



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 8 | Number 1

Article 3

1991

Validity of New York State Ethics Commission Rule 932.2 Barring Public Officers from Holding Political Party Office

William Josephson

Beverly Jean Ross

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Civil Law Commons](#), [Constitutional Law Commons](#), [Jurisprudence Commons](#), [Law and Politics Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Josephson, William and Ross, Beverly Jean (1991) "Validity of New York State Ethics Commission Rule 932.2 Barring Public Officers from Holding Political Party Office," *Touro Law Review*. Vol. 8: No. 1, Article 3.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss1/3>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

VALIDITY OF NEW YORK STATE ETHICS COMMISSION RULE 932.2 BARRING PUBLIC OFFICERS FROM HOLDING POLITICAL PARTY OFFICE

William Josephson* and Beverly Jean Ross*

INTRODUCTION

In 1954, on the recommendation of Governor Thomas E. Dewey, the New York State Legislature enacted several statutes establishing a code of ethical standards to govern the conduct of public officers.¹ New York Public Officers Law section 73 was intended to regulate situations in which a conflict of interests clearly endangers the proper exercise of public service. Section 74 was enacted to regulate situations in which the proper discharge of public duties may give rise or appear to give rise to a conflict of interests.

The last substantial revision of this code of ethical conduct was in 1987, when the Ethics in Government Act² made major changes to section 73 of the Public Officers Law, enacted a new section 73-a requiring annual financial disclosure from all state officers and many public employees, and shifted advisory and

* Partner of Fried, Frank, Harris, Shriver & Jacobson, New York, New York, and J.S.D. candidate at Columbia University School of Law, respectively. The authors thank George F. Carpinello, Esq., Charles King, Esq. and Todd Norbitz, Esq. for valuable contributions to this article.

1. Act of April 14, 1954, ch. 695-98, 1954 N.Y. Laws 955 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 73, 74, 166 (McKinney 1988)). The substantive provisions were contained in sections 73, *Business or professional activities by state officers and employees and party officers*, and 74, *Code of Ethics* of the Public Officers Law.

2. Ethics in Government Act, ch. 813, §§ 2, 3, 1987 N.Y. Laws 1404, 1404, 1411 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 73, 73-a (McKinney 1988 & Supp. 1991); Ethics in Government Act, ch. 813, § 7, 1987 N.Y. Laws 1404, 1421 (McKinney) (codified at N.Y. EXEC. LAW § 94 (McKinney 1988 & Supp. 1991)).

enforcement authority for the Code of Ethics contained in Public Officers Law section 74 from the attorney general³ to a new State Ethics Commission.⁴ Public Officers Law section 74 was not amended at that time.

The New York State Ethics Commission (Commission) adopted several implementing rules as part 932, entitled *Outside Activities*, effective April 11, 1990.⁵ The stated purpose of part 932 is “[t]o ensure compliance by policy-makers and certain others with the conflict of interest prohibitions of sections 73 and 74 of the Public Officers Law by promulgating rules concerning restrictions on outside activities.”⁶

Rule 932.2 is entitled *Restrictions on Policy-makers and Certain Others Holding Positions of Officer or Member of Political Party Organizations*. It provides:

(a) *No head of a State department, individual who serves as one of the four statewide elected officials, individual who serves in a policy-making position or member or director of a public authority (other than a multi-state authority), public benefit corporation or commission at least one of whose members is appointed by the Governor shall serve as an officer of any political party or political organization.*

(b) *No head of a State department, individual who serves as one of the four statewide elected officials, individual who serves in a policy-making position or member or director of a public authority (other than a multi-state authority), public benefit corporation or commission at least one of whose members is appointed by the Governor shall serve as a member of any political party committee including political party district leader*

3. N.Y. EXEC. LAW §§ 63(11), 74 (McKinney 1982), *added by* Act of April 14, 1954, ch. 698, 1954 N.Y. Laws 959 (McKinney) and *repealed by* Ethics in Government Act, ch. 108, § 1, 1988 N.Y. Laws 234, 235 (McKinney).

4. N.Y. EXEC. LAW § 94 (McKinney Supp. 1991).

5. N.Y. COMP. CODES R. & REGS. tit. 19, § 932 (1990).

6. Notice of Adoption, 12 N.Y. St. Reg. 15 (Apr. 11, 1990). The term “outside activities” is not defined in any relevant statute, in part 932, in other rules of the State Ethics Committee in title 19 of the New York Compilation of Codes, Rules and Regulations, in case law, nor in any advisory opinions of the

(however designated) or member of the national committee of a political party.⁷

The stated statutory authority for part 932 is New York Executive Law section 94(16)(a).⁸ Section 94 of the Executive Law, newly enacted by section 7 of the Ethics in Government Act,⁹ created and empowered the State Ethics Commission. Section 94(16) provides that, in addition to any other powers and duties specified by law, the Commission shall have the power and duty to “[p]romulgate rules concerning restrictions on outside activities and limitations on the receipt of honoraria by persons subject to its jurisdiction”¹⁰

Rule 932.2 raises at least four substantial legal issues, which are explored by this Article. Part I of this Article explores the consequences of violations of rule 932.2 and shows that apparently there are no penalties or other consequences of a violation. Part II examines the history of the legislature’s own decisions about which public officers should be excluded from political party office holding. It argues that in purporting to deny to prospective and possibly sitting public officers not already proscribed by statute the opportunity or right to continue or assume certain political party offices, this rule may well be *ultra vires*. Part III examines the legislature’s careful distinctions in the Ethics in Government Act of 1987 and a subsequent amendment between full-time salaried public officers and other public officers. It concludes that, even if not *ultra vires* as to all public officers, rule 932.2 would appear to be *ultra vires* as applied to uncompensated part-time public officers. Part IV analyzes the state’s separation of powers doctrine as enunciated by the New York Court of Appeals and concludes that the rule, even if within

Ethics Commission issued on or before January 10, 1991.

7. N.Y. COMP. CODES R. & REGS. tit. 19, § 932.2 (1990) (emphasis added).

8. N.Y. EXEC. LAW § 94(16)(a) (McKinney Supp. 1991); Notice of Adoption, 12 N.Y. St. Reg. 15 (Apr. 11, 1990).

9. Ethics in Government Act, ch. 813, § 7, 1987 N.Y. Laws 1404, 1421 (McKinney) (codified at N.Y. EXEC. LAW § 94 (McKinney Supp. 1991)).

10. N.Y. EXEC. LAW § 94(16)(a) (McKinney Supp. 1991) (emphasis added).

the validly delegated authority of the State Ethics Commission, has been construed by it to encompass policy-making activity which runs afoul of the constitutionally required separation of powers.

I. CONSEQUENCES OF VIOLATIONS

Rule 932.7, adopted by the State Ethics Commission simultaneously with rule 932.2, provides:

In addition to any penalty contained in any provision of law, a knowing and intentional violation of this Part by an individual subject to it may result in appropriate action taken by the State Ethics Commission or referral by it to the individual's appointing authority. The appointing authority, after such a referral, may take disciplinary action which may include a fine, suspension without pay or removal from office or employment in the manner provided by law.¹¹

No statute or regulation indicates what "appropriate action" by the State Ethics Commission under rule 932.7 might be. Furthermore, there appears to be no authority for adoption or implementation of this rule.¹² As we have seen, section 94 of the New York Executive Law establishes the State Ethics Commission, its functions, powers and duties.¹³ It also establishes the penalties authorized for violation of the Ethics in Government Act.¹⁴ Subdivision 16(a) of section 94 authorizes the Commission to "[p]romulgate rules concerning restrictions on outside activities . . . by persons subject to its jurisdiction."¹⁵

11. N.Y. COMP. CODES R. & REGS. tit. 19, § 932.7 (1990).

12. Legislation now pending in the New York State Senate would provide for civil penalties of up to \$10,000 for violations of rules contained in part 932, assuming, of course, the rules are authorized under New York law. S. 6448, 214th Sess., Reg. Sess. (1991). Senate bill 6448, section 3, would also authorize the Commission to refer violations of such rules for prosecution but would *not* authorize the Commission to take any other action, appropriate or otherwise, in respect to such violations. S. 6448 § 3 ; *see infra* note 16.

13. *See supra* note 10 and accompanying text.

14. *See infra* notes 19-20 and accompanying text.

15. N.Y. EXEC. LAW § 94(16)(a) (McKinney Supp. 1991).

Subdivision 16(a) then limits the Commission's authority to penalize persons for violating any such rule with the following proviso: "a violation of such rules in and of itself shall not be punishable pursuant to subdivision thirteen of this section unless the conduct constituting the violation would otherwise constitute a violation of this section."¹⁶ Subdivision 13 of section 94 contains the only penalty provisions found in the Ethics in Government Act, so subdivision 16(a) would not seem to authorize penalties beyond those authorized by subdivision 13. In order for the penalties authorized by subdivision 13 to apply, a violation of the Commission's rule prohibiting a person from holding political party office must constitute a violation of or under Executive Law, section 94 itself.¹⁷ Since section 94 does not have a provision restricting the holding of a political party office, the relevant penalties in subdivision 13 do not apply by the terms of subdivision 16(a).¹⁸

Nor do they apply by the terms of subdivision 13.¹⁹

16. *Id.* The State Ethics Commission apparently has recognized the limitations this proviso places upon the enforcement of rules which do not track the substance of Executive Law, section 94. Senate bill 6448, introduced on July 4, 1991 at the request of the governor, would (1) repeal this proviso of Executive Law, section 94 (16)(a); (2) specifically authorize the Commission to receive and investigate complaints alleging violation of rules promulgated pursuant to section 94(16)(a); and (3) make persons who knowingly and intentionally violate such rules subject to civil penalties of up to \$10,000 under section 94(13). *See* S. 6448 §§ 1, 2, 3 (1991).

