

# New York State Ethics Commission

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**Advisory Opinion No. 92-16:**

Application of Public Officers Law §74 to (a State employee) who is seeking elected office.

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## INTRODUCTION

The following advisory opinion is issued in response to a request from a (State employee) employed at (a State agency) for an opinion concerning whether the ethics law prohibits him from seeking elected office as a member of the city council or as a member of the school board.

Pursuant to its authority under Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that, because of the sensitive nature of the (State employee's) position and the duties of the elective office sought, Public Officers Law §74 prohibits the (State employee) from seeking election to and serving on the city council of a municipality in the geographic area in which he works, but does not prohibit his campaign for or service on the local school board in the same geographic area.

## BACKGROUND

The employee who (is involved with the leasing of property for his agency) asked his supervisor whether the provisions of Public Officers Law §74 prohibit him from seeking election to a seat on the city council in the area of his jurisdiction and holding such seat if elected. Both the administrative director and the commissioner denied the request to run for and serve on the city council.

The employee now has asked the Commission whether he may seek election either to a seat on the [ ] city council or a position on the [ ] school board.<sup>(1)</sup>

(The State agency) has not designated the employee as a policymaker.<sup>(2)</sup> The employee's duties (include surveying and inspecting available space and determining suitability for State rental.)<sup>(3)</sup>

### City council

City council members serve a term of two years each.<sup>(4)</sup> Generally, a city council may regulate, manage and control its property and local affairs and has all the rights, privileges and jurisdiction necessary and proper for carrying such powers into execution.<sup>(5)</sup> Pursuant to General City Law §20, every city is authorized:

1. To contract and be contracted with and to institute, maintain and defend any action or proceeding in any court.
2. To take, purchase, hold and lease real and personal property within and without the limits of the city; to acquire pursuant to the provisions of the eminent domain procedure law, real property within or without the limits of the city for the construction, maintenance and operation of a sewage disposal plant, together with the necessary rights of way for extending its sewage system to, and connecting the same with such disposal plant, to acquire or purchase real property and/or personal property within or without the limits of the city necessary for the construction, maintenance of a water supply system for such city together with necessary rights of way for extending its water supply system to and connecting the same with a source of the water supply. . . .
3. To take by gift, grant, bequest, or devise and to hold and administer real and personal property within or without the limits of the city, absolutely or in trust for any public or municipal purpose, upon such terms and conditions as may be prescribed by the grantor or donor and accepted by the city.
4. To levy and collect taxes on real and personal property for any public or municipal purpose.

....

10. To grant franchises or rights to use the streets, waters, water front, public ways and public places of the city.
11. To construct and maintain public buildings, public works and public improvements, including local improvements, and assess and levy upon the property benefited thereby the cost thereof, in whole or in part.

....

12. To adopt a local law or ordinance compelling the repair or removal of any building or structure that, from any cause, endangers the health, safety or welfare of the public . . .

....

### **School board**

Education Law §§2501 et seq., addressing city school districts of cities with fewer than 125,000 inhabitants, enumerate the powers of such boards of education. Powers and duties found in subdivisions of §2503, of relevance to this opinion, include:

....

2. Shall prescribe such regulations and by-laws as may be necessary to make effectual the provisions of this chapter and for the conduct of the proceedings of said board and the transaction of its business affairs, for the general management,

operation, control, maintenance and discipline of the schools, and of all other educational, social or recreational activities and other interests under its charge or direction.

3. Shall have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes.

....

6. Shall have the care, custody, control, safekeeping and maintenance of all school property or other property used for educational, social or recreational work of the district, and shall prescribe rules and regulations for the preservation of such property. This subdivision shall not apply to property used for social or recreational programs of municipalities not established or maintained exclusively for educational purposes.
7. Shall purchase and furnish such apparatus, maps, globes, books, furniture and other equipment and supplies as may be necessary for the proper and efficient management of the schools and other educational, social and recreational activities and interests under its management and control; and may, without authorization by the voters, provide textbooks or other supplies to all the children attending the schools of such city school district.
8. Shall lease, for such term as may be necessary, and equip property when necessary for the purpose of furnishing school accommodations for the schools of the district and may enter into lease-purchase agreements under the same terms and conditions as may boards of education of union free school districts, except as to the requirement of voter approval.

