

EXHIBIT 12

January 29, 2010

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CONFIDENTIAL COMMUNICATION
COVERED PURSUANT TO
EXECUTIVE LAW §94(12) AND
PUBLIC OFFICERS LAW §74.

VIA ELECTRONIC MAIL
AND FIRST CLASS MAIL

Michael G. Cherkasky, Chair
Commission on Public Integrity
c/o Altegrity
570 Lexington Ave.
7th Floor
New York, NY 10022

Re: John J. O'Connor- President of the SUNY Research Foundation

Dear Chairman Cherkasky:

I represent John J. O'Connor, the President of the State University of New York Research Foundation (the "RF"), and am greatly concerned that issues well beyond the statutory and historical parameters of the state ethics laws are being improperly applied to President O'Connor. Moreover, such an application creates the risk of irreversible damage to his reputation and his extraordinary career which includes 29 years in the field of higher education.

By way of background, President O'Connor received a letter from former Executive Director Herbert Teitelbaum dated January 29, 2009 ("the Teitelbaum letter" see attached) stating that the Commission had "received information indicating that you [President O'Connor] may have violated Public Officers Law sections 74(3)(d),(f) and (h)." I expect that the "information" that the Commission received was, in fact, two newspaper stories that appeared shortly before the January 29, 2009 Teitelbaum letter published in the Albany Times-Union. See, Foundation under scrutiny (January 4, 2009); Susan Bruno resume eyed (January 6, 2009).

The Teitelbaum letter continued stating "[t]he Commission has received information that in 2003 you secured employment for Susan Bruno for which she was not qualified and for which she did little or no work. The Commission has also received information that you permitted Ms. Bruno to work from home, a privilege you did not confer on your other employees." The letter also stated that my client could be subject to a \$10,000 civil penalty for a violation of Public Officers Law ("POL") §74(3)(d).

The media interest in Susan Bruno was based in large part because she is the daughter of former New York State Senate *President Pro Tem* and Majority Leader Joseph M. Bruno.

On April 10, 2009 I responded to the Teitelbaum letter, and advised the Commission that Ms. Bruno was hired by the RF and began work nearly *five years before* the passage of the Public Employee Ethics Reform Act of 2007 ("PEERA") which for the first time, applied POL §74 to the RF, effective April 25, 2007.¹ As you know, prior to PEERA, individuals employed at closely-affiliated corporations were not covered by the provisions of §74. Initially, Commission staff maintained that PEERA could be applied retroactively, prior to its effective date(s). Despite the obvious jurisdictional defect raised in my response, in the interests of general transparency, I also provided a robust factual account of Ms. Bruno's tenure at the RF.

On January 6, 2010-- after eight (8) months of having no communication with commission staff-- Executive Director Barry Ginsberg sent an amended 15-day letter, and has now modified the original allegation against President O'Connor asserting, this time, that "subsequent to April 25, 2007, your client [President O'Connor] permitted Susan Bruno, an employee of the SUNY-RF, to work from home until March 2009, when she resigned from the SUNY-RF. The Commission also has received information that your client permitted Bruno to receive compensation from April 25, 2007 through March, 2009 for little or no work" (see attached letter). In the January 6, 2010 e-mail attaching the revised 15-day letter the staff attorney at the Commission stated, "[p]lease see the attached letter, which resolves any alleged jurisdictional issues . . ."

The new date relied on by the Commission is obviously intended to conform the allegation date with the effective date of PEERA. Of equal or greater concern is the fact that the conduct alleged— that Ms. Bruno was allowed to work from home or did little or no work— is not a Public Officers Law issue. Section 74, the Code of Conduct, covers conflicts of interest between public duties and private interest, not management decisions of the RF. (See, NY State Asphalt Assoc. v. White, 138 Misc. 2d 863 (Sup. Ct. Albany Co. 1988) (a prohibited conflict of interest was found when an official used his official position to compel payment to a not-for-profit corporation in which the official had an interest)). The Commission's current application of §74 is well beyond the historical intent, design and interpretation of that statute.

