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BY EMAIL AND OVERNIGHT MAIL

Robert F. Meehan, Esq.
Office of the County Attorney
Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601

Re: Letter opinion

Dear Mr. Meehan:

The County of Westchester has retained Hinshaw & Culbertson LLP ("Hinshaw" or "we") to opine as consultants in respect to whether you, as Westchester County Attorney, have a disqualifying conflict of interest that prevents you from appearing in a pending Article 78 proceeding in the Supreme Court, Westchester County entitled *In the Matter of the Application of Civil Service Employees Assoc., Inc. et al.* (Index No. 2629-11) (hereafter, the "Action"). Hinshaw's Lawyers for the Profession® practice group regularly advises clients throughout the United States on professional responsibility questions such as those at issue herein. For the reasons below, we believe you would violate the New York Rules of Professional Conduct, and potentially risk professional discipline, if you assume representation of a Respondent or Necessary Party in the Action. Accordingly, we believe you should decline such representation.

Relevant Facts

Hinshaw has no first-hand knowledge of the relevant facts. We base our opinion and recommendation on the following facts that you have reviewed and approved.

The County is a municipal corporation. It is composed of an executive branch, the Office of the County Executive, and a legislative branch, the Board of Legislators. As County Attorney, you are regularly tasked with giving legal advice to both branches.

Effective at the end of 2010, the County, acting through Acting Commissioner of Planning Edward Buroughs, ended its contract with New York State to manage a federally sponsored Section 8 Housing Choice Voucher Program, which subsidizes housing costs for qualified low-

income persons and families. By law, the State is obliged to administer the Voucher Program. As a consequence of its action, the County terminated 38 employee members of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (hereafter, "CSEA").

In October 2010, when cancellation of the Voucher Program contract was being contemplated, you gave relevant legal advice on multiple occasions to the Office of the County Executive. On November 8, 2010, the Board passed Resolution No. 2010-154 asserting that the County should continue to run the Voucher Program after December 31, 2010. On November 12, 2010, you provided legal advice to the County Executive regarding the meaning and effect of the Resolution. Thereafter, the Board voted to add the 38 terminated positions in the County's 2011 budget. The County Executive vetoed this action but the Board voted to override his veto. However, the override did not, and does not, necessarily mean the terminated employees will be rehired.

In January 2011, CSEA commenced the Action, which demands that the County rehire the terminated workers. The Action names the County of Westchester and County Executive as Respondents, and also the Board of Legislators as a Necessary Party. Issue has not yet been joined in the Action.

Analysis

Given the previously stated positions of the County Executive and Board in respect to the issues at the heart of the Action, and the fact that you have already provided privileged advice to the County Executive regarding those issues, you are concerned that relevant Rules of Professional Conduct pertaining to conflicts of interest bar you from concurrently representing the County Executive and the Board in the Action, or even the Board alone. We believe your concerns are well-founded and conclude that you should not represent any party in the Action.

As a threshold matter, Rule 1.7(a) of the Rules of Professional Conduct provides that, unless several enumerated exceptions are met, "a lawyer shall not represent a client if a reasonable lawyer would conclude that ... the representation will involve the lawyer in representing differing interests." The classic conflict of interest scenario under this Rule involves an attorney faced with representing two different parties with conflicting interests in a litigation. Your situation presents exactly those circumstances. The positions taken by the Board and the County Executive with respect to the principle issue in the Action – employment of the terminated workers – are directly contradictory.

In certain circumstances, a conflict of interest can be waived with the informed consent of both parties. This, however, is not such a case. Rule 1.7(b) states, in pertinent part, that "[n]otwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if ... the lawyer reasonably believes that the lawyer will be able to provide

competent and diligent representation to each affected client." We do not think competent and diligent representation of both affected parties is possible in this instance, given their seemingly opposed interests in the outcome of the Action. The conflict is exacerbated by the fact that you must continue to render legal advice to the Board and the County Executive in other unrelated matters going forward. We do not believe you will be able to provide competent and diligent representation to the County Executive while representing the Board in the contentious litigation regarding the terminated employees, nor do we think you can adequately represent the Board given the legal advice you previously gave to the County Executive on the same issue. Thus, we believe Rule 1.7 prohibits you from representing either party in the Action due to a non-waivable conflict of interest.