....

The administrative director of (the State agency) denied the employee's request to seek public office (city council) and to serve, if elected. He reasoned that "it is evident that, at the minimum, an appearance of a conflict would occur if (the State employee) were to serve in any elected position in a community in which he/she could reasonably be expected to negotiate with private sector landlords." (Memo to employee dated April 1, 1991.) The employee appealed to the commissioner of (the agency), who affirmed the decision of the administrative director. Both denials were based on the ethical limitations found in Public Officers Law §74. The commissioner found actual and perceived conflicts of interest, reasoning:

The potential is inevitable that in your services of identifying suitable spaces for State leases, negotiations and lease formation and the servicing of State leases, you may be interacting with State residents of the City [ ] or persons having property interests in that City whose relationship to you as a Councilman would partake of the nature of a constituent of an elected official. Both the Code of Ethics and our Code of Conduct place clear restrictions not only upon your incurring an actual conflict of interest but on undertaking any outside activity or assuming other public

office which to the public may give the impression or be perceived by it, as a matter of appearance and regardless of the incurring of an actual conflict of interest . . . as likely to be attended by a conflict of interest. . . . It is my conclusion that the possible appearance or public perceptions of a conflict of interest between the elected office and the duties and responsibilities of your employment [ ] cannot be avoided. . . .

The employee believes that (the State agency's) application of Public Officers Law §74 violates the agency's own policy of encouraging its employees' participation in government activities.<sup>(6)</sup> The employee now seeks the Commission's opinion concerning the application of Public Officers Law §74 to his circumstances.<sup>(7)</sup>

### **STATUTORY AND POLICY BACKGROUND**

The code of ethics, found in Public Officers Law §74, provides minimum standards against which State officers and employees are expected to gauge their behavior. The code is directed at addressing the conflict between the obligation of public service and private, and often personal, financial interest.

The rule with respect to conflicts of interest is provided in Public Officers Law §74(2):

No officer or employee of a state agency . . . should have any interest . . . 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 which address not only actual but apparent conflicts of interest. Of relevance to this inquiry are the following:

(d) 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.

. . . .

(f) An officer 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.

. . . .

(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 trust.

The (State agency) "Policies and Procedures Manual" considers the special nature of leasing agents in the following provisions:

### **Section 3.11 Standards**

[s]taff members [ ] all aspire to a high standard of performance in the conduct of their official duties. Personal job-related conduct, which might be thought normal and acceptable in dealings between two private sector parties, may be viewed as an indication of inappropriate relationships with persons, parties, or firms doing business with staff members in their official capacity.

....

2. meetings discussions, and work of any nature dealing with private sector contracts should not be carried on in restaurants or other places of a public, social gathering nature, nor in private clubs or homes, over meals or refreshments. In an exceptional, unavoidable, rare circumstance, (such as a luncheon meal together required by conditions beyond the staff member's control), the situation is to be handled strictly on a dutch treat basis. A record of such meeting must be maintained and the supervisor advised accordingly.

....

4. personal business dealings, involvements or contracts, involving personal business matters rather than State transactions, with those with whom the Division does business on behalf of the State should be avoided unless there is a true, independent arm's length transaction, such as buying a house that is on the public real estate market and listed by a broker with whom the staff member might also do State business.<sup>(8)</sup>

....

### **Gifts & Benefits**

Gifts of any value should never be solicited from anyone in connection with work-related activities. While the Public Officers Law prohibits the receipt of a gift or benefit of \$75 or more, no gifts or private benefits, regardless of value, are to be accepted from firms or individuals with whom the employee has, or may have work-related contact in the course of his/her employment at OGS. Although givers may intend no wrong, the receipt of gifts or benefits would create the impression of special treatment or wrongdoing. . . .

