

From: Stacey Roth
To: pfontaine@cozen.com
CC: Wittenberg, Nancy
Date: 4/29/2014 12:33 PM
Subject: Request for State Ethics Commission Decision
Attachments: lloyd RFA w out address.pdf

Dear Mr. Fontaine:

I received your request for a copy of the decision issued by the State Ethics Commission concerning the Lloyd recusal matter. I have been advised by the State Ethics Commission staff that this document is public and may be provided upon request. A copy of the decision is attached to this email.

Best,

Stacey P. Roth
Senior Counselor
N.J. Pinelands Commission
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April 25, 2014

Edward Lloyd, Esq.

Re: Request for Recusal Advice
Edward Lloyd, Commissioner
Pinelands Commission

Dear Mr. Lloyd:

At its April 22, 2014 meeting, the State Ethics Commission considered your request for an advisory opinion addressing whether it was necessary for you to recuse from participating in the New Jersey Pinelands Commission's consideration of whether to approve a memorandum of agreement which would permit a gas pipeline to be constructed through a portion of the Pinelands preservation area. Based on the following facts and circumstances, the Commission advises that your recusal from the pipeline matter was necessary and appropriate.

BACKGROUND: According to its mission statement, the New Jersey Pinelands Commission ("Pinelands Commission") is charged with preserving, protecting and enhancing the natural and cultural resources of the Pinelands National Reserve while encouraging compatible economic and other human activities. You serve as a Commissioner on the Pinelands Commission. As such, you are a special State officer subject to the Conflicts of Interest Law, the Uniform Ethics Code, and the State Ethics Commission's regulations.

On December 12, 2013, you sent a letter to former Executive Director Peter Tober requesting advice as to whether you must recuse from participating in a matter that was pending before the Pinelands Commission. The matter concerned whether the Pinelands Commission will permit the construction of a natural gas pipeline through the Pinelands to provide service to a power plant in Cape May County ("pipeline matter").

Eastern Environmental Law Center. According to its website, the Eastern Environmental Law Center ("EELC") "advocates on behalf of organizations and community groups to resolve environmental problems that threaten people, natural resources, and communities throughout

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New Jersey and the surrounding region." You serve as the President of the Board of Directors of the EELC.

The Pipeline Matter. According to information provided by the Pinelands Commission, the pipeline matter concerned a plan by the South Jersey Gas Company to construct 10 miles of a 22-mile 24" high pressure natural gas main in a Pinelands Forest Area. The purpose for the development of the natural gas pipeline was twofold: 1) to provide natural gas for a repowered B.L. England Energy Generation Plant (the plant is currently fueled by coal and oil); and 2) to provide supply feed redundancy for Cape May and Atlantic County customers within the South Jersey Gas Company service area. The issue before the Pinelands Commission was whether to approve a proposed Memorandum of Agreement ("MOA") between the Pinelands Commission and the Board of Public Utilities ("BPU") which would provide the Pinelands Commission's authorization for the construction of the pipeline in the Pinelands Forest Area.

On December 5, 2013, Alice Baker, Esq., a staff attorney at the EELC, sent a letter to the Pinelands Commission stating that it was in violation of its obligation to provide at least ten days notice of the time, date, and location of the public hearing scheduled to take place on December 9, 2013 regarding the MOA. Although the Pinelands Commission did provide public notice of the hearing over ten days in advance of the scheduled hearing date, Ms. Baker advised that the address listed for the hearing on the public notice was incorrect. Ms. Baker requested that, in order to permit robust public participation and comply with its regulatory requirements, the Pinelands Commission should schedule an additional public hearing on the MOA with at least thirty days prior notice. In addition, the letter refers the Pinelands Commission to a website that posted a December 3, 2013 letter submitted to the Pinelands Commission by "concerned groups" which detailed additional reasons why the Pinelands Commission's public participation process for the MOA is inadequate. Although Ms. Baker's letter does not expressly take a substantive position on the merits of the pipeline matter, the letter referenced by Ms. Baker both encourages additional opportunities for public participation on the project and also takes a strong position urging the Pinelands Commission to reject the proposed MOA between the BPU and the Pinelands Commission.

