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June 2, 2014

VIA FIRST CLASS MAIL
Mr. Shaun Golden
14 Johnny Drive
Farmingdale, NJ 07727

Re: Holding Office as County Sheriff and County Party (Republican) Chair
MDMC Client No.: S0787-1001

Dear Mr. Golden:

You have requested our opinion concerning whether there is any prohibition for a person to hold the office of both County Sheriff and County Party (Republican) Chair. After review of the applicable statutes and interpreting case law, we have determined that there is no statutory prohibition against a person simultaneously holding the elected position of County Sheriff and County Party (Republican) Chair as the position of County Party Chair is a political, not civil or public, office. Additionally, it is unlikely that the duties and functions of these dual roles will run afoul of the New Jersey Local Government Ethics Law, N.J.S.A. §§ 40A:9-22.1 to -22.5 ("Ethics Law").

I. DUAL-ROLE AS COUNTY SHERIFF AND COUNTY PARTY CHAIR

N.J.S.A. § 40A:9-108 provides that,

> **No person shall hold any other civil office during the time he holds and exercises the office of sheriff** and by acceptance of the latter office his former office shall be deemed vacated, provided, however, that the governing body of any county may, by ordinance or resolution, as appropriate, provide that any person holding and exercising the office of sheriff may simultaneously hold and exercise the office of county disaster control coordinator but shall not receive any compensation or any other benefits otherwise attached to the office of county disaster control coordinator during such time as such person shall hold both such offices.

Therefore, under this statute, a county sheriff is barred from simultaneously holding a position as county sheriff and any other "civil office" position.

In Lanza v. De Marino, a case dealing with this precise issue, the Superior Court of New Jersey defined the term "civil office" and held that a county sheriff was *not* barred by N.J.S.A. § § 40A:9-108, from holding the office of both county sheriff and chairman of the municipal committee of the Democratic Party of the Township of Woodbridge. 160 N.J. Super. 71, 76 (App. Div. 1978). This was because the office of chairman of a municipal committee of a political party, the Court stated, was not a "public [or civil] office" which a county sheriff would be prohibited from simultaneously holding.

In making this decision, the Court noted that the definition of "civil office" one who is appointed or elected for the purpose of exercising the functions and carrying on the operations of government. Id. at 74 (citing Cedar Grove Bd. of Ed. v. State Bd. of Ed., 115 N.J.L. 67, 71 (Sup. Ct. 1935)). Using the term "civil office" interchangeably with "public office," the Court further defined "public office" as "any office in the government of this State or any of its political subdivisions filled at elections by the electors of the State or political subdivision." Id. (citing Kobylarz v. Mercer, 130 N.J.L. 44 (E. & A. 1942)).

The Court then distinguished the term "public office" from a position held in a "political party." Id. at 74-75. The "explicit nature" of the definitions of "civil office," "public office," and "political party," according to the Court, led it to conclude that "the Legislature intended to differentiate between public and party offices" and, therefore, "membership in a political committee belonging to one party or another does not come within the above description of what constitutes public office." Id. at 76 (citing In Opinion of the Justices, 347 Mass. 797, 800 (Sup. Jud. Ct. 1964)).

Here, the position of County Party (Republican) Chair is not a "public office" in that it is not "in the government of this State or any of its political subdivisions." Moreover, the position is not "filled at elections by the electors of the State or political subdivision" as "members of a county committee are elected by the voters of a political party in the primary elections held in each municipality and serve also as members of the municipal committee of the political party who in turn elect the municipal chairman." Lanza, supra, 160 N.J. Super. at 75 n. 1 (citing N.J.S.A. § 19:5-2, 3).

