



NEW YORK STATE LEGISLATURE

August 21, 2024

Lisa Lee, Deputy Inspector General for Gaming
New York State Offices of the Inspector General
Empire State Plaza, Agency Building 2, 16th Floor
Albany, NY 12223

Thomas Teige Carroll, Bureau Chief, Taxpayer Protection Bureau
New York State Office of the Attorney General
28 Liberty Street
New York, NY 10005-1495

Deputy Inspector General Lee & Bureau Chief Carroll:


We are writing regarding the severance packages that the Western Regional OTB has recently agreed to give to three of its officers who are stepping down from their positions amidst allegations of impropriety. Our analysis has led us to the following conclusions:

- Section 2854 of the Public Authorities Law (the prohibition of golden parachutes) applies to all public benefit corporations and public authorities, as was the intent of the legislature;
- The broad purpose of the off-track betting corporations is to generate revenue for state and local governments, and adherence to Public Authorities Law § 2854 is consistent with such purpose;
- Absent a contract provision requiring such payments, the severance packages constitute an unconstitutional gift of public funds; and
- The behavior of the WROTB officials, particularly President and CEO Henry Wojtaszek are a violation of Penal Law § 195.20, especially in light of *Etkin v. Capital Dist. Regional Off-Track Betting Corp.*, 9 A.D.3d 674 (2004) and *People v. Etkin*, 728 N.Y.S.2d 205 (2001).

We have attached a memo to this letter outlining the research supporting these assertions. We urge you to review the memo and the actions of the Western Regional OTB. The three severance packages total over half a million dollars of taxpayer money, and the decision to grant them warrants a thorough review by your offices.

We thank you for your attention to this matter and look forward to hearing from you.

Sincerely,

A handwritten signature in black ink that reads "Sean M. Ryan". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Sean M. Ryan
New York State Senator
61st District

A handwritten signature in black ink that reads "Monica Wallace". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Monica Wallace
New York State Assemblymember
143rd District

MEMORANDUM

To: Lisa Lee, Deputy Inspector General for Gaming & Thomas Teige Carroll, Bureau Chief, Taxpayer Protection Bureau
From: Senator Sean Ryan, Assemblymember Monica Wallace
Re: WROTB Severance Packages
Date: August 19, 2024

Issue: Were the severance packages offered to various WROTB officers legal?

Background: Henry Wojtaszek, Jacquelyne Leach, and William White have been asked to step down from their positions at the Western NY Region OTB (“WROTB”) amid allegations of financial mismanagement. The WROTB board has approved a severance package for the three officers valued at nearly \$500,000.

Applicability of Golden Parachute Law:

Section 2 of Public Authorities Law contains the definition of state authority: "1. 'state authority' shall mean a public authority or a *public benefit corporation* created by or existing under this chapter or any other law of the state of New York with one or more of its members appointed by the governor or who serve as members by virtue of holding a civil office of the state, other than an international authority or public benefit corporation including subsidiaries of such public authority or public benefit corporation [emphasis added]."¹

This definition section applies to the entirety of Public Authorities Law, including § 2854, which is the prohibition on golden parachute payouts. None of the WROTB board members are appointed by the Governor, but for the purposes of Public Authorities Law § 2, members who serve as members by virtue of holding a civil office of the state are those serving in an ex-officio capacity, which is the case for OTB board members.² OTBs may fall under the definitions of state or local authority in Public Authorities Law § 2.

Public Authorities Law § 2854 defines an “at-will employee” as an “employee of any entity organized under this chapter.”³ This definition conflicts with Public Authorities Law § 2, which is the definition section for the entirety of Public Authorities Law. Where such conflicts arise, it is appropriate to look at the legislative intent. In the sponsor memo, the bill’s sponsors, Senator Comrie and Assemblymember Wallace, stated “[w]hile golden parachute clauses may be appropriate in the private sector, such clauses are inappropriate in the public sector where the taxpayers are footing the bill. This practice seeks to insulate political appointees at the expense of taxpayers and is contrary to good government.”⁴ This statement makes reference to large severance payments being an inappropriate practice in the public sector as a whole, not a practice that is inappropriate for public authorities but appropriate for public benefit corporations. The definition of “at-will” employee was likely drafted to exclude employees

¹ Public Authorities Law § 2.

