STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS

Advisory Opinion No. 12-01: Application of the two-year bar set forth in Public Officers Law §73(8)(a)(i) to a former State employee seeking to represent an appellant in a *pro bono* capacity in a fair hearing before his former agency.

INTRODUCTION

The following advisory opinion is issued in response to a specific request by Mr. Doe,* a former hearing officer in of the Office of Temporary Disability Assistance of the State of New York ("OTDA"). Mr. Doe seeks to represent, in a *pro bono* capacity (*i.e.* free of charge), individuals who appear before OTDA to appeal determinations concerning social service benefits and other public assistance made by [another agency]. He has asked the Commission if the post-employment restrictions contained in Public Officers Law §73(8)(a)(i), known as the "two-year bar," apply to this activity and therefore prevent him from undertaking this work.

Mr. Doe's inquiry presents two distinct questions for the Commission. First, does Mr. Doe's proposed activity constitute the type of appearance or practice before his former agency that the two-year bar prohibits? Second, does *pro bono* service of the type Mr. Doe seeks to provide come within the ambit of the two-year bar contained in Public Officers Law §73(8)(a)(i)?

The Commission finds that both questions are answered in the affirmative. Consequently, pursuant to the authority vested in the New York State Joint Commission on Public Ethics ("Commission") by Executive Law §94, the Commission renders its opinion that Public Officers Law §73(8)(a)(i) prohibits Mr. Doe from appearing before OTDA for any reason within two years of his termination, including representing individuals who are appealing [the other agency's] decisions. This prohibition applies even if Mr. Doe is appearing before OTDA on a *pro bono* basis.

BACKGROUND

The requesting individual is Mr. Doe. [Less than two years ago], Mr. Doe retired from OTDA where he had served as hearing officer [ ]. As a hearing officer, Mr. Doe presided over what are known as "fair hearings." Authorized by Section 22 of the New York State Social Services Law and Part 358 of Title 18 NYCRR, a fair hearing is an opportunity for an individual to appeal a decision made by a local social services organization concerning denials and other determinations related to public assistance and other social service benefits. The fair hearing process allows an individual to be represented by an attorney, present witnesses, and examine evidence.[1]

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

[1] *See* 18 NYCRR §358-3.4.

An OTDA fair hearing is to be conducted by an "impartial hearing officer" who is to "preside over the fair hearing and regulate [its] conduct and course."[2] Additionally, the hearing officer is required to "review and evaluate the evidence, rule on the admissibility of evidence, determine the credibility of witnesses, [and] make findings of fact."[3] At the conclusion of the fair hearing, the hearing officer "prepare[s] an official report containing the substance of what transpired at the fair hearing and . . . a recommended decision to the commissioner or the commissioner's designee."[4]

Mr. Doe has the very laudable desire to provide *pro bono* legal representation for individuals who are appealing social service agency decisions through the OTDA fair hearing process. Specifically, as detailed in his [ ] correspondence to the Commission, Mr. Doe seeks to represent individuals in OTDA fair hearings that would review [the other agency's] decisions relating to social service benefits and other public assistance. As a former hearing officer, he now seeks to utilize his experience on behalf of persons who may not be able to afford an attorney. Mr. Doe's correspondence requested guidance on whether such work would run afoul of New York's restrictions on employment for former state employees.

In an electronic correspondence [ ], Commission staff issued informal guidance to Mr. Doe. Commission staff opined that Mr. Doe's representation of clients, regardless of compensation, in fair hearings conducted by OTDA would, in fact, be appearances before his former agency that are prohibited by the two-year bar in the Public Officers Law.

On [date], Mr. Doe submitted a request for a formal advisory opinion together with a brief supporting his position that a *pro bono* appearance in a fair hearing before OTDA should not be considered a violation of the two-year bar contained in the Public Officers Law.[5] Mr. Doe essentially proffers two categories of arguments in favor of his contention that the Public Officers Law does not prohibit his proposed activities. First, he argues that his representation of persons at OTDA fair hearings is not an actual appearance before OTDA, his former agency. Second, Mr. Doe argues that public policy and the manner in which the fair hearings are structured both weigh in favor of allowing *pro bono* representation of individuals at OTDA fair hearings.

