

Local Government Ethics Law

Opinions of the Office of the Attorney General

Subject: **Members of County Agriculture Development Boards**

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September 20, 1991

Barry Skokowski, Sr.
Deputy Commissioner
Department of Community Affairs
CN 800
Trenton, New Jersey 08625-0800

Re: 91-0092: Municipal Attorneys as "Local Government Officers" Pursuant to the Local Government Ethics Law.

Dear Deputy Commissioner Skokowski:

You have requested advice as to whether a municipal attorney is a "local government officer" pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. For the below stated reasons you are advised that a municipal attorney is a "local government officer" pursuant to the Local Government Ethics Law and therefore subject to its terms, particularly the requirement of filing a financial disclosure statement.

The Local Government Ethics Law was enacted on February 20, 1991 and became effective 90 days thereafter on May 21, 1991. L. 1991, c. 29, §27. The purpose of the Act is to provide a Statewide method for governing the ethical conduct of local government officers and employees and requiring financial

disclosure for local government officers. N.J.S.A. 40A:9-22.2(e). To effect this purpose the Legislature has established a Statewide Code of Ethics applicable to local government officers and employees. N.J.S.A. 40A:9-22.5. This Code of Ethics is enforced by the Local Finance Board. N.J.S.A. 40A:9-22.4. However, a county or municipality may establish a county or municipal ethics board to enforce the code of ethics. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19. The county or municipal ethics board establishes the local code of ethics. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19. If the local code is not identical to the State code, it is subject to the approval of the Local Finance Board. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19.

In addition to adhering to the ethical guidelines set forth in the law, a "local government officer" is required to file annually a financial disclosure statement, N.J.S.A. 40A:9-22.6, which contains information about his or her sources of income, certain business interests, and his or her real estate holdings in New Jersey. Ibid. (Initially financial disclosure statements are required to be filed by August 19, 1991, and thereafter annually by April 30. N.J.S.A. 40A:9-22.6). To be subject to the requirement of filing a financial disclosure statement, one must satisfy the test of being a local government officer of a local government agency. N.J.S.A. 40A:9-22.6. The term "local government officer" is defined as,

any person whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant Zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the "New Jersey Employer-Employee Relations Act," P.L. 1941, c. 100 (C. 34:13A-3), but shall not mean any employee of a school district or member of a school board. [N.J.S.A. 40A:9-22.3(g)].

Thus, a variety of persons serving in a "local government agency" are included within the definition of "local government officer."

In contrast to the term "local government officer" is the

term "local government employee." This latter term is defined as any person, whether compensated or not, whether part-time or full-time, employed by or serving on a local government agency who is not a local government officer, but shall not mean any employee of a school district." N.J.S.A. 40A:9-22.3(f).

In order to understand who is a "local government officer" the term "local government agency" should be examined. A "local government agency" is defined as,

any agency, board, governing body, including the chief executive officer, bureau, division, office, commission or other instrumentality within a county or municipality, and any independent local authority, including any entity created by more than one county or municipality, which performs functions other than of a purely advisory nature, but shall not include a school board. [N.J.S.A. 40A:9-22.3(e)].

The term "local government agency" encompasses a myriad of local government bodies and individuals. The definition is very broad and specifically excludes only purely advisory bodies and school boards.

The question is whether the municipal attorney serves i a "local government agency." The position of municipal attorney or corporation counsel is established by N.J.S.A. 40A:9-139. The statute provides that every municipal governing body shall provide by ordinance for the appointment of a municipal attorney for a term of one year, unless the term of office is otherwise provided by law. Ibid. The position of municipal attorney is deemed an "office." Reilly v. Ozzard, 33 N.J. 529, 542-543 (1960). Generally, an "office" is a post created or authorized by law for the continuous exercise of a portion of governmental power or authority. Ibid. A municipal attorney has broad responsibilities to provide legal advice to the governing body and municipal officials on any matter relating to municipal government. Perillo v. Advisory Commission on Professional Ethics, 83 N.J. 366, 371-372 (1980). In larger municipalities, the municipal attorney may have several other attorneys assisting him. Ibid.

It is apparent therefore that the position of municipal attorney -- created pursuant to law by municipal ordinance -- is a public office, rather than a position created by a service contract, even in the cases of smaller municipalities where the municipal attorney position is part-time and the individual

maintains a separate private law practice. An individual serving in the office of municipal attorney must be contrasted with a lawyer who serves the municipality in a special, limited capacity (e.g. special labor counsel or to handle a particular tort or environmental matter.) The latter representation are more akin to that of an "independent contractor" and would not be subject in our view, to the new Ethics Law. As an independent contractor, the attorney would stand in the same relationship that any other private vendor of services would have with a municipality, e.g. computer repair firm, telephone installation firm, or food vendor. There is generally no dispute that a private vendor would not be subject to the Local Ethics Law. See *State v. Indelicato*, 87 N.J. Super. 566, 569-570 (Law Div. 1965) (a professional auditor contracted by the municipality to audit its books annually was an independent contractor, and did not hold a public office). Further, unlike a traditional independent contractor, persons who serve as a municipal attorney may enroll in the Public Employees' Retirement System. Attorney General Formal Opinion, No. 20 (1976).

