

Local Government Ethics Law—An Act to Provide Standards of Conduct for Local Government Officials and Employees; to Provide a Means of Enforcement; and to Provide Penalties for Ethical Misconduct—N.J. Stat. Ann. § 40A:9-22 (S. 2027) (1991)

The Local Government Ethics Law (Ethics Law) requires financial disclosures to the Local Finance Board of the Department of Community Affairs (Local Finance Board) and contains restrictions on how local government officers and employees may conduct business and use the facilities available to them as local government officials and employees. The Ethics Law, which went into effect on August 19, 1991, affects almost all elected and appointed employees of New Jersey's 567 municipalities, twenty-one counties and various independent authorities.¹

Reaction to the Ethics Law has been mixed. Some officials called it an invasion of their privacy and an unwarranted questioning of their honesty.² They also asserted that the Ethics Law is an intrusion by the state into local affairs.³ Several municipalities have seen members of boards of health, zoning, planning and adjustment resign rather than comply with the Ethics Law.⁴ Other officials have questioned the Ethics Law's effectiveness, and the Local Finance Board has been overloaded with disclosure forms that have forced the diversion of personnel from their main duties and responsibilities.⁵

The Ethics Law, however, does have the approval of New Jersey Common Cause (Common Cause), a lobby devoted to good government. Common Cause contends that the Ethics Law is designed to protect the integrity of local officials and employ-

¹ School Board officials and employees are not affected by the Local Government Ethics Law. Local Government Ethics Law, S.2027, 204 N.J. Leg., 2d Sess., § 3(f-g) (1991) (to be codified at N.J. Stat. Ann. 40A:9-22.3(f-g) (West 1991)). Instead, they are governed by a new school board ethics law signed by Governor Florio on January 16, 1992. Matthew Reilly, *Governor Enacts School Ethics Law That Creates Rules To Avoid Conflicts*, STAR LEDGER (Newark), Jan. 17, 1992, at 17. That law, bill number A. 4593, contains an ethics code for school superintendents, principals and other school district officials which mirrors the ethics code of the Local Government Ethics Law in most regards. *Id.*

² Tom Hester, *Ethics Uproar*, STAR LEDGER (Newark), Aug. 19, 1991, at 1.

³ *Id.*

⁴ *Id.* at 9.

⁵ *Id.*

ees by enunciating standards of conduct.⁶ The New Jersey League of Municipalities also supports the Ethics Law, although it was concerned with the Ethics Law's exclusion of school board officials and employees.⁷ A spokesman for the Department of Community Affairs reported that although the Local Finance Board is currently overwhelmed, it will eventually be able to handle all the new paper work and effectively enforce the Ethics Law.⁸ This survey will discuss the goals of the Local Government Ethics Law, examine its requirements and analyze its long-range consequences.

I. Legislative History

The Ethics Law was introduced to the legislature in the 1988-89 session by Senator Paul Contillo (D-Bergen).⁹ The bill was passed unanimously by the Senate on May 1, 1989, but was never acted upon by the General Assembly.¹⁰ The bill was approved in its current form (S. 2027) by the General Assembly on December 17, 1990 and by the Senate on January 14, 1991.¹¹ The Ethics Law was signed on February 20, 1991 by Governor James Florio and took effect in August 1991.¹² Initially, the Ethics Law proposed the creation of a Local Government Ethics Commission to implement and enforce the law.¹³ An appropriation of \$90,000 was made in that version of the Ethics Law.¹⁴ The legislature declined to approve such an expenditure. Instead, it passed an amendment, with Senator Contillo's approval, which placed this responsibility on the Local Finance Board, or as an alternative, on an ethics board created by each municipality or county.¹⁵

⁶ *Id.*

⁷ *Id.* But see *supra* note 1.

⁸ *Id.*

⁹ *Senate Minority Office Staff Report*, at 3. That bill was originally numbered S. 2579. *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 4.

¹² Hester, *supra* note 2.

