

New York State Ethics Commission

Advisory Opinion No. 06-04

Application of Public Officers Law §74
to members of the Public Health Council.

INTRODUCTION

The following advisory opinion is issued in response to questions submitted by Donald P. Berens, Jr., General Counsel to the New York State Department of Health (“DOH”), concerning members of the State Public Health Council (“the Council”) who also hold positions as owners, officers or employees of DOH regulated hospitals, nursing homes or similar facilities, and their ability to appear before DOH with regard to certain matters.

BACKGROUND

Pursuant to Public Health Law (“PHL”) §220, the Council exists within DOH and is comprised of the Commissioner of Health and fourteen members appointed by the Governor with the advice and consent of the Senate. Membership on the Council shall be reflective of the diversity of the state’s population including, but not limited to, the various geographical areas and population densities throughout the state (see, PHL §220 and §221).

Since August 2000, members of the Council have included the Executive Director of the New York State Office of Science, Technology and Academic Research, a State agency; the Executive Director of the Strong Memorial Hospital of the University of Rochester¹; the Chairman of the New York Medical College²; the Executive Director of the Hillside Manor Nursing Home located in Queens; a Principal with William M. Mercer, Inc.³; the Public Health Director from Livingston County; the Executive Vice President/CEO of the Gurwin Jewish Geriatric Center located in Long Island; the Principal Clinical Coordinator with the Island Peer Review Organization⁴; the President of Rohm Services Corporation⁵; a physician with the Cornell Medical Center/Mount Sinai Hospital; a Professor with Columbia University; a senior vice-president with Catholic Health Services of Long Island⁶; the retired Counsel of the Visiting Nurse Service of New York⁷; the Executive Director of Government Relations with the University of Rochester Medical School; a senior accountant with St. Mary’s Hospital (Fulton County); a partner with the law firm of Cadwalader, Wickersham & Taft⁸; the retired President and CEO of the Westchester County Medical Center⁹; a physician with University Physicians Group, PC¹⁰; and the President/CEO of Bassett Healthcare¹¹.

All Council members serve in policy-making positions and are, or have recently been, employed as owners, officers, or employees of hospitals, nursing homes, health care providers, county health departments, private law firms, or as appointed members of other Councils. Members receive \$250 for each day devoted to Council work, not to exceed \$2700 in any one year, plus necessary expenses (see, PHL §223). Having no staff of its own, the Council is served by numerous DOH employees. Unlike most State councils and boards which are advisory in nature¹², the Council has final decision making authority and is responsible, among other things, for promulgating and revising the State Sanitary Code; prescribing the

qualifications of DOH public health personnel, as well as county and city healthcare personnel; approving the establishment, including change of ownership, of hospitals and other health facilities; and reviewing complaints of improper practices in hospital staff appointments.

DOH is responsible for supervising the work of local boards of health and local health officers, reporting on and control of disease, conducting mortality and morbidity research, promoting health education, enforcing PHL and the State Sanitary Code, operating hospitals and certain nursing homes, investigating and disciplining physician misconduct, and administering Medicaid. Berens states that Council members must abide by their adopted by-laws, which require them to identify potential conflicts of interest and to recuse themselves from participation in the discussion and decisions of the Council when a conflict of interest exists.

Not surprisingly, many of the issues before the Council pose a conflict of interest for one or more members. From September 2000 to June 2005, the Council considered 883 actions. In 379 of them (or approximately 43 percent), one or more members announced a conflict of interest.

In light of these statistics, the Commission believes it is important to voice its general concerns about the Council as currently comprised. The Commission recognizes, of course, that expertise in public health is an essential attribute for members of a body tasked with making public health decisions. As presently constituted, however, many of the Council members have acquired that expertise as a result of their on-going associations with organizations that the Council regulates. The potential for conflicts of interest, even with appropriate recusals, is therefore widespread. The Legislature has not directed the Commission to close its eyes to government ethics where the Council is concerned. Others should not close their eyes either. Put simply, in making appointments to the Council (and to similar bodies), the Governor and the Senate should give careful consideration to the potential for such conflicts of interest.

