

**STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY**

Advisory Opinion No. 10-02 The two-year and lifetime bar provisions set forth in Public Officers Law §73(8) apply to persons who volunteer as part-time staff attorneys in the Department of Environmental Conservation's Office of General Counsel.

INTRODUCTION

In response to a request for an advisory opinion submitted by the New York State Department of Environmental Conservation (“DEC”), the New York State Commission on Public Integrity (“Commission”) hereby renders its opinion, pursuant to Executive Law §94(15), concluding that the two-year and lifetime bar provisions set forth in Public Officers Law §73(8), apply to two persons who volunteer as part-time staff attorneys in DEC's Office of General Counsel.

BACKGROUND

DEC offers a range of volunteer opportunities to the public to afford individuals an opportunity to “obtain valuable work experience or ... contribute to the conservation of New York State's environment ...”¹ The volunteer opportunities listed on DEC's website include: grooming and clearing hiking and snowmobiling trails; assisting the wildlife biologists in studying or releasing game; assisting Environmental Educators at one of the agency's Environmental Education Centers as an instructor, greeter, assistant naturalist, gardener, or clerical helper; teaching Department sponsored programs, such as “Becoming an Outdoorswoman”; and working as a student intern.

In addition, while not noted on the website, attorneys may volunteer in DEC's Office of General Counsel. DEC's opinion request concerns two such attorneys. One is a former employee who left DEC in 1989, while the other left a position with a law firm. Both attorneys have more than ten years of professional experience and are volunteering at DEC in order to gain experience in the field of environmental law. DEC states that both attorneys have expressed an interest in being hired for positions in the private sector that would represent parties before DEC.

Each attorney has been with DEC over six months, volunteering one day per week. These two volunteers function in a manner that is not materially different from that of full-time, paid DEC staff attorneys. For example, the volunteers report to supervisory attorneys, who assign the volunteers work and review their work product. Because they are volunteers, the work of these two attorneys is more carefully monitored and scrutinized than if they were employed by DEC.

The focus of one attorney's work is researching administrative cases related to DEC's relationship with the Public Service Commission and the Federal Environmental Regulatory Commission. The other volunteer primarily handles enforcement cases pertaining to hazardous waste. In the course of enforcement proceedings, this volunteer informs adverse parties that she is representing DEC, without indicating that she is a volunteer. Many times this volunteer's work product is sent out under her supervisor's signature. However, her work product sometimes is

sent out under her own signature. As would be the case were she a paid, full-time DEC staff attorney, the volunteer's supervisor reviews settlements that the volunteer negotiates; only the supervisor, not the volunteer, is authorized to decide whether DEC will accept such a settlement. Her supervisor recently approved a settlement of an enforcement case that the volunteer negotiated in which the DEC obtained a significant sum for remediation.

Although both volunteers are privy to confidential information, DEC has not required them to sign confidentiality agreements or to execute oaths in which they agree to abide by the Public Officers Law, including the State Code of Ethics set forth in Public Officers Law §74, which all State employees are required to execute. Since they are both attorneys admitted to practice law in New York, however, DEC expects the volunteers to comply with the New York Rules of Professional Conduct. Under Rule 1.6, “[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person”²

The volunteers have asked DEC whether the post-employment restrictions in Public Officers Law §73(8) would preclude them from accepting positions that would involve appearing or practicing before DEC and from working on matters on which they worked for DEC. One volunteer recently learned of a position with an environmental law practice that regularly appears before DEC. DEC then requested this opinion from the Commission.

APPLICABLE LAW

Public Officers Law §73(1)(i) defines “state officer or employee” as follows:

The term "state officer or employee" shall mean:

- (i) heads of state departments and their deputies and assistants other than members of the board of regents of the university of the state of New York who receive no compensation or are compensated on a per diem basis;
- (ii) officers and employees of statewide elected officials;
- (iii) officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis; and
- (iv) members or directors of public authorities, other than multi-state authorities, public benefit corporations and commissions at least one of whose members is appointed by the governor, who receive compensation other than on a per diem basis, and employees of such authorities, corporations and commissions.