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[2] 18 NYCRR §358-5.6(a), (b).

[3] 18 NYCRR §358-5.6(b)(7)

[4] 18 NYCRR §358-5.6(b)(9).

[5] The specific question Mr. Doe asked the Commission to consider is as follows:

> Is it permissible for a person, formerly employed as a hearing officer by . . . OTDA, within the two year period directly after retirement from said retired person's State employment, to represent an Appellant in a pro bono capacity during a fair hearing presided over by an OTDA hearing officer, when the issue to be reviewed by the OTDA hearing officer relates to the adequacy, reduction, denial, and/or discontinuance of [ ] benefits, and/or any other issue subject to the fair hearing process, as delineated by [Title 18 NYCRR Part 358], which have been determined by the actions and/or inactions by . . . [the other agency]?

As explained more fully below, the Commission finds that neither of Mr. Doe's arguments is persuasive. Rather, the law clearly and plainly prohibits – for two years after his separation from state service – the services Mr. Doe seeks to provide.

DISCUSSION

Public Officers Law §73(8)(a)(i)

At issue here is Section 73(8)(a)(i) of the Public Officers Law. This section of the statute contains two different employment restrictions on former state officers and employees. Both restrictions are applicable for two years after a state officer or employee leaves state service:

> No person who has served as a state officer or employee shall within a period of two years after the termination of such service of 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.[6]

The first restriction prohibits former state officers and employees from appearing or practicing before their former agencies. This prohibition is commonly referred to as the "appearance/practice clause." The second restriction prohibits these persons from rendering services on behalf of others for compensation. This restriction is known as the "backroom services clause."

These post-employment restrictions, which are contained in The Ethics in Government Act (L. 1987, Ch. 813), 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."[7] Therefore, the language of the two-year bar addresses 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."[8]

The Representation of Persons in an OTDA Fair Hearing
Is an Appearance or Practice before OTDA

Mr. Doe contends that his representation of individuals at OTDA fair hearings does not constitute an appearance or practice before OTDA. In Mr. Doe's view, the fact that OTDA is reviewing another agency's decision means that the fair hearing is not a "case, proceeding or

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[6] Public Officers Law §73(8)(a)(i).

[7] Governor's Program Bill Memo, Governor's Bill Jacket, L. 1987, Ch. 813.

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

application or other matter before" OTDA.[9] This argument has no merit. Rather, Mr. Doe's proposed activities unmistakably constitute an appearance before OTDA, his former agency.

To characterize an OTDA fair hearing as anything other than a "case or proceeding" that is before the agency strains credulity and common sense. An OTDA fair hearing is, as Mr. Doe himself describes it, a "quasi-judicial" forum.[10] In that forum, an OTDA hearing officer exercises considerable judgment and discretion. As noted above, the hearing officer reviews and evaluates the evidence, rules on the admissibility of evidence, determines the credibility of witnesses and makes findings of fact.[11] Moreover, the hearing officer prepares an official report at the conclusion of the hearing and makes a recommended decision as to the outcome of the dispute.[12] Certainly, then, the fair hearing is a "case or proceeding" that is before OTDA.[13]

This conclusion is further supported by *Kelly v. New York State Ethics Commission*.[14] There, the court held that a former Public Employment Relations Board ("PERB") employee's activities as a mediator and arbitrator on panels administered by PERB violated the appearance/practice clause of the two-year bar. As a mediator or arbitrator, the former employee would, among other things, provide PERB with recommendations following a mediation or arbitration.[15] The court concluded that the former employee's service on these panels "undermine[d] the public trust and confidence in government" because the former PERB employee's "recent and close relations with PERB might readily have a tendency to unwarrantedly elevate his recommendations into PERB recommendations rather than allowing for new and independent solutions."[16]

Here, OTDA is similar to PERB in that both agencies' quasi-judicial activities involve hearing disputes that are external to the agencies themselves. OTDA, as explained above, adjudicates disputes involving public assistance and social service benefits determinations made by other agencies. PERB's Office of Conciliation "has primary responsibility for providing collective bargaining related dispute resolution services throughout" New York.[17] If a PERB arbitration or mediation falls within the reach of the appearance/practice clause, then so must an OTDA fair hearing. And, certainly, the same dangers to the public trust identified by the court in

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[9] Letter from Doe, received [date] ("Doe Letter"), p.3; Brief from Doe, dated [date] ("Doe Br."), pp. 2-4.

