

New York State Ethics Commission

Advisory Opinion No. 05-2:

Whether actual compensation received or the compensation attributed to the job rate should be the test for determining the financial disclosure requirement.

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [], a professor in the Department of [] at the City College of New York, a college of the City University of New York ("CUNY"). [The State employee] argues that because his actual compensation from CUNY for 2003 was \$69,076.23 and less than the filing rate of \$70,851, he should not be required to file the 2004 financial disclosure statement although he acknowledges that, but for his being on half-pay sabbatical leave for the Spring 2003 semester, he would have earned in excess of the job rate of a Grade-24 and would be a required filer.¹

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 pursuant to Public Officers Law §73-a, it is the job rate of the position in which the State officer serves as of April 1st of the year in which the form is due, and not the actual compensation received during the previous calendar year, that determines whether an individual is subject to the financial disclosure requirements.

APPLICABLE STATUTE

Public Officers Law §73-a(1) provides:

(c) The term "state officer or employee" shall mean:

(ii) . . . officers and employees of state departments, boards, bureaus, divisions, commissions or councils or other state agencies, who receive annual compensation in excess of the filing rate established by paragraph (l) of this subdivision or who hold policy-making positions, as annually determined by the appointing authority and set forth in a written instrument which shall be filed with the state ethics commission . . . provided, however, that the appointing authority shall amend such written instrument after such date within thirty days after the undertaking of policy-making responsibilities by a new employee or any other employee whose name did not appear on the most recent written instrument;

(l) The term "filing rate" shall mean the job rate of SG-24 as set forth in paragraph a of subdivision one of section one hundred thirty of the civil service law as of April first of the year in which an annual financial disclosure statement shall be filed.²

According to the statute, individuals required to complete the financial disclosure statement are those who (1) have been designated as policymakers by their appointing authority or (2) "receive

annual compensation in excess of the filing rate" as of April 1st of the year in which the financial disclosure form is due. It is the second part of this requirement that is at issue.

The Commission has always considered that it is the job and the attendant job rate as of April 1st of the year in which the form is due that cause one to file the form and not the income actually earned from the position during the previous calendar year. This is a reflection of the Legislature's intent to cover State employees in positions at the Grade-24 job rate and above.

State officers and employees may, for a variety of reasons, earn less than the job rate in the calendar year prior to the filing of the form. In [the State employee's] case, this was due to his being on half-pay sabbatical leave for one semester in 2003.

Others may be on approved leave without pay, voluntary work reduction, and a host of other personnel related leaves during the previous calendar year. However, for filing purposes, the issue is whether the individual on April 1st of the year in which the form is due is serving in a position at the Grade-24 job rate or above.

Linking the filing requirement to the job rate is also practical and obviates the potential burdensome obligation of an agency, in its annual written instrument to the Commission, to inquire and report whether each individual filer actually earned income in excess of the job rate during the preceding calendar year. Moreover, it eliminates any temptation of State employees to reduce their actual income received to an amount just below the filing rate in an effort to avoid the financial disclosure requirement. In addition, the statute uses the term "receive" in the present rather than the past tense, further evidencing that it is not the actual compensation received in the filing year that determines the financial disclosure requirement.

More persuasive is the statute which requires an agency to notify the Commission within 30 days when a new employee, who would otherwise be required to file, enters State service. If actual compensation in excess of the filing rate were the benchmark, this requirement would be meaningless in most cases, as very few employees who enter State service later in the year would earn actual compensation above the filing rate.³

CONCLUSION

The Commission concludes that it is the job rate of the position in which the State employee serves on April 1st in the year the form is due, and not the actual compensation received during the preceding calendar year, that determines whether an individual is subject to the financial disclosure requirements of Public Officers Law §73-a. Thus, [the State employee] is required to file.

This opinion shall apply prospectively to part-time and employees on other leaves who work less than full-time, but who are in positions at the Grade-24 job rate.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the persons who requested it and who acted in good faith,

unless material facts were omitted or misstated by the persons in the request for an opinion or related supporting documentation.

All Concur:
Paul Shechtman, Chair
Robert J. Giuffra, Jr.
Carl H. Loewenson, Jr.
Lynn Millane
Susan E. Shepard,
Members

Dated: March 28, 2005

End notes

¹ *The Commission notes that [the State employee] has filed his 2003 financial disclosure statement pending determination of his opinion request.*

² *In 2004, the job rate of a SG-24 was \$70,851; in 2005 it will be \$74,621.*

³ *[The State employee's] reliance on the definition of compensation which appears in Public Officers Law §73 is misplaced. That section of the law pertains to activities which may constitute violations of the Public Officers Law which include the receipt of improper gifts, conducting outside business before State agencies and the revolving door provisions, and is a separate section from Public Officers Law §73-a which provides for the completion of annual statements of financial disclosure.*