

New York State Ethics Commission

Advisory Opinion No. 91-7: Application of the Commission's regulations on Outside Activities, 19 NYCRR Part 932, restricting policymakers from holding positions as officers or members of certain for-profit corporations or institutions, to certain campus presidents of the State University of New York.

Introduction

The following advisory opinion is issued in response to Outside Activity Requests submitted by certain campus presidents of the State University of New York ("SUNY") to the State Ethics Commission ("Commission") pursuant to the Commission's regulations, set forth at 19 New York Code of Rules and Regulations ("NYCRR") Part 932, seeking approval for the presidents to serve as members of the boards of directors of banks in which SUNY campuses deposit funds.

Pursuant to the authority vested in the Commission by Executive Law §94(15), the Commission hereby renders its opinion that such service violates the Code of Ethics contained in Public Officers Law §74 and the presidents' requests to serve as members of the boards of directors of banks in which the relevant SUNY campuses deposit funds are denied, for reasons set forth in this opinion.

Background

The Commission has received the following Outside Activity Requests:

1. *President of the SUNY [College A].*

The President of the SUNY [College A] has requested approval to serve as a director of [holding company], and [Bank A], both profit making corporations.⁽¹⁾ According to the information provided to the Commission, the Bank is the parent bank of the bank holding company, [holding company], headquartered in [location].⁽²⁾ SUNY A maintains a number of accounts with the Bank including College A's general checking account.⁽³⁾ The Bank is the depository for two organizations closely affiliated with the College: [organization 1], and [organization 2]. The Bank had been recently designated by the State Comptroller to provide banking services to [College A], replacing the previous depository, the [former bank].⁽⁴⁾

2. *The President of SUNY [College B].*

The President of the SUNY [College B] has requested approval to serve as a member of the board of directors of [Bank B], [location].⁽⁵⁾ According to the information provided to the Commission, the Bank is the local depository for College B funds such as the general fund,

business office, work study, equal opportunity programs, petty cash, and checking accounts. The President also serves as an *ex officio* member of the Board of Trustees of the College Foundation ("Foundation"), a not-for-profit corporation which provides support for student scholarship, student financial aid, and grants to College B projects. The Foundation's accounts are also located at the Bank.⁽⁶⁾ Finally, the College Association, which administers student activities fees, has an account with the Bank.

3. *President of the SUNY [College C].*

The President of the SUNY [College C] has requested approval to serve as a director of [Bank C], a profit making corporation.⁽⁷⁾ According to the information received by the Commission, [College C] maintains a number of accounts with the Bank. The activities and services which the Bank provides to [College C], include general checking services for the following accounts:

1. *General Account*

Receipts from tuition, fees, financial aid, and income fund reimbursable programs total approximately \$36 million a year. Approximately 20,000 checks for refunds and financial aid are prepared by the Office of Student Accounts.

2. *Petty Cash/Travel Account*

Ten thousand checks totaling \$1.2 million are prepared annually from the Accounting Office.

3. *SEEK/EOP Account*

Four thousand checks, representing \$1 million are distributed annually for student stipends, books, room and board.

In addition, many campus-related organizations, such as the College's Research Foundation, Faculty Student Association, [College Foundation], Alumni Association, Inc., and the United Students' Government Service Group, Inc., maintain accounts with the Bank.

Discussion

Pursuant to Executive Law §94(16)(a), the Commission has the power and duty to "promulgate rules concerning restrictions on outside activities . . . by persons subject to its jurisdiction." In furtherance of this duty, the Commission adopted regulations on Outside Activities which are codified at 19 NYCRR Part 932.⁽⁸⁾ The relevant section of Part 932 is as follows:
932.3 Restriction on holding other Public Office or Private Employment in other Outside Activities.

....

(e) No individual who serves in a policy-making position on other than a non-paid or per diem basis . . . shall serve as a director or officer of a for-profit corporation or institution without, in each case, obtaining prior approval from the State Ethics Commission.

Pursuant to Part 932.4(c), the Commission makes its determination to approve or disapprove an individual's outside activity request based upon whether the proposed outside activity interferes with or is in conflict with the proper and effective discharge of such individual's duties on behalf of the State. In making such determination, the Commission considers the provisions of Public Officers Law §§73 and 74.

