



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

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August 21, 2008

Dave Zipin
Local Finance Board
P.O. Box 803
Trenton, NJ 08625-0803

Dear Mr. Zipin:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project. The Project's goal is to increase governmental openness and transparency.

As you are aware, I recently filed complaints against the municipal prosecutors in Sparta Borough and Egg Harbor Township. In a telephone conversation that I had yesterday with a municipal clerk of a borough in Atlantic County I learned that she believed that prosecutors are not required to file FDS forms because they are "part of the judiciary." I find that many, if not most, municipal clerks that I speak with are not clear on whether or not municipal prosecutors are required to file.

There shouldn't be such uncertainty over this rather straightforward issue. I request the Local Finance Board to clearly decide the question and to publicly disseminate its decision so that municipal clerks and prosecutors around New Jersey can be properly guided.

On the merits of the question, the footnote at the bottom of page 6 of a September 20, 2001 Division of Law opinion letter (attached as Exhibit pages 1 through 7) makes it reasonably clear that municipal prosecutors, as well as municipal public defenders, are not exempt from the Local Government Ethics Law.

This, however, is not the end of the inquiry. Not every person who is subject to the Local Government Ethics Law must file an FDS. Rather, only "local government officers" must file FDS forms. N.J.S.A. 40A:9-22.6. Therefore, the question is whether a municipal prosecutor is a "local government officer" as defined by the statute.

The Board has already decided this question in In re Stuart Alterman, Complaint No. FDS-03-01. In her June 4, 2004 letter (attached as Exhibit pages 8 and 9), Board

Chairwoman Susan Jacobucci wrote “that municipal prosecutors are required to file the Statement(s).”

Ms. Jacobucci’s statement is consistent with my research on the matter. N.J.S.A. 40A:9-22.3(g) defines the term “local government officer” 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;

Municipal prosecutors are not elected officials. Prosecutors lack the authority to enact ordinances, approve development applications or grant variances. And, prosecutors are not members of an independent municipal, county or regional authority. Finally, prosecutors do not appear to fit within the definition of “confidential employee” which is 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-3g.

Thus, if prosecutors are within the definition of “local government officers,” they must be “managerial executives” as defined by N.J.S.A. 34:13A-3f. According to that definition

"Managerial executives" of a public employer means 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.

According to the New Jersey Supreme Court

A person formulates policies when he develops a particular set of objectives designed to further the mission of [a segment 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. 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.

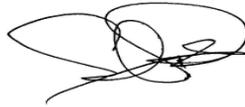
New Jersey Turnpike Authority v. American Federation of State, County and Mun. Employees, Council 73, 150 N.J. 331, 356 (1997).

It seems to me that a municipal prosecutor, who is entrusted to represent the government's interests in municipal court and who is empowered, in some cases, to enter into plea bargains with defendants, ranks fairly high in municipal government and possesses a substantial amount of discretion. Accordingly, it appears that municipal prosecutors are "managerial executives" and are thus required to complete and file FDS forms.

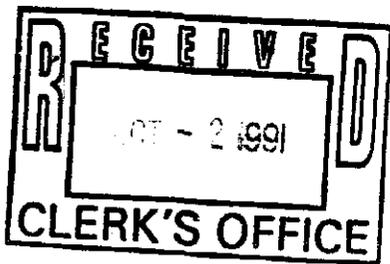
In summary, it appears that the Board has already correctly determined that municipal prosecutors are required to file annual FDS forms. The problem, apparently, is that not everyone is aware of Board's determination in this regard. Would you please let me know if the Board is willing to disseminate its position on this issue to New Jersey's municipal clerks?

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "John Paff", with a large, stylized flourish above the name.

John Paff



*Mun. Court Judges &
Court personnel are
not required to file*

ROBERT J. DEL TUFO
ATTORNEY GENERAL

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW

RICHARD J. HUGHES JUSTICE COMPLEX
CN 112
TRENTON 08625

EDWARD J. DAUBER
ASSISTANT ATTORNEY GENERAL
DIRECTOR

(609) 292-8564

September 20, 1991

cc: TC
Mayor
Atty
Admin
Asst Admin
Other

File: _____

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



Dear Deputy Commissioner Skokowski:

You have requested advice as to whether municipal court judges and municipal court employees are subject to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. For the reason expressed below you are advised that municipal court judges and municipal court employees are not subject to the Local Government Ethics Law.

