

**STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS**

Advisory Opinion No. 14-01:

Application of Public Officers Law Section 73(7)(a) to an individual who is a State employee due to his status as a Single Course Instructor (as defined in this Opinion) at the State University of New York.

INTRODUCTION

The following Advisory Opinion is issued in response to a written inquiry from John Doe.* Mr. Doe is an attorney in private practice. He represents clients before State agencies on a variety of issues, including ratemaking proceedings, cases to adopt or repeal a regulation, and licensing matters. He is interested in becoming a part-time academic employee at one of the State University of New York (“SUNY”) campuses to teach a single course in environmental law, a field within his area of expertise.

The dilemma for Mr. Doe (and other similarly situated individuals) is as follows: Should Mr. Doe teach a single environmental law course at a SUNY campus, he would, under the Public Officers Law, be prohibited from practicing the very type of law that makes him particularly qualified to teach the class. This predicament arises due to the fact that, under the present employment regime at SUNY, part-time academic employees are considered to be employees of the University and, therefore subject to the Public Officers Law. Among the restrictions that would apply to Mr. Doe is the provision, contained in §73(7)(a), prohibiting a State employee from receiving compensation for services before any State agency, including involvement in rate making and licensing proceedings, as well as proceedings to adopt or repeal rules or regulations having the force and effect of law. These activities are the staples of Mr. Doe’s private practice.

The New York State Joint Commission on Public Ethics (“Commission”) finds that such a result contravenes public policy and does not effectuate the purpose of Public Officers Law §73(7)(a). Therefore, pursuant to the authority vested in the Commission by Executive Law §94, the Commission renders its Opinion that Public Officers Law §§73(7)(a) and 73(12)¹ do not apply to individuals who are State employees merely because they serve as Single Course Instructors (as defined in this Opinion) at a SUNY institution. The Commission’s ruling is explained below.

* The requesting individual’s name and other identifying details have been changed or redacted.

¹ See n.7, *infra*, for an explanation of the inclusion of Public Officers Law §73(12) in this Opinion.

BACKGROUND

SUNY utilizes part-time academic employees to teach a wide variety of classes at its respective campuses. According to SUNY, a part-time academic employee is a person who teaches no more than one course a semester, often in an area that comports with his professional expertise.² Under various collective bargaining agreements to which SUNY is a party, part-time academic employees are classified as employees and not independent contractors. Under the Public Officers Law, SUNY institutions are State agencies.³ Consequently, like other employees of SUNY institutions, part-time academic employees are among the “State officer[s] and employee[s]” who are subject to the mandates in Public Officers Law §73.⁴

Section 73 of the Public Officers Law places a number of restrictions and prohibitions on the activities of State employees. As referenced above, Section 73(7)(a), prohibits a State employee from appearing or rendering services for compensation “in relation to any case, proceeding, application or other matter before a state agency” in connection with, among other things, “rate making,” the “adoption or repeal of any rule or regulation having the force and effect of law,” the “obtaining of grants of money or loans,” and “licensing” matters.⁵

DISCUSSION

As an initial matter, we must establish the contours of what constitutes a Single Course Instructor at a SUNY institution for purposes of this Opinion. A Single Course Instructor at a SUNY institution is an individual who meets all of the following criteria:

- (i) Teaches no more than one course a semester;

² Part-time academic employees, including Single Course Instructors (as that term is defined below), are often colloquially referred to as Adjunct Professors. Not all part-time academic employees, however, are Adjunct Professors, as the designation of a specific individual as an Adjunct Professor depends on criteria that may be unique to each SUNY campus.

³ See Public Officers Law §73(1)(g).

⁴ Public Officers Law §73(1)(i).

⁵ Public Officers Law §73(7)(a) states in full:

No statewide elected official, or state officer or employee, other than in the proper discharge of official state or local governmental duties, or member of the legislature or legislative employee, or political party chairman 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 rate making;
- (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.

- (ii) Has no guaranteed right to re-employment after the semester ends;
- (iii) Does not opt-in to become a paying member of United University Professionals;⁶
- (iv) Does not opt-in to the State retirement system;
- (v) Does not receive State health insurance benefits;⁷
- (vi) Does not have a formal role in campus or academic department decision-making; and
- (vii) Does not receive office space or support staff.

