

New York State Ethics Commission

Advisory Opinion No. 91-8: Application of the Commission's regulations on the Receipt of Reimbursement for Travel Expenses, 19 NYCRR Part 930.6, to members of certain State professional boards.

Introduction

The following advisory opinion is issued in response to a written inquiry from the State Education Department ("SED"), on behalf of certain State professional board executive secretaries, requesting an interpretation of the Commission's regulations on the receipt of reimbursement for travel expenses, as contained in 19 NYCRR 930.6, and, specifically, whether State professional board representatives may accept travel reimbursement from national councils.⁽¹⁾

Pursuant to the authority vested in the Commission by Executive Law §94(15), the Commission determines that membership alone in a national council of state professional boards does not constitute doing business or having a contract with an organization which would preclude the acceptance of reimbursement for travel expenses. In addition, even if the professional board has a contract with the national council for the use of a national examination and grading service, acceptance of reimbursement for travel expenses from the national organization is permitted provided that the national council is composed only of representatives of state professional boards and the national council is not engaged in any other activities, such as lobbying before SED, which would preclude the acceptance of travel reimbursement under Part 930.6(a)(7)(i) of the Commission's regulations.

Background

Pursuant to Education Law §§6506 and 6507, the Board of Regents of the State University of New York ("Regents") and SED supervise and administer admission to and the practice of the licensed professions in New York State.⁽²⁾ For each profession, there exists a State board, headed by an executive secretary, whose members are appointed by the Regents upon the recommendation of the Commissioner of Education. The State board members and the executive secretaries are considered employees or officers of SED for all purposes including coverage under the provisions of Public Officers Law §§73 and 74.

For most licensed professions, a national council, or similar organization, prepares and grades the nationwide licensing examination for that profession. The New York State professional boards are often members of the respective national councils or organizations. Use of the nationwide licensing examination is either a contractual benefit of membership or is available to the State professional boards at an additional fee by virtue of their membership on the national council.

According to SED's letter requesting an opinion from the Commission, representatives from the New York State professional boards regularly participate on committees of the national councils, particularly in developing and grading licensing examinations. It is SED's view that New York State professional boards should be represented on national councils notwithstanding the current State restrictions on State related travel.⁽³⁾ The national councils actively encourage and seek state board participation and, due to SED's current inability to pay for out-of-state travel, will provide travel reimbursement for state professional board representatives who serve as national council committee members. Therefore, SED has requested that if the Commission's regulations preclude such travel reimbursement, the Commission should grant a limited exemption from the provisions of Part 930.6 to permit SED employees to accept travel reimbursement for their participation on committees of the national councils.

Pursuant to the authority vested in the Commission under Executive Law §94(16)(a), the Commission had first adopted regulations limiting the receipt of honoraria and reimbursement for travel expenses as an emergency measure on February 15, 1989. As a result of a lawsuit, an injunction was issued which enjoined the Commission from enforcing the originally proposed regulations. The regulations were subsequently amended and were published in the *New York State Register* on January 17, 1990. Numerous State agencies submitted comments, the Commission made some modifications and adopted the regulations on April 11, 1990.

Part 930.6 of the regulations, pertaining to the receipt of reimbursement for travel expenses, provides the following:

Conditions under which reimbursement for travel expenses relating to the covered individuals duties may be accepted.

(a) Covered individuals may accept reimbursement for travel expenses from non-State agency organizations or individuals for travel related to the covered individual's official duties under the following conditions:

....

(7) the reimbursed expenses are not received from or on behalf of an individual who, or on behalf of an organization, or any of its officers or members of the board of directors, other than any governmental entity which

(i) is regulated by, regularly negotiates with, appears before on other than a ministerial matter, *does business with or has contracts with* either the State agency employing the covered individual or the covered individual in his or her official capacity on behalf of the State agency, or . . . (emphasis added.)

The question is whether the national councils conduct business with or have contracts with SED that would preclude State professional board members from accepting travel reimbursement from these organizations under the Commissioner's regulations, and if so should the Commission grant the requested exemption from the regulations.⁽⁴⁾

Discussion

SED has requested an opinion from the Commission for the following State professional boards.

