Advisory Opinion No. 02-1

Application of the lifetime bar restrictions of Public Officers Law §73(8)(a)(ii) to a former employee of the Metropolitan Transportation Authority and the New York City Transit Authority who seeks to work on a smart card technology opportunity with a different government agency.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by [a private attorney] on behalf of his client, [a private company]. [The private company] would like to retain the services of [a former State employee] of the Metropolitan Transportation Authority (“MTA”) and the New York City Transit Authority (“TA”), on a potential contracting opportunity with the Port Authority of New York and New Jersey (“PATH”).

Pursuant to the authority vested in it by Executive Law §94(15), the New York State Ethics Commission (“Commission”) renders its opinion that the lifetime bar does not prohibit [the former employee] from participating in the PATH proposal to develop a contact-less card system subject to the condition contained in this opinion.

BACKGROUND

[The former employee’s] work for the MTA and TA:

[The former employee] worked for the MTA and the TA from [date] until [date] and held various high level positions with each of the two agencies. From [date] to [date], [the former employee] was assigned to the TA as Vice-President for [ ]; from [date] to [date], he served as Vice-President for [ ]; and from [date] to [date], he returned to the TA as Chief for [ ]. His last day of employment with the TA was [ ].

As the TA’s Vice-President for [ ], [the former employee] was responsible for the implementation of the pilot and roll-out phases of the TA’s new automated fare collection system, which was known as “MetroCard.” He was also involved in the system-wide implementation of MetroCard, including the original selection of a magnetic read-write swipe card technology; negotiations with the selected vendor, [the private company]; and planning and contract management. He also supervised TA staff performing the day-to-day project management and contract administration work.

Once [the former employee] became the MTA [ ] Vice-President for[ ], his job duties shifted to the development of non-transportation uses of MetroCard. This effort was terminated in [date] when the MTA determined that there was an insufficient market interest, and [the former employee] returned to the TA. During his last three years with the TA, [the former
employee] was responsible for the sales and marketing of MetroCard, which involved the development of additional sales distribution channels.

[The requesting individual] states that [the former employee’s] involvement with the TA’s contract with [the private company] and implementation of the MetroCard automatic fare collection system ended in 1995. After that date, other than the terminated activities of the MTA Card Company venture and efforts to increase retail sales outlets for MetroCard sales, [the former employee] did not participate in any MTA or TA efforts or decisions related to further development of the MetroCard system.

[The former employee’s] duties for [the private company]:

[The former employee] is currently [the private company’s] Vice-President - New York Metropolitan Region. He is the company’s principal representative with current customers and directs efforts related to new projects in the region. Reporting to [the private company’s] Chief Operating Officer, [the former employee] has oversight responsibility for the regional staff to ensure that products and services are properly budgeted and that contract requirements are met.

[The private company] has several outstanding proposals with which [the former employee] is involved, including one for the New Jersey Department of Transportation for a new automatic fare collection system, and [the private company’s] subcontract with [another private company] for the supply of the automatic fare collection system for PATH’s John F. Kennedy Airport AirTrain. Based on a previously issued informal advisory opinion, [the former employee] is not involved with [the private company’s] ongoing transactions with the TA concerning enhancements to MetroCard.

*The PATH proposal:*

[The requesting individual] now seeks the Commission’s approval for [the former employee] to work on [the private company’s] proposal to PATH for a new automatic fare collection system. Specifically, PATH has requested that [the private company] submit a proposal to replace its existing fare collection system with a new system that would accept smart cards as well as read-write magnetic cards, including PATH’s existing QuickCard and the TA’s MetroCard.

The smart card, which is contactless and non-magnetic, is the cornerstone of the PATH procurement as it represents the future direction of automated transit fare collection. [The requesting individual] states that it is a relatively new application in the transit environment, used in Washington, D.C. and London, among other places, but not used by the TA or elsewhere in the New York City metropolitan area. He also asserts that PATH’s recent decision to implement a smart card is entirely independent of any possible future consideration by the TA of migration to a smart card technology.

As mentioned above, it is intended that PATH’s new system will be able to accommodate conventional magnetic fare cards and, particularly, MetroCard. [The requesting individual] provides that PATH’s new system will not overlay or constitute a refinement of the MetroCard
system, rather, it is newer, more advanced and contact-less. PATH consumers using the older MetroCard instead of the newer smart card will have to use an internal contact rather than the external type swipe reader maintained by the TA.

The anticipated technical specifications for the PATH system will also require compliance with an international open standard to assure future vendor competition as well as with the regional interface specifications for smart card payment systems as developed by PATH. These technical requirements guarantee that PATH will not be dependent on a sole source for future replacement requirements and that the new PATH system, unlike the TA system, will be capable of accepting other fare media such as MetroCard.

To the extent that [the private company] may have a competitive advantage in the PATH procurement, [the requesting individual] states that it is solely a function of [the private company’s] knowledge and technical expertise obtained through two decade’s work in New York City and around the world and not due to any specific knowledge [the former employee] obtained as a result of his employment with the MTA or TA.