## **DISCUSSION**

Public Officers Law §74 addresses not only actual conflicts of interest, but also conduct that gives the impression that a conflict exists. The law is intended to restore the public's trust and confidence in government through the prevention of corruption, favoritism, undue influence and abuses of official position.

The Commission does not read Public Officers Law §74 to preclude State officers and employees who conduct business with the general public from participating in the political process.<sup>(9)</sup> In the present case, however, it is conceivable that the public, political opponents, or (the State agency) might conclude that the leasing agent would appear to violate §74 by:

using his State office to secure unwarranted privileges, for example, some political advantage for himself or others, [§74(3)(d)];

being influenced in his official State activities by the campaign contributions and support of (agency) lessors or those seeking (agency) leases, [§74(3)(f)];

creating suspicion among the public that he is violating his public trust through his negotiations with private landlords on behalf of (the State agency), [§74(3)(h)]; and

abusing State time and resources [§74(2)].

The Commission will address each concern in turn.

**§74(3)(d): Using his State office to secure unwarranted privileges, for example, some political advantage, for himself or others**

(State employees with these responsibilities) exercise considerable judgment, and their decisions can result in significant benefit to landlords. (They) could parlay (their) State position, with its attendant powers, into campaign support, financial or otherwise. Furthermore, lessors or potential lessors might foresee preferential treatment from (the State agency) if they support the campaign of (the State employee.) While the (State employee) cannot be held accountable for the misunderstandings or intentions of others, he must do everything in his power to avoid any such inference being drawn.

The Commission believes that (the State agency's) strict policies for employees [ ], which specifically prohibit business dealings with those with whom the Division does business, do not entirely address this concern; nor does requiring, as has been suggested, that the (State employee) refuse to accept contributions from persons or entities which are current or potential lessors with (the State agency). To prevent a violation of Public Officers Law §74(3) during a campaign for city council or school board, the (State employee) would have to decline not only monetary, but also any other support from current or potential landlords from his area of jurisdiction.

**§74(3)(f): Being influenced in his official State activities by the campaign contributions and support of (State agency) lessors or those seeking (State agency) leases**

The employee, either during a campaign or once elected, may be affected in his official duties for the State by individuals' or entities' support or non-support for him in the political arena.

(The State agency's) policies prohibit its employees from soliciting or accepting gifts of any value from anyone in connection with work-related activities.<sup>(10)</sup> Landlords may take the

opportunity of the (State employee's) campaign (a non-"work-related" activity) to make contributions of money or other support. In the present case, to avoid the appearance of impropriety under §74(3)(f), the [ ] employee in his campaign for both offices would be required to form a separate entity for the receipt of campaign contributions and refuse any campaign contributions or other support from persons or entities which are current lessors with (the State agency) in (State employee's) geographic area or which are under (the State agency's) consideration during the campaign to become a lessor.

**§74(3)(h): Creating suspicion among the public that he is violating his public trust through his negotiations with private landlords on behalf of (the State agency).**

(The State agency) argues that (State employees with these responsibilities) have flexibility to make determinations that could result in significant profits or losses for those with whom the agent does business. In the agency's view, it is not possible to ensure that (an employee's) decisions made during a campaign are based on merit and not on a desire to obtain campaign support from the affected person or entity. The Commission agrees that the receipt of campaign contributions or other support from persons or entities which are current lessors with (the State agency) from the geographic area overseen by the (State employee) or which are under (the State agency's) consideration during the campaign could jeopardize the objectivity of the (State employee), even though campaign contributions may not constitute prohibited "gifts" under the law. And even if the (State employee) is capable of maintaining his objectivity, there is the appearance that he may be engaged in activity in violation of his or her public trust. Consequently, we conclude that the receipt of such contributions for any office would violate Public Officers Law §74(3)(h).

