

# Advisory Opinion 10-01

Advisory Opinion No. 10-01: Workers' Compensation Board is the former agency of employees of the Office of the Workers' Compensation Fraud Inspector General for purposes of Public Officers Law §73(8)(a)(i).

## INTRODUCTION

The following advisory opinion is issued pursuant to, and in accordance with, Executive Law §94(15) in response to a request from the Special Counsel to the Chairman (“Chair”) of the Workers' Compensation Board (“WCB”), asking whether the WCB is the former agency of employees of the Office of the Workers' Compensation Fraud Inspector General (“WCFIG”) for the purposes of Public Officers Law §73(8)(a)(i), which sets forth the “two-year bar.” The purpose of the “revolving door” provisions is to provide reasonable assurance that a former State employee will not leverage his or her knowledge, experience and contacts gained in State service to his or her advantage or that of a client, thereby securing unwarranted privileges, consideration or action. Thus, the Commission renders its opinion that the WCFIG is not a separate entity from the WCB for purposes of applying the two-year bar. Former employees of the WCFIG, including the Inspector General, are prohibited from appearing or practicing before the WCB and from rendering services for compensation on any matter before the WCB for a period of two years after separation from State service.

## BACKGROUND

### **Workers' Compensation Board**

The WCB administers the provisions of the New York State Workers' Compensation Law (“WCL”). The WCB receives and processes workers' claims for benefits, employers' reports of injury, and medical reports from physicians and other health care providers. The WCB adjudicates and resolves all issues, and makes awards and findings to ensure that an entitled claimant receives benefits and medical treatment promptly. The WCB is comprised of thirteen commissioners who are appointed by the Governor for seven-year terms.

### **Office of the Workers' Compensation Fraud Inspector General**

The WCFIG was created pursuant to WCL §136, which was amended by Chapter 635 of the Laws of 1996 and became effective September 10, 1996. Pursuant to WCL §136(2), the Inspector General is appointed by and serves at the pleasure of the Governor, who fixes the salary for the position. The Inspector General is authorized to appoint, and to set duties and fix salaries for, assistant inspectors general and other staff. The Inspector General and other WCFIG employees are employed by the WCB, since their salaries are part of the WCB's budget and are paid from its appropriations. WCL §148 further provides that the reasonable and necessary traveling and other expenses of all WCFIG employees, including the Inspector General, shall be

paid from the State Treasury upon the audit and warrant of the Comptroller, upon vouchers approved by the Chair or Vice-Chair or Secretary of the WCB.

WCL §136(5) provides that the WCFIG shall have the following powers, duties and functions:

(a) to conduct and supervise investigations, within or without this state, of possible fraud and other violations of laws, rules and regulations pertaining to the workers' compensation system;

(b) to subpoena witnesses, administer oaths or affirmations, take testimony and compel the production of such books, papers, records and documents as the inspector general may deem to be relevant to an investigation undertaken pursuant to this section;

(c) to report to the attorney general, the insurance frauds bureau, or other appropriate law enforcement agency, violations found through investigations undertaken pursuant to this section and to provide such materials and assistance as may be necessary or appropriate for the successful investigation and prosecution of violations of this chapter;

(d) to submit a written report, on an annual basis, to the governor and to the chair of the board, listing all activities undertaken to the extent such activities can be disclosed pursuant to subdivision five of this section; and

(e) to recommend legislative and regulatory changes to the governor and to the chair of the board.

Pursuant to WCL §136(4)(i), the Inspector General and WCFIG staff have unfettered access to WCB records. WCL §136(5) prohibits the WCFIG from publicly disclosing information that is part of an ongoing investigation or prosecution. Reform legislation enacted in 2007 amended §136(5) to provide, however, that it is not considered "public disclosure" when the WCFIG apprises the Chair of ongoing investigations.

## **APPLICABLE LAW**

Public Officers Law §73(8)(a)(i) 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.

## **DISCUSSION**

Public Officers Law §73(8)(a)(i) is part of what is generally referred to as the "revolving door" provisions, which set forth the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate their employment with a

State agency. The purpose of the revolving door provisions is to provide reasonable assurance that a former State employee will not leverage his or her knowledge, experience and contacts gained in State service to his or her advantage or that of a client.

Subparagraph (i), known as the two-year bar, prohibits a former State officer or employee, for two years following his or her separation from State service, from (a) appearing or practicing before his or her former agency, or (b) rendering services for compensation, in relation to any case, proceeding, application or other matter before his or her former agency (the so-called “back room services” clause). It is not necessary for the former agency to know that the former employee is working on the matter for there to be a violation. *See*, Ethics Commission Advisory Opinion No. 90-7.<sup>1</sup>

To date, neither this Commission, nor the prior Ethics Commission, has considered whether the WCB constitutes the "former agency" of former WCFIG employees for purposes of the two-year bar. Consideration of the purpose for the post-employment restrictions and two Ethics Commission precedents, however, support our determination that the WCB is the former agency of former WCFIG employees. Simply put, after having been the WCB's “watch dog,” a former WCB Inspector General or former WCFIB staff members may not appear before the WCB or render services for compensation with respect to any matter before the WCB within two years after leaving the WCFIG.