[The former employee] does recall participating in meetings in the early 1990's with PATH concerning the possible collaboration by PATH and MTA in fare collection activities. At those meetings, there was no discussion of using contact-less smart cards as the technology had not been sufficiently advanced. Notwithstanding these discussions, PATH affirmatively declined to participate in a collaborative system and instead awarded a contract to [a third private company] to design and install a fare collection system which remains technologically incompatible with MetroCard. PATH is now seeking to replace the [ ] system, which is now approaching technological obsolescence.

Thus, the preliminary discussions between the TA and PATH never advanced materially and were terminated. Furthermore, [the requesting individual] asserts that during [the former employee’s] subsequent work for the MTA Card Company, or his later work as Chief of [ ], a possible relationship or common ticketing with PATH was never resurrected or explored. While with the MTA and TA, [the former employee] had no involvement whatsoever on commenting on PATH’s development of the regional interface specifications and, in fact, PATH’s initiative began after [the former employee’s] departure from the TA. Finally, [the requesting individual] submits that the PATH procurement will be undertaken by the agency on its own and that MTA and TA is funding neither the proposal nor involved in PATH’s procurement evaluation, negotiation or decision making.

APPLICABLE STATUTE

Public Officers Law §73(8)(a)(ii) provides:

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 above provision, known as the “lifetime bar,” sets the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate their employment with a State agency. The lifetime bar prohibits former State officers and employees from appearing, practicing, communicating or rendering services before any State agency, and rendering services for compensation in relation to any case, proceeding, application or transaction with respect to which they were directly concerned and in which they personally participated during the period of their State service, or which was under their active consideration during that period.\(^{(4)}\)

The issue before the Commission is whether [the former employee’s] prior involvement with the TA’s automated fare card system precludes him from working on a proposal to link PATH’s anticipated contact-less card system with MetroCard.

The determination of whether the lifetime bar applies is one which must be made on a case-by-case basis. See Advisory Opinion No. 90-22. The Commission has issued several formal opinions which, although factually different, are nonetheless instructive.

For example, the present circumstances are unlike the situation in which an agency is developing and implementing a later phase of a project, after the passage of time and where a later phase may be somewhat different from what was originally planned (See, e.g., Advisory Opinion Nos. 97-9 and 00-2). Nor is this the case where a State employee was substantially involved with the planning stages of a particular transaction, including the development of technical specifications, and now desires to work on its implementation (see, Advisory Opinion No. 98-20), or where the former employee served on the agency’s selection committee and now wishes to be involved in the agency’s procurement (see, Advisory Opinion No. 97-23). In the aforementioned situations, the Commission found that the lifetime bar applied to prohibit the former State employee’s activities.

Rather, the transaction at hand is a new proposal by PATH to develop a contact-less card with a system that can also accommodate the older magnetic strip cards such as MetroCard. As [the requesting individual] points out, preliminary meetings between the TA and PATH to collaborate on a jointly issued card were terminated and the technology has advanced to the next generation of automated fare cards. Furthermore, the MTA and TA are not involved in the funding of the PATH project and are not part of the review and selection process of PATH’s vendor. More importantly, the PATH project will in no way impact upon the TA’s continued use of MetroCard for its subway and bus operations.

While the Commission has held that the lifetime bar does not prohibit a former employee from using the knowledge and methodologies developed while in State service to new settings (see, Advisory Opinion Nos. 94-9 and 94-18), the Commission can envision situations where [the former employee’s] prior work for the MTA and TA could limit his involvement in the PATH
proposal. For example, if in the course of [the former employee’s] work on the PATH proposal, an issue arises concerning the TA’s role in implementing the use of MetroCard in the MTA system and includes discussions which rest on [the former employee’s] prior involvement with MetroCard or enhancements to the existing MetroCard system, [the former employee] would need to avoid working on the matter. However, the Commission’s understanding is that such situations would rarely, if ever, occur and would not prevent [the former employee] from otherwise being involved in the PATH proposal.

CONCLUSION

The Commission concludes that the lifetime bar does not prohibit [the former employee] from participating in the PATH proposal to develop a contact-less card system subject to the condition contained in this opinion.

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

All concur:

Paul Shechtman, Chair
Robert J. Giuffra, Jr.
Carl H. Loewenson, Jr.
Lynn Millane, Members

Dated: April 5, 2002

Endnotes

1. The MTA is the parent entity of several affiliates and subsidiaries including the TA. The MTA board serves ex officio as the board of the directors of the TA. For further discussion, see, e.g., Advisory Opinion Nos. 95-4 and 95-33.

2. Unlike magnetic cards, contact-less cards permit the user to wave the card over a reading device. The contact-less card is based on recent technological advances, would allow for the implementation of regional ticketing and differs from the debit/credit card technology offered by MetroCard.

3. [The requesting individual] does note that it is conceivable that PATH might request the TA to comment on vendor proposals relating to compatibility issues.

4. As [the former employee] left State service more than two years ago, the two-year bar of Public Officers Law§73(8)(a)(i) is not at issue.