

New York State Ethics Commission

Advisory Opinion No. 91-20: Whether it is a violation of Public Officers Law §§73 or 74 for the commissioner of the Department of Health to receive an annual salary of \$61,601 from Health Research, Incorporated, for his services as president of that corporation.

Introduction

The Office of the Counsel to the Governor has requested an opinion as to whether it would be a violation of Public Officers Law §§73 or 74 for the new State commissioner of health to receive an annual salary of \$61,601 for his services rendered as president of Health Research, Incorporated ("HRI"), a private not-for-profit corporation that is closely affiliated with the Department of Health ("DOH"), in addition to the statutory salary established by Executive Law §169.

Pursuant to the authority vested in it by §94(15) of the Executive Law, the New York State Ethics Commission ("Commission") hereby renders its opinion that the commissioner of health may receive the salary for his services as president of HRI, consistent with the parameters of Public Officers Law §§73, 74 and the regulations of the Commission, as outlined in this Opinion.

Background

The Position of Commissioner

Pursuant to Public Health Law §203, the commissioner of health is a physician, a graduate of an incorporated medical college, has at least twenty years' experience in the actual practice of his profession, and has skill and experience in public health duties and science. The commissioner's general powers and duties include:⁽¹⁾

1. taking cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto;
2. exercising general supervision over the work of all local boards of health and health officers;
3. exercising general supervision and control of medical treatment of patients in the state institutions, public health centers and clinics in the department; and
4. enforcing the public health law and the sanitary code.

On August 20, 1991, the Governor announced the nomination of Dr. Mark Chassin to fill the position of commissioner of health, vacant since May 14, 1991. The press release indicated that: "as health commissioner, Dr. Chassin would receive the statutory salary of \$98,399."⁽²⁾ He would

receive an additional \$61,601 as president of Health Research, Inc., a not-for-profit corporation operated by the Health Department." Previous commissioners of health have served as president of HRI without pay.

Relationship of the Department of Health to HRI

In 1953, DOH officials established HRI as a not-for-profit corporation. HRI's main purposes are to assist in developing and increasing DOH facilities and to solicit, accept and administer federal, state and private financial resources to support DOH research and to finance and conduct related research studies.⁽³⁾

HRI is recognized in State Finance Law §53-a as one of several "membership corporations closely affiliated with specific state agencies and whose purposes are essentially to support, supplement or extend the functions and programs of such state agencies."⁽⁴⁾

HRI maintains its executive offices at DOH's central administration facilities in Albany and has operating divisions in Albany and Buffalo. Most of HRI's major research projects are carried out in State facilities, using State scientists and available administrative and laboratory resources.⁽⁵⁾ During fiscal year 1990-91, HRI had net revenues totaling \$75.1 million.⁽⁶⁾

HRI is governed by a board of directors, the majority of whom are DOH officials.⁽⁷⁾ The by-laws provide that the commissioner of health serves ex-officio, as a director. Directors may not receive any salary or compensation for their services. The by-laws direct that the president of the corporation be elected by a majority vote of the board of directors at the annual meeting. All past commissioners of health have served as the president of HRI. The by-laws direct that the president:

[S]hall generally and fully administer the daily affairs of the corporation. He [the President] shall present at each annual meeting of the Board a report on the condition of the corporation. He shall cause to be called, regular and special meetings of the Board in accordance with these By-Laws. The President shall also preside at all meetings of the Board, and do all that is necessary to carry out the general policies and directives issued and promulgated by the Board.⁽⁸⁾

The by-laws provide that any officer of HRI shall receive a salary or compensation as determined by the board of directors.⁽⁹⁾

HRI employs an executive director who oversees its administrative functions and reports to a DOH official who is directly responsible to the commissioner.⁽¹⁰⁾

As a not-for-profit corporation, HRI is not a State agency or a State public benefit corporation. Neither HRI nor any of its employees is subject to the State Civil Service Law; its employees are not considered State employees for purposes of insurance and leave benefits available to other State employees.⁽¹¹⁾

HRI employs approximately 1,200 administrative and technical support staff.

