

SUPREME COURT OF THE STATE OF NEW YORK  
WESTCHESTER COUNTY

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SAMUEL DAVIS and DAWN POWELL,

Petitioners,

For a judgment pursuant to CPLR Article 78 against

THE TOWN OF PUTNAM VALLEY TOWN BOARD  
and BOARD OF ETHICS,

Respondents.

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**REPLY MEMORANDUM OF  
LAW IN SUPPORT OF  
RESPONDENTS' MOTION TO  
DISMISS**

Index No. 06-23102

**PRELIMINARY STATEMENT**

This reply memorandum of law is submitted in support of the motion of respondents THE TOWN OF PUTNAM VALLEY TOWN BOARD and BOARD OF ETHICS to dismiss the verified petition based on objections in point of law pursuant to CPLR §404(a).

**STATEMENT OF FACTS**

The facts are more fully set forth in the accompanying affidavits of Archbishop Anthony Bondi dated January 16, 2007 and February 3, 2007; and the affirmation of Steven G. Leventhal, dated January 17, 2007.

**I.**

**THE PETITIONERS' AFFIDAVIT SHOULD BE DISREGARDED  
BECAUSE THEY WERE NOT SEVERALLY SWORN**

The Petitioners submitted a joint affidavit in opposition to respondents' motion to dismiss. Only one jurat appears at the foot of the joint affidavit. The jurat does not state which of petitioners' signatures it refers to. Nor does the jurat state that the affiants were severally sworn. It is impossible to determine whose sworn statement the affidavit purports to be. The affidavit should be disregarded.

**II.**  
**THE MORE RESTRICTIVE STANDARDS OF CONDUCT  
IN THE LOCAL ETHICS CODE DO NOT CONFLICT  
WITH ARTICLE 18 OF NY GEN. MUN. LAW**

The state law governing conflicts of interest of municipal officers and employees is Article 18 of the New York General Municipal Law (“Article 18”). It expressly authorizes a local municipality to adopt its own code of ethics, provided that a local ethics code may not authorize conduct that is prohibited by Article 18. It provides that “[s]uch codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited.” NY Gen. Mun. Law §806-1(a). Thus, a local ethics code does not “conflict” with Article 18 when it regulates or prescribes conduct which is not expressly prohibited by Article 18.

Article 18 prohibits municipal officers and employees from having an interest in municipal contracts that they have the power to authorize or approve, either individually or as a member of a board. NY Gen. Mun. Law §801. Officials are deemed to have an interest in the contracts of their spouses and dependents, except in the case of employment contracts. NY Gen. Mun. Law §800-3.

Like Article 18, the Town ethics code here prohibited Town officers and employees from having an interest in Town contracts that they had the power to authorize or approve. Like Article 18, the Town Code provided that officials were deemed to have an interest in the contracts of their spouses. However, unlike Article 18, the Town ethics code did not except employment contracts from those contracts of an official’s spouse or dependent that in which the official was deemed to have an interest.

Thus, the Ethics Board properly determined that the Town code of ethics barred employment contracts between the Town and the spouse or dependent of an official who,

individually or as a member of a board, had the power to authorize or approve the employment contract. Having determined that under the Town code of ethics, an official would have a prohibited interest in the employment contract of his or her spouse, the Board of Ethics reasoned that the spirit and intent of the local ethics code were offended by the employment of the Supervisor's domestic partner where the Supervisor had the power to authorize the domestic partner's employment contract.

**III.  
THE INFORMAL ADVISORY OPINION OF THE  
NY COMPTROLLER IS NEITHER ON POINT  
NOR CONTROLLING**

The petitioners incorrectly rely on an informal opinion of the State Comptroller interpreting Article 18, and on the advice they purportedly received from an unnamed source at the NYS Association of Towns. They argue that because the employment of a Supervisor's spouse or dependent would not violate Article 18, the employment of Ms. Powell to serve as the Supervisor's confidential secretary did not pose a conflict of interest.

However, the informal opinions of the New York Comptroller are non-binding. Moreover, the Board of Ethics concluded that the employment contract here did not violate Article 18. Instead, it relied on the spirit and intent of the Town code of ethics in reaching its conclusion that the employment of Ms. Powell to serve as the Supervisor's confidential secretary created a prohibited appearance of impropriety. Furthermore, the opinion cited by petitioners states that the employment of a Supervisor's spouse to serve as his confidential secretary may well violate the ethics code adopted by a particular local municipality, or otherwise create an appearance of impropriety. *See, NY Comptroller Inf. Op. 91-18.*

In its advisory opinion, the Board of Ethics set forth the analytic protocol that it used in reaching its conclusion. The Board considered the following three questions: (i) did the facts as presented constitute a violation of Article 18; (ii) did the facts as presented constitute a violation of the Town code of ethics; and (iii) did the facts as presented constitute a violation of the spirit and intent of the State or Town ethics laws, and thus amount to a prohibited appearance of impropriety?

