New York State
Ethics Commission

Advisory Opinion No. 93-9:	Application of Public Officers Law §74 to a State employee who is seeking elective office.

Introduction

The following advisory opinion is issued in response to a request for a formal opinion from an employee of [a State agency] whether Public Officers Law §74 and the Commission's regulations allow him to seek election to and serve as a member of the [ ] County Legislature and as a [ ] County Democratic Committeeperson.

Pursuant to its authority under Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that Public Officers Law §74 does not prohibit an officer or employee of the State from seeking and holding elective office when the responsibilities of elective office do not conflict with the employee's State responsibilities. The Commission's regulations do not prohibit a non-policymaker from serving as a member of a local political party committee.

Background

On February 6, 1992, the requesting individual, [a State agency], sought a Commission opinion concerning his possible candidacy for [ ] County legislator and his service as a member of a political party committee.[(1)] The Commission responded with an informal opinion on February 24, 1992, advising the employee that, subject to certain limitations, the Commission's regulations and Public Officers Law §74 did not prohibit him from pursuing or serving in either office. On December 10, 1992, the employee requested a formal opinion, later supplying additional background material.

The employee serves as Coordinator of the [title for outreach] [the State agency.] [The program features athletes and celebrities as role models to address the dangers of [certain behavior] to the total population throughout New York State.[(2)]] The requesting individual and the celebrities give speeches, appear in television and radio public service announcements and on television and radio talk shows. According to his duties description the requesting employee, [ ] plans and coordinates all communications activities including press activities and news releases. He is responsible for developing voluntary resources for the supporters of the program and for related [ ] efforts.[(3)] He develops appropriate public service announcements for the program and [the State agency], including writing, directing and editing as necessary, and he coordinates various meetings, conferences and briefings related to the prevention campaign.

The requesting individual, who anticipates seeking election to serve as one of [ ] members of the [ ] County Legislature on November 2, 1993, advised the Commission that the Legislature meets

the [ ] of each month. In addition to the regular monthly meetings, the legislators conduct committee meetings two or three times a month. All meetings are conducted during evening hours. The [ ] County legislators serve four-year terms on a part-time basis. Legislators, except for the chair, majority and minority leaders, are compensated $13,138 a year. The three leaders receive slightly higher salaries. The Legislature oversees the general policy decisions and operations of the [ ] County government.

The requesting individual also wishes to submit his name as a nominee to become a member of the [ ] County Democratic Committee. He describes this office as part-time and states that he would not receive compensation for his two-year term. There are 15 political districts in [ ], the community where the requesting individual anticipates seeking election as a committeeperson. Each district elects two committeepersons to the [ ] County Democratic Committee; thus, 30 persons serve from the town of [ ]. The [ ] districts convene three times a year and the county committee meets once a year. The requesting individual advised the Commission that, as a committeeperson, he would assist in the conduct of elections (petition processing, service at the polls, encouraging voter participation), attend meetings and, in general, serve as liaison between the voters and the town leaders.

[The State agency] provides funding for [both alcohol and substance abuse] programs throughout the State. Last year, the agency directed approximately $1.2 million to [ ] County. By contract, agencies of the County serve as the conduit for [state agency] funding to two community residences serving individuals with [certain alcohol-related] problems. [The State agency] indicates that certain County agencies also apply to [the State agency] for funding for [substance abuse] programs.

Statutory Framework and Analysis

Public Officers Law §73(4) states, in pertinent part, the following:
(a) No . . . state officer or employee . . . or firm or association of which such person is a member, or corporation, ten per centum or more of the stock of which is owned or controlled directly or indirectly by such person, shall (i) sell any goods or services having a value in excess of twenty-five dollars to any state agency . . . unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding.