² Email with the Authorities Budget Office, Jul. 18, 2024.

³ Public Authorities Law § 2854.

⁴ Sponsor memo for A.2840 of 2019, https://nyassembly.gov/leg/?default_fid=&leg_video=&bn=A02480&term=2019&Summary=Y&Memo=Y.

represented by a collective bargaining agreement who are subject to different protections and obligations under state law.

WROTB's counsel issued a statement that Public Authorities Law § 2854 does not apply, but this analysis is flawed. "It is clear we are not organized under chapter 43-a of the consolidated laws, and the Severance Pay Limitation Act does not apply."⁵ This seems to imply that they believe they are "organized" under Racing, Pari-Mutuel Wagering and Breeding Law and therefore exempt. Public Authorities Law § 2 states that it applies to authorities and public benefit corporations "created by or existing under" chapter 43-a. "Organized" is not synonymous with "created" or "existing under." Being that public benefit corporations broadly exist under the scope of Public Authorities Law, which is intended to apply to any such entity created "under any other law of the state of New York," it is highly unlikely that the legislature intended for organization under a chapter of law other than 43-a automatically exempt an entity from the provisions of chapter 43-a.

Applicability of various statutes to public benefit corporations:

Public authorities and public benefit corporations serve an important purpose. "[P]ublic authorities, as a general matter, 'are created to accomplish a specific purpose or mission and are endowed with the freedom and flexibility necessary to achieve that mission'...public benefit corporations should not necessarily be subject to operational restrictions and requirements that bind the state and its agencies, such as public contracting and civil-service provisions."⁶ This is not a blanket exemption from restrictions applicable to other state instrumentalities. New York courts have held that determining the applicability of a given law to a public benefit corporation requires a three-part analysis. "[A] court should consider whether a public benefit corporation should be regarded as a State body for purposes of a given statute in light of the objectives of the statute at issue, the statute's normal operation, and the public policy goals that the corporation was created to achieve."⁷

As the objectives of the statute at issue have been discussed in the previous section of this memo, this section will focus on the statute's normal operation and the public policy goals that the corporation was created to achieve.

With regards to the statute's normal operation, S.4292/A.2480 was only signed into law in 2019. As such, there is no litigation pertaining to this statute.

Section 518 of the Racing, Pari-Mutuel Wagering and Breeding Law outlines the purposes of the off-track betting corporations, which is primarily "to derive from such betting, as authorized by this article, a reasonable revenue for the support of government."⁸ Adhering to Public Authorities Law § 2854 would not only not be a hindrance to the public policy goals that the WROTB was created to achieve, it would

⁵ Kristen Mirand, *'It's corruption': State, county leaders call on OTB board to rescind executives' buyouts*, WKBW BUFFALO, Jul. 12, 2024, <https://www.wkbw.com/news/local-news/its-corruption-state-county-leaders-call-on-otb-board-to-rescind-executives-buyouts>.

⁶ *Pustilnik v. Battery Park City Authority*, 71 Misc.3d 1058, 1066 (2021).

⁷ *Id.*

⁸ Racing, Pari-Mutuel Wagering and Breeding Law § 518.

be consistent with such goals. The money awarded as severance to OTB officials should be used as “revenue for the support of government.” Given both the objectives of the statute at issue and the public policy goals that the WROTB was created to achieve, it follows that § 2854 of Public Authorities Law applies to public benefit corporations such as WROTB.

It should be noted that in cases analyzing the applicability of a given statute to a public benefit corporation, courts use “public benefit corporation” and “public authority” interchangeably.⁹ This comports with §2 of Public Authorities Law. Furthermore, many so-called “public authorities” are in fact public benefit corporations.¹⁰ The Office of the State Comptroller explains that “[p]ublic authorities are public benefit corporations created to further public interests.”¹¹ There are no legal distinctions between a public authority and a public benefit corporation.

