

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

Advisory Opinion No. 13-01: Whether a former Hearing Representative for the New York State Insurance Fund may represent claimants before the New York State Workers' Compensation Board in connection with a matter where the New York State Insurance Fund is the carrier or a party.

INTRODUCTION

The following advisory opinion is issued in response to a request by Mr. Doe,^{*} a Hearing Representative with the New York State Insurance Fund ("NYSIF"). After his retirement from State employment, Mr. Doe seeks to represent claimants before the New York State Workers' Compensation Board ("WCB") as a Licensed Representative. Some of these matters, according to Mr. Doe, may involve instances in which NYSIF, his soon-to-be former employer, is the carrier or a party. In November 2009, the New York State Commission on Public Integrity staff issued an informal opinion stating that Mr. Doe was prohibited from working as a Licensed Representative before the WCB on matters in which NYSIF was involved. Mr. Doe has now requested that the New York State Joint Commission on Public Ethics ("Commission") review that decision in a formal advisory opinion.

Mr. Doe's inquiry presents two distinct questions for the Commission. First, does the two-year bar contained in Public Officers Law §73(8)(a)(i) prohibit Mr. Doe's proposed post-State employment representing claimants before the WCB? Second, under what circumstances does the lifetime bar in Public Officers Law §73(8)(a)(ii) prohibit Mr. Doe's proposed post-State employment after the two-year bar period has expired?

Pursuant to the authority vested in the Commission by Executive Law §94, the Commission renders its opinion that Public Officers Law §73(8)(a)(i) prohibits Mr. Doe, for two years following his departure from State service, from representing individuals before the WCB when NYSIF is either a carrier or a party. After the two-year period has passed, Mr. Doe may, consistent with Public Officers Law §73(8)(a)(ii), represent individuals before the WCB in cases or matters involving NYSIF, provided he does not represent clients in matters in which he was directly concerned and in which he personally participated, or which were under his active consideration, while employed by NYSIF.

BACKGROUND

Mr. Doe is employed by NYSIF as a Hearing Representative. NYSIF is an independent, quasi-public agency within the New York State Department of Labor. It was created to guarantee workers' compensation protection to any employer seeking coverage in New York. Because NYSIF must offer workers' compensation insurance to any employer requesting it, it is the insurer of last resort for employers otherwise unable to obtain coverage.¹ NYSIF consists of

^{*} The requesting individual's name and other identifying details have been changed or redacted.

two separate funds. The Workers' Compensation Fund "insures employers against occupational injury and disease suffered by their employees." The Disability Benefits Fund "provides temporary cash benefits for employees who sustain disabling off-the-job injuries or illnesses."² At the end of 2011, NYSIF had over 166,000 active workers' compensation policies, constituting 38% of the market.³

An employer or carrier may contest, or "controvert" a claim submitted to NYSIF based upon certain enumerated criteria.⁴ Contested claims are brought before the WCB, which has the power to hear and adjudicate all claims for compensation.⁵ A claimant, the carrier, and the employer first attempt to resolve a contested claim through an informal settlement or conciliation.⁶ If the contested claim is not settled through this process, a hearing is conducted before a Workers' Compensation Law Judge ("WCLJ"). An appeal of a WCLJ decision is heard by a panel of three WCB members. The panel may affirm, modify, or rescind the decision. Additionally, the panel may restore the case to the WCLJ for further fact finding. Any non-unanimous decision of the panel may be further appealed to the full WCB.⁷ Consistent with NYSIF's share of the workers' compensation insurance market, approximately 40% of all cases before the WCB derive from claims where NYSIF is either the carrier or a party.⁸

According to NYSIF Counsel's office, a Hearing Representative, like Mr. Doe, represents the interests of NYSIF and the employer at hearings before the WCB. Hearing Representatives have the responsibility to prepare workers' compensation cases for hearings, meetings, or depositions. Additionally, Hearing Representatives are responsible for determining the nature of evidence to be produced at hearings, meetings, and depositions and directing its procurement. Finally, NYSIF Hearing Representatives prepare reports, briefs and memoranda of law when necessary.

A Licensed Representative – the position Mr. Doe seeks to hold upon his retirement from State service – represents the interests of the claimant. According to Counsel's office for the WCB, a Licensed Representative is the conduit between the carrier and the claimant. For

¹ N.Y. WKC. Law §76; NYSIF 2011 Annual Report.

² NYSIF 2011 Annual Report; *see also* N.Y. WKC. Law §76.

³ *See* NYSIF 2011 Annual Report, p. 5.

⁴ Examples of the bases upon which a claim may be controverted are allegations that: the accident or occupational disease did not arise out of and in the course of employment; NYSIF did not provide coverage to an employer at the time of the accident; the claimant is not an employee of the employer, is an independent contractor, or never worked for the employer; and the claimant has not provided medical evidence that establishes a causal relationship. New York State Insurance Fund, Controverted Claims, http://ww3.nysif.com/Workers_Compensation/Policyholders/Role%20of%20the%20Employer%20in%20the%20Claims%20Process/Controverted_claims.aspx.

