

Local Government Ethics Law

Opinions of the Office of the Attorney General

Subject: **Registered Municipal Accountants
as "Local Government Officers" or "Local
Government Employees" Pursuant to the
Local Government Ethics Law.**

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August 25, 1997

Beth Gates, Chair
Local Finance Board
Department of Community Affairs
P.O. Box 803
Trenton, New Jersey 08625-0803

Re: 97-0135--Registered Municipal Accountants
as "Local Government Officers" or "Local
Government Employees" Pursuant to the
Local Government Ethics Law.

Dear Ms. Gates:

You have asked whether a registered municipal accountant engaged by a local government to prepare an annual audit required by N.J.S.A. 40A:5-4 is a "local government officer" or a "local government employee" pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. For the reasons which follow, you are advised that a registered municipal accountant engaged by a local government to prepare an annual audit is not a "local government officer" or a "local government employee" pursuant to the Local Government Ethics Law and, therefore, a registered municipal accountant is not subject to the Local Government Ethics Law.

The purpose of the Local Government Ethics Law is to provide a statewide ethical code applicable to persons who serve in local government as "local government officers" or as "local government employees" and to require "local government officers" to file

annual financial disclosure statements. N.J.S.A. 40A:9-22.1 et seq. Generally, all local government agencies, except purely advisory bodies and school boards are within the scope of the Law. N.J.S.A. 40A:9-22.3(e). In the absence of action by the county or municipal governing body to establish a local ethics board, the Code of Ethics is enforced by the Local Finance Board in the Department of Community Affairs. N.J.S.A. 40A:9-22.4.

The Local Fiscal Affairs Law requires every "local unit" to cause an annual audit of its books, accounts and financial transactions to be made. N.J.S.A. 40A:5-4. The governing body of the local unit "shall employ a registered municipal accountant of New Jersey to prepare its annual audit or it shall enter into an agreement with the Director of the Division of Local Government Services for an annual audit to be made by qualified employees of the division." Id. The annual audit is required to be performed by a registered municipal accountant licensed by the New Jersey State Board of Public Accountants. N.J.S.A. 40A:5-9. No local unit is required to advertise for bids for any of the work performed in regard to the annual audit. N.J.S.A. 40A:5-11. The registered municipal accountant's report of audit and recommendations is to be filed with the clerk of the local unit and the Division of Local Government Services. N.J.S.A. 40A:5-6. The clerk of the local unit is required to publish in a newspaper of general circulation the synopsis of the audit and recommendations of the registered municipal accountant. N.J.S.A. 40A:5-7.

"Local government officers" are 1) elected officials; 2) members of local government bodies that have authority to enact ordinances, approve development applications, or grant zoning variances; 3) members of independent local authorities; and 4) persons who are "managerial executives" or "confidential employees." N.J.S.A. 40A:9-22.3(g). 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, . . . but shall not mean any employee of a school district or member of a local school board." N.J.S.A. 40A:9-22.3(g)(4). As the Local Government Ethics Law makes specific reference to the definition 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 sectors. N.J.S.A. 34:13A-2. The Act is administered by the State's Public Employment Relations Commission (PERC). N.J.S.A. 34:13A-5.2.

The Act defines "managerial executives" of a public employer

as

Persons who formulate managerial policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices....[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 comprised of local government employees. N.J.S.A. 34:13A-5.3.

PERC has established guidelines for determining whether a person formulates management policy and directs its effectuation and is accordingly a "managerial executive." These guidelines are commonly denoted as the Montvale test (Borough of Montvale, P.E.R.C. No. 81-52, 6 N.J.P.E.R. □11259 (1980)). However, the Supreme Court in New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 (1997), recently modified the Montvale test to provide as follows:

A person formulates policies when he develops a particular set of objectives designed to further the mission of [a segment of] the government 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 methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementations by line supervisors. 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 exercises. [Id. 150 N.J. at 356.]

The significance of the Supreme Court's modification to the Montvale test is that the Court removed the PERC guideline that said employee must "exercise organization-wide power" to be considered a "managerial executive." Ibid. Rather, pursuant to the Court's modification, an individual who exercises significant power, discretion and influence only within his/her own department may now be within the scope of "managerial executive." Ibid.

