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ATTORNEYS AT LAW

MEMORANDUM

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DATE: August 18, 2021

SUBJECT: Mayor's conditional offer of employment to a sitting member of council

This firm has been asked by the City of Hoboken (the "City") to render a legal opinion as to the propriety of Mayor Ravi Bhalla's (the "Mayor") offer of employment to sitting Councilperson Vanessa Falco ("Councilperson"), to become the City's Director of a new division of housing on or after January 1, 2022.

ISSUES PRESENTED

1. Whether the Mayor may lawfully offer a position to a sitting councilperson to take effect upon that councilperson's term ending or does the City need wait at least one (1) year to make such offer.
2. If such offer is lawful, whether the analysis is affected by the fact that the negotiation, offer and acceptance of such position with the City foreclosed on the sitting Councilperson's

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ability to run for re-election in the upcoming election. Specifically, does it raise any concerns under the Local Government Ethics Law or alike.

3. Does the Mayor's conditional offer of employment to a sitting council person increase the potential for litigation to the city as a result of casting any votes or participating in deliberations before council.

SHORT ANSWER

The Mayor was completely within his authority in making the conditional offer of employment to the sitting councilperson. The City is a municipality and not an 'independent local authority' and, therefore, not subject to the one (1) year restriction. In addition, the Mayor's offer was made to an individual who has a proven track record as an affordable housing advocate which he asserts will do a 'tremendous job' on behalf of residents of the City. There is no basis in fact or law to assert that this action was taken by the Mayor for his own personal gain or to garner influence; therefore, such actions are lawful and not in violation of any section of the Local Government Ethics Law. In addition, to the extent the councilperson's oath of office remains valid, the conditional offer of employment on its own, does not increase the potential for litigation against the city, and any votes or participation in deliberations before council are subject to compliance with the Local Government Ethics Law ("LGEL") on a case-by-case basis.

LEGAL ANALYSIS

I. THERE IS NO VIOLATION OF THE LOCAL GOVERNMENT ETHICS LAW BY THE ACTIONS TAKEN

The LGEL, N.J.S.A. 40A:9-22.1 to -22.25, was enacted by the New Jersey Legislature to insure the "public's confidence in the integrity of its elected and appointed representatives" and sets minimum ethical standards which local government officers must observe. N.J.S.A. 40A:9-22.2. Jurisdiction over the conduct of such officers was vested in the Local Finance Board in the

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Division of Local Government Services in the Department of Community Affairs (the “Board”). The Board is expected to “distinguish between those conflicts of interest which are legitimate and unavoidable in a free society and those conflicts of interest which are prejudicial and material and are, therefore, corruptive of democracy and free society.” N.J.S.A. 40A:9-22.4. However, our Supreme Court has advised that the LGEL “must be applied with caution, as local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official.” Grabowsky v. Twp. of Montclair, 221 N.J. 536, 552 (2015) (internal citations omitted).

A. The City, By Definition, Is Not An Independent Local Authority And Therefore Is Not Constrained To The One (1) Year Limitation Of Employment For Its Council Members

The City is not subject to the one (1) year limitation set forth in the LGEL. Specifically, N.J.S.A. 40A:9-22.5(b)(3) states in relevant part:

b. No independent local authority shall, for a period of one year next subsequent to the termination of office of a member of that authority: ...

(3) employ for compensation, except pursuant to open competitive examination in accordance with Title 11A of the New Jersey Statutes and the rules and regulations promulgated pursuant thereto, any former member of that authority. [N.J.S.A. 40A:9-22.5(b).]

Based on the plain language of the statute, subsection (b) is inapplicable, as the City of Hoboken is not an “independent local authority”. While the term “independent local authority” is not separately defined within the LGEL, it is included within the definition of what constitutes a “local government agency:

“Local government agency” means any agency, board, governing body, including the chief executive officer, bureau, division, office, commission or other instrumentality within a county or municipality, and any **independent local authority, including any**

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entity created by more than one county or municipality, which performs functions other than of a purely advisory nature, but shall not include a school board. [N.J.S.A. 40A:9-22.3(e)].

This definition of what constitutes a “local government agency” provides ample support that the Legislature’s use of the phrase “independent local authority” was deliberate and meant to narrow the applicability of the proscription on hiring to an entity that is independent, including any entity created by more than one county or municipality. In that regard, there is a clear distinction made between a “municipality” and an “independent local authority.” Therefore, and on its face, this provision of the LGEL does not apply to the Mayor’s offer of employment, as the City is not an independent local authority, but a municipality.

B. The Hiring of a Qualified Director is within the Mayor’s Discretion and Does Not Provide the Mayor with an Unwarranted Privilege or Advantage.

In that same context, there is no violation of N.J.S.A. 40A:9-22.5(c) based on the Mayor’s action. That section states in relevant part:

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. [N.J.S.A. 40A:9-22.5(c)].

That provision of the LGEL prohibits a local government officer from “us[ing] or attempt[ing] to use his official position to secure unwarranted privileges or advantages for himself or others.” Id. However, the New Jersey Appellate Division has determined that “a public official only violates this provision of the LGEL if she uses or attempts to use her official position with the intent to secure unwarranted advantages or privileges for herself or another.” Mondsini v. Local Finance Board, 458 N.J. Super. 290, 305 (App. Div. 2019). In other words, by the Mayor’s offer of employment to a sitting member of council, did he use his official position as mayor to secure unwarranted advantages or privileges for himself or another.