Section 73 generally prohibits State officers and employees from conducting any private business with State agencies, appearing or rendering services for compensation, before State agencies. Based upon the facts contained in the presidents' requests, a §73 violation does not exist in any of their individual cases because the presidents do not make compensated appearances or rendition of services before the State agencies in their positions as directors of the bank boards.⁽⁹⁾

Section 74 contains the Code of Ethics. It is concerned with both actual conflicts of interest and the appearance of conflicts. The rule with respect to conflicts of interest, contained in §74(2), provides the following:

No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Standards set forth in §74(3) which further explain and define the above-mentioned rule and which pertain to the present circumstances, include the following:

- a. No officer or employee of a state agency . . . should accept other employment which will impair his independence of judgment in the exercise of his official duties.
- b. No officer or employee of a state agency . . . should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

. . . .

- d. No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.
- e. No officer or employee of a state agency . . . should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

. . . .

- h. An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to engage in acts that are in violation of his trust.

These standards attempt to assure the public confidence in State officers and employees as they discharge their official duties. A public servant's actions, affiliations, etc. must be above reproach even if no actual conflict of interest is present. Any associations that give rise to the suspicion of favoritism, self-dealing or personal private gain by State officers and employees shakes the public's confidence.

According to the job specification, the duties of the position of "President" at a SUNY campus are to:

[S]erve[s] as chief administrative officer of a University campus and as such provide[s] leadership and direct[s] most complex, demanding, and frequently sensitive responsibilities in the areas of teaching-learning, scholarship-research, and appropriate public service. . . . Recommend[s] policy to Central Administration and implement[s] locally the policies of the Board of Trustees and the Chancellor; . . . direct[s] the preparation, presentation, and administration of the financial budget. . . .

The written Policy of the Board of Trustees of the SUNY, as amended in 1989, under Article IX ("College Officers and Organizations"), Title A., provides that the chief administrative officers of each college shall have the following responsibilities:

[S]hall administer the college for which he serves, and shall promote its development and effectiveness. He shall supervise the members of the professional and non-academic staff of such college. . . . He shall prepare and recommend the annual budget requests of the college. He shall report and make recommendations to the Chancellor and the Board of Trustees and the college council concerning the operation, plans and development of the college.

To serve as chief administrative officer and president of a SUNY campus and as a director of the board of any bank with which the campus has an ongoing and significant business relationship presents various conflict of interest issues.

First, the SUNY campus presidents, as chief administrative officers, are involved in the bank selection process. The State Comptroller's Office has informed the Commission that in 1989 it began to conduct reviews of SUNY banking practices and adopted a uniform procedure for bank selection. Pursuant to that procedure the Comptroller issued Requests for Proposals ("RFPs") seeking banks interested in providing services to all SUNY campuses.⁽¹⁰⁾ The Comptroller, SUNY Central Administration, and the local SUNY campus review the responses to the RFPs and jointly select the bank to receive the local SUNY campus's deposits. All banks the subject of this opinion were selected pursuant to this procedure within the past two years, although they may have already been serving the respective SUNY campuses pursuant to pre-existing relations. Before the Comptroller's involvement described above, individual SUNY campuses generally developed relationships with particular banks without the benefit of the bidding process.

The fact that the particular bank has been designated by the State Comptroller's Office in conjunction with SUNY to handle a campus's checking or other accounts does not, in and of itself, validate the service of the president of the SUNY campus to the bank's board and does not dispose of the issue of whether such service gives the appearance of a conflict of interest. The SUNY president is presented with the opportunity to influence the final decision of the State Comptroller of which bank to select. If the president actually takes a part in the selection process, that one vote of three has bearing on the outcome. However, even if the president has no actual part in the selection process and has delegated his authority to some other local SUNY campus official in determining which bank will serve as the campus's depository, there is the appearance that the president, as chief administrative officer of the campus, could influence the outcome.

Second, the SUNY campuses which the presidents serve provide beneficial business to the banks. The selected banks presumably profit from the deposits the campuses place with them.⁽¹¹⁾ The dollar amounts that are held at banks may be significant, depending on the time of year, and have the potential to generate considerable income for the bank. The presence of the presidents on the banks' boards also generates a certain degree of goodwill, respectability and favorable public relations towards the banks.

In [Advisory Opinion No. 90-6](#), this Commission considered whether §74 precludes a State officer or employee from serving as an uncompensated member and officer of the board of directors of a not-for-profit development corporation and its wholly owned for-profit subsidiary which conducted business with other State agencies and potentially with the State officer's employing agency:

The presence of a State employee on the board of such a corporation may raise questions as to the knowledge the corporation has about available State business and the matter in which it was received, as well as the influence the requesting party may exert to gain the State business. . . . No State employee should place, or appear to place himself or herself in a position of disclosing confidential information which he or she has received in a State position. Nor, should he or she disclose such information or attempt to obtain unwarranted privileges for others.