You advised that neither you nor Hilary Semel ("Semel"), the Executive Director of the EELC, was aware of Ms. Baker's letter before it was submitted to the Pinelands Commission. You first learned about the letter on December 6, 2013 when Deputy Attorneys General John Renella and Helene Chudzik called you to discuss the letter. During that conversation, Deputy Attorney General ("DAG") Renella advised that you appeared to have a conflict of interest based on your position with EELC and EELC's submission of a letter to the Pinelands Commission on the pipeline matter. Based on this conversation, it was also your understanding that a request had been made for you to recuse from participating in the Pinelands Commission's consideration of the MOA.

After receiving the recusal advice from DAG Renella, you spoke with Pinelands Commission Ethics Liaison Officer Stacey Roth ("ELO Roth"). According to you, ELO Roth advised that "because the Deputy Attorney General had offered his advice pursuant to *N.J.A.C.* 19:61-7.4(g), she had no further role to play." ELO Roth's recollection of this conversation is

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different. According to her, you asked whether she had the authority to overrule the advice given by the Attorney General's office. She advised that she did not, but she also recalled telling you during several subsequent conversations that you had a conflict and needed to recuse yourself from the MOA matter.

On December 9, 2013, EELC Executive Director Semel sent a letter to the Pinelands Commission seeking to withdraw the correspondence submitted to the Pinelands Commission by Ms. Baker and to rescind the comments and statements made in Ms. Baker's letter on behalf of the EELC. In this letter, Semel advised that it is EELC's policy not to "take an independent position on matters pending before a governmental agency." Semel stated that, although the EELC has limited exceptions to this policy, the exceptions are only made after evaluation and approval by appropriate EELC staff. Semel stated that it was an error for the EELC to submit Ms. Baker's correspondence to the Commission.

After receiving Semel's letter to the Pinelands Commission, ELO Roth contacted staff at the State Ethics Commission to discuss the situation. On December 12, 2013, ELO Roth e-mailed former Executive Director Tober advising that she had spoken to you that morning and advised you that it was her position that you were required to recuse from the MOA matter pending a determination by the State Ethics Commission to the contrary. According to ELO Roth, you advised her that you intended to participate in the Pinelands Commission's consideration of the MOA unless you were advised by the State Ethics Commission that you had a conflict. In response to ELO Roth's e-mail, former Executive Director Tober sent an e-mail to her later on December 12, 2013 which stated:

Please advise him that the SEC believes he has a conflict. I cannot really do anything else. We do not have any sort of injunctive power. Advise him that you spoke to the Commission staff and that since he sits on the Board of Directors of an entity that took a position on the issue before the Pinelands Commission, he must now recuse pursuant to Section IX of the Uniform Ethics Code. The SEC's position is that there is a mandatory recusal. You could also remind him that if he chooses to ignore this advice, he is subject to an ethics investigation with penalties of \$500 to \$10,000 per violation.

On Friday, December 13, 2013, the Pinelands Commission conducted a public hearing to consider the MOA. You recused from participating in the Pinelands Commission's consideration of the MOA at the December 13, 2013 meeting after making a statement on the record. No final decision was reached on the matter and the Pinelands Commission scheduled a continuation of its hearing on the MOA for January 10, 2014.

On December 17, 2013, ELO Roth provided this office with a transcript of the statement you made at the Pinelands Commission meeting on December 13, 2013 before you recused from the MOA matter. According to the transcript, you stated that you were recusing yourself because the State Ethics Commission had ordered you to do so. On January 10, 2014, the Pinelands

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Commission again addressed the MOA and split its vote 7-7 on a motion to approve the MOA. As a result, the motion failed to pass. You did not participate in the proceedings on this date.

Although the MOA matter is not currently pending before the Pinelands Commission, ELO Roth advised that the issue of whether you need to recuse from the Pinelands Commission's consideration of the pipeline matter is not moot because the Pinelands Commission may reconsider the matter. The Pinelands Commission's vote on the motion to approve the MOA was split 7-7, so a decision by this Commission that you do not need to recuse from the MOA matter could allow for another vote on the matter with you participating in the vote.