PERC's guidelines for the determination as to whether a person is a "confidential employee" require the following analysis:

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, P.E.R.C. No. 86-18, 11 N.J.P.E.R. □16179(1985).]

Mere access to confidential labor relations information is insufficient to render an employee confidential. Monmouth Reg'l Bd. of Educ., D.R. No. 94-10, 20 N.J.P.E.R. □25009 (1993). The Supreme Court in reviewing these guidelines did not modify the guidelines and PERC's case-by-case approach for making this determination. New Jersey Turnpike Authority v. AFSCME Council 73, supra, 150 N.J. at 358.

In applying these guidelines within the context of the Local Government Ethics Law, we have previously opined that while certain public officials may not be considered "employees" in a strict labor relations sense, the purpose of the Local Government Ethics Law is to subject "policy makers" who serve local government to the requirements of the Law as "local government officers." See e.g. Attorney General Opinion No. 91-0090 (September 20, 1991) (County Prosecutors); Attorney General Opinion No. 91-0092 (September 20, 1991) (Municipal Attorneys); See also, Dept. of Community Affairs v. Cook, 282 N.J. Super. 207, 209 (App. Div. 1995). The result is that these "policy makers" as "local government officers" are required to submit an annual financial disclosure

statement. N.J.S.A. 40A:9-22.6.

In contrast to a "local government officer," a "local government employee" is defined as "any person, whether compensated or not, whether part-time, employed by or serving on a local government agency who is not a local government officer, but shall not mean an employee of a school district." N.J.S.A. 40A:9-22.4(f). Thus, this definition goes beyond the traditional definition of "employee" within the labor relations context and seeks to identify persons who serve local government. However, we have previously recognized that certain professionals who are engaged by local government for a special limited purpose (e.g. bond counsel, labor counsel, counsel retained to handle a tort action) would not be subject to the Local Government Ethics Law as either "local government employees" or "local government officers." Attorney General Opinion No. 91-0092 (September 20, 1991); Attorney General Opinion No. 91-0134 (November 1, 1991). Further, as a general principle the private vendor of services to a municipality, such as a computer repair firm, telephone installation firm, or food vendor, would similarly not be subject to the Local Government Ethics Law. Attorney General Opinion No. 91-0092 (September 20, 1991).

However, a word of caution is appropriate in this regard. The Local Finance Board has previously determined that the mere status as an "independent contractor" is not dispositive as to whether an individual is subject to the requirements of the Local Government Ethics Law. *Department of Community Affairs v. Petti*, 94 N.J.A.R.2d (CAF) 58, 61 (1994). The Local Finance Board stated:

a person who maintains an ongoing and continual relationship with a local government agency [whether by contract or appointment], who provides regular advice or services to a local government agency, and who regularly participates in or contributes significantly to policy making determinations of a local government may be considered by the public as part of the official government family. In view of the important purposes and the liberal interpretation of the Local Government Ethics Law, depending on the particular facts, an individual who is technically an "independent contractor" may be considered as a "local government officer" or a "local government employee" and therefore subject to the ethical requirements of the Local Government Ethics.

[Ibid.]

Thus, the mere status of an individual as an independent contractor does not pre se result in the determination that the individual is not subject to the Local Government Ethics Law. Rather, if the independent contractor maintains an ongoing and continual relationship with a local government agency, provides regular advice or services to a local government agency, and regularly participates in or contributes significantly to the policy making determinations of a local government agency, the independent contractor may be deemed subject to the Local Government Ethics Law.

Before applying the above discussed principles to determine whether a registered municipal accountant who conducts an annual audit of a local unit is a "local government officer" or a "local government employee," it is appropriate to examine the statutes and regulations governing registered municipal accountants. Registered municipal accountants are licensed and regulated by the New Jersey State Board of Accountancy. N.J.S.A. 45:2B-33 et seq. The State Board also licenses and regulates certified public accountants, registered public accountants, and public school accountants. N.J.S.A. 45:2B-12 et seq., N.J.S.A. 18A:23-8. The purpose of this licensure and regulation is that it is in the public interest to promote the dependability of information which is used in assessing the status and performance of public and private enterprises and to ensure that persons who attest to the reliability of this information are qualified. N.J.S.A. 45:2B-2. These accountants are subject to the Rules of Professional Conduct promulgated by the State Board. N.J.A.C. 13:29-2.3(b), N.J.A.C. 13:29-3.1 et seq. In particular, N.J.A.C. 13:29-3.1 provides, in part, that

