

# New York State Ethics Commission

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**Advisory Opinion No. 93-7:** Whether an individual performing services under subcontract to a State agency and appointed to fill a position with the State agency is a covered State employee for purposes of Public Officers Law §§73, 73-a and 74.

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## Introduction

The following advisory opinion is issued in response to a request from [a State agency] whether [an individual], under subcontract to serve as clinical director of [a State facility] would be subject to the provisions of Public Officers Law §§73, 73-a and 74 by [the State agency's] appointing him to the position of executive/clinical director of the facility.<sup>(1)</sup>

Pursuant to its authority under Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that [the individual] is a State employee for purposes of Public Officers Law §§73, 73-a and 74 because of the responsibilities of his position as executive/clinical director of [a State] facility, and because of the degree of control [the State agency] exercises over him in the performance of those duties.

## Background

In 1988, [a New York State commission] uncovered abuse [at the State facility]. As a result of these findings and subsequent investigations, [the State agency] undertook several corrective measures including the recruitment and training of additional professionals at [the State facility].

On December 1, 1989, due to long-standing difficulties in recruiting for [the State facility] a qualified clinical director [and others], [the State agency] contracted with [a private corporation] to recruit and hire qualified [individuals] to fill these vacant positions and provide administrative support for the [individuals].<sup>(2)</sup> The New York State Attorney General approved the contract on January 17, 1990, and the State Comptroller approved it on February 2, 1990.

[The corporation] specializes in providing quality services to [specific facilities]. [The corporation's] services include:

screening, selecting and hiring under contract highly credentialed [ ] professionals;

ongoing supervision and training [ ];

designing quality assurance and utilization review programs;

program development and consultation services;

designing and implementing management programs including marketing and accreditation exercises; and

complete malpractice and risk management services.

The contract between [the State agency] and [the corporation], (referred to as "CONTRACTOR"), provides for the following:

the [employees] recruited by [the corporation] must be acceptable to the director of [the State facility] (Paragraph "FIRST" of the contract)<sup>(3)</sup>;

[the corporation] will provide continuing education and training for its [ ] staff of [the State facility] and programs and recommendations designed to enhance the quality of [ ] care provided to the patients of [the State facility] (Paragraph "FIRST" of the contract);

the director and governing body of [the State facility] and not [the corporation], will continue to be ultimately responsible for the quality of care provided [ ] (Paragraph "SECOND" of the contract);

[the corporation] must remove any person who, in the judgment of the director of [the State facility] is failing to provide a high quality of services (Paragraph "SECOND" of the contract);

[the corporation] will "direct its employees to follow at all times the administrative policies and procedures of [the State facility]" (Paragraph "SECOND" of the contract);

[the corporation] will assign its personnel to such [ ] services as may be required from time-to-time by the director of [the State facility] (Paragraph "THIRD" of the contract);

[ ] records shall remain the exclusive property of [the State agency] and shall comply with the standards set forth by the [ ] records committee of [the State facility] (Paragraph "FIFTH" of the contract);

[the corporation] is an independent contractor and neither it nor its employees are agents or employees of [the State agency] (Paragraph "SIXTH" of the contract);<sup>(4)</sup>

Any traveling expenses incurred by [ ] in providing services at the request of [the State agency] in connection with the contract shall be payable by [the State agency] and limited to those payable to State employees performing the same or similar duties and shall be subject to the rules of the State Comptroller (Paragraph "ELEVENTH" of the contract);

[the State agency] will provide all equipment, [ ], supplies, furniture, fixtures, and services of [ ] personnel for the efficient provision of services (Paragraph "SIXTEENTH"); and

[the corporation] and [the State agency] may require any [individuals] providing services under the contract to restrict or limit [outside activity] in accordance with the outside employment policy of [the State facility] (Paragraph "SEVENTEENTH" of the contract).

The term of the initial contract was for two years. Pursuant to the contract, [the corporation] subcontracted with [the individual] to serve as clinical director of [the State agency] commencing on [ ]. At that time, [the individual] also assumed some of the duties of the position of executive director of the facility which had not been filled. [The individual]'s position has now been designated executive/clinical director.<sup>(5)</sup>

According to the job description, the executive/clinical director of [the State facility] performs both executive and clinical functions. He or she "is the Chief Executive Officer and is responsible to the Regional Director and, ultimately, to the Commissioner, for all professional, administrative and support activities of [the State facility] under the [ ] Law of the State of New York." In addition, the executive/clinical director is "responsible for the administration of all treatment programs and, on a broader level, for the delivery of all [ ] ancillary services by both [ ] center staff and consultants." As executive/clinical director, [the individual] supervises approximately 200 [State agency] employees and is responsible for 70 [clients].

