

New York State Ethics Commission

Advisory Opinion No. 98-12: Application of Public Officers Law §74 to State employees who work on political campaigns, including fundraising.

Introduction

The State Ethics Commission ("Commission") has been asked by a State employee who is the supervisor of several units whether he may work on the political campaign of a candidate for elected office and whether there are any restrictions on his engaging in political activities. While this opinion responds to that inquiry, it should be viewed as a guide to those State officers and employees who choose to participate in political activities.

Pursuant to the authority vested in it by Executive Law §94(15), the Commission renders its opinion that the State employee may work on political campaigns, but his activities are subject to certain restrictions arising from his obligation to avoid a conflict of interest or the appearance of a conflict in violation of Public Officers Law §74.

Specifically, the employee may not solicit funds from any individual or business entity (1) which currently has matters before him or before the units he supervises, (2) which he has substantial reason to believe will have matters before him or such units in the foreseeable future, or (3) which had matters before him or such units in the last twelve months; provided, however, that he may participate in mass mailings, even if some of the letters will reach individuals or business entities from which he otherwise could not solicit funds.¹ If an entity properly solicited by him makes a contribution and then has a matter before him or a unit he supervises, he should recuse himself if the matter arises within one year of the contribution, although the length of the period may vary depending upon the circumstances. Finally, the employee may not use his official title, position or authority in his fundraising efforts or solicit from subordinates in his units. Nor may he use State resources for political purposes, engage in political activities in a State office, or engage in such activities during business hours unless leave is taken.

Applicable Law

The State's Code of Ethics, contained in Public Officers Law §74, prohibits a State officer or employee from engaging in activities having a conflict of interest or the appearance of a conflict with respect to his or her public responsibilities. The rule regarding 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 actual as well as 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 in violation of his trust.

These provisions address not only actual conflicts of interests, but also conduct that gives the impression that a conflict exists. The law is intended to enhance the public's trust and confidence in government through the prevention of corruption, favoritism, undue influence and abuse of official position.

Discussion

The Commission has not previously issued a formal opinion describing the political activities in which a State officer or employee may engage. This opinion, therefore, offers guidance on this important subject.²

The Commission has previously issued several opinions concerning State employees who desire to run for elective office. Significantly, it has held that Public Officers Law §74 should not be read to preclude State officers and employees who conduct business with the general public from participating in the political process ([Advisory Opinion No. 92-16](#)). It is the Commission's view that there is no fundamental prohibition which bars a State employee from being elected to and holding public office ([Advisory Opinion No. 93-9](#)). However, the Commission has recognized that there are instances when a State official's holding of an elected office may necessitate recusal from certain matters in order to avoid even the appearance of a conflict of interest. And in some unusual situations, where the conflict is direct, a State employee may be prohibited from seeking a particular elected office (See [Advisory Opinion No. 92-16](#)).

The Commission has addressed engaging in political activities other than running for office only by regulation. The Commission's regulations governing outside activities, found at 19 NYCRR Part 932, provide that an individual who is serving in a policymaking position may not serve as a member of any political party committee or as an officer of any political party or "political organization" (19 NYCRR Part 932.2). A "political organization" is defined to mean only an

"organization that is affiliated with or subsidiary to a political party" It does not include "campaign or fundraising committees" (19 NYCRR Part 932.1[f]).

Thus, the Commission has, in its regulations, considered the political activities of State employees, and has permitted all employees, whether or not policymakers, to engage in political campaigns, including fundraising. In short, there is no fundamental prohibition to a State employee's engaging in these activities.

This does not mean, however, that a State employee's political efforts are without restriction. The standards of Public Officers Law §74 remain applicable to an employee working on behalf of a candidate or in any other political endeavor.

[Advisory Opinion No. 97-28](#) considered the restrictions imposed on a State employee who wished to engage in charitable fundraising in his personal capacity. In that opinion, the Commission distinguished the employee's solicitation of funds from which he would personally receive no benefit from solicitations made for personal gain, which the Commission had prohibited in [Advisory Opinion 94-16](#). It went on to describe the restrictions imposed in the context of a State employee's soliciting for charitable purposes.

Political solicitation has many of the same characteristics as charitable contributions.³ In both circumstances, the individual employee receives no direct personal benefit. In the charitable context, the solicitation is for an organization the employee wishes to support; in the political context, it is for an issue or a candidate that the employee wishes to support. However, there is a greater danger in the political context than in the charitable context that fundraising may raise suspicion among the public that the public servant may engage in acts in violation of his trust.

[Advisory Opinion No. 97-28](#) provides some guidance in considering the matter of political fundraising. In that opinion, it was determined that the employee, whose State work involved handling specific cases, was barred from soliciting from those business entities or individuals where there were open pending cases in which he was involved. In addition, he was required to refrain from soliciting from those with whom he had dealings in the past year. To do so could create the appearance that he was using a relationship developed in his public position to seek a contribution, or that a contribution in such circumstances was a reward for his public activities.

