



Offices of the
Inspector General

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Inspector General

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June 13, 2022

Brian O'Dwyer
Chair
New York State Gaming Commission
One Broadway Center
Schenectady, New York 12305

Richard A. Ball
Chair
Agriculture and New York State
Horse Breeding Development Fund
and
Commissioner
New York State Department of
Agriculture and Markets
10B Airline Drive
Albany, New York 12235

Re: NYS IG 2597-342-2021

Dear Chairs O'Dwyer and Ball:

In March 2020, the Office of the Gaming Inspector General (OGIG)¹ learned that Dr. [REDACTED] then a New York State Gaming Commission (Commission) supervising racing veterinarian, was also an independent contractor with the Agriculture and New York State Horse Breeding Development Fund (Fund). On several occasions, she simultaneously worked for both the Commission and the Fund, effectively billing both entities for her services. In January 2021, OGIG received an additional complaint that [REDACTED] was transporting blood and urine samples from race tracks to the New York Equine Drug Testing and Research Program (EDTRP), potentially raising concerns regarding the handling and integrity of the samples, as well as chain of custody.

OGIG investigated these allegations and found that from 2016 through 2020, [REDACTED] was an employee of the Commission and concurrently an independent contractor with the Fund. The

¹ Effective June 18, 2021, the duties and responsibilities of the Office of the Gaming Inspector General were transferred to and encompassed by the Offices of the New York State Inspector General. *See* Racing, Pari-mutuel Wagering and Breeding Law § 130.

Commission requires its per diem employees to record actual hours worked, while the Fund does not require its contractors to do so. However, receipts submitted by ██████ to the Fund revealed some minor overlap between time she reported working for the Commission while also working for the Fund. There was also an instance when ██████ was in Schenectady for a Fund hearing but claimed to be working for the Commission at the same hearing.

The investigation further found that the Commission and Fund failed to consistently comply with provisions of their Shared Services Agreement (Agreement). In addition, the investigation found ██████ did not obtain written approval from the Commission or the New York State Joint Commission on Public Ethics (JCOPE) for continuing her private veterinary practice or work with the Fund. Lastly, the investigation found that contrary to standard operating procedure, ██████ and other Division of Horse Racing and Pari-Mutuel Wagering (Division of Racing) staff occasionally transported horse blood and/or urine samples from race tracks to the EDTRP, but the Commission kept no record of when or why such personal delivery was undertaken.

Methodology

In furtherance of this investigation, OIG reviewed Commission and Fund records, including emails, expense reports, time sheets, reimbursement forms and supporting receipts, and the Commission and Fund's 2017 Shared Services Agreement, among other records. Additionally, OIG interviewed Ronald G. Ochrym, the Commission's executive deputy director of operations and director of the Division of Racing and acting executive director of the Fund, and M. Kelly Young, the Fund's former executive director, among other Commission and Fund staff.

██████ Background

On April 3, 2013, ██████ began her employment with the Commission's Division of Racing as supervising racing veterinarian at Buffalo Raceway. A supervising racing veterinarian is responsible for ensuring the proper collection and handling of equine urine and blood samples to be tested by the EDTRP for the presence of prohibited substances.² Subsequently, ██████ was assigned to Batavia Downs and Yonkers Raceway and covered at other race tracks throughout the state.

Division of Racing staff assigned to race tracks are per diem employees. They work for the Commission only when the race track is operational and must be reappointed to those positions every year. Nevertheless, per diem employees report their actual hours worked to determine eligibility for health benefits, as well as for their pension calculation. Commission policies apply to all employees, including salaried, per diem, and temporary employees.

██████ Commission personnel history folder (PHF) contained acknowledgments that she received and read certain Commission conflicts of interest policies³ and Public Officers Law

² See PML § 902(1).

³ ██████ PHF contained acknowledgments for Commission Code 4F-110, Conflicts of Interest/Political Activities, and Commission Code 4F-423, Conflicts of Interest Upon Hiring. The former is no longer in effect and was superseded by HR-002, Code of Ethics for Gaming Commission Employees, which does not require any acknowledgment.

sections 73, 73-a, 74, 75, 76, 77 and 78, as well as executed the State Employee Statement in Lieu of Oath Pursuant to Civil Service Law section 62. She also attended Corruption Awareness Trainings given by OGIG in 2016 and 2019.

