

New York State Ethics Commission

Advisory Opinion No.	Application of Public Officers Law §74 to a State employee, designated as a policy maker by her agency, serving as a member of the board of directors of a not-for-profit organization that has interests similar to the employee's State agency.
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INTRODUCTION

The following advisory opinion is issued in response to a request from [a State employee] at the Adirondack Park Agency ("APA"), for an opinion as to whether she would violate the Public Officers Law by serving as a member of the board of directors of a not-for-profit organization that has interests similar to those of the APA.

Pursuant to the authority vested in it by Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that the [requesting individual] may serve on the board of directors of the not-for-profit organization, provided she abides by the guidelines set forth in this opinion.

BACKGROUND

The [requesting individual], has been designated by the APA as a policy maker. She is responsible for drafting hearing notices and permits, dealing with enforcement issues, issuing formal jurisdictional determinations, and preparing enforcement referrals to the Attorney General. In addition, the [requesting individual] deals with local planning issues, drafts legislation and legislative memoranda, conducts legal research and addresses issues arising out of the State Land Master Plan, unit management plans, and Article XIV of the Constitution.⁽¹⁾

When the APA deems it appropriate and staff time permits, the [requesting individual] also represents the agency in proceedings before the Federal Energy Regulatory Commission ("FERC"). FERC, in part, licenses and regulates hydropower projects in the United States. Various entities, including local governments, state agencies and interest groups, may seek "intervention" in FERC proceedings in order to protect their rights or interests. While FERC considers the positions of the intervenors, it makes the final determination as to whether to license or re-license a hydropower project.

In addition to her public position, the [requesting individual] currently serves as a member of an [organization] a not-for-profit river conservation organization created in 1992 "to coordinate and promote effective river management strategy statewide."⁽²⁾ The [organization] encourages watershed management and focuses on the problems of water quality, land-use management, scenic enhancement, and public access. According to its literature, the [organization] has played a "lead role in hydro relicensing projects throughout the State". It has formally intervened with

[FERC] in all 43 hydro relicensing proceedings initiated in 1993 in New York State, as well as in all proceedings for new licenses for hydro projects.⁽³⁾ The [organization's] Board of Directors consists of ten members who are not compensated and who meet on a quarterly basis.

The [requesting individual] accepted the [organization's] Board appointment in October, 1993. In her acceptance letter, she specifically conditioned her participation on the Board, stating that she would "not participate in any FERC-related decisions with regard to specific rivers located in the Adirondack Park." She set forth her reasons for this restriction as follows: "This exclusion is necessary so that I may participate on behalf of the Park Agency in the FERC processes with regard to rivers in the Park. It is important that I maintain this separation so as to preserve the [APA's] independent role."⁽⁴⁾

Currently, both the APA and the [organization], along with other parties, are participating in "settlement negotiations" regarding the relicensing of certain hydropower projects. The [requesting individual] is representing the APA in these discussions and has developed the agency's position in consultation with APA staff, other governmental agencies and environmental groups. According to the [requesting individual], the [organization] is also participating in these negotiations and has, to date, developed its position with its counsel and without guidance from its Board. She indicates that she knows of the [organization's] positions only to the extent that they have been revealed to the parties in the settlement negotiations. Since, as a Board member, the [requesting individual] has had no input into the [organization's] positions, and she indicates that she "will not", she believes there is no conflict of interest in representing APA.

The [requesting individual] asks the Commission whether her membership on the [organization] Board, as limited by her acceptance letter, constitutes a potential conflict of interest.

APPLICABLE LAW

Section 74 of the Public Officers Law sets forth a code of ethics for State employees, prohibiting conflicts of interest or the appearance of conflicts. The rule with respect to conflicts of interest as contained in §74(2), provides the following:

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 . . . which is in substantial conflict with the proper discharge of his duties in the public interest.

Following this rule, Public Officers Law §74(3) provides standards of conduct. In particular, these standards provide:

. . .

- 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.

. . .

e. An officer or employee of a state agency . . . should not by his conduct give a reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor . . .

