

**STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY**

Advisory Opinion No. 07-04

Advisory Opinion No. 07-04: Application of Public Officers Law §74 to the duties and responsibilities of the Chair, Deputy Chair and members of a Board with respect to their previous private employment.

INTRODUCTION

The following advisory opinion is issued in response to a request from [], Deputy Chair and Counsel to the [] Board, concerning the application of Public Officers Law §74 to the duties and responsibilities of the Chairman of [the Board], Deputy Chair and Counsel, [], and Board member [], with respect to their employment prior to being members of [the Board].

Pursuant to the authority vested in the New York State Commission on Public Integrity ("Commission") by Executive Law §94(15), the Commission concludes that Chairman [] and [the Deputy Chair], who were full-time, in-house counsel to [Employee Organization A], are required, as full-time State employees, to recuse themselves from all matters that come before [the Board] where [Employee Organization A] is a party. The Commission further concludes that Board member [], who was hired by [], an employee organization, to represent three of its members in disciplinary matters, is not required, as a per diem Board member, to recuse himself from those matters where [Employee Organization B] is a party in a matter before [the Board]. ⁽¹⁾

BACKGROUND

[The Board] was established in [date] pursuant to [] Law and is responsible for administering and adjudicating [] employee labor issues pursuant to the [] Act []. The specific functions of [the Board] are set forth in [] Law §[]. The Board is comprised of three members appointed by the Governor, upon the advice and consent of the Senate ([] Law §[]). The Governor designates one member to serve as the Chair, who "shall give his whole time to his duties" ([] Law §[]). The other Board members, who are compensated on a per diem basis, "shall hold no other public office or public employment in the state" ([] Law §[]). Chairman [] and Board member [] were confirmed by the Senate on [date]. The nomination of the third Board member has not been acted upon by the Senate as of this date.

The Board is authorized to appoint other staff that will assist it in the performance of its functions ([] §[]). [], [the Board's] Deputy Chair and Counsel, is a full-time employee and acts as the legal advisor to the Chairman and [the Board]. The Deputy Chair is responsible for handling all procedural matters involving cases before [the Board] and assists in drafting decisions. [The Deputy Chair] commenced employment as Deputy Chair and Counsel to [the Board] on [date].

Prior to their employment at [the Board], Chairman [] and [the Deputy Chair] were both full-time, in-house counsel to [Employee Organization A], which is a [] union that [the Deputy

Chair] states is a frequent party to cases filed at [the Board]. [The Board member], a private attorney, was hired by [Employee Organization B] to represent three of its members during separate internal affairs interrogations into alleged misconduct. ⁽²⁾ [The Board member] represented two of the members more than two years ago; he represented the third member within the past two years.

[The Deputy Chair] explains that there are two general categories of matters that come before the Board. The adjudicatory responsibilities of the Board consist of rendering final determinations on disputed cases relating to, among other issues, improper practice charges and representation. There are also ministerial functions, including certifying employee organizations after an election or without an election. This is a critical function of [the Board], as an employee organization cannot negotiate with a [] employer until it is either certified by [the Board] as the exclusive bargaining agent for the employees, or is recognized as such by the employer.

[The Deputy Chair] indicates that both he and Chairman [] "have already taken the necessary steps to recuse ourselves from all aspects of pending cases that were filed by our former client prior to our being employed at [the Board] as well as other cases involving events and circumstances that we had participated in during our tenure at [Employee Organization A]." Included in the types of matters from which Chairman [] has recused himself are certifications, described above, that pertain to [Employee Organization A]. [The Deputy Chair] states that the Board's delay in issuing certifications deprives both employee organizations and [] employers of the opportunity to conduct collective negotiations. [The Board member] has likewise indicated his intention to recuse himself from matters pertaining to the [employee organization].

Since there are only two members appointed to [the Board] at this time, [the Deputy Chair] states that the recusals by Chairman [] and [the Board member] have delayed, and will continue to delay, the issuance of final determinations. Therefore, he is requesting, on behalf of himself, Chairman [] and Board member [], an opinion clarifying under what circumstances recusal is mandated and, if recusal is not required, guidance as to the necessary steps that should be taken to avoid the appearance of impropriety.

