

## New York State Ethics Commission

**Advisory Opinion No. 07-01:** Application of Public Officers Law §73(8)(a) to a former employee of the Governor's Office of Employee Relations.

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### INTRODUCTION

The following advisory opinion responds to an inquiry from [the requestor], University Counsel and Vice Chancellor for Legal Affairs at the State University of New York ("SUNY"), concerning [ ], a former [employee] of the Governor's Office of Employee Relations ("GOER"). [The requestor] has asked about the application of the post-employment restrictions to [the former State employee's] present position as a Labor Relations Specialist ("LRS") with [the association], an association of unions.

Pursuant to Executive Law §94(15), the New York State Ethics Commission ("Commission") renders its opinion that the two-year bar prohibits [the former State employee] from appearing or practicing before GOER or from rendering compensated services on matters before GOER on behalf of [the association] for two years. The lifetime bar prohibits [the former State employee] from working on the same cases, proceedings, applications and transactions on which she worked while in State service. She is not precluded, after two years, from representing her employer in contract grievances or improper practice charges where such matters involve new parties, cases, proceedings, applications or transactions.

### BACKGROUND

[The former State employee] served as an [ ] at GOER for [ ] years. GOER represents the Governor in Executive Branch collective bargaining and negotiates, and administers agreements between the State and a variety of labor organizations, including [a member organization]. At GOER, [the former State employee] performed various duties, including conducting legal research and rendering legal opinions on a variety of public sector and employment law topics, and responding to inquiries from State agencies concerning the application of the collective bargaining agreements and the Taylor Law.

She also was assigned to the State's collective bargaining team for the [ ] throughout her tenure at GOER. In this capacity, she was privy to the State's strategy for the negotiation of benefits and contractual provisions for all the bargaining units in the State.

In addition, [the former State employee] was assigned grievances, arbitrations and improper practice ("IP") hearings, primarily involving [ ] and [ ]. [The former State employee] last represented the State in an improper practice charge involving [the member organization] in [ ]. She also was involved in litigation and settlement negotiations concerning the clinical practice program at the Health Science Centers of SUNY.

[The former State employee] resigned from State service on [date].

[The former State employee] subsequently accepted a position as a Labor Relations Specialist with [the association], an unincorporated, voluntary membership association under IRS code §501(c)(5), of more than 900 unions. [The association] provides services to its various affiliates, including [a member organization], an employee organization certified to represent State employees of the [ ] within SUNY.

[The former State employee] represents [the member organization] members who work for [several SUNY campuses]. Specifically, her duties include providing advice to and representing the interests of [a member organization] members under the collective bargaining agreement, and in employee relations matters and labor/management programs. [The former State employee] meets with [ ] members, attends [ ] meetings, counsels and trains union officials and members, and interacts with [the association] staff to discuss matters internal to [the association]. [The former State employee] has stated that she will have no involvement of any kind on behalf of [the member organization] in upcoming negotiations for a successor collective bargaining agreement.

[The former State employee] also will spend some portion of her time dealing with grievance matters on behalf of [the member organization] members.

As provided by the 2003-07 collective bargaining agreement between the State and [the member organization], there are various steps to the grievance procedure. A Step 1 grievance must be filed with the College President or designee. This is a "campus level" grievance that a [the member organization] employee may file without union representation but, can also be filed by an LRS. If the matter is not resolved, the grievance is appealed to the Chancellor or his or her designee (Step 2). This appeal is generally prepared and submitted by [the member organization] LRS. If the matter remains unresolved, [the member organization] may appeal the Step 2 response by filing an appeal with the Director of GOER or his or her designee (Step 3). This appeal, as with all other appeals in the process, must be in writing and include copies of the grievances and related documents filed at Steps 1 and 2. Step 3 constitutes a "record review" and there is no physical appearance or hearing. GOER must issue a written response to the appeal within 20 working days after receipt of the Step 3 appeal. If the issue remains unresolved, the parties may proceed to Step 4 arbitration. Generally, arbitrations for contract grievances are held at the GOER offices before arbitrators selected by the representatives. GOER represents the State in the grievance proceeding. An LRS usually represents the grievant at the arbitration hearing. Conversations between GOER representatives and [the member organization] concerning the case can occur, before, during and after the arbitration.

Regarding disciplinary grievances, GOER has no direct role as to the merits of a case, and neither attempts to resolve the matter nor participates in the arbitration or review of the grievance. Labor relations representatives from SUNY's Systems Administration may consult with GOER regarding the issues, charges or recommended penalties. GOER also will aid SUNY in obtaining assistance from the Attorney General, should the arbitrator's award be appealed. Disciplinary arbitrations are typically held on the respective SUNY campuses.