[a] licensee or a firm of which he or she is a partner, member or a shareholder shall not express an opinion on financial statements of an enterprise in such a manner as to imply that he or she is acting as an independent public accountant with respect thereto unless he or she or his or her firm is independent with respect to such enterprise. Independence will be considered to be impaired if, for example:

1. During the period covered by the financial statements, during the period of the professional engagement, or at the time of expressing an opinion, the licensee or his or

her firm:

i. Was associated with the enterprise as a... director or officer or in any capacity equivalent to that of a member of management or of an employee; [Emphasis added.]

Thus, a registered municipal accountant and his/her firm is required by these Rules of Professional Conduct to be independent of the enterprise being audited. In this regard, this Office has previously determined that, in view of the requirement that a registered municipal accountant be independent of the enterprise being audited, a municipality could not place a registered municipal accountant on retainer and advance him/her monies for work not yet performed. Attorney General Opinion No. 83-5784 (November 28, 1983).

In *State v. Indelicato*, 87 N.J. Super. 566 (Law Div. 1965), the court discussed the relationship of a registered municipal accountant with a municipality which engaged him to conduct the annual audit required by N.J.S.A. 40A:5-4. The court stated:

[d]efendant (registered municipal accountant) in this case did not possess any power of government. He did not make any decision in relation to policies and programs, and he in no way exercised any governmental discretion. His only function was to provide a service to the City...The City was required to obtain this service by N.J.S.A. 40A:5-4...defendant clearly was in the position of an independent contractor. It is clear that the Legislature has regarded the auditor's service to be rendered under N.J.S.A. 40A:5-4 as professional services to be rendered on the basis of contract between the parties. Defendant's duties were merely to audit the books. He had no control or discretion to exercise any government function of the City...He was merely a check on the departments and department heads responsible for keeping various accounts...the work to be performed under their arrangement, have none of the indicia of a public office....[*Ibid.* 87 N.J. Super. at 570. Emphasis added.]

Thus, the registered municipal accountant who is engaged by a local

unit to conduct the annual audit required by N.J.S.A. 40A:5-4 does not make any decisions in relationship to government policies or programs and he/she does not exercise any government discretion. Rather, the registered municipal accountant is an independent contractor engaged by the local unit by contract to audit the local unit's books and act as a check on the financial accounts of the local unit.

In considering the responsibilities of the registered municipal accountant in the context of the Local Government Ethics Law it is clear that he/she would not be deemed a "local government officer" or "local government employee." The registered municipal accountant is not an elected official, a member of local government with authority to enact ordinances, approve development applications or grant zoning variances, or a member of an independent local authority. N.J.S.A. 40A:9-22.3(g)(1)-(3).

In turning to whether the registered municipal accountant would be deemed to be a "managerial executive" or "confidential employee," he/she does not exercise any government discretion, he/she does not exercise any policy making responsibilities within local government, and he/she is not involved in labor relations. In considering whether the registered municipal accountant would be deemed to be a "local government employee," his/her relationship with the municipal is that of an independent contractor and he/she does not maintain an ongoing and continual relationship with a local unit, does not provide regular advice or services to a local unit, and does not regularly participate in or contribute significantly to the policy making determinations of the local unit. Rather, the registered municipal accountant is engaged to annually audit the financial books of the local unit and to act as a check on those government officials who keep the local unit's financial accounts. In exercising this responsibility, the registered municipal accountant is required to be independent of the entity being audited. In these circumstances, it is unlikely that a reasonable person would consider a registered municipal accountant, who is a check on the local unit's financial accounts, to be a part of the official government family of a local unit.

For the foregoing reasons, you are advised that a registered municipal accountant who is engaged by a local government to prepare the annual audit required by N.J.S.A. 40A:5-4 is not a "local government officer" or "local government employee" pursuant to the Local Government Ethics Law and he/she is accordingly not subject to the requirements of the Local Government Ethics Law.

Sincerely yours,

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By: _____
John J. Chernoski
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