¹ Through PEERA the language contained in POL §74(1) defining of "state agency" was expanded to include "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 RF is one of the enumerated closely affiliated entities at State Finance Law §53-a(5)(d).

POL § 74 is Not Intended or Designed to Second Guess Managerial Decisions

First, to be clear, the information the Commission is relying on in this regard is patently untrue, as will be explained later in this correspondence. However, as a preliminary matter of law it is our position that POL §74 was not intended or designed to second-guess the management of organizations or agencies, or the deployment of organization or agency resources. Were the Commission to allow the information it received, even if true, to rise to the level of a POL §74 violation, such would be a fundamental departure from the last half century of POL §74 interpretation.

It would be the first time the ethics law has been used to second-guess an organization's staffing or management decisions. For example, §74 has been appropriately applied to the misuse of state resources for private gain (see, e.g., In the Matter of Hevesi; Advisory Opinion No. 07-03 prohibiting the use of state resources for partisan politics) but it has never been applied to second-guessing the qualifications of an employee or the motivation for the hiring of such an individual. Imagine how such a fundamental departure would open the door to scrutiny of gubernatorial appointments on per diem boards and commissions, who are also covered by §74 and similar decision-making processes.

The Commission and its predecessor entity have long appreciated the bright line between a state agency's operational decision-making prerogatives and the Commission's limited role as interpreter of the state ethics laws. An example of this is the Commission's process for evaluating the substance of outside activities.² Outside activity approval is vested in large part in the state agency. The Commission's regulations in this area explicitly state that, "[t]he approving authority shall make its determination based on the provisions of sections 73 and 74 of the Public Officers Law, as well as pertinent State agency policies, procedures or rules and regulations governing employee conduct, and such other factors as the approving authority may deem appropriate" See, 19 NYCRR Part 932.4(b). The Commission's regulations further state that "[n]othing contained in this Part shall prohibit any State agency from adopting or implementing its own rules, regulations or procedures with regard to outside employment which are more restrictive than the requirements of this Part" See, 19 NYCRR Part 932.4(e). The reason for this is a recognition by the Commission that the agency is in the best position to evaluate the parameters within which to regulate the activities of its employees.

Moreover, POL §74(2) the precursor to the "Standards" found in POL subsection (3) states as follows:

"Rule with respect to conflicts of interest. No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or

² See, 19 NYCRR 932 et. seq.

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" (emphasis added).

When taken into consideration, this critical portion of the Code of Ethics would mandate a finding of a "substantial conflict" either prior to, or in conjunction with, the "Standards" articulated in subdivision (3). In this case, there is no "substantial conflict" with respect to the employment of Ms. Bruno, therefore POL §74 does not apply to President O'Connor in this instance.

Finally, there is no reasonable basis that would allow for an interpretation that President O'Connor's managerial decisions as President of the RF – without more – could ever result in a finding of a violation of POL §74 [d] or [h].

FACTUAL PRESENTATION

Despite our continuing belief that the Commission does not have jurisdiction over President O'Connor, under the confidential framework set forth in Executive Law §94(12)(a) and the ethical Standards concerning the treatment of confidential materials at POL §74, as well as the shield provided by the Personal Privacy Protection Act, we are afforded a safe harbor and the ability to provide you some background and perspective concerning the "information" the Commission received.

The History of the RF and President John O'Connor

The RF was chartered in 1951 as an independent non-profit educational corporation, governed by its own board of directors for the purpose of assisting in the development of state university facilities by encouraging gifts, contributions and donations for the benefit of the university system; receiving, holding and administering gifts or grants; and to finance the conduct of studies and research in all academic disciplines. There are no gubernatorial appointments to the board or other appointments to the board by any other public officials, either elected or appointed.

The RF created and adopted its original Bylaws in 1952, which have been amended periodically. The Bylaws state that "the board of directors shall manage the operations of the corporation" (see, Bylaws Art. I sec.1). The President of the RF is appointed by the board of directors and serve[s] at its pleasure" (see, Bylaws Art. II, sec. 1). The President serves as the "chief executive officer and shall be responsible for the supervision and operation of the corporation . . ." (see, Bylaws Art. II, sec. 2). Additionally, the President "shall have such powers

and perform such other duties as the board may direct or as are reasonably incidental to the office." (see, Bylaws Id).