⁵ N.Y. WKC. Law §142.

⁶ WCB Counsel's office.

⁷ Workers' Compensation Board, Hearings and Appeals, http://www.wcb.ny.gov/content/main/onthejob/hearings_OTJ.jsp.

⁸ WCB Counsel's office.

instance, it is the Licensed Representative – and not the claimant – who has contact with the carrier and the employer and who negotiates directly with those entities. With respect to WCB hearings, according to Counsel’s office for NYSIF, the Licensed Representative also has responsibilities in representing the interests of claimants that are largely similar to those of a Hearing Representative.

Mr. Doe plans to retire from NYSIF. He inquires whether, after leaving State service, he may be employed as a Licensed Representative before the WCB without violating the post-employment restrictions in Public Officers Law §73(8)(a). As noted above, in November 2009, Mr. Doe initially presented this question to the Commission on Public Integrity. Mr. Doe now seeks a review of that decision and asks the Commission to issue a formal opinion on his request.

DISCUSSION

Public Officers Law §73(8)(a) contains two types of restrictions on what State employees may do with the knowledge, experience, and contacts gained from public service after they terminate their State employment. These post-employment restrictions were enacted to “enhance public trust and confidence in our governmental institutions [by strengthening] prohibitions against behavior which may permit or appear to permit undue influence or conflicts of interest.”⁹ Therefore, these restrictions address both the actual and apparent ethics issues that arise when a State employee leaves State service. Indeed, “[a]lthough a particular individual may not actually engage in wrongdoing, it is the potential for abuse that [the] statute addresses.”¹⁰

The first restriction, known as the “two-year bar,” is contained in Section 73(8)(a)(i). The second restriction, referred to as the “lifetime bar,” is found in Section 73(8)(a)(ii). The application of these two statutory provisions to Mr. Doe’s request is addressed below

Two-Year Bar: Public Officers Law §73(8)(a)(i)

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 agencies, regardless of compensation (the “appearance/practice clause”), or (b) rendering services for compensation, in relation to any case, proceeding, application, or other matter before their former agency (the “back room services” clause):

No person who has served as a state officer or employee shall within a period of two years after 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.¹¹

⁹ Governor’s Program Bill Memo, Governor’s Bill Jacket, L. 1987, Ch. 813.

¹⁰ Attorney General Opinion No. 84-F20 (interpreting the post-employment restrictions contained in Public Officers Law §73(8)(a)).

¹¹ Public Officers Law §73(8)(a)(i).

Among the activities the Commission has determined are prohibited by the appearance/practice clause during the two-year period: negotiating a contract with a former agency;¹² submitting a grant proposal or application to a former agency;¹³ representing a client in an audit before a former agency;¹⁴ engaging in settlement discussions with a former agency;¹⁵ or calling a former agency to seek guidance on how it would be likely to apply a regulation in the future, if the agency would not generally provide such information.¹⁶

The “back room services” clause of Public Officers Law §73(a)(8)(i) precludes a former employee from rendering services in relation to any case, proceeding or application or other matter before the individual’s former agency, “even in the absence of a personal appearance.”¹⁷ The Commission has determined that during the two-year period the clause precludes, among other things, a former State employee from “accepting compensation to prepare documents for a private firm when it is reasonably foreseeable that the documents will be reviewed by the individual’s former agency.”¹⁸ Moreover, a former State employee may not accept compensation for assisting another person in the creation or development of (i) an application to be submitted to the former employee’s State agency, or (ii) a plan or strategy for influencing a decision of the former employee’s State agency.¹⁹

The two-year bar, as the plain language of the statute indicates, is agency specific. Thus, the prohibition applies regardless of whether the former State employee had any involvement, during his State service, with the matter that is the subject of his post-employment activities. It is also not necessary for the former agency to know that the former employee is working on the matter for there to be a violation of the two-year bar.²⁰

Here, Public Officers Law §73(8)(a)(i) plainly prohibits Mr. Doe, for a period of two years after his separation from State service, from appearing or practicing before NYSIF or rendering services for compensation related to a matter that is before that agency. Mr. Doe, however, seeks to be a Licensed Representative for matters that come before the WCB, which is not his former agency. Under ordinary circumstances, the bar in Public Officers Law §73(8)(a)(i) applies only to appearances, practices, and the rendering of services on a matter before the State agency that employed the former State employee.

¹² Advisory Opinion No. 90-04.

¹³ Advisory Opinion No. 90-21.

¹⁴ Advisory Opinion No. 90-04.

¹⁵ Advisory Opinion No. 95-28.

¹⁶ Advisory Opinion No. 99-17.

¹⁷ Advisory Opinion No. 08-02.