¹³ *Senate Minority Office Staff Report*, *supra* note 9.

¹⁴ *Id.*

¹⁵ Hester, *supra* note 2.

II. *Purposes and Standards of Conduct*

The Ethics Law has several purposes. First, it provides standards of ethical conduct and financial disclosures for officers and employees of local governments.¹⁶ Second, it provides that these standards be clearly, consistently and uniformly applied.¹⁷ Third, it implements a method of statewide enforcement.¹⁸ Finally, the Ethics Law provides a forum where local government employees and officers may seek advice on how to avoid any conflicts of interest they may face as they perform their duties.¹⁹ In sum, the Ethics Law is an attempt by the legislature to build public confidence in the honesty of elected and appointed local government officials.²⁰

The Ethics Law affects any local government officer or employee of any public instrumentality below the state level.²¹ This includes volunteer and paid personnel, whether part-time or full-time, elected or appointed, who serve on or are employed by any local government agency.²² A local government agency is defined as "any agency, board, governing body, chief executive officer, or other instrumentality within a county or municipality, and any independent authority," regional as well as local, which performs more than advisory functions.²³ Spouses and dependent children who live in the same household as the officer or employee are also affected by the Ethics Law and fall under the category of "immediate family members."²⁴ School board offi-

¹⁶ Local Government Ethics Law, S. 2027 § 2(e) (to be codified at N.J. STAT. ANN. 40A:9-22.2(e) (West 1991)).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* S. 2027 § 2(b-d) (to be codified at N.J. STAT. ANN. § 40A:9-22.2(b-d)).

²¹ *Id.* § 3(f-g) (to be codified at N.J. STAT. ANN. § 40A:9-22.3(f-g)).

²² *Id.*

²³ *Id.* S. 2027 § 3(e) (to be codified at N.J. STAT. ANN. 40A:9-22.3(e)). Some recognized categories of affected local officials and employees include:

[P]ersons elected to any office of a local government agency; persons serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances; members of any independent municipal, county or regional authority; and anyone who is a managerial, executive or confidential employee of a local government agency.

ASSEMBLY STATE GOVERNMENT COMMITTEE, 204th N.J. Leg., 2nd Sess., STATEMENT ON S. 2027 (1991).

²⁴ S. 2027, § 3(i) (to be codified at N.J. STAT. ANN. § 40A:9-22.3(i)).

cials and employees, as previously stated, are excluded from the Ethics Law.²⁵

Pursuant to the Ethics Law, local government officers and employees must make the following disclosures:

(1) All sources of earned and unearned income greater than \$2000 received by himself or herself or an immediate family member during the preceding calendar year. However, individual client fees, customer receipts and commissions do not have to be separately reported. Publicly traded securities only have to be reported separately if the person or immediate family member has an interest in the organization.²⁶ "Interest" is defined as "ownership or control of more than ten-percent of the profits, assets, or stock of a business organization" which is not a non-profit organization or labor union.²⁷

(2) All sources of fees and honorariums of an aggregate amount greater than \$250 received by himself or an immediate family member during the preceding calendar year for any personal appearance, speech or writing.²⁸

(3) All sources of gifts, reimbursements or prepaid expenses with an aggregate value of more than \$400 received during the preceding calendar year by himself or an immediate family member from any single source, except a relative.²⁹

(4) "The names and addresses of all business organizations" in which the person or an immediate family member "held an interest during the preceding calendar year."³⁰

(5) "The address and a brief description of all real property in the state" in which the person or immediate family member "held an interest during the preceding calendar year."³¹ In addition, all disclosure statements must be filed with the Local Finance Board on or before April 30 of each year.³² These disclosure statements are public records.³³

²⁵ *Id.* § 3(f-g) (to be codified at N.J. STAT. ANN. § 40A:9-22.3(f-g)). *But see supra* note 1.

²⁶ *Id.* § 6(a)(1) (to be codified at N.J. STAT. ANN. § 40A:9-22.6(a)(1)).