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. A 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 sources of income, certain business interests, and 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. Ibid.) To be subject to the requirements 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 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. 194, 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).

The Act applies to "local government officers" and "local government employees" of a "local government agency." 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 initial question is whether a municipal court judge and municipal court employee serve in a "local government agency."

The Legislature is authorized to establish courts of limited jurisdiction. N.J. Const. (1947), Art. VI, §1 ¶1. The Legislature has established municipal courts. N.J.S.A. 2A:8-1 et seq. L. 1984, c. 264. With the enactment of this legislative scheme then existing police, magistrate, and recorder's courts were constituted and established as municipal courts. N.J.S.A. 2A:8-2. Municipal court judges are appointed for a term of three years by the municipal governing body. N.J.S.A. 2A:8-5. The judges of municipal courts whose jurisdiction extends to more than one municipality are nominated by the Governor and approved with the advice and consent of the Senate. N.J. Const. (1947), Art. VI, §6, ¶1. The territorial jurisdiction of the municipal courts are limited to the territorial limits of the municipality or in the case of municipal court for two or more municipalities to the territory embraced by the municipalities. N.J.S.A. 2A:8-20. The governing body of the municipality or municipalities, as the case may be, provide for a court clerk and other necessary clerical personnel or other assistants and provide for their compensation. N.J.S.A. 2A:8-13. Municipal court judges have been treated as members of the judiciary and a part of the State's justice system. Knight v. Margate, 86 N.J. 374, 385 (1981). Municipal court judges, clerks of municipal courts, and municipal court employees are bound by the Rules of the Supreme Court and may be removed by the Supreme Court for violations of the Rules. Hughes v. Lipscher, 906 F.2d 961, 965 (3rd Cir. 1990). However, municipal court judges, and the court's employees, are generally considered municipal, rather than state, officers. 9A McQuillin, Municipal Corporations, §27.01 p. 256 (3rd ed. 1986). In this regard, municipal court judges are not part of the State's judicial retirement system. N.J.S.A. 43:6A-5. Also, a predecessor to the municipal court, a police court, was deemed a municipal office rather than a state office. Perry v. Bianchi, 96 N.J.L. 113, 116 (Supreme Ct.

1921). The municipal court clerk and other municipal court personnel may be included with other municipal employees in the municipal employees bargaining unit established pursuant to the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Tp. of Mine Hill, 17 NJPER 315 ¶22139 (1991).

Thus, municipal court judges and personnel are generally considered local government officers and employees. However, as they are part of the State's judicial system they are subject to the supervision of the Supreme Court. Notwithstanding the fact that municipal court judges and municipal court personnel are subject to the control of the Supreme Court, the Court in the absence of its own action, has accepted and adopted statutory schemes touching upon the administration of the courts and statutory schemes dealing with public employees whose duties are intimately related to the judicial system. Passaic Cty. Probation Officers' Ass'n v. Cty of Passaic, 73 N.J. 247, 255 (1977). Therefore, the focus of this inquiry is whether the Legislature intended to apply the Local Government Ethics Law to municipal court judges and municipal court personnel and whether the Supreme Court has previously taken its own action in this area.

The purpose of the Local Government Ethics Law is, in part, to ensure the public that local government officers and employees are faithfully performing their duties and to establish a method by which the ethical conduct of these persons can be measured. N.J.S.A. 40A:9-22.1(d) and (e). Previously the Legislature enacted a State Conflict of Interest Law, N.J.S.A. 52:27D-12 et seq., L. 1971, c. 182, which parallels the Local Government Ethics Law in many respects. One part of this statutory scheme restricts certain State executive and legislative officials and full-time members of the judiciary and certain municipal court judges from engaging in certain activity with the casino industry. N.J.S.A. 52:13D-17.2. The Supreme Court in Knight v. Margate, supra, in upholding the restriction on members of the judiciary, including municipal court judges, noted that it had the ultimate authority to decide whether to accept or reject the legislative enactment as it concerned members of the judiciary, including municipal court judges.

