Law §73(7)(h) would prohibit him from appearing or rendering services before the University for the items enumerated in §73(7)(a)(i) - (vi), such as the purchase, sale, rental or lease of real property, goods or services, or a contract therefore; the adoption or repeal of any rule or regulation having the force and effect of law; and the obtaining of grants of money or loans.

Regarding Public Officers Law §74, the informal opinion held that because, as Town Supervisor, [the State employee's] actions concerning legislation, land use and land planning, as well as social and economic initiatives, will likely have a direct impact on the University “it would not be unreasonable to assume that the public might perceive any benefits provided to [the State employee] by the University as an attempt on the part of the University to gain the favor of Supervisor [ ].” Thus, “the responsibilities, influence and impact [the State employee's] ‘outside activity’ could have, or at least appear to have, on the University is significant given the relationship between the University and the Town” and “[the State employee] and the University must take all reasonable steps necessary to avoid an actual conflict or even the appearance of a conflict of interest. By severing his employment with the University, the conflict would be ameliorated.<sup>2</sup> If severing is not a viable option, by suspending his employment relationship with the University in the form of a leave of absence, [the State employee] may avoid any conflict or the appearance of conflict of interest . . .”

[The requesting individual] has now asked for a formal opinion of the Commission for guidance as to how the University should conduct itself with [the State employee] in an effort to avoid an actual conflict or the appearance of a conflict of interest. While recognizing the Public Officers Law applies to individual employees and not agencies, the Commission understands the University's need for appropriate guidance in this situation.

### APPLICABLE STATUTES

In assessing the ethical obligations of a State employee, the Commission looks to the provisions of Public Officers Law §73(7)(a), which impose limitations on a State employee appearing or rendering services for compensation before State agencies in his or her outside employment, and provides the following:

*No . . . state officer or employee, other than in the proper discharge of official duties . . . shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation, in whatever form, for the appearance or rendition of services by himself or another in relation to any case, proceeding, application or other matter before a state agency where such appearance or rendition of services is in connection with:*

- (i) the purchase, sale, rental or lease of real property, goods or services, or a contract therefore, from, to or with any such agency;*
- (ii) any proceeding relating to rate making;*
- (iii) the adoption or repeal of any rule or regulation having the force and effect of law;*
- (iv) the obtaining of grants of money or loans;*
- (v) licensing;*
- (vi) any proceeding relating to a franchise provided for in the public service law.*

Also relevant to this inquiry is Public Officers Law §73(7)(h) which provides:

*Nothing contained in this subdivision shall prohibit a state officer or employee, unless otherwise prohibited, from appearing or rendering services in relation to a case, proceeding, application or transaction before a state agency, other than the agency in which the officer or employee is employed, when such appearance or rendition of services is made while carrying out official duties as an elected or appointed official, or employee of a local government or one of its agencies (emphasis added).*

Public Officers Law §74 addresses an employee's obligations regarding conduct that may result in actual conflicts of interest as well as conduct that may give the impression that a conflict exists. Public Officers Law §74(2), the Code of Ethics for State officers and employees, sets forth the rule when addressing conflict between the obligation of public service to the State and one's personal interests. The rule with respect to conflicts of interest is as follows: *No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.*

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct addressing actual, as well as apparent, conflicts of interest:

*(a) No officer or employee of a state agency . . . should accept other employment which will impair his independence of judgment in the exercise of his official duties.*

*(d) No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.*

*(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.*

*(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.*

## DISCUSSION

The guidance requested by the University raises several unique issues regarding a State employee who also holds an elected or appointed public office, where that office has a close relationship with the employee's State agency.

### **Public Officers Law §73**

Public Officers Law §73(7)(a) prohibits State officers and employees from receiving compensation for appearing or rendering services before any State agency in connection with certain enumerated matters. While Public Officers Law §73(7)(h) permits State officers and employees who also serve as elected or appointed local government officials to appear before State agencies to carry out their local responsibilities, such public officials still may not appear before their own State agency. Accordingly, as a University employee serving as Town Supervisor, [the State employee] would be prohibited from appearing or rendering services before the University with respect to matters enumerated in §73(7)(a) (i) - (vi). In response to the question posed by Jarvis, the University must insure that it does not deal with [the State employee] regarding such matters.

**Public Officers Law §74**

While the Commission is vested with the authority to approve outside activities, the courts of this State have held that, pursuant to Public Officers Law §74, the Commission must articulate a “rational basis” when it makes a determination to bar or limit a State employee from engaging in a particular outside activity. [see, Advisory Opinion No. 96-26 citing, Matter of Hancox v. Bress, 208 A.D.2d 1031 (3rd Dept. 1994); see also, Speers v. State Ethics Commission, 209 A.D.2d 919 (3rd Dept. 1994).]

