

# Everyday Ethics for ALJs and Hearing Officers Under the Public Officers Law

By Donald P Berens, Jr.

## Introduction

Besides their own personal norms, participants in New York State administrative proceedings must consider a variety of external ethical standards. Business representatives may follow a corporate code of conduct imposed by their employer. Professionals, such as lawyers, obey codes of professional responsibility. State officers and employees are subject to the New York State Ethics Law, codified at Public Officers Law (POL) §§ 73-74.

N.Y.S. employees often act as advocates for agency positions in administrative proceedings. They must obey their agencies' codes of conduct and, if they are lawyers, the Code of Professional Responsibility. They rarely encounter problems under the POL, at least, not problems that come to the attention of the State Ethics Commission.

The Ethics Commission sees many cases where N.Y.S. employees take off their state hats and, while acting in some other capacity, do administrative business with the state. In these cases, and in those of administrative decisionmakers, the Commission has interpreted the law in Advisory Opinions, acted on requests for approval of outside activities, and-when necessary- investigated and proscribed violations of law. This article will discuss some examples.

## The Public Officers Law Standards

The Ethics Law applies to statewide elected officials, state officers and employees in the Executive Branch, members of the Legislature and Legislative Branch employees, as well as to some political party officials. For simplicity, I will limit the discussion to statewide elected officials, state officers and employees and, unless the context requires otherwise, I will refer to them as N.Y.S. employees.

POL § 74 sets general standards for the conduct of N.Y.S. employees, both as public officials and as private persons who may have business before the state, including administrative business. POL § 73 forbids N.Y.S. employees to engage in certain specified conduct, including some conduct as a private participant in state administrative proceedings. POL § 73 also forbids former N.Y.S. employees to engage in certain activities involving any later work before their former state agencies or their former state work in any later forum. POL § 73-a requires financial disclosure by certain N.Y.S. employees.

## General Statutory and Regulatory Standards

The general statutory rule with respect to conflicts of interest is that no N.Y.S. employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation, in substantial conflict with the proper discharge of his or her duties in the public interest.'

Statutory standards follow the general rule with respect to conflicts of interest. Those of interest here include the prohibition against the use or attempted use of an official position to secure unwarranted privileges for a N.Y.S. employee or others.<sup>2</sup> No N.Y.S. employee should engage in any transaction as agent of the state with any business entity in which she has a financial interest that might reasonably tend to conflict with the proper discharge of her official duties.<sup>3</sup> A N.Y.S. employee 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.<sup>4</sup> A N.Y.S. employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that she is likely to be engaged in acts that are in violation of her trust.<sup>5</sup> No full-time N.Y.S. employee (nor any firm or association of which such employee is a member nor corporation substantially controlled by such employee) should sell goods or services to any entity which is licensed or whose rates are fixed by the state agency in which such employee serves.<sup>6</sup>

This general statute is supplemented by a New York State Ethics Commission regulation restricting the ability of state officers and employees to engage in certain outside activities.<sup>7</sup> Any N.Y.S. employee, whether or not policy making and whether or not paid, should avoid any outside activity which interferes or is in conflict with the proper and effective discharge of the individual's official duties or responsibilities.<sup>8</sup> An individual who serves in a policy-making position on other than a nonpaid or per diem basis needs the prior approval of the Commission in order to engage in any private employment, profession or business, or other outside activity from which more than \$4,000 in annual compensation is received or anticipated.<sup>9</sup> Such a paid policymaker also needs Commission approval to hold certain other paid public office or public employment or to serve as a director or officer of a for-profit corporation or entity.<sup>10</sup> Even if she anticipates less than \$4,000 in annual compensation, if she receives or anticipates more than \$1,000, she needs prior approval of her approving authority." For most N.Y.S. employees, the approving authority is the head of the employing agency or the head's designee; for agency heads themselves, it is the Commission.<sup>12</sup>

### **Specific Statutory Prohibitions**

POL § 73 contains specific prohibitions, including some relevant to the administrative process. No N.Y.S. employee, other than in the proper discharge of official duties, shall receive or agree to compensation for the appearance or rendition of services in relation to any case, proceeding, application or other matter before a state agency in connection with -among other things- any rate-making proceeding; the adoption or repeal of any rule or regulation; licensing, as defined in POL § 73(1)(B) and (e); or any Public Service Law franchise.<sup>13</sup>

