

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

Advisory Opinion No. 09-04 Clarifying that, under Advisory Opinion No. 05-02, a permanent part-time employee, who is not a policymaker and serves in a position with a full-time salary in excess of the filing rate and receives compensation that is intended to be less than the filing rate and cannot exceed the filing rate, is not required to file an annual statement of financial disclosure.

INTRODUCTION

In Advisory Opinion No. 05-02, the New York State Ethics Commission (“Ethics Commission”)¹ determined that a full-time City College of New York professor whose annual salary exceeded the statutory filing rate was required to file an Annual Statement of Financial Disclosure for a year in which he received about \$1,800 less in compensation than the filing rate as a result of taking a voluntary half-pay sabbatical for one semester.

Pursuant to the authority vested in the New York State Commission on Public Integrity (“Commission”) by Executive Law §95(15), the Commission hereby renders its opinion that, pursuant to Public Officers Law §73-a, a State officer or employee who is not a policymaker and serves in a position with a full-time salary in excess of the filing rate, but who is hired on a permanent part-time basis and, thus, receives annual compensation that is intended to be less than the filing rate, and cannot exceed the filing rate, is not required to file an Annual Statement of Financial Disclosure with the Commission.

BACKGROUND

Public Officers Law §73-a (2)(a) requires “every . . . state officer or employee . . . [to] file an annual statement of financial disclosure . . .” Subsection (1)(c)(ii) defines “state officers or employees” in pertinent part as “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 establishedClarifying that, under Advisory Opinion No. 05-02, a permanent part-time employee, who is not a policymaker and serves in a position with a full-time salary in excess of the filing rate and receives compensation that is intended to be less than the filing rate and cannot exceed the filing rate, is not required to file an annual statement of financial disclosure. by paragraph (1) 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 . . .” Subsection (1)(l) defines “[t]he term “filing rate” [as] 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.”

Advisory Opinion No. 05-02 addressed the question whether a full-time professor serving in a position whose “job rate” exceeded the filing rate was required to file an Annual Statement of Financial Disclosure. The professor maintained he was not required to file for the year at issue because he had taken a half-pay sabbatical leave during the Spring semester and, as a result, had

received compensation that was about \$1,800 less than the filing rate. The Ethics Commission noted that State employees hired at or about the filing rate may actually earn less than the filing rate in a given year, for example, because of approved leave without pay, voluntary work schedule reduction, “and a host of other personnel related leaves during the previous calendar year.” In this context, the Ethics Commission determined that whether one received compensation above the filing rate, and thus was required to file an Annual Statement of Financial Disclosure, was determined based on “the job rate of the position in which the State officer serves . . . and not the actual compensation received during the previous calendar year.” In summarizing its conclusion, the Ethics Commission stated, “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.” (Emphasis added.)

APPLICABLE LAW

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.

DISCUSSION

Since the issuance of Advisory Opinion No. 05-02, the Commission has required part-time State officers and employees serving in positions with a salary of the job rate for grade 24 or above to file Annual Statements of Financial Disclosure with the Commission each year. For example, Commission staff recently conducted a civil penalty hearing arising out of the failure of a part-time State University of New York professor whose compensation was nine percent of a position with a full-time annual compensation rate of \$148,367. The professor was paid \$13,353 for the year and was not entitled to receive any additional compensation. This was about sixteen percent of the threshold filing rate of \$82,389. Unlike the State employee at issue in Advisory Opinion No. 05-02, the part-time professor had not voluntarily reduced his compensation. Nevertheless,

applying the broad language set forth in the conclusion of Advisory Opinion No. 05-02, the hearing officer determined that the individual was required to file an Annual Statement of Financial Disclosure for the year at issue and had knowingly and willfully failed to do so. Accordingly, the hearing officer determined that the part-time professor was subject to a civil penalty of up to \$40,000. The hearing officer recommended, however, that the Commission assess no civil penalty. Moreover, the hearing officer suggested that the Commission should consider amending Advisory Opinion No. 05-02 as applied to such part-time State employees.

