

New York State Ethics Commission

Advisory Opinion No. 92-1: Whether Public Officers Law §§73(5) and 74 limit the statutory authority of the commissioner of the Department of Agriculture and Markets to accept contributions from any source and to delegate that authority to Department officers and employees; whether authority to accept contributions implies authority to solicit.

Introduction

The following advisory opinion is issued in response to a request from the Department of Agriculture and Markets ("Department") for an opinion on the application of Public Officers Law §74 to Department employees receiving or soliciting contributions of money to the Farm Products Publicity Fund ("Fund") which supports the Seal of Quality program from persons and entities subject to the Department's regulatory jurisdiction.

Pursuant to the authority vested it by Executive Law §94(15), the State Ethics Commission ("Commission") concludes that:

1. the commissioner's authority to accept contributions to the Fund from regulated persons and entities must be tempered by consideration of Public Officers Law §73(5) which precludes accepting gifts under certain circumstances, and §74 which prohibits conflicts of interest. The commissioner must take reasonable steps to assure that he does not accept, on the Department's behalf, contributions to the Fund from persons and entities who are under the Department's investigation or in litigation against the Department; for all other donations, he must consider the source, timing and value before accepting. Further, the commissioner must exercise care in acknowledging contributions;
2. the Department employees' authority to accept contributions to the Fund, as delegated by the commissioner, must be tempered by the same Public Officers Law considerations. As a result, the Commission concludes that Department employees involved in regulatory activities may not accept, on the Department's behalf, contributions to the Fund; any other employees' acceptance of contributions must conform with conditions set forth in (1) above; and
3. the issue of whether the commissioner's statutory authority to accept contributions of money to the Fund implies the authority to solicit such contributions is a question of statutory construction that the Commission defers for the Department's or Attorney General's interpretation.

Background

To carry out its responsibilities under the Agriculture and Markets Law, the Department conducts both regulatory and promotional activities. For example, the law authorizes the commissioner to investigate the cost of food production and marketing and the production, transportation, storage, marketing and distribution of food sold, offered for sale, stored or held within the State and to enforce prohibitions against the sale and distribution of adulterated and mislabeled foods. The Department also conducts a host of programs to promote the sale of farm products grown and processed in New York State and cooperates with farmers and other food producers, distributors and consumers to maintain and improve systems for distributing and marketing foods.

The Seal of Quality ("Seal") program began in 1985-86 with an appropriation of \$500,000 "for services and expenses related to developing an agricultural product quality and market development program."

Agriculture and Markets §156-h authorizes the Department to design, determine and adopt official brands to be used on labels, packages or containers to identify fresh or processed New York State farm products for the program. Agriculture and Markets Law §156-i provides that all monies received by the commissioner from the sale of the Seal program labels or from the right to use the labels or from any other sources for such purchases or from charges from inspections made pursuant under the Seal program are to be deposited in a special fund known as the "Farm Products Publicity Fund." The Fund is used to defray the expenses of printing and distributing labels, general publicity and other incidental expenses associated with the Seal program.

The Seal may be applied only to New York State farm products inspected and approved by the Department under an official quality control program established by the commissioner and set forth in 1 NYCRR Part 163. Pursuant to those regulations, any person or firm lawfully operating in the State may apply for the use of the Seal; the product must be inspected by an authorized farm products inspector from the Department and meet the grade requirements established by the Department for the use of the Seal. The Department charges a fee for the inspections and, if authorization is granted, for the use of the Seal.

The Department also may accept contributions to support the Fund pursuant to Agriculture and Markets Law §156-i (see below). Although the Department asserts that a donor's decision to contribute to the Fund would be totally voluntary and would in no way affect the Department's enforcement policies or procedures, it has inquired about the propriety of the Department's officers and employees accepting or soliciting contributions of money to the Fund from persons and entities subject to the Department's regulatory jurisdiction. These contributions would be distinct from those fees paid to the Fund by regulated persons and entities for inspections related to the right to use the Seal label. The Commission's analysis addresses possible Public Officers Law §73 and 74 implications.

Applicable Statutes

Agriculture and Markets Law §156-i

The commissioner's acceptance of contributions to the Fund, unconnected to fees received for services provided under the Seal program, is specifically authorized by statute. Agriculture and Markets Law §156-i provides, "[t]he commissioner may accept contributions of money to the 'Farm Products Publicity Fund'"

Public Officers Law §§73(5) and 74

Public Officers Law §73(5) states:

No . . . state officer or employee . . . shall, directly or indirectly, solicit, accept or receive any gift having a value of seventy-five dollars or more whether in the form of money . . . under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such gift to a . . . state officer or employee . . . under such circumstances.

The Code of Ethics set forth in Public Officers Law §74 is concerned with both actual conflicts of interest and the appearance of conflicts by State officers and employees when acting in their official capacity. The rule with respect to conflicts of interest, as contained in §74(2), 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 discharge of his official duties in the public interest.

The rule is further explained by standards outlined in Public Officers Law §74(3) which provide, in pertinent part, the following:

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 public trust.

1. Whether Public Officers Law §§73(5) and 74 limit the commissioner's authority to accept contributions to the Fund from any source.

By requesting this opinion, the Department recognizes that the public might perceive that donors would receive preferential treatment or other benefits from the Department in return for contributions to the Fund.

