

**MINUTES OF THE PUBLIC SESSION OF THE
AUGUST 8, 2017
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
HELD AT
540 BROADWAY
ALBANY, NEW YORK**

Acting Chair: Michael K. Rozen (Webex)

Members: Robert Cohen (ALB)
James E. Dering (ALB)
Marvin Jacob (NYC)
Seymour Knox, IV (BUF)
Gary J. Lavine (ALB)
J. Gerard McAuliffe, Jr. (ALB)
Barry C. Sample (ALB)
Dawn L. Smalls (NYC)
George H. Weissman (ALB)
James A. Yates (ALB)

**Members
Absent:**

Staff: Seth H. Agata, Executive Director
Monica J. Stamm, General Counsel
Martin L. Levine, Deputy General Counsel
Stephen J. Boland, Director of Administration
Keith C. St. John, Director of Ethics
Andrew Bechard, Director of Lobbying
Walter J. McClure, Director of Communications and Public Information
Officer
Pei Pei Cheng-deCastro, Director of Investigations and Enforcement
Emily A. Logue, Deputy Director of Investigations and Enforcement
Patrick E. Coultry, Chief Investigator
Peter J. Smith, Investigator
Michael Sande, Deputy Director of Ethics Guidance
Stephanie Blattmachr, Deputy Director of FDS
Carol C. Quinn, Deputy Director of Lobbying Guidance
Meghann Hennigan, Deputy Director of Education
Erin R. Lynch, Associate Counsel
Lori Donadio, Principal Investigative Analyst
Deborah Novak, Secretary to the Commission

I. CALL TO ORDER

Acting Chair Michael Rozen called the August 8, 2017 Commission Meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION

June 27, 2017

A motion was made by Commissioner McAuliffe, seconded by Commissioner Weissman, to approve the minutes from the Public Session of the June 27, 2017 Commission Meeting. The motion was approved by a vote of 10-0-1. Chair Rozen and Commissioners Cohen, Dering, Jacob, Knox, Lavine, McAuliffe, Smalls, Weissman and Yates voted in favor of the motion. Commissioner Sample abstained from the motion.

III. REPORT FROM STAFF

First Quarter Financial Report

Stephen Boland, Director of Administration, presented the financial report. The appropriation for personal service this year was \$4,682,000 and \$900,000 for non-personal service, for a total of \$5,582,000, which was the same as last year. The cash targets were, for personal service \$4,620,000, and \$911,000 for non-personal service. In the first quarter, the Commission spent \$1,240,964 on personal service, which is approximately 27% of personal service cash ceiling. The Commission spent \$148,000 on non-personal service. The breakdown is approximately \$9,000 in supplies; \$6,000 in equipment, \$5,000 for travel and \$127,000 for contractual services, which is 16.3% of the cash target for non-personal service. The total spent in the first quarter was \$1,389,034 or 25.1% of the Commission's cash target. The spending in personal service during the first quarter was higher than normal due to the state-wide retroactive parity increases.

Update on Outreach Activities

Executive Director Seth Agata stated that education staff has posted a spring/summer edition of the newsletter on the website. We are working with ethics officers regarding the recent parity increases (arising out of the CSEA and PEF pay bills) which will impact threshold FDS filers. The education unit has also put a fall training schedule online so all FDS filers who require training can sign up.

JCOPE will be holding its first ethics conference on October 26, 2017 in New York City. Staff has sent a save-the-date announcement to the agency ethics officers and general counsels. There will be CLE credits available. The soft-bound book on Ethics and Lobbying Regulations in New York will be distributed as part of the Conference. The conference will have three segments; the first will be the keynote speaker, Richard Rifkin, Senior Counsel, the New York State Bar Association and a former Director of the State Ethics Commission, followed by two panels -- one on post-employment restrictions and one on the JCOPE investigations process.

IV. REGULATIONS

Proposed Comprehensive Lobbying Regulations

Staff's Proposed Comprehensive Lobbying Regulations were put out many months ago, eliciting extensive public comments, many of which have been incorporated into the latest draft. There were also changes made since the Commission's last meeting reflecting the input of Commissioners. Staff recommends commencing the SAPA rulemaking process which will allow the draft regulations to be posted in the state register. That process will provide for further public comment which staff will then incorporate and bring back to the Commission for consideration. There is also the opportunity to hold another public hearing in Albany. General Counsel Monica Stamm added that staff anticipates multiple rounds of comments and revisions.

Commissioner Jacob asked about the fee schedule for late filings and the leniency toward first-time filers. Deputy General Counsel Martin Levine explained that the

special treatment of first-time filers derives from the statute, which also gives the agency discretion with respect to late fees, and it has been a longstanding practice to have a late fee schedule that departs from the statutory schedule. Commissioner Smalls stated that the policy rationale must be that new filers have a learning curve. Executive Director Agata stated that we will see if we receive any public comments on this issue.

Commissioner Cohen commended the staff for an exceptional work product and for the exceptional efforts undertaken over the past year. A motion was made by Commissioner Cohen, seconded by Commissioner Dering, to approve the proposed Comprehensive Lobbying Regulations for publication in the State Register to commence the SAPA rulemaking process. The motion was approved by unanimous vote.

Proposed Amended Source of Funding Regulations

Executive Director Agata stated that the Proposed Amended Source of Funding Regulations also have been posted and put out for comment. Deputy General Counsel Levine stated that the Commission already has Source of Funding regulations in place; these new amendments were drafted in conjunction with the proposed lobbying regulations, with corresponding changes.

