

Advisory Opinion 09-01

Advisory Opinion No. 09-01 Application of the Commission's regulation regarding Reimbursement for Travel Expenses, 19 NYCRR Part 930.6(a)(7), from non-governmental organizations comprised of private sector members.

INTRODUCTION

The New York State Commission on Public Integrity (“Commission”) has received requests for a Commission interpretation of 19 NYCRR Part 930.6(a)(7), the Commission's regulation identifying individuals or entities from whom a State officer or employee may permissibly accept reimbursement for travel expenses that are related to his or her official duties.

Pursuant to its authority under Executive Law §94(15), the Commission renders its opinion that, according to the plain language of 19 NYCRR Part 930.6(a)(7), a State officer or employee may permissibly accept travel expense reimbursement from a non-governmental organization that has members who may be engaged in activities listed in 19 NYCRR Part 930.6(a)(7)(i-iv), provided the non-governmental organization's officers or members of its board of directors are not engaged in the listed activities.

BACKGROUND

In pertinent part, NYCRR Part 930.6, provides as follows:

Conditions under which reimbursement for travel expenses related to the covered individual's official duties may be accepted.

(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 of 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; or

(ii) attempts to lobby or influence action on positions on legislation or action on rules, regulations or ratemaking before either the State agency employing the covered individual or the covered individual in his or her official capacity on behalf of the State agency; or

(iii) is involved in litigation, adverse to the State, with the State agency with which the covered individual is employed or affiliated, or the covered individual in his or her official capacity, and no final order has been issued; or

(iv) has received or applied for funds from the State agency employing the covered individual at any time during the previous calendar year, up to and including the date of the proposed receipt of honorarium.

On its face, the above-quoted portion of Part 930.6(a)(7) prohibits receipt of expense reimbursement from a non-governmental organization that has any officers or board members who are engaged in the activities listed in subparts i through iv. The regulation does not, however, place any restrictions on receipt of expense reimbursement from a non-governmental organization that has any members who may be engaged in the listed activities. The question presented here is whether subpart seven prohibits a State officer or employee from accepting expense reimbursement from a non-governmental organization that has private sector members engaged in activities listed in 19 NYCRR Part 930.6(a)(7)(i-iv), but does not have any officers or board members engaged in those activities. We will consider the advisory opinions that have construed this regulation as well as the language of the regulation itself.

In Advisory Opinion No. 91-8, the former New York State Ethics Commission (“Ethics Commission”) considered whether State professional board representatives employed by the State Education Department (“SED”) could permissibly accept travel reimbursement, pursuant to 19 NYCRR Part 930.6, from several different national councils to which SED belonged and paid membership dues. Three of the councils were comprised solely of representatives of State professional boards and performed a quasi-governmental function. The Ethics Commission concluded that “membership alone in a national council of state professional boards does not constitute doing business or having a contract with an organization which would preclude the acceptance of reimbursement for travel expenses.” While the Ethics Commission determined that SED employees could accept the travel reimbursement from the national councils because of the public status of the membership and the quasi-governmental function, the Ethics Commission also concluded, however, that SED employees could not accept travel reimbursement from a national council that also served as a professional organization because its members were non-government officials who were directly regulated by the State professional board.

The Ethics Commission subsequently followed this precedent in Advisory Opinion No. 99-11, which it issued to respond to an inquiry from employees of the Department of Transportation (“DOT”), who asked whether they were permitted to accept travel reimbursement from an organization that had members from both the private and public sectors. The Commission concluded that DOT employees could permissibly accept such travel reimbursement, provided the “private sector members are not otherwise engaged in activities that would disqualify them under 19 NYCRR §930.6(a)(7)(i-iv).” The mere fact that an entity had private sector membership was determined not to prohibit State employees from accepting travel expense

reimbursement from that entity. Rather, the Ethics Commission said, “the appearance of a conflict of interest to be avoided is that private individuals who have a relationship with the State agency may seek to curry favor by offering travel expense reimbursement to State employees.”