In Advisory Opinion No. 00-05, the Ethics Commission determined that the Uninsured Employers Fund (“Fund”) is within the WCB, rather than separate from and independent of the WCB, for purposes of Public Officers Law §73(8)(a). As a result, the Ethics Commission concluded that Fund employees were prohibited by the two-year bar from appearing or practicing before the WCB and from rendering services for compensation on a matter before the WCB for a period of two years following their separation from State service. The Ethics Commission considered the following factors in making its determination: the Fund is not defined in the statute as separate from and independent of the WCB; the Fund is financially supported by and administratively operates under the auspices of the WCB; by statute, the WCB Chair appoints "*an employee of the Board . . . to serve as the representative of the Fund . . .*" and also appoints all other Fund personnel [emphasis added]; the Fund has not been assigned an independent, five-digit agency code by the Office of the State Comptroller ("OSC"), which codes are used by OSC to identify freestanding agencies for payroll, accounting, appropriation and auditing purposes; the Fund operates under the WCB's Bureau of Compliance and Regulatory Services, which is one of the WCB's divisions; and the Fund does not submit a budget request independent of the WCB nor is it physically segregated from other the WCB operations.

Consideration of the factors set forth in Advisory Opinion No. 00-05 leads to the conclusion that WCFIG is part of the WCB for purposes of applying the two-year bar. No section of the WCL states that the WCFIG is a separate and independent entity. Rather, the applicable section of the WCL provides that WCFIG shall investigate violations of the laws and regulations pertaining to the operation of the workers' compensation system, which is integral to the WCB.

The WCFIG website is part of the WCB website, which states:

“The Office of the Inspector General . . . of the Workers' Compensation Board . . . was created in 1996 *as part of the WCB* to investigate violations of the laws and regulations pertaining to the operation of the workers' compensation system.” [emphasis added]<sup>2</sup>

The WCFIG does not have an independent funding source. The activities of the WCFIG are funded by assessments on insurance carriers and self-insured employers, the same as the other programs administered by the WCB. WCL §151 requires the Chair to determine the WCB budget, including the costs associated with the WCFIG, and also requires the Chair to submit this request to the Director of the Budget for approval. In fact, the request for the Director of the Budget's approval lists the WCB as the agency and the WCFIG as a bureau within the WCB. The total cost is then assessed quarterly pursuant to the formula set forth in WCL §151. The WCB's budget does not segregate funds for the Inspector General or other WCFIG employees, as they are included in the budget with the WCB employees. Nor does the WCB take any steps to separate the funding and administrative activities of the Inspector General or the WCFIG from the operation of the WCB. Based on information provided, all Inspector General and WCFIG records list the same agency code as the WCB.

Furthermore, any procurement documents pertaining to goods and services purchased for the WCFIG are issued by the WCB. WCFIG contracts relating to such procurements are signed by appropriate the WCB staff on behalf of the WCB. Goods and services are paid out of the WCB's budget. The WCB provides all computers, software, equipment, telecommunications devices and office supplies. The Inspector General and other WCFIG staff are required to attend all the WCB employee trainings, and they are also required to comply with all the WCB personnel, ethics and conflict of interest policies. Pursuant to Commission Regulation pertaining to outside activities found at 19 NYCRR Part 932.3(d), policy-making employees of the WCFIG are required to obtain prior approval from their “approving authority” to engage in outside activity where such activity results in annual compensation greater than \$1,000. The Chair of the WCB approves such requests.

Finally, the WCFIG and the WCB do not maintain separate offices. The WCFIG is located in the WCB District Offices and in the Executive Offices at 20 Park Street in Albany, New York.

Advisory Opinion No. 99-16, in which the Ethics Commission concluded that, because the WCB is centrally operated and administered, its eleven regional offices that are geographically spread throughout the State cannot stand alone as separate State agencies for purposes of the post-employment restrictions, also supports our determination in this instance.<sup>3</sup>

## CONCLUSION

The Commission determines that the WCB is the former agency of the Inspector General and WCFIG employees for the purposes of Public Officers Law §73(8)(a)(i) because the WCFIF is not separate from or independent of the WCB. Therefore, for a period of two years after termination from State service, the Inspector General and other WCFIG employees are prohibited from appearing or practicing before the WCB or from rendering services for compensation on any matter before the WCB.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the persons or entities 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 documents.

All concur:

Michael G. Cherkasky,

Chair

Virginia M. Apuzzo

John M. Brickman

Andrew G. Celli, Jr.

Richard D. Emery

John T. Mitchell

Joseph A. Spinelli,

Members

June 10, 2010

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<sup>1</sup> Pursuant to and in accordance with Executive Law §94(1), this Commission follows the Advisory Opinions that were published by the former State Ethics Commission (“Ethics Commission”).

<sup>2</sup> See, <http://www.wcb.state.ny.us/content/main/fraud/Fraudpg.jsp>

<sup>3</sup> On the other hand, neither Advisory Opinion No. 90-18 (Division of Tax Appeals determined to be separate entity from State Department of Taxation and Finance) nor Advisory Opinion No. 95-1 (Liquidation Bureau separate from the State Insurance Department) requires a different result. The relationship between WCFIG and the WCB is materially different than that between the Division of Tax Appeals and the Department of Taxation and that between the Liquidation Bureau and the State Insurance Fund because, among other things, the agencies at issue in those two matters both had funding mechanisms that were independent of their “host” agencies, which WCFIG does not. Similarly, in Advisory Opinion No. 95-3, the Ethics Commission held that the Governor's Office of Employee Relations was separate from the New York State/CSEA Labor-Management Committee (“Committee”), noting that, unlike the case with WCFIG and WCB, decisions regarding hiring and firing, financial expenditures, and policy and program initiatives were made by the Committee, representing the interests of both labor and management.