By Agreement between the RF and the State University of New York (the "University") effective June 1, 1977, the RF agreed to "assist the University in the procurement of funds from the federal government and other authorized sources to support such sponsored programs at the University as the University shall request" (see, Agreement, Part A, paragraph 1). As part and parcel of this Agreement, the parties provided for the administration of sponsored programs, prepared an annual plan of expenditures and agreed to certain other general provisions (i.e. audits, patent and copyright policies and public liability insurance). The RF was designated as a "contractor" in the Agreement approved by both the Office of the Attorney General and the Office of the State Comptroller (see, Agreement, Part C, paragraph 20; see also, Agreement, Exhibit B).

The RF is a non-profit corporation and was intentionally not designed to be a state agency or quasi-governmental entity.

John O'Connor was hired to be the President of the RF in or about March, 2000. In his role as President, Mr. O'Connor fulfills his responsibilities under the corporation's Bylaws and is responsible for the administration of over \$1B (est. 2008-09) in externally-funded support for over 9,000 contracts and grants with 17,000 employees. President O'Connor is responsible for coordinating operations at 14 affiliated corporations established to facilitate university-industry-government partnerships and to accelerate the growth of research. President O'Connor is tasked with providing high quality, cost-effective administrative support, financial management, computer systems and audit services for all research and related programs, including faculty practice plans at University campuses. President O'Connor does not draw a salary for his work as President of the RF.

The Hiring and Qualifications of Susan Bruno

The RF had a desire to fill the position of Assistant Director for Federal Relations during the general time period of February – May, 2003. The credentials of Susan Bruno were presented as an individual who possessed the requisite experience to fill the position. Most importantly, Ms. Bruno's credentials included an extended period of work experience as an Executive Assistant in the New York State Assembly (1991-2003). Ms. Bruno participated in a selection process where she was interviewed. Ms. Bruno's work experience and her understanding of government operations were factors in her hiring at the RF. The decision was made to hire Ms. Bruno and the hiring transaction was completed on or about May 19, 2003.

Nearly five years later, in January, 2009, the Albany Times-Union published articles (previously cited herein) calling into question Ms. Bruno's post-secondary educational

background dating back approximately 25 years. Although the RF was not previously aware of the questions surrounding her academic credentials, we believe that it is important to keep in mind that at the time of her hiring, her legislative work experience would have carried more weight when evaluating her qualifications for the position than her post-secondary educational background.

The Work Product of Susan Bruno

Ms. Bruno worked in two positions while at the RF. She was originally hired as the Assistant Director for Federal Relations. Later in her career at the RF, Ms. Bruno became a Special Assistant to the President. In this capacity Ms. Bruno had a wide variety of responsibilities to the RF. These responsibilities included, but were not limited to, the promotion of public events acknowledging advances in research and scholarship, coordination of events for dignitaries,³ participating in cooperative ventures between British and American community colleges, and representing the RF at numerous functions (i.e. SUNY Day in D.C.). Ms. Bruno seemed to adequately fulfill her responsibilities in these positions. Ms. Bruno was not an employee of the State University of New York system or any other state agency to the best of our knowledge. Ms. Bruno's employment with the RF ceased effective March 2, 2009.

President O'Connor's observations and anecdotal impressions of Ms. Bruno's interaction with her co-workers at the RF captured a certain awkwardness. The difficulty that Ms. Bruno faced was the burden that she bore by virtue of being the child of a well-known and powerful government official in a government town. Like many offspring in similar situations, the immediate reaction tended to be that any position that she had – particularly with a government bent – was solely a product of her father and not connected to any abilities that she might possess. This unshakeable attribute limited the degree to which Ms. Bruno was accepted by certain co-workers. For the reasons described below, this dynamic was exacerbated by the federal investigation of her father.

The Development of Ms. Bruno's Telecommuting Arrangement

Initially, it is important to acknowledge that the RF has a policy with respect to off-site work or telecommuting. Contrary to media reports, Ms. Bruno was not the only employee or affiliate who participated in telecommuting.

