

# STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory  
Opinion No.  
89-5:**

Whether the post-employment restrictions of §73(8) of the Public Officers Law prohibit a former State employee from appearing or practicing or receiving compensation for services rendered as an employee of a governmental entity.

## INTRODUCTION

The following advisory opinion is issued in response to an inquiry whether §73(8) of the Public Officers Law prohibits a former employee in the New York State Department of [ ] from appearing, practicing or receiving compensation for services rendered before the [Department] as an employee of [a municipality] within two years after his termination from service with the [Department] further, whether the individual's knowledge of specific [ ] projects in the municipality would preclude his appearance, practice or receipt of compensation for services on those projects, at any time.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by §94(15) of the Executive Law, the Commission hereby renders its opinion that neither the two-year ban nor the lifetime post-employment restrictions of §73(8) of the Public Officers Law act to prohibit a former State employee of the [Department] from appearing or practicing or receiving compensation for services rendered before the [Department], as long as such appearance, practice or services rendered are on behalf of another governmental entity in the capacity as an employee of that governmental entity.

## BACKGROUND

Subdivision 8 of §73 of the Public Officers Law provides, in relevant part, as follows:  
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. 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 personally participated during the period of his service or employment, or which was under his or her active consideration . . . (emphasis added)  
As the Commission noted in its Advisory Opinion Number 88-1, subdivision 8 of §73, generally referred to as the "revolving door" provision, "sets the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate employment with a state agency."

While in State service, the individual held the position of [ ].<sup>1</sup> In this position, he was responsible for the management of the [ ] Section and project management within [ ] and [ ] counties. These duties included [ ] inspection and [ ] review and/or permitting of the [ ] projects in the [municipality].

The individual's performance evaluation program for the period from November 29, 1988 to November 28, 1989 listed the following tasks and objectives:

1. Progress the planning, design and monitor the construction of the [ ] in accordance with the section workplan.
2. Provide project guidance and management [ ].
3. Refer significant violations [ ] for enforcement. Prepare and provide technical support for these enforcement efforts.
4. Provide program direction and guidance to [ ] section [ ].
5. Undertake appropriate management, computer, report writing, legal and technical training as available and directed.
6. Provide administration and personnel management for the [ ] section. [ ].
7. Provide an assessment report of the impacts upon the [ ] program resulting from the revisions to the Part [ ] Regulations. Specific details of the staffing needed to undertake the new or expanded areas of regulation and the proposed plan [ ].

The description of the position of [Director] for the [municipality] provides that:

(t)he director would be responsible to advise the [municipality] in planning for management of [ ] and related [ ] issues. The work involves analysis of present practices and the direction of services in [ ]. The incumbent would assist the [municipal board] in the development of a comprehensive [ ] program. This would include a community education program. The incumbent would serve as primary contact with all regulatory and monitoring county, state or federal agencies [ ]. Supervision would be exercised over all [ ] appropriate personnel or programs. Work will be performed under the general supervision of the [ ] Supervisor. A high level of independence will be afforded this significant [ ] management position.

## **DISCUSSION**

In reviewing the application of the two year proscription contained in §73(8), the Commission considered the provisions of the statute, which prohibit the appearance or practice before a former employing State agency, or the receipt of compensation for any services rendered "on behalf of any person, firm, corporation or association" in relation to any case, proceeding or application or other matter before such agency. The Commission also considered what the purpose of the revolving door subdivision is, i.e., to preclude the possibility that a former State employee may leverage his or her knowledge, experience and contacts gained in State service to his or her advantage or that of a client, thereby securing unwarranted privileges, consideration or action.

The Attorney General, in interpreting the previous revolving door provision contained in §73(7) of the Public Officers Law, stated that the purpose of the subdivision was to "address the ethics

problems that arise when a State employee leaves State service to work in the private sector." (Op.No. 84-F20; 84-F12.) The subdivision seeks to eliminate any public doubt as to whether actions by the officer prior to separating from State service were in the public interest. (Op.No. 84-F20.)

In the matter currently before the Commission, the individual intends to transfer his employment from State government to municipal government. In both situations, the "client" is the same: the public-at-large. There would be no benefit to the public if a former State employee, serving the citizens of this State in another public employment capacity, as a local government employee, were precluded from appearing or practicing before his or her former State agency. The "evil" to be avoided -- the misuse of knowledge and contacts to the benefit of a private client--would not be a possibility in the case now before us. Application of §73(8) is triggered when a State officer or employee leaves State (or "public" service), and joins the non-governmental (or "private") sector.

The Commission concludes that the two year ban on appearance, practice or receiving compensation for services rendered before an individual's former employing agency does not apply in the case of a State employee who transfers employment from one State agency to another; or to one who terminates employment with a State agency and takes employment with the legislative or judicial branch of government or with any municipal government as long as he or she is acting within the proper discharge of his or her official duties.

With respect to the lifetime ban on appearances, a similar reasoning applies. There the proscription lies against any appearance, practicing or services rendered on behalf of any person, firm, corporation or "other entity" before any State agency with respect to which the former employee was directly concerned and personally participated or which was under his or her active consideration. Here, the drafters chose to substitute the phrase "other entity" for "association" which appears in the two year ban. Arguably, the term "entity" encompasses a broader spectrum of meaning than does the word "association". The term must be read within the context of the other terms around it--person, firm or corporation--and within the intent of a revolving door proscription to prevent former public employees from gaining an unfair advantage in their private employment, where income and appointment depends upon the contacts, knowledge and influence the individual gained while in public service.

The Commission concludes, as with the two-year ban, that the impact of the lifetime ban is aimed at services rendered by the former employee in non-governmental service on behalf of a client or entity, and not at services rendered as a government employee on behalf of that employing government. Nothing in legislative intent or previous interpretations would lead us to conclude otherwise.

Therefore, since the "client" in the matter before the Commission is a unit of local government, the individual may render whatever services may be required in his position [as Director for the municipality] and may appear or practice before his former State agency as long as such services, appearances or practicing are in this official capacity.

It must be noted that the opinion of this Commission extends only to those activities on behalf of the [municipality] engaged in by the former State agency employee as a public employee of that government. Any other activity by that employee on behalf of any entity which is proscribed by §73(8) of the Public Officers Law would continue to be prohibited. This former employee cannot represent in any capacity any person, firm, corporation, association or other private entity before his former State agency unless that representation is in accordance with §73(8).

All concur:

Elizabeth D. Moore, Chair Joseph J. Buderwitz, Jr.

Angelo A. Costanza

Norman Lamm

Robert B. McKay, Members

Dated: April 11, 1989

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## **ENDNOTES**

1. The job description of a [ ] provides: [ ].