

**STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC
ETHICS**

Advisory Opinion No. 17-03:

**Applying the post-employment restrictions
in Public Officers Law §73(8) to State
employees who are also full-time students**

INTRODUCTION

This Advisory Opinion is issued in response to inquiries from several individuals regarding application of the post-employment provisions of Public Officers Law §73(8)(a) to full-time students who are also in State service. The post-employment restrictions, which set the ground rules for what individuals employed by the State may do with the knowledge, experience, and contacts gained from public service, are meant, among other things, to preclude the possibility that a former State employee may leverage these gains from State service to their own advantage or that of a private client. In Advisory Opinion No. 91-01, the Commission¹ noted that this concern generally does not apply to full-time students who also serve as State employees because students typically “do not form the same type of long-term or even short-term contacts and associations” on the job as do other State employees who are employed on a regular basis. Consequently, the Commission held that the post-employment restrictions should not be applied to individuals who are “primarily” students, and serve secondarily as State employees.

Advisory Opinion No. 91-01 established four criteria for identifying an individual in State employ as primarily a student:

- (1) must be enrolled as a full-time student in an accredited course of study or on a seasonal recess therefrom;
- (2) cannot work half-time or more during the school year;
- (3) must engage in no more than one hundred twenty days (four months) of full-time State service in the summer, or during a similar semester break; and
- (4) cannot receive any State employee benefits such as medical, retirement, or vacation benefits, or have any right to re-employment.

The Opinion did not allow for discretion or flexibility in applying these criteria, or considering additional circumstances that might be relevant. Therefore, under current law and practice, each of these criteria must be satisfied for an individual to be deemed primarily a student and exempted from the post-employment restrictions.

¹The “Commission,” as used herein, refers to the Joint Commission on Public Ethics and its predecessor agencies.

The Commission has found that, in some cases, strict and mechanical application of the criteria fails to honor the intent and spirit of the reasoning in Advisory Opinion No. 91-01. For example, an individual who works 25 or 30 hours per week will fail to meet the second criterion. Correspondingly, an individual who incidentally accrues paid leave time will fail to meet the fourth criterion. Even if all the remaining criteria are satisfied, Advisory Opinion No. 91-01 precludes further inquiry and unyieldingly compels the conclusion that these individuals are primarily State employees. A more flexible and accommodating view of the circumstances, however, might demonstrate that such individuals' status as State employees is clearly secondary to their educational goals. Indeed, many students enter State service in order to earn course credits or otherwise meet educational requirements, or to gain experience that will help them find a job in their field after they graduate. If their post-graduation employment requires interaction with their former State agency, the two-year bar may prohibit them from accepting the job. The Commission finds it just to revisit applying the post-employment provisions to students who also enter into State service.

Pursuant to Executive Law §94(16), the Commission hereby renders its opinion that the test for determining student status outlined in Advisory Opinion No. 91-01 should be modified to permit a reasonably flexible application of the criteria set forth therein, and to permit consideration of other facts as may be relevant and appropriate under the circumstances. These additional circumstances shall include, in particular and without limitation, whether the individual sought State employment expressly to satisfy a requirement of his or her educational program or to finance his or her education, and the extent to which the individual functioned in a role that was substantially the same as other State employees.

BACKGROUND

One requesting individual is a full-time student working toward a Master's Degree in Public Health. She has also worked as a temporary, hourly Student Assistant for the New York State Department of Health ("DOH") for approximately two years. The Student Assistant position is available only to persons who are enrolled in a degree program, and the individual will lose the job upon receiving her degree. After a period of time in State service, she automatically began to accrue paid leave. Having earned State employee benefits in the form of paid vacation, the individual is no longer eligible for the student exemption to the post-employment restrictions because the fourth criterion in Advisory Opinion No. 91-01 is not satisfied. Application of the two-year bar will restrict her search for post-graduation employment in Public Health because, for two years following her departure from State service, she is generally prohibited from working on matters in which the DOH is involved.

