

STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS

IN THE MATTER OF AN INVESTIGATION OF

TRACY R. KINN,

Respondent.

DECISION

Alleged violations of §§ 73(5)(a) and 74(3)(d), (f),
and (h) of the Public Officers Law.

The New York State Joint Commission on Public Ethics (“Commission”), at its April 25, 2017 and May 23, 2017 meetings, considered the Hearing Officer’s Findings and Recommendations (“Recommendations,” attached as Exhibit A) in the Matter of an Investigation of Tracy R. Kinn (“Respondent”), a counselor at the New York State Division of Veterans’ Affairs (“DVA”). The Commission agrees with and adopts the Hearing Officer’s findings of fact. Further, the Commission accepts and adopts the Hearing Officer’s legal conclusion that there is insufficient evidence to support the charge that Respondent knowingly and intentionally violated Public Officers Law §§ 73(5)(a) and 74(3)(d), and (f). As set forth below, however, the Commission disagrees with and rejects the Hearing Officer’s legal analysis and conclusion of law with respect to Public Officers Law § 74(3)(h).

The Commission, on the facts presented at hearing and summarized by the Hearing Officer, reverses the Hearing Officer’s conclusion that Respondent did not pursue a course of conduct in violation of the public trust and, therefore, did not violate Public Officers Law § 74(3)(h). The Commission finds Respondent did not endeavor to pursue a course of conduct that would not raise public suspicion that she was likely to be engaged in acts that were in violation of her trust. Insofar as no civil penalty attaches to a violation of Public Officers Law § 73(3)(h), the Commission adopts the Hearing Officer’s Recommendations with respect to the civil penalty assessment, and no penalty is assessed in this matter.

As evident from the record, Respondent’s close relationship with a client of the DVA required her to take affirmative steps to distance herself from the direct delivery of DVA services to that client, which she failed to do. Moreover, the DVA was wholly deficient in meeting its responsibility as an agency of the State to create, foster and insist upon an environment where personal relationships between employees and clients—and potential conflicts of interest arising therefrom—are identified and discouraged.

I. PROCEDURAL BACKGROUND

Pursuant to Executive Law § 94(13), on October 8, 2014, the Commission sent Respondent a “15-day letter” alleging violations of Public Officers Law §§ 73(5)(a) and 74(3)(d), (f), and (h) and providing Respondent fifteen days within which to respond to the allegations. Respondent, through her counsel Mark G. Farrell, was granted an extension of time to respond, which she did by letter dated November 6, 2014.

On March 29, 2015, the Commission voted to commence an investigation to determine whether a substantial basis existed to conclude that Respondent violated Public Officers Law §§ 73(5)(a) and 74(3)(d), (f), and (h). On April 8, 2015, the Commission sent Respondent a Notice of Substantial Basis Investigation that detailed the alleged violations. On February 24, 2016, the Commission issued a Substantial Basis Investigation Report (“SBIR”) finding a substantial basis to conclude that Respondent knowingly and intentionally violated Public Officers Law §§ 73(5)(a) and 74(3)(d), (f), and (h). On April 27, 2016, the Commission sent Respondent a Notice of Hearing and a copy of the Commission’s adjudicatory proceedings and appeals regulations.

On November 9 and 10, 2016, a hearing was held before the Honorable George C. Pratt, the designated Hearing Officer, in accordance with 19 NYCRR Part 941.¹ The parties were provided the opportunity to submit post-hearing briefs to the Hearing Officer, which they did on February 28, 2017. On March 21, 2017, the Hearing Officer issued his Recommendations.

Pursuant to 19 NYCRR 941.15(b), the parties were given an opportunity to submit to the Commission briefs in response to the Hearing Officer’s Recommendations. Commission staff submitted its brief on April 13, 2017. Respondent did not submit a brief. Under 19 NYCRR 941.15(c), the Commission “shall have 60 days from receipt of the briefs, or as soon thereafter as possible, in which to issue a final decision. The Commission may adopt the findings of fact and recommendation of the hearing officer in whole or in part, or it may reverse, remand and/or dismiss the hearing officer’s finding of fact and recommendation based upon the record produced at the hearing.”