APPLICABLE STATUTES

Council members are fully subject to Public Officers Law §74. As Council members receive no compensation for their services other than on a per diem basis, generally Public Officers Law §73 does not generally apply¹³.

Public Officers Law §74(2), the code of ethics for State officers and employees, is concerned with both actual and apparent conflicts of interest. It provides minimum standards against which State officers and employees are expected to gauge their behavior, addressing the conflict between an employee's obligation in public service and his or her private, often personal, financial interests. This Section includes the rule with respect to conflicts of interest: *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 duties in the public interest.*

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct which address actual as well as apparent conflicts of interest:

(b) No officer or employee of a state agency . . . should. . . engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

(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.

. . . .

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

. . . .

(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 in violation of his trust.

DISCUSSION

In Advisory Opinion No. 95-27, the Commission responded to an inquiry from a member of the Council, who was an attorney, asking whether he could appear before DOH on behalf of clients regarding matters that would not come before the Council. The Commission concluded that the Council member could not do so because the DOH employees providing services and assistance to the Council would be among the same DOH employees that the Council member would interact with on non-Council matters, and there would be the appearance that the attorney would receive preferential treatment due to his position with the Council¹⁴.

That opinion informs the Commission's response to Berens' questions, which focus principally on the circumstances in which a Council member who is an owner, officer or employee of a DOH regulated entity may communicate with DOH other than in his or her capacity as a Council member. The short answer is that a Council member may not engage in such communications on any issue, even if he or she recuses himself or herself from the Council's decision-making process. Any such communication involves the appearance of a conflict of interest in that it reasonably could be perceived that the Council member was using his or her public position for private benefit or had greater access to DOH by virtue of his or her public position.

That bright line rule applies regardless of whether (i) the matter is one pending before the Council and relates specifically to the Council member's facility (e.g., the establishment of a new facility in the same county), or (ii) the matter is pending before the Council and affects all facilities equally (e.g., a proposed amendment to the State Sanitary Code), or (iii) the matter is not before the Council and will never be (e.g., a change in Medicaid reimbursement rates). Regardless of the circumstance, there is too great a potential for the appearance of favoritism to allow the communication to occur. The sole exception to this rule is a situation where a

Council member is also a physician and required by law to report certain matters to DOH. Plainly, a physician must be allowed to communicate with DOH to fulfill his or her reporting obligations under the law. By the same token, DOH should not give special preference to such a communication by virtue of the fact that the physician is a Council member.

Two final points merit mention. First, the rule enunciated herein applies even if contact is initiated by DOH. If a communication is prohibited, DOH cannot “waive” that prohibition by initiating the dialogue. Second, nothing herein prevents a person who is not a Council member from communicating with DOH even if a Council member is associated with the same facility. If the Executive Director of “X” facility is a Council member, the Assistant Director may contact DOH. That person, however, may not use his or her association with a Council member to advance his or her interests. And DOH may not give that person’s views added weight because of that association. Any other rule would disable a facility from communicating with DOH if someone associated with it agreed to serve on the Council and would be a powerful deterrent to public service.¹⁵

CONCLUSION

The Commission concludes that, with the limited exception noted above, a Council member who is also an owner, officer or employee of a DOH regulated hospital, nursing home, or similar facility may not communicate with DOH on any issue as such contact entails the appearance of a conflict of interest in that it could reasonably be perceived that the Council member is using his or her State position for private gain or has greater access to DOH by virtue of their Council position.