Applying the first analytic protocol, the Ethics Board found that even if Ms. Powell were the spouse or dependent of the Supervisor, her employment as his confidential secretary would not violate Article 18 because employment contracts are specifically excluded from those contracts of a spouse or dependent in which an official is deemed to have an interest. *See, NY Gen. Mun. Law §800-3.*

In the second step of its analysis, the Board of Ethics observed that under the Town code of ethics, employment contracts were not excluded from those contracts of a spouse or dependent in which an official was deemed to have an interest. In as much as it was conceded that the Supervisor and Ms. Powell were not spouses, the Board considered whether Ms. Powell was the Supervisor's dependent at the time she was hired as his confidential secretary, or whether he otherwise derived a pecuniary or material benefit from her employment by the Town (contrary to petitioners' assertion, there were no shifting definitions applied; the Board inquired into the issue of dependency because the dependents of a municipal officer or employee are among those in whose contracts the officer or employee is deemed to have an interest).

The Board of Ethics considered the written statements submitted by the Supervisor and Ms. Powell indicating that she was a practicing chiropractor before she

was hired to serve as the Supervisor's confidential secretary. In separate interviews both of which were attended by board members (The Most Rev.) Anthony Bondi and Michael Cicale, the Supervisor and Ms. Powell stated that they were financially "interdependent" on each other. Based on this information, the Board found insufficient evidence to conclude that Ms. Powell would not be able to sustain herself without the Supervisors support. Therefore, the Board concluded that Ms. Powell was not the Supervisor's dependent, and that her employment contract did not violate the express provisions of the Town code of ethics.

In the third step of its analysis, the Board noted that the Town code of ethics is more restrictive than Article 18 in that it does not exclude employment contracts from those contracts of an official's spouse or dependent in which the official is deemed to have an interest. *See*, Point II, above. Since the Supervisor's decision to employ his spouse would have violated the local ethics code, the Board concluded that the Supervisor's decision to employ his domestic partner violated the spirit and intent of the local ethics code, and that it created a prohibited appearance of impropriety.

**IV.  
BY HIRING MS. POWELL TO SERVE AS HIS CONFIDENTIAL  
SECRETARY, THE SUPERVISOR UNDERMINED PUBLIC  
CONFIDENCE IN TOWN GOVERNMENT  
AND CREATED AN APPEARANCE  
OF IMPROPRIETY**

The newspaper clippings submitted by petitioners in opposition to this motion demonstrate that public confidence in Town government has been seriously undermined by the Supervisor's decision to employ Ms. Powell as his confidential secretary. They vindicate the conclusion of the Board of Ethics that an appearance of impropriety was created by the Supervisor's hiring of Ms. Powell.

Government ethics regulations serve to inspire public confidence in government. To achieve this goal, municipal officers and employees must adhere to the spirit and intent of government ethics regulations. Accordingly, in 2002, the New York Attorney General opined that:

In resolving conflict of interest questions, one fundamental principle predominates: a public official must avoid circumstances that compromise his or her ability to make impartial decisions solely in the public interest. See Matter of Tuxedo Conservation & Taxpayers Ass'n v. Town Bd., 69 A.D.2d 320 (2d Dep't 1979); Op. Atty. Gen. (Inf.) No. 97-5; Op. Atty. Gen. (Inf.) No. 88-60. Even the appearance of impropriety should be avoided in order to maintain public confidence in government. Op. Atty. Gen. (Inf.) No. 97-5.

2002 N.Y. op. (Inf.) Att'y Gen. 9.

Contrary to the arguments advanced by petitioners, the spirit and intent of the Town Code of Ethics was not reflected in the purported practices of Supervisors elsewhere in the state to hire their spouses to serve as their confidential secretaries. The spirit and intent of the Town Code of Ethics was reflected in its rejection of the nepotism allowed by Article 18 (*see*, Point II, above).