The Commission found it significant that one of the entities on which the employee served as a director was a for-profit corporation, stating:

The potential for conflict is more of a problem with the private, for-profit corporation. For, in the case of [such a corporation], the profits that may be received from doing business with the State may appear to have been the direct result of involvement of the requesting individual [State employee], a voting board member [of the for-profit corporation]. . . . We [the Commission] express greater concern about the involvement of public servants in profit making corporations.

Holding the positions of president of a SUNY campus and director of the board of the bank, a profit-making corporation, could raise the reasonable suspicion among the public that, for example, the president had a role in directing the campus's business to a particular bank, that his or her presence on the board ensures the bank will maintain the campus's business and encourages campus related organizations to use the same bank.

Third, serving both entities (campus and bank) can pose a dilemma for these individuals. The job requirements for the position of SUNY president contemplate comprehensive attention to all major aspects of policy and operation. As far as duties to the bank, *The Director's Book, The Role of a National Bank Director*, describes the "duty of loyalty" imposed upon directors under the common law as follows:

The duty of loyalty generally prohibits directors from putting their personal or business interests or those of others above the corporate interests of the bank. Thus, directors must be fair in their dealings with the bank, and personal interests must not be allowed to bias board decisions. . . .

A bank director's breach of the duty of loyalty could expose the director to both criminal and civil liability. Faced with such a duty, it may be impossible for a SUNY campus president, as a bank director, to place the campus's interests above those of the bank in situations where there is a dispute or a disagreement between the two institutions.

The Commission considered how an individual who serves in both capacities may serve both responsibly in a situation where the best interests of one do not coincide with those of the other.⁽¹²⁾ Further, if the campus should enter into a dispute with the bank concerning any of the campus's deposits or checking account activities with the bank, the Commission perceives that the president, as director, would have competing interests in the resolution of the matter. It is precisely because of this potential for conflict and because of the incompatibility of the two positions that the Commission must conclude that the dual loyalties to the State and to the bank present, at a minimum, the appearance of a conflict of interest which is prohibited under Public Officers Law §74.

There is ample authority to support the Commission's position. The Commission concurs with the conclusion reached in an Informal Opinion of the Attorney General of the State of New York, dated January 4, 1974, that found that the Niagara Frontier Transportation Authority, a State agency, "should not deposit funds in banks of which a member [of the Board] is also a director of such bank or director of a holding company owning the bank," based upon the provisions of Public Officers Law §74(3)(e). (1974 Op. Atty. Gen. 50.)⁽¹³⁾ The rationale for the Attorney General's conclusion was the following:

The bank directors owe a fiduciary duty to the shareholders of the bank and the directors are personally liable for a breach of the fiduciary duty. Therefore, a bank director would have an indirect, if not direct, financial interest *'that might reasonably tend to conflict with the proper discharge of his official duties'* (Public Officers Law, §74(3)(e)) as a member of the Niagara Frontier Transportation Authority if Authority deposits are made in a bank of which he is a director. (Emphasis in original text.)

The Commission also considered opinions of the State Comptroller that addressed the appearances of a conflict of interest under the General Municipal Law. The Comptroller has found a conflict of interest for a member of the board of education of a school district, who was also a director of a bank, in any transactions between the school district and the bank (Opinion No. 80-514); for a member of the board of trustees of a community college, who was a bank director, with respect to any contracts between the college and the bank (Opinion No. 83-143);

for a town supervisor, who was also a director of a bank, in the designation of the bank as a town depository ([Opinion No. 89-4](#)).

The Commission considered whether an argument could be made to justify the presidents' services on the bank boards. The Commission recognizes that SUNY campus presidents are leaders in their communities and, therefore, likely candidates for bank board memberships. They, as others, desire to perform "community service." It might also be asserted that their role in the bank selection process is limited to a single vote of three. However, it is the Commission's view that their role (or perceived role) in the selection process, the requirement of board members to consider and vote on matters affecting the campus accounts, and their conflicting duties to both institutions present the possibility of the appearance of a conflict of interest which outweighs the potential benefit of their service on the bank board to the campus.⁽¹⁴⁾ Nor would a president's recusal from consideration of any bank matter affecting his or her campus outweigh the potential for conflicts or the appearance of conflicts of interest.