. . .

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.

. . .

As has been often noted, Public Officers Law §74 is concerned with activities that have the appearance of a conflict of interest; an actual conflict is not required for a violation to occur. The issue presented to the Commission is whether the [requesting individual]'s service on the Board of Directors of the [organization] constitutes a conflict of interest or creates the appearance of a conflict of interest with her State policymaking position.

DISCUSSION

The Commission has had occasion to consider situations in which a State employee designated as a policy maker by his or her agency wished to serve on the board of an entity licensed or regulated by the agency. In [Advisory Opinion No. 90-25](#), the Commission held that a policymaking employee may not serve on the board of directors of a not-for-profit organization that is licensed or regulated, or whose rates are set, by the employee's agency. The Commission concluded that an appearance of a conflict of interest will always be present in such circumstances. In Advisory Opinion No. 92-4, the Commission similarly held that a director of a State facility who was designated as a policymaker was prohibited from serving as an uncompensated member of the board of directors of an entity over which his agency exercised certain oversight responsibilities.

In the instant case, the APA does not license or regulate the [organization], nor does it act as the final arbiter in FERC proceedings. Therefore, the opinions cited are distinguishable. However, the APA does have regulatory authority over areas of interest to the [organization]. It is possible that both APA and the [organization] may take positions on subjects of mutual interest, which may, at times, conflict. Thus, there is the potential for a conflict of interest.

Recognizing that this potential exists, the Commission believes that the [requesting individual] need not be precluded from simultaneously serving as both a policymaking employee of the APA and an [organization] Board member. She could avoid violation of Public Officers Law §74 by recusing herself in appropriate situations. The Commission holds that she must recuse herself from any [organization] discussions or votes concerning land or rivers within the Adirondack Park or concerning specific issues on which the APA has or will likely take a position. She should also disclose her [organization] board membership to the APA with regard to each such matter. The agency will then be able to consider whether to reassign the matter. Observing these

measures will enable the [requesting individual] to fulfill her responsibilities at the APA and pursue her personal interests without violating the Public Officers Law.⁽⁵⁾

As public servants, State employees gain a unique perspective on the complex issues that challenge State government. As private citizens, many of these individuals remain dedicated to the same issues with which they deal on a daily basis in the workplace. The Commission wishes to encourage them to participate in organizations that, for example, promote a clean environment, encourage the health and well-being of those less fortunate or support industries and technologies that serve to enlighten minds or advance the economic stability of financially-strapped regions.

It is not the intent of the Ethics in Government Act to dissuade or discourage civic-minded State employees from contributing to their communities or pursuing personal interests outside the workplace. However, especially when State employees have been designated policymakers by their employing agency and their outside activities relate to their agency's mission, the potential for a conflict of interest or the appearance of a conflict is present. While each situation must be reviewed on an individual basis, conflicts can often be avoided if employees observe the type of conditions identified in this opinion. While certain activities must inevitably be avoided entirely to prevent a conflict, the Commission will, whenever possible, attempt to permit civic and charitable activities.

CONCLUSION

The Commission concludes that the [requesting individual] may, while serving as an APA [employee], serve on the board of directors of the [organization] provided she recuses herself from any board discussions or votes concerning land or rivers within the Adirondack Park or concerning specific issues on which the APA has or will likely take a position. She should also disclose her board membership to the APA with regard to each such matter.

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

Angelo A. Costanza
Robert E. Eggenschiller
Donald A. Odell, Members

Dated: March 7, 1995

Endnotes

1. Job description memo dated February 28, 1985.
2. [The organization newsletter] Spring 1994, Vol. 1, No. 1 p. 1.
3. Id.
4. The [requesting individual] has also indicated that she has not and would not "participate in any [organization] decisions about in-Park river projects over which [APA] has jurisdiction."
5. Assuming the potential of an appearance of conflict or actual conflict, only APA can determine if the extent of such potential conflicts makes it impossible for the [requesting individual] to perform her job. Based on the information received by the Commission, such does not seem to be the case.