**V.  
THE SUPERVISOR'S CLAIMS ARE BARRED BECAUSE,  
AS A MEMBER OF THE TOWN BOARD, HE HAS  
THE POWER AND DUTY TO NEGOTIATE  
OR APPROVE HIS OWN CLAIMS**

Except in the case of specified statutory exceptions, a municipal officer or employee may not have a claim against the municipality from which he or she will materially benefit, if he or she has the power to authorize or approve the claim, either individually or as a board member. *See*, NY Gen. Mun. Law §801 (prohibited interest in a contract with the municipality), §800-2 (“contract” means any claim, account or demand against, or agreement with a municipality”), §800-3 (“interest” means any direct

or indirect pecuniary or other material benefit). A prohibited contract (i.e., claim, account or demand against, or agreement) willingly entered into by or with a municipality is null, void and wholly unenforceable. *See*, NY Gen. Mun. Law §804.

For a clear and concise discussion of the forgoing provisions of Article 18, *see*, Davies, Article 18: A Conflicts of Interest Checklist for Municipal Officers and Employees, NYSBA/MLRC *Municipal Lawyer*, Summer 2005, Vol. 19, No. 3 (a copy of Professor Davies' article is attached to this memorandum of law).

**VI.**  
**THE ADVISORY OPINION WAS NOT**  
**A FINAL DETERMINATION**

It is the law of this Department that an advisory opinion is not a “final determination” within the meaning of CPLR §7801. *See*, Scarpati-Reilly v. Town of Huntington Bd. of Ethics, 300 A.D. 2d 404 (2d Dep’t 2002); Neale v. Cohen, 281 A.D.2d 421 (2<sup>nd</sup> Dept 2001); Hammer v. Veteran, 86 Misc. 2d 1056 (Westchester Co. 1975), affd., 53 A.D.2d 629 (2d Dep’t 1976).

In their joint affidavit submitted in opposition to this motion, petitioners cite trial level authority and appellate decisions from other Departments to support their contrary contention. Even more remarkably, they argue that a decision of this Court, Hammer v. Veteran, 86 Misc. 2d 1056 (Westchester Co. 1975), affd., 53 A.D.2d 629 (2d Dep’t 1976), was wrongly decided, even though it was affirmed by the Second Department (in citing the case, petitioners omitted the subsequent history, despite the fact that the respondents provided the full cite in their memorandum in support of this motion.

Furthermore, the petitioners erroneously stated that they were identified by name in the advisory opinion rendered by the Ethics Board here. The Supervisor and Ms.

Powell were not identified by name in the advisory opinion. They were identified by their titles. Nevertheless, their identities were self-evident.

**VII.  
THE PENALTIES AUTHORIZED BY THE REVISED  
ETHICS CODE ARE REASONABLE**

Petitioners use hyperbole to variously characterize the penalties that are authorized by the Revised Ethics Code as “huge”, “enormous”, “staggering”, “unlimited”, “draconian” and “quasi-criminal”. They are none of these.

The Revised Ethics Code provides at §17-07 (Penalties) that the Town Board may impose one or more of the following penalties for violations: (i) disciplinary action, (ii) a civil penalty not to exceed \$1,000, (iii) disgorgement of the gain or profit derived from the violation.

**VIII.  
MS. POWELL WAS NOT AGGRIEVED BY THE  
ADVISORY OPINION OR THE RESOLUTION  
OF THE TOWN BOARD**

No inquiry was made to the Board of Ethics regarding the conduct of Ms. Powell, and no opinion was expressed that she engaged in any acts that gave rise to an appearance of impropriety.

The petitioners point to the fact that Ms. Powell’s compensation for the new budget year was reduced by the Town Board. However, the Board of Ethics determined that Ms. Powell’s rate of compensation was not so unreasonably high as to violate the spirit and intent of Article 18 or the Town ethics code; and that no prohibited appearance of impropriety existed by virtue of the rate at which she was compensated for her services as secretary to the Supervisor. The Town Board accepted the advisory opinion.

Thus, the adjustment to Ms. Powell's compensation for the new budget year was an exercise of discretion by the Town Board separate and apart from the advisory opinion rendered by the Board of Ethics, or its resolution accepting the advisory opinion.

### **CONCLUSION**

For the forgoing reasons, and for the reasons stated in respondents' memorandum of law dated January 17, 2007, it is respectfully requested that the Court grant an order dismissing the verified petition, and that respondents The Town of Putnam Valley Town Board and Board of Ethics have such other and further relief as the Court deems just and proper.

Dated: Roslyn, New York  
February 8, 2006

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