APPLICABLE LAW AND REGULATIONS

In addition to the above-quoted portion of 19 NYCRR Part 930, the question presented implicates Public Officers Law §74, the Code of Ethics, which provides minimum standards against which State officers and employees are expected to gauge their behavior. The Code addresses the conflict between the obligation of public service and private, personal interest.

The rule with respect to conflicts of interest is provided in Public Officers Law §74(2):

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:

...

(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.

...

(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

...

(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.

...

DISCUSSION

Subdivision seven of Part 930.6(a) bars a State employee from accepting travel expense reimbursement: (i) from any individual who is engaged in any of the activities set forth in subparagraphs i through iv of that subpart; (ii) made on behalf of an organization that is engaged in any of those activities; or (iii) from an organization, other than any government entity, that has an officer or member of the board of directors, who is engaged in any of those activities. The question presented here is whether subpart seven also prohibits a State officer or employee from accepting expense reimbursement from a non-governmental organization that has private sector members engaged in activities set forth in 19 NYCRR Part 930.6(a)(7)(i-iv), but does not have any officers or board members engaged in those activities.

As discussed in Advisory Opinion No. 99-11, the fact that a non-governmental organization has private sector membership does not, by itself, preclude the non-governmental organization from reimbursing State officers or employees for travel expenses. The Ethics Commission indicated that State officers and employees may accept travel reimbursement from a non-governmental organization with private sector members, provided the private sector members are not engaged in activities listed in 19 NYCRR Part 930.6(a)(7)(i-iv). However, there may be instances when private sector members may be engaged in the listed activities, while officers or members of the board of directors of the non-governmental organization, or the non-governmental organization itself, may not be engaged in such activities. In such circumstances, the prior advisory opinions conflict with the regulation.

As indicated in the Commission's regulation, if the officers or members of the board of directors, or the non-governmental organization itself, are engaged in the activities identified in Part 930.6(a)(7)(i-iv), then it is not permissible for State officers and employees to accept reimbursement for travel expenses related to their official duties from the non-governmental organization. The regulation does not restrict reimbursement based upon the activities of its members who are not officers or board members.

Therefore, we find that that, according to the plain language of 19 NYCRR Part 930.6(a)(7), a State officer or employee is not prohibited from accepting travel expense reimbursement from a non-governmental organization that has members who may be engaged in activities listed in 19 NYCRR Part 930.6(a)(7)(i-iv), provided the officers or members of the board of directors, or the non-governmental organization itself, are not engaged in any of these listed activities.

In keeping with the letter and the spirit of the regulations, State officers and employees should only accept travel reimbursement when it is clear that the non-governmental organization is not being used as a subterfuge to offer reimbursement from an entity or individual who would otherwise be disqualified from providing travel reimbursement in accord with the Commission's regulation or Public Officers Law §74. Accepting travel reimbursement from a non-governmental organization that is merely passing through funds from individuals or entities who would otherwise be barred, pursuant to a Commission regulation or statute, from providing such reimbursement may be a violation of one of more of the prohibitions contained in Public Officers Law §74(3). Therefore, State officers and employees should inquire into the source of the travel reimbursement from a non-governmental organization.

We affirm Advisory Opinions Nos. 91-8 and 99-11 to the extent that they are consistent with this Opinion, and we reverse to the extent that Advisory Opinions Nos. 91-8 and 99-11 conclude that State officers and employees may not accept travel reimbursement related to their official duties if private sector members of a non-governmental organization are engaged in any of the activities identified in Part 930.6(a)(7)(i-iv).

CONCLUSION

19 NYCRR Part 930.6(a)(7) does not prohibit a State officer or employee from seeking reimbursement from a non-governmental organization that has private sector members who may be engaged in activities listed in 19 NYCRR Part 930.6(a)(7)(i-iv), provided the officers or members of the board of directors of the non-governmental organization are not engaged in activities listed in 19 NYCRR Part 930.6(a)(7)(i-iv).

This opinion, unless and until 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:

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February 3, 2009