The post-employment restrictions, set forth in Public Officers §73(8)(a), establish 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 restrictions are of two types – a two-year bar and a lifetime bar – and are as follows:

(i) 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.

(ii) 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

Relying, in part, on an unpublished, informal opinion rendered by Ethics Commission staff in 1991, in its present request to the Commission DEC maintains that the post-employment restrictions should not apply to the volunteers about whom it now inquires for several reasons.³ DEC urges that, first, volunteers are not included in the definition of “employee” in Public Officers Law §2, nor are they included in the definition of “State officer or employee” in Public Officers Law §73(1)(i)(iii). Second, DEC contends the volunteers do not meet the common definition of employee, since they receive no compensation and DEC cannot control their conduct. Third, DEC argues, the volunteers do not possess any indicia of employment, including salary, health and other employee benefits, and participation in the State retirement system. Finally, DEC says, while Public Officers Law §17 specifically includes volunteers in the definition of “employees” for purposes of identifying individuals who are entitled to have the State defend and indemnify them if they are sued, volunteers are not mentioned in Public Officers Law §73.

We turn first to DEC's contention that volunteers are not included in the definition in Public Officers Law §73(1)(i)(iii).⁴ It is black-letter law that words and phrases used in a statute are to be given the meaning intended by the Legislature. “It is fundamental that words used should be given the meaning intended by the lawmakers, and words will not be expanded so as to enlarge their meaning to something which the Legislature could easily have expressed but did not.” (Citations omitted).⁵

Public Officers Law §73(1)(i)(iii) defines State officers or employees as “officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies.” The subdivision then expressly excludes from the definition of State officers or employees persons who are “officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis.” [Emphasis added.] Signally, the Legislature did not extend the exclusion to unpaid or *per diem* officers and employees of State departments, bureaus, divisions, or other State agencies. If the Legislature intended to exclude unpaid or *per diem* officers or employees of State departments, bureaus, divisions or other State agencies (as opposed to officers of boards, commissions or councils) from the definition of State officers or

employees, it could have done so specifically. It did not. It would be inappropriate for the Commission to so expand the clear statutory language.⁶

This is consistent with the well-established principle of statutory construction that the specific mention of a person implies the exclusion of others. “[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded.”⁷ Therefore, based upon the language of Public Officers Law §73(1)(i)(iii), the Commission concludes that those who serve without compensation in State departments, bureaus, divisions or other State agencies are State officers and employees for purposes of Public Officers Law §73.⁸

The Commission has previously addressed DEC's remaining arguments that the volunteers are not State employees because DEC cannot control their conduct and the volunteers do not possess any indicia of employment. In Advisory Opinion No. 93-07, the Commission considered whether an individual under sub-contract to serve as clinical director of a State facility was subject to the provisions of Public Officers Law §§73 and 74. Due to difficulties in recruiting qualified professionals, the State agency contracted with a private corporation to retain an individual who would perform the duties of clinical director. The individual was to receive one dollar per year directly from the State and no State benefits, and was to receive compensation, fringe and retirement benefits from the corporation under a separate contract. The State agency argued that by virtue of his receipt of one dollar in direct State compensation and the agency's designation of him as a policy-maker for financial disclosure purposes, the individual would be a State employee subject to ethics provisions of the Public Officers Law.

The Commission discussed the general indicia of employment. The Commission relied on Hardy v. Murphy, 29 AD2d 1038 (3rd Dept. 1968); Lieberman v. Gallman, 41 NY2d 774 (1977); and 1979 Op. Atty. Gen 57, which hold generally that, although the indicia of employment typically include the power to hire and fire, the payment of salary, and the power to direct the employee in his or her performance of official duties on behalf of the State, only the last element is essential to a finding of employment.⁹ The Commission found that it was not the amount of direct State compensation, but the person's relationship with the agency that determines whether a person is a State employee. The Commission concluded:

[the individual] functions as the executive/clinical director of a State facility with responsibilities no different from those of other similarly situated directors of other [the State agency] facilities. (footnote omitted) As stated in the job description for this position, [the individual] is responsible and reports to [the State agency]'s Regional Director and, ultimately to the Commissioner of [the State agency].