DOH and HRI operate under the terms of an operating contract, approved by the State Comptroller and the Attorney General, which specifies the rights and obligations of each party.⁽¹²⁾ The most recent operating contract is dated April 1, 1991. The major provisions of this contract are the following:

1. DOH is responsible for the overall supervision and direction of HRI's activities.
2. HRI pays the State monthly for a share of DOH's overhead costs (personal services, facilities and support services) applicable to HRI research at a rate subject to the Comptroller's approval.⁽¹³⁾
3. The State subsidizes HRI's annual net operating loss, at a rate subject to the Comptroller's approval.⁽¹⁴⁾
4. Contract fees, interest income and revenue from inventions are retained by HRI and deposited into HRI's Intracorporate Fund ("ICF") and are not used in computing HRI's annual loss or profit.⁽¹⁵⁾
5. HRI may not acquire or lease real property, vehicles, etc. or purchase any equipment in excess of \$10,000 without the approval of the Division of the Budget ("DOB").
6. The Comptroller reviews HRI's accounting and financial reporting system.
7. The Comptroller and DOB retain the right to inspect HRI's records for up to six years.
8. HRI shall indemnify the State for any damages, fines or judgments.
9. HRI will conform to the applicable State policies for reimbursement for travel expenses and for the purchase of supplies and equipment whenever feasible.

In addition to the operating contract, HRI licenses DOH's patents under a separate agreement between the two parties. The DOH patent policy provides that HRI shall serve as the technology transfer agency for DOH.⁽¹⁶⁾ Currently, HRI administers approximately 55 DOH inventions, 21 of which have been licensed to private sector companies, for which approximately 36 patents have been issued or are pending. HRI receives royalties and other forms of direct payments for the use of the licenses or patents. DOH permits HRI to retain the revenues received from royalties and licensing fees as part of HRI's Intracorporate Fund, which is not actively monitored by the Comptroller and which is not used to offset HRI's net operating losses.⁽¹⁷⁾

Discussion

Pursuant to Executive Law §94, the Commission has jurisdiction to interpret and enforce the provisions of Public Officers Law §§73 and 74 with respect to State officers and employees.⁽¹⁸⁾ Section 73 addresses the business or professional activities of State officers and employees and contains certain post-employment restrictions. Section 74 sets forth the Code of Ethics (which existed prior to the Ethics in Government Act of 1987) and standards of ethical conduct. Pursuant to the authority granted under Executive Law §94(16)(a), the Commission has adopted regulations pertaining to the outside activities of State officers and employees and limitations on their receipt of honoraria and reimbursement for travel expenses.

This opinion shall apply the Public Officers Law and the regulations of the Commission to the proposal to pay the commissioner of health a salary for his services as HRI's president.

Public Officers Law §73 places certain restrictions on the compensated professional and business activities of State employees.⁽¹⁹⁾

Previous commissioners of health were not compensated for their services as president of HRI; therefore, this issue under Public Officers Law §73 did not arise before.

Public Officers Law §73 applies to a State officer or employee acting in his or her official State capacity, and it affects his or her capacity to act as a private citizen engaged in certain outside business and professional activities.

Public Officers Law §73(7)(a)

Public Officers Law §73(7)(a) states the following:

No . . . state officer or employee other than in the proper discharge of official duties, . . . shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation, in whatever form, for the appearance or rendition of services by himself or another in relation to any case, proceeding, application or other matter before a state agency where such appearance or rendition of services is 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.

In [Advisory Opinion No. 89-2](#), the Commission addressed a similar issue when it determined that Public Officers Law §73(7) does not permit a State employee, acting as executive director of a not-for-profit corporation from which he receives compensation, to sign a certification portion of an application on behalf of the private organization to be submitted to another State agency to obtain State funding. As the Commission stated in [Advisory Opinion No. 89-2](#):

The Commission finds that the individual, when acting in his capacity as Executive Director of the [private not-for-profit organization], is not acting in "the proper discharge of official duties" as a State employee; that the individual could be indirectly, if not directly, receiving compensation from the funds applied for, or, at the least, is compensated for his services as Executive Director in which capacity he signed the Certification . . .