Accordingly, even though Lanza involved a county sheriff seeking to hold office as the chairman of a *municipal* committee, we believe that it is the nature of the committee itself, not whether the committee is formed within a municipality or county, which is relevant. For example, when distinguishing between "public office" and "party office," the Lanza Court cites to Rogers v. Republican Party State Comm., 96 N.J. Super. 265, 271 (Law Div. 1967) for the proposition that "the governmental functions, if any, given to **a political party committee or its chairman** are so minimal in significance that they cannot be classified as a truly governmental entity." (Emphasis added). Moreover, the Lanza Court cites to In Opinion of the Justices, 347

Mass. 797, 800 (Sup. Jud. Ct. 1964) which distinguishes "public office" from "political committee":

> Without attempting an exhaustive definition of what constitutes a "public office," we think that it is one whose duties are in their nature public; that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interest, either as members of the entire body politic or of some duly-established division of it....**membership in a *political committee* belonging to one party or another does not come within the above description of what constitutes public office. The fact that the legislature has deemed it expedient to regulate by statute the election and conduct of *political committees* does not make the office a public one**."

Lastly, the statutory definition of "political party committee" also does not distinguish between county and municipal committees. N.J.S.A. § 19:44A-3(p) defines the term "political party committee" as "the State committee of a political party, as organized pursuant to R.S.19:5-4, **any county committee of a political party**, as organized pursuant to R.S.19:5-3, **or any municipal committee of a political party**, as organized pursuant to R.S.19:5-2. (Emphasis added).

Moreover, both R.S. 19:5-2 (municipal committees) and R.S. 19:5-3 (county committees), have nearly identical election procedures as both require that "members of each committee shall elect some suitable person who shall be a resident of such [municipality or county respectively] as chairman," and that the "chairman shall preside at all meetings of the committee and shall perform all duties required...by law and the constitution and bylaws of such committee." N.J.S.A. § 19:5-2, 3.

Therefore, a county sheriff will not be barred by N.J.S.A. § 40A:9-108, from holding the office of both County Sheriff and County Party (Republican) Chair because County Party (Republican) Chair is a political party office, not a "civil office."

II. ETHICAL CONSIDERATIONS

The Ethics Law governs conflicts of interest. However, the Ethics Law refines the definition of a conflict of interest established in the common law. Shapiro v. Hertz, 368 N.J. Super. 46, 52 (App. Div. 2004). Therefore, "[w]hen determining whether a conflict exists, we must look to the Ethics Law as well as to the common law..." Id. at 52.

A. Common Law

Under the common law, the public is entitled to have its representatives perform their duties free from any "personal or pecuniary interests that may affect their judgment." Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 200 (App. Div. 1989). "This is essential if the public is to have confidence and trust in the representatives who are required to decide public issues coming before them." Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 200 (App. Div. 1989). Thus, in determining whether there is a conflict of interest, the question is not whether the conflicting interest actually influenced the action, but whether there is "potential" for conflict. Wyzykowski, supra, 132 N.J. at 523.

A potential conflict "arises when the public official has an interest not shared in common with the other members of the public." Id. at 524. Such an interest and, therefore, the appearance of impropriety must be "something more than a fanciful possibility. It must have some reasonable basis." Higgins v. Advisory Comm. On Prof'l Ethics of the Supreme Court of N.J., 73 N.J. 123, 129 (1977). Therefore, a conflict does not exist unless "contradictory desires [are] tugging the official in opposite directions." Wyzykowski, supra, 132 N.J. at 524.

In Wyzykowski, the Supreme Court identified four (4) situations that require disqualification due to a conflict:

> (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain;
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> (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
>
> (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and
>
> (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.
>
> [Id. at 525-26].

The decision whether an impermissible conflict of interest exists, requiring disqualification under one of these situations, "is necessarily a factual one and depends on the circumstances of the case." Id. at 523 (quoting Van Itallie v. Franklin Lakes, 28 N.J. 528, 268

(1956)). Therefore, in determining whether an interest is sufficient to disqualify a public official, "[t]he question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Van Itallie, supra, 28 N.J. 258 at 268.