On November 4, 1991, [the State agency], at its option and with the agreement of [the corporation], extended the term for an additional three years to November 30, 1994.<sup>(6)</sup> Pursuant to that amendment, [the corporation] budgeted \$203,680 to cover the salary, fringe and retirement benefits of the position of clinical director for the period of December 1, 1990 through November 30, 1991, and \$218,752 for the position for the period of December 1, 1991 through November 30, 1992. According to [the State agency], executive directors and clinical directors at other [State agency] facilities receive a State salary in the high \$90,000/year range plus benefits from the State.<sup>(7)</sup>

[The State agency] proposes to appoint [the individual] to a full-time "policy-making" State position as clinical director of [the State facility]<sup>(8)</sup> for which he would receive one dollar per year directly from [the State agency] and no State benefits. He would continue to receive compensation, fringe and retirement benefits from [the corporation] under a separate subcontract.

[The State agency] argues that by virtue of his receipt of one dollar in direct State compensation and the agency's designation of him as a policymaker for financial disclosure purposes, [the individual] would be a State employee subject to the provisions of Public Officers Law §§73, 73-a and 74 as well as the regulations of the Commission concerning limitations on the receipt of honoraria and travel reimbursement (19 NYCRR Part 930) and outside activities (19 NYCRR Part 932). [The State agency] also argues that, as a State employee, [the individual] would be entitled to defense and indemnification by the State pursuant to the provisions of Public Officers Law §17 for actions arising out of his employment.

[The State agency] contends that "it is important that [the individual] be appointed as a State employee while serving as the Clinical/Executive Director [of the State facility] because in these roles he will implement policies of [the State agency] and also will serve as a policy-making employee." [The State agency] also argues that only by [the individual]'s appointment as a State employee will he be subject to the Commission's enforcement of the provisions of Public Officers Law.

### **Applicable Law**

Public Officers Law §73(1)(i)(iii) defines the term "state officer or employee" to mean:

. . . officers and *employees* of state departments . . . or other state agencies. (emphasis added)

Public Officers Law §73-a(1)(c)(ii) defines "state officer or employee" for the purpose of financial disclosure as:

. . . officers and employees of . . . state departments or other state agencies who receive annual compensation in excess of the filing rate . . . or who hold policymaking positions.

Public Officers Law §74 applies to any officer or employee of a State agency. The term "state officer or employee" is not further defined.

### **Discussion**

To determine whether [the individual] is a State employee for purposes of Public Officers Law §§73, 73-a and 74, the Commission considered general indicia of employment including whether Public Officers Law §17 applies to him.<sup>(9)</sup>

#### *General indicia of employment*

"Although the indicia of State employment typically include the power to hire and fire, the payment of salary, and the power to direct the employee in his or her performance of official duties on behalf of the State, only the last element is essential to a finding of employment." *Hardy v. Murphy*, 29 AD2d 1038 (3rd Dept. - 1968); *Lieberman v. Gallman*, 41 NY2d 774 (1977), 1979 Op. Atty. Gen. 57. Therefore, it is not the amount of direct State compensation, but the recipient's relationship with [the State agency] that will determine whether [the individual] is a covered State employee.<sup>(10)</sup>

While [the corporation] does provide recruitment services under its contract with [the State agency], any [staff] selected by [the corporation] must be acceptable to the director of [the State facility]. The contract provides that [the corporation] agrees to direct its [staff] to follow the applicable administrative policies and procedures of [the State facility] and that the director of [the State facility], and not [the corporation], is ultimately responsible for care at the facility. [The corporation] assigns its personnel to any required services as directed by [the State facility]. The contract requires [the corporation] to remove any person who does not meet the standards of the director of the facility after [the State agency] provides 30 days' notice. [The corporation]'s [staff] must comply with the State's travel regulations and the facility's policy on outside employment.

While the Commission does recognize that the contract refers to [the corporation] as a "contractor" and declares that [staff] engaged by [the corporation] are not [State agency] employees, [the State agency] has appointed [the individual] to a State position of executive/clinical director (not one established by [the corporation]). [The individual] functions as the executive/clinical director of a State facility with responsibilities no different from those of other similarly situated directors of other [the State agency] facilities.<sup>(11)</sup> As stated in the job

description for this position, [the individual] is responsible and reports to [the State agency]'s Regional Director and, ultimately to the Commissioner of [the State facility].

Under these circumstances, it is clear that [the State agency], and not [the corporation], has the right to control [the individual] in the performance of his duties at [the State facility]. In the instant matter, the Commission concludes that [the State agency] has appointed [the individual] to the position of clinical director, he is doing the work of the State, the power to direct and control his performance at [the State facility] rests with [the State agency] and not [the corporation]; therefore, he is a covered State employee for purposes of Public Officers Law §§73, 73-a and 74.

### *Public Officers Law §17.*

Public Officers Law §17 provides for defense and indemnification of State officers and employees. It defines an "employee" as "any person holding a position by election, appointment or employment in the service of the state, whether or not compensated, . . . but shall not include any independent contractors." The Commission has in the past looked to whether an individual is covered by Public Officers Law §17 as an indication of whether he or she is a State employee for purposes of Public Officers Law §§73, 73-a and 74.

In its request for an opinion, [the State agency] states that as a State employee, [the individual] would be defended and indemnified for actions arising out of his employment under Public Officers Law §17. While the Commission is not authorized to interpret the provisions and application of Public Officers Law §17, statutory provisions and Attorney General opinions tend to indicate that [the State agency]'s position is correct.<sup>(12)</sup> [Cite omitted] states Public Officers Law §17 coverage shall apply:

. . . to any [categories of employees] licensed to practice pursuant to the New York education law, who [are] rendering professional treatment authorized under such license at the request of [the State agency] or an office facility to patients receiving care or professional consultation from the office while rendering such professional treatment.