The Commission holds that a Single Course Instructor is not subject to Public Officers Law §73(7)(a). Public Officers Law §73(7)(a) does not – and should not – present a deterrent to person like Mr. Doe from sharing his expertise, through a circumscribed position at a public institution of higher learning, to educate the students of this State. Mr. Doe’s employment as a Single Course Instructor would play only a minor role in his professional life, and the overwhelming majority of Mr. Doe’s income would be derived from his legal practice. He would be subject to the Public Officers Law merely by operation of contract and not due to the innate nature of the work he seeks to perform as a Single Course Instructor. Moreover, his work in the private sector is precisely what makes him qualified to teach the specific class at SUNY. Given these circumstances, the Commission does not believe Public Officers Law §73(7)(a) was designed to reach this specific scenario and deprive the public institutions of New York of a pool of highly qualified educators.

The Commission’s decision here comports with Advisory Opinion No. 91-01, which was issued by the State Ethics Commission (“Ethics Commission”), a predecessor agency. In Advisory Opinion No. 91-01, the Ethics Commission determined that another provision of the Public Officers Law – Section 73(8) – was not intended to extend to particular individuals meeting specified and narrowly defined criteria. Specifically, that Advisory Opinion held that the two-year bar in Public Officers Law §73(8) does not apply to certain full-time students who were employed by the State on a part-time basis. In reaching this conclusion, the Ethics Commission noted that, “unlike ‘traditional’ State employees, students, appointed by State agencies, are generally ineligible for most benefits, such as health insurance, vacation or sick leave, or retirement plans, that are incident to State employment.” Additionally, the students “seldom have any rights to re-employment by the State or gain permanency in their positions.”

⁶ All SUNY faculty members, including Single Course Instructors, are automatically members of the State University Professional Services Negotiating Unit (the “Unit”). Members of the Unit receive limited non-State benefits. *See* Advisory Opinion No. 09-02. The United University Professionals, in contrast, is comprised of voluntary, dues-paying members and confers substantially more benefits to its membership.

⁷ Academic employees who teach more than one course a semester are automatically eligible for State benefits that are not available to Single Course Instructors. Consequently, a Single Course Instructor, by definition, is not eligible for State health insurance benefits. Nonetheless, this criterion is included to avoid any doubt that the receipt of State health benefits disqualifies an individual from the exemption set forth in this Opinion.

In short, the Ethics Commission reasoned, the employment of these individuals is based “on their student status.” Thus, “it is less likely, in the case of students that the public might reasonably question whether these individuals carried out their public responsibilities solely to acquire information and contacts that would increase their opportunities for private gains once they terminated their State service.” In other words, the Ethics Commission determined that the unfair advantage the post-employment restrictions in Public Officers Law §73(8) were designed to prevent is not a concern with respect to student employees.

Here, Mr. Doe’s employment with the State would be based on his status as a private practitioner of law. Indeed, it is precisely his experience in the private sector that makes him attractive to SUNY as a teacher. Much like the student employees, then, “it is less likely” that an individual teaching as a Single Course Instructor would be undertaking such duties to gain an untoward advantage. Similarly “it is less likely” that an employee of a State agency before which the individual ordinarily practices would be influenced by the individual’s status as a Single Course Instructor (assuming, of course, the employee even has knowledge of this fact). Consequently, the harm Public Officers Law §73(7)(a) seeks to prevent is essentially abated given these particular circumstances.⁸

CONCLUSION

Public Officers Law §73(7)(a) does not apply to individuals, like Mr. Doe, who are State employees merely because they serve as Single Course Instructors at SUNY campuses. Nothing in this Opinion should be construed to relieve such persons of other obligations or restrictions under the Public Officers Law.⁹

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.

Concur:

Daniel J. Horwitz, Chair

David A. Renzi

Paul Casteleiro

Michael A. Romeo, Sr.

Hon. Joseph Covello

Hon. Renee R. Roth

Seymour Knox, IV

George H. Weissman

Hon. Mary Lou Rath

⁸ Because this Opinion holds that Public Officers Law §73(7)(a) does not apply to Single Course Instructors, it follows that Public Officers Law §73(12), which imposes additional restrictions on individuals subject to Section 73(7)(a), also does not apply to Single Course Instructors.

⁹ As discussed in note 7, *supra*, Single Course Instructors are also exempt from the requirements of Public Officers Law §73(12).

Absent:

David Arroyo

LaShann M. DeArcy

Mitra Hormozi

Marvin E. Jacob

Gary J. Lavine

Dated: April 29, 2014