In the Matter of Hancox (*supra*), the court ruled that the Commission could not preclude a Principal State Accounts Auditor assigned to the Division of Management Audit and Financial Reporting within the Office of the State Comptroller (“OSC”) from serving as an unpaid member of the Albany City School District Board. The court based its determination on the fact that although the OSC had responsibilities regarding school boards, including the ability to audit these boards, the State employee in question was not assigned to the unit within OSC that conducted such audits. Based on the lack of a nexus between the official’s State duties and his service on the school board, the Commission was not permitted to bar the State employee’s service on the school board<sup>3</sup>

Here, as in Hancox, there does not appear to be a *per se* prohibition from [the State employee] serving as Town Supervisor while also retaining his status as a State employee, because he has no job duties with respect to the Town in his University position.

However, unlike the situation in Hancox, the University and the Town have a significant relationship and the duties of Town Supervisor have a direct impact upon the University. There will likely be many determinations, both favorable and unfavorable to the University, which will have to be made over the course of [the State employee’s] service as Town Supervisor, including those in which the interests of the Town and the University diverge.

As has been previously stated, because [the State employee] has elected to retain his status as a State employee, he must abide by the provisions of Public Officers Law §74. Accordingly, [the State employee] may not use his position as Town Supervisor to secure unwarranted privileges or exemptions for himself or others from the University. This might include extending preferential treatment to the University in the form of legislative actions or economic incentives, in an effort to secure unwarranted promotions and/or monetary benefits from the University during or after his leave period. Concomitantly, the University must not offer [the State employee], either directly or indirectly, unwarranted rewards or benefits, or the promise thereof, in his position at the University in exchange for official actions taken, or penalize or suggest possible retribution for unfavorable actions.

### CONCLUSION

The Commission concludes that, pursuant to Public Officers Law §73(7), [the State employee] may not appear or render services before the University on behalf of the Town with regard to those matters covered by the statute. Pursuant to Public Officers Law §74, [the State employee] and the University must take steps to insure that neither party conducts itself in such a way as to receive an unfair advantage or unwarranted benefit nor to create the impression that they are in any way affected by [the State employee’s] dual position. In addition, [the State employee] must recuse himself as Town Supervisor with regard to issues in which the interests of the Town and the University diverge.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the persons who requested it and who acted in good faith, unless material facts were omitted or misstated by the persons in the request for opinion or related supporting documentation.

All concur:  
Paul Shechtman,



Chair

Robert J. Giuffra, Jr.

Carl H. Loewenson, Jr.

Lynn Millane

Susan E. Shepard,

Members

Dated: July 17, 2006

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<sup>1</sup> *Town Law §29 provides that the duties of a Town Supervisor shall include the following: serve as treasurer, collecting and securing all monies belonging to or due the town; oversee accounts payable and receivable for the town; disbursement of town salaries and contractual obligations; survey the boundaries of the town; prepare and file an annual financial report, accounting for all monies received and disbursed by the town; and lease, sell and convey in the name of the town, property owned by it, granting easements or other rights in land or property owned by the town.*

<sup>2</sup> *Were [the State employee] to sever his employment relationship with the University, he could fully engage and appear before the University without violating the post-employment (revolving door) restrictions, as the position of Town Supervisor would fall under the government-to-government exception. See, Public Officers Law §73(8)(e).*

<sup>3</sup> *By contrast, see Advisory Opinion No. 92-16 in which the Commission held that a leasing agent employed by a State agency was prohibited from seeking election to, and serving on the city council of, a municipality in the geographic area in which he worked. There, the Commission held:*

Given the broad scope of the responsibilities of members of the city council, we are skeptical that the leasing agent can fulfill his responsibilities both as a State employee and as a council member without a conflict of interest. Among the city council's powers, for example, are those to levy taxes, to purchase and lease real estate, take real estate by eminent domain, administer to, construct and maintain public buildings and facilities, and to order the repair or removal of buildings. This only partial list of city council powers suggests that there would be significant matters affecting current and potential lessors from which the leasing agent, because of his State position, should recuse himself when discussing, voting and otherwise serving as a city council member to meet the State's code of ethics.

We do not believe recusal is a viable option, however, to prohibit an elected official from discussing and voting on the significant range of matters and issues that would be required would, to us, appear to be contrary to public policy. . . Therefore, the Commission cannot but conclude that, if proper application of the Public Officers Law requires a State employee to repeatedly recuse himself as a publicly elected official, the two positions are incompatible and the employee should not seek that office.