The Commission concludes that it must read Agriculture and Markets Law §156-i authorizing the commissioner to accept contributions of money to the Fund in light of the subsequent enactment of Public Officers Law §§73 and 74 to determine whether a violation of those ethics provisions could occur from such acceptance.

Public Officers Law §73(5) prohibits the acceptance of contributions of money/gifts having a value of \$75 or more under circumstances in which it can be reasonably inferred that the gift was intended to influence the gift recipient to perform some official act to benefit the donor or as a

reward for any official action. Public Officers Law §74(2) prohibits acts that have the appearance of a conflict of interest. Therefore, the commissioner must at all times be cognizant of actual and potential conflicts of interest when accepting contributions to the Fund.

It is impossible for the Commission to list every type of donor whose donation may raise suspicions under Public Officers Law §73(5) or §74. However, to guide the commissioner in determining how to avoid accepting a contribution in violation of either Public Officers Law §73(5) or §74, the Commission sought to identify those potential contributors or circumstances most likely to pose problems. While it is not the Commission's intent to eliminate the pool of potential donors, we believe the following guidelines will assist the commissioner to avoid violating the spirit or letter of the law. First the Commission considered, and rejected, the notion that the commissioner should not accept contributions from any regulated individuals or entities. We note that, when enacting the Agriculture and Markets Law §156-i, the Legislature was cognizant of the commissioner's dual role as a regulator and promoter of the agricultural industry in New York State. Furthermore, logic indicates that those most likely to be interested in promoting New York farm products are those involved in their production, distribution, etc.; that is, those subject to the regulation of the Department.

The Commission concludes that the commissioner may accept contributions from regulated persons and entities, but not when those individuals and entities are involved in litigation with the Department or under the Department's investigation. In such adversarial situations the Department's impartiality is especially important. The commissioner should assume the responsibility of establishing procedures designed to guard against his accepting a contribution from inappropriate sources.

The Commission next considered other easily identifiable categories of donors (such as entities doing business with the Department, lobbyists, applicants for licenses, permits, etc.) whose gifts, due to the donors' relationships to the Department, might raise the specter of impropriety. In such cases, the commissioner must carefully consider the source, timing and amount of the contribution before accepting it. He or she must also consider that other categories not listed here might also pose a Public Officers Law §73(5) or §74 problem.

In conclusion, the Commission urges the commissioner to take care in how he speaks of the Fund and acknowledges contributions to it, lest he or the Department be perceived by the public as favoring donors or pressuring others to give.

2. Whether Public Officers Law §§73(5) and 74 limit the commissioner's power to delegate to Department officers and employees his authority to accept contributions.

Agriculture and Markets Law §17 authorizes the commissioner to delegate to Department staff any of his powers under the law "except where . . . the context otherwise requires".

As with the foregoing analysis, the Commission concludes that, in this context, Public Officers Law §§73(5) and 74 temper the commissioner's ability to delegate authority to accept contributions. Public Officers Law §73(5) prohibits the acceptance of certain gifts under circumstances where the public could reasonably infer an effort by the donor to influence or

reward the official acts of the Department official or employee. Public Officers Law §74 prohibits both actual conflicts of interest and acts which give the appearance of a conflict. Thus, the acceptance of a gift to the Fund by a Department employee under certain circumstances could result in a violation of the Public Officers Law. Therefore, the Commission recommends that, to avoid a violation of Public Officers Law §73(5) or 74, the commissioner should not delegate his or her authority to accept contributions to the Fund to Department employees involved in regulatory functions on behalf of the agency.

The commissioner may delegate to Department officers or employees not involved in regulatory activities on behalf of the Department the power to accept a contribution to the Fund, subject to the same caveats set forth under section 1 of the discussion of this opinion. Authorized officers and employees should avoid circumstances in which persons or entities may feel compelled to make contributions to the Fund if other similarly situated entities have done so. The commissioner should assume the responsibility for establishing procedures to assure the Department employees' compliance with this opinion.

3. Whether the commissioner's statutory authority to accept contributions to the Fund implies the authority to solicit.

Executive Law §94(15) authorizes the Commission to render advisory opinions interpreting Public Officers Law §§73, 73-a and 74. Agriculture and Markets Law §156-i specifically permits the commissioner to "accept" contributions, it does not speak to whether the commissioner may "solicit" money for such purpose. Since it is not within the statutory responsibility of the Commission to interpret the Agriculture and Markets Law, the Commission declines to address the issue of whether the commissioner's explicit statutory authority to accept contributions to the Fund necessarily implies the authority to solicit monies for the Fund. The Department itself or the State's Attorney General is better situated to interpret the Agriculture and Markets Law.

At such time as the Department or the Attorney General renders an opinion interpreting Agriculture and Markets Law §156-i, the Commission will consider the Department's inquiry as to the application of the Public Officers Law to the solicitation of contributions to the Fund from regulated persons and entities.

The Department also requested guidance from the Commission for ways it can encourage the support and participation of regulated parties in promotional programs without risking a violation of the Public Officers Law should the Commission preclude Department officials from accepting contributions from regulated parties. The Commission will review any Department proposals to accept contributions to the Fund consistent with the reasoning set forth in this opinion pending the Department's interpretation of whether Agriculture and Markets Law §156-i permits the commissioner to "solicit" contributions to the Fund from regulated entities.

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

Donald A. Odell, Members

Dated: February 6, 1992