The Governor's proposal of this bill would seem to confirm the conclusion that the current penalty provisions of the Ethics in Government Act do not provide for or authorize imposition of sanctions for violations of rules promulgated by the Commission which do not also constitute violations of the statute.

Although enactment of this bill would provide a penalty for violations of Ethics rule 932.2, *cf. infra* notes 17-30 and accompanying text, it would not provide a basis for other penalties ostensibly authorized by rule 932.7. *See supra* text accompanying note 12. It also would not provide authority for the substance of rule 932.2 insofar as the rule exceeds the scope of Public Officers Law, section 73(9). *See infra* notes 35-131 and accompanying text.

17. *See* N.Y. EXEC. LAW § 94(13), (16)(a) (McKinney Supp. 1991).

18. *See supra* notes 12, 16.

19. Subdivision 13 would be amended by Senate bill 6448 to authorize only (1) civil penalties of up to \$10,000 or (2) reference to the appropriate

Subdivision 13 of section 94 provides that an individual who knowingly and intentionally violates specified provisions of section 73 of the Public Officers Law, knowingly and wilfully fails to file an annual statement of financial disclosure, or knowingly and wilfully makes a false statement or gives false information on an annual statement of financial disclosure with intent to deceive shall be subject to a civil penalty in an amount not to exceed \$10,000.²⁰ Subdivision 13 also provides that certain violations are punishable as Class A misdemeanors, which could result in imprisonment for up to one year.²¹ Because violation of rule 932.2 by holding a political office while, for example, serving as a member of a public benefit corporation is not a violation of section 73, 73-a, or 74 of the Public Officers Law, none of the aforementioned subdivision 13 penalties apply.

Subdivision 13²² also provides that the Commission shall adopt "rules relating to the assessment of the civil penalties *herein authorized*"²³ and provides further:

Notwithstanding any provision of law to the contrary, *no other penalty*, civil or criminal *may be imposed* for a failure to file, or for a false filing, of such statement, or a violation of section seventy-three of the public officers law, *except that the appointing authority may impose disciplinary action as otherwise provided by law*.²⁴

On its face, this restriction does not relate to violations of regulations which do not also constitute violations of sections 73²⁵ or

prosecutor for knowing and intentional violations of regulations lawfully adopted by the Commission. S. 6448, 214th Sess., Reg. Sess. (1991); *see supra* notes 12, 16.

20. N.Y. EXEC. LAW § 94(13) (McKinney Supp. 1991).

21. *Id.*

22. *Id.*

23. *Id.* (emphasis added).

24. *Id.* (emphasis added). Senate bill 6448 states explicitly that no penalty other than the ones set forth in subdivision 13 of Executive Law, section 94, may be imposed for violations of any rules promulgated pursuant to Executive Law, section 94(16)(a). S. 6448, 214th Sess., Reg. Sess. (1991).

25. Section 73 provides in subdivision (6)(c):

Any such legislative employee who knowingly and wilfully with intent to deceive makes a false statement or gives information which he knows

73-a²⁶ of the Public Officers Law. Furthermore, it certainly does not authorize penalties for any such regulatory violation,²⁷ and does evidence a strong legislative policy that, except as explicitly provided by the statute, the only penalties available under the Ethics in Government statute should be disciplinary action that “the appointing authority may impose . . . as otherwise provided by law.”²⁸

As these provisions show, the legislature did not authorize the State Ethics Commission to impose any additional penalties for violation of rules it might promulgate, unless such violations also constitute violations of the statutes, and then only to the extent of the penalties set forth in subdivision 13 of Executive Law section 94. Therefore, a violation of rule 932.2, other than violation by a judge, attorney-general or other public officer covered by Public Officers Law, section 73(9),²⁹ is punishable only “as otherwise provided by law.”³⁰

Hence, our conclusion is that the Commission has gone beyond its authority in its attempt to authorize, by rule 932.7, fines or

to be false in any written statement required to be filed pursuant to this subdivision, shall be assessed a civil penalty in an amount not to exceed ten thousand dollars. Assessment of a civil penalty shall be made by the legislative ethics committee in accordance with the provisions of subdivision twelve of section eighty of the legislative law. For a violation of this subdivision, the committee may, in lieu of a civil penalty, refer a violation to the appropriate prosecutor and upon conviction, but only after such referral, such violation shall be punishable as a class A misdemeanor.

N.Y. PUB. OFF. LAW § 73(6)(c) (McKinney 1988).

26. Section 73-a provides in subdivision (4):

A reporting individual who knowingly and wilfully with intent to deceive makes a false statement or gives information which such individual knows to be false on such statement of financial disclosure filed pursuant to this section shall be subject to a civil penalty in an amount not to exceed ten thousand dollars.

N.Y. PUB. OFF. LAW § 73-a(4) (McKinney Supp. 1991).

27. *See supra* note 24.

28. N.Y. Exec. Law § 94(13) (McKinney Supp. 1991).

29. *See infra* notes 51-96 and accompanying text.

30. N.Y. EXEC. LAW § 94(13) (McKinney Supp. 1991). This is so even if Senate bill 6448 is enacted.

suspension from office without pay for violations of rule 932.2 that are not also violations of Public Officers Law, section 73(9).³¹

The question then is what, if any, "disciplinary action" the appropriate appointing authority is authorized to take with respect to a public officer subject to rule 932.2. Obviously, there are many appointing authorities in the state government and this Article cannot canvass them all. But to take the common case of public officers appointed by the governor, we are unaware of any provision of law which generally authorizes the governor to fine or suspend his appointees.³²

What is the governor's power of removal? One starts with the New York State Constitution which states: "When the duration of any office is not provided by this constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment."³³ The constitution provides that there is a difference between an office whose duration is provided by the constitution or declared by law and an office for which neither provision is made. In the latter case a public office holder can be removed summarily by the appointing authority.³⁴ The constitution implies that this may

31. See *infra* notes 51-96 and accompanying text. While fines of up to \$10,000 could be imposed if Senate bill 6448 is enacted, the Commission still would have no power to authorize any appointing authority to suspend a public officer appointee without pay, and we know of no law generally authorizing suspension of a public officer without pay.

32. Under section 75 of the Civil Service Law, any gubernatorially appointed public officer or employee designated as holding a policy-making position by the governor and in the competitive or non-competitive class of the classified service of the state could be fined up to \$100 or suspended without pay for up to two months' for misconduct. N.Y. CIV. SERV. LAW §75(3) (McKinney Supp. 1991). Such officers and employees would not include most gubernatorial appointees who will be in either the exempt class of the classified service, N.Y. CIV. SERV. LAW § 41 (McKinney 1983), or the unclassified service, *id.* § 35.

33. N.Y. CONST. art. XIII, § 2.

34. *Ryan v. Wells*, 178 N.Y. 135, 136, 70 N.E. 218, 219 (1904) (*per curiam*) (office of deputy tax commissioner held during the pleasure of authority making appointment) (citing N.Y. CONST. of 1894, art. X, § 3; renumbered art. XIII, § 6, Nov. 8, 1938; renumbered art. XIII, § 2, Nov. 6,

not be so for public office holders whose terms are set by constitution or other law.

This implication is confirmed by an analysis of the removal provisions contained in the Public Officers Law.³⁵ There are two principal methods of removal of gubernatorial appointees. The first relates to those appointed with the advice and consent of the senate:

An officer appointed by the governor by and with the advice and consent of the senate, except an officer who is or any or either of the officers who are the head of a department, and except as otherwise provided by special provision of law *may be removed by the senate* upon the recommendation of the governor.³⁶

This section also provides that the governor, before making a recommendation to the senate for the removal of any officer, may in his discretion take proofs for the purpose of determining whether such recommendation shall be made.³⁷ Thus, the governor may not act alone to remove an officer whose appointment must be approved by the senate, other than a head of department,³⁸ and there is a clear implication that the governor must have some basis for recommending the removal to the senate.

The Public Officers Law also makes special provisions for removal of public officers appointed solely by the governor for a term:

An officer appointed by the governor *for a full term . . .* whose appointment is not required by law to be made by and with the advice and consent of the senate . . . may be removed by the governor within the term for which such officer shall have been chosen, *after giving to such officer a copy of the charges against him and an opportunity to be heard in his defense.*³⁹

1962).

35. N.Y. PUB. OFF. LAW §§ 32-36 (McKinney 1988).

36. *Id.* § 32 (emphasis added).

37. *Id.*

38. *Id.* § 33-a.

39. *Id.* § 33(1) (emphasis added); cf. *Gere v. Whitlock*, 92 N.Y. 191

This provision also implies that if the officer is appointed by the governor for a fixed term, even if her appointment is not approved by the senate, the governor must have some "charges" or cause on which to base the removal.