Thus, Public Officers Law §73(7) would prohibit the commissioner of health, while serving in his capacity as president of HRI, from receiving compensation from HRI for his appearance or rendition of services on behalf of HRI, in any of the types of matters listed in §73(7) that would come before any State agency. The Commission concludes that the commissioner of health, upon taking this office and the position of HRI president, should direct the staff at HRI to make any

such appearances to avoid any potential §73(7)(a) problem and to screen him from all such activities.

Public Officers Law §74

The Code of Ethical Conduct contained in Public Officers Law §74(2) states:

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 official duties in the public interest.

The Rule is further explained by Standards which provide, in pertinent part, 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.

. . . .

- c. No officer or employee of a state agency, . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.
- 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.

. . . .

- 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 public trust.

. . . .

The Commission must determine whether there is the appearance of a conflict of interest for the commissioner of health to serve as a compensated officer of HRI. Prior opinions of the Commission have addressed related, but factually different, applications of Public Officers Law §74 to other cases where a State employee served, in some capacity, for a not-for-profit corporation or a for-profit corporation:

- In [Advisory Opinion No. 89-7](#), the Commission prohibited a State employee from serving as an uncompensated director of a not-for-profit corporation and its for-profit subsidiary that conducted business with her employing State agency.
- In [Advisory Opinion No. 90-25](#), the Commission concluded that a policy-making employee may not serve as an uncompensated member of the governing board of an entity that is regulated, licensed or has its rates set by the policymaker's State agency.

- In [Advisory Opinion No. 91-7](#), the Commission stated that SUNY campus presidents may not serve as compensated members of the boards of directors for banks in which their campuses deposit funds because of the campus' role in the selection process.

The instant circumstances may be distinguished as follows. In the advisory opinions cited above, the not-for-profit corporation, the regulated entities and the banks all had a different relationship with the pertinent State agency than HRI has with DOH. Those private entities were not established, dominated or controlled by the State agency involved. In each case, the private entity with which the State employee sought to serve had either a strictly business or regulatory relationship with the State agency. There was an additional element of competition from other entities regulated or doing business with the State agency which could perceive a conflict of interest by virtue of the State employee's service to their competitor.

Conversely, HRI has a common purpose with DOH; its board of directors is dominated by DOH officials, it performs virtually all of its activities on behalf of the State agency and there is not a competitor who could call "foul" by the commissioner of health's service as president of HRI. The Commission concludes that the special nature of HRI and its relationship with DOH warrants distinction from regulated entities or entities that conduct business with the Department.

The Commission also considered that, while it is true that DOH and HRI are closely affiliated, DOH officials dominate the corporation's board, and DOH and HRI share most of the same goals and purposes, there are circumstances in which the interests of the two entities differ. For example:

1. HRI has an interest in providing the lowest rate of reimbursement to the State for the use of DOH facilities and resources. DOH's and the State's interest are to receive the highest rate of reimbursement;
2. DOH and the State have an interest that HRI's net operating loss be as low as possible to preserve State funds. HRI has no such compelling interest; and
3. HRI has an interest in remaining DOH's technology transfer agent. DOH may have reasons to discontinue this policy and retain the patent rights for the benefit of the State.

However, as stated in the corporation's by-laws, HRI's purposes "are to assist in developing and increasing the facilities of DOH" and "to support DOH research," and, considering its DOH dominated Board, DOH officers and employees must place DOH interests above HRI's in making decisions. Therefore, in this circumstance, there is no appearance of a conflict of interest between the DOH commissioner's service to HRI (whether paid or unpaid) because HRI's purpose is to advance DOH's interests.

There remains the question of how best to insure that the commissioner of health will place DOH's concerns above those of HRI to avoid the appearance of a conflict of interest between the two entities. For this purpose, the Commission need only look to the Code of Conduct of Public Officers Law §74 which covers all State employees in all that they do. Should the commissioner of health find himself in a position in his capacity as president of HRI that would place HRI's interests over those of DOH, he should recuse himself from taking any action as president of HRI because of the conflict of interest.

Limitations on the Receipt of Honoraria

The Commission's regulations, 19 NYCRR Part 930.3, states in relevant part, the following:

- a. A covered individual may accept an honorarium, if
 1. the honorarium is not to be received for services rendered for or on behalf of an individual who, or on behalf of an organization, or any of its officers or members of the board of directors, which
 - i. is regulated by, or regularly negotiates with, appears before [in] other than a ministerial matter, does business with or has contracts with either the State agency employing the covered individual in his or her official capacity on behalf of the agency, or
 - iv. has received or applied for funds from the State agency employing the covered individual at any time during the previous calendar year, up to and including the date of the proposed receipt of the honorarium, . . .

