

# New York State Ethics Commission

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**Advisory Opinion No. 96-28:** Interplay between the Commission's regulations on limiting receipt of reimbursement for travel expenses, Public Officers Law §§73(5) and 74(3)(h), and a more restrictive agency policy.

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## INTRODUCTION

The following advisory opinion is issued in response to an inquiry from Robin Bramwell, Assistant Director of the Governor's Office of Employee Relations ("GOER"), who asks the Commission whether [a doctor], a Cancer Research Scientist employed by the Department of Health ("DOH"), should have been permitted to accept certain travel reimbursement from a corporation that has contracts with DOH.

Pursuant to the authority vested in the Commission by Executive Law §94(15), the Commission hereby renders its opinion that neither the Commission's regulations limiting the receipt of reimbursement for travel expenses, nor Public Officers Law §§73(5) or 74(3)(h), prohibits [the doctor] from receiving travel reimbursement. It is for DOH to interpret its own internal policy with respect to this matter.

## BACKGROUND

[The doctor] is a Cancer Research Scientist at the Roswell Park Cancer Institute ("Roswell"), which is part of DOH. He has initiated a contract grievance which is presently pending before GOER. Basically, he has grieved DOH's denial of his acceptance of travel reimbursement for attendance at a conference. GOER has asked for an opinion of the Commission, and the Public Employees Federation ("PEF") and DOH, the parties to the grievance proceeding, have consented. GOER will render a decision upon its receipt of this opinion.

As a Cancer Research Scientist at Roswell, [the doctor's] major areas of responsibility involve the Human Lymphocyte Antigen Laboratory and serological HLA typing. He also teaches a seminar on physiology at the Roswell Park Graduate Division of the State University at Buffalo, and, on occasion, gives lectures.<sup>(1)</sup> On [date], [the doctor] received an invitation to attend the Tenth Annual Clinical Histocompatibility Workshop ("Workshop"), which was to be held on [date] at the Paradise Island Resort in Nassau, Bahamas. The Workshop included presentations and discussions in clinical histocompatibility testing, which is [the doctor's] field of expertise. [The private company], the sponsor of the conference, offered to provide participants, including [the doctor], with a travel stipend to cover round-trip transportation and hotel accommodations. In [date] [the doctor] sought and received prior approval from his superiors to attend the Workshop and accept the stipend. It appears that he had received similar approval for the [previous year's] conference.<sup>(2)</sup>

On [date], less than one month prior to the conference, J. Fitzpatrick, the Chairman of Roswell's Department of Laboratory Medicine, acting at the direction of both the Vice President for Clinical Affairs and Legal Counsel, informed [the doctor] that he was not to accept the stipend from [the private company]. Fitzpatrick, who had given his approval in [date], stated in his memorandum to [the doctor] that "it is a violation of the State's Public Officers Law (also known as the ethics law) for you to accept support from [the private company]. . . ." Noting that [the private company] sells products used by the Laboratory in which [the doctor] works, Fitzpatrick stated that his acceptance of travel expenses would constitute a violation of the Public Officers Law §73(5), which prohibits the receipt by State employees of certain gifts valued at more than \$75.

On [date], [the doctor] responded to Fitzpatrick. He noted the provision contained in 19 NYCRR Part 930, the Commission's regulations regarding limitations on the receipt of honoraria and travel reimbursement, that exempts a Cancer Research Scientist who also serves in academic status from the restrictions on receipt of travel reimbursement and honoraria when ". . . attendance at conferences are within the discipline of the individual involved."