²⁷ *Id.* § 3(d) (to be codified at N.J. STAT. ANN. § 40A:9-22.3(d)).

²⁸ *Id.* § 6(a)(2) (to be codified at N.J. STAT. ANN. § 40A:9-22.6(a)(2)).

²⁹ *Id.* § 6(a)(3) (to be codified at N.J. STAT. ANN. § 40A:9-22.6(a)(3)).

³⁰ *Id.* § 6(a)(4) (to be codified at N.J. STAT. ANN. § 40A:9-22.6(a)(4)).

³¹ *Id.* § 6(a)(5) (to be codified at N.J. STAT. ANN. § 40A:9-22.6(a)(5)).

³² *Id.* § 6(b) (to be codified at N.J. STAT. ANN. § 40A:9-22.6(b)).

³³ *Id.* § 6(c) (to be codified at N.J. STAT. ANN. § 40A:9-22.6(c)).

The Ethics Law also clearly distinguishes proper from improper conduct. Local government officers and employees must comply with the following ethical standards:

(1) They cannot have an interest in any business organization, nor engage in any business activity, "which is in substantial conflict with the proper discharge of [their] duties." This also applies to immediate family members.³⁴

(2) At the termination of office of a member of an independent local authority, that authority cannot, for one year, (a) "award any contract which is not publicly bid" to that former member; (b) allow that former member to "represent, appear for, or negotiate on behalf of any other party before that authority;" or (c) hire that former member unless it is pursuant to open competitive examinations under the Civil Service. This restriction applies to business organizations in which the former member has an interest.³⁵

(3) They cannot use or attempt to use their official positions to gain unwarranted privileges for themselves or others.³⁶

(4) They cannot act in an official capacity in matters where they, an immediate family member, or a business organization in which they "[have] a direct or indirect financial or personal involvement that might reasonably be expected to impair their objectivity or independence of judgment."³⁷

(5) They cannot undertake any employment or service, compensated or not, "which might reasonably be expected to prejudice [their] independence of judgment" in the exercise of their official duties.³⁸

(6) They cannot accept or solicit "any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that [it] was for the purpose of influencing [their] discharge of official duties."³⁹ This restriction also applies to immediate family members and business organizations in which they have an interest. However, contributions to campaigns of announced candidates

³⁴ *Id.* § 5(a) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(a)).

³⁵ *Id.* § 5(b) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(b)).

³⁶ *Id.* § 5(c) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(c)).

³⁷ *Id.* § 5(d) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(d)).

³⁸ *Id.* § 5(e) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(e)).

³⁹ *Id.* § 5(f) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(f)).

for elected public offices are allowed as long as the candidate has no reason to believe that such was the motivation behind the contribution.⁴⁰

(7) They cannot use, or allow to be used, their public offices, employment or information received or acquired "in the course of and by reason of his office or employment" generally unavailable to the public for their financial gain, that of immediate family members or business organizations with which they are *associated*, not just in which they have an interest.⁴¹ (emphasis added)

(8) They cannot represent any person or party other than the local government in any proceeding before the local government agency on which they serve. This also applies to business organizations in which they have an interest, but does not prevent them from representing other employees in the context of labor union responsibilities.⁴²

In the following circumstances, local government officers and employees would *not* be in conflict with the Ethics Law:

(a) For taking actions regarding an ordinance or resolution which provides them with a benefit as a member of a profession or group which is no greater than the benefit gained by any other member of that group.⁴³

(b) For making informational inquiries on behalf of constituents as long as no fee or other thing of value "is promised to, given to or accepted by the officer or an immediate family member in return therefor."⁴⁴

(c) Local government officers, employees and immediate family members are not prohibited from representing themselves in negotiations or proceedings concerning their own interests.⁴⁵

The Ethics Law also provides that when interpreting and applying its provisions, the Local Finance Board must recognize the following: (1) that public officers and employees can, do and should have personal interests in government policies and decisions; (2) that government officers and employees do have rights to private personal, financial and economic interests; and (3) that

⁴⁰ *Id.* § 5(g) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(g)).