Under these circumstances, it is clear that [the State agency], and not [the corporation], has the right to control [the individual] in the performance of his duties at [the State facility]. In the instant matter, the Commission concludes that [the State agency] has appointed [the individual] to the position of clinical director, he is doing the work of the State, the power to direct and control his performance at [the State facility] rests with [the State agency] and not [the corporation]; therefore, he is a covered State employee for purposes of Public Officers Law §§73 and 74.

The Commission's conclusion in Advisory Opinion No. 93-07 further supports the conclusion that the two DEC attorneys are employees for purposes of Public Officers Law §73. DEC's website lists many positions available to the general public that provide a service to the State of New York. Some of these activities require a degree of expertise; some require no expertise or experience. Activities such as greeters or instructors provide a service to the public, while other positions, such as assisting wildlife biologists or Environmental Educators, involve service to a DEC staff person. In the Commission's view, there is a material difference between activities that are designed for volunteers, and volunteer activities that allow an individual to perform similar functions to that of a State employee and thereby acquire knowledge of the agency's internal operations and be privy to confidential agency information.

According to DEC, it is difficult to hire attorneys during the State's current fiscal crisis. Therefore, the two volunteer attorneys are providing services to DEC that would otherwise not be completed, or would be completed in a substantially longer period of time, because DEC has insufficient attorneys to handle all of the matters that come before it. In this regard, the two attorneys function in a similar manner as other DEC attorneys, albeit on reduced schedules and without salary and benefits, and perform tasks that would otherwise be undertaken by DEC attorneys. Unlike many of the volunteer opportunities described on the DEC website, the work being completed by these volunteers was not designed to be undertaken as an independent volunteer activity. Rather, it is essential to the mission of DEC and is performed under close DEC supervision.

Therefore, Advisory Opinion No. 93-07 is applicable here for several reasons. The two attorneys perform similar functions to other DEC attorneys. They report to supervisory attorneys, who give them assignments and review their work. In fact, their work is subject to a greater degree of scrutiny because they are volunteers. The supervisory attorneys have the final decision with respect to the attorneys' work. The volunteers do not have final authority to bind the agency to a decision, *e.g.*, settlement of an enforcement matter.

Under these circumstances, it is clear that the Office of General Counsel controls the two attorneys in the performance of their tasks for DEC. The General Counsel has permitted these two attorneys to undertake these responsibilities on behalf of DEC. The attorneys are doing the work of the State, which would otherwise not be completed or completed in a less timely manner. Contrary to DEC's contention, the power to direct and control these attorneys' work rests with the supervisory attorneys in the Office of General Counsel. Therefore, we conclude that, consistent with the rationale set forth by the Commission in Advisory Opinion No. 93-07, the two volunteer attorneys are functioning in roles that are substantially the same as other State employees and are subject to the control of the Office of General Counsel. Thus, we conclude that the volunteer attorneys are covered State employee for purposes of Public Officers Law §73.¹⁰

The Commission appreciates that the State's current fiscal constraints make it difficult to maintain adequate staffing levels for an agency, such as DEC, to fulfill its mission, and that volunteers perform valuable service for the State. The contributions of volunteers are valuable and their efforts should be appreciated. However, fiscal limitations or individuals' beneficence cannot be permitted to trump governmental integrity. Individuals functioning as State employees

who, for personal reasons, are willing and able to perform duties and responsibilities for the State without receiving a State salary or benefits should not be able to circumvent the State ethics provisions. Volunteers such as these attorneys, who perform the work of State employees, have a duty of loyalty to the agency and may not exploit their volunteer work to serve their private interests. The public should be assured that a person acting on behalf of an agency, such as DEC, is free of conflict of interest and is not utilizing his or her experience for personal gain.