A N.Y.S. employee who is a member, associate, or shareholder of any firm, association or corporation which is appearing or rendering services in connection with any case, proceeding, application or other matter listed in POL § 73(7)(a) shall not orally communicate, with or without compensation, as to the merits of such cause with an officer or employee of the agency concerned with the matter.<sup>14</sup>

New York has a two-year bar and a lifetime bar to limit one's ability to use the "revolving door" to exploit the knowledge and contacts gained in state service to unfair private gain after leaving such service. Generally, no person who has served as a N.Y.S. employee shall within two years after the termination of such service appear or practice before her former agency or receive compensation for any services rendered by her in relation to any case, proceeding or application of other matter before such agency.<sup>15</sup> Furthermore, no such former N.Y.S. employee shall appear, practice, communicate or otherwise render services before any state agency or receive compensation for such services rendered by such former employee in relation to any case, proceeding, application or transaction with respect to which he or she was directly concerned and in which he or she personally, participated during the period of state employment, or which was under his or her active consideration.<sup>16</sup>

### **Application of POL Standards to Administrative Cases**

In its formal advisory opinions and its enforcement actions, the Ethics Commission has applied the Ethics Law standards to N.Y.S. employees appearing in an unofficial capacity in administrative proceedings,

administrative decisionmakers misusing their state positions, and to former decision-makers appearing before their former state agencies.

### **Unofficial Paid Appearances by State Employees on Administrative Matters Can Be Violations**

POL 73(7)(a)(iv) does not permit a N.Y.S. employee, acting as a paid Executive Director of a not-for-profit organization, to sign an application on behalf of organization to obtain a grant of money from a agency.<sup>17</sup> The statute contains an exception set forth in POL § 73(7)(c) for ministerial matters defined in 73(1)(d), but neither the certification of the application by the Executive Director nor the review by the state was ministerial. The rationale would apply to any state employee, acting other than in the discharge of official duties, who receives compensation for any appearance or services in relation to any of the administrative matters listed in the statute.

Motor Vehicle Violation Bureau Referees (MVRs) are attorneys employed by the State Department of Vehicles (DMV) to administratively adjudicate noncriminal moving traffic violations. MVRs who represent private clients in traffic violations cases, no matter in the county where they are employed, violate POL § 74(2) and (3)(h); furthermore, an MVR is prohibited by POL § 73(7)(a) from representing a private client DMV proceeding before another MVR in a license matter.<sup>18</sup> Private representation of clients in traffic violations cases requires aggressive defense using every advantage available under the law; yet an MVR must render unbiased and impartial decisions to enforce the same law. An attorney who does both would "raise a suspicion the public that he is likely to be engaged in acts in violation of his trust."

POL § 73(7)(a) precludes a policy-making N.Y.S. employee from appearing or rendering services for compensation before state agencies, not his own, on behalf of his private consulting business in relation to any license or other permission that a corporate client to close a particular site.<sup>19</sup> It is immaterial whether there is a connection between his state duties and his outside work. The nature of the work, that is, whether it is arguably objective and quantitative, so long as it non-ministerial, does not bear on the determination whether it is barred by § 73(7)(a).

POL § 73(7)(a) and § 74 preclude a policy-making N.Y.S. employee from engaging in paid outside employment for a county facility licensed and inspected employee's state agency.<sup>20</sup> Even if unpaid, the outside employment could give the public cause to perceive that the county facility might receive preferential treatment from the state agency in the administration of its sight function.

POL § 74(3)(i) prohibits full-time policy-makers from providing consulting services of any kind to entities regulated and licensed by that agency.<sup>21</sup> Private work related to licensing, ratesetting or other regulation of the entity is prohibited.