According to ██████ 2013 employment application, she worked at a private veterinary practice and intended to continue working there while with the Commission. A review of her PHF contained no requests or approvals for outside employment.⁴ It should be noted that although Commission policy requires staff to obtain written “clearance for potential conflicts of interest for all outside employment and/or volunteer activity,” no criteria are provided to supervisors and managers to evaluate whether there is a potential conflict of interest in an employee’s proposed outside activity. Moreover, the Commission form for requesting such approval does not require an employee to disclose potential earnings, though Commission policymakers are also required to obtain JCOPE approval if earnings could be over \$5,000 annually. The form also does not require review and approval by the Commission’s ethics officer even though the review of such activity falls within that position’s scope of responsibility.⁵

Although not indicated in ██████ PHF, OGIG learned that the Commission failed to designate her a policymaker to JCOPE until February 27, 2019.⁶ This designation required that ██████ file an annual Financial Disclosure Statement (FDS)⁷, on which she was obligated to report any outside employment and income generated from such employment. In addition, as a policymaker, ██████ should have obtained JCOPE’s (along with the Commission’s) approval prior to engaging in outside employment that could generate over \$5,000 in annual income, which she failed to do. It should also be noted that ██████ filed her 2020 FDS late and failed to complete any of the required JCOPE ethics trainings.⁸

During this investigation, on March 5, 2021, ██████ tendered her resignation to the Commission, effective immediately.⁹

The Commission and Fund’s Shared Services Agreement

On March 10, 2017, the Commission and Fund executed a Shared Services Agreement, retroactive to January 1, 2014, and continuing through December 31, 2023. The Agreement covers the use of Commission staff, non-personnel services, and office space. Pursuant to the

⁴ ██████ supervisor, the Commission’s equine medical director, was aware that ██████ continued her private veterinary practice and worked for the Fund but was not aware whether she had obtained formal approval for her outside employment.

⁵ See JCOPE “Responsibilities of the Agency Ethics Officer,” last revised Sep. 2018, at 1, “Overview,” and JCOPE Ethics Officer Info Center, at <https://jcope.ny.gov/ethics-officer-info-center>, last accessed June 3, 2022. The publication is available at <https://jcope.ny.gov/system/files/documents/2018/10/responsibilities-ethics-officer91018.pdf>.

⁶ Supervising racing veterinarians in the Division of Racing are supposed to be designated policymakers as they oversee equine drug testing at the race tracks.

⁷ In accordance with statutory requirements set forth in New York Public Officers Law § 73-a.

⁸ ██████ failed to complete JCOPE’s Online Ethics Orientation by May 28, 2019, and the Comprehensive Ethics Training Course by February 27, 2021.

⁹ On March 3, 2021, OGIG served ██████ with a notice to appear for a March 9, 2021, interview.

Agreement, the Commission invoiced the Fund for all services provided to the Fund by Commission employees since 2014.¹⁰ The Agreement, in pertinent part, reads:

[t]o the extent the Fund, upon consultation with the Commission, determines that an employee of the Commission is appropriately suited for performing Fund-related work, the Fund *shall* use such [Commission] [e]mployee. (emphasis added)

Commission employees who work in multiple program areas or for the Fund pursuant to the Agreement must document the amount of time they spent working on each area in the Time Distribution System (TDS) of the electronic Leave and Accrual Tracking System (LATS-NY) used by the Commission.¹¹

Division of Racing per diem staff complete and sign paper time sheets, which are countersigned by their respective presiding judge or steward. Supervising racing veterinarians must also follow this process to track their time and attendance, although they are supervised by the Commission's equine medical director. The director of racing officials reviews and approves the time sheet prior to entry into LATS-NY by the Commission's Human Resources Management unit, which ensures that hours are accurately entered, including time worked, time charged, and accruals. If staff are covering at another race track or engaged in work outside of a race day, they are supposed to indicate same on their time sheets. Racing per diem staff are expected to report one hour before the first race post time, except for the judges, who typically report two hours before the first race post time.