ISSUE: Whether you are required to recuse from any involvement in the Pinelands Commission's consideration of the MOA matter because of EELC's involvement in the matter.

DISCUSSION: Section 23(e)(7) of the Conflicts of Interest Law provides:

No State officer or employee or special State officer or employee should knowingly act in any way that might reasonably be expected to create an impression or suspicion among the public having knowledge of his acts that he may be engaged in conduct violative of his trust as a State officer or employee or special State officer or employee.

N.J.A.C. 19:61-7.4 provides in relevant part:

(d) A State official must recuse himself or herself from a matter if he or she has:

1. Any financial interest, direct or indirect, that is incompatible with the discharge of the State official's public duties; or
2. Any personal interest, direct or indirect, that is incompatible with the discharge of the State official's public duties.

(e) For purposes of (d) above, an incompatible financial or personal interest includes, but is not limited to, outside employment; a debtor/creditor relationship; a fiduciary relationship; a source of income; any matter pertaining to a relative or cohabitant; a relationship with a person providing funds, goods or services without compensation; any matter pertaining to a business associate or business investment; **and a leadership role in a professional or trade organization**, which interest might reasonably be expected to impair a State official's objectivity and

independence of judgment in the exercise of his/her official duties or might reasonably be expected to create an impression or suspicion among the public having knowledge of his or her acts that he or she may be engaged in conduct violative of his or her trust as a State official. (emphasis added)

(f) An incompatible financial or personal interest may exist in other situations which are not clearly within the provisions of (d) and (e) above, depending on the totality of the circumstances. A State official should contact his or her agency ethics liaison officer or the Commission for guidance in such cases.

(g) A State official must seek the advice of the State agency's counsel, agency ethics liaison officer or the Commission as to the propriety of participation in a matter if any person requests that a State official recuse himself or herself from that matter. Oral advice, followed up by a writing, may be provided by the agency's counsel, the agency ethics liaison officer or the Commission to avoid delay. Oral advice should subsequently be memorialized by a writing or by inclusion in public minutes.

Section IX of the Uniform Ethics Code provides, in pertinent part:

A State officer or employee or special State officer or employee is required to recuse him/herself on an official matter if he/she has a financial or personal interest that is incompatible with the proper discharge of his/her public duties.

An incompatible personal or financial interest includes, but is not limited to, outside employment; a debtor/creditor relationship; a fiduciary relationship; a source of income; any matter pertaining to or involving a relative or cohabitant; a relationship with a person providing funds, goods or services without compensation; any matter pertaining to or involving a business associate or business investment; **and a leadership role in a professional or trade organization**, which interest might reasonably be expected to impair a State official's objectivity and independence of judgment in the exercise of his/her official duties or might reasonably be expected to create an impression or suspicion among the public having knowledge of his or her acts that he/she may be engaged in conduct violative of his/her trust as a State official. (emphasis added)

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Upon determining that a State official shall recuse him/herself on any matter, the State official shall execute the recusal in writing, and shall have no involvement with the subject matter of the recusal. If a State official cannot determine whether he/she should execute a letter of recusal in any matter, the State official shall contact his/her agency ELO or the Commission for guidance. A State official shall seek the advice of the State agency's counsel, agency ELO or the Commission as to the propriety of participation in a matter if any person requests that a State official recuse him/herself from that matter. Oral advice, followed up by a writing, shall be provided by the agency's counsel, the agency ELO or the Commission to avoid delay. Oral advice shall subsequently be memorialized by a writing or by inclusion in public minutes.

Commission Precedent. *In the Matter of Sandra A. Kilkuts*, D.M.D., Board of Dentistry, Commission Case No. 20-94, the Commission considered whether a member of the Board of Dentistry must recuse herself from discussion and voting on proposed amendments to regulations governing continuing education requirements for dentists because she was president of the New Jersey Academy of General Dentistry ("NJAGD"). The NJAGD is a non-profit organization devoted exclusively to providing continuing education to members of the dental profession. The Commission noted that the NJAGD was an active player with respect to the regulations; the NJAGD had commented extensively on the regulations and had been vocal in its criticism of the Board on certain continuing education issues. The Commission determined that Kilkuts was required to recuse herself from discussion and voting on regulations governing continuing education requirements for dentists as long as she remained an officer of the NJAGD. The Commission felt that Kilkuts' proposed involvement would be violative of sections 23(e)(1), (5) and (7) of the Conflicts Law.