Furthermore, the concerns are compounded where the (State employee) seeks election to the city council in the geographic area over which he has responsibility for lease negotiations. Given the broad scope of the responsibilities of members of the city council, we are skeptical that the (State employee) can fulfill his responsibilities both as a State employee and as a council member without a conflict of interest. Among the city council's powers, for example, are those to levy taxes, to purchase and lease real estate, take real estate by eminent domain, administer to, construct and maintain public buildings and facilities, and to order the repair or removal of buildings. This only partial list of city council powers suggests that there would be significant matters affecting current and potential lessors from which the (State employee), because of his State position, should recuse himself when discussing, voting and otherwise serving as a city council member to meet the State's code of ethics.

We do not believe recusal is a viable option, however, to prohibit an elected official from discussing and voting on the significant range of matters and issues that would be required would, to us, appear to be contrary to public policy. (Certain of the (State employee's) State duties may also be similarly restricted by (the city's) code of ethics which pertains to the conduct of council members.) Therefore, the Commission cannot but conclude that, if proper application of the Public Officers Law requires a State employee to repeatedly recuse himself as a publicly elected official, the two positions are incompatible and the employee should not seek that office.

The Commission does not see the same coincidence of duties with relation to school board service. The employee can recuse himself from school board duties that could conflict without compromising his ability to act as a board member. Further, his State duties are not so intertwined with the public he serves and the duties he would perform as school board member as to prohibit such school board service. Therefore, the Commission finds recusal to be a remedy to potential conflict of interest violations should the (State employee) be elected to the school board.<sup>(11)</sup>

### **§74(2): Abusing State time and resources**

Section 74(2) contemplates and prohibits possible conflicts of interest. One such conflict of particular concern in the area of those seeking elected office is the abuse of State time and resources. The Commission recognizes that seeking elected office may require the expenditure of a great deal of such time and resources.

Public Officers Law §74 requires that campaigns be run on an employee's own time.<sup>(12)</sup> No State resources of any type, including telephones, office supplies, postage, photocopying machines or support staff assistance, can be used in the furtherance of the campaign. Should the employee win the election, the same proscriptions against using State resources would apply as well.

While a campaign biography may include the employee's State title and a simple description of his State position, he should make every effort to ensure that campaign literature and speeches do not demonstrate, to any degree, that (the State agency) is endorsing his campaign or positions or that his State position should be considered as a reason to vote for him.<sup>(13)</sup>

## **CONCLUSION**

The Commission concludes that (a State employee with the described responsibilities) who campaigns for a city council seat would create at the least an appearance of a conflict of interest in violation of the standards of Public Officers Law §74; further, to avoid §74 violations while serving on the city council, the individual would likely need to recuse himself so frequently from the performance of his city *and* State duties so as to limit his ability to properly perform either set of duties effectively. However, the (State employee) may campaign for and serve as a school board member, provided that he complies with the foregoing discussion. In particular, the (requesting individual) employee should not accept campaign contributions or other political support from current or potential lessors (with the State agency) from the geographic area overseen by the leasing agent, whether directly or through a committee.

Should specific conflict of interest concerns arise during the course of or subsequent to the election, the Commission will consider the circumstances at that time. It is understood that, if elected to the school board, the leasing agent must abide by the standards of conduct set forth in §74(3) that cover all State officers and employees.

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

Joseph M. Bress, Chair

Barbara A. Black

Angelo A. Costanza

Donald A. Odell, Members

Dated: July 2, 1992

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### Endnotes

1. At the agency level, the employee's request dealt only with the city council position, not the school board position.

2. Pursuant to Public Officers Law §73-a, appointing authorities designate employees as policymakers based on guidelines issued by the Commission. Policymakers must then file financial disclosure statements and are subject to the Commission's rules on outside activities.

3. (State agency manual.)

