

November 18, 2013

WESTERN NEW YORK POWER PROCEEDS ALLOCATION BOARD STANDARDS OF CONDUCT

1.0 Purpose

The purpose of these Standards of Conduct (Standards) is to ensure that members of the Western New York Power Proceeds Allocation Board (“WNYPPAB” or “Board”) identify and disclose certain issues which arise from their private interests when performing public duties imposed on them as a WNYPPAB member, and take appropriate actions in response to potential conflicts of interest.

Advisory Opinion (“AO”) No. 98-07, issued by the New York State Ethics Commission (“Commission”),¹ provides that Public Officers Law (“POL”) § 74, entitled “Code of Ethics,” applies to members of advisory boards (1) who are designated as policymakers, or (2) when at least one member of any such board is appointed by the Governor.

While this opinion does not specifically mention WNYPPAB, the Board has determined that WNYPPAB members should conform their individual conduct to the requirements of POL § 74.²

2.0 Implementation

These Standards shall apply to all Board members. A copy of these Standards shall be furnished to every person who is appointed to the Board, who shall be required to acknowledge receipt of these Standards in writing.

3.0 POL § 74

POL § 74, entitled “Code of Ethics,” provides the minimum standards against which State officers and employees are expected to gauge their behavior. The Code of Ethics, which is comprised of a “rule with respect to conflicts of interest” and “standards,” addresses issues relating to the conflict between the obligation of public service and private, often personal, financial interest.

¹ Pursuant to the Public Employee Ethics Reform Act of 2007, all powers, duties, functions and staff of the State Ethics Commission were transferred to the New York State Commission on Public Integrity, currently the New York State Joint Commission on Public Ethics.

² This Policy is in addition to any requirements that are imposed on WNYPPAB and its members pursuant to law or regulation and is not intended to limit or otherwise affect such requirements.

The “rule with respect to conflicts of interest” (“Rule”) provides:

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, POL §74(3) establishes the following nine (9) standards of conduct (“Standards”) which address actual as well as apparent conflicts of interest:

a. No officer or employee of a state agency, member of the legislature or legislative employee should accept other employment which will impair his independence of judgment in the exercise of his official duties.

b. No officer or employee of a state agency, member of the legislature or legislative employee should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

c. No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.

e. No officer or employee of a state agency, member of the legislature or legislative employee should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

f. An officer or employee of a state agency, member of the legislature or legislative 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.

g. An officer or employee of a state agency should abstain from making personal investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest.

h. An officer or employee of a state agency, member of the legislature or legislative employee 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.

i. No officer or employee of a state agency employed on a full-time basis nor any firm or association of which such an officer or employee is a member nor corporation a substantial portion of the stock of which is owned or controlled directly or indirectly by such officer or employee, should sell goods or services to any person, firm, corporation or association which is licensed or whose rates are fixed by the state agency in which such officer or employee serves or is employed.³

4.0 Application

Under these Standards, WNYPPAB members must avoid a conflict between their private interests and their public duties. Therefore, members must consider the Standards on an ongoing basis when matters come before WNYPPAB.

For example, in certain cases, the Standards may require WNYPPAB members to disclose conflicts and refrain from deliberating and voting on matters involving actual or potential conflicts of interest.

Whether disclosure and/or recusal, or some other action is required by a board member often depends on the circumstances of the individual matter. Advisory Opinion Nos. 95-29 and 93-16 may help to provide some insight on how the Commission applies the requirements of POL § 74 to the facts of individual cases.

In Advisory Opinion No. 95-29, the Commission was asked whether a State agency employee may serve as a board member of an industrial development agency (“IDA”). The employee was responsible for legal staff development, supervision and management activities, and performing substantive work on legislation and regulations sent to the employee’s agency by various State entities, and making decisions regarding which regulations or regulatory schemes are candidates for regulatory reform and periodically will review regulations that directly affect IDAs.

Referencing the Rule and Standards (3)(a), (b), (c), (f) and (h), the Commission noted that POL § 74 prohibits a State officer or employee from engaging in an outside activity over which the individual has substantial regulatory or enforcement responsibility, and in some a State employee may engage in outside activities provided there was disclosure and recusal in appropriate circumstances. However, if a State employee must recuse in a State position so frequently so as to limit the employee’s ability to perform the State job, a conflict is presented that precludes the non-State activity.

³ The Public Officers Law contains penalties for violations of the Code of Ethics which are substantiated by the Commission.

The Commission determined that the State employee in this case may continue to serve on the IDA board because it did not appear there would be an inordinate number of regulatory issues before the State agency directly affecting IDAs. It cautioned that the State employee should, in his State position, recuse himself from consideration of matters concerning IDAs. In addition, to avoid even the appearance of a conflict of interest, the Commission concluded that he should, at an IDA meeting, disclose his State position to his colleagues and the public, and recuse himself on any State regulatory matters that come before the IDA board. According to the Commission, these steps would serve to ensure that the employee remains in compliance with POL § 74.