In the Matter of Robert Kinniebrew, Member, New Jersey Real Estate Commission, Department of Banking and Insurance, Commission Case No. 37-98, Kinniebrew requested an opinion from the Commission as to whether his roles with the New Jersey Association of Realtors ("NJAR") and the National Association of Realtors ("NAR") conflicted with his role as member of the Real Estate Commission ("REC"). Kinniebrew was a Director and Past President of NJAR; in that capacity, he attended NAR meetings as New Jersey's representative and voted on behalf of the NJAR. The NAR engages in legislative and regulatory lobbying campaigns at all levels of government and representatives of the NJAR or NAR may appear at REC hearings on rule proposals or changes or may submit written comments.

The Commission advised Kinniebrew that there was no *per se* prohibition against his serving as a Director of the NJAR and as an NJAR representative to the NAR while he is a member of the REC. He must, however, recuse himself from any matters involving the NJAR or the NAR that come before the REC.

Application of Standards. There is no dispute that you are the President of the Board of Directors of the EELC and that the EELC submitted two letters to the Pinelands Commission

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regarding the pending MOA matter. You raised numerous arguments addressing why the submission of these letters does not create a conflict requiring your recusal from participating in the Pinelands Commission's consideration of the matter, each of which is summarized and addressed below.

In your December 13, 2013 letter, you raised several "procedural issues" which must be addressed. First, you argue that because no member of the public or any party interested in the MOA matter has requested your recusal, it is not clear that you were obligated to seek recusal advice from this Commission, ELO Roth or the Pinelands Commission's counsel. *N.J.A.C.* 19:61-7.4(g) requires that you seek recusal advice from the State Ethics Commission, ELO Roth or the Pinelands Commission's counsel whenever any person requests that you recuse from a matter. Nothing in the Conflicts of Interest Law or the Commission's regulations, however, prohibits you from seeking recusal advice whether or not it is requested by someone else. Whether or not you were required to seek recusal advice, the issue is moot because your December 13, 2013 letter requests the State Ethics Commission's opinion addressing your obligation to recuse from the MOA matter.

Second, you argue that nothing in the State Ethics Commission's regulations authorizes the agency counsel (in this case the DASG assigned to represent the Pinelands Commission) to offer unsolicited recusal advice to you. While the State Ethics Commission's regulations do not contain an express authorization for such action, nothing in its regulations prohibits agency counsel from acting proactively to advise special State officers such as you when they believe that doing so will assist you in avoiding an ethics violation. Not only is such advice permissible, the State Ethics Commission staff encourages and relies on ethics liaison officers and agency counsel to provide such prophylactic advice.

Third, you suggest that if, as is the case here, agency counsel advises that you must recuse from a matter pursuant to *N.J.A.C.* 19:61-7.5(a), you have the option to **either** recuse from the matter **or** seek the advice of the State Ethics Commission, but you need not do both. As long as you chose to recuse from the MOA matter, as you have done to date, it was not necessary for you to seek recusal advice. The fact that you requested recusal advice from the State Ethics Commission, however, as you have done in this case, does not suspend your obligation to comply with the Conflicts of Interest Law, the Uniform Ethics Code and the regulations of the State Ethics Commission while your request for advice is pending. Therefore, if you had not recused from the Pinelands Commission's consideration of the MOA while this request for advice is pending, and the State Ethics Commission subsequently concluded that recusal was required, penalties could be imposed on you by the State Ethics Commission for committing an ethics violation. The Commission commends you for recusing from the MOA while this request for advice was pending.

The substantive issue you presented to the State Ethics Commission is whether you are obligated to recuse from any involvement in the Pinelands Commission's consideration of the MOA. Both *N.J.A.C.* 19:61-7.4 (the State Ethics Commission's recusal rule) and Section IX of the Uniform Ethics Code require that you recuse from a matter if you have a personal or financial interest in the matter, and both include within the definition of a personal or financial

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interest "a leadership role in a professional or trade organization, which interest might reasonably be expected to impair a State official's objectivity and independence of judgment in the exercise of his/her official duties or might reasonably be expected to create an impression or suspicion among the public having knowledge of his or her acts that he or she may be engaged in conduct violative of his or her trust as a State official."