B. New Jersey Ethics Law

Pursuant to the Ethics Law, N.J.S.A. § 40A:9-22.5, "local government officers or employees" are required to comply with numerous provisions. The Ethics Law generally provides that a "local government officer or employee" shall not engage in any activity that places him in an actual or apparent conflict of interest regarding his public duties. N.J.S.A. 40A:9-22.5(a) to (k). For example, the Ethics law forbids the following:

> a. No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;
>
> c. No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;
>
> d. No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;
>
> e. No local government officer or employee shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties; and
>
> f. No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties...

We understand that two municipal chairs have cited these provisions as potential conflicts that could arise if a person were to hold office as County Sheriff and County Party (Republican) Chair.

Our research has not disclosed any case law interpreting the Ethics Law that involves a similar set of facts as presented. See Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 229-30 (2009) However, the Court's decision in Lanza—which applied common law—was based on the same set of facts and found that there were "no conflict of duties...that would make the positions of chairman of the municipal committee of a political party and sheriff incompatible." 160 N.J. Super. 71 at 78. Therefore, even though Lanza was decided prior to the enactment of the Ethics Law—which simply "refines the definition of a conflict of interest established in the common law"—its determination that no incompatibility, or conflict, exists should be given great weight. Shapiro v. Mertz, 368 N.J. Super. 46, 52 (App. Div. 2004).

In Lanza, the plaintiffs argued—similar to the arguments here—that a conflict may arise between the defendant's position as sheriff and chairman of the democratic party "because he will have to solicit contributions, votes, jobs and 'favors' as municipal chairman," which "is incompatible with his role as sheriff in which he may be called upon to enforce a violation of the election laws or arrest a member of his political party." Id. at 77. The Court, however, rejected this argument stating:

> Plaintiffs ignore the reality that the sheriff is an elected official who necessarily has to solicit votes and contributions, and plaintiffs' argument, when analyzed, would logically prohibit a sheriff from belonging to any political party, notwithstanding one who seeks office and who does not run as an independent must to some extent, at least, align himself with some political organization.

Moreover, in Lanza, the plaintiffs argued that the sheriff's "role as municipal chairman would be incompatible with his role as sheriff and chief law enforcement officer in such county because of certain ministerial functions he performs for the court under the supervision and direction of the court." Id.

The Court again rejected plaintiffs' argument indicating that "Rule 1:17-1, which prohibits certain persons associated with the courts from engaging in political activity, does not include sheriffs within its prohibitions but, to the contrary, Rule 1:17-[4] specifically exempts sheriffs from its applicability." Id. at 78. Therefore, the Court in Lanza held that the functions and/or duties of a sheriff and policy party chairman are not incompatible or in conflict.

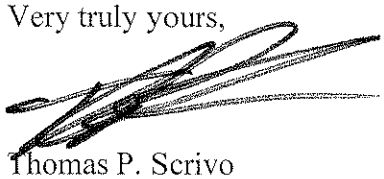
Here, there is no indication that the dual role of County Sheriff and County Party (Republican) Chair will tempt the County Sheriff from departing from his sworn duty pursuant to

N.J.S.A. § 40A:9-96. See N.J.S.A. § 40A:9-96 ("...solemnly swear (or affirm) to support the Constitution of this State and of the United States and perform the duties of my office as sheriff, faithfully, impartially and justly to the best of my ability"). Instead, there appear to be only mere or "fanciful" possibilities of such a conflict which is inadequate for a finding of disqualification. However, it is necessary to reiterate that a review of the case law interpreting the Ethics Law did not reveal facts sufficiently similar to the facts presented here.

Accordingly, pursuant to N.J.S.A. § 40A:9-108, and its interpreting case law, a County Sheriff will not be barred from holding the office of both County Sheriff and County Party (Republican) Chair because County Party (Republican) Chair is a political party office, not a "civil office." Moreover, based on a review of the Ethics Law and common law, it is unlikely that a court would determine that a conflict exists between the duties and functions of these two roles.

Thank you.

Very truly yours,



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