

September 5, 2023

State of New York
Commission on Judicial Conduct

ATTN: David M. Garber, ESQ.

Referee

S. Peter Pedrotty, ESQ.

Senior Attorney, Commission on Judicial Conduct

Hon. E. Timothy Mercer

Respondent

File No. 2021/A-0198

May a part-time town justice perform work and or services on a one time or occasional basis for the town in which the justice presides?

Opinion 89-19 dated February 24, 1989

Opinion 95-79 dated June 29, 1995

Opinion 98-163 dated October 22, 1998

Opinion 99-128 dated September 14, 1999

Applicability or inapplicability of said *Opinions* with regards to the facts and testimony presented on May 16th and May 17th, 2023.

Opinion 89-19

February 24, 1989

Case Topic: Propriety of town justice performing carpentry work for the town court.

Rule Statement: A town justice who is also a carpenter may remodel the town court for the town. 22 NYCRR 100.5 (c) and (h)

Case Applicability: In this opinion I find my case and Opinion 89-19 applicable. The installation of said security system did not interfere with my Judicial duties and or exploit my judicial position, 22 NYCRR 105 (c) as testimony states the Town was not aware of our JCAP grant award for the CCTV security system. It was a one-time award by JCAP during a Covid lockdown and limited supply chain. Section 100.5 (h) states if the source of payment doesn't exceed a reasonable amount nor shall it exceed what a person who is not a judge receive. The project grant was within industry amount standards. NYCRR100.4 (d) (1) (a), (b) and (c) prohibit a judge from engaging in Financial and business dealing that may reasonably be perceived the judge's judicial position, involve the judge with any business, organization or activity that ordinarily will come before the judge, or involve the judge in frequent transactions or a continuing business relationship that would come before the Court.

The Committee concludes the judge can do the work in Opinion 89-19.

However, in complaint against Mercer, proper procurement procedures should have been used. Procurement procedures again played a role as to the belief that Athens Town Court functioning separately from the Town and the Town is just a money facility for the JCAP grant funding to pass through.

Opinion 95-79

June 29, 1995

Case Topic: Compensation from the Town for services rendered by Judge in connection with the use of a new computer provided by the Town to use in your court.

Rule Statement: The Committee sees no ethical objection to your making a request to the for such compensation. 22NYCRR 100.6(B) (4) and 22NYCRR 100.4(a)(1), (2) AND (3)

Case Applicability: In this opinion, I find it not applicable to my case. The services are ongoing. My case was a one-time grant project with no additional services or software requirements. No reoccurring billing. Even though his employment in 95-79 did not conflict or interfere with the proper performance of the judges' duties 22NYCRR 100.6 (B)(4) His computer services are similar in Opinion 89-19, he is permitted to do part-time, small parttime work as a part-time Justice. The rules also require that any Judge, full-time or part-time, conduct his or her extra-judicial activities so that the do not cast reasonable doubt on the Judges capacity to act with impartiality, detract from the dignity of Judicial office, interfere with the performance of judicial duties and are not incompatible with judicial office. 22 NYCRR 100.4 (A)(1), (2) and (3).

The Committee saw no Objection to him making a request for compensation from the Town. It has been the Committee's view that an on-going business relationship with a judge's own municipality, unlike a one-time or occasional project, poses a greater risk of creating a conflict of interest or an appearance of impropriety, opinion 06-66

Opinion 98-163

October 22, 1998

Case Topic: A part-time town justice, who owns and operates a local construction business may bid on and if successful, construct an airport hanger at an airport owned by the town.

Rule Statement: The opinion of the Committee that, under the circumstances, the judge inquiring may bid on and if the bid is accepted construct such airport hangar which the town owns. 22 NYCRR100.4 (D) (1) (a), (b) and (c); 100.6 (B0) (4)

Case Applicability: In this opinion the Judge asks for permission to bid on the project. Yes, all the 22 NYCRR rules apply, and he can be awarded the bid based on the bidding project scope. My case is not applicable as my small project to install CCTV was not put up for bidding. The Athens Town Court had the belief that it didn't need to be put to bid as we operate separately from the Town. In respondents exhibit "I" judge Pazin and Marcia Puorro clearly states that "we do not belong to the town" and "it's the Courts money" by Ms. Puorro. Why would we bid the job. The past JCAP projects also have shown that for courtroom remodeling in 2012. A judge must also require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge (see 22 NYCRR 100.3[C][2]).

The Committee's opinion on this single contract bid was allowable since it was an open and public bid that includes a finite object and its conclusion, the construction of an airport hangar, each bidder was subject to procedural requirements, safeguards and Municipal Law.

