

# New York State Ethics Commission

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**Advisory Opinion No. 92-23:** Application of Public Officers Law §74 to an outside activities request.

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## Introduction

The following advisory opinion, issued in response to an inquiry from [a State agency head], addresses the Public Officers Law §74 implications of a State agency head's selecting certain selected State employees in his agency to assist him in performing consulting services for which he has already received approval.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission hereby renders its opinion that it is a violation of Public Officers Law §74 for a supervisor to select certain of his employees to participate in outside employment, which he will supervise, for compensation. The ethics law's standards of conduct prohibit State employees from taking any action which might create the appearance of impropriety, such as using public office for private gain or giving preferential treatment to anyone.

## Background

[Description of the agency deleted.]

The Commission and the Board of Public Disclosure before that have previously granted the chair's outside activity request to serve as a consultant in the federal court's supervision of the implementation of court orders in [a particular case]. Recently, with the approval of the court, the parties to the litigation asked the chair to assess the status of compliance with the court orders. The chair, wishing to secure the short term assistance of others with experience in monitoring [State agency] facilities to perform services under his supervision, has already asked several [State agency] employees to provide the necessary services.<sup>(1)</sup> He addressed the possible concerns as follows:

Although many professional colleagues have expressed an interest in working with me on this project because of the significance of the [ ] case, I thought this presented a good opportunity for staff of the [State agency] to gain exposure to another state's method of operating [ ] facilities. I therefore invited several to participate. Most accepted the invitation, some did not. . .

There is no real or apparent pressure on employees to accept the invitation. Like other professional development opportunities, many staff would welcome the opportunity while others would not want to spend their free time in this manner. . .

The safeguards that protect work place decisions from being influenced by such outside activities are the specific, job-related performance programs of employees which govern their evaluations, and the separate review which occurs in each evaluation. Performance evaluations in turn play a role in promotional decisions.

As with other activities, these considerations must be balanced against a valuable professional development opportunity for staff, a chance to gain exposure to another state's system as well as to the effect of court orders in restructuring a [] system. Since much of the [State agency's] work in the state involves passing judgment on the quality and appropriateness of such programs, this opportunity to closely study another state's system will be a valuable learning experience that will benefit both individual staff members and the [State agency]. With restrictions on state-funded out of state travel, these types of professional development opportunities have become scarce. In my judgment, the benefit to the [State agency] from this professional activity, done on the employees' own time and at the expense of another state, overcomes the concerns.

In inviting the [State agency] staff to participate, the chair said he considered that

there are no conflicts of interest with their New York duties, as [the State agency] transacts no business with [another State];

the assignment would be performed on non-State work time, using no resources of the State;

the assignment would provide an educational experience for staff in a field where surveyors hone their skills through exposure to different facilities and systems, thereby benefitting the [State agency] and the State;

the [State agency] staff in question are qualified to do the work;

the compensation is fair and reasonable; in some cases, it may exceed \$4,000.

### **Statutory Background**

Public Officers Law §74(2) sets forth the rule with respect to conflicts of interest:

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.

The relevant standards set forth in subdivision (3) of §74 include:

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. . .

f. An officer or employee of a state agency. . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the

performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person. . .

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 be engaged in acts that are in violation of his trust.

### **Discussion**

The Commission assumes that the chair has only good intentions in making the outside employment available to some of his subordinates. The Commission does not question the benefit of this opportunity either to the invited individual employees or to the State, or whether such activity is, absent the involvement of the chair in the arrangement, acceptable.<sup>(2)</sup> The question before the Commission is whether the arrangement by which the head of a State agency invites some of the employees under his supervision to engage in compensated outside employment also under his supervision is appropriate under Public Officers Law §74.<sup>(3)</sup>

