

To: Mr. Hal Samis

cc: Greenburgh Town Board  
Greenburgh Town Clerk  
Ms. Judith Kessler (by mail)

## **OPINION 2010-4 B**

### *Background*

On July 13, 2010, Hal Samis, [the complainant] a resident of the Town of Greenburgh, submitted a Verified Complaint to the Board of Ethics pursuant to the "citizen complaint" procedure authorized by Section 11D(3) of the Code of Ethics adopted July 27, 2007.

The allegation of the complaint is that Paul Feiner, Town Supervisor, solicited and accepted a campaign contribution from Judith Kessler, the wife of Barry Kessler. In July 2009 the Town Board appointed Barry Kessler, the husband of Ms. Kessler, to the Board of the Hartsdale Parking Authority effective January 1, 2010. According to records of the New York State Board of Elections, a contribution of \$100.00 was made by Ms. Kessler to the supervisor on August 20, 2009.

The facts alleged in this complaint are the same as those contained in a previous complaint by Mr. Samis dated January 20, 2010. The January 20 complaint which referred to Section 570-4A (1) (b) of the Code of Ethics was dismissed by the Board of Ethics on April 7, 2010 in Opinion 2010-4. The instant complaint refers to Section 570-7A. Section 570-7A of the Code of Ethics provides that "No Public Officer or Agency Member shall, directly or indirectly, solicit or accept any contribution or money, services or thing of value for any political party, campaign committee or any Candidate from any Appointed Officer or Employee or from any Applicant or from an Applicant's Affiliates or from an Applicant's legal representatives or professional consultants or their respective Affiliates".

Section 570-3 of the Code of Ethics defines Public Officer as "Both elected and appointed officers as herein defined, unless otherwise indicated" and defines Appointed Officer as "Every appointed official of the Town as defined in the Town Law, the Suburban Town Law, the General Municipal Law, the Public Officers Law or any other law referring to officers acting on behalf of the Town or any agency thereof and shall also include those persons employed by the Town on a full-time basis as department heads or deputy department heads or whose job categories are classified as exempt for civil service classification purposes". The Board of Ethics is not aware of any such definition in any relevant state law and none was cited to the Board of Ethics by the complainant. The General Municipal Law has a definition of "municipal officer" for purposes of "when used in this article [Article 18 of the GML]", but the solicitation/acceptance provisions at issue in the previous complaint and in this complaint are not similar to any provisions of the GML, and absent a statutory basis in the Code of Ethics there is no rationale to use a related definition from another statute in the Town's Code of Ethics when it relates to operative provisions which are not similar to the operative provisions in the Town's law.

In the absence of such definition, we rely on the use of the term Public Officer, of which Appointed Officer is one category, and Agency Member throughout the Code as well as the legislative intent as expressed in 570-4A (1) (b) and Section 570-7D. The Board of Ethics believes that the language of and the legislative intent reflected in 570-4A (1) (b) as well as in Section 570-7D govern the resolution of the issue raised in both the previous complaint and this complaint because they particularly apply to Agency Members.

The first Section of the Code of Ethics, Section 570-1, refers to “Public Officer, Employees and Agency Members.” The use of phrases which include both “Public Officer” and “Agency Member” is pervasive throughout the Code of Ethics. There are 49 references in 12 out of 18 sections to either “Public Officer, Employee and/or Agency Member” or “Public Officer and/or Agency Member” and one reference in another section to Public official and Agency Member”. An Agency Member does not, individually, act as an officer of the Town, and, if “Agency Member” were included for purposes of the Code of Ethics within the definition of “Public Officer”, Agency Member would not be separately identified within the operative provisions of the Code of Ethics. Therefore, the Board of Ethics concludes, under the Code of Ethics, Agency Members are not Public Officers, either elected or appointed. Whereas solicitations are proscribed from Appointed Officers, Employees and Agency Members, acceptance is proscribed only from Appointed Officers and Employees but not from Agency Members. This conclusion is based on 570-4A (1) (b) and Section 570-7D, which states “Nothing contained in this chapter shall prohibit any Public Officer, Employee or Agency Member from holding or expressing a political opinion or from affiliating with any political party or organization of her/his choice, or from Elected Officials and Agency Members voluntarily and without solicitation making a contribution thereto or to a candidate or candidates of her/his choice”.

Section 570-7A also prohibits public officers from soliciting or accepting contributions from applicants. Section 570-3 defines Applicant as “An person seeking employment, or any person or Legal Entity seeking other material financial benefit from the Town, or any person or Legal Entity filing an application for approval by any Public Officer, Employee or Agency for any matter of material financial benefit to such person or Legal Entity for a period commencing 12 months prior to the filing and ending 12 months after the application has been withdrawn or decided”. There is nothing in this definition which would lead us to conclude that an uncompensated Agency Member is an Applicant.

The complainant was given an opportunity at the Board of Ethics meeting on September 7 to explain how the provisions of Section 570-7A would cause a different result from the opinion that addressed the issue under Section 570-4A (1). The complainant did not do so; rather, he stated that he disagreed with the previous opinion.

The Code is silent concerning solicitation of spouses or other affiliates of Agency Members, neither specifically including nor excluding them. However it does prohibit both the direct and indirect solicitation of Agency Members. Therefore, we focused on whether the solicitation of a donation from the spouse of an Agency Member serving in an uncompensated capacity would constitute an indirect solicitation of that Agency Member. With respect to uncompensated Agency Members, the Board of Ethics finds that that a solicitation of a spouse is not an indirect solicitation. Thus, the Board of Ethics finds that, unlike prohibitions on solicitation of Appointed Officers, Employees,

contractors or others with a direct financial interest with the Town, the law concerning Agency Members applies only to Agency Members and does not apply to the spouse or other relatives of an Agency Member, unless that Agency Member is compensated by the Town. The record is devoid of evidence that the contribution in question was solicited, either from Mr. Kessler or from Ms. Kessler.

Opinion

Pursuant to the above, it is the opinion of the Board of Ethics that an Agency Member is not an Appointed Officer and an uncompensated Agency Member is not an Applicant. It is also the opinion of the Board of Ethics that the mere status of being an uncompensated Agency Member does not lead to the conclusion that contributions made by an Agency Member or the spouse of an Agency Member were intended as a reward to or for the benefit of a Town official for the appointment as an Agency Member.

Thus, as previously stated in Opinions 2010-3 and 2010-4, unlike prohibitions on solicitation of Appointed Officers, Employees, contractors and others with a direct financial interest with the Town, the law concerning the solicitation of Agency Members applies only to Agency Members and does not apply to the spouse or other relatives of an Agency Member, unless that Agency Member is compensated by the Town.

The issues raised in the instant complaint are substantially the same as those raised in the previous complaint on this matter which was dismissed by the Board of Ethics in Opinion 2010-4. The Board of Ethics has not found anything in Section 570-7A which would lead to a different conclusion. Since the Code of Ethics does not prohibit the solicitation or acceptance of contributions from spouses of uncompensated Agency Members and since the Board of Ethics has not found any section of the Code of Ethics implicated by the instant complaint, the Board of Ethics has determined to dismiss the instant complaint.

BY THE BOARD OF ETHICS

*Adopted at September 7, 2010 Meeting*

Voting For:

Mr. Constantine

Mr. McLaughlin

Mr. Rivera

Mr. Scott

Mr. Sigal