

New York State Ethics Commission

Advisory Opinion No. 05-03:

Whether the lifetime bar of Public Officers Law §73(8)(a)(ii) precludes a former State employee of the Metropolitan Transportation Authority and the New York City Transit Authority from providing information on the next generation of automatic fare collection technology.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by [an attorney], on behalf of his client, [a private company]. [The private company] would like [] a former employee of the Metropolitan Transportation Authority (“MTA”) and the New York City Department of Transit (“NYCT”), to respond to a solicitation by NYCT concerning next generation smart card technology.

Pursuant to the authority vested in the New York State Ethics Commission (“Commission”) by §94(15) of the Executive Law, the Commission concludes that the lifetime bar does not prohibit [the former State employee] from providing information to NYCT on the adaptability of smart card technology to the transit environment.

BACKGROUND

In 1991, the MTA, acting through NYCT, awarded [the private company] a multi-million dollar contract for the design and installation of an automatic fare collection system (“AFC”), now well-known as Metro Card. At that time, [the former State employee] served as NYCT’s Vice-President for [] and was responsible for the system-wide implementation of Metro Card, including the original selection of the magnetic swipe card technology, negotiations with [the private company], and the overall planning and contract management. His involvement with NYCT’s contract with [the private company] and implementation of the Metro Card ended in 1995. He went on to serve as Vice-President of [] for the MTA Card Company; and from 1996 to December 1999, he was assigned to the NYCT as Chief of []. He retired from NYCT in [] and was hired by [the private company] as Vice President of [], and initially placed in its [] office.

In 2001, after his two-year bar expired, [the former State employee] moved to [the private company’s] New York City Office and sought the Commission’s guidance concerning his ability to work on Metro Card issues within the restrictions of the lifetime bar provision of Public Officers Law 73(8)(a)(ii). Recognizing that NYCT and [the private company] had ongoing arrangements based on swipe card technology, that upgrades to Metro Card were contemplated during its initial implementation and that the parties would continue to have a relationship until such time as the NYCT determined to replace the Metro Card system

altogether, the Commission precluded [the former State employee] from working on any modifications or enhancements to the Metro Card system on behalf of [the private company]. At the same time, the Commission concluded that the lifetime bar did not prohibit [the former State employee] from participating in a Port Authority of New York and New Jersey (“PATH”) proposal to develop a new contact-less card system which would also accommodate the Metro Card. The Commission concluded that the Port Authority project was a new transaction and not one which he was directly concerned and personally participated or was under his active consideration while a NYCT employee (see, Advisory Opinion No. 02-01). [The former State employee] was advised, however, that if an issue arose concerning NYCT’s role in integrating the Metro Card with the PATH system, he would need to avoid working on the matter because of his prior involvement with Metro Card.

Given the passage of time and advancement in technology, NYCT is now considering migrating from a magnetic swipe system to smart card technology.¹ In March 2005, [the private company], among other vendors, received an inquiry from NYCT inviting a presentation “as to the adaptability of smart card technology” to NYCT. [The attorney representing the State employee] anticipates that NYCT will materially upgrade, modernize and enhance its AFC system, including the introduction of new contact-less smart card fare media. He states that the overall modernization project will replace core hardware and software elements in the turnstile, fare box, station computers and at remote central server and network control locations.² Over time, the smart card would become the dominant fare media for NYCT and eventually replace Metro Card.

[The attorney representing the State employee] maintains that, while the new smart card technology will need to interface, to a limited degree, with the older existing technology, NYCT will publish the interface specifications to all competitors, and thus, [the private company] will not have any technical advantage by virtue of [the former State employee’s] prior government service.³

APPLICABLE STATUTE

The lifetime bar found in Public Officers Law §73(8)(a)(ii) states, in relevant part, that: 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 State service, or which was under their active consideration during that period.

The issue before the Commission is whether [the former State employee's] involvement on behalf of [the private company] in materially upgrading NYCT's AFC to a new contact-less smart card constitutes a continuation of the same magnetic fare collection transaction that he was involved with while employed with NYCT.

As previously noted, the Commission held that [the former State employee's] work on the PATH proposal to develop a smart card with a system that could also accommodate the Metro Card was a new transaction outside of the scope of the lifetime bar. At the same time, the Commission advised [the former State employee] that he could not work on upgrades to Metro Card because those were reasonably contemplated at the time of Metro Card's initial implementation.

The Commission recently considered the issue of major technological advances and upgrades and their application to the lifetime bar in Advisory Opinion No. 04-02. In that opinion, the Commission considered whether a former Long Island Railroad ("LIRR") employee could work for a contractor who was responding to a LIRR request for proposals to replace certain locomotive components, when ten years earlier the same employee had worked for the LIRR in connection with the original procurement of the locomotives. After a decade of significant problems with the locomotives, the LIRR determined that they could be salvaged only by major upgrades not contemplated at the time of the initial procurement.⁴ The project included major upgrades involving the installation of new technology, while at the same time maintaining some of the original features of the locomotives.

An entirely new public procurement was expected to ensue, and the LIRR believed that the former employee did not possess insider information, which would provide him with an undue advantage. Based on all of these factors, the Commission was persuaded that the proposed work was a new transaction outside of the lifetime bar.

The Commission notes that it has been fourteen years since the Metro Card system was introduced and six years since [the former State employee] left NYCT, and that technical advancements with AFC systems were not contemplated at the time of Metro Card's implementation. Thus, consistent with the rationale found in Advisory Opinion No. 04-02, the Commission concludes that the proposal put forward by [the private company] for replacing the existing magnetic card system with next generation smart card technology is a separate transaction. Here, as in Advisory Opinion No. 04-02, there is no reason to believe that [the former State employee] has inside knowledge or will be trading on his prior government service to advantage his private sector employer.

CONCLUSION

The Commission concludes that Public Officers Law §73(8)(a)(ii) does not prohibit [the former State employee] from making a proposal to NYCT demonstrating next generation smart card technology because it is a new transaction.

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

All concur:

Paul Shechtman,

Chair

Robert J. Giuffra, Jr.

Carl H. Loewenson, Jr.

Lynn Millane

Susan E. Shepard,

Members

Dated: September 20, 2005

End Notes

¹ Unlike the Metro Card system, the smart card system is a non-magnetic, contact-less method of collecting fares in which the passenger holds a card containing a computer chip over a reader on a turnstile.

² [The attorney representing the State employee] states that NYCT may elect to retain certain hardware from the existing system in order that passengers may choose between the existing magnetic media and the new contact-less smart card media.

³ According to [the attorney representing the State employee], once NYCT frames and publishes the interface specifications, [the private company] engineers will define and propose [the private company's] solution, a project which will not involve [the former State employee].

⁴ During an intermediate stage, the Commission applied the lifetime bar to the former LIRR employee and precluded him from working on repair solutions for the same contractor which he had helped select as a LIRR employee.