II. HEARING OFFICER’S FINDINGS OF FACT

The Hearing Officer correctly determined the facts. The Commission hereby adopts the findings of fact set forth by the Hearing Officer (Recommendations at 5-10) and incorporates those findings herein by reference.

¹ References to 19 NYCRR Part 941 are to the Commission’s regulations governing adjudicatory proceedings that were in effect at the time. The regulations were later amended on December 21, 2016.

III. HEARING OFFICER'S CONCLUSIONS OF LAW

The Commission accepts and adopts the Hearing Officer's determination that Respondent did not knowingly and intentionally violate Public Officers Law §§ 73(5)(a) and 74(3)(d), and (f), but disagrees with and rejects the Hearing Officer's legal analysis with respect to Public Officers Law § 74(3)(d), (f), and (h). Those provisions of Public Officers Law § 74, the State's "Code of Ethics," provide:

(d) No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated nongovernmental purposes.

(f) An officer or employee of a state agency, member of the legislature or legislative employee should not by his or her conduct give reasonable basis for the impression that any person can improperly influence him or her or unduly enjoy his or her favor in the performance of his or her official duties, or that he or she is affected by the kinship, rank, position or influence of any party or person.

(h) An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of his or her trust.

The Commission disagrees with and rejects the Hearing Officer's legal analysis regarding Public Officers Law § 74(3)(h). The Hearing Officer, having concluded that Respondent did not violate Public Officers Law §§ 73(5)(a) and 74(3)(d) and (f), therefore concluded that Respondent could not have violated Public Officers Law § 74(3)(h)—which he described as "a vague, catchall provision that apparently would have no application unless § 75(3)(a) or [paragraphs] (d) or (f) of § 74(3) were also violated." (Recommendations at 4.) There is nothing in the plain language of the statute that supports such a reading of paragraph (h), nor does there appear to be any precedent to support the Hearing Officer's conclusion. Further, adopting that conclusion would defy a canon of statutory interpretation, in that it would render paragraph (h) meaningless. Finally, as a matter of common sense, it would seem that a State employee could engage in a course of conduct that raises suspicion among the public that he or she is likely to be engaged in acts that are in violation of her trust, in contravention of paragraph (h), without accepting a gift (in violation of Public Officers Law § 73(5)(a)), or using her office to secure unwarranted privileges or exemptions for herself or others (in violation of Public Officers Law § 74(3)(d)), or giving reasonable basis for the impression that any

person can improperly influence her or unduly enjoy her favor in the performance of her official duties, or that she is affected by the kinship, rank, position, or influence of any party or person (in violation of Public Officers Law § 74(3)(f)).

In the instant matter, the Commission indeed finds, after careful deliberation, that Respondent did violate the ethical standard articulated in Public Officers Law § 74(3)(h) in the course of maintaining a close and personal relationship with an active client to whom she was providing counseling and other services as part of her employment with the DVA. The fact that Respondent received initial warnings and counseling from her supervisors about the impropriety of her relationship with Mr. Matie, together with the evidence of the personal and financial development of their relationship *after* the services were provided, demonstrate that Respondent did not endeavor to pursue a course of conduct that would not raise public suspicion that she was likely to be acting in violation of her trust. A sanction for any such violation could be disciplinary action by the State employee's appointing authority.

While the Commission agrees with the Hearing Officer that the evidence here is insufficient to support the charged violations of the Public Officers Law § 74(3)(d), and (f), it does so for different reasons. It appears that the Hearing Officer, having determined that Respondent did not accept gifts in violation of Public Officers Law § 73(5)(a), consequently concluded that “[n]othing shows that Kinn used or attempted to use her official position to secure any privileges or exemptions ([paragraph] (d)), and nothing shows a reasonable basis for inferring that she could be influenced in the performance of her official duties ([paragraph] (f)).”