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 the 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: July 17, 2006

¹ *Strong Memorial Hospital is a 750-bed care center which provides a comprehensive range of general and highly specialized services.*

² *New York Medical College is one of the nation's largest private health science universities and has 1,350 full-time and 1,450 part-time faculty that conduct research and provide patient care at 28 hospital affiliates.*

³ *According to its website, William M. Mercer, Inc. is one of the world's largest consulting firms.*

⁴ *According to its website, Island Peer Review Organization is one of the largest and most experienced health care quality review and improvement organizations in the United States.*

⁵ *Rohm Services Corporation is a central support system for its family of nursing facilities including 12 in the Rochester area.*

⁶ *Catholic Health Services is comprised of five hospitals, three nursing homes, a regional home care and hospice network, and a community based agency for persons with special needs.*

⁷ *The Visiting Nurse Service of New York describes itself as the largest not-for-profit home health care agency in the nation and its care providers travel throughout New York City, Nassau and Westchester counties seeing an average of 26,500 patients on any given day.*

⁸ *According to the law firm's website, it successfully "serves hospitals, nursing homes, clinical laboratories, health maintenance organizations, home health care providers . . . in every facet of their operations" and Cadwalader "also actively participates in the development of health care legislation and public policy at the state and national level."*

⁹ *Westchester County Medical Center, a State agency, is an academic medical center and the region's tertiary and Level I trauma center.*

¹⁰ *The individual is the co-founder and vice-president of United Physicians Group, PC, a large multi-specialty physician group encompassing Staten Island and Brooklyn. He was also recently promoted to associate chairman of medicine at Staten Island University Hospital and will assume the additional duties of structuring the hospital's medical and residency programs.*

¹¹ *Bassett Healthcare runs facilities in central New York including four hospitals, 23 health centers and the 230 member Bassett Physician Group.*

¹² *There are several councils and boards within the State that have similar decision making authority. These including the Banking Board which promulgates regulations for the conduct of banking business and consists of the Superintendent of Banking and 16 members appointed by the Governor, eight of which are public members and eight of which must have banking experience and must represent various segments of the banking community; the Freshwater Wetlands Appeals Board which hears and decides challenges to the regulatory decisions made by the Department of Environmental Conservation and is comprised of four members appointed by the Governor and that the chair and two other members must be attorneys*

admitted to practice in the State; the Developmental Disabilities Planning Council which awards federally funded grants to entities that provide services to individuals with developmental disabilities and their families and consists of 24 members appointed by the Governor and at least half of its membership must include developmentally disabled persons or their families; the New York State Council on the Arts which provides funds to the arts community and consists of 20 members appointed by the Governor and shall be broadly representative of all fields of the performing and fine arts; the State Soil and Water Conservation Committee which establishes policy to guide the programs of the 58 county soil and water conservation districts which shall consist of 10 members appointed by the Governor with 5 voting members one of whom shall be appointed from a list of nominees submitted by the state grange, one from nominees submitted by the Soil Conservation Districts Association, Inc., one from nominees submitted by the state farm bureau association, one who shall represent the farm interest, and one who shall represent the urban, suburban and rural non-farm landowner interest, and the Hudson River Valley Greenways Communities Council which consists of 27 members, two of which are appointed by the Governor and the remainder by Legislative leaders and the chief elected official of the ten counties adjoining the Greenway.

¹³ *Public Officers Law §73(3) prohibits any individual who files a financial disclosure statement from appearing against the interests of the State in the Court of Claims.*

¹⁴ *In analyzing whether a member of a board can appear before other parts of the State agency to which the board is attached, the Commission has looked at the nature and power of the board. Thus, in Advisory Opinion No. 93-17, the Commission held that members of the Freshwater Wetlands Appeals Board (“Board”) could not represent clients before the Department of Environmental Conservation (“DEC”) because “the appearance of a conflict of interest would exist because the Board’s power to review and reverse decisions of the Commissioner [of DEC] is incompatible with a Board member representing a client who is seeking favorable treatment from the Commissioner.” In contrast, see Advisory Opinion No. 97-27 (member of the State Superfund Management Board may practice before DEC because the Superfund Board has no decision-making authority); and Advisory Opinion No. 98-8 (member of the State Solid Waste Management Board may practice law before DEC because the Waste Management Board has neither advisory power nor final decision making authority with respect to the DEC Commissioner.*

¹⁵ *As the statute is directed at State officials’ private obligations conflicting with their public obligations, the same concerns are not present with Council members who are also government officials, e.g. a county Health Director. Thus, those Council members who are officials or employees of other governmental bodies may communicate with DOH except with regard to specific matters that are before the Council.*