I. The New York State Board for Nursing.

The New York State Board for Nursing is a member of the National Council of State Boards of Nursing, Inc. ("NCSBN"), a Pennsylvania not-for-profit corporation. The primary areas of member board activity supported by NCSBN include licensure (through the development and grading of licensing examinations), discipline (through the disciplinary data bank), practice development (through publication of papers and monographs) and education (through model legislation, papers and monographs.)

The State board pays an annual fee of \$3,000 to NCSBN as part of its membership contract. A condition of membership is that the State board use one or both of the NCSBN licensure examinations.⁽⁵⁾ The current examination fee is \$40.⁽⁶⁾ Candidates for the examination pay this fee to SED which in turn pays the examination fee to NCSBN.⁽⁷⁾

There are currently 61 members of NCSBN: the professional boards of nursing for all 50 states (6 of which have two boards--one for RNs and one for LPNs), the District of Columbia, and four territories (Guam, Virgin Islands, Northern Mariana Islands and the American Samoa.) The policymaking body of NCSBN is composed of two delegates from each of the 61 member boards of nursing.

While NCSBN is not in the technical sense a "governmental entity," it performs many quasi-governmental functions and is comprised solely of representatives of all state professional boards. There is no means by which the national council could influence the decisions or actions of State professional boards members who receive the travel reimbursement. New York State and the nurses who practice therein would be disadvantaged should the State professional boards members not be able to fully participate in meetings of the national council, particularly in the areas of licensing examination development and grading. Under these circumstances, the Commission concludes that representatives of the State Board for Nursing may accept reimbursement for travel expenses from the national council notwithstanding the contractual relationship between SED and NCSBN.

II. The New York State Board for Pharmacy.

The National Association of Boards of Pharmacy ("NABP") is a not-for-profit corporation whose members are the respective state boards of pharmacy of all states, including the New York State board, the District of Columbia, Puerto Rico, seven provinces of Canada, the Virgin Islands, and two states in Australia. Active members each have one vote at the annual meeting of NABP.

The annual fee for state board membership in NABP is \$250. NABP does not receive any other compensation from its members except as may be provided by contract for the examinations developed by NABP, such as the National Association Boards of Pharmacy Licensing Examination ("NABPLEX").⁽⁸⁾ According to information received by the Commission from SED, the State agency does have such a contract and, pursuant to its terms, pays NABP \$150 per

candidate for the use of the examination and grading services.⁽⁹⁾ This sum is recouped by SED from the candidate's registration fee.⁽¹⁰⁾

As in the case of the State Board for Nursing, the Commission concludes that the State Board for Pharmacy may accept reimbursement for travel expenses from NABP notwithstanding SED's contract with the national council because of the quasi-governmental functions performed by NABP and because the national council's membership is comprised of all state professional boards.

III. *The New York State Board for Public Accountancy.*

With regard to the New York State Board for Public Accountancy, the board or its representatives currently have membership in four organizations: the New York State Society of Certified Public Accountants, the Empire State Association of Public Accountants, the American Institute of Certified Public Accountants ("AICPA"), and the National Association of State Boards of Accountancy ("NASBA"). The first three entities are New York State or national professional organizations comprised of individuals licensed as certified public accountants ("CPAs") or as public accountants ("PAs"). The Commission concludes that State board members may not receive travel reimbursement from the two New York State professional organizations because the individual CPAs and PAs, who are members of these organizations, are directly regulated by the State Board of Public Accountancy.

While SED's letter does not specifically address the issue, State boards members could also not accept travel reimbursement from the two New York State professional associations if the associations lobby or attempt to influence the Regents, SED or the State board concerning the regulation of CPAs and PAs in the State of New York. According to the information contained in SED's letter requesting an opinion, the NYS Society of CPAs has as its mission to "protect the interests of its members and the general public with respect to the practice of accountancy, to promote reforms in law. . . ." The Empire Association of Public Accountants has a similar mission directed towards licensed PAs rather than CPAs.