This analysis is supported by an observation made by then Chief Judge Breitel toward the end of the New York Court of Appeals opinion in *Rapp v. Carey*.⁴⁰ In this case, the court of appeals held that a dual public-political party office prohibition promulgated by a gubernatorial executive order exceeded the express terms of then sections 73(8)⁴¹ and 73(6)⁴² of the Public Officers Law and, therefore, was not authorized.⁴³ The court stated:

None of this is to say that the Governor may not require that his appointees, serving at his will, abstain from transactions or business associations that potentially conflict with State duties. The Governor is, of course, free to regulate the business activities of employees *serving at his pleasure*. The same cannot be said, however, of employees who have civil service tenure, *or even gubernatorial appointees who serve for fixed terms. These employees may not be removable except for cause, and are thus not subject to summary dismissal by the Governor.* The challenged executive order exceeds the Governor's power of appointment and reaches employees who could be neither directly appointed *nor summarily dismissed by the Governor. As to these employees, the Governor is without power to impose the*

(1883) (an officer has no right to a hearing before dismissal unless such right has been granted by the legislature or the state constitution).

40. 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978).

41. Section 73(8) provided: "No party officer while serving as such shall be eligible to serve as a judge of any court of record, attorney-general, district attorney or assistant district attorney." Act of April 24, 1964, ch. 941, § 6, 1964 N.Y. Laws 1679, 1685 (McKinney), *renumbered by* Act of July 20, 1965, ch. 1012, § 2, 1965 N.Y. Laws 1486, 1487 (McKinney), and *amended and renumbered* as subdivision (9) by Ethics in Government Act, ch. 813, § 2, 1987 N.Y. Laws 1404, 1404 (McKinney).

42. Section 73(6) then provided for annual written disclosures of certain financial interests by members of the legislature and legislative employees. Act of July 20, 1965, ch. 1012, § 3, 1965 N.Y. Laws 1486, 1488 (McKinney).

43. *Rapp*, 44 N.Y.2d at 164-65, 375 N.E.2d at 749, 404 N.Y.S.2d at 568-69.

*strictures contained in the executive order.*⁴⁴

The court cited no authority for these observations. Nevertheless, as implied by Chief Judge Breitel, it is difficult to believe that the governor could, by executive order, in effect remove a public officer other than one serving at his pleasure or require his resignation without presenting his case to the senate,⁴⁵ or to the appointee if the senate's approval were not necessary for the appointment.⁴⁶ If that is so, it is equally difficult to believe that the governor's appointees, in this case members of the State Ethics Commission, could in effect do so by regulation.⁴⁷

44. *Id.* at 165, 375 N.E.2d at 749-50, 404 N.Y.S.2d at 569 (emphasis added).

45. See N.Y. PUB. OFF. LAW § 32 (McKinney 1988).

46. See *id.* § 33(1).

47. We have found no New York authority squarely on point. The separation of powers cases discussed *infra* hold that an executive agency's rule-making authority may not exceed the constitutional or statutory authority conferred on the governor to execute and implement the laws enacted by the legislature and interpreted by the judiciary. See *infra* notes 110-48 and accompanying text.

One of the counsel in *Rapp* did perceive the relationship between the appointment and removal powers and the governor's effort by executive order to impose disciplinary regulations on a very large class of state officers and employees, but the New York cases cited do not seem on point. Brief for Appellant, at 63, *Rapp v. Carey*, 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978) [hereinafter Appellant's Brief *Rapp*]. Nevertheless, there is a relationship.

On the federal level, a Memorandum Opinion of a United States Assistant Attorney General thoughtfully analyzes the interrelationship of the president's removal power and congress' power to delegate to an executive agency, over which the president has only limited control, authority to take disciplinary action against executive branch employees. The assistant attorney general advised that congress may not take from the president the ultimate authority to act. 2 Op. Office of Leg. Counsel 107 (1978). If the reasoning of the assistant attorney general were applied to the State Ethics Commission's adoption of rule 932.2, it would follow that even an explicit legislative delegation to the Commission of removal power over gubernatorial appointees serving at the governor's pleasure would impermissibly interfere with the governor's "duty faithfully to execute the laws." *Id.* at 109.

Moreover, the removal powers of the United States President with respect to officers appointed with the advice and consent of the senate or for a term are different from those of the New York State Governor. Under *Myers v. United*

Because of the phrase in Public Officers Law section 33(1), "within the term for which such officer shall have been chosen,"⁴⁸ this section presumably does not apply to a public officer who has been appointed by the governor alone but not for a definite term. Nor does it appear to apply to a public officer to whom the section otherwise applies but who is holding over after expiration of her term pursuant to Public Officers Law section 5.⁴⁹

But until the governor does appoint a successor, neither he nor any gubernatorial appointee may, directly or indirectly, effect a removal other than in accordance with section 32 or 33(1). This presumably is what Chief Judge Breitel had in mind in the *Rapp* dictum quoted above.⁵⁰

States, 272 U.S. 52 (1926), the president's unilateral removal power, even over officers appointed by and with the advice and consent of the senate, is considerable. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-9 at 186-91 (1st ed. 1978) (discussing the president's powers of removal as chief executive). Under New York Public Officers Law section 32, the governor can only recommend removal of such officers to the senate, and under section 33, the governor can remove appointees for a definite term only for cause after notice and a hearing. Thus, it seems very unlikely that the legislature would have conferred on the State Ethics Commission any authority over executive appointees protected by Public Officers Law sections 32 and 33 that might lead to their dismissal unless it had done so explicitly, which it did not.

48. This phrase does not appear in section 32, which relates to the removal by the senate of officers appointed by the governor by and with the advice and consent of the senate. Nor does any phrase like it appear in any other relevant provision.

49. In the case of holdovers this distinction between the governor's power to remove with and without cause is one without a difference because the Public Officers Law provides that "the office [of a holdover] shall be deemed vacant for the purpose of choosing his successor." N.Y. PUB. OFF. LAW § 5 (McKinney 1988). Thus, whether a holdover is an officer appointed by and with the advice and consent of the senate or an officer appointed for a term, the governor can simply appoint a successor and need not resort to removal.

50. *Rapp v. Carey*, 44 N.Y.2d 157, 165, 375 N.E.2d 745, 749-50, 404 N.Y.S.2d 565, 569 (1978); *see supra* note 44 and accompanying text.

II. IS RULE 932.2 SUBSTANTIVELY *ULTRA VIRES*?

An explicit prohibition concerning dual public and party office holding is found in Public Officers Law section 73(9) as amended by the Ethics In Government Act.⁵¹ It provides:

*No party officer while serving as such shall be eligible to serve as a judge of any court of record, attorney-general or deputy or assistant attorney-general or solicitor general, district attorney or assistant district attorney. As used in this subdivision, the term "party officer" shall mean a member of a national committee, an officer or member of a state committee or a county chairman of any political party.*⁵²

The legislature's intent to limit the class of public officials prohibited by section 73 from simultaneously holding a political party office is affirmed in the legislative history of section 73(9).⁵³ The dual-role prohibition was originally adopted as subdivision 5 of newly enacted section 73, *Business or professional activities by state officers and employees and party officers*, in 1954.⁵⁴ Subdivision 5 limited the scope of the "dual-role" prohibition to judges, the attorney general, and prosecutors. The legislature subsequently amended section 73 on seven separate occasions.⁵⁵ Aside from redesignating subdivision

51. N.Y. PUB. OFF. LAW § 73(9) (McKinney Supp. 1991), *amended by* Ethics in Government Act, ch. 813, § 2, 1987 N.Y. Laws 1404, 1404 (McKinney).

52. *Id.* (emphasis added).

53. Not even the most detailed section-by-section analysis of the Ethics in Government Act found in the Governor's Bill Jacket of chapter 813 of the 1987 New York Laws. comments on the amendment of section 73, subdivision 9 of Public Officers Law, subdivision 9 of section 73. It therefore seems most unlikely that anyone perceived this amendment as effecting any change in the statute's basic policy, nor indeed any significant substantive change.

54. Act of April 14, 1954, ch. 695, § 1, 1954 N.Y. Laws 955, 955 (McKinney) (codified at N.Y. PUB. OFF. LAW § 73 (McKinney 1988)).

55. *See* Act of April 24, 1964, ch. 941, § 6, 1964 N.Y. Laws 1679, 1685 (McKinney) (omitting legislative employees and members of legislature from subdivisions 1, 2, 3, 6); Act of July 20, 1965, ch. 1012, §§ 1-3, 1965 N.Y. Laws 1468, 1486-1488 (McKinney) (defining legislative employees and

5 of section 73 as subdivision 8,⁵⁶ the legislature has substantively amended the dual-role provision only once in this thirty-seven year period, when it enacted the Ethics in Government Act.⁵⁷ Then, as part of its program to establish "strong ethical standards to govern the conduct of public officers and employees in all three branches of government,"⁵⁸ the legislature revisited the scope of the dual-role provision then codified in section 73(8). But the legislature did not broaden the class of public officials subject to the rule. It simply added deputy and assistant attorney-general and solicitor generals to the prohibited offices and redesignated the provision as subdivision 9 of section 73,⁵⁹ thus maintaining the limitation of the provision's scope to licensed attorneys who are officers of the court as well as of the state.