⁴¹ *Id.* § 5(h) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(h)).

⁴² *Id.* § 5(i) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(i)).

⁴³ *Id.* § 5(j) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(j)).

⁴⁴ *Id.* § 5(k) (to be codified at N.J. STAT. ANN. § 40A:9-22.5(k)).

⁴⁵ *Id.* § 4 (to be codified at N.J. STAT. ANN. § 40A:9-22.4).

there are minor conflicts of interest that arise which are unavoidable in a free society which should be distinguished from major conflicts of interest which are corruptive and therefore punishable.⁴⁶

III. Enforcement and Implementation

General responsibility for enforcement and implementation of the Ethics Law belongs to the Local Finance Board.⁴⁷ Counties and municipalities are allowed to establish their own ethics codes and boards but they cannot be more liberal than the provisions of the Ethics Law and they must be approved by the Local Finance Board.⁴⁸ These local boards must have six members, appointed by the governing body and chosen for "their known and consistent reputation for integrity" and knowledge of municipal or county affairs.⁴⁹ No more than three members can be of the same political party, and they must serve staggered terms of five years.⁵⁰ In the case of county boards, no more than one member can be from the same municipality.⁵¹ Members of county and local boards serve without pay but may be reimbursed for necessary expenses that arise in the course of their duties.⁵² They may also hire clerks, counsel and staff as are necessary to carry out their duties.⁵³ These restrictions apply only to local and county boards, not to the Local Finance Board. However, any decision made by the Local Finance Board or a county/municipal board must be made by two-thirds of its membership.⁵⁴ Final decisions of county and municipal boards may be appealed to the Local

⁴⁶ *Id.*

⁴⁷ *Id.* §§ 13(a) and 19(a) (to be codified at N.J. STAT. ANN. §§ 40A:9-22.13(a); -22.19(a)).

⁴⁸ *Id.* §§ 15 and 21 (to be codified at N.J. STAT. ANN. §§ 40A:9-22.15(a); -22.21(a)).

⁴⁹ *Id.* §§ 13(a) and 19(a) (to be codified at N.J. STAT. ANN. 40A:9-22.13(a); -22.19(a)).

⁵⁰ *Id.* § 13(a) (to be codified at N.J. STAT. ANN. § 40A:9-22.13(a)).

⁵¹ S2027 § 13(d) and 19(d) (to be codified at N.J. STAT. ANN. §§ 40A:9-22.13(d) -22.19(d)).

⁵² *Id.* §§ 14(c) and 20(c) (to be codified at N.J. STAT. ANN. §§ 40A:9-22.14(c); -22.20(c)).

⁵³ *Id.* §§ 8-9, §§ 17-18, §§ 23-24 (to be codified at N.J. STAT. ANN. § 40A:9-22.8-9; -22.17-18; -22.23-24).

⁵⁴ *Id.* §§ 18 and 24 (to be codified at N.J. STAT. ANN. § 40A:9-22.18; -22.24).

Finance Board,⁵⁵ whose final decisions may be appealed to the Appellate Division of the Superior Court as may any other final agency decision.⁵⁶ All hearings conducted by the Local Finance Board or a county/municipal board must follow the rules and procedures of the Administrative Procedure Act for hearings by a state agency in contested cases.⁵⁷

The Local Finance Board can initiate or hear complaints, hold hearings regarding possible violations, subpoena documents and witnesses pertinent to an investigation and forward cases to the county prosecutor or Attorney General if need be.⁵⁸ It can also impose penalties. These can include fines of up to \$500, but not less than \$100, for both elected and appointed officers and employees.⁵⁹ Appointed officers and employees can also be subjected to further disciplinary action, suspension, demotion or even removal by an officer or agency having the power to do so.⁶⁰ However, a person in the career service who is found guilty of violating the Ethics Law and is sentenced to removal, suspension, demotion or other disciplinary action can only be so punished according to the procedures of Title 11A and the applicable rules thereunder.⁶¹ County and municipal boards have the same powers as the Local Finance Board.⁶² Furthermore, it can mete out whatever penalties it deems appropriate, within the limitations of the Ethics Law.⁶³