The Agreement also requires that the Commission's Office of Racing Promotion and Development (ORPD) coordinate the use of these employees and ensure the Commission makes quarterly assessments of actual costs and expenses for such employees including fringe benefits.¹² However, the investigation found that ORPD has been without a director since 2015, and such vacancy could have contributed to the lack of oversight and accountability identified by OGIG. Instead, the Fund communicates with Ochrym and the Bureau of Finance and Administration regarding billing and payment.

██████████ and Nine Other Commission Employees Worked as Independent Contractors

OGIG's investigation determined that when ██████████ began working for the Fund in 2016, she was effectively working for the same person at the Commission and the Fund, namely Ochrym, who was both the director of the Commission's Division of Racing and the Fund's acting executive director. From July 2, 2015, through December 11, 2017, Ochrym served as the Fund's acting executive director, until M. Kelly Young was named the Fund's executive director. Upon Young's resignation on November 16, 2021, Ochrym resumed the role in an acting

¹⁰ Such an agreement was reportedly contemplated for several years, but there was a delay in execution. Under the Agreement, the Fund was billed for services provided by Ochrym as well as the Commission's former director of the Office of Racing Promotion and Development, a former assistant counsel, a senior accountant, and the special assistant for special projects.

¹¹ The TDS requirement went into effect in late March 2017. Nevertheless, as noted *supra*, the Fund was retroactively charged for the services performed by Commission staff as far back as 2014.

¹² ORPD was created within the Commission to, among other things, administer the Fund. *See* Laws of New York, Chapter 60 of the Laws of 2012.

capacity. Given these dual roles, Ochrym was well-aware of ██████ outside employment with the Fund. Nonetheless, ██████ services were not utilized by the Fund through the Agreement. Rather, the Fund directly hired ██████ as an independent contractor for its equine drug testing program.¹³

Furthermore, OGIG found that the Fund entered into contracts with at least nine other Commission staff members instead of using their services through the Agreement, including an assistant to the presiding judge, an assistant to the supervising racing veterinarian, a former associate judge, and three supervising racing veterinarians. Also, since retiring from their full-time employment with the Commission, a former director of racing investigations and two former racing investigators contracted with the Fund while working on a limited per diem basis for the Commission. Yet, other Commission employees, including Ochrym and a senior accountant, were utilized by the Fund pursuant to the terms of the Agreement.

As to the reasons for the Fund's inconsistent application of the Agreement, OGIG received several conflicting rationales. According to Young, the Fund's former executive director, the genesis of this practice predated her tenure at the Fund. Young further advised that services under the Agreement are more costly to the Fund than those provided by independent contractors.¹⁴ Ochrym confirmed that the Fund employed Commission supervising racing veterinarians both outside of and pursuant to the Agreement. Although not indicated in the Agreement, Ochrym asserted that its terms only apply when Commission staff are used by the Fund for pari-mutuel races, such as the Sire Stakes and Excelsior races, which the Commission regulates. Ochrym claimed that for non-pari-mutuel races, such as County Fairs, the Fund should obtain services outside the Agreement. Contrary to his assertion, ██████ worked for the Fund during pari-mutuel races and was never utilized through the Agreement.

According to Ochrym, the Commission's veterinarians did not need to obtain approval to work for the Fund as the Fund is a "subset" of the Commission, thus such work is not considered to be outside employment. Ochrym advised that the Fund's then counsel had written a legal memorandum advising of the same, but he was unable to produce the memorandum when asked.¹⁵ Notably, JCOPE, which is responsible for investigating and enforcing violations of these laws¹⁶, defines an outside activity as:

¹³ In 2016 and 2017, the Fund's relationship with its independent contractors was executed via an "employment letter." In 2018, the Fund began using a "Services Agreement." Although no 2017 employment letter was located for ██████, Fund records revealed that she was paid by the Fund for veterinary services performed in 2017. It should be noted that Ochrym claimed that he had consulted with the then Fund's counsel, who was also then a Commission assistant counsel, regarding veterinarians' contracts, though only an employment letter was utilized during his tenure.

¹⁴ According to Young, the Fund must pay to the Commission a prorated fee based on a Commission employee's total compensation for a pay period rather than the employee's salary or time actually worked for the Fund.

¹⁵ OGIG conducted a limited search of Commission email accounts but found no emails or memoranda between Ochrym and then Fund counsel regarding this matter. Ochrym also claimed that he had consulted with the then Fund's counsel regarding veterinarians' contracts, although only an employment letter was utilized during his tenure.