Having determined that a municipal attorney is a municipal officer and serves a local government agency, it is necessary to determine if that position puts the incumbent in the category of a person serving in local government deemed to be a "local government officer" for purposes of the Local Government Ethics Law. Included as "local government officers" are 1) elected local officials; 2) members of local bodies that have authority to enact ordinances, approve development applications, or grant zoning variances; and 3) members of independent local authorities; and N.J.S.A. 40A:9-22.3(g). A municipal attorney is not within the scope of the first three classes of local government officers.

The fourth and last category of "local government officer" is a person "who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the 'New Jersey Employer-Employee Relations Act.' P.L. 1941, c. 100 (C. 34:13A-3), but shall not mean any employee of a school district or member of a school district." N.J.S.A. 40A:9-22.3(g)(4). As the Local Government Ethics Law makes specific reference to the definitions contained in the Employer-Employee Relations Act, it is necessary to examine the latter Act. The Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., provides a mechanism for the resolution of labor disputes in the private and public section. N.J.S.A. 34:13A-2. The Act is administered by the State's Public Employment Relations Commissioner (PERC). N.J.S.A. 34:13A-5.2.

The Act defines "managerial executives" of a public

employer as,

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district. [N.J.S.A. 34:13A-3(f)].

"Confidential employees" of a public employer are defined as,

employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties. [N.J.S.A. 34:13A-3(g)].

The significance of "managerial executives" and "confidential employees" under the Employer-Employee Relations Act is that these individuals are excluded from membership in the local collective bargaining unit comprising of local public employees. N.J.S.A. 34:13A-5.3. The underlying purpose of this exclusion is that "managerial executives" and "confidential employees" have access to highly confidential labor relations information which place persons in these positions in an intolerable conflict of loyalties if they were to be part of a collective bargaining unit. Wayne Tp. v. AFSME, Council 52, 220 N.J Super. 340, 346 (App. Div. 1987).

Neither the Employer-Employee Relations Act nor PERC's regulations, N.J.A.C. 10:1-1 et seq., provide an enumeration of positions in local government which are deemed a "managerial executive" or a "confidential employee." Rather, the determination of which positions are "managerial executive" or "confidential employee" are case-by-case judgments. See e.g. In the Matter of Township of Clark, 11 NJPER 283 □16104 (1985), (Township construction official was not a managerial executive). However, PERC in its decisions has provided general guidance in making the determination as to whether a person is a "managerial executive" or "confidential employee."

A "managerial executive" is a person "who formulates management policies or practices and person who are charged with

the responsibility of directing the effectuation of such management policies and practices...." N.J.S.A. 34:13A-32.3(f). PERC has established guidelines for determining whether a person formulates management policy and direct its effectuation.

A person formulates policies when he develops a particular set of objective designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercise. [Boro of Montvale, 6 NJPER 507, 508-09 □11259 (1980)].

Thus, the determination as to whether a person is a "managerial executive" requires an examination of the person's position in the local agency's hierarchy, his job function and responsibilities, and the amount of individual discretion exercised by the individual. The analysis of these three factors is very often a position-by-position determination.

The determination as to whether a person is a "confidential employee" also requires an individualized determination. PERC has narrowly construed the term "confidential employee." County of Essex, 17 NJPER 256, 257 □22118 (1991). The "key" to status as a confidential employee "is an employee's access to, and knowledge of, material used in labor relations processes including contract negotiations, contract administration, grievance handling and the preparation of these processes." Ibid. Specifically PERC makes this case-by-case analysis as follows:

We (PERC) scrutinize the facts of each case to

find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [State of New Jersey, 11 NJPER 507, 510 □16179 (1985)].

Thus, a "confidential employee" has access to confidential information of the employer which is relevant to the labor relations of the local government agency.

To a large extent, by virtue of the definitional standards employed by the Legislature, "local government officers" are those individuals serving in local government who exercise a high level of authority and independent judgment which directly affects the policy and purposes of the agency and who have detailed knowledge of the agency's confidential labor relations matters. Not all municipal attorneys may be persons who formulate management policies and who direct the effectuation of such policies. However, municipal attorneys by the nature of the duties of this office, participate in the formulation of management policies and we believe that the office should be deemed a "managerial executive." "Policymakers" include not only persons who occupy traditional management executive positions, but also includes those in the legal profession who exercise discretion concerning issues of public importance. Gregory v. Ashcroft, ___ U.S. ___, 111 S.Ct. 2395, 2404, 115 L.Ed.2d 410, 427-428 (1991) (Judges were deemed to be policymakers). By the nature of their responsibilities, municipal attorneys must exercise independent legal judgment and discretion affecting issues of public concern. In addition, municipal attorneys are by the nature of their position intimately involved with the municipality's labor relations practices and is in our view necessarily a "confidential employee" for purposes of the Local Government Ethics Law.

Having concluded that the municipal attorney is a local government officer who works for a local government agency, you are advised that the municipal attorney is a local government officer for purposes of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., and is subject to the requirement of filing a financial disclosure statement.

Very truly yours,

ROBERT J. DEL TUFO
ATTORNEY GENERAL

By: _____
JOHN J. CHERNOSKI
Senior Deputy Attorney General