The Commission concludes that the post-employment restrictions in Public Officers Law §73(8) are applicable to the two volunteer attorneys about whom DEC has inquired. The Commission has consistently said that the “evil to be avoided” by the post-employment restrictions is the misuse by a former employee of knowledge and contacts to the benefit of a private client. (*See*, Advisory Opinion Nos. 89-05, 90-03, 90-22, 94-8, 96-15, 97-15, 99-07 and 99-13.) The purpose of the revolving door restrictions is to prevent former government employees from unfairly profiting from or otherwise trading upon the contacts, associations and special knowledge they acquired during their tenure as public servants. *See*, Advisory Opinion No. 99-13.¹¹ The two attorneys are volunteering for DEC precisely in order to gain experience and expertise. Although their contribution is valuable and appreciated, it is intended to benefit them. To allow the two volunteers to appear and practice before DEC, most likely in adverse matters, would contravene the purpose of the post-employment restrictions.

Conclusion

The two attorneys volunteering for DEC are functioning as State employees and are subject to the control of the Office of General Counsel. Therefore, these two volunteer attorneys are covered State employee for purposes of Public Officers Law §73. The post-employment restrictions in Public Officers Law §73(8) are applicable to the two attorneys.

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 the opinion or related supporting documentation.

All concur:

Michael G. Cherkasky,

Chairman

Virginia M. Apuzzo

John M. Brickman

Richard D. Emery

Hon. Howard A. Levine

John T. Mitchell

Mark G. Peters,

Members

Dated: August 12, 2010

¹ <http://www.dec.ny.gov/about/1151.html>

² Rule 1.6 provides: “Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.”

³ In the 1991 informal opinion, by which the Commission is not bound in this or any other current matter, Ethics Commission staff concluded that an attorney who worked for DEC as a volunteer while awaiting admission to the New York bar, in order to gain experience that would improve his score on the Civil Service Legal Specialties Exam, was not an employee subject to the post-employment restrictions in Public Officers Law §73(8)(a). Commission staff relied, in part, upon Public Officers Law §2, which provides that an “employee” under the Public Officers Law means “every officer ... appointed by one or more state officers ... and authorized to exercise his official functions throughout the state.” Citing case law, staff also considered the following factors: the selection and engagement of the person; the payment of salary or wages; the power of dismissal; and the power of control of the person's conduct. Concluding that control is the most important of these factors, staff determined that the volunteer was not an “employee,” since DEC did not have the authority to compel the volunteer to perform any particular duties. In addition, staff noted that the volunteer did not possess any other indicia of employment, such as compensation and retirement, health and other employee benefits.

⁴ Pursuant to Executive Law §94(1), the Commission's jurisdiction does not include interpreting the definitions of “state officer” and “local officer” in Public Officers Law §2. The scope of our discussion, therefore, will pertain to the definition of “state officer or employee” set forth in Public Officers Law §73.

⁵ McKinney's Statutes §230.

⁶ Id.

⁷ McKinney's Statutes §240.

⁸ Contrary to DEC's contention, the Commission's conclusion is buttressed by the language in Public Officers Law §17. While the Commission is not authorized to interpret the provisions of Public Officers Law §17, we note that the inclusion of volunteers in the definition of “employee” indicates that, where the Legislature specifically intended to extend a benefit to volunteers, it has expressly provided for such benefit in the statute. This is distinguishable from Public Officers Law §73(1)(i)(iii), where the Legislature did not extend the exclusion afforded to unpaid or per diem officers to officers and employees of State departments, bureaus, divisions, or other State agencies who receive no compensation or are compensated on a per diem basis, thereby supporting our determination that volunteers were intended to be omitted from the exclusion in Public Officers Law §73(1)(i)(iii).

⁹ The principle that the most significant factor to the finding of employment is the power to direct and control the daily activities of the worker was reaffirmed in Advisory Opinion No. 95-34.

¹⁰ While the application of Public Officers Law §74 to the two DEC volunteers is not the question before us, we agree with the Commission's conclusion in Advisory Opinion No. 93-7 that individuals who serve without compensation are employees for purposes of the Code of Ethics set forth in Public Officers Law §74.

¹¹ In Advisory Opinion Nos. 91-02, 93-15 and 02-04, the Commission interpreted the post-employment restrictions to permit former employees to be involved in matters that would otherwise violate the post-employment restrictions in narrow circumstances in which the activity at issue benefits the State, provided that neither the former employee nor the former employee's firm would benefit financially.