

STATE OF NEW YORK STATE ETHICS COMMISSION

Advisory Opinion No. 89-7: Application of §73(8) of the Public Officers Law to former State employees.

INTRODUCTION

The following Advisory Opinion is issued in response to an inquiry by an attorney made on behalf of clients who are former State employees to determine the application of the revolving door proscriptions of §73(8) of the Public Officers Law to certain general situations.

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 on the application of §73(8) to such former State employees.

The Commission, because of the general questions of the application of §73(8) involved, will apply this Advisory Opinion to any similar request and to any complaint alleging a violation of §73(8) of the Public Officers Law.

APPLICABLE LAW

Subdivision 8 of §73 of the Public Officers Law provides, in pertinent 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. . . . *This subdivision shall not apply to any appearance, practice, communication or rendition of services before any state agency, . . . or to the receipt of compensation for any such services, rendered by a former state officer or employee . . . which is made while carrying out official duties as an elected official or employee of a federal, state or local government or one of its agencies.*¹ (emphasis added)

DISCUSSION

The questions shall be addressed in order, followed by the Commission's conclusions.

1. To what extent may a former State employee within two years of termination of State employment assist a client in matters related to the preparation of a permit application, grant

application, or contract proposal *prior* to the submission of that application or proposal to his or her former agency assuming the former employee was directly involved in the project while employed by that agency? (emphasis in original)

The question as presented combines the aspects of the two revolving door provisions of §73(8) of the Public Officers Law. A former State employee may not receive compensation for any matter related to the preparation of a permit application, grant application or contract proposal prior to its submission to his or her former employing State agency within two years of termination from State service whether or not he or she was involved in the project while employed by the agency. Even though the former employee does not appear or practice before the former agency, he or she is barred for two years from receiving compensation in any form for services rendered in relation to any matter before the former agency.

Further, to the extent that the former employee was directly involved in the permit application, grant application or proposal during his or her employment with the State agency, he or she is permanently proscribed by §73(8) from appearing, practicing or receiving compensation for any services before *any* State agency in relation to that application or transaction. The question suggests that the underlying issue is the propriety of services performed by a former State employee *prior in time* to a permit or grant application or contract proposal or any matter actually being submitted to the former employing agency. The question is framed to suggest that, once the preliminary services had been performed and compensation received therefor, the former State employee would disassociate him or herself from the matter *before* it is submitted to the former agency for consideration. Presumably, this disassociation would occur to avoid the certain application of the revolving door provisions. In addition, the question supposes that the former employee was directly involved in the project while in State service.

The Commission must determine the meaning of the phrase "before such agency" as used in §73(8) which triggers the application of the revolving door provision. The Commission reviewed the legislative history surrounding the Ethics in Government Act, previous Attorney General's opinions and the rules of statutory construction for guidance.

Subdivision 8 of §73 can be said to reflect the same intent expressed by Congress when it enacted the federal restrictions on post-employment activities--that "[f]ormer officers should not be permitted . . . to utilize information on specific cases gained during government service for their own benefit and that of private clients."²

In interpreting the former revolving door provisions which preceded the current New York State restrictions on post-employment activities,³ the Attorney General stated that the subdivision

addresses the ethics problems that arise when a State employee leaves State service to work in the private sector. . . . The statute also seeks to deal with the situation where a former State Employee, soon after separation, deals with his former colleagues in their official capacities, and may receive special treatment or may create the impression in others that he enjoys the favor of his former colleagues. . . . Although a particular individual may not actually engage in wrongdoing, it is the potential for abuse that the statute addresses.⁴

McKinney's Statutes, §95, suggests that courts, when passing on matters of legislative intent, should look at the old law, and the mischief sought to be remedied by the new legislation, and should construe the act in question so as to suppress the evil and advance the remedy.⁵ It is frequently held that the words of a statute are construed with reference to its subject matter and the object sought to be obtained; and that construction is to be preferred which furthers the object, spirit and purpose of the statute. McKinney's Statutes, §96.⁶

The time frame in which the services of the former State employee are rendered with respect to bringing a case, proceeding, application or transaction in front of the former employing agency is not the decisive factor in determining whether or not it is permitted under the law. Clearly, a specific permit or grant application or contract proposal as posed in the question is under the jurisdiction of a particular agency, at all times, whether or not the agency physically has received the documentation or was yet to be contacted on the matter.⁷

To conclude that the revolving door proscription does not apply in the circumstances described herein would run afoul of the purpose of the subdivision and contort the meaning of the subdivision by splitting hairs. It would not be a sensible result to find that §73(8) would allow former State officers and employees to be compensated for services rendered on permit or grant applications or contract proposals in circumstances where all of their services were rendered "prior to submission" to the agency.⁸

Such an interpretation would create a window in the revolving door proscriptions which the Commission does not believe was intended by the Legislature. If a private client has chosen to retain the services of the former State employee, it is likely that choice was made on the basis of the former State employee's knowledge of the subject matter as well as of the inner workings and policies of his or her former agency. The client is seeking specific expertise and "insider" knowledge. The revolving door proscriptions are aimed at preventing former State employees from utilizing such knowledge, experience and contacts gained in State service to the benefit of a private client or to his or her own personal gain.