APPLICABLE STATUTE

Public Officers Law §74, defines the term "state agency" as "any state department or division, board, commission or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor" (Public Officers Law §74[1]). [The Board] is a State agency since the Governor appoints the Board members ([] Law §[]). The Board members and employees of [the Board] are, therefore, governed by the provision of the Public Officers Law. ⁽³⁾

Public Officers Law §74, the Code of Ethics, provides the minimum standards against which State officers and employees are expected to gauge their behavior. The Code addresses the conflict between the obligation of public service and private, often personal, financial interest. The rule with respect to conflicts of interest is as follows:

No officers 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 that address actual as well as apparent conflicts of interest:

- 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.
- 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.
- 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

The Commission has previously addressed the tension between the need to prevent conflicts of interest or their appearance, as required by the Public Officers Law, and the State's need for skilled employees recruited from the private sector. In Advisory Opinion No. 94-11, the Commission considered the issue of prior employment and past business relationships of part-time, unpaid members of a State Board responsible for acting on funding applications. In that opinion, the Commission established a presumption that official State actions taken within two years of leaving private employment that pertained to the prior employer creates the potential for conflict of interest and would be prohibited. However, the Commission noted that the presumption could be rebutted by looking at other factors such as the nature and duration of the relationship, i.e., whether the board member was in an employment relationship, which signifies daily oversight and control, or whether the board member was a consultant, suggesting a more temporary connection.

The Commission considered the potential for conflicts of interest for State employees who may be called upon to participate in matters that pertain to their prior employers. In Advisory Opinion No. 98-09, the Commission held that the period of examination for a potential conflict of interest is two years from the date of termination from the prior employer. The Commission reasoned that the potential for a conflict is diminished with the further passage of time beyond that date.

In Advisory Opinion No. 98-9, the Commission did not create a presumption of required recusal for this two year period, as it established in Advisory Opinion No. 94-11. Rather, during this time, should a State employee have to engage in a matter that pertains to a prior employer, the Commission determined that a further inquiry is to be made that would consider the nature of the prior relationship between the employee and the prior employer, the nature and importance of the employee's role in the matter that he or she is being asked to participate, including the discretion to be exercised, and the sensitivity of the matter to be considered by the employee. The

Commission determined that each of these factors is to be considered in any potential conflict issue that may arise with a prior employer.

With respect to [the Board member], who is a per diem Board member, Advisory Opinion No. 94-11 applies. The two year presumption of required recusal is applicable, unless there are factors that may rebut the presumption, including the nature and duration of the relationship with the prior employer. Thus, the question is whether there are factors that rebut the presumption.

[The Board member], as part of his private practice, was hired by [Employee Organization B] in order to provide representation to employees. [The Board member], though paid by [Employee Organization B], did not have oversight and control of the organization. ⁽⁴⁾ Rather, he was hired to represent three individual employees in discrete disciplinary matters, and did not represent [Employee Organization B] as a whole.

Therefore, the Commission concludes that [the Board member's] prior employment of providing legal representation to three employees of [Employee Organization B], two of whom were represented more than two years ago, is not in substantial conflict with the proper discharge of his duties in the public interest with respect to matters that [Employee Organization B] may bring before [the Board]. His presence during the interrogations and his subsequent review of the transcript of the interrogation for accuracy for the three members of [Employee Organization B] do not rise to the level where we can conclude that he may be improperly influenced, or will raise suspicion among the public that the member is engaged in acts that are in violation of his trust. The two year bar for participating in matters pertaining to [Employee Organization B] that may come before [the Board] is, therefore, rebutted. ⁽⁵⁾

Turning to Chairman [] and [the Deputy Chair], who are full-time State employees, Advisory Opinion No. 98-9 is on point. Therefore, the Commission is presented with the question whether it is necessary for Chairman [] and [the Deputy Chair] to recuse themselves from all cases for the two year period where [Employee Organization A] is a party. Unlike [the Board member], who represented the employees of an employee organization as part of his private law practice, Chairman [] and [the Deputy Chair] were full-time in-house counsel with [Employee Organization A]. It can be reasonably inferred that, as in-house counsel, Chairman [] and [the Deputy Chair] were intimately involved in the day-to-day activities and the policy deliberations of their previous employer.