The nominee should be cognizant that he will not be able to accept an honoraria or receive reimbursement for travel in his position as president of HRI that he would be barred from receiving as commissioner of health. Under Part 930, as commissioner of health he is barred from accepting honoraria from entities which relate with DOH. Although the president of HRI is not a State position, as commissioner, he is barred from accepting such honoraria or travel reimbursement. [\(20\)](#)

Outside Activities

The Commission's regulations, 19 NYCRR Part 932.1, states in relevant part:

- b. "Covered individual" shall mean the four statewide elected officials and State officers or employees.

Additionally, Part 932.3 states:

- a. No covered individual shall engage in any outside activity which interferes or is in conflict with the proper and effective discharge of such individual's official duties or responsibilities.

. . . .

- c. No individual who serves in a policy making position other than a non-paid or per diem basis, or who serves as one of the four Statewide elected officials, shall expend time or otherwise engage in any private employment, profession or business, or other outside activity from which more than nominal compensation, in whatever form, is received or anticipated to be received without, in each case, obtaining prior approval from the State Ethics Commission.

....

Under the regulations, "nominal compensation" is defined as annual income in excess of \$4,000 for personal services rendered. As an individual who has been designated as serving in a policy-making position, the commissioner of health would have to complete an outside activity request to receive the compensation from HRI and have the request approved by both his appointing authority and the Commission.⁽²¹⁾ This approval must occur initially upon engaging in outside activities and be updated or a new request filed upon a change in circumstance, i.e., increase in outside compensation, additional outside activities, changes in duties of outside activity previously approved.

Conclusion

The Commission concludes that the commissioner of health may receive the proposed salary for his services as president of HRI without a violation of Public Officers Law §§73 or 74, or the Commission's regulations, consistent with the provisions of this Opinion.

The Commission is concerned that closely affiliated corporations such as HRI perform many functions for a State agency and remain outside the scope of the Public Officers Law. The Commission strongly urges that DOH (as well as State agencies with affiliated not-for-profit corporations), consider subjecting HRI's officers and employees to the provisions of Public Officers Law §§73 and 74, by contract or internal policy, to ensure that those officers and employees are governed by the same ethical standards as officers and employees of DOH. At least one State public benefit corporation has voluntarily made the provisions of the Public Officers Law applicable to the officers and employees of its closely affiliated not-for-profit corporation.

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

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza
Donald A. Odell, Members

Dated: September 16, 1991

Endnotes

1. See Public Health Law §206 for a full description of the Commissioner's powers and duties.

2. Executive Law §169.

3. HRI's by-laws, amended February 24, 1988, Article I, §2, state the following purposes of the corporation:

- a. to assist in developing and increasing the facilities of the DOH,
- b. to receive, hold and administer gifts or grants for the purposes of the corporation and consistent with the objectives of DOH, and
- c. to carry out all the functions of a corporation such as acquire property, borrow money, execute agreements, etc. to further the purposes of the corporation.

4. A number of other State agencies have benefited from the creation of separate not-for-profit corporations which administer and receive research grants. These corporations are not State agencies and would include, for example, the Welfare Research Institute (affiliated with the NYS Office of Mental Health), Research Foundation for Mental Hygiene, Inc. (NYS Office of Mental Retardation and Developmental Disabilities) and the State University of New York ("SUNY") and City University of New York ("CUNY") Research Foundations. While the respective State agencies maintain some degree of control over the corporations, they remain separate and distinct independent entities, whose employees are not State employees and, therefore, are not subject to the provisions of the Public Officers Law.

5. According to DOH, this organizational integration is designed to ensure that HRI's policies and practices remain consistent with, and in the best interests of, the State of New York, while providing the flexibility and responsiveness required to meet the changing needs of its research programs.

