

New York State Ethics Commission

Advisory Opinion No. 06-08

Application of Public Officers Law §74 to a State employee serving as board President of a not-for-profit agency licensed and funded by the employee's agency.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by Paul R. Kietzman (“Kietzman”), General Counsel to the New York State Office of Mental Retardation and Developmental Disabilities (“OMRDD”), who asks whether it is a conflict of interest or creates the appearance of such a conflict under Public Officers Law §74 for [], an OMRDD employee, to serve in her private capacity as the unpaid President of the board of directors of a not-for-profit agency that is licensed and receives funds from OMRDD.

Pursuant to its authority under Executive Law §94(15), the New York State Ethics Commission (“Commission”) concludes that [the State employee] may serve as President of the board without violating Public Officers Law §74, provided she adheres to the conditions set forth in this opinion.

BACKGROUND

Pursuant to §31.22 of the Mental Hygiene Law and §404(q) of the Not-For-Profit Corporation Law, all not-for-profit providers are required to receive an operating certificate from OMRDD before beginning any residential or day program. OMRDD also sets the rates which providers may bill for services, and provides funding for many provider programs.

The [voluntary agency] is a not-for-profit agency that provides an array of services to improve the quality of life for individuals with disabilities. Its family support program, for instance, which is funded by OMRDD, provides families with resources to care for their relative at home, including such services as recreation, service coordination, family reimbursement, and guardianship.¹

[The State employee] has been employed with OMRDD as a [], a non policymaking position, since [date]. [The State employee] is under the direct supervision of the [] and is responsible for the supervision of all activities within the [] Unit which includes four subordinates. According to her job description, [the State employee] plans, develops, and supervises the preparation of agency budget estimates, program justifications and workload forecasts. She also supervises payroll projections to ensure that the Developmental Disability Service Offices (“DDSOs”) manage within spending plan allocations.

The [] processes local assistance contracts and family support services for many statewide providers, including [the voluntary agency]. [The State employee] does not have responsibility for licensing, rate setting or certification of provider agencies.

In 1997, the Commission approved [the State employee’s] service, in her private capacity, as a member of [the voluntary agency’s] board on two conditions: that she recuse herself from consideration of any [the voluntary agency] contracts and have her supervisor process them, and to recuse herself when serving on the board from any decision or vote concerning [the voluntary agency’s] contracts with OMRDD or any specific issue on which OMRDD may likely take a position.²

Recently, [the State employee] requested permission from the Commission to serve as President of [the voluntary agency]. [The State employee] stated that her State duties had not changed since she was approved to serve on the [the voluntary agency] board in 1997. According to [the voluntary agency’s] by-laws, the President may not receive

compensation, serves as the chief executive officer, and presides at all meetings; the Vice-President may perform any or all duties of the President in the event of his or her absence or disability, or at his or her request (see [the voluntary agency] Bylaws, Arts. VII and VIII). Based upon the foregoing, in an informal opinion, dated [], the Commission approved [the State employee's] request to serve as President of [the voluntary agency], subject to her recusal from all contracts relating to [the voluntary agency] and the restrictions of Public Officers Law §73(12).

Keitzman now requests that the Commission render a formal opinion due to his concern that [the State employee's] responsibilities as a board officer gives a strong appearance of a conflict of interest because other voluntary providers may think [the voluntary agency] receives favored treatment.

APPLICABLE STATUTE

Public Officers Law §73(12), states in relevant part, that:

*A . . . state officer or employee. . . who is a member, associate, retired member, of counsel to, or shareholder of any firm, association or corporation which is appearing or rendering services in connection with any case, proceeding, application or other matter listed in paragraph (a) or (b) of subdivision seven of this section shall not orally communicate, with or without compensation, as to the merits of such cause with an officer or an employee of the agency concerned with the matter.*³

Public Officers Law §74, the rule with respect to conflicts of interest, provides:

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 not only actual but apparent conflicts of interest. Of relevance to this inquiry are the following:

. . . .
(b) No officer or employee of a state agency . . . should accept employment or 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.