We know of only two other occasions where the legislature has

regulatory agency, adding terms to subdivisions 1, 2, 3, 4, 7, 9, redesignating subdivisions 4, 5, 6 as 7, 8, 9, adding subdivision 5, 6 and 10); Act of May 31, 1968, ch. 420, § 244, 1968 N.Y. Laws 721, 780 (McKinney) (changing term department of public works to department of transportation in subdivision 7); Act of June 15, 1974, ch. 940, § 2, 1974 N.Y. Laws 1444, 1444 (McKinney) (redefining minor child in subdivision 6(a)(1)); Act of July 27, 1983, ch. 764, § 1, 1983 N.Y. Laws 1430, 1430 (McKinney) (adding to definition of state agency in subdivision 1 public benefit corporation and public authority); Ethics in Government Act, ch. 813, §§ 2, 3, 20, 1987 N.Y. Laws 1404, 1404, 1411, 1454 (McKinney) (adding new terms to section 73, subdivision 1 through 14, redesignating subdivision 8 as subdivision 9, and adding thereto offices of deputy or assistant attorney general or solicitor general, newly enacting section 73-a); Act of July 1, 1989, ch. 242, §§ 1, 2, 1989 N.Y. Laws 609, 610 (McKinney) (deleting members of board of regents and other uncompensated and per diem members or directors from subdivision 1, paragraph (i), (iii), and (iv), adding terms to subdivisions 3, 4 and 8).

56. Act of July 20, 1965, ch. 1012, § 2, 1965 N.Y. Laws 1486, 1487 (McKinney).

57. Ethics in Government Act, ch. 813, § 2, 1987 N.Y. Laws 1404, 1404 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 73, 73-a (McKinney 1988)).

58. Executive Memorandum, *Ethics in Government Act and New York State Governmental Accountability, Audit and Internal Control Act of 1987*, reprinted in 1987 N.Y. Laws 2727 (McKinney).

59. Ethics in Government Act, ch. 813, § 2, 1987 N.Y. Laws 1404, 1404 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 73, 73-a (McKinney 1988)).

regulated the holding of a public and political party office.⁶⁰ Section 94(2) of the Executive Law, as enacted by the Ethics In Government Act, provides that no member of the State Ethics Commission can be a political party office holder. Section 2590-c(4) of the Education Law provides that New York City Community School District board members may not be political party office holders.⁶¹ These recent enactments, like Public Officers Law section 73(9), are carefully limited to specific public offices where special measures are deemed necessary to ensure incorruptibility.⁶²

The fact that the legislature has chosen very specific and limited regulation of those public officers subject to a political party officer prohibition is inconsistent with the astounding breadth of rule 932.2. The rule prohibits heads of state

60. See N.Y. EDUC. LAW § 2590-c(4) (McKinney Supp. 1991), *amended* by Act of Dec. 19, 1988, ch. 739, § 3, 1988 N.Y. Laws 1551, 1552 (McKinney); N.Y. EXEC. LAW § 94(2) (McKinney Supp. 1991), *enacted by* Ethics in Government Act, ch. 813, § 7, 1987 N.Y. Laws 1404, 1421 (McKinney).

Presumably the Commission promulgated rule 932.2 because of its concern about potential conflict of interests for anyone acting simultaneously in one of the enumerated party offices and one of the covered public offices. However, in the absence of a specific validly adopted applicable ethics standard, nothing in state law would prohibit such dual office holding. See N.Y. Att'y Gen. Op 91-32 (City employees, one of whom is the tax assessor, may serve as coordinators of 1991 election campaign for city political party absent applicable prohibition in city's code of ethics, so long as they recuse themselves from any matter arising in the course of their public duties which raises a specific conflict of interests or appearance of impropriety.)

61. N.Y. EDUC. LAW § 2590-c(4) (McKinney Supp. 1991).

62. The restrictions on New York City Community School District board members in Education Law section 2590-c(4) have been upheld against United States constitutional challenge. *Fletcher v. Marino*, 882 F.2d 605 (2d Cir. 1989). Similar restrictions in 1989 New York City Charter section 2604(b)(15) have withstood state as well as federal constitutional challenge. *Molinaro v. Conflicts of Interest Bd.*, No. CV-90-0067 (E.D.N.Y. Feb. 7, 1991) (1991 US Dist. LEXIS 1913) (1989 New York City Charter provision prohibiting certain high-ranking city officials from simultaneously holding leadership positions in any political party upheld against federal constitutional challenge); *Golden v. Clark*, 76 N.Y.2d 618, 564 N.E.2d 611, 563 N.Y.S.2d 1 (1990) (same New York City Charter provision upheld against state constitutional challenge).

departments, statewide elected officials, all policy-makers,⁶³ and members or directors of public authorities, public benefit corporations, or commissions from serving as a political party or organization officer or from being a member of a political party committee. The legislature has carefully and repeatedly regulated political party office holding by public officers, including by the same comprehensive statutory revision in which it made the delegation of authority relied upon by the Commission. As a consequence, one must seriously doubt whether the legislature, in delegating to the State Ethics Commission the power further to regulate public officer "outside activities," intended that phrase to cover political party office holding.

Moreover, there is persuasive authority that rule 932.2 is not

63. Under the Commission's Guidelines for Determination of Persons in Policy-Making Positions, such persons include every individual, regardless of compensation, who:

(a) has been determined to be managerial pursuant to Civil Service Law section 201, subdivision 7 because he or she formulates policy; or

(b) is in the non-competitive class of the classified service of the State of New York under section 2.2 and whose position is designated in appendix 2 of the rules and regulations of the Department of Civil Service as requiring the performance of functions influencing policy; or

(c) exercises responsibilities of a broad scope in the formulation of plans for the implementation of goals or policy for a state agency (as defined in New York Public Officer Law section 73(1)(g)), or acts as an advisor to an individual in such a position. *See* Ethics Advisory Notice 90-1, Designation of Policy-Makers, Guideline 2 (1989).

The Commission's interpretation of this guideline may be influenced by New York Executive Law, section 94(9)(k), which prevents the commission from granting an exemption from the requirement to file an annual disclosure statement to any state employee earning more than the amount specified (currently about \$54,000) who, although not determined by his appointing authority to hold a policy-making position, has duties that involve the negotiation, authorization or approval of:

(i) contracts, leases, franchises, revocable consents, concessions, variances, special permits, licenses,

(ii) the purchase, sale, rental or lease of real property, goods or services, or contracts therefor,

(iii) grants of money or loans, or

(iv) rules of regulations having the force of law.

N.Y. EXEC. LAW § 94(9)(k) (McKinney Supp. 1991).

authorized by either section 73 or section 74 of the Public Officers Law. In *Rapp v. Carey*,⁶⁴ the New York Court of Appeals considered whether then section 73 or 74 of the Public Officers Law authorized the governor, using inherent gubernatorial powers, to prohibit a public officer from holding a political party office beyond the statutory proscriptions of then section 73(8), the predecessor of section 73(9). The court held that neither section authorized such regulation.⁶⁵

Governor Carey had promulgated an executive order in 1976 that required the filing of financial disclosure statements beyond the requirements of then section 73(6) of the Public Officers Law and prohibited a broad class of public officials from simultaneously holding political party office,⁶⁶ thus far exceeding the limited proscriptions of then section 73(8) of the Public Officers Law.⁶⁷ In support of his order, the governor made two arguments: (1) the order is a valid exercise of his authority to oversee the executive branch, and (2) the order implements legislative policy.

In support of the first argument, the governor cited *In re DiBrizzi*,⁶⁸ which sustained the governor's and attorney general's statutory authority to create a State Crime Commission.⁶⁹ Which did not involve the exercise by public officers of a generalized regulatory or inherent authority.⁷⁰ The governor also cited *Evans v. Carey*⁷¹ in support of the first argument.⁷² That case did

64. 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978).

65. *Id.* at 164-65, 375 N.E.2d at 749, 404 N.Y.S.2d at 569.

66. Exec. Order No. 10.1, N.Y. COMP. CODES R. & REGS. tit. 9, § 3.10 (1976).

67. *See supra* text accompanying notes 53-57.

68. 303 N.Y. 206, 101 N.E.2d 464 (1951); *see* Appellant's Brief *Rapp*, *supra* note 47, at 14.

69. *DiBrizzi*, 303 N.Y. at 216, 101 N.E.2d at 469.

70. The court stated: "The purpose of the investigation is to secure information to guide executive action, not to indict or punish any individuals." *Id.* at 216-17, 101 N.E.2d at 469.

71. 40 N.Y.2d 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976) (rejecting federal constitutional challenges to gubernatorial executive order requiring financial disclosures of public officers and employees).

72. *See* Appellant's Brief *Rapp*, *supra* note 47, at 18.

sustain the governor's exercise of inherent authority to require financial disclosure from certain state public officers.⁷³ But three of the seven judges concurred only because the issue of whether or not a statute rather than an executive order was required was not raised and briefed by the parties.⁷⁴

In support of his second argument, that the executive order implemented legislative policy, the governor relied on Public Officers Law section 74,⁷⁵ which is related to section 73 and its predecessor section, and the Executive Law, which gives the governor authority “to examine and investigate the management and affairs of any department, board, bureau or commission of the State.”⁷⁶ This argument persuaded the two dissenting judges,⁷⁷ but not the majority.⁷⁸

Although the governor's brief failed to point out the existing statutory prohibition on political party office holding by public officers in then section 73, subdivision 8 of Public Officers Law,⁷⁹ the court specifically discussed its relevance in rejecting

73. *Evans*, 40 N.Y.2d 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976).