Local government officers and employees may request advisory opinions from either the Local Finance Board or a county/municipal board on whether certain conduct would violate the ethics code therein (or one adopted by a county or municipal ethics board).⁶⁴ These opinions cannot be made public unless by agreement of two-thirds of the board involved, and in that case,

⁵⁵ *Id.* § 9 (to be codified at N.J. STAT. ANN. § 40A:9-22.9).

⁵⁶ *Id.* § 12 (to be codified at N.J. STAT. ANN. § 40A:9-22.12).

⁵⁷ *Id.* § 7(d) (to be codified at N.J. STAT. ANN. § 40A:9-22.7(d)).

⁵⁸ *Id.* § 10(a-b) (to be codified at N.J. STAT. ANN. § 40A:9-10(a-b)).

⁵⁹ *Id.* § 11 (to be codified at N.J. STAT. ANN. § 40A:9-22.11).

⁶⁰ *Id.*

⁶¹ *Id.* §§ 16 and 22 (to be codified at N.J. STAT. § 40A:9-22.16; -22.22).

⁶² *Id.* §§ 18 and 24 (to be codified at N.J. STAT. ANN. § 40A:9-22.18; -22.24).

⁶³ *Id.* §§ 7(e), 16(d) and 22(d) (to be codified at N.J. STAT. ANN. § 40A:9-22.7(e); -22.16(d); -22).

⁶⁴ *Id.* §§ 8, 17 and 23 (to be codified at N.J. STAT. ANN. §§ 40A:9-8; -22.17(d); -22.23(d)).

the requesting person's name cannot be made public unless the board decides so.⁶⁵

IV. Analysis and Conclusion

The Local Government Ethics Law has several major flaws. First, there is no requirement for bipartisan membership on the Local Finance Board, although there is such a requirement for county and municipal boards.⁶⁶ The Local Finance Board consists of eight members, including the Director of the Division of Local Government Services, who are appointed for five years by the Governor with the advice and consent of the Senate.⁶⁷ This presents the possibility that appointees of a Governor of one party will harass officials of another party. This could, in turn, lead to the kind of mudslinging election campaign tactics that have offended the public in recent years.

Second, the Ethics Law will have a detrimental effect on home rule. Officials of counties and municipalities that do not pass their own codes will have the state looking over their shoulders to determine if their conduct is unethical. Local government will become inefficient if local officials are forced to seek the state's permission to do anything. Although the Ethics Law recognizes that there are such things as minor conflicts of interest which are inconsequential and tolerable, it does not provide an objective standard for determining which conflict of interest is minor and leaves that decision to the subjective understanding of board members from outside the locality.

The establishment of county and municipal ethics boards would probably provide little relief. Although bipartisan, their decisions can be reversed by the Local Finance Board, which, as stated earlier, is not bipartisan. Thus, the problem of harassment of officials of a party different from the party that sits on the Local Finance Board still exists. The Ethics Law requires that members of municipal and county ethics boards be chosen for their honesty. Isn't that a requirement for ANY political office? Or will members of these boards be subject to an even higher level of ethical scrutiny? If so, why not make honesty an express require-

⁶⁵ *Senate Minority Office Staff Report, supra* note 9.

⁶⁶ N.J. STAT. ANN. § 52:27D-18.1 (West 1986).

⁶⁷ *Senate Minority Office Staff Report, supra* note 9.

ment for sitting on the Local Finance Board? That would seem logical since the Local Finance Board will also be making the ethical examinations of local officials and has the power to reverse municipal and county ethics board decisions. Local politics could become even dirtier as people begin questioning the prior conduct of members of the ethics boards themselves. Will the issues get lost in the middle of all this mudslinging?

