

# **EXHIBIT 19**

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**MEMORANDUM**

April 4, 2011

TO: Mitra Hormozi, Chair  
Virginia M. Apuzzo  
Hon. Richard J. Bartlett  
John M. Brickman  
Vernon S. Broderick  
George F. Carpinello  
Richard D. Emery  
Hon. Howard A. Levine  
John T. Mitchell  
Mark G. Peters  
Barry Ginsberg, Executive Director

FROM: Karl J. Sleight  
Harris Beach, PLLC *KJS*

ISSUE: Whether President O'Connor has been denied his statutory right to an "opportunity to be heard" pursuant to Executive Law §94(12)(a).

**PRIVILEGED AND CONFIDENTIAL COVERED BY  
EXECUTIVE LAW §94(12)(a) AND PUBLIC OFFICERS LAW §74**

**Background**

This investigation began nearly two and a half years ago on January 29, 2009 when former Executive Director Herb Teitelbaum, after reading newspaper articles in the Albany Times-Union notified Research Foundation President John O'Connor that he believed Mr. O'Connor may have violated three provisions of the state's ethics law by hiring Ms. Susan Bruno in 2003. The letter alleged that Mr. O'Connor secured employment for Ms. Bruno for which she was unqualified and for which she did little or no work. In addition, the letter alleged that she was permitted to telecommute, a privilege Mr. O'Connor did not confer on other employees. Mr. O'Connor was invited to respond in writing to the charges and was offered a chance to meet with a Commission representative. On April 10, 2009, Mr. O'Connor responded that the Research Foundation and its employees were not covered under the ethics laws in 2003 and therefore the Commission lacked jurisdiction. In addition, he advised that other employees were permitted to telecommute and therefore Ms. Bruno was not given a "privilege" not provided to other employees consistent with the management of the Research Foundation.

A year passed since Mr. Teitelbaum's letter when on January 6, 2010, an amended letter was issued to Mr. O'Connor by the current Executive Director, Mr. Ginsberg. The letter sought to cure the jurisdictional defect by changing the date of the alleged violations to April 25, 2007<sup>1</sup> through March 2009 when Mr. O'Connor allegedly permitted Ms. Bruno to work from home and receive compensation for little or no work. Tellingly, the letter removed any mention of Mr. O'Connor awarding the telecommuting privilege to the exclusion of others as it was untrue. In response to the amended 15-day letter, dated January 29, 2010, Mr. O'Connor argued that the alleged violations were not the type of conflict of interests that would traditionally implicate the state ethics laws, but rather were managerial issues traditionally best left to the agency to handle. The fact that Ms. Bruno generated work for the Research Foundation on various projects was highlighted in the response. With no readily apparent Public Officers Law section 74 violation, Mr. O'Connor  to terminate what he feared would be a lengthy and protracted investigation which would not in any way support a conflict of interest as contemplated by the statute. After all, section 74 proscribes "substantial" conflicts of interest between one's State duties and outside interests that are of a financial nature. There is no evidence or allegation that Mr. O'Connor profited or received any benefit, financial or otherwise, from employing Ms. Bruno, a critical fact needed to support a violation of §74(2).   


Now, more than two years later, Mr. O'Connor remains the subject of an investigation and the utility of further inquiry seems nil. No evidence has yet to emerge that would support reasonable cause to believe that Mr. O'Connor violated §74(3)(d)(f) or (h). Over this period, the Commission has interviewed several Research Foundation employees, subpoenaed and examined countless documents and other information. Both Mr. O'Connor and the Research Foundation have fully cooperated with the Commission. The telecommuting policy supports the fact that others employees were permitted to telecommute and we have reason to believe the Commission possesses *exculpatory* material on the issue of whether Ms. Bruno had a no-show job – she did not, and there is work product to prove it. Indeed, as the Commission has pursued its inquiry further it has found less not more to support the allegations.

In the meantime, the Board of the Research Foundation -- Mr. O'Connor's appointing authority -- conducted and concluded their internal review of the matter. Mr. O'Connor was cleared of any inappropriateness related to the employment of Ms. Susan Bruno.

Moreover, upon information and belief, the Commission has not issued a 15 day letter to Ms. Bruno, raising legitimate questions in the case. Since Ms. Bruno was not notified with a 15 day letter within one (1) year of having left employment with the Research Foundation, the Commission is precluded by statute from pursuing a case against her (see, Executive Law

<sup>1</sup> This is the operative date when pursuant to the Public Employee Ethics Reform Act of 2007 ("PEERA") that the CPI was able to argue that the Research Foundation came within its purview for purposes of enforcement of Public Officers Law §74.

§94(12)(c). Even assuming *arguendo* that Ms. Bruno's work was insufficient to justify her compensation it is not an ethics violation. If she is not held accountable in the Commission's view then under what possible theory is Mr. O'Connor liable for her conduct?

### **President O'Connor's Opportunity to Be Heard**

In both of Mr. O'Connor's 15 day letters it states that in addition to a written response he would be afforded an opportunity to meet with a Commission representative. Mr. O'Connor has responded in writing to the 15-day letters and has expressed his willingness to come in and speak with the Commission regarding the circumstances surrounding Ms. Bruno's employment at the Research Foundation. In fact, Mr. O'Connor has a statutory right to be heard and offered to meet with the Commission staff on April 12, 2011 at 10 am. Mr. Ginsberg is insisting, however, that Mr. O'Connor respond to a Commission subpoena and provide a sworn statement just like all "other witnesses" in this investigation and has now subpoenaed Mr. O'Connor to appear on April 12, 2011 at 10 am. Mr. O'Connor is not like any other witness – he is the *target* or *subject* of the Commission's investigation and as such is granted certain due process protections under law.

Previously, Executive Law §94(12)(a) sets forth the unique process by which the Commission is required to conduct an investigation. It provides:

If the commission receives a sworn complaint alleging a violation of section . . . seventy-four of the public officers law . . . by a person or entity subject to the jurisdiction of the commission . . . or if the commission determines on its own initiative to investigate a possible violation, *the commission shall notify the individual in writing, describe the possible or alleged violation of such laws and provide the person with a fifteen day period in which to submit a written response* setting forth information relating to the activities cited as a possible or alleged violation of law. If the commission thereafter makes a determination that further inquiry is justified, it shall give the individual an opportunity to be heard. The commission shall also inform the individual of its rules regarding the conduct of adjudicatory proceedings and appeals and the due process procedural mechanisms available to such individual. If the commission determines at any stage of the proceeding, that there is no violation or that any potential conflict of interest violation has been rectified, it shall so advise the individual and the complainant, if any. All of the foregoing proceedings shall be confidential (emphasis added).

Certainly, a subpoena compelling Mr. O'Connor to testify is not what the Legislature had in mind when it drafted the "opportunity to be heard" language. Mr. Ginsberg's refusal to meet with Mr. O'Connor in an informal setting and participate in an unsworn interview has denied Mr. O'Connor his opportunity to be heard as required by Executive Law §94(12)(a).

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The ongoing investigation has negatively impacted Mr. O'Connor's ability to perform his work and over the last two years this situation has unnecessarily impaired the administration of the Research Foundation.

Despite his belief that there is no utility in further inquiry, he remains willing to meet with staff to informally discuss this matter.