

To: Supervisor Paul Feiner
cc: Greenburgh Town Board
Greenburgh Town Clerk
Mr. Tomas Saez
Mr. Hal Samis

OPINION 2010-3

On February 4, 2009, Mr. Hal Samis [the complainant] filed a verified complaint alleging a violation of the Town of Greenburgh Code of Ethics with the Town of Greenburgh Board of Ethics. The allegation of the complaint is that Mr. Paul Feiner, Town Supervisor [the supervisor], solicited and accepted a campaign contribution from Mr. Tomas Saez [the donor]. On June 25, 2008 the Town Board appointed the Mr. Saez to a five year term as a member of the Library Board effective January 1, 2009. A contribution of \$100.00 was made by the donor to the supervisor on or about October 23, 2008. A second contribution to the supervisor in the amount of \$100.00 was made by the donor on or about June 17, 2009.

Section 570-4A (1) (b) of the Code of Ethics provides that “no elected officer shall, directly or indirectly, solicit or accept any gift or item of personal or real property or an contribution or donation from any appointed officer or employee, and no elected officer shall, directly or indirectly solicit any gift or item of personal or real property or any contribution or donation from agency members”. The Code of Ethics thus makes a distinction between appointed officers and employees, on the one hand, and agency members, on the other. Whereas solicitations are proscribed from both categories, acceptance is proscribed only from the former category and not from agency members.

Subsequent to the receipt of above mentioned verified complaint, pursuant to Section 12 of the Code of Ethics, the Board of Ethics queried both the supervisor and the donor concerning the circumstances surrounding the donation including whether or not a solicitation had been made to the donor. The donor initially stated that he usually made his contributions in response to solicitations. Approximately two months later, he stated that the reason he made the two contributions was that the complainant had criticized Mr. Feiner and, in the first instance, the donor took the remarks as abusive to himself.

At its September 16, 2009 meeting, the Board of Ethics determined that a Phase 2 investigation was warranted. The focus of the investigation was on whether a solicitation to the donor had or had not been made. The supervisor was asked additional questions and offered an opportunity to appear before the Board of Ethics. The supervisor responded to the request for information and stated that he did wish to appear before the Board of Ethics.

In an email dated January 4, 2010 the supervisor stated: “I do not recall having any fundraisers [fund raising events] in 2008 and 2009. I do recall receiving the donor’s contributions months after the fundraising letter went out. My campaign sends out fundraising letters to people who previously contributed so I would assume that the donor’s name was on a mailing list. The letter was a form letter (not a personal letter addressed to the donor or anyone else). In recent years the letters (to the best of my recollection) highlight some accomplishments made in recent months. The Friends of Paul Feiner fundraising letters typically indicate that Paul Feiner is preparing for a re-election effort and invites people to contribute or volunteer. An envelope is enclosed in the letter that people can send back. PAUL FEINER”

On January 20, 2010 Mr. Feiner appeared before the Board of Ethics to testify in this matter. The supervisor declined the right to have a stenographic record made of his testimony. He made his direct testimony, and was cross-examined by both the complainant and members of the Board of Ethics.

During his testimony the supervisor was asked whether he went through his mailing list to eliminate agency members. He stated: “I haven’t had the time to remove the names [of agency

members] from the list". He stated: "There are approximately 10,000 names on the list. We don't always send to the entire list. Sometimes we go back two years or five years or longer, even back to my congressional campaign or days as a county legislator". Mr. Feiner was asked if he would purge the list of agency members if the Board of Ethics determined that the non-solicitation law applies to mailings. He stated: "it would be cumbersome but I would comply with the law". He also stated that "the Town Board would have the option of changing the law".

The complainant and the supervisor were given the opportunity to file a written statement with the Board of Ethics by the February 13 filing date established by the Board of Ethics. Neither chose to avail themselves of this opportunity.

At the February 22, 2010 meeting, the complainant was given an opportunity to present arguments to the Board of Ethics. Complainant spoke for approximately 20 minutes prior to deliberations by the Board of Ethics. Included in his comments were the following points of view: 1) that agency members are appointed officers. Under Section 570-4A (1) (b), elected officers are not permitted to solicit or accept contributions from public officers and 2) that agency members are applicants and are subject to Section 570-7A (1) which prohibits public officers from soliciting or accepting contributions from applicants.

Subsequent to deliberations by the Board of Ethics, the complainant was again given an opportunity to speak. He spoke for approximately 25 minutes. During this second period he made the point that one or both of the contributions in question were intended as a reward to Mr. Feiner for appointing the donor to the Library Board and that Section 570-4A (2) prohibits the solicitation or acceptance of a gift or contribution if the gift or contribution could reasonably be expected to influence her/him in the performance of her/his official duties; or was intended as a reward for any official action on her/his part.

