

WARREN COUNTY BOARD OF ETHICS

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April 26, 2022

(by email and regular mail)

Supervisor Eugene Merlino
Town of Lake Luzerne
539 Lake Avenue
Lake Luzerne, New York 12846

RE: Advisory Opinion 2022-2: Women of the Year Dinner and Scholarship Fund

Dear Supervisor Merlino:

The Board of Ethics (hereafter, "BOE") provides you this advisory opinion in response to your request for guidance concerning the Women of the Year Dinner, scheduled for Friday, May 6, 2022 at the Fort William Henry Conference Center and the newly created Gene Merlino Scholarship Fund at the Hadley-Luzerne Junior/Senior High School.

This advisory opinion is issued to you under Resolution No. 317 of 2021 which enacted Warren County Local Law No. 6 of 2021, entitled "A Local Law Amending and Updating Local Law No. 5 of 2021, 'A Local Law Amending and Updating Local Law No. 6 of 2014, Warren County Ethics and Disclosure Law'" commonly referred to as the Code of Ethics (hereafter, "Code"). The Code provides the BOE authority to issue advisory opinions under Section 20(c), and by application of the Warren County Board of Ethics Standing Rules and Procedures, enacted April 20, 2022 (hereafter, "Standing Rules"). Your request for an advisory opinion was made prior to the Standing Rules being enacted, and therefore, the Standing Rules requirement that your request be made in writing was waived, in part because the BOE received other written materials as referenced below.

As a preliminary matter, the BOE assigned a case number to this matter (AO-2022-2) and determined that: (1) The questions presented are within the jurisdiction of the Code and the BOE; (2) The Board possesses sufficient information to issue an advisory opinion in this matter; and (3) The advisory opinion may assist you and guide your future conduct in this matter.

The statement of reported facts presented and considered by the BOE is stated as follows:¹

¹ This advisory opinion and the information set forth in support of this opinion does not constitute "fact-finding." The advisory opinion does not determine the veracity or credibility of any "facts" underlying this matter and was based upon accepting as true the information obtained and stated in the opinion. The information stated as the basis for the advisory opinion may have been provided by you or from other sources and has been relied upon for the advisory opinion. Should the "facts" differ from the information set forth by this advisory opinion, the accuracy of the BOE opinion may be impacted.

1. That Supervisor Merlino is the Town Supervisor for the Town of Lake Luzerne and a member of the Warren County Board of Supervisors. Supervisor Merlino holds the position of the 2022 Chairman for the Tourism Standing Committee and served as the Chairman for the Tourism Committee in 2020, as well as years prior to 2020. Supervisor Merlino is currently a 2022 member of the Occupancy Tax Standing Committee and may have served as a member of the committee in years prior to 2021.

2. That on March 18, 2022, during the monthly Board of Supervisors meeting, Supervisor Merlino presented award plaques and flowers to five women² for their service to the tourism community during the COVID-19 pandemic. The award plaques and flowers were purchased by Supervisor Merlino using his personal funds. One of the five award recipients was a County employee.³ Another award recipient was the CEO for the Fort William Henry Hotel. While the presentation of awards appeared on the posted meeting agenda, no proclamation was enacted by the Board of Supervisors or by formal action taken by a County committee or the Board of Supervisors.

3. That on April 18, 2022, the Post-Star newspaper published an article stating that the five women who received awards on March 18, 2022 were to be “feted” at an event on May 6, 2022 at the Fort William Henry Hotel.⁴ The article also stated that tickets for the event were \$75.00 each, and that \$25.00 from each ticket sold would go to the “newly-established Gene Merlino Scholarship Program at Hadley-Luzerne High School” (hereafter, “Scholarship Fund”) The article continued to state that “Merlino is the longtime supervisor of the Town of Lake Luzerne and chair of the Tourism Committee of the Warren County Board of Supervisors.”

4. That a flyer advertising the May 6th event states that “The Warren County Tourism & Hospitality Business Group” is organizing the event which will take place at the Fort William Henry Conference Center. The flyer also states that the “Warren County Tourism & Hospitality Business Group along with the Fort William Henry have decided to donate \$25 from each ticket to the newly created Gene Merlino Scholarship fund at the Hadley-Luzerne Junior/Senior High School.”⁵

5. That the Chief Executive Officer for the Fort William Henry Hotel, Kathy Muncil who was one of the five awardees, informed the County that the idea for the Scholarship Fund and creation of the Scholarship Fund was done solely by the Fort William Henry Hotel and other businesses and that Supervisor Merlino had nothing to do with the Scholarship Fund.