AICPA is a professional organization consisting of 250,000 members nationwide. AICPA is under contract with SED to prepare and grade the Uniform CPA Examination for about \$650,000 a year.⁽¹¹⁾ SED, as in the cases of candidates for licensure in nursing and pharmacy, recoups the cost of the examination from the accounting candidates for licensure. In addition, all CPA members in practice are bound by the AICPA rules of conduct developed by its committees.⁽¹²⁾ AICPA is not a national council of state boards but a professional organization for CPAs. The State Board of Public Accountancy is not a member of AICPA although representatives of the State board may be members in their capacities as licensed CPAs. Like the two New York State professional organizations for CPAs and PAs, AICPA presumably lobbies or attempts to influence actions or positions of the Regents, SED or the State board that affect CPAs. AICPA's mission is "to unite certified public accountants . . ." and "to promote the interests of CPAs . . ." Therefore, due to AICPA's status as a professional organization and the fact that AICPA membership is not composed solely of state board representatives, New York State board members may not accept travel reimbursement from the national organization under Part 930.6(7).

The State Board of Public Accountancy is a member of NASBA and pays the national organization a membership fee of \$5,000 based on the number of licensed CPAs in the State. NASBA develops policies, procedures and shares information for uniform use in the 54 licensing jurisdictions that comprise its membership. According to the information received by the Commission from SED, the State board has no other contractual relationship with NASBA and, unlike the previous cases, does not purchase any examinations from this national organization. Under these circumstances, the Commission concludes that State board members may receive reimbursement for their travel expenses from the organization because the only relationship between the State board and NASBA is the membership fee.

IV. The New York State Board for Engineering.

The New York State Board for Engineering is a member of the National Council of Examiners for Engineering and Surveying ("NCEES"). NCEES is a not-for-profit corporation made up entirely of representatives of all state professional boards and United States territorial jurisdictions. Each state board pays NCEES an annual membership of \$1500. The only other consideration NCEES receives from the member state boards is the cost of purchasing examination booklets and scoring the examinations.⁽¹³⁾ Under these circumstances, the Commission concludes that representatives of the State board for engineering may accept travel reimbursement from NCEES notwithstanding the contractual relationship between the entities because NCEES performs a quasi-governmental function and because the membership of the national council is comprised of representatives from all state professional boards.

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 persons in the request for opinion.

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza

Norman Lamm

Donald A. Odell, Members

Dated: May 21, 1991

Endnotes

1. The inquiry is made on behalf of the State professional boards for nursing, pharmacy, public accountancy and engineering.
2. The licensed professions, in addition to nursing, pharmacy, engineering and public accountancy, include: land surveying, medicine, dentistry, architecture, landscape architecture,

shorthand reporting, psychology, message therapy, ophthalmic dispensing, physical therapy, chiropractic, social work, optometry and veterinary medicine.

3. The Division for the Budget ("Division") has prohibited out-of-state travel for State employees due to the State's financial condition. According to SED, the agency applied for a waiver from the Division to permit SED to pay for the travel. Prior to the travel restriction, SED paid for the state professional board members to travel out-of-state to participate in national council meetings. The Division denied the request at the time the Division first promulgated the travel restrictions. SED has not made any further waiver requests.

4. Except where noted in this opinion, the national councils are not regulated by or negotiate with or appear before SED.

5. As part of the membership contract, member boards have access to a disciplinary data bank of licensure actions across the country. State board members also have access to NCSBN's clearinghouse of regulatory information and receive various publications issued by the organization.

6. According to SED, approximately 17,000 candidates sit for the registered professional nurse ("RN") licensing examination in New York State each year. As of January 1, 1991, the total fee for first-time candidates for licensure as RNs in New York State is \$165. Of this sum, \$40 would go to NCSBN for the use of the nursing examination. This would amount to approximately \$680,000 that NCSBN receives via SED from New York State candidates for licensure.

7. In some states the examination fees are paid directly by the candidates to NCSBN. In other states, like New York, the examinations fees are part of the total cost paid by the candidates to the state board.

8. According to SED, NABPLEX is the only nationwide examination available to pharmacy licensing candidates. The only alternative to using NABPLEX would be for SED to develop its own licensing examination for pharmacy candidates.

9. According to SED, approximately 1,000 candidates sit for the pharmacy licensing examination in New York State each year.

10. This is currently \$330 for first-time candidates.

11. The examination is used by the 54 licensing jurisdictions in the United States.

12. These standards are referenced in New York State under the Regents Rules of Professional Conduct and are applied by SED in its disciplinary proceedings.

13. According to information provided by NCEES to SED and transmitted to the Commission, use of the national examination is the primary purpose of membership in NCEES.