




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OCT 24 2017

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Specific Party Matters Involving the State of New York, Including the New York State Assembly

FROM: Kevin S. Minoli 
Designated Agency Ethics Official and
Acting General Counsel

TO: Peter D. Lopez
Regional Administrator
Region II

On October 10, 2017, I issued an impartiality determination authorizing you to participate in particular matters that affect the State of New York. This determination allowed you to interact with the State of New York, except for the New York State Assembly as an entity. This authorization is attached and hereby incorporated by reference.

You recently asked the Office of General Counsel/Ethics (OGC/Ethics) whether this determination limits you from interacting with members of the New York State Assembly as the elected representatives of their districts or from interacting with chairpersons of New York State Assembly Committees. Based on your October 10, 2017 conversation with OGC/Ethics and upon further consideration of your need to freely interact with the Assembly's elected representatives and legislative committees, I am rescinding the limitation related to the New York State Assembly. Therefore, you are now authorized to interact with the State of New York, including the New York State Assembly, its elected members, and Committee chairpersons.

All other portions of the October 10, 2017 impartiality determination are still in effect for the remainder of your cooling off period. If you have any questions regarding this determination, please contact Justina Fugh at fugh.justina@epa.gov or (202) 564-1786.

cc: Catherine McCabe, Deputy Regional Administrator, Region II
Eric Schaaf, Regional Counsel, Region II
Mitchell Cohen, Regional Ethics Counsel, Region II
Eduardo J. Gonzalez, Regional Ethics Counsel, Region II
Justina Fugh, Senior Counsel for Ethics



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SUBJECT: Impartiality Determination to Participate in Certain Specific Party Matters
Involving the State of New York

FROM: Kevin S. Minoli
Designated Agency Ethics Official and
Acting General Counsel

K SQ.

TO: Peter D. Lopez
Regional Administrator - Designee
Region II

In anticipation of being appointed as the Regional Administrator for the United States Environmental Protection Agency (EPA) Region II, you sought permission to participate in specific party matters involving the State of New York. Within the last year, prior to being appointed to this position, you served as an elected member of the New York State Assembly.

Under President Trump's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of "former employer."¹ Therefore, the Ethics Pledge does not apply to your State of New York employment.

Federal ethics rules do not contain a similar exclusion for state governments, and those rules do apply to your employment with the State of New York. In particular, I understand that you have a defined benefit plan with the State of New York. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the State's ability or willingness to honor its contractual obligations with respect to your state retirement interests. In the Agency's experience, it is unlikely that you as the Regional Administrator will be in any position to affect the State's ability or willingness to pay these benefits to its retirees. I do not expect, then, that 18 U.S.C. § 208 will prohibit you from carrying out your official EPA duties. Should you encounter a situation that could raise such a concern at any point in your EPA tenure.

¹ See Exec. Order 13770, Section 2(j), which provides that "'former employer' does not include ... State or local government."

please contact our office for additional guidance.

However, what remains is an impartiality concern. The applicable ethics rules are set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." Upon assuming the position of Regional Administrator, you will have a "covered relationship" with the State of New York pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the time you resigned from the New York State Assembly, absent an impartiality determination from me, you cannot participate in any specific party matter in which the State of New York is a party or represents a party if that matter is likely to have a direct and predictable effect upon the State or if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. See 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

As Regional Administrator, you are the leader of your Region and part of the Agency's political team. You will be asked to participate in discussions and meetings related to particular matters that affect New York. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Regional Administrator in particular matters that involve the State of New York, but not for any interactions involving the New York State Assembly as an entity. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2007, you served as an elected member of the New York State Assembly (the lower house of the New York State Legislature) representing a seven county region. Although you were a member on the New York Assembly Committee on Environmental Conservation and subsequently involved with state environmental issues, your prior employment was as an elected official, rather than with the state environmental agency. States share responsibility with EPA in protecting human health and the environment. With

respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with states on a continuing and frequent basis.

Effect of the matter upon your financial interest – I have concluded that there is only a remote possibility that any of EPA’s actions will affect the State’s ability or willingness to honor its contractual obligations to pay benefits to its retirees. Your actions as the Regional Administrator will not affect any pay-outs you may receive from your retirement plan.

Nature and importance of the employee’s role – As the leader of Region II, New York is a substantial area of responsibility for you since the Region covers two states, one commonwealth and one territory. In your role as Regional Administrator, you are expected to communicate freely with states, including New York.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you may be asked to participate, including ones that merit your participation and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation in nationally significant issues and critical issues facing Region II will be of importance to the Administrator.

While we have issued you this determination to interact with the State of New York, except for the New York State Assembly, please note that you may wish to make adjustments to your duties to not participate in a particular matter that involves New York. Nothing in this impartiality determination should preclude you from choosing to recuse yourself, although you are advised to confer with your Regional Counsel should such a circumstance arise. You should also consult with ethics officials if you have any questions about potential matters involving the New York State Assembly as an entity.

This authorization will remain in effect for the remainder of your cooling off period. After one year from the date of your resignation from the New York State Assembly, you will no longer have a covered relationship with the State of New York under the impartiality standards and will no longer require this determination.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh at fugh.justina@epa.gov or (202) 564-1786.

cc: Catherine McCabe, Deputy Regional Administrator, Region II
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