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Here, there is no basis to indicate that the Mayor is using his position to secure “unwarranted advantages or privileges” for himself or anyone else. Any claim of an unwarranted advantage or privilege is completely contradicted by the Mayor’s stated intention for the offer of employment. Based upon the Mayor’s press release, it is Councilperson Falco’s “proven track record on the city council as an affordable housing advocate,” that he was “confident [that] she [would] do a tremendous job on behalf of [the] constituents as head of the new division of housing.” Thus, there is no direct benefit to the Mayor, personally, but a decision which is based upon the best interests of the City’s residents and based on the qualifications of the candidate. Therefore, such action by the Mayor does not violate the LGEL, as to a personal benefit to the Mayor.

II. THE MAYOR’S ACTIONS IN HIRING THE COUNCILPERSON, AS A DIRECTOR, WOULD NOT VIOLATE ANY LAWS RELATED TO OFFICIAL MISCONDUCT

A. The Mayor’s Actions Would Not Violate N.J.S.A. 2C:30-20, As Such Action Was Not Taken With Purpose To Obtain A Benefit For Himself Or Another Or To Injure Or To Deprive Another Of A Benefit.

Similar to the analysis under the LGEL, there is no basis for a claim of official misconduct, as the Mayor took no action with “the purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit.” In that connection, N.J.S.A. 2C:30-20 provides in part:

A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; . . .

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A violation of such statute requires three (3) separate elements: (i) that the defendant is a public servant; (ii) that he committed an act relating to his office knowing it was unauthorized; and (iii) that he did so with the purpose to benefit himself or another. State v. Schenkolewski, 301 N.J. Super. 115, 142-43 (App. Div. 1997); State v. Bullock, 136 N.J. 149, 153 (1994).

Misconduct in office thus occurs when there is an act or omission in breach of a duty of public concern by one who has accepted public office. State v. Maioranna, 225 N.J. Super. 365, 369 (Law Div. 1988), aff'd, 240 N.J. Super. 352 (App. Div. 1990), certif. denied, 127 N.J. 327 (1991). Official functions include those duties which are imposed by law as well as those which are clearly inherent in and naturally arise from the nature of the office. State v. Lore, 197 N.J. Super. 277, 282 (App. Div. 1984); Maioranna, 225 N.J. Super. at 371. To determine whether an act sufficiently relates to a defendant's office to constitute official misconduct, a court will look to the scope of the defendant's apparent authority. Bullock, 136 N.J. at 156.

Here, the Mayor's stated basis for hiring the Councilperson was her "proven track record on the city council as an affordable housing advocate." It is clearly within the Mayor's authority to appoint officials he believes best suited to further the interests of the City. Thus, as the Mayor's act was authorized and for a proper purpose, there can be no finding that he violated N.J.S.A. 2C:23-20.

B. The Mayor's Actions Would Not Violate N.J.S.A. 2C:27-11, As Such Action Was Not Taken To Influence A Public Servant In The Performance Of An Official Duty Or To Commit A Violation Of An Official Duty.

N.J.S.A. 2C:27-11 makes it a criminal offense to offer a public servant an unlawful benefit for official behavior. In relevant part,

- a. A person commits a crime if the person offers, confers or agrees to confer any benefit, whether the benefit inures to the public servant

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or another person, to influence a public servant in the performance of an official duty or to commit a violation of an official duty.

b. A person commits a crime if the person, directly or indirectly, confers or agrees to confer any benefit not allowed by law to a public servant. [N.J.S.A. 2C:27-11].

As stated in greater detail herein, the Mayor's actions are not in violation of this Statute. The Mayor extended a conditional offer of employment to an outgoing city councilperson. The Mayor extended an offer of employment to a well-respected councilperson who is viewed by all, including her opposition, as an important voice and accomplished advocate for affordable housing. Moreover, at the time the conditional offer of employment was made, the Mayor has not yet won re-election and the 2022 budget has not been adopted. Thus, the conditional offer of employment cannot act as a basis to influence a sitting member of council, whose oath of office remains valid and enforceable. Conversely, the purpose of the Mayor's action was to benefit the City and its residents, and not himself and a conditional offer of employment cannot serve act as a basis to influence the councilperson in the performance of an official duty. Therefore, there has been no violation of N.J.S.A. 2C:27-11.

III. THE MAYOR'S CONDITIONAL OFFER OF EMPLOYMENT TO A SITTING COUNCILPERSON DOES NOT INCREASE LITIGATION TO THE CITY AS A RESULT OF CASTING ANY VOTES OR PARTICIPATING IN DELIBERATIONS BEFORE COUNCIL.

A sitting member of council, with a conditional offer of employment to commence at the expiration of her term does not in isolation increase litigation to the City either because of any votes cast or participation in matters before city council. A councilperson's acceptance of a conditional offer of employment after her term ends does not diminish or in any way compromise her oath of office. The conditional offer of employment is uncertain at best. Specifically, at the time the conditional offer of employment was made, the Mayor has not yet won re-election and

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the 2022 budget, creating the new position, has not been adopted. This councilperson's oath of office, like any other member of council, is still valid and subject to compliance with the LGEL. Like with any vote before council, whether a conflict exists will have to be determined on a case-by-case basis.

CONCLUSION

The Mayor was completely within his authority in making a conditional offer of employment to the sitting councilperson. There is no basis in fact or law to assert that this action was taken by the Mayor for his personal gain or to garner influence; therefore, such actions are lawful and not in violation of any statute or the LGEL. In addition, to the extent the councilperson's oath of office remains valid, the conditional offer of employment on its own, does not increase the potential for litigation against the city, and any votes or participation in deliberations before council are subject to compliance with the LGEL on a case-by-case basis.