¹⁶ Among OGIG's duties and responsibilities is investigating "conflicts of interest in the [C]ommission." See PML § 131(1).

an employment, business, or professional activity that is not related to your official State duties. An outside activity may be an occupation, whether paid or unpaid, ownership of a business, membership on a board, volunteer work, or *even a second job with the State*. An outside activity must occur outside of your regular work hours and without utilizing any government resources.¹⁷ (emphasis added)

Here, ██████ was contracting with the Fund, a State public benefit corporation, and this outside employment fell within JCOPE’s definition of an outside activity.¹⁸

Analysis of ██████ Commission Time Sheets and Fund Reimbursement Forms

According to Commission policy, all employees must obtain approval from the Commission prior to engaging in any outside employment.¹⁹ In addition, Public Officers Law requires that policymakers obtain JCOPE approval for an outside activity that exceeds or is expected to exceed \$5,000 annually.²⁰

Fund records²¹ revealed that, since 2016, ██████ has been providing veterinary services to the Fund and, since 2018, earned over \$5,000 in per diem annually. Additionally, unlike the Commission, the Fund reimburses its veterinarians for travel-related expenses²² and testing supplies. Since 2016, the Fund’s total annual payments to ██████ were in excess of \$5,000 annually. The table below shows ██████ per diem earnings and total payments from the Fund.

Year	Per Diem Earnings	Total Payments
2016	\$3,630	\$6,075.85
2017	unknown ²³	\$5,645.47
2018	\$8,250	\$12,541.59
2019	\$5,940	\$10,364.57
2020	\$8,580	\$13,472.87

Although the Fund requires independent contractors to indicate the number of hours worked, it does not require them to specify the actual hours. The investigation identified 31 instances between 2016 and 2020 when ██████ Commission time sheets and Fund reimbursement forms and receipts revealed likely overlap of time. In most instances, the overlap is minimal, although on several dates, the records indicate hours of overlap.

¹⁷ See <https://jcope.ny.gov/outside-activities>, last accessed Jun. 30, 2021. The Public Officers Law does not specifically define what constitutes an outside activity.

¹⁸ See PML §§ 330-336.

¹⁹ See Commission Code 6.204, Conflicts of Interest/Outside Employment or Volunteer Activities.

²⁰ See POL §§ 73 and 74.

²¹ For 2018 through 2020, the Office reviewed ██████ reimbursement forms and supporting documentation (receipts), and QuickBooks printouts related to the Fund’s equine testing programs. For 2016 and 2017, the Office reviewed QuickBooks related to payments to ██████ as the Fund’s reimbursement forms and supporting documentation were archived.

²² Unlike other meets regulated by the Commission, pursuant to Commission practice, the equine medical director and a supervising racing veterinarian are entitled to travel reimbursement from the Commission for the New York Racing Association’s Saratoga meet.

²³ The Fund’s records failed to distinguish between per diem and reimbursements payments to ██████ in 2017.

In one instance, in June 2018, █████ Commission time sheet indicated that she was in Schenectady for a hearing, while her Fund reimbursement form also indicated that she was testifying at a Fund hearing for five hours. On 15 occasions, █████ time sheets indicated that she reported to work two or more hours before the scheduled first race post time and her Fund reimbursement forms indicated that she was conducting out-of-competition testing. On another occasion, █████ time sheets indicated that she was working at a race track on a day when no races were taking place, and her Fund reimbursement form indicated that she was working for the Fund in the detention barn. These discrepancies should have been caught by the Division of Racing staff who were responsible for approving her time sheet, as they would have been aware if █████ was required to testify at a Commission hearing, report early to a track, or work on a day when no races were taking place.²⁴ Had █████ worked pursuant to the existing Agreement, her hours allocated for the Fund would have been recorded in LATS-NY. This internal control would have prevented possible overlap in hours charged to both entities.