4. General City Law §2.

5. Id. at §19.

6. See (State agency policy).

7. See also employee's memo to Commissioner [ ].

8. (State agency) officials note that (employees) are made aware of the constraints contained in [ ] agency rules at the inception of their service.

9. The Commission's view is consistent with that of the Attorney General, who found there is "no statutory or constitutional provision which would prohibit a State employee from being elected to or serving as a member of the Assembly while retaining his other State position." (Op. Atty. Gen. 43, 1974.) The opinion states the general rule that:

one person may hold two or more public offices at the same time provided that the duties to be performed do not create an incompatibility of offices.

The Attorney General's opinion also cites the landmark case on the question of incompatibility of offices, *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874), in which the Court states:

Incompatibility between two offices, is an inconsistency in the functions of the two. . . . The offices must subordinate, one the other, and they must, *per se*, have the right to interfere, one with the other, before they are incompatible at common law.

The court focused on whether a conflict existed between the obligations of both positions held, rather than the actual candidacy of the individual.

10. Public Officers Law §73(5) precludes the receipt by a State officer or employee of a gift over \$75 in value under circumstances in which it could reasonably be expected to influence him in the performance of his official duties or reward him or her for official action. In the case of *DiLucia v. Mandelker* (110 A.D. 2d 260, 493 N.Y.S.2d 769) (1985) a New York City mayoral candidate brought action against the treasurer of a political committee for the current mayor asserting that political contributions constituted gifts to a public official prohibited by the New York City Charter. The Appellate Division held that a political contribution is not a "gift" within the purview of the City Charter section prohibiting gifts to public officials. The Court relied upon an interpretation by the Board of Ethics of New York City that campaign contributions are not gifts. (Formal opinion no. 35, (1961), reemphasized in letter opinion no. 263 (1981).) "The conduct of political committees and the making of political contributions is covered by other laws, and we have been advised by the Corporation Counsel that in his opinion such other laws have not been violated."

11. The Commission is mindful that elected officials are subject to an accountability measure above and beyond those imposed by the Public Officers Law (or its counterparts), codes of ethics or internal rules and regulations; specifically, the approval of the voters. Our concern is limited to the ability of the requestor to fulfill the duties of (the position) consistent with the provisions of the Public Officers Law.

12. Although he would remain subject to Public Officers Law §§73 and 74, an employee may consider taking a leave of absence to avoid potential conflicts issues arising from the campaign. The Commission notes that granting the request is a matter of administrative discretion.

13. It is important to note that Civil Service Law §107 contains safeguards for civil service employees of the State or any civil division against discriminatory practices based on political affiliations. No appointments, selections to or removals from an office or employment can be affected or influenced by political opinions or affiliations. The law prohibits the use of a State authority or official position to coerce, intimidate or otherwise influence State employees to give money or service or any valuable thing for any political purpose or influence the political action of any person or body or to interfere with any election. These prohibitions provide that civil service officers and employees may not be compelled or induced to pay or promise to pay any political assessment or contribution.

Election Law §17-158 similarly prohibits those who hold public office, or are being nominated or seeking a nomination therefor from corruptly using or promising to use, directly or indirectly, any official authority or influence possessed to secure or aid in securing any office or public employment. Such Election Law restrictions include prohibitions versus making offers to procure any nomination or appointment for any public office or place or accepting or requesting

payment or contribution of any valuable consideration, or upon an understanding or promise thereof.

Finally, any State employee whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency must not violate the "Hatch Act" (5 USCA §1501 et seq.). The Hatch Act restricts the political activity of individuals principally employed by State or local executive agencies with such programs. Such restrictions include prohibitions against candidacy for public office in partisan elections, the use of official authority or influence for the purpose of interfering with or affecting the results of an election or a nomination for office and against directly or indirectly coercing contributions from subordinates in support of a political party or candidate. Opinions concerning the Hatch Act may be obtained from the United States Merit Systems Protection Board.