Advisory Opinion No. 05-02 considered the proper application of Public Officers Law §73-a to those State officers or employees who are employed at a job rate that exceeds the filing rate and, concomitantly, are eligible to receive compensation that exceeds the filing rate. The Ethics Commission expressed concern in the advisory opinion that a State employee, on his or her own volition, may choose to forego income by participating in the State's voluntary reduction work schedule program or by taking a sabbatical or other similar action. The Commission was concerned that, by choosing to forego income, a State employee could avoid the statutory requirement to file an Annual Statement of Financial Disclosure.

While the Commission indicated in the conclusion of Advisory Opinion No. 05-02 that it applied to part-time employees, the opinion did not otherwise consider whether or how to apply §73-a to a State officer or employee who is permanently hired at a percentage of a job rate that exceeds the filing rate but receives annual income below the filing rate. In such a situation, unlike the circumstances that the Commission considered in Advisory Opinion No. 05-02, the State employee's annual compensation is intended to be less than the filing rate and may not exceed the filing rate, not as the result of any voluntary leave, work schedule reduction or other employee decision or action.

Public Officers Law §73-a describes those State officers or employees who are required to file Annual Statements of Financial Disclosure as those “*who receive annual compensation in excess of the filing rate.*” (Emphasis added.) State officers and employees who are hired on a permanent part-time basis at a percentage of the filing rate, which results in annual income below the filing rate, do not and cannot “receive annual compensation in excess of the filing rate.” Consider, for example, a State employee hired on permanent part-time basis at 35% of a full-time equivalent in a position with a Grade 24 salary. While the Grade 24 job rate would trigger a filing requirement for a full time employee, in this example, it is not intended that the employee receive annual compensation in excess of the filing rate, nor can the employee receive annual compensation in excess of the filing rate. The Commission concludes that the statute does not require State officers and employees in this category to file Annual Statements of Financial Disclosure because they cannot “receive annual compensation in excess of the filing rate.”²

We affirm the Ethics Commission's conclusion in Advisory Opinion No. 05-02 to the extent consistent with this opinion. Therefore, a State officer or employee who serves in a position with a job rate of salary grade 24 or above and is required to file an Annual Statement of Financial Disclosure with the Commission must still file in any year that he or she chooses to forego income due to approved leave without pay, voluntary work reduction, sabbatical, or other personnel related leaves. We distinguish, however, that category of State officers and employees who serve in positions with a salary in excess of the filing rate, but who are hired on a permanent

part-time basis so that the annual compensation to be received is intended to be less than the filing rate and cannot exceed the filing rate. This limited category of part-time State officers and employees are not required to file an Annual Statement of Financial Disclosure with the Commission.

CONCLUSION

We affirm Advisory Opinion No. 05-02 to the extent that it is consistent with this Opinion. We conclude that a State officer or employee who is not a policymaker and serves in a position with a full-time salary in excess of the filing rate, but who is hired on a permanent part-time basis and, thus, receives annual compensation that is intended to be less than the filing rate, and cannot exceed the filing rate, is not required to file an Annual Statement of Financial Disclosure with the Commission.

This opinion, unless and until 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 opinion or related supporting documentation.

All concur:
Michael G. Cherkasky
Chair
John M. Brickman
Richard D. Emery
Daniel J. French
David L. Gruenberg
Hon. James P. King
Steven C. Krane
Hon. Howard A. Levine
Loretta E. Lynch
John T. Mitchell

Members
September 16, 2009

Footnotes:

1 The Public Employee Ethics Reform Act of 2007 created the New York State Commission on Public Integrity, which 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 Public Officers Law §73-a(c)(ii) also requires State officers and employees “who hold policymaking positions,” as determined by their agency, to file Annual Statements of Financial Disclosure. Individuals who are designated policymakers are required to file without regard to compensation. An individual who is not required to file an Annual Statement of Financial Disclosure due to their part-time employment may be designated as a policymaker by their agency, if consistent with the agency’s guidelines.