In Advisory Opinion No. 93-16, the Commission was asked about the propriety of a member of a State board serving full-time as an officer of two private organizations. The State Board member would have occasion to vote on applications of members of the two private organizations, and approval of the application would be an economic benefit to the applicant. The role of the private organizations is to support and lobby on behalf of their members.

The Commission determined that the Board member has at least an indirect financial interest in the private entities that might reasonably tend to conflict with the proper discharge of his official duties for the State board, and therefore it would be a violation of §74(3)(e) for him to engage in review of these entities' applications as a representative of the State.

The Commission also noted that POL §74 addresses not only actual but apparent conflicts of interest, and that under § 74(3)(f), a State officer or employee should not give reasonable basis for the impression that he or she is affected by the position or influence of any party or person or that any party or person can unduly enjoy his or her favor in the performance of official duties. Given that the State board member's employment with the two private organizations centered on promoting and lobbying on behalf of their members, and the State board member's position allows him to determine which applicants receive the economic benefits, it is foreseeable that the public might suspect that he is favorably disposed toward the two private organizations when making determinations in his official public position.

Accordingly, the Commission advised that the State board member should recuse himself from voting as a member of the State board upon applications of members of the two private organizations, and the individual should not provide any assistance to members of the private organizations that are preparing applications for the Board, or consult with any other member of the Board as to the merits of such applications.

Another example of a prohibited action is acceptance by a board member of a gift from a party interested in the outcome of a subject the board is considering. The Commission, in Advisory Opinion No. 98-07, gives the following example:

[I]f an advisory board to the Insurance Superintendent were to advise him as to whether he should permit mutual companies to be converted into stock companies, a board member should not accept a gift from a mutual company that is actively seeking to

convert. In general, acceptance of a gift from a party directly interested in a board's discussions would be a conflict of interest and a violation of §74.

Acceptance of a gift may also violate other provisions of the POL, such as POL § 73(5). For example, POL § 73(5)(a) provides in part:

No . . . state officer or employee . . . shall, directly or indirectly . . . solicit, accept or receive any gift having more than a nominal value, whether in the form of money, service, loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance 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.

5.0 Reporting Unethical Behavior & Guidance

Members are encouraged to report actual or suspected unethical behavior to the Commission. Any information concerning corruption, fraud, criminal activity, conflicts of interest or abuse must be reported to the NYS Office of the Inspector General. Anyone reporting an ethical concern or improper governmental action in good faith or participating in the investigation of a reported concern is protected by law.

The Commission is available to provide guidance and issue advisory opinions relating the requirements of POL § 74 and related statutory provisions.

If you believe there are circumstances that may merit disclosure and/or recusal or you are uncertain about the application of the law to a particular circumstance, you should contact the Commission. The Commission may be contacted for legal guidance by e-mail (legal@jcope.ny.gov) or by telephone (518-408-3976). The following is the link to the Commission's internet website: <http://www.jcope.ny.gov>.

In addition, NYPA's Law Department may be able to assist you on issues relating to POL § 74 and facilitate communications between Board members and the Commission.

New York State Public Officers

§ 74. Code of ethics. 1. Definition. As used in this section: The term "state agency" shall mean any state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor or corporations closely affiliated with specific state agencies as defined by paragraph (d) of subdivision five of section fifty-three-a of the state finance law or their successors.

The term "legislative employee" shall mean any officer or employee of the legislature but it shall not include members of the legislature.

2. Rule with respect to conflicts of interest. No officer or employee of a state agency, member of the legislature or legislative 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 of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

3. Standards.

a. No officer or employee of a state agency, member of the legislature or legislative employee should accept other employment which will impair his independence of judgment in the exercise of his official duties.

b. No officer or employee of a state agency, member of the legislature or legislative employee should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

c. No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.

e. No officer or employee of a state agency, member of the legislature or legislative employee should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

f. An officer or employee of a state agency, member of the legislature or legislative 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.

g. An officer or employee of a state agency should abstain from making personnel investments in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public

interest and his private interest.

h. An officer or employee of a state agency, member of the legislature or legislative employee 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.

i. No officer or employee of a state agency employed on a full-time basis nor any firm or association of which such an officer or employee is a member nor corporation a substantial portion of the stock of which is owned or controlled directly or indirectly by such officer or employee, should sell goods or services to any person, firm, corporation or association which is licensed or whose rates are fixed by the state agency in which such officer or employee serves or is employed.

4. Violations. In addition to any penalty contained in any other provision of law any such officer, member or employee who shall knowingly and intentionally violate any of the provisions of this section may be fined, suspended or removed from office or employment in the manner provided by law. Any such individual who knowingly and intentionally violates the provisions of paragraph b, c, d or i of subdivision three of this section shall be subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of any gift, compensation or benefit received as a result of such violation. Any such individual who knowingly and intentionally violates the provisions of paragraph a, e or g of subdivision three of this section shall be subject to a civil penalty in an amount not to exceed the value of any gift, compensation or benefit received as a result of such violation.