### **A State Employee Must Not Render Paid Services to an Entity Licensed by Employee's Agency**

POL § 74(3)(i) prohibits full-time' policymakers from providing consulting services of any kind to entities regulated-and licensed by that agency.<sup>22</sup> Private work related to licensing, ratesetting or other regulation of the entity is prohibited. In 1993 the Commission found reasonable cause to believe that a Senior Motor Vehicle Referee (MVR) with the N.Y.S. Department of Motor Vehicles (DMV) violated 74(3)(i) when the MVR received compensation in the form of a car while representing an automobile dealership, licensed by DMV, in the MVR's private law practice. Pursuant to POL § 74(4), the Commission referred the matter to DMV for possible discipline of the MVR.

## **The Use of a State Administrative Position to Secure Unwarranted Privileges is a Violation**

The Ethics Commission is empowered to investigate and issue notices of reasonable cause to believe that a violation of POL § 73, § 73-a or § 74 has occurred.<sup>23</sup> Certain violations of POL § 73 or § 73-a may be punished by the Commission's assessment of a civil penalty up to \$10,000. Other violations, including those of POL § 74, may be referred by the Commission to the employing agency for discipline in the manner provided by law, including by the Civil Service Law and any collective bargaining agreement. The Commission has made such referrals in cases where administrative decisionmakers tried to use their state positions to secure unwarranted privileges or exemptions for themselves or others, and raised suspicion that they violated their public trust, in violation of POL § 74(3)(d) and (h) respectively.

For example, in 1991 the Commission found reasonable cause to believe that a Hearing Officer (HO) with the State Division of Housing and Community Renewal (DHCR) violated POL § 74(3)(d) and (h) when, identifying himself as an ALJ, he wrote to a municipal agency on behalf of the his neighbor in a private matter. In 1994 the Commission found cause to believe that an Administrative Law Judge (ALJ) with the State Department of Labor violated POL § 74(3) (d) and (h) when, while representing an inmate in a private matter before N.Y.S. DOCS, she stated that she could be reached during office hours at a state telephone number where she was an ALJ. In 1999 the Commission found cause to-believe that an Administrative Hearing Officer (AHO) with DHCR violated POL § 74(2) and (3)(d) and (h) when: (a) in a court matter unrelated to any DHCR duties, he implied to an adversary's attorney that he would use his position to ensure prejudice at DHCR against the attorney and (b) he used the title "Judge" when claiming entitlement to a private library privilege and a private personal matter.

## **The "Revolving Door" Rules Restrict a Former Administrative Law Judge**

The two-year bar of POL § 73(8)(a)(i) precludes an Administrative Law Judge (ALJ) who worked for the Workers' Compensation Board in one of its offices for ten months from appearing or practicing or rendering services on matters before the Board in all parts York State; neither the temporal nor geographic limits of his service mitigates the application of the bar.<sup>24</sup>

## **Conclusion**

The Ethics Commission will investigate and sanction violations of the Ethics Law when it must. It is preferable for N.Y.S. employees to seek the Commission's confidential advice in order to ensure compliance with the law before engaging in questionable conduct.

## **Endnotes**

1. POL § 74(2).
2. POL § 74(3)(d).
3. POL § 74(3)(e).
4. POL § 74(3)(f).
5. POL § 74(3)(h).
6. POL § 74(3)(i).
7. 19 N.Y.C.R.R. part 932.
8. 19 N.Y.C.R.R. § 932.3(a).
9. 19 N.Y.C.R.R. § 932.3(c).
10. 19 N.Y.C.R.R. § 932.3(b), (e).
11. 19 N.Y.C.R.R. § 932.3(d).

12. 19 N.Y.C.R.R. § 932.1(a).
13. POL § 73(7)(a).
14. POL § 73(12).
15. POL § 73(8)(a)(i).
16. POL § 73(8)(a)(ii).
17. AO #89-2.
18. AO #91-16.
19. AO #92-6.
20. AO #94-7.
21. AO #92-i3.
22. Id.
23. Executive Law § 94(12).
24. AO #99-16.

**Donald P. Berens, Jr., became Executive Director of the New York State Ethics Commission in 1999. He previously worked for three New York State Attorneys General, most recently as Deputy Attorney General for the Division of State Counsel.**

Reprinted with Permission from: *Government, Law and Policy Journal*, Fall 2000, Vol. 2, No. 2, published by the New York State Bar Association, One Elk Street, Albany, New York 12207, (1-800-582-2452), <http://www.nysba.org>.