Public Officers Law §73(7)(a) prohibits an officer or employee of the State of New York from appearing or rendering services for compensation before any State of New York agency where such appearance or services are in connection with:

i. the purchase sale, rental or lease of real property, goods or services, or a contract therefor, from, to or with any such agency;
ii. any proceeding relating to ratemaking;
iii. the adoption or repeal of any rule or regulation having the force and effect of law;
iv. the obtaining of grants of money or loans;
v. licensing; or
vi. any proceeding relating to a franchise provided for in the public service law.

The rule with respect to conflicts of interest is provided in Public Officers Law §74(2):

No officer or employee of a state agency, . . . should have any interest, . . . 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.

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct which address not only actual but apparent conflicts of interest. Of relevancy to this inquiry are the following:

Section 74(3)(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.

Section 74(3)(f)

An officer 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.

Section 74(3)(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.

The Commission's regulations governing the political involvement of its officers and employees are contained in 19 NYCRR Part 932.2. That section provides as follows:

a. No head of a State department, individual who serves as one of the four statewide elected officials, *individual who serves in a policy-making position* or member or director of a public authority (other than a multi-state authority), public benefit corporation or commission at least one of whose members is appointed by the Governor shall serve as an officer of any political party or political organization.
b. No head of a State department, individual who serves as one of the four statewide elected officials, *individual who serves in a policy-making position* or member or director of a public authority (other than a multi-state authority), public benefit corporation or commission at least one of whose members is appointed by the Governor shall serve as a member of any political party committee including political party district leader (however designated) or member of the national committee of a political party. (Emphasis added.)

Discussion

State officers and employees are prohibited from making compensated appearances before any State agencies by Public Officers Law §§73(4) and 73(7). Subdivision 7(a) was added to the Public Officers Law §73 as part of the Ethics in Government Act ("Act") of 1987, which established strong ethical standards to govern the conduct of public officers and employees.[(4)] According to the Governor's Approval Message of August 7, 1987, the Act provides for "restrictions on dealings with government, which will bar public officers and employees from . . . doing business with the State in the absence of competitive bidding."

In Advisory Opinion No. 91-5, the Commission reconciled the provisions of §73(7)(a), which prohibits a State employee from appearing or rendering services for compensation before a State agency in relation to any matter in connection with the sale of goods or services to a State agency, (and other circumstances) with those of §73(4), which allows appearances and services pursuant to a competitively bid contract. The Commission's opinion addressed a State contract which was awarded, after public notice and competitive bidding, to a company whose sole shareholder was a full-time employee of the State University of New York. The next lowest bidder objected to the award based upon Public Officers Law §73(7). In finding the State employee's appearance before a State agency to be proper, the Commission reasoned that State officers and employees may bid on State contracts on behalf of themselves or others:

[i]n those cases where the contract is to be let after competitive bidding, provided that the State officer or employee does not receive compensation either for the submission of the bid or its preparation or any personal participation in the presentation of the bid/proposal to the awarding agency personnel.

It is possible that the requesting individual, through his duties as an elected legislator or committeeperson, could make an appearance before a State agency. Since the requesting individual would be compensated for his services as a [ ] County legislator but not as a committeeperson, should he be elected to the Legislature, the law would prohibit him from making compensated appearances, for example, on behalf of any one including [ ] County, to obtain a contract, apply for a grant of money or loan, from any State agency. Because as a committeeperson he is not compensated, §§73(4) and 73(7) do not prohibit him from making appearances before State agencies, however, as discussed below, Public Officers Law §74 would.

Public Officers Law §74 not only addresses actual conflicts of interest, but also conduct that gives the impression that a conflict exists. The law is intended to restore the public's trust and confidence in government through the prevention of corruption, favoritism, undue influence and abuses of official position. The Commission does not find that Public Officers Law §74 precludes State officers and employees who perform services for the general public from participating in the political process. (See Advisory Opinion No. 92-16.) It is the Commission's view that there is no absolute prohibition against being elected to and holding public office while continuing one's employment with the State. This view is consistent with that of the Attorney General, who found there is "no statutory or constitutional provision which would prohibit a State employee from being elected to or serving as a member of the Assembly while retaining his other State position." (Op. Atty. Gen. 43, 1974.) The opinion states the general rule that:

one person may hold two or more public offices at the same time provided that the duties to be performed do not create an incompatibility of offices.[(5)].