Another requesting individual is a recent college graduate who was under consideration for employment with an engineering company that held contracts with the New York State Department of Transportation ("DOT"). Recently, however, while a full-time college student,

she worked full-time for the DOT during one semester in order to fulfill a “Cooperative Education” school requirement – many of the students at the school were required to seek and obtain paid full-time employment related to their field of study for one or two semesters as a prerequisite for graduation. This triggered the two-year bar with respect to the DOT because – having worked full-time during a semester – the second criterion from Advisory Opinion No. 91-01 is not satisfied. After graduating, the individual finds her search for employment in her field significantly curtailed.

A third requesting individual is a wounded military veteran and a former full-time student who was required to obtain a job as a condition for receiving benefits from the federal Department of Veterans Affairs. He worked for the DOH for two and one-half years, on a variable work schedule that averaged approximately thirty hours per week. He reported that he did not decide his own work hours, which were set by the DOH based on the agency’s needs. Since he generally worked more than 20 hours per week during the academic year, he was precluded from accepting proffered employment in the private sector because it would have required interaction with the DOH.

APPLICABLE LAW

Section 73(8) of the Public Officers Law contains two types of post-employment restrictions: a “two-year bar” and a “lifetime bar.” The two-year bar, set forth in Section 73(8)(a)(i), prohibits former State officers and employees, for two years following their separation from State service, from (a) appearing or practicing before their former agency, regardless of compensation, or (b) rendering services for compensation, in relation to any case, proceeding, application, or other matter before their former agency:

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency.

Section 73(8)(a)(ii) – the lifetime bar – is implicated when a former State employee seeks to engage in activities relating to a matter with which he was directly concerned, in which he personally participated, or that was under his active consideration while in State service. With respect to such matters, the lifetime bar prohibits a former State employee from ever (a) appearing, practicing, communicating, or otherwise rendering services before any State agency, or (b) receiving compensation for any such services:

No person who has served as a state officer or employee shall, after the termination of such service or employment, appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.

DISCUSSION

The post-employment restrictions set ground rules for what individuals may do – and may not do – with the knowledge, experience, and contacts gained from public service after they terminate employment with a State agency.² The rules are intended to prevent former State employees from leveraging their State service to their own advantage or that of a client, thereby securing unwarranted privileges, consideration or action.³ They also help to eliminate public doubt as to whether State employees’ actions are motivated by a concern for the public interest or by considering their private business interests after leaving State service;⁴ and to prevent former State employees from receiving special treatment or creating the impression that former State employees enjoy the favor of former colleagues, when dealing with them in their official capacities.⁵

In Advisory Opinion No. 91-01, the Commission examined whether the post-employment restrictions should be applied to individuals who were students while they were in State service. It found a distinction between (1) employees of the State who may also be students – individuals who are fully subject to the post-employment restrictions of §73(8) because their enrollment in an academic program is tangential to their service on behalf of the State – and (2) individuals who are primarily students but also serve the State. The Commission observed that the concerns underlying the post-employment restrictions are of “limited relevance” with respect to those who are primarily students because:

. . . typically, students do not form the same type of long-term or even short-term contacts and associations that non-seasonal employees employed on a regular basis develop. Students are generally employed

² Advisory Opinions No. 99-16, 95-17, 91-17, 88-1.

³ Advisory Opinions No. 95-19, 94-05, 90-04, *citing* Attorney General Opinion No. 84-F12; 84-F20.

⁴ Advisory Opinion No. 89-08, *citing* Attorney General Opinion No. 84-F20.

⁵ Advisory Opinion No. 89-07, *citing* Attorney General Opinion No. 84-F20.

either for the summer or part-time during the school year and for the purpose of financially supporting their education or pursuing practical experience in an area under study. Their positions with the State are of a short and intermittent basis, based on their student status. They seldom have any rights to re-employment by the State or gain permanency in their positions. It is less likely, in the case of students, that the public might reasonably question whether these individuals carried out their public responsibilities solely to acquire information and contacts that would increase their opportunities for private gains once they terminated their State service. Unlike "traditional" State employees, students, appointed by State agencies, are generally ineligible for most benefits, such as health insurance, vacation or sick leave, or retirement plans, that are incident to State employment.