On [date], Roswell's legal counsel, Harriet Katz, responded to [the doctor's] memorandum, noting that "[y]ou are correct that 19 NYCRR 930.7 exempts you as a cancer research scientist from the generic prohibition on the receipt of honoraria and travel expenses for attending conferences in your discipline." She noted that "[t]he confusion arose from the more restrictive DOH Administrative and Procedure Manual Item 633.7." In a follow-up memorandum to [the doctor], dated [date], Katz said, ". . . since [the private company] is a vendor in your area, I thought it best to avoid the appearance of impropriety by your acceptance of any honoraria or travel expenses from them," citing Public Officers Law §§73(5) and 74(3)(h). She continued:

You are correct that under certain circumstances 19 NYCRR 930 permits research scientists to accept honoraria and travel expenses. As I mentioned to you the Health Department's Administrative Policy and Procedures Manual may be read to be more restrictive than the regulations. Efforts will be made to harmonize the Manual and regulations. In the meantime the language from the statute to avoid the appearance of impropriety (section 74h) I thought embodied the intent of the Act.

[The doctor] attended the Workshop at his own financial expense<sup>(3)</sup> and then filed the grievance that is now before GOER. With the agreement of Roswell and PEF, the employee organization which represents [the doctor], GOER is asking the Commission to determine whether he should have been permitted to accept the payment in question. It appears that the stipend is still available and could, if permitted, be accepted by [the doctor].

### **APPLICABLE STATUTES AND REGULATIONS**

Pertinent to this inquiry are the following sections of the Public Officers Law:

§73(5). 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, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, 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. . . .

§74(3)(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.

Also pertinent to this inquiry are the Commission's regulations on the acceptance of honoraria and travel reimbursement (19 NYCRR Part 930). These regulations provide in part:

930.6 Conditions under which reimbursement for travel expenses related to the covered individual's official duties may be accepted.<sup>(4)</sup>

(a) Covered individuals may accept reimbursement for travel expenses from the federal government, other State or municipal government entities, non-State agency organizations or individuals for travel related to the covered individual's official duties under the following conditions:

. . . .

(7) the reimbursed expenses are not received from or on behalf an individual who, or on behalf of an organization, or any of its officers or members of the board of directors, other than any governmental entity, which

(i) is regulated by, regularly negotiates with, appears before on other than a ministerial matter, does business with or has contracts with either the State agency employing the covered individual or the covered individual in his or her official capacity on behalf of the State agency

. . . .

930.7 Exemption.

(a) Academic employees of the State University and City University of New York including all their constituent units who are covered by §73 of the Public Officers Law and employees serving in the titles of "Research Scientist," "Cancer Research Scientist," and "Research Physician" who also serve in academic status are exempt from the limitations on the receipt of honoraria and reimbursement for travel expenses to the extent that the publication of books and articles, delivery of speeches or attending meetings or conferences are within the discipline of the individual involved.

## **DISCUSSION**

The provisions of 19 NYCRR Part 930 set forth above preclude State employees from accepting travel reimbursement from an entity that "contracts with either the State agency employing the covered individual or the covered individual in his or her official capacity on behalf of the State

agency." Since it is clear that [the private company] sells products to the laboratory in which [the doctor] works, he would, unless excepted, be barred from accepting the stipend offered.

In reviewing the positions of the parties to the grievance proceeding, there seems to be agreement that [the doctor] comes within the exception set forth in 930.7. He holds the position of Cancer Research Scientist at Roswell; he serves in academic status by teaching at the Roswell Park Graduate Division of the State University of Buffalo; and the travel reimbursement he seeks is for attending a conference within his discipline. Thus, Part 930 does not preclude his accepting the offer of payment from [the private company]. The question, then, is whether some restriction found elsewhere would preclude this payment.

DOH has cited Public Officers Law §§73(5) and 74(3)(h) as possible support for its position. However, it would be unfair in the extreme for the Commission, in its regulations, to exempt a Cancer Research Scientist from restrictions precluding acceptance of travel reimbursement, but to then hold that such reimbursement is precluded by the statutes that underlie the regulations. The Commission's regulations are intended to implement Public Officers Law §§73 and 74. State employees should be confident that when they comply with the Commission's regulations, they are in conformance with these statutes. Therefore, neither §73(5) nor §74(3)(h) should be read to preclude [the doctor's] acceptance of travel reimbursement.

