New York State
Ethics Commission

Advisory Opinion No. 95-27:	Application of Public Officers Law §74 to a member of the Public Health Council appearing before the Department of Health with respect to matters not pending before the Council.

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [ ], an attorney with the law firm of [ ], who asks whether a member of the Public Health Council ("Council") may appear before other components of the New York State Department of Health ("DOH") with respect to matters not pending before the Council.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission hereby renders its opinion that, to avoid the appearance of a conflict of interest under Public Officers Law §74, a member of the Council may not appear before any unit of DOH.

BACKGROUND

Public Health Law §220, establishing the Council, provides that it "shall continue to be" in DOH and consist of the Commissioner of DOH and fourteen members appointed by the Governor with the advice and consent of the Senate. At least one opinion of the Attorney General refers to the Council as a "component" of DOH. See 1988 Op. of the Attorney General 8.

Public Health Law §224 authorizes the Commissioner, upon the request of the Council, to designate an officer or employee of DOH to act as secretary to the Council, and to assign from time to time other DOH employees to the Council.[(1)] Public Health Law §225 provides that the Council, at the request of the Commissioner, shall "consider any matter relating to the preservation and improvement of public health, and may advise the Commissioner thereon." It may also submit recommendations to the Commissioner "relating to the preservation and improvement of public health" and appoint advisory committees in major areas of public health concerns.[(2)]

In addition, the Council has the power to establish and, from time to time, amend sanitary regulations, known as the sanitary code. These regulations cover numerous, varied aspects of the State's promotion of public health.[(3)] The code is enforced by the Commissioner.[(4)]

Finally, the Council must approve the establishment of all health facilities in the State, as well as every transfer of interest in such facilities.[(5)] Applications for establishment are filed with the Commissioner and are reviewed by other planning bodies before being presented to the Council for its consideration.

Pursuant to Public Health Law §201, DOH, which has broad authority over all aspects of public health in New York State, shall, among its functions, powers and duties:

- supervise the reporting and control of disease;
- conduct laboratory examinations for the diagnosis and control of disease;
- promote education in the prevention and control of disease; and
- exercise control over and supervise the abatement of nuisances affecting or likely to affect public health.

The Commissioner shall, among his or her general powers and duties:

- take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto;
- exercise general supervision over the work of all local boards of health and health officers;
- exercise general supervision and control of medical treatment of patients in the state institutions, public health centers and clinics in the department; and
- enforce the public health law and the sanitary code.[(6)]

APPLICABLE STATUTE

Public Officers Law §74 sets forth the Code of Ethics for State officers and employees. Section 74(2) contains the rule with respect to conflicts of interest:

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 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:

. . . .

c. No officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.
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.

. . . .

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.

. . . .

DISCUSSION

Public Officers Law §74 prohibits activities that give rise to the appearance of a conflict of interest; an actual conflict is not necessary for a violation of the law. Subdivision (3)(c) precludes a State officer or employee from disclosing confidential information obtained through State employment to further his or her personal interests; subdivision (3)(d) precludes such an officer or employee from using his or her official position to secure unwarranted privileges, influence or other favorable treatment for himself or others; and subdivision (3)(h) precludes him or her from giving the impression that unwarranted privileges or exemptions are being provided.

Because the Council is a component of DOH, a State agency, its members, as State officials, are subject to the provisions of Public Officers Law §74. (See Advisory Opinion No. 93-3.) In fact, they have been designated by DOH as serving in policymaking positions.

The issue presented to the Commission by the requesting individual's request is whether a member of the Council could be perceived, when appearing before DOH, as being in a position either to be able to disclose or use confidential information to the advantage of a client or to be able to seek unwarranted privileges. In Advisory Opinion No. 93-17, the Commission held that a member of the Freshwater Wetlands Appeals Board ("Board") would violate the provisions of §74 if he were to represent clients before the Department of Environmental Conservation ("DEC"). There, the Board had the power to review and reverse orders and decisions of the DEC Commissioner relating to freshwater wetlands.

In holding that a Board member may not represent private clients in any matter before DEC, whether or not relating to wetlands, the Commission concluded that the appearance of a conflict of interest would exist because the Board's power to review and reverse decisions of the Commissioner is incompatible with a Board member representing a client who is seeking favorable treatment from the Commissioner. The Commission said:

If the Board member were to engage in private practice before DEC, the public might well infer that, in his role as Board member, he was affected or even influenced by his clients', not the public's interests. By the very nature of the Board member's position and authority, there would always be the suspicion that the Commissioner or any party before the Board could be treated either favorably or unfavorably depending upon the Board member's success in his representation of private clients before the DEC.

The Commission determined that whether or not a Board member did, in fact, take advantage of his State position to obtain or use confidential information is not the issue. As noted, §74(3)(c) and (h) prohibit actions which can lead to the public's perception that a State officer's actions resulted in a conflict of interest. The Commission found, in Advisory Opinion No. 93-17, that the public might reasonably perceive that a Board member's representation of clients before DEC would be more successful because of his position on the Board.

While the relationship between the Council and DOH is not identical to that between the Board and DEC, as the Council does not have the statutory power to review and reverse orders and decisions of the Health Commissioner, the Council does act upon the recommendations of the Health Commissioner's staff and relies upon the advice and assistance of DOH employees. Therefore, the same concerns are present as were present in Advisory Opinion No. 93-17. The public could perceive that a member of the Council might be privy to confidential information that could be of value to a client when the member appears before DOH. The public could also perceive that a council member might receive preferential treatment from DOH because of his or her position. By virtue of their service on the Council, members become acquainted with the Commissioner and senior Department staff, with whom they are likely to work closely. Some of the same staff members who are assigned to the Council, and who work for the Council, may be involved with or even have final decision-making authority in matters a member may pursue for a client.

Given the powers of the Council and its necessary close working relationship with the Commissioner of DOH and his or her staff, the Commission concludes that a member of the Council may not appear before any unit of DOH with respect to matters not pending before the Council.

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 person in the request for opinion.

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza,
Robert E. Eggenschiller, Members

Donald A. Odell abstained.

Dated: July 18, 1995

Endnotes

1. The Council has no employees of its own and relies exclusively upon DOH employees for advice and assistance.

2. These areas of concern include health education, health manpower, economics and delivery of health care service, sanitation problems and interprofessional relationships.

3. See Public Health Law §225.5 for a description of what may be contained in the code.

4. Public Health Law §206.11(f).

5. Public Health Law §2801-a.

6. *See* Public Health Law §206 for a full list of the Commissioner's powers and duties.