74. *Id.* at 1009, 359 N.E.2d at 984, 391 N.Y.S.2d at 394 (Breitel, C.J., concurring); *see also* *Rapp v. Carey*, 44 N.Y.2d 157, 161, 375 N.E.2d 745, 747, 404 N.Y.S.2d 565, 567 (1978) (gubernatorial order requiring financial disclosure by a wide range of state employees was unconstitutional because it was not authorized by the state legislature).

75. *See* Appellant's Brief *Rapp*, *supra* note 47, at 23.

76. Appellant's Brief *Rapp*, *supra* note 47, at 23 (quoting N.Y. EXEC. LAW § 6 (McKinney 1982)).

77. *Rapp v. Carey*, 44 N.Y.2d at 171-72, 175-76, 375 N.E.2d at 753-54, 756, 404 N.Y.S.2d at 573-74, 576 (Cooke, J., dissenting in part in a separate opinion; Jansen, J., dissenting in a separate opinion).

78. *Id.* at 164-65, 375 N.E.2d at 749, 404 N.Y.S.2d at 569.

79. Section 73(8) then provided:

No party officer while serving as such shall be eligible to serve as a judge of any court of record, attorney general, district attorney or assistant district attorney. As used in this subdivision the term “party officer” shall mean a member of a national committee, an officer or member of a state committee or a county chairman of any political party.

Act of April 24, 1964, ch. 941, § 6, 1964 N.Y. Laws 1679, 1685 (McKinney), *renumbered by* Act of July 20, 1965, ch. 1012, § 2, 1965 N.Y. Laws 1468, 1487 (McKinney).

the governor's argument.⁸⁰ The court concluded that in section 73 "the Legislature demonstrated its ability and readiness to proscribe specified transactions peculiarly vulnerable to conflicts of interest, transactions in 'definable areas on which there should be no disagreement[,]'"⁸¹ and that "[t]he prohibited conduct and the employees to which each prohibition applies are carefully described."⁸² Accordingly, section 73(8) provided no statutory authority for the executive order.⁸³

The court also concluded that Public Officers Law section 74, entitled *Code of Ethics*, was not statutory authority for the dual-role regulation and did not authorize the executive order.⁸⁴ The court explained that the legislative intent of section 74 was to provide general standards of conduct which could be flexibly administered by rules that determined conflicts of interest on a case-by-case basis.⁸⁵ "The crux of the matter is the determination by the Legislature, implicit in its enactment of the Code of Ethics, that the existence of conflicts in these areas is to be determined on a case-by-case basis, not by use of blanket prohibitions."⁸⁶ Accordingly, the court concluded that the "inflexible proscriptions"⁸⁷ of the executive order, far from being an implementation of section 74, constituted "a nullification of it."⁸⁸ The court stated: "The restriction on political activities is particularly troublesome. While the restriction on the merits would be supported by many or even most, it involves a broad question of policy, hardly resolvable by other than the representatively elected lawmaking branch of

80. *Rapp*, 44 N.Y.2d at 164-65, 375 N.E.2d at 749, 404 N.Y.S.2d at 568-69.

81. *Id.* at 164, 375 N.E.2d at 749, 404 N.Y.S.2d at 569 (quoting Memorandum of Governor Thomas E. Dewey on Approval of chapters 695-698, reprinted in 1954 N.Y. Laws 1408 (McKinney)).

82. *Id.* at 164, 375 N.E.2d at 749, 404 N.Y.S.2d at 568.

83. *Id.* at 165, 375 N.E.2d at 749, 404 N.Y.S.2d at 569.

84. *Id.*

85. *Id.* at 164-65, 375 N.E.2d at 749, 404 N.Y.S.2d at 569.

86. *Id.* at 165, 375 N.E.2d at 749, 404 N.Y.S.2d at 569.

87. *Id.* at 164, 375 N.E.2d at 749, 404 N.Y.S.2d at 569.

88. *Id.* at 165, 375 N.E.2d at 749, 404 N.Y.S.2d at 569.

government, the Legislature.”⁸⁹

Rapp can be distinguished from the instant case only by the fact that the Commission rather than the governor is acting and that it is acting pursuant to a statutory rather than an inherent, state constitutional, rule-making authority. Neither seems to be a persuasive reason for a different result from that in *Rapp*. All of the members of the Commission are appointed to terms by the governor without the advice and consent of the senate and are subject to removal by the governor after written notice and opportunity to reply.⁹⁰ The Commission, therefore, is nearly the equivalent of the governor. The statutory authority pursuant to which the Commission is acting is a completely generalized rule-making authority. In *Evans v. Carey*,⁹¹ the New York Court of Appeals rejected the federal constitutional challenges to the governor requiring financial disclosures of public officers and employees. Three judges of the court were careful to reserve the issue of whether “a statute requiring financial disclosures . . . is required”⁹² because the issue had not been raised. The issue was raised in *Rapp*. The court searched the New York State Constitution and statutes for “express or implied authority for the Governor to exact of state employees compliance with the requirements” of his executive order.⁹³ As we have seen, the court held that a statute was required. It observed:

In fact, even the Legislature is powerless to delegate the legislative function unless it provides *adequate standards*. (Packer Coll. Inst. v. University of State of N.Y., 298 N.Y. 184, 189). Without *such standards* there is no government of law, but only government of men left to set their *own standards*, with resultant authoritarian possibilities.⁹⁴

89. *Id.* at 165, 375 N.E.2d at 750, 404 N.Y.S.2d at 569.

90. *See* N.Y. EXEC. LAW. § 94(2), (3), (7) (McKinney Supp. 1991).

91. 40 N.Y.2d 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976).

92. *Id.* at 1009, 359 N.E.2d at 984, 391 N.Y.S.2d at 394 (concurring memorandum); *see supra* note 71.

93. *Rapp v. Carey*, 44 N.Y.2d 157, 160, 375 N.E.2d 745, 746, 404 N.Y.S.2d 565, 566.

94. *Id.* at 162, 357 N.E.2d at 748, 404 N.Y.S.2d at 568 (emphasis added).

The court noted that prior executive orders “were repetitive of existing legislation as to *standards* and implemented the enforcement of those *standards* by [imposing no new sanctions]”⁹⁵ The court concluded this section of its opinion by adding: “Where it would be practicable for the Legislature itself to set *precise standards*, the executive’s flexibility is and should be quite limited.”⁹⁶

We, therefore, believe that a rule promulgated by a governmental agency of the executive pursuant to a generalized rule-making statutory authority, which itself contains no standards whatsoever, does not meet the *Rapp* tests.

III. IS RULE 932.2 *ULTRA VIRES* WHEN APPLIED TO UNCOMPENSATED PART-TIME PUBLIC OFFICERS?

The New York State Legislature has exempted all uncompensated or per diem public officers from the regulation of Public Officers Law section 73 with one limited exception.⁹⁷ Section 73(1)(i) states:

(i) The term “state officer or employee” shall mean:

(i) heads of state departments and their deputies and assistants *other than* members of the board of regents of the university of the state of New York *who receive no compensation or are compensated on a per diem basis*;

(ii) officers and employees of statewide elected officials;

(iii) officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies *other than* officers of such boards, commissions or councils *who receive no compensation or are compensated on a per diem basis*; and

(iv) *members or directors of public authorities, other than*

95. *Id.* at 163, 375 N.E.2d at 748, 404 N.Y.S.2d at 568 (emphasis added).

96. *Id.* (emphasis added).

97. See N.Y. PUB. OFF. LAW § 73(3)(b) (McKinney Supp. 1991).

multi-state authorities, *public benefit corporations* and commissions at least one of whose members is appointed by the governor, *who receive such compensation other than on a per diem basis*, and employees of such authorities, corporations and commissions.⁹⁸

Section 73(1)(i)(iv) was newly enacted by the Ethics In Government Act.⁹⁹ The exemptions made for other uncompensated and per diem officials in section 73 subdivision 1, subparagraphs (i) and (iii) were enacted as amendments to section 73 in 1989.¹⁰⁰ The *Memorandum of State Executive Department* accompanying Chapter 242¹⁰¹ evidences the enactors' intent to exclude all uncompensated or per diem officials from the general scope of section 73 of the Public Officers Law and points out that State Ethics Commission Advisory Opinion No. 88-2 is consistent with this intent:

Under the Act, a question has been raised whether the definition of "state officer or employee" should include non-paid or per diem members of State commissions, boards or councils as subject to § 73 of the Public Officers Law. *The Commission addressed this question in its Advisory Opinion No. 88-2, and concluded that no clear legislative intent existed to lead the Commission to conclude that those individuals should be covered by § 73.* Currently, members or directors of public authorities, public benefit corporations and commissions, at least one of whom is appointed by the Governor, who receive compensation on other than a per diem basis, are subject to POL § 73. *Members or directors who receive a per diem payment, or who are unpaid, are not covered by POL § 73.*

However, members of other state commissions or boards or councils are *not* similarly excluded. Recognizing the importance of public-spirited citizens serving on boards and councils without

98. *Id.* § 73(1)(i) (emphasis added).