Moreover, if an entity from which he accepted a contribution subsequently had a matter that came before him, he was required to recuse himself if the matter arose within one year of his acceptance of the contribution. This recusal requirement⁴ was intended to avoid the perception that the State employee's public actions were related to his receipt of a contribution. A one year period after the acceptance of a contribution was determined to be sufficient in most instances. However, the Commission noted that this period may be longer in certain circumstances.⁵

Finally, the Commission prohibited the State employee from using his official title, position or authority in his fundraising efforts and from soliciting from subordinates in his unit, thereby preventing him from his abusing his public position.

Since, as noted, the methods of charitable and political fundraising share many similarities, these are guidelines which should be followed by employees engaged in raising money for political purposes, including campaigns. How these guidelines are applied to various State employees will depend upon their positions and responsibilities.

In [Advisory Opinion No. 97-28](#), the Commission was considering a State employee who had immediate oversight over specific cases. The employee who requested this opinion supervises several units.

While the Commission finds the principles set forth in [Advisory Opinion No. 97-28](#) applicable to the political campaign arena, they will be applied differently depending upon the different level of responsibilities of the particular State employee involved.

The employee who requested [Advisory Opinion No. 97-28](#) was prohibited from soliciting from any person or entity which had a matter pending before him. Where, as here, an employee is the supervisor of a unit or units, the prohibition extends as well to any person or entity that has a matter pending before the unit or units for which he is responsible. Such a matter is, at least, indirectly before him, and his personal involvement is always a possibility.

For the same reasons, a State employee should refrain from soliciting a person or entity which he has substantial reason to believe will have dealings with him within the foreseeable future. Again, in the case of a supervisor, this restriction is extended when there is substantial reason to believe that a person or entity will have dealings with the unit or units under his supervision.

A State employee also should not solicit persons or entities that had dealings with him (or, if a supervisor, the unit or units he supervises) within the past twelve months. Such solicitations create an implication of the use of a relationship developed in his public position for political purposes. Furthermore, there is a risk that a contribution in such circumstances could be perceived as a reward for his public activities.

In prohibiting these solicitations, the Commission is addressing only the solicitations targeted to individuals or entities under the jurisdiction of the unit in which the employee works. The same conflicts do not arise when a State employee participates or allows his name to be used in an untargeted mass mailing, even if some of the mailed documents reach individuals or entities which had or have matters before him or his unit. Thus, his participation would be permissible.⁶

If a State employee has appropriately solicited a political contribution (other than by a mass mailing) from a person or entity and subsequently the person or entity has a matter before him or the unit or units he supervises, he must recuse himself from the matter. Any agency employees who would ordinarily report to him must report to a different supervisor. This recusal requirement is imposed for a reasonable period of time based upon the circumstances. While a one year period was adopted in [Advisory Opinion No. 97-28](#), the exact time period may vary depending on the extent of the contribution. A State employee facing this situation is urged to seek further advice.

In addition to the above restrictions, no State employee may use his official title, position or authority in any campaign activities, including untargeted mass mailings. No State resources of any type may be used in furtherance of these activities, including, but not limited to, telephones, office supplies, postage, photocopying machines, computers and support staff (See [Advisory Opinion No. 93-9](#)). Nor may campaign activities be conducted from a State office or during State business hours unless leave is taken. Finally, no State employee may solicit from subordinates, as this practice is strictly forbidden by Civil Service Law §107 (See also Election Law §17-158).

At all times the State employee shall avoid conduct which promotes the perception that his actions as a State employee may be influenced by his political activities.

Conclusion

The State employee, in working on the political campaign of a candidate for elective office, must observe the restrictions set forth in this opinion.

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:

Paul L. Shechtman,
Chair
Evans V. Brewster
Henry G. Gossel
O. Peter Sherwood,
Members

Dated: October 20, 1998

Endnotes

1. Throughout this opinion, the term "funds" includes in-kind contributions.
2. This opinion is applicable to State officers and employees but not to statewide elected officials running for re-election. Such officials are in a unique position, as they both hold elected office and are simultaneously engaged in political activities. Their fundraising activities are subject to the Election Law.

Since unpaid and per diem members of public benefit corporations, authorities, boards, commissions and other multi-member bodies are State employees for purposes of Public Officers Law §74, this opinion applies to them as well. However, the Commission recognizes that the

nature of their duties is different, and, therefore, that the application of the opinion may be different to reflect their distinctive ethical obligations. The Commission is available to offer advice based upon the specific responsibilities of these officials.

The opinion is based only on Public Officers Law §74. Some employees may have additional restrictions. For example, the policy of the agency for which they work may contain additional restrictions; employees on federally funded lines are subject to the restrictions of the Hatch Act (5 U.S.C. §7323).

3. In considering what constitutes a political "solicitation," the Commission looks to the federal definition, where the term means "to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by permitting its use by others." (5 C.F.R. §2635.808.) As discussed below, however, our opinion, like federal law, does not bar participation in mass mailings (See footnote 6).

4. After recusal, the State employee could play no role, nor could he discuss the matter with the individual to whom the matter is assigned.

5. For example, the Commission noted that the potential for conflict increases as the amount of the contribution increases.

6. In determining what constitutes a permissible mass mailing, the Commission looks to the federal definition, found at 5 C.F.R. 2635.808, which describes this activity as: "[The] solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources"

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