The Commission found support for this analysis in the field of labor relations, specifically in the application of the Public Employees Fair Employment Act (the "Taylor Law"). As the Commission observed, not all individuals in State service are considered "employees" of the State for purposes of the Taylor Law (which covers State employees). For example, the Public Employment Relations Board held that graduate assistants' and teaching assistants' employment by the State University of New York was incidental to their academic enrollment and subordinate to their student relationships. Therefore, such students were not public employees under the Taylor Law.

The Commission concluded that certain students should not be included within the definition of "employee" for purposes of Public Officers Law §73, and should not be bound by the post-employment restrictions, because those restrictions were not intended to apply to individuals who were primarily students, and only secondarily served in certain capacities with the State. Looking again to the case law for guidance,⁶ the Commission created criteria for determining whether an individual was primarily a student for purposes of the post-employment restrictions. The Commission concluded that, in order to preserve one's status as primarily a student (and not primarily a State employee), an individual:

- (1) must be enrolled as a full-time student in an accredited course of study or on a seasonal recess therefrom;
- (2) cannot work half-time or more during the school year;

⁶The cases cited in Advisory Opinion No. 91-01 included *Cardo v. Lakeland Central School Dist.*, 592 F.Supp. 765 (1984); *In the Matter of Merrick Union Free School Dist. and Merrick Faculty Ass'n*, 19 PERB 4040 (1986); and *Byrne v. Long Island State Park Comm'n*, 323 N.Y.S.2d 442, 66 Misc. 2d 1070 (1971).

(3) must engage in no more than one hundred twenty days (four months) of full-time State service, in the summer or during a similar semester break; and

(4) cannot receive any State employee benefits such as medical, retirement, or vacation benefits, or have any right to re-employment.

The Commission required that each of the factors, without deviation, be satisfied, and made no provision for flexibility in their application or consideration. This laudable effort to have the determination turn on an application of objective criteria has ended up, in practice, cutting against their purpose and leading to unfair results. A full-time student becomes subject to the restrictions if, on occasion, she works 25 hours in a week during the school year. A student who undertakes full-time employment with a State agency for one semester – for example, to fulfill an educational requirement – would be deemed primarily a State employee and only secondarily a student. An individual who serves the State in a position that is only available as long as she is a student would be considered a State employee because she automatically began to accrue paid leave time. The rigid application of strict criteria guarantees results that are contrary to the intent and spirit of the primary holding in Advisory Opinion No. 91-01.

The Commission now renders its opinion that the criteria set forth in Advisory Opinion No. 91-01 should be applied with reasonable flexibility, with due regard for the particular facts and circumstances of each case, and such other relevant factors. Such other factors may include, but need not be limited to, whether the individual’s State service earned course credits or otherwise satisfied a requirement of his or her educational program, or was intended to finance the individual’s education; whether the State position was specifically designed to be filled by students; and the extent to which the individual functioned in a role that was substantially the same as other State employees.⁷

This Opinion should not be interpreted as intended to expand the class of “students” not subject to the post-employment restrictions. Rather, this holding acknowledges and accommodates the myriad conditions of State service, and calibrates and maintains the balance between protecting the public’s interest in good government with avoiding the unintended application of the post-employment restrictions to individuals whose State service is secondary to their educational endeavors and where such other public interests are not otherwise negatively impacted.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the persons who requested it and who acted in good faith,

⁷ See Advisory Opinion No. 10-02 (finding that attorneys who provided volunteer services to a State agency were State employees subject to Public Officers Law §73 because their functions were “substantially the same” as those of other agency attorneys.)

unless material facts were omitted or misstated by the persons in their request for the opinion or related supporting documentation.