[Employee Organization A] continues to be a party to matters that are filed at [the Board]. As a matter of procedure, Chairman [] would be a decision-maker in such cases. [The Deputy Chair] would provide legal advice on such cases to the Chairman. The Commission suggested in Advisory Opinion No. 98-9 that close supervision of a State employee by his or her supervisor would reduce the appearance that the State employee may favor his or her prior private employer. Further, if a State employee's role in the matter that involves a prior private employer could be diminished, the State employee could offer his or her expertise while reducing the potential for conflict. Here, however, there is no potential to reduce the significant role of Chairman [] or [the Deputy Chair], nor is there a supervisor who may oversee their participation in matters before [the Board] where [Employee Organization A] is a party.

The Commission concludes that it is appropriate for Chairman [], consistent with Advisory Opinion No. 98-9, to recuse himself from all matters that pertain to [Employee Organization A]. Because of his role as in-house counsel to [Employee Organization A] and his current position as an adjudicator of matters where he will exercise substantial discretion, there may be a perception that he could be using his official position to "secure unwarranted privileges or exemptions" for [Employee Organization A], or raise suspicion that he may be engaged in acts that violate the public trust. [\(6\)](#)

With respect to [the Deputy Chair], because of the nature of his relationship with [Employee Organization A] and the nature and importance of his respective role in matters coming before [the Board], including the discretion he may be called upon to exercise, [the Deputy Chair] is required to recuse himself from all matters where [Employee Organization A] is a party for a two year period from the date that he terminated employment with [Employee Organization A].

CONCLUSION

The Commission concludes that Chairman [] and [the Deputy Chair], who were full-time, in-house counsel to [Employee Organization A], are required, as full-time State employees, to recuse themselves from all matters that come before [the Board] where [Employee Organization A] is a party for a two year period from the date that they terminated employment. The Commission further concludes that Board member [], who represented [Employee Organization B], as part of his private practice, under these circumstances, is not required, as a per diem Board member, to recuse himself from those matters where [Employee Organization B] is a party in a matter before [the Board].

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding.

All concur:

John D. Feerick,
Chair

Daniel R. Alonso

Virginia Apuzzo

John M. Brickman

Andrew G. Celli, Jr.

Richard D. Emery

Daniel J. French

Robert J. Giuffra, Jr.

David L. Gruenberg

Hon. James P. King

Hon. Howard A. Levine

Loretta E. Lynch, Members

Commissioner John T. Mitchell is recused from this Opinion.

Date: December 11, 2007

Endnotes

1. The Public Employee Ethics Reform Act of 2007 created the New York State Commission on Public Integrity. The new thirteen-member Commission assumed the powers and duties of the New York State Ethics Commission and the New York Temporary State Commission on Lobbying. See, Chapter 14 of the Laws of 2007. Executive Law §94(1) states that "[t]his section shall not revoke or rescind any regulations or advisory opinions issued by the state ethics commission and the temporary lobbying commission in effect upon the effective date," i.e., September 22, 2007.
2. [The Board member's] representation consisted of his presence during the interrogations and his subsequent review of the transcript of the interrogation for accuracy.
3. [The Board member] is not subject to Public Officers Law §73 (except §73(3)(b) relating to appearances against the State's interest in the Court of Claims) because this section exempts from coverage officers of boards "who receive no compensation or are compensated on a per diem basis." Public Officers Law §73(1)(i)(iii). No similar exemption is contained in §74.
4. [The Deputy Chair] indicates that [Employee Organization B] has in-house counsel and a law firm on retainer.
5. While we conclude that [the Board member's] intermittent representation of [Employee Organization B's] employees does not preclude him from participating in [Employee Organization B's] matters that come before [the Board], the Commission expects that [the Board member] will recuse himself from [Employee Organization B's] matters that come before [the Board] should he be offered and accept the opportunity to represent additional members.
6. The Commission recognizes that the effect of this decision is that the [] Board will be unable to render decisions with respect to [Employee Organization A] until such time as a new Board member is appointed by the Governor or the two-year period has abated. Public Officers Law §9, which provides for the appointment of deputies for the performance of certain functions, may provide a remedy for the Chairman of the [] Board.