Opinion 99-128

September 14, 1999

Case Topic: A part-time town justice may also serve on an occasional basis as town engineer and be compensated for such services.

Rule Statement: The roles of per diem town engineer and town justice are not incompatible. In addition, the justices' services does not appear to conflict or interfere with the proper performance of the duties of a part-time judge. 22 NYCRR 100.4 (A)(1), (2) and (3) and . 22NYCRR 100.6(B) (4)

Case Applicability: Opinion 99-128 is relevant and applicable to my case. Allowing the part-time judge to accept public employment and that employment is not incompatible with his judicial office with no conflict and or interferes with the proper performance of the judges' duties. The actual awarded JCAP project would have conformed to all the judicial rules and Municipal laws if all steps and procedures would have be followed.

The Committee concludes that the roles of the per diem engineer and town justice are not incompatible and he can bill the town for his engineering services.

Municipal Law, Article 800
Town Ethics Code and Town of Athens Ethics Code

September 5, 2023

Case Topic: Is a Town Justice an officer or an employee of the Town.

Rule Statement:

A town justice is an elected official as listed in section 102 (definitions) of the Athens “Employee” Handbook. A Town employee is a person employed by the Town but not an elected official or an independent contractor. New York State identifies a Town Justice in as a Public Official, either elected or appointed to a governmental position. General Municipal Law Section 810 defines the term “Local elected official” shall mean an elected official of the political subdivision, except *Judges or Justices of the Unified Court System*. NYS office of Court Administration, Office of Justice Court Support, “the Court, even at a local level, is the third branch of government. Ethically, that separation must remain and therefore we cannot be deemed a separate department of the Town” ref Opinion 16-104. A judge must uphold the judiciary’s integrity and, especially in this situation, its independence (see 22 NYCRR 100.1); and must always act to promote public confidence in the judiciary’s integrity and impartiality (see 22 NYCRR 100.2[A]). In addition, a judge “shall require staff, court officials and others subject to the judge’s direction and control to observe the standards of fidelity and diligence that apply to the judge” (22 NYCRR 100.3[C][2]).

Case Applicability: The Justice Court is not a routine department or office of town or local government: it is part of a constitutionally different branch of government, and its Justices have rights and duties that are constitutionally different from all other town or village officials. Our Justice Courts are part of the New York State Unified Court System, Justice Courts – must operate free from undue interference from the executive and legislative branches. Judicial independence and its protections are core features of the separation of powers and apply as much to towns as to other levels of government. Town Boards need to keep in mind that all justices must comply with the Chief Administrative Judge’s Rules Governing Judicial Conduct. This is why in training “taking the Bench” it is mentioned not to sign your Town Handbook or your Towns Sexual Harassment policy. Decisions bearing directly on the core judicial operations of Justice Courts, such as the processing or outcome of cases, generally are inappropriate for interference by the executive and legislative branches of local government. Such intrusion by municipal officials in the affairs of a Justice Court can undermine the court’s independence and violate the constitutional separation of powers. Towns must not unduly interfere in local court administration. While towns and villages may set general personnel and administrative policies for their local governments and employees, Justice Court operations are the responsibility of the justices to supervise. For instance, the local justice supervises court staff in performing court-related functions, and a court clerk cannot be discharged from the Justice Court without the consent of the justice or justices (Town Law § 20 (1) (a)). The Justice has say over hiring and firing , not the Town.

In General, Municipal Law, I am considered a Local Elected Official. In all the Town of Athens handbook, referring to Section 806 of the General Municipal Law, the Town Board recognizes that there are rules of ethical conduct for Elected Officials and employees that must be observed. In Section 308 Code of Ethics, Officer or Employee will mean and refer to an officer or employee of the Town of Athens, whether paid or un-paid. As an elected official, Athens Town Justice, I am not an employee of the Town of Athens. We are still responsible to The Unified Court System and its Chief Administrative Judge. The Athens Court, not being a Department of the Town of Athens, for decades has had the belief that the Athens Town Court is that it is separate from the Town and functions separately as the Judicial Branch of Government under The Unified Court System. We should not be intruded on. That I consider the main reason why the Court, Athens Town Court, didn't feel the Board needed to give "approval" for the CCTV in the JCAP Grant. We could have just request a resolution for a said dollar amount, not include any items, the Board approves a resolution for said dollar amount and Court Clerk applies for the specifics on the application and not the Board resolution.

Respectfully submitted.

September 5, 2023

Hon. E. Timothy Mercer