The significance of N.J.S.A. 52:13D-17.2, and the Court's response thereto, is that the Legislature specifically included the judiciary within the statute's ambit. In contrast the Local Government Ethics Law does not specifically include within its ambit local government officers and employees who are members of the State's judiciary. Notwithstanding the enactment of the Local Government Ethics Law, these persons are and have been subject to the Supreme Court's Code of Judicial Conduct and the Rules of Court. This Code and the Rules of Court serve many of the purposes

of the Local Government Ethics Law. A municipal court judge is prohibited from practicing before an agency of the municipality he serves. R. 1:15-1(b). Further, the Code of Judicial Conduct generally requires judges, including municipal judges, to uphold the integrity of the judiciary, to avoid impropriety or the appearance thereof, and to perform his duties impartially, which requires him to disqualify himself from proceedings if he or his immediate family have a personal or financial interest in a matter. Employees of the municipal court are also subject to the Supreme Court's Rules. R. 1:1-1. Generally, they are prohibited from holding or seeking public office, engaging in political activity, and holding other employment without the Court's permission. R. 1:17-1, R. 1:17-3, R. 1:17-4. A municipal court judge is required to ensure that court personnel observe the same standards of fidelity and diligence that apply to him. Pressler, Rules Governing the Courts, (1991), Commentary to Canon 3, Code of Judicial Conduct, p. 277. Also, municipal court personnel are required to comply with the various administrative directives of the Supreme Court. Hughes v. Lipscher, supra, 906 F.2d at 965-66. The directives may include regulation of the personal activity of court personnel. Ibid. For a violation of the Rules, Code of Judicial Conduct, or administrative directives, a municipal court judge and municipal court personnel may be removed from office or disciplined. Ibid.

In contrast, the Code of Ethics established by the Local Government Ethics Law also broadly requires local government officers and employees to maintain integrity, to avoid impropriety, and limits their appearance before municipal agencies. N.J.S.A. 40A:9-22.5(a) to (h). A violation of the State's Code of Ethics may result in the disciplining or removal of the officer or the employee. N.J.S.A. 40A:9-22.11.

The only substantial difference between the Code of Judicial Conduct and the requirements of the Local Government Ethics Law is the financial disclosure requirements imposed upon "local government officers" by the Ethics Law. The Supreme Court has determined that the Code of Judicial Conduct does not require a judge to make a financial disclosure. Pressler, supra, Commentary to Canon 5, Code of Judicial Conduct, p. 282. In addition, in reviewing the definition of "local government officer" contained in the Local Government Ethics Law, we have determined that a municipal court judge and court personnel are not "local government officers." In deciding whether these individuals are "managerial executives" or "confidential employees," and thus are "local government officers," would require an analysis into the inner workings of the administration of the judicial branch of government. See, Attorney General Opinion No. 91-0093. This analysis may be an unwarranted inference in the affairs of the judiciary. Further, a municipal ethics board may enact its own local code of

ethics. N.J.S.A. 40A:9-22.19. Subjecting members of the judicial branch of government to potentially differing ethical requirements, is contrary to the uniform regulation that the Supreme Court applies to members of the judicial branch.

In view of the Supreme Court's active regulation of the ethical conduct of municipal court judges and employees and in the absence of a specific legislative determination to include these members of the State's judicial system within the scope of the Local Government Ethics Law, you are advised that the Law is not intended to apply to municipal court judges and municipal court personnel. This conclusion recognizes the principles of comity among the various branches of government and that the ethical conduct of members of the judicial branch of government, whether state or local officials, is subject to the regulation of the Supreme Court.