The development of Ms. Bruno's telecommuting arrangement begins with the federal investigation into her father, former Senate Majority Leader Joseph M. Bruno. As you will appreciate, because Senator Bruno has yet to be sentenced in the matter and published reports

³ For example, Ms. Bruno was involved in a formal event welcoming Admiral John R. Ryan as the University at Albany President in May, 2004.

suggest other federal inquiries are underway, we are limited to providing only certain information to the Commission.

The federal investigation into Senator Bruno appears to have begun in earnest in February, 2006 with a grand jury investigation. As you may be aware, the grand jury for the Northern District of New York sits in the federal courthouse in Albany, which is located directly across Broadway from the RF, and coincidentally also in close proximity to the offices of the Commission.

As public reporting of the federal investigation grew, some of Ms. Bruno's co-workers were increasingly withdrawing from interacting with her which was creating a difficult work environment. The RF was faced with a barrage of media reporters, most notably certain reporters employed by the Albany Times-Union, who were calling RF employees at home, tailing Ms. Bruno when she was driving and camping out at a location on Broadway adjacent to the RF and near the federal courthouse. Not surprisingly, RF employees who were not aware of the scope of the inquiry were unnerved to work closely with Ms. Bruno. For practical purposes, it seemed Ms. Bruno was in effect stigmatized by the events swirling around her father.

In addition to the federal investigation, Ms. Bruno was coping with the simultaneous and extraordinary difficulties of her mother's deteriorating health condition due to advanced Alzheimer's Disease from January, 2007 through her death on January 7, 2008. During this period, it is believed that Ms. Bruno was the primary caregiver to her mother.

President O'Connor personally observed a dramatic change in Ms. Bruno's ability to cope with the pressure that was brought to bear as a result of her mother and father's situations. As the leader of the RF, President O'Connor was required to manage the immediate staff which would include dealing with Ms. Bruno's employment situation against the unique backdrop of her parents' respective ordeals. President O'Connor sincerely believed that a combination of on-site work and off-site work (telecommuting) would maximize Ms. Bruno's effectiveness as an RF employee. Just as importantly, it would reduce the tension that existed at the RF work site and add significant productivity to the remainder of the RF staff. Key to President O'Connor's decisions in this regard, was an effort to minimize the significant distractions caused by the federal investigation and the attendant media attention.

Moreover, the transaction allowing Ms. Bruno to telecommute was made and completed in or slightly before May, 2006, which is of course nearly a year before the Commission arguably obtained jurisdiction over the RF by virtue of the PEERA legislation.

The implementation of this management solution was a decision made by President O'Connor in his role as leader of the RF. The decisions regarding Ms. Bruno were multi-faceted and complex. Public Officers Law §74 should not be applied to this situation, since there is no

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"substantial conflict of interest" or any conduct which could be interpreted as violating any of the Standards set forth in POL §74(3). On the contrary, the solution to the situation combined effective staff management with an appreciation for a matter with a genuine human element.

* * * * *

As set forth in the introduction to this correspondence, we question whether the Commission has jurisdiction over President O'Connor concerning the employment of Susan Bruno.

Notwithstanding remaining questions concerning whether the Commission has jurisdiction over this matter, which we do not waive or submit to, we genuinely hope that this robust response to Mr. Ginsberg's letter provides you with sufficient legal analysis and factual background to alleviate any concerns you may have related to this situation.

In closing, I respectfully request that the Commission affirmatively advise me if this response suffices to close this matter with the Commission. In the absence of a confidential determination along these lines, my client finds himself in the untenable position of possibly waiting for the issuance of an unjustified (though public) Notice of Reasonable Cause that could be announced without warning and which, in my view, would not be supported by the facts or law. Such a formal allegation, alone, by the Commission would clearly cause irreparable damage to President O'Connor's prestige and well-deserved reputation

If you have any questions regarding this matter in the future, I would welcome the opportunity to discuss them with you.

Very truly yours,



Karl J. Sleight

KJS:kmd

cc: Barry Ginsberg, Executive Director
Bridget Holohan, Associate Counsel