6. That Supervisor Merlino indicates that he was unaware of the Scholarship Fund until recently, was not involved with the creation of the Scholarship Fund, how the Scholarship Fund would be funded, or part of the future decision-making process on who receives scholarships from the Scholarship Fund. Supervisor Merlino also stated that he was not aware of any County funds being involved in the May 6th event and that if he should attend the event, that he would be purchasing his own ticket.

7. That a review of the Hadley-Luzerne School District’s website reported information for donations to the Hadley-Luzerne Scholarship Fund, Inc., which is described as a

² The five women were: Joanne Conley; Gina Mintzer; Kathy Muncil; Sara Mannix; and Amy Collins.

³ The County employee is scheduled to retire on May 26, 2022.

⁴ The Post-Star article was received and reviewed by the BOE.

⁵ The event flyer was received and reviewed by the BOE.

non-profit organization whose sole purpose is to provide scholarship awards to graduates of the Hadley-Luzerne Central School. The information notes that the non-profit organization is responsible for a number of permanent scholarships and that a minimum donation of \$10,000 is required to establish a permanent scholarship. The BOE has no information concerning whether the Scholarship Fund intends to be a permanent scholarship (i.e. over \$10,000).

This advisory opinion refers to the following provisions of the Code:

The Code, Section 19(a) states the following concerning gifts:

No Warren County officer or employee shall solicit, accept or receive a gift in violation of section 805-a(1)(a) of the General Municipal Law as interpreted by this section.

General Municipal Law § 805-a(1)(a) provides that no municipal officer or employee shall:

directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part.

The Code, Section 19(c)(1) further provides that:

No Warren County officer or employee may accept or receive any gift, or multiple gifts from the same donor, having an annual aggregate value of seventy-five dollars (\$75) or more when the gift reasonably appears to be intended to influence the officer or employee in the exercise or performance of his or her official powers or duties.

The Code, Section 19(d) further defines the term “gift” as:

Anything of value, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form.

The Code provides two “presumptions” which the BOE considered as part of this advisory opinion. Code, Section 19(e)(1) states:

A gift to a Warren County officer or employee is *presumed* to be intended to influence the exercise or performance of his or her official powers or duties when the gift is from a private person or organization that seeks Warren County action involving the exercise of discretion by or with the participation of the officer or employee.

The second presumption in Section 19(e)(2) further states that:

A gift to a Warren County officer or employee is *presumed* to be intended as a reward for official action when the gift is from a private person or organization that has obtained Warren County action involving the exercise of discretion by or with the participation of the officer or employee during the preceding twelve months.

The advisory opinion provides the following analysis:

First, the BOE observes that based on the statement of reported facts, stated above, there is no indication that Supervisor Merlino took any action, or contemplated taking any action, in violation of the Code. The facts provided suggest that Supervisor Merlino did not solicit, accept, or directly receive any gift as a result of the Scholarship Fund being created. Further, the Scholarship Fund was created by private individuals and private entities, in the Supervisor's name, without the Supervisor's prior knowledge.

Second, the BOE acknowledges that the Code has no jurisdiction and no authority over private individuals and private entities, such as the Fort William Henry Hotel and the Warren County Tourism & Hospitality Business Group (hereafter, "Tourism Group"). The Tourism Group is not a County government entity but rather a private unassociated entity, despite the group's name. It is believed that the Tourism Group is an unassociated entity which is not organized or incorporated under any State law. For these reasons, the BOE does not issue this advisory opinion with the intent of advising what actions a private entity may or may not undertake concerning the planned awards dinner or the scholarship fund. The BOE's jurisdiction is limited and reserved to Warren County officers and employees, such as Supervisor Merlino.

Third, the Scholarship Fund creates the appearance of a prohibited gift to Supervisor Merlino from the Fort William Henry Hotel and the members of the Tourism Group. The BOE is not making any determination that the Scholarship Fund is actually a prohibited gift and addresses the potential appearance created by the parties which established the Scholarship Fund in the name of the person stated on the Scholarship Fund.