99. Ethics in Government Act, ch. 813, § 2, 1987 N.Y. Laws 1404, 1404 (McKinney) (codified at N.Y. PUB. OFF. LAW §§ 73, 73-a (McKinney 1988)).

100. Act of July 1, 1989, ch. 242, § 1, 1989 N.Y. Laws 609, 610 (McKinney) (codified at N.Y. PUB. OFF. LAW § 73 (McKinney Supp. 1991)).

101. Executive Memorandum, *Ethics in Government*, reprinted in 1989

pay, or for a modest per diem, and weighing the fact that *similarly situated members or directors of public benefit corporations and public authorities are not subject to POL § 73*, this amendment would clarify that non-paid or per diem members of state boards or councils are not subject to POL § 73.¹⁰²

There is only one limited exception to this exclusion. An uncompensated member or director of a public authority or public benefit corporation¹⁰³ must file a financial disclosure statement.¹⁰⁴ Public Officers Law section 73-a, subdivision 1(c)(iii) requires “members or directors of public authorities, other than multi-state authorities, public benefit corporations . . . and employees . . . who hold policy-making positions, as determined annually by the appointing authority . . .” to file annual financial disclosure statements.¹⁰⁵ This required disclosure is obviously unlike the substantive prohibitions of specific activities which are the subject of section 73.¹⁰⁶ Public Officers Law section 73, subdivision 3(b) does preclude an officer

N.Y. Laws 2395 (McKinney).

102. *Id.* (emphasis added except for second “not” in second paragraph which was emphasized in the original).

103. While the statute exempts members and directors of both public authorities and “public benefit corporations,” only public benefit corporations have legal status under the General Construction Law. *See* N.Y. GEN. CONST. LAW §§ 65, 66 (McKinney Supp. 1991). Many if not most public corporations denominated as public authorities are established by the legislature as public benefit corporations. *See, e.g.*, N.Y. PUB. AUTH. LAW §§ 552(1) (McKinney Supp. 1991) (Triborough Bridge and Tunnel Authority); 1201(1) (McKinney Supp. 1991) (New York City Transit Authority); 1263(1)(a) (McKinney Supp. 1991) (Metropolitan Transportation Authority); 1328(1) (McKinney 1982) (Central New York Regional Transportation Authority), 1677 (McKinney Supp. 1991) (Dormitory Authority of the State of New York); 1802(1) (McKinney Supp. 1991) (New York Job Development Authority); *but see* N.Y. PUB. AUTH. LAW §§ 352(1) (McKinney 1982) (New York State Thruway Authority is a “public corporation”); 1002(1) (McKinney Supp. 1991) (Power Authority of the State of New York is a “political subdivision of the state”).

104. N.Y. PUB. OFF. LAW § 73-a (McKinney Supp. 1991).

105. *Id.*

106. *See, e.g.*, N.Y. PUB. OFF. LAW §§ 73(2), (3), (4)(a), (5), (7), (8) (McKinney 1988 & Supp. 1991).

required to file a financial disclosure statement pursuant to section 73-a, but not otherwise subject to the provisions of section 73, from appearing before the New York State Court of Claims in an action which is against the interests of his or her affiliated agency.¹⁰⁷ This limited prohibition is narrower than paragraph (a) of subdivision 3, the parallel provision of section 73, subdivision 3 that precludes salaried state officers and employees from appearing before the court of claims in any action against the interest of the state, not just that of a state agency.¹⁰⁸ Neither section 73(3)(a) or (b) has anything to do with political party office holding.

The broad scope of rule 932.2 thus appears incompatible with Public Officers Law section 73, subdivision 1, subparagraphs (i) and (iv), which generally exempts uncompensated or per diem members or directors of a public authority, public benefit corporation or other state agency from section 73 prohibitions.¹⁰⁹ The legislature has carefully confined its regulation of uncompensated members or directors to the conduct of certain, not all, court of claims appearances in Public Officer Law section 73, subdivision (3)(b) and to disclosure obligations in Public Officer Law section 73-a, subdivision (1)(c)(iii). The State Ethics Commission's prohibition of outside political activities of uncompensated or per diem members or directors of a public benefit corporation in rule 932.2 appears to be incompatible with these narrowly crafted statutory policy determinations.

IV. SEPARATION OF POWERS

Assuming rule 932.2 is within the authority of the State Ethics

107. N.Y. PUB. OFF. LAW § 73(3)(b) (McKinney Supp. 1991).

108. *Id.*

109. These part-time members and directors of public authorities and public benefit corporations were also covered by the Executive Order at issue in *Rapp v. Carey*, 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978). Not only the majority, but also one of the dissenters in that case refused to uphold the governor's right to prohibit these public officers from holding political party office, even in light of section 74. *Id.* at 169-73, 375 N.E.2d at 752-53, 404 N.Y.S.2d at 572-73 (dissenting opinion).

Commission, it raises substantial issues of separation of powers and interference with the rights of gubernatorial appointees. The New York State Constitution distributes governmental powers among the executive, legislative, and judicial branches. The constitution vests “[t]he legislative power of this state . . . in the senate and assembly[,]”¹¹⁰ the “executive power . . . in the governor.”¹¹¹

The constitution’s tripartite system “is designed to achieve a delicate balance preventing excessive concentration of power in any one particular branch or person and to insure a representative form of government.”¹¹² Accordingly, “[e]ach branch is separate, independent, and co-equal, possessing inherent powers to protect itself from impairment of function.”¹¹³

As stated by the supreme court in *People v. Smith*,¹¹⁴ “[t]he constitutional doctrine of separation of powers is violated when: one branch of government presumes to exercise the duties and powers of another branch contrary to constitutional authority.”¹¹⁵

That is not to say there can be no overlap of governmental duties among those branches.¹¹⁶ As the court of appeals noted in

110. N.Y. CONST. art. III, § 1.

111. N.Y. CONST. art. IV, § 1. Article VI, section 1 provides “There shall be a unified court system for the state.”*Id.* An analysis of the judicial branch in relation to the separation of powers doctrine is not relevant for the purposes of this article.

112. *Boreali v. Axelrod*, 130 A.D.2d 107, 112, 518 N.Y.S.2d 440, 443 (3d Dep’t 1987), *aff’d*, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987).

113. *Ascione v. City of N.Y.*, 84 Misc. 2d 414, 419, 379 N.Y.S.2d 599, 606 (Sup. Ct. New York County 1975).

114. 69 Misc. 2d 746, 331 N.Y.S.2d 81 (Sup. Ct. Nassau County 1972).

115. *Id.* at 748, 331 N.Y.S.2d at 85. *See also* *Subcontractors Trade Ass’n v. Koch*, 62 N.Y.2d 422, 427, 465 N.E.2d 840, 842, 477 N.Y.S.2d 120, 122 (1984) (“Respect for this structure and the system of checks and balances inherent therein requires that none of these branches be allowed to usurp powers residing entirely in another branch.”).

116. *See Clark v. Cuomo*, 66 N.Y.2d 185, 189, 486 N.E.2d 794, 797, 495 N.Y.S.2d 936, 939 (1985) (“[W]e have recognized that some overlap between the three separate branches does not violate the constitutional principle of separation of powers.”).

People v. Tremaine,¹¹⁷ “common sense and the necessities of government do not require or permit a captious, doctrinaire, and inelastic classification of governmental functions.”¹¹⁸

Under New York’s separation of powers doctrine, the legislative branch may not cede its lawmaking function to an executive branch agency or commission, but may delegate to an agency or commission the authority to administer the law as enacted by the legislature.¹¹⁹ The legislature may confer upon an agency or commission broad authority to promulgate rules and regulations to further the purposes of specific legislation.¹²⁰ However, it is impermissible for an executive agency or commission to promulgate a rule or regulation which exceeds, or is inconsistent with, the express or implied purposes of the relevant statute or statutes.¹²¹ An agency or commission may only administer the law as enacted and may not make policy determinations properly reserved to the legislative branch.¹²²

In *Rapp v. Carey*,¹²³ the court concluded that while “the executive has the power to enforce legislation and is accorded great

117. 252 N.Y. 27, 168 N.E. 817 (1929).

118. *Id.* at 39, 168 N.E. at 820.

119. *See* *Levine v. Whalen*, 39 N.Y.2d 510, 349 N.E.2d 820, 384 N.Y.S.2d 721, (1976).

Because of the Constitutional provision that ‘[t]he legislative power of this State shall be vested in the Senate and the Assembly’ the Legislature cannot pass on its law-making functions to other bodies . . . but there is no constitutional prohibition against the delegation of power, *with reasonable safeguards and standards*, to an agency or commission to administer the law as enacted by the Legislature. (emphasis added).

Id. at 515, 349 N.E.2d at 822, 384 N.Y.S.2d at 723 (quoting N.Y. CONST. art. III, § 1).

120. *Boreali v. Axelrod*, 71 N.Y.2d 1, 9, 517 N.E.2d 1350, 1353, 523 N.Y.S.2d 464, 467-68 (1987) (section 225(5)(a) of the Public Health Law, authorizing the Public Health Commission to “deal with any matters affecting the . . . public health” is not an unconstitutional delegation of legislative authority).

121. *See* *Tze Chun Liao v. New York State Banking Dep’t*, 74 N.Y.2d 505, 510, 548 N.E.2d 911, 913, 549 N.Y.S.2d 373, 375 (1989); *see infra* note 146.