You are the President of the Board of Directors of the EELC. As such, you hold a leadership role in that organization, a professional organization which represents the interests of its clients. EELC submitted a letter dated December 5, 2013 to the Pinelands Commission specifically referencing and relating to the proposed MOA between the Pinelands Commission and the BPU. The letter expressly challenged the adequacy of the Pinelands Commission's public notice for its December 9, 2013 meeting on the matter, referenced a web link to another letter submitted to the Pinelands Commission which detailed additional reasons why the notice provided was inadequate, emphasized the need for robust public participation in the matter, and urged the Commission to schedule an additional public hearing date with at least thirty days notice, which is longer than the ten day notice required under the Pinelands Commission's regulations. Under these circumstances, EELC participated in the MOA matter by seeking to influence how the Pinelands Commission conducts its public hearing(s) on the matter. Because EELC participated in the matter, and you are the Chair of the EELC Board of Directors, there could be a reasonable impression or suspicion that your objectivity in the MOA matter is tainted by EELC's participation in the matter.

You raise three arguments in support of your position that the December 5, 2013 EELC submission to the Pinelands Commission did not create a conflict of interest mandating you recusal from participating in the pipeline matter. First, you argue that you were not involved in or even aware of the EELC's December 5, 2013 letter before it was submitted to the Pinelands Commission. There is no question, however, that you were made aware of the letter after it was submitted. Under the relevant provisions of Uniform Ethics Code and the Commission's regulations, your prior knowledge or involvement in the letter is not required to create a recusal obligation.

Second, you argue that no conflict exists because the EELC's December 5, 2013 letter did not address the merits of the MOA matter. Neither the Commission's recusal rule nor Section IX of the Uniform Ethics Code requires that an entity with which a special State officer holds a leadership position must take a position on the merits of the matter for a recusal obligation to exist. Furthermore, the purpose of the December 5, 2013 EELC submission to the Pinelands Commission was to state that adequate notice of the public hearing must be provided, and an additional hearing date should also be scheduled, to permit "robust public participation" in the matter. Presumably, the EELC made these arguments because the requested additional hearing with adequate and longer public notice time could potentially influence the Pinelands Commission's consideration and ultimate decision on the MOA. In addition, the website referenced in the December 5, 2013 EELC letter refers to a letter submitted to the Pinelands Commission which expressly urges the Pinelands Commission to reject the MOA. Certainly, reference to this letter by the EELC in its December 5, 2013 letter could create the reasonable

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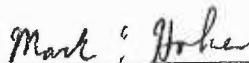
appearance that the EELC supported that position as well, even if the EELC letter did not expressly endorse the position.

Finally, you argue that the December 5, 2013 EELC letter was unauthorized and was subsequently rescinded by the December 9, 2013 letter to the Pinelands Commission by EELC Executive Director Semel. For purposes of a conflicts of interest analysis, it is of no consequence whether the December 5, 2013 letter was sent to the Pinelands Commission in violation of EELC policy. The fact remains that the letter was submitted. Even if the subsequent letter from Semel has the effect of eliminating the Pinelands Commission's consideration of the December 5, 2013 letter, it cannot undo the fact that the December 5, 2013 letter was submitted to the Pinelands Commission and that the EELC had, at least briefly, participated in the MOA matter by taking a position on how the Pinelands Commission should schedule its hearings in the matter. Thus, the Commission finds that you must recuse from any involvement in the MOA matter because of EELC's involvement in the matter.

Based on the above facts and circumstances, the Commission advises that your recusal from any involvement in the Pinelands Commission's consideration of the MOA in the pipeline matter as a Commissioner on the Pinelands Commission was necessary and appropriate.

Very truly yours,

STATE ETHICS COMMISSION



For the Commission
Mark T. Holmes
Deputy Director

MTH/ms
c. Stacey Roth, ELO

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