Based on the facts presented, both organizers shall redirect \$25.00 from each \$75.00 event ticket to the Scholarship Fund for the Hadley-Luzerne School District. This would be a transfer of funds greater than \$75.00 from each of these entities. Based on the value being greater than \$75.00, the BOE is concerned that the Scholarship Fund may qualify as a potential "gift" under section 805-a(1)(a) of the General Municipal Law, and Code, Section 19(d).

A gift is "anything of value." The Fort William Henry Hotel and the Tourism Group appear to be creating a thing of value for the supervisor in the community by creating the Scholarship Fund which was named for a current Supervisor on the Board of Supervisors, who now serves as the Chairman for the Tourism Committee, and also serves as a member of the Occupancy Tax Committee.⁶

Fourth, the BOE is also sensitive to the presented fact that the Scholarship Fund was created by the two private entities which may directly and/or indirectly seek Warren County action involving the exercise of discretion by or with participation of the officer or employee. The BOE possesses no information that either private entity actually sought or seek county action involving the supervisor's discretion or participation. The BOE advisory opinion focuses upon the appearance of a Code violation, not any actual violation of the Code which would result in a complaint, not an advisory opinion. The Code presumes that a gift is intended to influence the exercise or performance of official powers and duties when the private entity or person that seeks Warren County action involving the exercise of discretion by or with the participation of the

⁶ The BOE advisory opinion does not make any factual finding concerning the Scholarship Fund, only that there is a potential appearance that the Scholarship Fund creates the appearance of a "gift."

officer or employee. See Code, Section 19(e)(1). It is the appearance that the Scholarship Fund in the name of the supervisor creates which forms the basis of this advisory opinion.⁷

ADVISORY OPINION 2022-1:

Based on the above-stated information, the BOE provides you with the following advisory opinion:

While the facts presented for consideration do not indicate that you took any action to create the Scholarship Fund in your name, we advise that the creation and funding of the Scholarship Fund in your name may create the appearance of an improper gift from two private entities and that these two private entities may directly or indirectly seek Warren County action involving the exercise of discretion by or with your participation, as a member of the Board of Supervisors, member of the Occupancy Tax Committee, and Chairman for the Tourism Committee.⁸ We also acknowledge that the BOE has no authority over the two private entities which created the Scholarship Fund, or any private persons or entities which comprise the Tourism Group.

For these reasons, we recommend that you take the following course of action to aid in protecting against any future allegations that your actions, or failure to act, violated the Code:

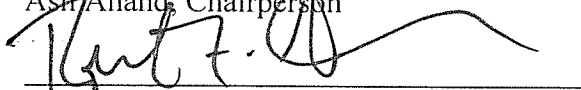
1. Inform the Fort William Henry Hotel and the Tourism Group that you do not consent to the Scholarship Fund bearing your name;
2. Request that the Fort William Henry Hotel and the Tourism Group cease any further advertising for the May 6th event which references the Scholarship Fund being awarded in your name; and
3. Inform the Hadley-Luzerne School District that you do not consent to the Scholarship Fund bearing your name.

It is the unanimous opinion of the BOE that taking each action stated above would result in you using your best efforts to remove the appearance of an inappropriate gift given in your name in the form of a Scholarship Fund.



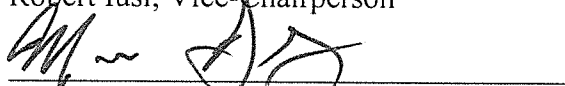
Ash Anand, Chairperson

Dated: April 27, 2022



Robert Iusi, Vice-Chairperson

Dated: April 27, 2022



Martin Deslauriers, Member

Dated: April 27, 2022

⁷ The Code also addresses gifts presumed to be a reward for official action taken by Warren County that was obtained through the exercise of discretion by or with the participation of the officer or employee during the prior twelve months. The presented facts do not provide any basis for issuing any advisory opinion on this ground.

⁸ It is unknown to the BOE what private persons or entities are associated with the Tourism Group and what Warren County actions those private persons or entities may seek which involve the exercise of discretion by or with your participation.