To assure that the business of any State agency is conducted effectively, objectively and without improper influence or the appearance thereof, all State officers and employees must observe the standards of conduct set forth in Public Officers Law §74. State officers and employees must avoid any real or apparent conflict between their private interests and their public duties. The Commission sees the issues as follows:

by offering outside employment to subordinates and by accepting such employment will the chair and his subordinates give reasonable basis for the impression that they can improperly influence each other, unduly enjoy favor in the performance of official duties, that they are affected in their State decision making by the rank or position of the chair or that their outside employment impairs the exercise of independent judgment in their State jobs? [§74(3)(a) and (f)]

by asking subordinates to participate in outside employment, is the chair pursuing a course of conduct which will raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust? Likewise, are the employees who agree to participate pursuing such a course of conduct? [§74(3)(h)]

In this inquiry, whether there is an impermissible conflict of interest rests primarily on the analysis of the relationship between the supervisor and the supervised, rather than on the personal integrity of the actual employees involved.

The Commission believes that the [State agency head's] asking employees to engage in this outside employment raises a number of questions. Can they refuse with absolute impunity? What will happen if an employee falls behind in the outside services? Will he or she feel the need to forego official duties to perform on the outside matter? Will the [State agency head's] evaluation of a State employee's State job performance be affected by that employee's performance on the outside activity?

Those employees not selected may question how the benefit of outside employment was conferred. The [State agency head] has admitted in conversation that he chose qualified employees. Is he rewarding them for their good work for the State? Are they the only employees who deserve special recognition?

The situation is ripe for an unacceptable confusion of the roles of the parties. It is not unreasonable to conclude that the [State agency head] gives reasonable basis for the impression that employees who agree may unduly enjoy his favor in the performance of official duties. It is difficult to imagine how the [State agency head's] State-work related decisions concerning employees who accept the outside employment cannot be colored by that outside employment relationship. Similarly, the [State agency head's] work place decisions about those who refuse the offer might also be affected by those denials, or others may perceive so.

The Commission concludes that the supervisor's request to his employees and their acceptance of outside employment under his supervision gives reasonable basis for the impression that the employees will enjoy the [State agency head's] favor in the performance of their official duties, and that the employees are affected by the chair's rank, in violation of Public Officers Law §74(3)(f).

The perceptions of those outside the agency are likewise important. Although the [State agency head's] or the employees' judgments in their State positions might not actually be affected by their outside employment in violation of §74(3)(a), the Commission must consider whether an impermissible appearance would result from the arrangement for outside employment. The Commission concludes that by offering outside employment to certain of his subordinate employees the [State agency head] has pursued a course of conduct that raises suspicion among the public that he is engaged in acts in violation of his trust in violation of Public Officers Law §74(3)(h).

It may be regrettable that these individuals will lose a valuable professional experience. Since the opportunity did not progress naturally from the programs of the [State agency] or the State, however, we are hard pressed to translate this missed opportunity as some harm to the State. The potential for the appearance of impropriety, pressure, and undue influence are too great to permit the arrangement.

### **Conclusion**

Applying the rule and standards found in the code of ethics of Public Officers Law §74, the Commission finds that, for the [State agency head] of the [State agency], who is engaged in outside consulting activities, to request his subordinate State employees to participate in such outside employment and supervise them in both capacities, creates an impermissible appearance of a conflict of interest.

The Commission advises the [State agency head] to withdraw the offers for outside employment that he has made to members of his staff.

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

Concurring:

Joseph M. Bress, Chair

Barbara A. Black

Angelo A. Costanza

Robert E. Eggenschiller, Members

Odell, D., dissenting. While these arrangements may raise certain management and personnel related issues these should be resolved by the Governor to whom the [State agency head] reports organizationally. I do not find these activities rise to the level of a violation of the Public Officers Law.

Dated: November 24, 1992

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### **Endnotes**

1. Information from the chair's inquiry letter of April 23, 1992.
2. That it has already ruled that the chair may be so engaged is not dispositive of the issue regarding other State employees.
3. As of May 8, 1992, 9 [State agency] employees (out of 105) have submitted outside activity request forms, indicating they anticipate earning over \$4,000 in the next year. They uniformly describe their assignments as "review[ing] of institutional and community services to class members [ ] in [another State]."