[The former State employee] has indicated that she will not be the representative of record and will not sign a contract grievance filed by [the member organization] members. However, she

anticipates having an active involvement in resolving grievances at the Step 1 and Step 2 levels. Should a matter proceed to Step 3 and beyond, she would have no further contact with or involvement in the matter. Regarding disciplinary grievances, [the former State employee] would be actively involved throughout the process, and would appear before the Public Employment Relations Board ("PERB") in an improper practice charge, but would not handle any potential settlement or document request.

On [date], [ ], General Counsel at GOER, requested an informal opinion concerning the application of the post-employment restrictions as applied to [the former State employee], a former GOER employee.

In response to this request, the Commission issued an informal opinion on [date]. Based on the Commission's precedent and information provided by [the member organization] regarding the number of Step 3 contract grievances which are actually appealed to the Step 4 level (and therefore before GOER), the Commission staff concluded that [the former State employee] could provide assistance to [the member organization] members on issues which may result in the filing of a grievance, noting that her involvement could commence from the point at which an issue is brought to the attention of a [member organization] representative up until the time the matter remains unresolved and reaches GOER at Step 3. She could work with her assigned campuses as well as SUNY's Systems Administration to resolve the matter, but was not permitted to contact GOER directly regarding the matter at any point during this period.

Regarding whether [the former State employee] could represent [the member organization] members at the arbitration of a contract grievance, the informal opinion noted that the "notice of intent" to proceed to arbitration must be filed by [the member organization] with the Director of GOER. GOER and [the member organization] jointly agree on the selection of an arbitrator to hear the matter and a representative of GOER is present at the proceeding to present the case. During this proceeding, the case remains a "matter before GOER." As such, [the former State employee] would be precluded from representing a [member organization] member at the arbitration of a contract grievance.

On matters regarding [the former State employee's] communication with GOER on behalf of [the member organization] members, the informal opinion, citing Commission precedent, stated that [the former State employee] may not, for a period of two years, contact GOER employees on behalf of [the member organization] regarding matters pertaining to labor relations issues, contract administration, and policies and procedures related to the responsibilities of GOER or seek information that is not otherwise available to the general public.

Concerning [the former State employee's] ability to file improper practice charges, represent [the member organization] members before PERB and request documents or engage in settlement discussions, the informal opinion, citing Advisory Opinion No. 95-28, concluded that [the former State employee] may represent clients before PERB, but may not request documents or engage in settlement or other discussions with the former agency, although she may subpoena documents from GOER.

On [date], [the former State employee] requested an informal opinion from the Commission concerning the application of the post-employment restrictions to her new position with [the member organization]. Commission staff responded to this opinion on [date], providing a response similar to the opinion provided to [GOER]. Concerning the lifetime bar, the Commission stated that [the former State employee] was prohibited from representing [the member organization] on issues pertaining to the [ ] settlement she was involved in which clarified Article 29 of the [member organization] contract concerning the [ ] programs at the [ ]. [The former State employee] was encouraged to contact the Commission should other issues arise involving the lifetime bar.

On [date], [the requestor] requested the Commission issue a formal opinion regarding [the former State employee's] post-State employment activities. In his letter, [the requestor] stated that [the former State employee] had represented [ ] in grievance arbitrations and improper practice charges involving a number of specified articles within the [member organization] contract and was provided with "full access to University and campus administrators as well as confidential information and documents." [The requestor] stated his belief that the issue of such recurrent litigation involves either specific contract provisions or rights provided under the Taylor Law and that while complaining parties and fact patterns may vary, it is the contract provision/statute which is the subject matter of the litigation rather than the individual. Accordingly, [the requestor] argued, the "University . . . believes that [the former State employee's] current assignment in representing University employees on behalf of [the member organization] involves the same subjects she worked on when she defended the University in matters initiated by [the member organization] on behalf of University employees. This activity appears improper, and as a result, we ask for a formal opinion regarding the application of the lifetime bar provisions under Section 73(8) of the Public Officers Law."

[The requestor] then posed a series of questions for the Commission's consideration similar to those posed by [GOER]. [The requestor] also asked several additional questions pertaining to the lifetime bar as well as whether [the former State employee] could appear at and participate in labor/management meetings with SUNY on behalf of [the member organization] and its members.

SUNY provided follow-up information to the Commission in a letter dated [ ].

The Commission responded to [the requestor's] request with an informal opinion dated [ ]. This opinion was, again, similar to the opinions provided to [GOER] and [the former State employee].

