

New York State Ethics Commission

Advisory Opinion No. 95-3: Determination of "former agency" for purposes of application of the post-employment restrictions of Public Officers Law §73(8).

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [a State employee], of the New York State/Civil Service Employees Association Labor-Management Committees. He asks the Commission to determine the "former agency" of employees of labor-management committees for purposes of the post-employment restrictions of Public Officers Law §73(8)(a).

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 a Labor-Management Committee is the former agency and only former agency of the individuals it employs.

BACKGROUND

THE LABOR-MANAGEMENT COMMITTEES

A. History

In 1976, as a consequence of a severe financial situation, the State of New York laid off approximately 10,000 public employees. In response to this action, the State and the Civil Service Employees Association ("CSEA"), the State's largest union representing State employees, negotiated and funded a "Continuity of Employment Committee" ("CEC") to assist displaced employees in securing new jobs.⁽¹⁾ In 1979, the State, along with CSEA and the Public Employees Federation, renewed the CEC "and expanded its mandate to include work environment and productivity issues." In that same year, the State and the United University Professions created their first joint labor-management committee on employment. Since that time, the State and the public employee unions representing its workers have created joint labor-management committees to meet the needs of a changing work environment.

Since their creation, these committees have examined issues and developed pilot projects, several of which have culminated into on-going programs funded by specific articles of the various collective bargaining agreements (e.g., employee assistance programs, day care programs). The labor-management committee structure also serves as "a vehicle for both sides to examine particularly perplexing issues in a less adversarial forum [i.e., outside the collective bargaining process] and begin to seek a common ground for resolution."⁽²⁾

B. Funding

Labor-management committees are funded through the collectively negotiated agreements.⁽³⁾ For auditing and accounting purposes, these funds are allocated to a State agency code designated "Labor-Management Committee." All personal and non-personal service expenditures of the committees are made from this agency code. The Governor's Office of Employee Relations ("GOER") Division of Administration ("Division") serves as the financial officer to all of the labor-management committees by preparing certificates of appropriation, monitoring expenses, assisting in budget preparation and submitting monthly expenditure reports to the committees. The Division also pre-audits all committee expenditures prior to final approval by the Office of State Comptroller. Labor-management committee funding remains separate from the GOER operating budget.

Once the funding has been appropriated, the Executive Board ("Board")⁽⁴⁾ of each labor-management committee reviews and approves the programmatic activities of the committee. The Board consists of the Director of GOER and the President of the respective union, or their representatives. Rank and file union members and management representatives may also serve on the Board.

C. Staffing

Because of the dual nature of the labor-management committees, both GOER and the union must review and approve appointments of prospective employees of the committees. Once a candidate has been agreed upon, the Division prepares the paperwork for appointment, following the Budget Director's approval process utilized to hire any non-competitive State employee. Labor-management committee employees receive all the benefits of full-time State employees, including a State-issued pay check, health insurance, retirement benefits and leave accruals.

The staff members of the labor-management committees generally regard themselves as "neutral" employees, i.e., neither labor nor management, and they are identified for administrative purposes as employees of the "Labor-Management Committee" State agency. However, GOER's Division acts as administrative officer to the committee and their employees by processing their payroll, travel vouchers and timecards, and by providing personnel and benefit information. On occasion, GOER may also supervise the leave activity of certain committee employees (e.g., labor-management committee Directors) by approving their official timecards.

THE CSEA LABOR-MANAGEMENT COMMITTEE

The CSEA Labor-Management Committee ("Committee") is the largest of the labor-management committees, employing approximately 20 staff persons to administer \$3 million annually in collectively negotiated programs, benefits and initiatives in the following areas: labor-management training; occupational safety and health; career and skills enhancement; quality of work life and productivity; and employment security.⁽⁵⁾ The Director of the Committee meets with representatives of the Executive Board on a quarterly basis to discuss program administration and to seek policy guidance and direction. The Committee may also utilize the expertise of both GOER and CSEA employees when developing Committee programs (e.g., safety and health, training). The Director of the Committee has indicated that GOER's Division

for Administration "provides administrative support, personnel, finance and office services" to the Committee.⁽⁶⁾

DISCUSSION

Public Officers Law §73(8)(a) provides that:

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation, or association in relation to any case, proceeding or application or other matter before such agency.

This subdivision's two-year bar is absolute with respect to a former employee's appearing, practicing or receiving compensation for services rendered before the State agency which employed him or her. Thus, in applying this bar, it is critical to identify the former agency of the former employee.

While the Commission has been asked to consider what agency constitutes the "former agency" for the staff of the Committee, it must first determine whether the employees of the Committee are State employees. The post-employment restrictions of Public Officers Law §73(8) will apply only if they are.

The Commission considers a number of factors in making this determination. These include whether the individual is compensated, whether he or she receives the rights and benefits of a State employee (e.g., health insurance, leave credits, participation in the State's retirement system, eligibility for workers' compensation and unemployment insurance coverage) and whether he or she is subject to the direction of a State agency in the performance of his or her official duties. This last element is essential to a finding of employment. *Hardy v. Murphy*, 29 AD2d 1038 (3rd Dept. - 1968), *Lieberman v. Gallman*, 41 NY2d 774 (1977).⁽⁷⁾

In the instant matter, Committee employees are compensated by the State and receive all the benefits of State employees. In addition, the State directs these individuals in the performance of their official duties to the extent that (1) the Director of GOER serves on the Board that sets the policy direction of the Committee, which serves to define the duties of its employees (2) all employees hired by the Committee must be acceptable to the Director of GOER and (3) all Committee employees are required to comply with the administrative procedures and policies of the State.