Significantly, in a letter to your office dated February 4, 2011, CSEA agrees that "given the obvious adverse positions as between the County Executive and Board of Legislators, the County Attorney's Office cannot possibly represent the Board of Legislators in [the Action] pursuant to Rule 1.7 of the Rules of Professional Conduct." Indeed, since you already had privileged communications with the County Executive's office with respect to the issues in the Action, we believe the County Executive could successfully move to disqualify you should you attempt to "switch sides" and represent the Board. We presume that, when it received your advice, the Office of the County Executive reasonably believed that you were lawfully acting as its attorney and that all of its communications with you would remain privileged and protected as required under Rule 1.6 of the Rules of Professional Conduct. We also presume that if you were to accept representation of the Board going forward, you would be called upon to assert arguments favoring CSEA's litigation position and contradicting your own prior advice to the County Executive. Both of these circumstances provide significant, if not overwhelming support for an argument that, having represented the County Executive, you cannot now represent the Board in essentially the same matter, and we believe a court would likely order your disqualification should you attempt to do so. N.Y.R.Prof.C. 1.9(a) ("[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client ..."); *see also Greene v. Greene,* 47 N.Y.2d 447, 453 (1979) ("to obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonably probability should suffice"); *Narel Apparel Ltd. v. American Utex Int'l,* 92 A.D.2d 913, 914 (2d Dep't 1983) ("[d]oubts as to the existence of an asserted conflict of interest are to be resolved in favor of disqualification").

* * *

We understand that the Board takes the position that County Law § 501(2) dictates that you must represent it in the Action. In our opinion, this position lacks merit because the statute does not address your obligations when the executive and legislative branches have differing interests in a pending litigation. Section 501(2) states, in relevant part, that "[w]henever the interests of the

board of supervisors or the county are inconsistent with the interests of any officer paid his compensation from county funds, the county attorney shall represent the interests of the board of supervisors and the county." It is an elementary principle of statutory construction that clear and unambiguous statutory language should be construed so as to give effect to the plain meaning of the words used. *See, e.g., People v. Finnegan*, 85 N.Y. 2d 53, 58 (1995). Contrary to the Board's assertion, the statute does not say that you must represent the Board when it disagrees with the Office of the County Executive; it says that, in a conflict with an officer, you shall represent the interests of the Board and the County instead of the officer.

Therefore, by its plain meaning, the statute is inapplicable to the situation presented. Obviously, you cannot simultaneously advance arguments supporting the opposed interests of both the County and the Board, and the statute provides no guidance where the interests of the Board and the County are opposed. Rather, § 501(2) contemplates a conflict between either the legislative or the executive branch and a county officer. In such a situation, you must represent the county government and the individual must retain his own attorney. This makes perfect sense given the many conceivable circumstances in which the interests of a government employee or agency might become adverse to a branch of the county government. Not surprisingly, every case we found invoking § 501(2) involved a county attorney representing the county against an employee or employees. *See, e.g., Caputo v. County of Suffolk,* 275 A.D.2d 294 (2d Dep't 2000); *Niagara County Civil Service Com'n by Moose v. County of Niagara,* 217 A.D.2d 963 (4th Dep't 1995).

And even if, *arguendo,* County Law § 501(2) can reasonably be read to require you to represent the Board rather than the County in the Action, it is far from clear that the statute is operative in any sense in Westchester County. Per section 158.01 of the Westchester County Charter, you were appointed by and serve at the pleasure of the County Executive. By contrast, County Law § 500(1) provides that a "county attorney" be appointed by "[t]he board of supervisors." Pursuant to Municipal Home Rule Law § 33, a county of the State organized by charter may supersede County Law provisions in favor of its own local laws. *See, e.g., Spencer v. Christo,* 70 A.D.3d 1297, 1298 (3d Dep't 2010). Plainly, it would be illogical to assume that although you are appointed by the County Executive, you must represent the Board against the County Executive whenever the executive and legislative branches of the Westchester County government are at odds with one another in a pending litigation. It is more consistent with operative law to assume that, in any such situation, either the converse is true and you should represent the County Executive, or, given your ongoing obligations to advise the Board in other matters, you should decline to represent any party.

Conclusion

Insofar as (i) County Law § 501(2) is not applicable to the situation presented, (ii) the County Executive and Board clearly have differing interests, and (iii) you have already provided relevant confidential, privileged legal advice to the County Executive, we believe you would violate the

New York Rules of Professional Conduct if you were to concurrently represent the County Executive and the Board, or merely the Board alone, in the Action.

Very truly yours

HINSHAW & CULBERTSON LLP

By: _____
J. Richard Supple, Jr., Partner