In 1980 Op. Atty. Gen. 40, the Attorney General held that, while independent contractors are not covered by Public Officers Law §17, health care providers rendering professional services pursuant to a contract with the Department of Correctional Services are entitled to defense and indemnification by the State pursuant to the specific statutory authorization of Correction Law §24-a, which provides for the indemnification of individuals holding a license to practice a profession under the Education Law and who render professional services for the Department within or without a correctional facility.

Also arguing for §17 coverage is a 1981 Attorney General opinion in which the Attorney General found that certain CETA workers are State employees for the purpose of Public Officers Law §17, "since they are doing the work of the State at the direction and control of the State for compensation, regardless of the source of the compensation." 1981 Op. Atty. Gen. 62.

### **Conclusion**

[The individual] is a State employee subject to the provisions of Public Officers Law §§73 and 74 by virtue of his responsibilities as executive/clinical director of [the State facility] and [the State agency's] authority over him in the performance of his duties in this State position, regardless of the compensation, if any, he earns. When [the State agency] designates him as a policymaker, he will be required to comply with the financial disclosure requirements of Public Officers Law §73-a.

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

All concur:

Joseph M. Bress, Chair

Barbara A. Black

Angelo A. Costanza

Robert E Eggenschiller, Members

Dated: March 8, 1993

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## Endnotes

1. [The State agency] initially asked whether [the individual] would become a covered State employee by virtue of [the State agency's] paying him one dollar in annual salary. As discussed, *infra.*, [The individual's] receipt of \$1 from [the State agency] is not determinative of the issue of whether he is a covered State employee for purposes of Public Officers Law §§73, 73-a and 74.

2. The contract provides that [the corporation] budget for a 1/3 time on-site administrator and additional sums for general administrative and support services.

3. According to [the State agency] the term "director" that appears in the contract is the same position as executive director of the facility.

4. Paragraph "SIXTH" of the December 1, 1989, agreement between [the State agency] and [the corporation] states:

The Parties agree that the Contractor is an independent contractor and is not an agent or employee of [the State agency]. The Contractor hereby agrees not to enter into any agreement nor make any commitments which would bind or obligate [the State agency] in any manner, and further agrees that its employees shall not be considered to be employees of [the State agency].

5. According to [the State agency], staff members from [the State agency's] regional office have performed other duties of the position of executive director of [the State facility].

6. Paragraph "NINTH" of the December 14, 1989, contract between [the State agency] and [the corporation].
7. Typical State benefits include health insurance coverage, vacation, sick and personal leave and participation in the State retirement system. Some executive directors receive additional benefits such as on-site housing and the use of a State vehicle.
8. The [State agency] anticipates that he would also perform some of the functions of executive director of the facility.
9. The Commission also made reference to principles applied in determining employment status for workers' compensation and unemployment insurance purposes. In workers' compensation cases, the existence of an employer-employee relationship is a threshold issue. Factors such as right to control, method of payment, furnishing of equipment, right to fire, and the nature of work are considered, and an employment relationship, under some circumstances, may be established on the basis of any one of these factual elements. *Grigoli v. Nito*, 11 AD2d 581, 200 NYS2d 511 (3rd Dept. - 1960); *Pelow v. Sork*, 39 AD2d 494, 337 NYS2d 218 (3rd Dept. - 1972); *Rastaetter v. Wilson Memorial Hospital*, 80 AD2d 608, 436 NYS2d 47 (2nd Dept. - 1981). For coverage under the unemployment insurance law, the Unemployment Insurance Appeal Board is authorized to look behind the terms of a written contract to determine the actual relationship between the parties where the issue is raised as to whether compensation benefits claimant is an employee or an independent contractor. *Lloyd v. Sans Souci Realty Corp.*, 32 AD2d 602, 209 NYS2d 613 (3rd Dept. - 1969). *Gold v. Catherwood*, 35 AD2d 887, 315 NYS2d 643 (3rd Dept. - 1970). The Board has held that reference in a contract between physicians and employer to physicians as "contractors" is not binding.
10. The Commission is mindful that there are numerous State officials and employees who perform their official duties for \$1/year in State compensation and are covered by the provisions of Public Officers Law §§73, 73-a and 74.
11. Again, referring to Public Officers Law §17 coverage, in 1981 Op. Atty. Gen. 11, the question was raised whether unpaid member of the Board of Public Disclosure established by Executive Order 10.3 are employees. There the Attorney General held the members are so covered as they are "clearly [a] person(s) holding a position by appointment. It is equally clear that the position is 'in the service of the State.'"
12. The Attorney General possesses such jurisdiction and the Commission reserves the right to reconsider this opinion should the Attorney General determine that [the individual] is not covered by the defense and indemnification provisions of Public Officers Law §17. See 1981 Op. Atty. Gen. 11, supra.