Commissioner Lavine noted that these new drafts delete the evidentiary standard and the phrase “substantial likelihood of harm” from the individual exemptions. Deputy General Counsel Levine explained that those changes were proposed to conform to the language of the statute. Commissioner Lavine asked what evidentiary standard the Commission should apply in making determinations. General Counsel Stamm stated that should the Commission view it as needing an evidentiary standard, there is a range of standards that the Commission could adopt. Executive Director Agata stated that we can solicit comments from experts on administrative law on the issues relating to appropriate standards of review. Commissioner Yates stated that the changes merely conform the regulations to the

statute, as “clear and convincing evidence” went well beyond the language in the statute. Commissioner Jacob noted other differences between individual and group exemptions in the statute which support the removal of “clear and convincing evidence.” Commissioner Weissman stated that this has been a long-term philosophical issue for the Commission, balancing the legislative interest in transparency with the Supreme Court’s requirements for protecting the First Amendment rights of certain sources.

In response to questions from Commissioner Lavine, General Counsel Stamm explained that by statute, individual exemptions can be appealed to a hearing officer, who has the final say, not the Commission. Group exemptions can only be challenged under Article 78. The Commissioners discussed that this type of statutory scheme is not unique to JCOPE and that other agencies have to accommodate final decisions of hearing officers with which they may not agree. The agency does not have any recourse.

A motion was made by Commissioner Weissman, seconded by Commissioner Jacob, to approve the Amended Source of Funding Regulations for publication in the State Register and to commence the SAPA rulemaking process. The motion was approved by unanimous vote.

Proposed Amended Records Access Regulations

General Counsel Stamm explained the Record Access Regulations were originally amended in March or April of 2012, on an emergency basis. These amendments conform the Commission on Public Integrity regulations to the new Public Integrity Reform Act. Recently, it was discovered that those changes were never made permanent, and the regulations reverted to the version that the Commission on Public Integrity had in place. Staff is requesting that the Commission adopt the Proposed Amended Record Access Regulations on an emergency basis so that they are immediately in effect and conform with the statute, and also move forward on a permanent basis. Commissioner Jacob inquired into what time frame constitutes

“promptly” in Part 937.2(2)(i) of the regulations. General Counsel Stamm explained that the details for the time period are in 937.3. Staff can remove the word “promptly” and simply state that the record will be available in accordance with 937.3. A motion was made by Commissioner Jacob, seconded by Commissioner Yates, to approve the Amended Records Access Regulations as further amended and to proceed under SAPA with implementation of both emergency and permanent regulations. The motion was approved by unanimous vote.

V. **PROPOSED ADVISORY OPINION**

Application of the Post Employment Restrictions to Students

Deputy Director of Ethics Guidance, Michael Sande, explained that the proposed Advisory Opinion addresses issues that staff has encountered in applying the post-employment restrictions, in this case to full-time students who also serve as state employees. Deputy Director Sande stated that the Commission gets several inquiries relating to students per year. The precedent goes back to Advisory Opinion 91-01 which concluded that certain students should not be included within the definition of employee for purposes of Public Officers Law §73, and should not be bound by post-employment restrictions after leaving state service. Advisory Opinion 91-01 set forth the four criteria that an individual must meet in order to be deemed primarily a student. Pursuant to Advisory Opinion 91-01, each of the factors must be satisfied without allowing for any flexibility in the consideration of applications. Deputy Director Sande noted that strictly applying the criteria has led to unfair results in many cases, and cited specific examples. The opinion before the Commission provides that the criteria set forth in Advisory Opinion 91-01 should be applied with reasonable flexibility with due regard for the particular facts and circumstances of each case and a non-exhaustive sampling of additional factors that may be considered, such as whether the individual’s state service provides an academic credit or otherwise satisfy an educational requirement. Staff believes that this opinion maintains the proper balance between protecting the public’s interest underlying the post-employment restrictions, while avoiding applying the post-

employment restrictions to individuals whose employment is clearly secondary to the educational endeavors.

Some Commissioners expressed concern regarding confidentiality and lifetime bar implications, but others stated that those concerns need to be balanced against the practical application of the restrictions to students who will become unemployable.

After some discussion, a motion was made by Commissioner Cohen, seconded by Commissioner Jacob, to approve the proposed Advisory Opinion for the Application of the Post Employment Restrictions to Students without amendment. The vote on the motion was 9-2. Chair Rozen and Commissioners Cohen, Dering, Jacob, Knox, Lavine, McAuliffe, Sample and Smalls voted in favor of the motion. Commissioners Weissman and Yates opposed the motion. The motion carried.

VI. NEW AND OTHER BUSINESS

None

VII. MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO EXECUTIVE LAW §94(19)(b)

A motion was made by Commissioner McAuliffe, seconded by Commissioner Yates, to enter into Executive Session pursuant to Executive Law §94(19)(b). The motion was approved by unanimous vote.

VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

General Counsel Stamm announced that during the Executive Session, pursuant to Executive Law §94(19)(b), the Commission discussed litigation matters, commenced an investigation, authorized actions on investigations matter and discussed other investigative matters.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Yates, seconded by Commissioner Weissman, to adjourn the Public Meeting. The motion was approved by unanimous vote.