

STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory
Opinion No.
89-11:**

Whether a State employee, as a principal and owner of the subject property, in a joint venture with a not-for-profit corporation, is prohibited by §73(7)(a)(iv) of the Public Officers Law from applying to a State agency for funding for a project in which the subject property will be rehabilitated for the purpose of providing low-income housing.

INTRODUCTION

The following is an advisory opinion issued in response to an inquiry whether §73(7)(a)(iv) of the Public Officers Law prohibits an employee of the [], (hereinafter "State agency-X") and an employee of the [] (hereinafter "State agency-Y") from applying to the State [] Fund Corporation for a loan to finance a joint venture between the State employees and a not-for-profit corporation aimed at rehabilitating a building owned by the employees for the purpose of providing low-cost housing.

Pursuant to the authority vested in the New York State Ethics Commission (hereinafter "Commission") by §94(15) of the Executive Law, the Commission hereby renders its opinion that §73(7)(a)(iv) of the Public Officers Law prohibits a State employee, acting as a principal in a private business enterprise, from receiving compensation for appearing or services rendered in connection with an application to obtain a grant of money or loan from a State agency for a project.

BACKGROUND

Subdivision 7 of §73 of the Public Officers Law provides, in relevant part, the following:
(a) No statewide elected official, or state officer or employee other than in the proper discharge of official duties, . . . shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation, in whatever form, for the appearance or rendition of services by himself or another in relation to any case, proceeding, application or other matter before a state agency where such appearance or rendition of services is in connection with:

. . . .

(iv) the obtaining of grants of money or loans;

In the instant case, [State agency-X] and [State agency-Y] have submitted a joint inquiry to the Commission for an advisory opinion on the issue of the propriety of two State employees, who are husband and wife and owners of a building, as principals in a joint venture with the [] Corporation (a private not-for-profit corporation), making an application to the State [] Trust Fund Corporation in order to obtain sufficient funds to rehabilitate the building owned by the two State employees for the purpose of providing low-income housing.

DISCUSSION

As employees of [State agency-X] and [State agency-Y], the individuals who are the subject of this opinion are governed by the provisions of §73 of the Public Officers Law.

Section 73(7) of the Public Officers Law prohibits certain business and professional activities by State employees which are considered likely to give rise to a conflict of interest, or at the very least, an appearance thereof. Subdivision 7 precludes a State employee from receiving or entering into an agreement for compensation, in any form, for the appearance by the State employee in relation to any application before a State agency in connection with the obtaining of a loan.

In this case, the two State employees have entered into an agreement with the [Corporation] to rehabilitate a building as a joint venture. The State employees have applied for a loan as principals in a joint venture with the not-for-profit [Corporation]. The [Corporation] is taking most of the responsibility for formulating the loan application, but the status of the State employees as principals remains unchanged.

A favorable response on the loan application will mean that the building owned by the State employees will be rehabilitated by the [Corporation] using the loan proceeds to fund the project. Under certain circumstances, pursuant to statute, the loan may be forgiven, and those funds need not be repaid. The benefit to the employees of the rehabilitation of the building is classified as compensation.¹ The definition of compensation requires a finding of a thing of value, in this case the rehabilitation of the building, in return for services rendered or to be rendered. The two State employees have rendered services with regard to the not-for-profit corporation by virtue of their making available the building for rehabilitation and their participation in the process of rehabilitation and are appearing as part of that application for funding. In both cases, compensation will be received: the value of the building after rehabilitation, the possible forgiveness of the loan and the ultimate rents received from the low-cost housing, available only as a result of the potential loan.

The questions which remain are whether or not an application for funding should be considered an "appearance" by the State employees in relation to the loan application and whether or not the State [] Fund Corporation is a "state agency" as defined in the Public Officers Law.

As to the matter of "appearance", the definition of appearance for the purpose of interpreting the Public Officers Law is broadly construed. The Attorney General, in formulating an opinion concerning the "revolving door" provisions of the Public Officers Law, determined that participation in submission of a response to a Request for Proposal by principals to a private business enterprise constitutes an "appearance" under the Public Officers Law. Specifically, the Attorney General stated:

In submitting a proposal to provide to DCJS an Automated Fingerprint Identification System, it seems clear that the subject persons, through the "Private Firm" would be appearing before DCJS within the meaning of section 73(7) of the Public Officers Law. These persons are president and vice-president, respectively, of the "Private Firm" and are principal investors. Any application by the "Private Firm" constitutes an appearance by these persons. Inevitably, principals of the companies submitting proposals will be required to appear before representatives of DCJS.²

In the instant case, the individuals have participated in the formulation of the proposal to be submitted to the State [] Fund Corporation, and are clearly principals in the joint venture; thus, the Commission concludes that the submission of the loan application by the two would constitute an "appearance" as defined in the Public Officers Law.

The remaining issue is whether or not the State [] Fund Corporation is a State agency as defined in the Public Officers Law, such that an appearance by way of a loan application would constitute a violation of the provisions of §73(7).

The Public Officer's Law defines "state agency" as any State department, or division, board, commission, or bureau of any State department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor.³

The State [] Fund Corporation was established as a public benefit corporation under State law. The membership of the corporation consists of the Commissioner of [State division], who serves as the chairperson, the chairman of the [Agency]⁴ and one additional member who is appointed by the chairman of the State [] Fund Corporation. The members of the [State Agency] consist of the Commissioner of the [State division], the [Director of a State agency], the Commissioner of [another State agency], and four members appointed by the Governor. The Commissioner of [the State division] is appointed by the Governor, as are all other members of the [State Agency] from which the chairman is selected for the State [] Fund Corporation membership. Thus, the State [] Fund Corporation squarely falls within the Public Officers Law definition of a "state agency".

The Commission cannot determine that, under §73(7)(a) of the Public Officers Law, activities which appear to serve the "public good" could be sanctioned and those activities which do not meet that standard would violate the subdivision. The question of what constitutes "public good" is a value judgment which the Commission is neither empowered nor authorized by statute to decide. The purpose of this subdivision is to avoid all possibility of special favors or conflicts between one's employment relationship with the State and attempts to receive benefits from the State which have no relationship to one's official duties.

The Commission, therefore, concludes that the proposed application by the joint venture involving two State employees, acting other than in the proper discharge of their official duties to a [State agency] for a loan in order to rehabilitate a building owned by those employees for the purpose of supplying low cost housing would be in violation of §73(7) of the Public Officers Law.

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 an opinion.

All Concur:

Joseph J. Buderwitz, Jr.
Angelo A. Costanza

Norman Lamm
Robert B. McKay, Members

Dated: December 14, 1989

ENDNOTES

1. "Compensation" is defined in Section 73(1)(a) of the Public Officers Law as meaning: ". . . any money, thing of value or financial benefit conferred in return for services rendered or to be rendered. With regard to matters undertaken by a firm, corporation or association, compensation shall mean net revenues, as defined in accordance with generally accepted accounting principles as defined by the state ethics commission or legislative ethics committee in relation to persons subject to their respective jurisdictions."
2. 86 Op. Att'y Gen. F6 (1986).
3. Section 73(1)(g), Public Officers Law.
4. "Agency" in this context refers to the [State Agency] created by section [] of the [] Law.