Gift of public funds:

Article VII § 8(1) of the New York State Constitution explicitly prohibits gifts of public funds. “The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking.”¹²

There is a robust body of case law regarding what does and does not constitute a gift of public funds. New York Courts have held that pensions and certain termination payments do not violate the constitutional gift of public funds prohibition.¹³ Termination payments are permissible in contexts where there is “a statute or contract authorizing”¹⁴ such payments. In the context of the WROTB, there is no statute authorizing termination payments.¹⁵ It also seems unlikely that these payments are the result of a previously negotiated contract provision, as “[t]he [WROTB] board approved a resolution that states Wojtaszek will have his full year’s salary to be paid out on December 15,”¹⁶ meaning the decision to pay out the severance was reached during and not prior to the board meeting. In *Rampello v. East Irondequoit Cent. School Dist.*, the court held that ex post facto payment arrangements constitute unlawful gifts of public funds.¹⁷ “Because the Board did not authorize payment for sick days *prior to their accumulation*, there was no legal obligation supporting the retirement incentive [emphasis added].”¹⁸

⁹ See generally, *Pustilnik v. Battery Park City Authority*, 71 Misc.3d 1058 (2021).

¹⁰ See, eg. Public Authorities Law §§ 152, 202, 552, 577, 653, 702, 826, 878, 902, 1005.

¹¹ OFFICE OF THE NEW YORK STATE COMPTROLLER, PUBLIC AUTHORITIES, (Aug. 1, 2024) <https://www.osc.ny.gov/public-authorities#:~:text=Public%20authorities%20are%20public%20benefit,bridges%2C%20mass%20transit%20and%20schools>.

¹² N.Y. Const. art VII, § 8, cl. 2.

¹³ See, eg. *Rampello v. East Irondequoit Cent. School Dist.*, 236 A.D.2d 797 (1997), *Lecci v. Nickerson*, 63 Misc.2d 756, 758-59 (1970), *Ingram v. Boone*, 91 A.D.2d 1063, 1064 (1983), *Matter of Boyd v. Collins*, 11 N.Y.2d 228 (1962), *Department of Personnel of the City of New York v. NYC Civil Service Commission*, 79 N.Y.2d 806, 807 (1991).

¹⁴ *Department of Personnel of the City of New York v. NYC Civil Service Commission*, 79 N.Y.2d 806, 807 (1991).

¹⁵ See Article 5-A of the Racing, Pari-Mutuel Wagering and Breeding Law.

¹⁶ Kristen Mirand, *President and CEO Henry Wojtaszek to be bought out of contract at Western Regional Off-Track Betting*, WKBW BUFFALO, Jun. 28, 2024, <https://www.wkbw.com/news/local-news/president-and-ceo-henry-wojtaszek-to-be-bought-out-of-contract-at-western-regional-off-track-betting>

¹⁷ *Rampello v. East Irondequoit Cent. School Dist.*, 236 A.D.2d 797 (1997).

¹⁸ *Id.* at 798.

Termination payments outlined in an employment contract or collective bargaining agreement are equivalent to “a retirement award, a retirement allowance, a retirement pension or retirement pay [are] earned compensation and [are] not ...gift[s].”¹⁹ That is because they are all “earned compensation, which is deferred to retirement and...calculated on prior years of service.”²⁰

Pensions and other deferred compensation “constitute pay withheld to induce long and faithful service.”²¹ It cannot be said that the goal in awarding severance pay to Mr. Wojtaszek and the other OTB officers is to induce long and faithful service, as they are being asked to step down. Where a termination payment is not calculated on prior years of service or intended as an inducement of a long term of service, it is an unconstitutional gift of public funds. In *Matter of Boyd v. Collins*, a “teacher was paid her final year’s salary for not actually teaching, which [the court held] was clearly an unconstitutional gift.”²² The severance packages have been described by the media as “buy[ing] Wojtaszek out of his contract,”²³ which implies that the money is in consideration of his *not* working, which mirrors the unconstitutional exchange in *Boyd*.