Local boards would also put a strain on overtaxed county and municipal budgets, as they would require local clerks, counsel and staff to carry out the board's duties. Such expenses could be futile if the Local Finance Board reverses the local board's decisions. It is too early to tell if the Ethics Law will deter citizens from participating in local government or if current officials will leave en masse, but the discouragement of competent and qualified people from participating in local government is a very real possibility.

Third, the Local Finance Board itself would also have to divert staff and resources to keep up with claims that originate within that office or wind up there on appeal. Local Finance Board staffers might have to be sent throughout the state to investigate complaints. Local officials may feel like the targets of an inquisition and residents would probably resent the state intrusion into a local matter. This would be especially likely where an official already cleared by a local ethics board, was then subjected to charges of ethical misconduct by the Local Finance Board. The Ethics Law does not indicate whether the Local Finance Board, or any ethics board, is bound by its own precedents. The Local Finance Board could find itself mired in local politics as it decides not only questions involving local finance, but also of the ethical character of local elected and appointed officials. Thus, the Local Finance Board is not the proper state agency to be responsible for enforcing the Ethics Law. Either another state instrumentality should be found to enforce the Ethics Law, or a state ethics board should be created for that purpose.

Fourth, the Ethics Law is uneven in its application. While the Ethics Law prohibits former members of local independent authorities from being employed by or receiving contracts from authorities, the prohibition does not apply to former officials or

employees of counties and municipalities.⁶⁸ These oversights allow some local officials and employees to commit acts forbidden to others.

Furthermore, the definition of "immediate family member" is underinclusive. It should also include children not living in the same household regardless of age, brothers, sisters and parents of officials, employees and their spouses because they are also capable of exerting undue influence on the official conduct of local government officials and employees. The argument could be made that spouses, brothers and sisters would fall under the provisions prohibiting action in matters which could reasonably impair an official's objective judgment and forbidding the use of their official positions to gain unwarranted privileges for other people. Unfortunately, it is not clear whether an official act by one in an official capacity on a matter involving one of these categories of people has committed a violation of the Ethics Law. This problem should be addressed and solved by widening the category of "immediate family member."

Finally, the Ethics Law is silent about what happens after a claim of ethical misconduct is defeated or proved. Can the accuser be subject to a slander or libel suit from the accused? Or, are people who make allegations of ethical misconduct in good faith protected from liability? If so, what happens to those who accuse in bad faith? If the accuser in bad faith is himself a local official affected by the Ethics Law, can the accuser be brought up on charges of ethical misconduct? Beyond its specific penalty provisions, the Ethics Law is vague about the ramifications of ethical misconduct. If an official is found guilty of ethical misconduct is he also guilty of a crime? Apparently not since the Ethics Law provides that cases are referred to law enforcement agencies as the need arises. But in that case, can a finding of ethical misconduct be used to infer a crime? The Ethics Law is completely silent on these points and the result of this silence could be the introduction of many lawsuits into an already burdened court system.

Despite all these problems, the Ethics Law did receive wide support from Common Cause, the New Jersey Department of Personnel, the Communication Workers of America and the

⁶⁸ *Id.*

League of Municipalities.⁶⁹ It passed the entire legislature by an overwhelming majority⁷⁰ and no major discontent was reported at committee hearings or seminars.⁷¹ The Ethics Law would benefit local officials by having conduct evaluated beforehand and thus help prevent embarrassment. The Ethics Law was designed to build public trust in local government and interestingly enough, virtually all dissatisfaction has come from local politicians and officials, and not from ordinary citizens. The Ethics Law is not really an invasion of privacy because all that is required is disclosure of *sources* of income above certain dollar amounts, not an accounting of every dollar received. Over the long run, the Ethics Law may very well reach its goal of promoting public trust in government. The only question is, will the public be willing to pay the price?

Richard J. Mohr

⁶⁹ *Id.* at pp. 3-4.

⁷⁰ Hester, *supra* note 2.

⁷¹ *Id.*