122. *Tze Chun Liao*, 74 N.Y.2d at 510, 548 N.E.2d at 913, 549 N.Y.S.2d at 375.

123. 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978).

flexibility in determining the methods of enforcement . . .[.]”¹²⁴ the executive may not “go beyond *stated legislative policy* and prescribe a remedial device not embraced by the policy.”¹²⁵

The court of appeals has most carefully enunciated the factors which it will consider under the separation of powers doctrine in *Boreali v. Axelrod*.¹²⁶ There, the court held that a non-smoking regulation promulgated by the Public Health Commission pursuant to its general enabling statute, section 225, subdivision (5)(a) of the Public Health Law, impermissibly transgressed the “line between administrative rule-making and legislative policy-making.”¹²⁷ The attorney general argued that the legislature had properly delegated authority to the Public Health Council under section 225(5)(a) of the Public Health Law to “deal with any matter for the preservation and improvement of the public health.”¹²⁸ Principles of administrative law “permit[ted] the Legislature to confer interstitial policy-making authority upon an administrative agency so long as the Legislature establishes standards to guide administrative discretion,”¹²⁹ and that the regulation was rationally based.¹³⁰

This argument persuaded the lone dissenting judge:

The Legislature declared its intent that there be a PHC in

124. *Id.* at 163, 375 N.E.2d at 748, 404 N.Y.S.2d at 568; see N.Y. CONST. art. IV, § 3.

125. *Rapp*, 44 N.Y.2d at 163, 375 N.E.2d at 748, 404 N.Y.S.2d at 568 (quoting *In re Broidrick v. Lindsay*, 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976)) (emphasis added).

126. 71 N.Y.2d 1, 11-15, 517 N.E.2d 1350, 1355-56, 523 N.Y.S.2d 464, 469-71 (1987); see *infra* notes 133-37 and accompanying text.

127. *Boreali*, 71 N.Y.2d at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469.

128. Brief for Appellant, at 16, *Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987) [hereinafter Appellant's Brief *Boreali*].

129. See Appellant's Brief *Boreali*, *supra* note 128, at 17 (citing *Chiropractic Ass'n v. Hilleboe*, 12 N.Y.2d 109, 120-21 (1962)).

130. See Appellant's Brief *Boreali*, *supra* note 128, at 38 (“So long as the Legislature has delegated authority to regulate in an identifiable field with sufficient standards to constrain administrative discretion, and the regulations reasonably further the statutory objectives, the regulation must be upheld regardless of their socioeconomic consequences.”).

this State and empowered it to adopt a Sanitary Code for the preservation and improvement of the public health. The Legislature also wisely refrained from enacting a rigid formula for the exercise of the PHC's critical agenda of concerns because that calls for expert attention. That legislative forbearance represents both a sound administrative law principle and, at the threshold, a constitutional one as well (*Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515, *supra*; *Chiropractic Assn. v. Hilleboe*, 12 N.Y.2d 109, 120, *supra*). The Legislature could not have foreseen in 1913 the specific need for PHC regulations in areas of human blood collection, care and storage; X-ray film usage; pesticide labels; drinking water contamination; or a myriad of other public health topics (see, New York State Sanitary Code, 10 NYCRR parts 1-25). It was prescient and sound governance as well to grant flexibility to the objective expert entity so it could in these exceptional instances prescribe demonstrably needed administrative regulation for the public health, free from the sometimes paralyzing polemics associated with the legislative process. Just as many of the other specified categories in the State Sanitary Code have properly been regulated by the PHC, so, too, does the subject of public indoor smoking and its impact on the health and well-being of innocent third-party victims comfortably fall within that identical, broad legislative embrace.

While the court admits the difficulty under the high separation of powers standard of articulating the basis for drawing, and even finding, some line limiting the PHC's conceded exercise of authority, it nevertheless goes ahead and does so. Its line is no line, but rather an arbitrary judgment call of its own. It is this judicial branch intrusion which constitutes the truly egregious separation of powers breach into the exercise of prerogatives of the Legislature (Public Health Law § 225[4], [5][a] [enabling legislation]) and of the executive (10 NYCRR 25.2 [implementing regulation]).¹³¹

But the majority of the court of appeals concluded that "while Public Health Law § 225(5)(a) is a valid delegation of regulatory authority, it cannot be construed to encompass the policy-making

131. *Boreali*, 71 N.Y.2d at 17-18, 517 N.E.2d at 1358-59, 523 N.Y.S.2d at 473 (Bellacosa, J., dissenting).

activity at issue here without running afoul of the constitutional separation of powers doctrine.”¹³² The court listed four factors indicating that the Public Health Commission’s no-smoking code was a usurpation of legislative authority: (1) the regulation addressed social, economic or political choices, and did not merely implement the legislature’s policy choices;¹³³ (2) there were no legislative standards or guidance in the area;¹³⁴ (3) the legislature had tried and failed to make its own policy choices regarding the issue;¹³⁵ (4) the subject of the regulation was not a technical one which requires greater expertise than that possessed by the legislature.¹³⁶ New York courts have invalidated a number of other regulations on the basis of one or more of these criteria.¹³⁷ Several recent court of appeals decisions illustrate that to determine whether or not an agency regulation implements the legislative policy underlying a statute, one must examine carefully what has been omitted as well as by what is covered by the statute in question, as well as other statutes expressive of legislative policy in the same area. For example, *Campagna v. Shaffer*¹³⁸ involved an order of the secretary of state (Secretary) prohibiting real estate brokers and salespersons from soliciting

132. *Id.* at 14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

133. *Id.* at 11-12, 517 N.E.2d at 1355-56, 523 N.Y.S.2d. at 469-470.

134. *Id.* at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470.

135. *Id.* at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470-71.

136. *Id.* at 13-14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

137. *E.g.*, *New York State Health Facilities Ass’n v. Axelrod*, 155 A.D.2d 208, 211-12, 554 N.Y.S.2d 352, 354 (3d Dep’t 1990) (Public Health Council’s regulation subjecting participating Medicaid residential healthcare facilities to an acceptance and admission quota violates statutory prohibition of discrimination based on sponsorship); *Health Ins. Ass’n of America v. Corcoran*, 154 A.D.2d 61, 72-74, 551 N.Y.S.2d 615, 612-22 (3d Dep’t 1990) (ban by State Superintendent of Insurance on the use of human immunodeficiency virus test results in determining insurability of individual and small group policies); *Campagna v. Shaffer*, 73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933 (1989) (Secretary of State’s order prohibiting a licensed real estate broker from soliciting clients); *East Forty Assocs. v. Ewell*, 138 Misc. 2d 235, 246, 527 N.Y.S.2d 204, 210-11 (App. Term 1st Dep’t 1988) (succession provisions of New York City Rent Stabilization Code).

138. 73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933 (1989).

for sale residential realty in eastern Bronx County and a related regulation restricting the number of brokers permitted to operate in the areas covered by the non-solicitation order. The Secretary relied on her authority to license real estate brokers and salespersons,¹³⁹ to discipline licensees who demonstrate "untrustworthiness,"¹⁴⁰ and to enact rules and regulations to effectuate this authority,¹⁴¹ "which, reasonably interpreted, authorizes her to set standards of conduct for the real estate industry and to promulgate regulations pertaining to the licensing and disciplining of real estate brokers."¹⁴² In the State Human Rights Law,¹⁴³ by separate enactment, the legislature had made illegal any broker's representation that changes to the racial or ethnic character of a neighborhood might lead to undesirable consequences of any kind.¹⁴⁴

Nevertheless, the court held that the Secretary's nonsolicitation order exceeded her authority because it exceeded the clear legislative policy to interdict only illegal solicitation, not all broker solicitation.¹⁴⁵ The court stressed, "[a]n agency cannot by its regulations effect its vision of societal policy choices . . . and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer."¹⁴⁶

139. N.Y. REAL PROP. LAW § 441-a (McKinney 1989 & Supp. 1991).

140. N.Y. REAL PROP. LAW § 441-c (McKinney 1989).

141. N.Y. EXEC. LAW § 91 (McKinney 1982).

142. *Campagna*, 73 N.Y.2d at 240, 536 N.E.2d at 369, 538 N.Y.S.2d at 934.

143. N.Y. EXEC. LAW §§ 290-301 (McKinney 1982 & Supp. 1991).

144. N.Y. EXEC. LAW § 296(3-b) (McKinney 1982).

145. *Campagna*, 73 N.Y.2d at 243, 536, N.E.2d at 370, 538 N.Y.S.2d at 935.

146. *Id.*; see also *Kahal Bnei Emunim v. Town of Fallsburg*, N.Y.L.J., July 3, 1991, at 22, col. 1 (N.Y. Ct. App. 1991); *Tze Chun Liao v. New York State Banking Dep't*, 74 N.Y.2d 505, 548 N.E.2d 911, 549 N.Y.S.2d 373, (1989). In *Tze Chun Liao*, the court of appeals held that the State Banking Department exceeded its regulatory authority by denying a check cashier license based upon criteria not contained in the State Banking Law, declaring "[a]n agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower themselves to rewrite or add substantially to the administrative charter itself." *Id.* at 510, 548 N.E.2d at 913, 549 N.Y.S.2d at 375. See also

The Executive Law¹⁴⁷ gives the State Ethics Commission the authority to regulate the “outside activities” of persons subject to its jurisdiction. To be consistent with the separation of powers doctrine,¹⁴⁸ a rule promulgated by the State Ethics Commission

McNulty v. State Tax Comm’n, 70 N.Y.2d 788, 791, 516 N.E.2d 1217, 1218, 522 N.Y.S.2d 103, 104 (1987) (“Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute.”) (quoting *Jones v. Berman*, 37 N.Y.2d 42, 53, 332 N.E.2d 303, 308, 371 N.Y.S.2d 422, 429 (1975)).