█████ and Other Division of Racing Staff Transported Equine Drug Testing Samples

Ochrym confirmed that Commission samples are generally picked up at the race tracks by United Parcel Service and shipped to the EDTRP. Certain blood sample assays, such as blood gas testing, require that samples be promptly received by the EDTRP for testing to be possible. Otherwise, testing for performance enhancing or other prohibited substances will not be possible. According to Ochrym, in an emergency, Division of Racing staff (usually one of the racing investigators, who Ochrym asserted are mindful of chain of custody) will personally transport samples to the EDTRP. Though occasionally, one of the supervising racing veterinarians has transported samples, as happened for the 2019 Belmont Stakes. When asked how often samples are transported by staff, Ochrym estimated that about 10 times in 2020, but only four or five times in 2019. Neither Ochrym nor the Division of Racing record these instances, but he stated that he was notified and approved of each occurrence either verbally or by email. The Division of Racing provided no written policies and procedures related to collection and transportation of equine drug testing samples.

Of concern is whether █████ was transporting Commission and/or Fund equine drug testing samples, since on a particular day, she may have worked both for the Commission as a supervising racing veterinarian for races and for the Fund collecting samples before races. In the event that a hearing was requested as a result of a decision, ruling, or violation by the Commission or Fund related to the test results of their respective samples, it is unclear which entity █████ could, or would, say she was working for when she transported the samples. This overlap in employment could present challenges at hearings, such as evidentiary issues and chain of custody.

²⁴ See Commission Code 6.207, Time and Accrual Records (stating that a supervisor is expected to “[r]egularly check employee time records to be sure attendance is being recorded accurately and timely” and to “review time record entries and leave request e-mails, to ensure proper entry of time worked, absences and accruals used” prior to approving time sheets).

Findings

OGIG found that from 2016 through 2020, ██████ contracted with the Fund while employed by the Commission. Given that the Fund does not require its per diem employees to log actual hours worked for the Fund, the investigation could not definitively determine the number of hours when ██████ billed both entities simultaneously. However, the investigation found several instances when Division of Racing staff responsible for reviewing and approving her time sheet should have questioned her entries.

The investigation further found that the Commission and Fund failed to consistently comply with provisions of their Agreement. Instead, ██████ and at least nine other Commission employees engaged with the Fund as independent contractors in lieu of using the Agreement.

In addition, the investigation found ██████ did not obtain written approval to continue her private veterinary practice or for her outside employment with the Fund from the Commission or JCOPE.

Lastly, the investigation found that contrary to standard operating procedures, ██████ and other Division of Racing staff occasionally transported equine blood and urine samples from race tracks to the EDTRP. As these occasions were not documented by Ochrym or the Division of Racing, these aberrations may present chain of custody issues in the event that a hearing is requested to dispute drug test results. Instances when ██████ transported samples were more problematic, as she was likely transporting both Commission and Fund samples.

Recommendations

As a result of the above findings, the Inspector General recommends the following:

1. The Commission and Fund should consistently comply with the terms of the Shared Services Agreement;
2. The Commission should review ██████ time and attendance records to determine if any monies were paid to her in error, recover any such overpayments, and inform the Office of the New York State Comptroller to adjust pension calculations, if appropriate;
3. The Commission should regularly review its employee roster to ensure that staff is properly designated as a threshold or policymaker filer with JCOPE;
4. The Commission should update its policies and procedures on outside activities, as there are no criteria to evaluate whether a proposed outside activity poses a potential conflict of interest, the Commission's ethics officer is not involved in the approval process, and the form does not request sufficient information to determine whether a policymaker must also seek JCOPE approval;
5. The Commission should periodically remind staff of their obligation to obtain approval for outside activities;

6. The Commission should remind supervisors of their obligations regarding approval of subordinate time sheets; and
7. The Division of Racing should maintain a record regarding personal transport of samples from tracks to the EDTRP to ensure that chain of custody is established.

Of note, JCOPE's jurisdiction over [REDACTED] expired on March 5, 2022, as she left State service on March 5, 2021.

Please advise of the action taken by the Commission in response to these recommendations within 45 days of the date of this letter. If you require further information, please contact Gaming Deputy Inspector General Lisa Lee at [REDACTED].

Sincerely,

A large black rectangular redaction box covering the signature of Lucy Lang.

Lucy Lang
Inspector General

cc: Robert Williams
Executive Director
New York State Gaming Commission

Ronald G. Ochrym
Acting Executive Director
Agriculture and New York State
Horse Breeding Development Fund