In the present case, the requesting individual is responsible in his State position for directing a program that raises the awareness of problems associated with [alcohol and substance abuse]. [State agency] officials advised the Commission that it funds [ ] programs through county agencies, and that [ ] agencies also apply for [ ] funding.[(6)] According to [the State agency] the County Legislature is removed from the funding application process. We must presume that the Legislature is aware of the various county agencies' expectations or receipt of funding from [the State agency] and indeed approves the county agencies' budgets.[(7)]

The requesting individual believes that his responsibilities as a [ ] County legislator or as a [ ] County committee person would not require that he speak or perform services for these [the State agency] supported programs, although conceivably discussion of these programs could occur during the course of a campaign or during the course of the requesting individual's political activities. While such a potential does not exclude the requesting individual from seeking and holding elective office, he must ensure that his political literature and speeches do not demonstrate, to any degree, that either [the State agency] or the [ ] program endorse his campaign or positions or that he has been influential in bringing these programs to [ ] County. To that end, any campaign biography must be restricted to include only a statement of the employee's State title and description of his State position.

Public Officers Law §74(3)(h) requires that the employee's actions on behalf of the State not cause suspicion among the public that he is engaged in conduct violative of his public trust. The employee must disclose to his supervisor his campaign and potential service as a legislator and committeeman and recuse himself from [State agency] matters affecting [ ] County regardless of whether his actual [State agency] duties concern any aspect of the matters under consideration. To avoid the appearance of a conflict of interest, he may not appear before any State agency, including [his employing State agency] in his capacity as a paid legislator or an unpaid committeeperson.

Section 74(3)(d) prohibits the requesting employee from using his State position to secure any unwarranted privileges for himself or his outside employer or other entity. One area of particular concern for those seeking elected office is the abuse of State time and resources. The Commission recognizes that seeking elected office may require the expenditure of a great deal of such time and resources. The law requires that campaigns be run on an employee's own time.[(8)] No State resources of any type, including telephones, office supplies, postage, photocopying machines or support staff assistance, can be used in the furtherance of the campaign for either position. Should the employee win either of the elections he contemplates, the same proscriptions against using State resources would also apply.

To avoid the appearance of improper influence under §74(3)(f), the requesting individual in his campaign should form a separate entity for the receipt of campaign contributions and refuse any campaign contributions or other support from persons or entities which are regulated by, negotiating with or in any manner doing business with or representing [the State agency] during his campaign.

Because the requesting individual has not been designated a policymaker by his appointing authority, he is permitted by the Commission's regulations to serve as a political party committeeperson. Unlike the circumstance where he is a compensated county legislator, Public Officers Law §73 does not prohibit his appearance before State agencies (other than [his employing State agency]) as a non-paid political party committeeperson so long as those matters are unrelated to his [State agency] responsibilities. Nevertheless, State agencies may question whether the requesting individual is appearing on behalf of the State or on behalf of [ ] County. It is to prevent such confusion of motives that Public Officers Law §74 precludes the employee from appearing before any State agency on behalf of [ ] County, whether as a Legislator or committeeperson.[(9)]

The Commission's decision in this matter is distinguished from an earlier decision, Commission's Advisory Opinion No. 92-16, where the Commission determined that an individual serving as a leasing agent for a State agency was prohibited by Public Officers Law §74 from seeking election to a town councilmember position in the territory over which he had negotiation responsibilities. The Commission determined that:

. . . it is conceivable that political opponents would accuse the leasing agent of using his or her office to secure political advantage, that official State activities are influenced by the contributions and supportof (State agency) clients and that the objectivity of negotiations on behalf of (the State agency) could be questioned. It is those types of suspicions that the law was enacted to dissuade.