Following the Commission's response, [the requestor], in a letter dated [ ], disagreed with aspects of the Commission's letter dated [ ] and asked that the Commission again respond to his request, this time in the form of a formal opinion.

In a letter dated [ ], [GOER], on behalf of GOER, also requested that the Commission render a formal opinion concerning [the former State employee's] post-State employment activity. Having learned of [the requestor's] [ ] request, [ ] stated that GOER had no objection to the Commission issuing one formal opinion addressing the issues raised by both State agencies. In addition, the request asked for clarification regarding aspects of the informal opinion. These included: general

communications with GOER; contract grievances and arbitrations; disciplinary grievances; improper practice charges; participation in labor/management meetings; and contract negotiations.

### **APPLICABLE STATUTE**

The statutory language setting forth the two-year bar is found in Public Officers Law §73(8)(a)(i), which states: *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.*

The lifetime bar contained in Public Officers Law §73(8)(a)(ii) states: *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**

Turning to the two-year bar, the Commission must consider the level and extent to which [the former State employee] may represent the membership of [the member organization] in a variety of contexts posed by both [GOER] and [the requestor]. Each of these contexts will be discussed in turn.

#### **Two-Year Bar**

- *Contract Grievances and Arbitration*

The Commission has held that a former employee may, within two years of departure from State service provide general information on the requirements of the employee's former agency, unrelated to a specific case (see, Advisory Opinion No. 90-4); and provide services that do not involve specific advice or participation in the preparation of an application to be submitted to the employee's former agency (see, Advisory Opinion No. 90-3). The Commission also has held that if a former employee has reason to know or anticipate, through a law, regulation or policy, that his or her private sector work will be referred by one State agency to his or her former agency, he or she is barred from submitting so much of the work as will be referred to the former employee's State agency (see, Advisory Opinion Nos. 89-8, 94-6, 99-3, and 03-8).

In Advisory Opinion No. 96-8, the Commission held that the two-year bar did not preclude a former State employee from submitting claims for processing to an entity

under contract with his former agency, even though the former agency might randomly review such claims. The Commission held that because the former agency reviews fewer than one percent of all claims, it was not possible for the former employee to know whether or not any particular claim he might file would be selected by the former agency for review and assessment. Accordingly, the Commission concluded the former employee had no reason to know or anticipate that his work product would be submitted to his former agency after its submission to the contractor and, thus, there was no violation of the two-year bar in his making the submission to the contractor.

In its informal opinions, the Commission cited statistics relevant to the number of [the member organization] Step 1 grievances filed which actually proceed to Step 3 and Step 4. Based on this information and the formal advisory opinions previously cited, Commission staff concluded that [the former State employee] could provide assistance to [the member organization] members on issues which may result in the filing of a grievance. It stated that [the former State employee's] active involvement in such matters may commence from the point at which an issue is brought to the attention of a [member organization] representative, up until the time the matter remains unresolved and reaches GOER at Step 3. [The former State employee] may work with her assigned [ ] as well as [ ] to resolve the matter prior to the Step 3 filing. She may not, however, contact GOER regarding the matter at any point during this period. Nor may she prepare the Step 3 appeal form or represent a [member organization] member at the arbitration of a contract grievance as such actions would constitute prohibited appearances before GOER.

[The former State employee] has indicated that she will not be the representative of record and will not sign contract grievances filed by [the member organization] members but that she will have active involvement in resolving grievances at the Step 1 and Step 2 level. The Commission believes this level of involvement does not violate the two-year bar, as such matters are not before her former agency. Accordingly, the Commission need not address the question of whether [the former State employee] may actually prepare and/or submit a Step 1 or Step 2 grievance. Nor must the Commission render a determination as to whether it is "reasonably foreseeable" that a particular Step 1 grievance will reach the Step 3 or Step 4 level.

- *Disciplinary Grievances*

The Commission concludes that [the former State employee] may be involved in the disciplinary grievance process. She may consult and work with [the member organization] members, the campus and SUNY Systems Administration to resolve disciplinary issues, prior to and following the issuance of a notice of discipline. She also may play an active role in filing a disciplinary grievance with the Chancellor or his or her designee pursuant to Article 19.4(c) of the Agreement between [the member organization] and the State. She may participate in meetings and settlement discussions to the extent such matters do not constitute an appearance before GOER. She is prohibited from filing with GOER the notice of appeal to disciplinary arbitration. Once the notice of appeal is filed with GOER, [the former State employee] must cease any further involvement in the matter.