In determining whether an individual is covered by Public Officers Law §73, the Commission has also considered the nature of the work performed. In [Advisory Opinion No. 93-7](#), the Commission noted that an individual hired on contract to function as a director of a State facility performed the same duties as other State employees serving as facility directors and that such individual was "doing the work of the State." The Commission found him to be a State employee. In [Advisory Opinion No. 90-2](#), the Commission held that employees of a board, the

function of which is to dispense funding to legal service organizations, are carrying out a "public function" on behalf of the State.

Here, Committee employees administer specific programs that are derived from and funded by the State's collective bargaining agreement with CSEA. It is clearly within the State's interest, and indeed its contractual responsibility, that the terms of the negotiated agreement are carried out. Employees whose duty it is to administer the terms of these agreements are performing a public service on behalf of the State.⁽⁸⁾ They report to the Board regarding their job responsibility. Based on the information provided, the Commission concludes that Committee employees are State employees for purposes of the post-employment proscriptions of Public Officers Law §73(8).

The next issue, then, is defining the "former agency" of former Committee employees. The Commission considers whether the Committee itself constitutes the former agency, or whether it is GOER, or whether it is the Committee and GOER.

GOER was created by Chapter 491 of the Laws of 1969 to "act as the Governor's agent in conducting collective negotiations, to assure the proper implementation and administration of agreements reached pursuant to such negotiations, and to assist the Governor and direct and coordinate the State's efforts with regard to the State's powers and duties under the Public Employees' Fair Employment Act."⁽⁹⁾ It is part of the Executive Department, and its Director is appointed by and holds office at the pleasure of the Governor.⁽¹⁰⁾

The Committee, which was created seven years after GOER was established, serves a different function. At first, it assisted displaced workers in securing jobs. It has since evolved into a non-adversarial entity dealing with many matters. Decisions are made by the Executive Board, which represents both management and labor. Its employees are bound to be "neutral." The mission of the Committee is twofold: (1) to act as a "safety valve" for both labor and management to discuss complex issues that can threaten the delicate negotiating process and (2) to administer various provisions of the collectively negotiated agreement.

While both GOER and CSEA have a significant stake in this mission, the role of the Committee as an entity is separate and distinct from either. Indeed, neither side may act independently of the other in this forum. Decisions regarding hiring and firing, financial expenditures, and policy and program initiatives must be by agreement of representatives of both labor and management.

Although GOER acts as both the administrative and financial arm to the Committee, this is more a matter of administrative convenience.⁽¹¹⁾ That the Committee maintains a separate State agency code and that GOER takes painstaking steps to ensure the funding and administrative activities of the Committee remain separate from its operation is further evidence of the Committee's independence.

While in some circumstances the Commission has found certain individuals who worked for two agencies to have dual former agencies ([Advisory Opinion No. 90-22](#)), those situations are clearly distinguishable. The employees of the Committee act on behalf of the Committee and not on

behalf of GOER. Thus, the Commission concludes that for purposes of Public Officers Law §73(8), the Committee is the sole former agency of its employees.

Finally, the Commission's conclusion is not altered by the position of the Director of GOER as a member of the Executive Board of the Committee. The Commission has previously held that when an agency head sits as a member of a board or council, that body does not thereby become part of the agency. "To find otherwise would compromise the integrity and independence of those boards and councils."⁽¹²⁾

Consequently, for a period of two years following their termination from State service, former Committee employees may not appear or practice before the Committee or receive compensation for services rendered on any matter before the Committee. These individuals may appear before GOER or other labor-management committees during this period without violating the two year bar provision.⁽¹³⁾

CONCLUSION

The Commission concludes that, for purposes of applying Public Officers Law §73(8), the New York State/CSEA Labor-Management Committee is the former agency and only former agency of the individuals it employs.

This opinion, until and unless amended or revoked, shall be binding on the Commission in any subsequent proceeding.

All concur:

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

Chair Joseph M. Bress recused himself from discussions and voting on this opinion.

Dated: January 17, 1995

Endnotes

1. Governor's Office of Employee Relations - 1993-4 Report to the Legislature on the Activities and Expenditures of the Labor-Management Committees, p.2.
2. Id., p.2-3.
3. In the 1994-5 fiscal year, \$39.9 million was appropriated to carry out the terms of the State's collective bargaining agreements.

4. The Executive Board is also referred to as the Executive Committee.
5. Historically, these programs operated as separate labor-management committees and to some extent, continue to be funded on an individual basis. It is for this reason the New York State/CSEA Labor-Management Committee is technically referred to in the literature as *Committees*. For purposes of this analysis, we will refer to the Committee in the singular.
6. Request letter from [the requesting individual], dated [].
7. See also Commission [Advisory Opinion No. 93-7](#).
8. See for example, Agreement between The Civil Service Employees Association, Inc. and the State of New York - Operational Services Unit (1991-95). Article entitled "Conclusion of Collective Negotiations."
9. Executive Law, Article 24, Section 650 - Statement of Policy.
10. Executive Law, Section 652.
11. The Commission has been informed by GOER that several other labor-management committees operate with as few as two employees. Consolidating the administrative and fiscal operations of each committee within the Division is clearly an appropriate use of State resources and personnel. It should be noted that GOER assesses each labor-management committee a percentage of its funding to support the cost of providing these services.
12. See [Advisory Opinion No. 89-3](#).
13. In addition, since the Committee is a State agency, former Committee employees would be prohibited from appearing, practicing, communicating or otherwise rendering services before any State agency or receiving compensation for such services in relation to any case, proceeding, application or transaction with which they were directly concerned or personally participated in, or which was under their active consideration during their State service.