If the legislature had enacted the substance of Rule 932.2 and purported to make it self-executing, interesting issues would still be raised. For example, in *Strati v. Balancia*, an amendment to the Town of Harrison Ethics Code, providing that running for office on the Town Board or as supervisor constitutes cause for removal from any of several town boards dealing with real property planning, zoning or assessment, was upheld against challenges under the first and fourteenth amendments of the United States Constitution. N.Y.L.J., May 23, 1991, at 28, col. 2 (Sup. Ct. Westchester County 1991).

The court also held that the amendment was not unconstitutional by reason of the fact that “at the time [plaintiff] accepted his appointment on the Planning Board, he was not required to waive his right to run for office.” *Id.* Although not clearly expressed, the court appears to conclude that the new conflict of interests provision neither removed plaintiff from his first appointive position nor proscribed him from running for elective office, but reasonably required him to make a choice between the two offices. *But see* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-9, at 190 (1st ed. 1978) “While Congress may delegate some of its removal power to the Executive, it cannot usurp that removal power which the Constitution vests in the Executive. In particular, congressional authority to force the President, or other executive authorities, to dismiss particular government officials is severely limited.” *Id.* (citing *United States v. Lovett*, 328 U.S. 303, 315-18 (1946) (decided on bill of attainder grounds rather than power of removal grounds also argued to the court)).

Finally, the *Strati* court dismissed the plaintiff’s claim that the conflict of interests amendment, enacted after the plaintiff had accepted the appointive office, amounted to a bill of attainder under the federal Constitution. *Cf.* *United States v. Lovett*, where a rider to a federal appropriations statute prohibiting use of any appropriated monies after a specified date to make salary payments to three named employees of the United States Post Office was held to be an unconstitutional bill of attainder. 328 U.S. 303, 315-18 (1946).

147. N.Y. EXEC. LAW § 94(16)(a) (McKinney Supp. 1991).

148. The standards that have evolved through New York Court of Appeals cases for determining whether a violation of the separation of powers doctrine

must adhere to the specific terms and general purposes of Public Officers Law sections 73, 73-a, and 74.

As we have seen, section 73(1)(i)(iv) exempts uncompensated and per diem members or directors of a public benefit corporation from the statute's conflict of interest provisions as they relate to "state officers or employees."¹⁴⁹ Because of this exemption, the outside activities of an uncompensated or per diem member or director is beyond the jurisdiction of the outside activities to be restricted by an administrative exercise of the section 94(16)(a) power. However, rule 932.2 would subject such member or director to the political party office prohibition. There is no evidence that such a rule is consistent with the intent of the legislature. Indeed, the 1989 amendments of section 73 by New York Laws Chapter 242,¹⁵⁰ which clarify and expand the class of

has occurred were succinctly summarized by the Appellate Division in *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, where the court held the acquisition and closing of Shoreham nuclear power facility by the Long Island Power Authority was authorized by the legislature even in the absence of a complete takeover of Long Island Lighting Company by the power authority. 159 A.D.2d 141, 559 N.Y.S.2d 381 (3d Dep't 1990), *aff'd*, N.Y.L.J., Oct. 24, 1991, at 22, col. 3 (Ct. App. 1991).

The court restated the basic standard "that the executive branch may not infringe upon the primacy of the legislative branch in the policy-making function of government," noted that such infringement is more likely to occur when an executive agency purports to act pursuant to a "claimed implied general authority to enforce the law," rather than under an express statutory delegation of power by the legislature, and acknowledged that broad delegations of implementing authority permitting "considerable flexibility and discretion to determine the means of enforcement," are valid "where the subject matter is complex and the future circumstances to be encountered in carrying out the legislative will are not readily foreseeable." *Id.* at 152-53, 559 N.Y.S.2d at 387. However, the court also emphasized that the executive branch must, in any case, refrain from (a) utilizing a remedial device not embraced by the legislature's policy objective, (b) "engaging in broad policy making on controversial issues not foreseen or contemplated when the enabling legislation was enacted," or (c) taking any action that is not "consistent with legislative policy choices," or does not bear "a reasonable relation to the purpose of the enabling legislation." *Id.*

149. N.Y. PUB. OFF. LAW § 73(1)(i)(iv) (McKinney Supp. 1991); *see supra* notes 98-99 and accompanying text.

150. Act of July 1, 1989, ch. 242, 1989 N.Y. Laws 609 (McKinney).

part-time uncompensated public officers not subject to section 73, are powerful evidence that rule 932.2 is inconsistent with the legislature's intent.¹⁵¹ Furthermore, as explained above, section 73(9) prohibits only judges and certain state law officers from simultaneously holding political party office, but rule 932.2 extends this prohibition to almost all public officers. There is no evidence that such a rule is consistent with the intent of the legislature and, as we have seen, much evidence that it is not.¹⁵²

Section 73-a(1)(c)(iii) includes an uncompensated or per diem member or director of a public benefit corporation as a "state officer or employee" subject to section 73-a's financial disclosure requirements, presumably because such persons are always policy-makers within the ambit of the disclosure provisions. Section 94(16)(a) clearly gives the Commission authority to regulate such members' and directors' outside activities as they pertain to the financial disclosure requirements. However, rule 932.2 would restrict all such members and directors as well as all other policy-makers within the meaning of section 73-1(1)(c)(iii) from holding political office, a notion nowhere to be found in section 73-a. Indeed, the legislature specifically considered the issue of dual office holding in the context of persons subject to section 73-a and merely required disclosure of any political party office held by the filer in the statutorily mandated disclosure form.¹⁵³

Looking at rule 932.2 in light of the four *Boreali* factors¹⁵⁴ is instructive. First, the regulation does make a social and political judgment that *all* part-time uncompensated members and directors of public benefit corporations and public authorities, as well as all other State officers and employees who serve in policy-making positions, would face untenable conflicts of interest if they were to simultaneously hold office in a political party or political organization, or serve as a district leader of a political party or as a member of any political party committee, including the national

151. See *supra* notes 100-02 and accompanying text.

152. See *supra* text accompanying notes 53-59.

153. See N.Y. PUB. OFF. LAW § 73-a(3), Item 7 (McKinney Supp. 1991).

154. See *supra* notes 133-36 and accompanying text.

committee of a political party.¹⁵⁵ This is precisely the kind of judgment made by the legislature in enacting and amending subdivision 9 of Public Officers Law section 73. Secondly, there are legislative standards in this area, namely Public Officers Law section 73(9), section 73(1)(i) and Item 7 under section 73-a(3).¹⁵⁶ The Ethics Commission appears to have ignored these standards, and we know of no other provision of State law directly addressing and supporting the policy choices made by the Commission in rule 932.2. Thirdly, the legislature had not only tried but *succeeded* in making its own policy choices in this area,¹⁵⁷ and the legislature's policy choices are not consistent with those made by the Commission, as expressed in rule 932.2. Finally, the subject of the regulations was substantive, not technical, as shown by the fact that the legislature had made precisely the same kind of judgment or determination in Executive Law section 94(2) and Education Law section 2590-c(4), as well as Public Officers Law section 73(9).¹⁵⁸ Under these circumstances, it is hard to see how a court could fail to find that rule 932.2 is not only "out of harmony"¹⁵⁹ with the statute it purports to implement, but also an invasion of the legislature's policy-making function and, therefore, unconstitutional.

CONCLUSION

In conclusion, under existing law there appears to be no authorized penalty for violations of rule 932.2 and no authority for implementing rule 932.7. Penalties otherwise provided under other statutes may be available, for example, removal under the Public

155. See N.Y. COMP. CODES R. & REGS. tit. 19, § 932.2 (1990).

156. See *supra* notes 51-109 and accompanying text.

157. N.Y. PUB. OFF. LAW § 73(9) (McKinney 1988).

158. See *supra* notes 53-62 and accompanying text.

159. *Jones v. Berman*, 37 N.Y.2d 42, 53, 332 N.E.2d 303, 308, 371 N.Y.S.2d 422, 429 (1975) (Social services regulation unconditionally provided that emergency funds to replace stolen or misspent grants received under the Federal Aid to Families with Dependent Children Program was void where the regulation added a requirement not present in the statute.).

Officers Law or suspension under the Civil Service Law.

Substantively, it appears doubtful that the legislature intended to authorize the Commission to deny to prospective and sitting public officers the opportunity or right to continue in or assume certain political party offices, unless such public officers are already covered by the proscription of subdivision 9 of Public Officers Law section 73. Even greater doubts are raised with respect to part-time uncompensated public officers because of the legislature's careful exclusion of such public officers from almost all other substantive proscriptions of the Ethics in Government Act. Finally, even if rule 932.2 is within the validly delegated authority of the Commission, it encompasses policy-making activity reserved to the legislature under the state constitution's separation of powers doctrine.