- *Improper Practice Charges*

Based on Advisory Opinion No. 95-28, the Commission concludes that [the former State employee] may represent clients before PERB, but may not request documents or engage in settlement or other discussions with her former agency. This prohibition extends to contact with GOER by letter or phone. [The former State employee] may, however, in accordance with No. 95-28, subpoena documents from GOER.

- *Labor/Management Meetings*

In its [date] letter, GOER asks whether [the former State employee] may participate in labor/management meetings. These are "local" meetings held at each campus. For [the member organization], the meeting generally is conducted by the Chapter President who prepares the agenda and presents each issue. The LRS also may attend these meetings but is generally not an active participant. Management representatives may include the Provost or Dean of the campus along with the Director of Human Resources or appropriate designee. Issues raised at this meeting are primarily resolved at the campus level with each party agreeing to take some corrective action.

GOER states that matters may be raised at these meetings which are subsequently referred to SUNY's Systems Administration and then to GOER. GOER might then provide advice and guidance on such labor relations issues.

As described, [the former State employee's] former agency is not present at the campus meeting. And, at the time an issue is raised by the Chapter President, there may or may not be a "matter" before GOER. To the extent [the former State employee] has knowledge that an issue raised in the context of a labor/management meeting becomes a matter before GOER, she may not engage in any further activity on behalf of [the member organization] regarding that issue. To preclude [the former State employee] from engaging in any labor/management meeting merely because of the possibility that an issue raised in that context could be brought to GOER for consideration at some point in the future would set an undesirable precedent and extend beyond the intent of the two-year bar.

- *General Communications*

GOER seeks clarification regarding the issue of [the former State employee's] "general communication" with her former agency. The Commission has held that a former employee may not, within two years of his or her separation from State service, contact the former agency on matters pertaining to contract negotiations (Advisory Opinion No. 90-4); engage in settlement discussions (Advisory Opinion No. 95-28); contact key personnel to collect data from the former agency (Advisory Opinion No. 04-6); make a Freedom of Information request on behalf of a client (Advisory Opinion Nos. 89-7; 97-12; 04-6) or call the former agency to ask questions on behalf of a client (Advisory Opinion No. 94-05). Accordingly, [the former State employee] may not, for a period of two years, contact GOER employees regarding matters pertaining to labor relations

issues, contract administration, and policies and procedures related to the responsibilities of GOER on behalf of [the member organization], or seek information that is not otherwise available to the general public.

Should GOER have questions regarding the nature of a specific contact or inquiry involving a former employee, GOER should contact the Commission for guidance.

### **Lifetime Bar**

The Commission has held that the determination of whether the lifetime bar applies must be made on a case-by-case basis (Advisory Opinion No. 92-20). [The requestor] has argued that [the former State employee's] experience in processing contract grievances "involves recurrent litigation of rights set forth in the collective bargaining agreement" and that while the complaining parties and fact patterns may differ, "the subject matter of the litigation . . . is the contract provision, not the individual." The Commission recognizes that, in the context of a contract grievance, parties to the contract may be particularly focused on the meaning and intent of the contract provision. Complaining parties will argue whether the fact pattern they present violates or comports with the meaning of the contract language. In this way, it could be said that a multitude of cases involving a single contract article amounts to recurrent litigation of a single matter and all such cases are basically the same. However, in the context of a lifetime bar analysis, it is precisely those factors that the Commission must consider in order to determine whether the case, proceeding, application or transaction on which the former employee worked constitutes the same matter on which they worked prior to leaving State service (Advisory Opinion No. 95-32).

[The former State employee's] representation of the State in a contract grievance, the subject of which is a particular provision of the [member organization] contract, does not forever bar her from representing another [member organization] member, who years later, seeks to file a grievance involving the same contract provision. The new party, the different fact pattern, the passage of time, when considered all together, constitute a new transaction for purposes of the lifetime bar. Accordingly, the Commission affirms the analysis presented in its informal opinion to [the requestor] dated [ ], that after her two-year bar has run, [the former State employee] may represent [the member organization] in contract arbitrations.

### **CONCLUSION**

The Commission concludes that the two-year bar prohibits [the former State employee] from appearing, or practicing before GOER or from rendering compensated services on a matter before GOER on behalf of [the association] as described in this opinion. The lifetime bar prohibits [the former State employee] from working on the same cases, proceedings, applications and transaction on which she worked while in State service. She is not precluded, after two years, from representing her employer in contract grievances or improper practice charges where such matters involve new parties, cases, proceedings, applications or transactions.

This opinion, unless and until 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:

John D. Feerick, Chair

Robert J. Giuffra, Jr.

Carl H. Loewenson, Jr.

Lynn Millane

Susan E. Shepard, Members

Dated: May 30, 2007