CITY OF SARATOGA SPRINGS
BOARD OF ETHICS
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JUSTIN HOGAN
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August 9, 2019

Ann C. Bullock
86 Lincoln Avenue
Saratoga Springs, NY 12866

William J. McTygue
15 York Street
Saratoga Springs, NY 11866

Re: Inquiry submitted

Dear Ms. Bullock and Mr. McTygue:

This inquiry came to the Board's attention by receipt of a copy of a June 6 letter you sent to several City officials, including a City Council member. It concerns the activities of a member of the Saratoga Springs Housing Authority as well as those of a city employee who is chairman of a local political party. The inquiry is not submitted by way of the usual inquiry form, but the Board will not delay its review of the matter because of that discrepancy. (Section 7.2 of the Board's procedures states that an inquiry must be submitted "in writing").

Your inquiry describes a contract, recently approved by the City Council, between the City and an energy provider. You state that the energy provider operates as a limited liability corporation (LLC), and that two individuals that you describe as "principals" in that LLC are 1) a member of the Saratoga Springs Housing Authority, and 2) an employee in the city's Department of Public Works (you indicate that these two individuals are husband and wife). You go on to indicate that both individuals are also officers of a local political party that has made endorsements of several current City Council members, and has made a monetary campaign contribution to one current Council member. You assert that these actions constitute conflicts of interest and violate both state law and the city's own Code of Ethics, and that therefore the contract should be deemed null and void.

First, with respect to the Housing Authority member, Article 18 of the General Municipal Law establishes ethical standards for municipal officers and employees. This article is incorporated into our city Code of Ethics. (section 13-1). There are numerous authorities, including court cases and administrative opinions, that establish convincingly that members of municipal housing authorities are not, as a matter of law, officers or employees of the municipality in which they serve. In Ciulla v. State of New York, 191 Misc. 2d 528, the Court of Claims reviewed a wide variety of established authority on the subject and concluded:

"...taking the Public Housing law as a whole, reading it within the framework of the entire concept of the nature of public authorities as indicated by the many considerations already discussed, the intent of the Legislature seems abundantly clear – housing authorities are separate, legally independent public corporations; they are the agents of neither the state nor its municipalities."

The New York State Comptroller reached the identical conclusion, and further specified that housing authority personnel were not subject to the conflict of interest provisions of General Municipal Law Article 18. Opinions of State Comptroller 83-13, 82-166. The Board therefore must conclude that the housing authority member's activities that you describe do not violate any provision of Article 18 or the city Ethics Code.

Turning now to the city employee, the Board must first recognize that an employee's service as a political party official does not, of itself, constitute a violation of the city Ethics Code. Political party officers may not serve on the Board of Ethics [13-5 (B)(1)], and no city officer or employee may use a city workplace for political activities [13-3(K)(1-3)], but our city's Ethics Code goes so far as to affirmatively state that political activities outside the workplace are not so prohibited, and that "Nothing in (13-3(K) shall be construed to deny any officer or employee the right to support or refuse to support any political party, committee, campaign or candidate outside of the workplace." [13-3(K)(4)]. Also, the Board is aware of General Municipal Law section 811, in which a municipality is authorized, if it so desires, to require the completion and filing of disclosure forms by local political party officials as if those officials were officers or employees of the municipality [see GML 811(1)(b)], however, the Board notes that such disclosure is only required in cities of one million or more, and that it remains a local option in cities of lesser size. The Board finds it significant both that the State Legislature has never imposed this requirement on cities the size of Saratoga Springs, and that the City Council has never enacted such a requirement.

Thus, the remaining issue concerns the city employee and the contract. We turn first to General Municipal Law section 801, which provides that "...(1) no municipal officer or employee shall have an interest in any contract with the municipality of which he or she is an officer or employee, *when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above...*" (italics added). The remaining prohibitory language in section 801 pertains only to fiscal officers. Section 13-3(P)(1) of our city Ethics Code prohibits those interests that are prohibited by section 801, and states that contracts "willfully entered into" which violate section 801 are "null, void, and wholly unenforceable to the extent provided by (GML section 804)".

Section 801 does not apply to every municipal officer and employee, but only to those who have the powers or duties specified therein. The Board has reviewed the Civil Service job description for the employee in question, and finds nothing therein that confers upon that employee any of the specified powers or duties. The Board therefore finds section 801 inapplicable to that employee.

We now proceed to the issue of required disclosure as stated in GML section 803 and our city Ethics Code. Your letter suggests a disclosure requirement under Ethics Code section 13-3 (G), but that section applies only to disclosure of interests in "any legislation before the City Council". There is no legislation to discuss here. Rather, it is section 13-3 (P) (2) that must be reviewed along with GML section 803.

Section 803 establishes that "Any municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body". This section has a much broader applicability than section 801, but it references exceptions in section 802 for which such disclosure shall not be required. One such exception is for "A contract for the furnishing of public utility services when the rates or charges thereof are fixed or regulated by the public service commission." [GML 802(2)(b).]

A review of consumer protection policies in effect for the public service commission reveals that the commission monitors inquiries from non-residential customers regarding energy service companies, and an excessive number of confirmed complaints may result in an energy service company no longer being eligible to supply electric or natural gas in New York State. This policy establishes that contracts such as you describe are regulated by the commission in a manner within the exception of GML 802(2((b), and therefore no disclosure under section 803 was required in this situation.

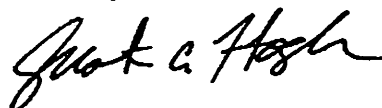
Finally, the Board notes that, even if the exception in GML 802(2)(b) did not apply, GML 803 does not operate to render a contract void in the event of a failure to disclose. Only section 801 does so. Also, the disclosure requirements in city Ethics Code 13-3(P) establish that violations are subject to penalties if they are done "willfully and knowingly", and that disclosure, when required, must be filed "promptly." Such language strongly suggests that a failure to disclose without knowledge of the requirement may be made promptly following discovery of the omission.

In conclusion, the Board finds that there is no reasonable cause for believing that the individuals named in your letter have violated any provision of the Code of Ethics.

Enclosed please find a copy of the standard inquiry form. If you wish to submit additional information the Board invites you to use that form in future correspondence.

With the unanimous approval of the Board.

Sincerely,



Justin Hogan
Chair

cc: Edward Miller
Joanne Foresta