However, Respondent could still violate Public Officers Law § 74 without violating the gift prohibitions contained in Public Officers Law § 73(5)(a). As the Hearing Officer found, Respondent and Charles Matie, Respondent's client at the DVA, had a close, long-term relationship that predated Respondent's employment at the DVA and her official actions to help Mr. Matie obtain veteran benefits. (Recommendations at 27.) Given their pre-existing relationship, and the initial warnings and counseling from her supervisor about that relationship, Kinn should have refrained from providing *any* services to Matie as a DVA counselor because of her duty under Public Officers Law § 74(3)(h) to endeavor to avoid any suspicion that might be raised among the public that she is likely engaged in acts that are in violation of her trust. Public Officers Law § 74 prohibits a State employee from engaging in an activity that raises even an appearance of a conflict of interest with respect to her State duties, and a violation of the law may occur even in the absence of an actual conflict. *See, e.g.,* Advisory Op. No. 94-07. Recusal may be an appropriate remedy where the potential arises for a conflict of interest between one's State duties and personal life.

Notwithstanding the availability of recusal as a remedial mechanism to isolate Respondent from the delivery of care and services to Mr. Matie (in order to safeguard and preserve the integrity of the DVA's supportive relationship with Matie, in light of the troubling appearance of the personal relationship between Matie and Kinn), nothing in the hearing record indicates that Respondent made any effort to recuse or separate herself from the direct delivery of care and services to Matie. Respondent could have—and

should have—conducted herself differently, with respect to Matie’s services through the DVA. Respondent’s open, close and personal relationship with a DVA client to whom she provided DVA services is unacceptable and must not be condoned, neither tacitly nor implicitly.

Nevertheless, most noteworthy and troubling for the Commission is the DVA’s apparent failure, as an institution, to ensure that all of its employees understood and lived up to their ethical obligations under the law. Moreover, the DVA lacked any policy regarding the interaction of employees with DVA clients and, particularly, the acceptance or receipt by any employee of a gift from a DVA client. Compounding the DVA’s institutional failure to safeguard the interests of its client, Mr. Matie, was its abject failure to address Respondent’s continuing personal relationship with Matie—the DVA, instead, disregarded the questionable relationship and simply chose to look the other way.

The DVA took no additional steps, after its initial counseling of Respondent in May 2005 regarding the appearance of a conflict of interest on account of her personal relationship with Matie. The DVA did nothing to address the potential conflict to ensure that Respondent was no longer taking official action on behalf of Matie, nor is there any evidence in the record to indicate that the DVA provided additional training or guidance to Respondent and other employees on their obligations under the State’s Code of Ethics. Moreover, the DVA did nothing to create or implement policies to require recusal in similar situations immediately following the agency’s initial counseling of Respondent. Indeed, the DVA took no action until after the Office of the Inspector General—in response to a complaint regarding Respondent made by the DVA itself—conducted an investigation into the matter and concluded that “serious deficiencies existed in DVA policy regarding conflicts of interest and acceptance of gifts.” (OIG Report at 10.) This Commission will not countenance such nonfeasance.

While all State officers and employees have a legal and ethical responsibility to uphold the highest standards of conduct, in recognition of the fact that public service is a public trust requiring State officers and employees to place loyalty to the State Constitution, statutes and ethical principles above personal or private interests, State agencies, like the DVA, are expected to supplement, as necessary and appropriate, the comprehensive statutes and regulations applicable to State officers and employees with regulations of special applicability to the particular functions and activities of that agency. Additionally, State agencies should ensure the review by all employees of the relevant ethics provisions of the state Public Officers Law and Civil Service Law, in addition to regulations promulgated by this Commission.

IV. CONCLUSION

The Commission confirms and adopts as its own the factual findings set forth in the Hearing Officer’s Recommendations and the legal conclusion that Respondent did not knowingly and intentionally violate Public Officers Law §§ 73(5)(a) and 74(3)(d), and

(f). However, the Commission rejects the Hearing Officer's legal analysis with respect to Public Officers Law § 74 and concludes that a violation of Public Officers Law § 74(3)(h) has occurred, for which there is currently no civil penalty.

Michael K. Rozen
Acting Chair

Marvin E. Jacob
Seymour Knox, IV
Gary J. Lavine
J. Gerard McAuliffe, Jr.
David A. Renzi
Dawn L. Smalls
George H. Weissman
Hon. Penny M. Wolfgang

Absent: Hon. Renee R. Roth
Members

June 8, 2017