

Town Law §§ 20(1)(a), 50-a(1), 50-a(2), 52(1), 60(1), 64(1), 119(1); Municipal Home Rule Law §§ 10(1)(i), 10(1)(ii)(a)

A town council member may not also serve as financial operations manager.

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William M. Wallens
Counsel
Town of New Paltz
Roemer, Wallens, Gold & Mineaux, LLP
13 Columbia Circle
Albany, NY 12203

Informal Opinion
No. 2013-1

Dear Mr. Wallens:

You have requested an opinion relating to whether the positions of town council member and town financial operations manager or, alternatively, director of finance can be held by the same person. As explained below, we are of the opinion that they cannot.

You have explained that evidence of misused public funds and inadequate oversight by a previous administration recently have come to light and now the Town is in a fiscal crisis. The town supervisor, as the Town's chief fiscal officer, has been working to stabilize the Town's financial situation. She has found that she needs the temporary assistance of a fulltime financial operations manager so that she can both resolve the Town's current fiscal problems and prepare a budget for the next year. In the course of the supervisor's remedial financial work to date, she has relied heavily on the assistance of a council member, who has become familiar with the minutia of the Town's finances. The supervisor would like the town board (comprised of the town supervisor and four persons denominated council members, Town Law § 60(1); *id.* § 20(1)(a)) to adopt a local law creating the temporary position of financial operations manager, who would be subject to the supervision and control of the town board, and then she would like the town board to appoint the council member to the new position.¹ The council member also would continue to serve on the town board. If appointed, the member would recuse herself from town board discussion and voting relating to compensation for the position of financial operations manager.

¹ You have suggested that the town supervisor alternatively could appoint the council member as director of finance pursuant to Town Law § 52(1), which would not require a local law or town board approval. This statute applies to suburban towns and you have advised that the Town is not a suburban town as statutorily defined. Town Law § 50-a(1),(2). This authority is therefore unavailing.

First, we are of the opinion that the Town is authorized to adopt a local law creating the temporary position of financial operations manager. Pursuant to its home rule authority, it may adopt a local law relating to its property, affairs and government and relating to the powers and duties of its officers and employees, insofar as the local law is not inconsistent with the provisions of the Constitution or a general state law. Municipal Home Rule Law § 10(1)(i),(ii)(a). The creation of the temporary position of financial operations manager, in our opinion, falls within this authority.

We believe, however, that because of the town board's responsibility to oversee the Town's fiscal operations, a council member should not simultaneously hold the position of financial operations manager. As an initial matter, we repeatedly have concluded that one person cannot serve as both a member of a local government's governing body and a subordinate second position for the same local government. *See, e.g.,* Op. Att'y Gen. (Inf.) No. 90-56 (town board member and secretary to zoning board of appeals); Op. Att'y Gen. (Inf.) No. 88-3 (town board member and administrative assistant to town planning board). This is a fundamental principle of incompatibility: one person cannot be both the supervisor and the supervised. *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304 (1874); *see also* Op. Att'y Gen. No. 88-F1; Op. Att'y Gen. (Inf.) No. 83-52.

We previously have opined that a local government may overcome the common law principle of incompatibility by local law after finding that the overall public interest would be served.² *See, e.g.,* Op. Att'y Gen. (Inf.) No. 91-42; Op. Att'y Gen. (Inf.) No. 87-47. Under the circumstances described, however, we doubt that a local law establishing an exception to the rule of incompatibility would serve the public's interest.

First, here the supervision would be direct and pervasive. The financial operations manager will report directly to the town board, which will have supervision and control of her employment. This fact alone has been enough for us to conclude that a local law overcoming incompatibility will not serve the public interest. Op. Att'y Gen. (Inf.) No. 84-22 (town board member and town constable); *but see* Op. Att'y Gen. (Inf.) No. 96-4 (town supervisor and temporary flood disaster administrator).

² Similarly, we have opined that the common law prohibition against a body appointing one of its members to another position, *see Wood v. Town of Whitehall*, 120 Misc. 124 (Sup. Ct. Washington Co.), *aff'd*, 206 A.D. 786 (3d Dep't 1923), implicated in the proposed appointment of the council member to the position of financial operations manager, may be overcome by local law. Op. Att'y Gen. (Inf.) No. 87-47.

Second, the checks and balances over municipal finances would be eroded if a council member simultaneously served as financial operations manager. The town board is responsible for the general management and control of the Town's finances. Town Law § 64(1). Additionally, the town board audits claims against the Town before they are paid. Town Law § 119(1). The financial operations manager will be responsible for rectifying the consequences of past financial mismanagement, maintaining the Town's day-to-day course to financial stability, and developing procedures to inhibit future mismanagement. The town board must be able to review the actions of the financial operations manager impartially to ascertain that they are in the Town's financial best interest. Such impartiality is questionable when a board is reviewing the work of one of its members in another capacity. Op. Att'y Gen. No. 88-F1. Even if impartiality is possible, the situation would create the appearance of impropriety. Avoiding even the appearance of impropriety is crucial in light of what the town supervisor described as a "scathing" financial report recently issued by the Office of the State Comptroller, in which the town board's responsibility for overseeing the Town's finances was emphasized.

For these reasons, we conclude that a town council member may not also serve as financial operations manager.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD
Assistant Solicitor General
in Charge of Opinions