6. From its creation in 1953 through 1988, HRI has accepted and administered over \$350 million in research funding.

7. The by-laws do not require that DOH officials serve as members of HRI's board of directors. The 1990-91 board of directors consisted of: David Axelrod, Commissioner, DOH; Herbert Dickerman, Director, Wadsworth Center for Laboratories and Research; Andrew Gage, Associate Institute Director for Clinical Affairs, Roswell Park Memorial Institute; James Karr, Chief, Office of Scientific Administration, Roswell Park Memorial Institute; Robert Kistler, Director, Office of Institutional Management, DOH; Lorna McBarnette, Executive Deputy Commissioner, DOH; Peter Millock, General Counsel, DOH; Magdalena Ramirez, Director, Helen Hayes Hospital; Linda Randolph, Director, Office of Public Health, DOH; Raymond Sweeney, Director, Office of Health Systems Management, DOH; Thomas Tomasi, Director, Roswell Park Memorial Institute; Lee Van De Carr, Deputy Commissioner for Administration, DOH; Charles Wenner, Roswell Park Memorial Institute.

8. It is not expected that the services which the health commissioner performs as HRI president would in any way detract from the time and commitment required to fulfill the job responsibilities as health commissioner as it has not for prior commissioners.

9. Other officers of HRI specifically mentioned in the by-laws are a vice president (currently Lorna H. McBarnette, Acting Commissioner, DOH), secretary/treasurer (currently Lee J. Van de Carr, Deputy Commissioner for Administrative Officers, DOH), and the executive director. Currently the executive director receives a salary, while the secretary and treasurer do not.

10. According to HRI's executive director, he reports directly to the President of HRI or to the vice president of the Corporation.

11. ¹¹ HRI employees participate in the State retirement system and are eligible to participate in the State's health insurance system under the definition of a quasi-governmental entity that is eligible to apply to the President of the Civil Service Commission for participation.

12. The operating contract refers to HRI as "Party of the Second Part." Nowhere within the contract is HRI explicitly referred to as an "agent" of DOH or the State.

13. For the fiscal year ending March 31, 1991, HRI paid \$3.1 million to the State for overhead.

14. This amounted to \$721,000 for the year ending March 31, 1991.

15. As of March 31, 1991, the ICF had a \$3.4 million balance.

16. DOB and the Comptroller's Office have approved HRI's designation as technology transfer agent.

17. According to the executive director of HRI, the Intracorporate Fund ("ICF") is utilized for the following purposes:

- Corporate Reserve. An organization of the size of HRI (\$75 million/year, 1,200 employees) must maintain a reserve against unforeseen contingencies.
- Seed Money. Providing start-up funding for projects that are expected to result in obtaining outside funding in the future.
- Projects. Projects of special significance to DOH, when other sources of funding cannot be identified.
- Scientist Recruitment. ICF funds are used to provide supplemental items (research equipment, supplies) needed to attract scientists to DOH employment.
- Funding Continuity. External funding can be irregular, and sometimes it makes good sense to use ICF funds to continue support of a project for a defined time period while additional funding is sought.
- Technology Transfer Expenses. The costs of patenting and licensing DOH inventions, which HRI does in its role as technology transfer administrator, are taken from the ICF.

18. The Commission also interprets Public Officers Law §73-a which relates to financial disclosure filings and has no relevance to this inquiry.

19. For example, §73(4)(a) prohibits State officers and employees from selling goods or services to State agencies in excess of \$25 in the absence of public notice and competitive bidding.

Uncompensated outside business and professional activities are generally not covered by §73 but may be an issue under the Code of Ethics of Public Officers Law §74 and the Commission's regulations on outside activities.

20. By their nature, as defined in the Commission's regulations, honoraria are payments, fees or other compensation for services rendered **not related** to the State employee's official duties, which payment is made as a gratuity or an award or honor; e.g. for delivering a speech, writing or authoring an article or publication or attending a meeting or conference. [19 NYCRR Part 930.2(c)] Impliedly, since employers pay salaries to their employees, they are not likely to offer an honorarium to an employee. Further, since the commissioner of health's service as HRI president is arguably job related, (since he sits on HRI's board of directors in an ex-officio capacity), as the salaried president of HRI, the health commissioner is not eligible to receive an honorarium from HRI.

21. Counsel to the Governor has been delegated the authority to approve outside activity requests on behalf of the Governor for his appointees.

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