[10] Doe Br., p.3.

[11] *See* 18 NYCRR §358-5.6(b)(7).

[12] *See* 18 NYCRR §358-5.6(b)(9).

[13] Indeed, in Advisory Opinion No. 99-17, the Commission generally stated that an agency's adjudication of a claim is "a matter before the agency" for the purposes of Public Officers Law §73(8)(a)(i).

[14] 614 N.Y.S.2d 996 (Sup. Ct. 1994).

[15] *See id*. at 999.

[16] *Id.* at 1001.

[17] Office of Conciliation, Public Employment Relations Board, http://www.perb.ny.gov/Concil.asp (last visited, Aug. 24, 2012).

Kelly – the possibility of unwarranted influence over quasi-judicial decision makers – would be present should Mr. Doe advocate before his former colleagues at OTDA.

Moreover, the Commission's and the *Kelly* court's common sense application of the plain language of the law precisely comports with the "underlying premise" of the statute, as articulated by the New York Court of Appeals:

> The underlying premise is that "[f]ormer officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies."[18]

Mr. Doe's proposed activities directly implicate this scenario – he would be representing clients in front of his former colleagues. It makes no difference, then, that OTDA is adjudicating another agency's determination or that the fair hearing decision itself is reviewable by the courts.[19] The purpose of the law – eliminating the "unfair advantage"[20] former state employees (and their clients) have when appearing before their former agency – does not allow for such exceptions.

The Commission also observes that while the purpose behind the appearance/practice clause applies throughout State government, its significance is even greater in connection with quasi-judicial hearings, like those OTDA conducts. "Basic to every judicial and quasi-judicial proceeding is that the integrity of the decision-making body must be above reproach and even the appearance of impropriety should be avoided."[21]

Finally, the Commission notes that the appearance/practice clause is not limited to merely physical appearances or interactions (telephone calls, letters, electronic correspondence) with a former state officer's or employee's agency. The clause also covers activities, such as a former employee's submission of briefs and other materials bearing his name related to the representation of a client at an OTDA fair hearing.[22]

<u>The Appearance/Practice Clause Applies to *Pro Bono* Services</u>

Having established that Mr. Doe's representation of persons in OTDA fair hearings is an appearance before that agency for the purposes of Public Officers Law §73(8)(a)(i), the next inquiry is whether the appearance/practice clause allows for appearances before a former state

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[18] *Forti v. State Ethics Comm'n*, 75 N.Y.2d 596, 605 (1990) (alterations in original) (quoting Pub. L. 95-521 [Ethics in Government Act], Sen. Rep. No. 95-170 reprinted in 1978 U.S. Code, Cong. & Admin. News 4216, 4247).

[19] Doe Letter, p.3.

[20] *Forti*, 75 N.Y.2d at 605; *see also Kelly*, 614 N.Y.S.2d at 1001 (The two-year bar is designed to "prevent[] favoritism, undue influence, conflicts of interest and even the appearance of same.").

[21] *Santola v. Eisenberg*, 465 N.Y.S.2d 91, 92 (4th Dept. 1983).

[22] *See* Advisory Opinion No. 95-24 ("Generally, a former employee may not, during this two year period, prepare an application or submit or complete any documents that will be reviewed by his or her former agency."); Advisory Opinion No. 95-15 ("Other prohibited appearances include preparing documents which are to be presented before the former agency."); *see also Kelly*, 614 N.Y.S.2d at 1000.

employee's agency that are provided on a *pro bono* basis. It does not. Rather, the appearance/practice clause prohibits any appearance, regardless of whether the former state employee or officer is compensated.