In the present case, the requesting individual does not now perform services for the State which, if he were to seek political office in [ ], would cause suspicion among the public that his State responsibilities are affected by his political activities. To be prohibited by Public Officers Law §74, his actions must provide a reasonable basis for such public suspicion. The Commission does not find reasonable basis for such suspicion under the set of circumstances related in this request.

Conclusion

Because he has not been designated a policymaker, the Commission's regulation prohibiting serving on political committees does not apply to him. The Commission concludes that it is not a Public Officers Law §74 violation for the [State employee] to seek election and hold office in the [ ] Legislature, or to serve as a member of the [ ] County Democratic Committee, provided that he comply with the foregoing discussion. Should specific conflict of interest concerns arise during the course of or subsequent to the election, the Commission will consider the circumstances at that time. To avoid a Public Officers Law §74 violation if elected as a County Legislator or while serving as a member of the [ ] County Democratic Committee, the individual must not render services on behalf of the County before any State agency.

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.

All concur:

Joseph M. Bress, Chair

Barbara A. Black
Angelo A. Costanza
Robert E. Eggenschiller, Members

Dated: March 8, 1993

Endnotes

1. [Footnote deleted.]

2. Information supplied to the Commission by [the State agency].

3. The requesting individual advised the Commission that these responsibilities require that he recruit and train [athletes] interested in participating in the program and that he serve as liaison between those [athletes] and the programs and associations seeking their services.

4. Chapter 813 of the Laws of 1987, as amended.

5. The Attorney General's opinion also cites the landmark case on the question of incompatibility of offices, *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874), in which the Court states:

Incompatibility between two offices, is an inconsistency in the functions of the two. . . . The offices must subordinate, one the other, and they must, *per se*, have the right to interfere, one with the other, before they are incompatible at common law.

The court focused on whether a conflict existed between the obligations of both positions held, rather than the actual candidacy of the individual.

6. These programs are conducted pursuant to [legal citation deleted.]

7. [State agency] officials provided the following data for State aid funding for FY 1992-93 in [ ] County: [ ].

8. Although he would remain subject to Public Officers Law §§73 and 74, an employee may consider taking a leave of absence to avoid potential conflicts of interest issues arising from the campaign. The Commission notes that granting the request is a matter of administrative discretion.

9. It is important to note that Civil Service Law §107 contains safeguards for civil service employees of the State or any civil division against discriminatory practices based on political

affiliations. No appointments, selections to or removals from an office or employment can be affected or influenced by political opinions or affiliations. The law prohibits the use of a State authority or official position to coerce, intimidate or otherwise influence State employees to give money or service or any valuable thing for any political purpose or influence the political action of any person or body or to interfere with any election. These prohibitions provide that civil service officers and employees may not be compelled or induced to pay or promise to pay any political assessment or contribution.

Election Law §17-158 similarly prohibits those who hold public office, or are being nominated or seeking a nomination therefor from corruptly using or promising to use, directly or indirectly, any official authority or influence possessed to secure or aid in securing any office or public employment. Such Election Law restrictions include prohibitions versus making offers to procure any nomination or appointment for any public office or place or accepting or requesting payment or contribution of any valuable consideration, or upon an understanding or promise thereof.

Finally, any State employee whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency must not violate the "Hatch Act" (5 USCA §1501 *et seq*.). The Hatch Act restricts the political activity of individuals principally employed by State or local executive agencies with such programs. Such restrictions include prohibitions against candidacy for public office in partisan elections, the use of official authority or influence for the purpose of interfering with or affecting the results of an election or a nomination for office and against directly or indirectly coercing contributions from subordinates in support of a political party or candidate. Opinions concerning the Hatch Act may be obtained from the United States Merit Systems Protection Board.