. . . .
(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 that are in violation of his trust.

DISCUSSION

As recently noted, in applying §74 of the Public Officers Law, the Commission no longer employs a broad rule that prohibits employees of an agency from serving on the board of directors of an entity regulated or licensed by the agency, but considers several factors in evaluating such service, including (i) the employee's duties on behalf of the agency; (ii) the relationship of the agency and the proposed outside activity; (iii) whether the employee would be in a position to use his or her position to secure unwarranted privileges; (iv) whether the outside activity would impair the employee's independence of judgment in the exercise of official duties; and (v) whether the principles of

disclosure and recusal remedy any appearance of impropriety [see, Public Officers Law §74(3)(c),(d) and (h); Advisory Opinion No. 06-01].

Commission precedent allows OMRDD employees to serve on the board of directors of a not-for-profit corporation licensed by OMRDD, where their job responsibilities are removed from the agency's licensing and rate setting functions (see, Advisory Opinion No. 95-12), to act as family care providers provided they do not work in the unit that certifies or administers the family care programs (see, Advisory Opinion Nos. 91-11, 94-17), and to have an outside employment relationship with a provider provided their State duties do not involve licensing and rate setting functions (see Advisory Opinion No. 91-3). In permitting these activities, the Commission considered whether the public might perceive that the employees in their outside capacity would receive preferential treatment from agency employees or be privy to confidential agency information not available to others engaging in similar activities.

In [the State employee's] case, her responsibilities do not involve licensing, rate setting or certification of providers. Although the [] Unit has oversight of provider contracts statewide, it is the Commission's understanding that [the State employee] recuses herself from any consideration of a [voluntary agency] contract, including family support services related to [the voluntary agency]. It is the Commission's understanding that [the State employee's] supervisor is assigned these matters. The Commission also understands that [the State employee] recuses herself from any decision or vote as President of [the voluntary agency] concerning [the voluntary agency's] contracts with OMRDD or concerning any specific issue on which OMRDD may likely take a position. These precautions should remedy any appearance that [the voluntary agency] is receiving preferential treatment by virtue of [the State employee's] position as an OMRDD employee.

In reaching this conclusion, we note that OMRDD has not suggested [the State employee's] prior position as Vice-President has posed any ethical issue.

It should also be noted that Public Officers Law §73(12) provides an additional safeguard to avoid the appearance of a conflict of interest. This provision prohibits a State employee who is a member of an association or corporation which is appearing or rendering services in connection with any matter covered by §73(7)(a) from orally communicating as to the merits of such cause with an officer or employee of the State agency concerned with the matter, whether or not compensation is received (see Advisory Opinion No. 06-02). Accordingly, in any matter relating to [the voluntary agency], [the State employee], in her capacity as President of [the voluntary agency], is prohibited from having any oral communications with OMRDD staff concerning the merits of a contract, a rate or rule, funding or licensing relating to [the voluntary agency], further increasing transparency and avoiding the appearance of such a conflict.

CONCLUSION

The Commission concludes that [the State employee] may serve as President of the board without violating Public Officers Law §74, provided she adheres to the conditions set forth in this opinion.

In reaching this conclusion, we note that OMRDD has not suggested that [the State employee's] prior position as Vice President of [the voluntary agency] raised any ethical issues.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the requesting individual who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion.

All concur:

Paul Shechtman,
Chair

Robert J. Giuffra, Jr.

Carl H. Loewenson, Jr.

Lynn Millane
Susan E. Shepard
Members

September 21, 2006

1. *Description of [the voluntary agency] from [http://www.\[\].org](http://www.[].org).*
2. *[The State employee] later held positions as Secretary and Vice-President of [the voluntary agency].*
3. *Section 73(7) prohibits the appearance or the rendition of services before a State agency where such appearance is in connection with six broad areas of activity, including (i) the purchase, sale, rental or lease of real property, goods or services, or a contract therefore, 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.*