The plain language of the statute and established canons of statutory construction easily answer this question. The phrase "receive compensation" comes immediately after the disjunctive "or" that separates the appearance/practice clause from the backroom service clause.[23] It is, therefore, readily apparent that the phrase pertains only to the backroom services clause and does not modify, or have any bearing on, the appearance/practice clause. This conclusion follows from the well-settled principle that "terms connected by a disjunctive be given separate meanings."[24] Consequently, the bar in the appearance/practice applies regardless of whether a former employee or officer receives compensation for his services. In other words, the appearance/practice clause applies even to *pro bono* activity. Any other conclusion would run afoul of the plain language of the statute as well as long-established rules of statutory construction.

Mr. Doe[25] and others who have made submissions to the Commission in support of his proposed work cite to studies and initiatives that speak to the very important need to provide legal representation to persons of modest means in civil proceedings involving fundamental human needs. Chief Judge Lippman of the New York Court of Appeals has described these legal services as the "ultimate safety net – often the only means by which [people] can keep their lives afloat."[26] And the Chief Judge is certainly correct when he states that "ensuring adequate legal representation" is necessary in order to provide "equal justice under the law."[27]

These policy considerations, however, do not prevail over the unambiguous plain language of the statute. "Our conclusion that the statute is unambiguous obviates any need to consider . . . the public policy arguments made" by Mr. Doe and others.[28] Indeed, in the face of unambiguous language, the Commission cannot look beyond the four corners of the statute. Rather, "[i]t is axiomatic that the plain meaning of a statute controls its interpretation, and that . . . review must end at the statute's unambiguous terms."[29] It should come as no surprise then, that the

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[23] *See* Public Officers Law §73(8)(a)(i).

[24] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

[25] *See* Doe Br., p. 4.

[26] Chief Judge Jonathan Lippman, Testimony before Senate and Assembly Hearings on IOLA and Civil Legal Services (January 7, 2010), p. 1, available at http://www.nlada.org/DMS/Documents/1263915337.42/Testimony%20of%20Chief%20Judge%20Jonathan%20Lippman%201-10.pdf.

[27] Chief Judge Jonathan Lippman, *Law in the 21st Century: Enduring Traditions, Emerging Challenges* (May 1, 2010), p. 17, available at http://www.nycourts.gov/ctapps/LD10Transcript.pdf.

[28] *U.S. v. Peterson*, 394 F.3d 98, 107 (2d Cir. 2005).

[29] *Brodie v. Schmutz (In re Venture Mort. Fund, LP)*, 282 F.3d 185, 188 (2d Cir. 2002).

Commission has long-held that the appearance/practice clause reaches, without exception, "efforts to influence a decision of the former agency."[30]

Pro Bono Backroom Services

Mr. Doe did not seek any guidance on the backroom services clause of Public Officers Law §73(8)(a)(i). Nonetheless, in light of Mr. Doe's desire to provide *pro bono* legal assistance, the Commission will supply guidance on how Mr. Doe can accomplish his goal, at least in part, without violating Section 73(8)(a)(i).

As noted above, the appearance/practice clause of the statute prohibits Mr. Doe from appearing or practicing before OTDA in a fair hearing, whether for compensation or on a *pro bono* basis, for two years after his separation from state service. Under the backroom services clause of the statute, however, Mr. Doe may provide certain services, free of charge, to individuals participating in OTDA fair hearings. These *pro bono* backroom services are activities that do not rise to the level of appearing or practicing before OTDA. Such activities may include providing general information, guidance and strategy on the fair hearing process as well as assisting in the preparation of documents that may be submitted by the client or by another attorney. In this way, Mr. Doe would be able to utilize his expertise as a former OTDA hearing officer, serve those in need of legal advice, and remain compliant with the law's post-employment restrictions. Additionally, nothing in Public Officers Law §73(8)(a)(i) necessarily prohibits Mr. Doe from appearing, practicing or rendering backroom services, whether or not on *pro bono* basis, to individuals with matters pending before agencies other than OTDA.

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
Patrick J. Bulgaro
Hon. Joseph Covello
Hon. Vincent A. DeIorio
Marvin E. Jacob
Seymour Knox, IV
Hon. Mary Lou Rath
David A. Renzi
George H. Weissman
Ellen Yaroshefsky

Absent:

Ravi Batra
Mitra Hormozi
Daniel J. Horwitz
Gary J. Lavine

Dated: August 28, 2012

[30] Advisory Opinion No. 00-4 (citing Advisory Opinion No. 99-17).