The only other support for DOH's position is its internal manual -- Administrative Policy and Procedures Manual Item No. 633.7. This manual contains the same restrictions on the receipt of travel reimbursement as do the Commission's regulations, but, critically, it does not contain the exception for Cancer Research Scientists. Presumably, the manual was adopted pursuant to Executive Law §94(9)(j), which authorizes the Commission to assist State agencies in establishing rules and regulations relating to possible conflicts of interests between private interests and official duties of State officers and employees.

This section is consistent with the Court of Appeals decision in *Nicholas v Kahn*, 47 NY2d 24 (1979), where the Court upheld rules issued by the Department of Public Service prohibiting its employees from owning any interest in certain business concerns whose performance was related, at least in part, to companies regulated by the Department. In upholding the Department's authority to promulgate rules related to §74, the Court stated that:

[I]t is evident that in enacting this statutory scheme the Legislature recognized the varying duties and responsibilities of the multitude of State agencies would render it impractical to prescribe a rigid formula applicable to all. It is equally obvious that the statutes were not intended simply as a guide to the conscience of State employees. The provisions of the code of ethics are not merely innocuous platitudes or beneficent bromides relating to the standard of conduct that those charged with the public trust should follow. Were this the case, there would be no provision in the code empowering an agency to remove employees who violate their ethical duties nor any statute empowering an administrative agency to promulgate rules and regulations consistent with the legislative scheme. (*Nicholas*, at 32).

Despite *Nicholas*, a State agency is not without restrictions in issuing rules. For example, following the January 1, 1989, effective date of the financial disclosure reporting requirements of

the Ethics in Government Act, DOH promulgated a financial disclosure policy requiring its employees to identify on a departmental form any entities regulated or supervised by DOH in which they or their family members had an interest. DOH cited Executive Law §94(9)(j) as the source of its authority to promulgate the policy. In a 1992 decision, the Public Employment Relations Board held that §94(9)(j) was not a "source of a statutory mandate" and that "nothing in §94(9)(j) required DOH to promulgate its disclosure policy or any other conflict of interest rule."<sup>(5)</sup> Rather, the Board held that DOH's actions were discretionary, and to the extent that the exercise of that discretion embraced terms and conditions of employment, such promulgation was the subject of mandatory negotiation under Civil Service Law §201(4).<sup>(6)</sup>

The Commission has learned from DOH that shortly after the Commission's promulgation of 19 NYCRR 930.6, the agency issued its internal policy that, unlike Part 930.6, did not include an exception for Research Scientists, Cancer Research Scientists or Research Physicians. Thus, it appears that DOH's policy would preclude [the doctor] from accepting the stipend. However, a determination of this question is for DOH and not the Commission. If the Policy Manual Item No. 633.7 precludes acceptance, it is for DOH to take steps to enforce its policy. The Commission cannot hold that violation of an agency policy, by itself, is a violation of the Public Officers Law.

### CONCLUSION

The Commission concludes that [the doctor's] travel reimbursement from [the private company] would not violate the Commission's regulations governing the receipt of reimbursement for travel expenses, or Public Officers Law §73(5) or §74(3)(h). It is for DOH to interpret its internal policy.

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.

Concur:

Evans B. Brewster  
Angelo A. Costanza  
Donald A. Odell, Members

Dissent:

Robert E. Eggenschiller, Member

Dated: December 17, 1996

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**Endnotes**

1. Letter from Charles Siewert of Roswell's Human Resource Management Department to Robin Bramwell, Assistant Director, GOER, dated [ ].

2. Step Two grievance decision.

3. He did not make a formal presentation to the attendees.

4. 930.2 defines an honorarium as a payment which is "not related to the covered individual's official duties." Since there is no dispute that the conference in question was related to [the doctor's] official duties, the applicable regulation is Part 930.6, which sets forth the conditions under which reimbursement for travel expenses related to an individual's official duties may be accepted.

5. *Public Employees Federation, AFL-CIO v State of New York (Department of Health)*, Case Nos. U-9397 and U-11611 (1/31/92).

6. See also *Board of Education of the City School District of the City of New York v PERB*, 75 N.Y.2d 660, 23 PERB 7012 (1990).