OPINION

The core issue is whether a mass mailing which invites contributions is a "solicitation" within Section 570-4A (1) (b) of the Code of Ethics. The Board of Ethics believes that asking for a contribution is a solicitation. The Board of Ethics notes that the prohibition against solicitation of an agency member is not restricted to a solicitation involving direct contact, such as a face-to-face meeting, a phone call or email. Thus, it is the opinion of the Board of Ethics that the prohibition on solicitation of agency members includes solicitations by mail, including mass mailings. The facts provided by Mr. Feiner lead us to conclude that one or more such mass mailing solicitations were sent to the donor. It is also likely that other agency members received one or more such solicitations. Therefore, the Board of Ethics finds that Mr. Feiner violated Section 570-4A (1) (b) for soliciting contribution from one or more agency members. Pursuant to the definitions contained in 570-3 of the Code of Ethics, 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. In addition, Section 570-4A (1) (b) of the Code of Ethics makes a clear distinction between public officers and employees on the one hand and agency members on the other hand. 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 were intended as a reward to or for the benefit of a Town official for the appointment as an agency member.

RECOMMENDATIONS

To comply with the Code of Ethics, Mr. Feiner should:

- 1) Remove the names of agency members from any mailing list or lists used for solicitation.
- 2) Keep such list or lists updated. When an individual is appointed to an agency by the Town Board or other appointing authority, the name of that individual should be removed from such list or lists.

3) Refrain from using such lists for mailing solicitations until the names of any agency members have been removed.

4) Report back to the Board of Ethics in writing within 60 days of the date this opinion is issued that he has complied with the above three points and intends to maintain any mailing list or lists used for solicitations in compliance with the Town Code of Ethics.

The Board of Ethics defers any recommendation of penalty for violation pending receipt of written confirmation from Mr. Feiner that he has complied with the above recommendations. If Mr. Feiner states timely in writing that he has complied with the above recommendations, the Board of Ethics will not recommend that the Town Board impose a financial or other penalty. On the other hand, if Mr. Feiner does not respond or responds that he has not complied with the above recommendations, the Board of Ethics will, at its first meeting after the 60 day period, consider recommending that the Town Board impose a penalty for the above violation.

CONCLUDING MATTERS

With respect to the scope of the law concerning the non-solicitation of agency members, the Board of Ethics believes that there is a distinction to be made with respect to uncompensated agency members. With respect to uncompensated agency members the Board of Ethics does not believe that solicitation of a spouse is 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. Thus, Mr. Feiner is not required to purge his solicitation mailing lists of spouses of agency members who are not compensated.

The Board of Ethics emphasizes that, unlike the accepting of contributions from, for example, appointed officers or employees, the Code of Ethics does not proscribe accepting contributions from agency members. Agency members may make contributions, and the contributions may be accepted and retained by elected officials.

Also subsequent to the deliberations of the Board of Ethics, complainant expressed the opinion that the Board of Ethics should have recommended to the Town Board that the Town Board impose a penalty on Mr. Feiner and that he be required to return the contributions in question to the donor. The Board of Ethics did consider asking Mr. Feiner to return the contributions. This would seem intuitive. However, unlike situations in which the acceptance of contributions is not permitted by the Code of Ethics because the source of the contribution is, for example, an applicant, contributions from agency members, as mentioned above are not prohibited. The Board of Ethics therefore was not of the opinion that it had the legal basis to recommend that the contributions be returned to the donor. And even if it did have the basis it would be likely only able to do so if the contribution or contributions had been the result of a solicitation. The Board of Ethics has determined that there were one or more solicitations. It has not determined that the contributions were a result of solicitations. The first statement provided by the donor was not definitive and the second statement gave a different reason for making the contributions.

In the context of this specific situation, the focus of the Board of Ethics has been remedial, not punitive. Its emphasis in this complaint has been to investigate, determine the relevant facts, clarify outstanding questions concerning the applicability and interpretation of the Code of Ethics, and recommend appropriate remedial action. The Board believes that this will best serve as a basis for the future compliance with the Code. This should not be interpreted as an unwillingness to recommend the return of a contribution and /or a fine, when appropriate, for any future cases involving a violation of the Code of Ethics.

BY THE BOARD OF ETHICS

Adopted at February 22, 2010 Meeting

Voting for:

Mr. McLaughlin

Mr. Rivera

Mr. Sigal

Not Present due to family emergency: Mr. Scott