However, it should be noted that in some municipalities, certain individuals, with the permission of the Supreme Court, may serve both the municipal court and the municipality as dual office holders, e.g., a full-time municipal secretary is assigned part-time to work in the municipal court. These individuals are subject to regulation by the Supreme Court and the Local Government Ethics Law, as appropriate, regarding their respective positions. Thus, the fact that a municipal employee is also a part-time employee of the municipal court will not exempt the employee from otherwise complying with the Law.

For the above stated reasons you are advised that municipal court judges and municipal court employees are not subject to

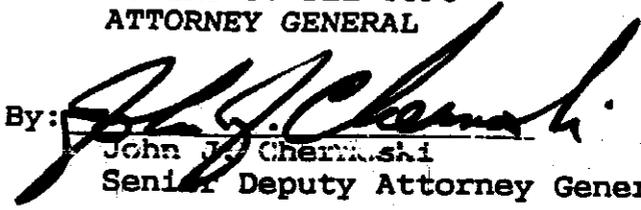
A municipal court prosecutor and a municipal court public defender are not considered part of the judicial branch of government. See, Joint memo from Barry Skokowski, Director of the Division of Local Government Services and Robert Lipscher, Administrative Director of the Courts, re: Municipal Court Budgets (Nov. 28, 1990). This opinion is not intended to exclude these individuals and other executive branch officials and employees from the requirements of the Local Government Ethics Law.

the Local Government Ethics Law.* Rather, the ethical conduct of these individuals are subject to regulation by the Supreme Court.

Very truly yours,

ROBERT J. DEL TUFO
ATTORNEY GENERAL

By:



John J. Chermanski
Senior Deputy Attorney General

* The scope of this opinion also applies to judicial branch employees at the county level, except for "elected" officials, e.g. the County Clerk and the County Surrogate, whose compensation and employment is listed on the County's Judicial Function Budget. As to "elected" officials, the Legislature has made the specific determination that elected local officials are deemed "local government officers." N.J.S.A. 40A:9-22.3(g)(1).



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS

JAMES E. MCGREEVEY
Governor

SUSAN BASS LEVIN
Commissioner

June 4, 2004

John T. Paff
P.O. Box 5424
Somerset, New Jersey 08875-5424

Re: Local Government Ethics Law
Complaint #FDS-03-01
Notice of Dismissal

Dear Mr. Paff:

The purpose of this letter is to advise you of the status of the above-referenced complaint. As you are aware, the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., provides the Local Finance Board (Board) with the power to initiate, receive, hear and review complaints, and hold hearings with regard to possible violations of the Local Government Ethics Law, where no local ethics board has been established, and determine if a complaint against a local government officer or employee is within its jurisdiction, frivolous, or without a reasonable factual basis, prior to conducting an investigation.

Complaint #FDS-03-01 was filed by you against Borough of Haddon Heights Municipal Prosecutor Stuart Alterman. You alleged that Mr. Alterman failed to file an Annual Financial Disclosure Statement for the filing year of 2002. As a Municipal Prosecutor of the Borough of Haddon Heights serving in 2002, he was required to file an Annual Financial Disclosure Statement by April 30th of that year.

N.J.S.A. 40A:9-22.6. a. states:

Local government officers shall annually file a financial disclosure statement.

The Board reviewed its records and found that Alterman had not filed a financial disclosure statement for the year(s) 2001 or 2002 with the Board or the municipal clerk. Pursuant to the Board's established policy of allowing "local government officers" an opportunity to file, a letter was sent to Alterman informing him that municipal prosecutors are required to file the Statement(s).

On March 8, 2004, the Board received a faxed copy of Mr. Alterman's Financial Disclosure Statement, dated December 5, 2003, disclosing information on one form for both filing years 2001 and 2002.



John T. Paff
June 4, 2004
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Therefore, the Board dismissed the complaint as no longer having a reasonable factual basis. Copies of the filings are enclosed.

This case is now closed.

If you have any questions regarding this matter, please feel free to contact Ursula Baker or David Nenno at (609) 292-0479.

Sincerely,



Susan Jacobucci, Chair
Local Finance Board

SJ:UB:la
Enclosures
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