¹⁸ *Id.* See also Advisory Opinion No. 94-06 (“[I]f the former employee can reasonably assume that his/her work product will reach the individual’s former agency, the employee would violate the two year bar by receiving compensation for services rendered on a matter before his former agency.”); Advisory Opinion No. 97-05 (quoting Advisory Opinion No. 94-06).

¹⁹ Advisory Opinion No. 99-17.

²⁰ Advisory Opinion No. 90-07.

In this instance, however, when NYSIF is a party or a carrier in a matter before the WCB, the responsibilities of a Licensed Representative necessarily require Mr. Doe to both appear before the NYSIF and render services in relation to matters that are before NYSIF. As noted above, a contested claim is only heard by a WCLJ if it has not been resolved through conciliation. According to Counsel's office for the WCB, the conciliation process requires that a Licensed Representative have direct contact and communication with the carrier. Moreover, given that the Licensed Representative represents the claimant's interest, such contact and communication during the conciliation process necessarily is intended, at least in part, to influence NYSIF (the carrier). Thus, when NYSIF is a party or carrier in a matter before the WCB, as a Licensed Representative Mr. Doe would be attempting to "influence a decision of [his] former agency," in violation of Public Officers Law §73(8)(a)(i).²¹

Additionally, the back room services clause in Public Officers Law §73(8)(a)(i) prohibits Mr. Doe, for a period of two years after leaving State service, from receiving compensation for assisting or advising a colleague in the preparation of documents or other materials related to a matter before the WCB, including matters at the conciliation stage, where NYSIF is a carrier or party. Under the back room services clause, however, Mr. Doe may provide such services free of charge.²²

Lifetime Bar: Public Officers Law §73(8)(a)(ii)

Section 73(8)(a)(ii), the lifetime bar, is implicated when a former State employee seeks to engage in activities in relation to a matter with which he was directly concerned, personally participated in, or that was under his active consideration while in State service. With respect to such matters, the lifetime bar prohibits a former State employee, during his lifetime, from (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.²³

The lifetime bar, as the language of the statute indicates, applies to the appearance, practice, or rendering services before *any* State agency, not merely the agency that employed the former State worker. Thus, while the two-year bar is *agency* specific, the lifetime bar is *transaction* specific. The two-year bar, as explained above, is agnostic with respect to specific

²¹ Advisory Opinion No. 99-17.

²² Advisory Opinion No. 12-01.

²³ Public Officers Law §73(a)(a)(ii).

transactions and therefore prohibits the appearance, practice, and rendering of services for compensation relating to any matter that is before a former employee's former State agency. The lifetime bar, on the other hand, is indifferent as to the agency.

Based on these principles, the lifetime bar in Public Officers Law §73(8)(a)(ii) prohibits Mr. Doe from appearing, practicing, or rendering services (regardless of compensation) before any State agency, including the WCB, in relation to a "case, proceeding, application, or transaction" in which he "personally participated" or that was under his "active consideration" while employed by NYSIF.²⁴ Upon his retirement, Mr. Doe may, however, appear, practice or render services in relation to such matters that are before an entity that is not a State agency (such as a court) provided that he is not compensated for such activities.²⁵

CONCLUSION

The two-year bar in Public Officers Law §73(8)(a)(i) prohibits Mr. Doe, for a period of two years after he leaves State service, from appearing or practicing before the WCB on a matter in which NYSIF is the carrier or a party. This prohibition applies regardless of whether Mr. Doe is compensated for his work. In addition to barring such appearances or practices, the statute also precludes Mr. Doe, during the two-year period, from performing any other services for compensation in matters before the WCB where NYSIF is a carrier or a party. In matters before the WCB in which NYSIF is not a carrier or a party, Mr. Doe may appear, practice, or perform other services for compensation without violating Public Officers Law §73(8)(a)(i).

The lifetime bar in Public Officers Law §73(8)(a)(ii) precludes Mr. Doe from appearing, practicing, or rendering services (regardless of compensation) before any State agency – including the WCB – in relation to any case, proceeding, application, or transaction in which he was "directly concerned and in which he ... personally participated[,] ...or which was under his ... active consideration" while employed by NYSIF.²⁶ Upon his retirement, Mr. Doe may, however, appear, practice, or render services in relation to such matters that are before an entity that is not a State agency provided that he is not compensated for such activities.

²⁴ Advisory Opinion Nos. 93-11; 95-07; 95-15; 95-19; 11-03; *Matter of McCulloch v. New York State Ethics Commission*, 285 A.D.2d 236 (3d. Dept. 2001).

²⁵ Advisory Opinion No. 11-03; *McCulloch*, 285 A.D.2d 236.

²⁶ Public Officers Law §73(8)(a)(ii).

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and acted in good faith unless material facts were omitted or misstated in the request for opinion.

Concur:

Hon. Janet DiFiore, Chair

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