In *Ingram v. Boone*, a superintendent had a four year contract with the board of education. His performance as superintendent was called into question, and he was asked to step down. This payment of public funds was made “as damages for breach of a contractual obligation.”²⁴ In the case of the WROTB officers, there is no contractual term that was cut short. In *Ingram*, even the presence of a contract was insufficient to prove the payment was not a gift of public funds. The court held that “it is impossible to determine whether the payment to Dr. Lancaster can be construed as a settlement of a legitimate claim or whether it is in fact a gift of public moneys. A mere claim of exercise of discretion and judgment is not enough, in the absence of competent proof, to validate the payment.”²⁵

Defrauding the government:

Penal Law § 195.20 outlines the crime of defrauding the government. “A person is guilty of defrauding the government when, being a public servant or party officer, he or she: (a) engages in a scheme constituting a systematic ongoing course of conduct with intent to: (i) defraud the state or a political subdivision of the state or governmental instrumentality within the state or to obtain property, services or other resources from the state or a political subdivision of the state or a governmental instrumentality within the state by false or fraudulent pretenses, representations or promises; or (ii) defraud the state or a political subdivision of the state or a governmental instrumentality within the state by making use of property, services or resources of the state, political subdivision of the state or a governmental instrumentality within the state for private business purposes or other compensated

¹⁹ *Lecci v. Nickerson*, 63 Misc.2d 756, 758-59 (1970).

²⁰ *Id.* at 760.

²¹ *Id.* at 758.

²² *Lecci v. Nickerson*, 63 Misc.2d 756, (1970) citing *Matter of Boyd v. Collins*, 11 N.Y.2d 228 (1962).

²³ Kristen Mirand, *President and CEO Henry Wojtaszek to be bought out of contract at Western Regional Off-Track Betting*, WKBW BUFFALO, Jun. 28, 2024, <https://www.wkbw.com/news/local-news/president-and-ceo-henry-wojtaszek-to-be-bought-out-of-contract-at-western-regional-off-track-betting>

²⁴ *Ingram v. Boone*, 91 A.D.2d 1063, 1064 (1983).

²⁵ *Id.*

non-governmental purposes; and (b) so obtains property, services or other resources with a value in excess of one thousand dollars from such state, political subdivision or governmental instrumentality.”²⁶

OTB officers have been convicted and sentenced under Penal Law § 195.20 in the past.²⁷ In 2000, Davis Etkin, President and CEO of the Capital Region OTB was sentenced to two years in jail and a fine of \$100,000 for violations of Penal Law § 195.20 and other laws.²⁸ “Under Mr. Etkin, the management team spent more than \$4 million over the last seven years on activities that had nothing to do with off-track betting, including tennis tournaments and tennis sponsorships, the racing board's report concluded.”²⁹ Etkin retired amid allegations of impropriety and was prosecuted shortly thereafter.

In WNY, Henry Wojtaszek has been accused of using OTB funds to purchase tickets for concerts and sporting events, pay for a car and cell phone for himself, and awarding contracts to politically connected vendors.³⁰ The WROTB also purchased health insurance for its board members, despite receiving a letter from the Office of the Attorney General advising that such purchases were impermissible. All of this behavior appears to fall under the umbrella of “obtain[ing] property, services or other resources from...a governmental instrumentality within the state by false or fraudulent pretenses, representations or promises.” And, given that one such item of property obtained by Mr. Wojtaszek was a car, it is a reasonable assumption that he has obtained property in excess of one thousand dollars from the state.

Conclusion:

Public Authorities Law § 2854 most likely applies to the WROTB. Even if it does not, it is possible that the severance packages awarded to OTB officers constitute an impermissible gift of public funds, especially in light of potential violations of Penal Law §195.20 by the officers awarded such severance packages. It is highly unlikely that the severance packages issued to OTB officers are legal.

²⁶ Penal Law § 195.20.

²⁷ See, *Etkin v. Capital Dist. Regional Off-Track Betting Corp.*, 9 A.D.3d 674 (2004).

²⁸ *Id.*

²⁹ The Associated Press, *Money-Losing Capital OTB is Accused of Abuses in Spending*, NEW YORK TIMES, Jan. 11, 1998, <https://www.nytimes.com/1998/01/11/nyregion/money-losing-capital-otb-is-accused-of-abuses-in-spending.html>

³⁰ J. Dale Schoemaker, *Embattled Wojtaszek leaving OTB*, INVESTIGATIVE POST, Jun. 27, 2024, <https://www.investigativepost.org/2024/06/27/embattled-wojtaszek-leaving-otb/>