Whereas such a connection may not only be tolerated but indeed encouraged in the private sector, in the public arena, it may give rise to speculation about the loyalties of the presidents. Whereas there has been absolutely no indication that any of the four presidents the subject of this decision have engaged in any questionable, illegal or even mildly improper activity, it is the mere appearance that such might be the case that leads the Commission to conclude that they should not continue to serve on the boards of banks in which their colleges deposit funds.

Conclusion

The Commission denies the outside activity requests. An appearance of a conflict of interest, in violation of Public Officers Law §74, exists by serving as president of a SUNY campus and as a director of the bank in which the college deposits funds or has an ongoing business relationship.⁽¹⁵⁾ Therefore, the presidents must resign from their service to the banks.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the requesting individual who acted in good faith, unless material facts were omitted or misstated by the persons in the request for opinion.

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza

Norman Lamm

Donald A. Odell, Members

Dated: May 21, 1991

Endnotes

1. According to information received from the President, he receives between \$9,000 to \$12,000 annually in retainer and meeting fees for his service to the Bank.

2. The President has stated that he has been a director of the Bank since 1972, vice chairman of the Bank's board for four years, and that the Bank's board only considers loans in excess of \$50,000. The President has also been a director of the bank holding company since its founding in 1983, and its vice chairman for four years. The campus changed depositories to [Bank A] while the president held said positions on the Bank and bank holding company boards.

3. According to information received by the Commission, there are the following accounts: [SUNY A Account 1] (average balance \$36,474); [SUNY A Account 2] (\$17,482); and [SUNY A Account 3] (\$82,713).

4. It is the Commission's understanding that the change in the designation of the depository took place while the President was a director of the Bank and a director of the bank holding company.

5. The President supplied the Commission with the following description of the board's activities:

The board of directors is the bank's highest authority. . . . The board directs the activities of the bank in the same way that owners direct the activities of any business. The board determines the strategic objectives of the bank and is the source of all its policies. The board's decisions are the final authority within the bank. Specific responsibilities include (1) selecting and supervising the president [of the bank], (2) establishing strategic objectives and long-term goals, (3) determining bank policies, (4) providing overall direction for the bank, (5) monitoring short-term plans and budgets, and (6) monitoring bank performance.

In 1989, the President received \$2,375 for his service as a director of the Bank.

6. The Bank supports the Foundation by making an annual contribution.

7. The President has stated that because the Bank board is regional, rather than local, the board does not consider loans to individuals or businesses. Primary responsibility of the board members is to review the financial position of the bank and suggest ways to improve it. Directors serve on either a community affairs committee or a strategic plan committee, which brings suggestions to the entire board for marketing, community affairs involvement of the Bank and strategies for dealing with the competition of other financial institutions. For his service to the bank board, the President receives \$400 for each monthly board meeting he attends.

8. The regulations generally apply only to State officers and employees who have been designated as serving in policy-making positions by their appointing authority. SUNY presidents have been designated policymakers by their appointing authority.

9. If, for example, a SUNY president were compensated to appear on behalf of a bank before the State Comptroller to obtain a contract for the bank, a Public Officers Law §73(7) violation would occur.

10. The only exception to the Comptroller's review and request for proposals are faculty/student association accounts.

11. According to the Comptroller's Office, it maintains control of SUNY money deposited with banks. However, each local SUNY campus, as part of its agreement with the selected bank, must keep a minimum deposit in the account from which the campus does not derive any interest.

12. For example, a president may be aware that a certain employee of the SUNY campus, who has applied from the bank for a loan, will be terminated by SUNY. In this circumstance, a president may have a duty to inform the bank of the employee's status, although such information may be considered confidential.

13. Prior to the creation of the Commission, the Attorney General was empowered to interpret and render advisory opinions concerning Public Officers Law §§73 and 74. The Commission has previously stated that, where the opinions of the Attorney General involve interpretations of Public Officers Law §§73 and 74 which have not been amended or enacted by the Ethics in Government Act of 1987, the Commission shall consider the opinions as precedent where appropriate.

14. In the case of the President of SUNY [College A], the fact that [Bank A] replaced the [former bank] as the depository bank during the time that he served as both President of the College and as a director of the board of the bank and the bank holding company heightens the appearance of a conflict of interest.

15. The Commission's determination does not mean that a SUNY campus president may never sit as an officer or member of the board of directors of a bank. A different result has been reached in cases where the bank has no ongoing business relationship to the SUNY campus. There may be still other fact patterns which would lead to a different conclusion.