Therefore, the Commission concludes that the two year bar of §73(8) acts to preclude a former State employee from appearing, practicing or receiving compensation for services rendered in relation to the preparation of a permit or grant application or contract proposal even if such services were rendered prior to the submission of such application or proposal to the former employing agency. As well, the lifetime bar acts to preclude such activities before any State agency where the former employee personally participated in, was directly concerned with, or actively considered the case, proceeding, application or transaction while employed. 2(a). To what extent may a former State employee within two years of termination of his or her State employment communicate, on behalf of a client, with his or her former agency relative to generic issues regarding the policies and procedures of his or her former agency?

A "communication" by a former State employee on behalf of a client or any person amounts to an appearance or practice before his or her former agency prohibited by §73(8). Generic issues regarding policies and procedures would fall within the "other matters" category of proscribed circumstances and would be barred whether or not compensation is received for the services rendered.

2(b). May a former State employee within two years of termination of his or her State employment make a freedom of information request pursuant to Public Officers Law, §87 on behalf of a client?

A former State employee, within two years of termination from State service, may not appear or represent a client or any person on a Freedom of Information Law request. Such an appearance under Article 6 of the Public Officers Law (Freedom of Information), would not simply be *pro forma*. Should the request be denied, §89(4) of the Public Officers Law allows an appeal to be filed in writing and representation before such former State agency in order to reverse an initial denial of access to the information. A Freedom of Information Law request made on behalf of a client or other person would be an appearance or practice before the former agency which is prohibited by §73(8).⁹

However, a former employee who is acting solely on his or her own behalf (and is not compensated for the services) in relation to a Freedom of Information Law request, may make such a request within two years of termination of employment with his former agency. In this limited circumstance, the individual is acting on his or her own behalf in relation to a personal inquiry. The Commission does not find that the "revolving door" provision was meant to limit such personal inquiries for public information, as long as such inquiries are personal in nature only and relate solely to the inquirer. The Commission would look closely at any circumstance which could be construed to be merely a veil to make an otherwise prohibited appearance before a former employing agency.

3. To what extent may a former State employee within two years of termination of his or her State employment appear or practice before his or her former agency on matters on which he or she was not directly involved while an employee of the agency on behalf of a municipality for which he or she is acting as a paid consultant?

There is a total ban for two years on any appearance or practice before a former employing agency or receipt of compensation for any services rendered by a former employee on behalf of any person, firm, corporation or association in relation to any matter before such agency, without regard to whether the former employee was directly involved or personally participated in the matter.

If the appearance or practice is made by a former State employee as an *employee* or *elected official* of a municipality, such conduct would be allowed. Section 73(8) of the Public Officers Law was amended in 1989 to provide a clarification of the status of a former State agency employee who became employed by or was elected to an official position of a local government.¹⁰ That narrow exception to the "revolving door" restriction clearly does not extend to "paid" consultants or retained representatives of such government.¹¹ Where the former employee is retained as a consultant or representative of the municipality and no employment relationship exists, the revolving door provision applies to prohibit such conduct before one's former agency.

For the purposes of construing the §73(8) reference to "corporation" on whose behalf a former employee may not appear, practice or render services for compensation, the State Ethics

Commission has concluded that "corporation" includes "municipal corporation", including counties, towns, cities and villages.¹²

4. To what extent may a former DEC employee, within two years of termination of his or her State employment, participate, on behalf of a client, in the settlement of an action which has been commenced either by or on behalf of the DEC in a state or federal court when settlement negotiations involve direct contact with the DEC?

A former DEC employee, within two years of termination from State service, may participate in the settlement of an action in State or federal court on behalf of a client, even if such settlement negotiations require direct contact with DEC staff. The representation of the client, as long as the matter is in a court proceeding and does not involve a case, proceeding, application, other matter or transaction which is before the former employing agency, would not violate the "revolving door" provision. The case or controversy must be before a court of competent jurisdiction. In most cases, such court must review or approve such a settlement prior to its ultimate acceptance. Under §73(1)(g) of the Public Officers Law, a State (or federal) court is not one of the entities defined as a State agency;¹³ it is thus not covered by §73.

The lifetime bar of §73(8) of the Public Officers law is different and distinct from the two year bar, and it also must be considered in light of the question posed. The lifetime bar prohibits a former employee from receiving compensation in relation to any case, application, proceeding or transaction without any limitation as to where such activity occurs--before any State agency or any court of competent jurisdiction. The "lifetime" prohibition reads as follows:

. . . (n) no person who has served as a state officer or employee shall after the termination of such services 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.

Therefore, a former State officer or employee is barred from receiving compensation from a client in any federal or State court proceeding where that former officer or employee was either directly concerned with and personally participated in the case, application, proceeding or transaction or had such case, etc., under his or her active consideration during State employment or service.

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 an opinion.

All concur:

Elizabeth D. Moore, Chair

Joseph J. Buderwitz, Jr.
Angelo A. Costanza
Norman Lamm
Robert B. McKay, Members

Dated: December 14, 1989

ENDNOTES

1. The last sentence cited became effective July 1, 1989, pursuant to Chapter 242 of the Laws of 1989.
2. 1978, US Code and Administrative News, p. 4247, as cited in State Ethics Advisory Opinion 88-1.
3. §73(7) of the Public Officers Law.
4. Opinion No. 84-F20.
5. pp 196-201.
6. McKinney's Statutes, §96, pp 202-210.
7. Webster's Ninth New Collegiate Dictionary defines "before" to mean "under the jurisdiction. . .of"
8. The word "before" is not an indication of time. For, once the application has been filed, even should such former employee then totally withdraw from participation now that the former agency actually has the application, he or she at the moment of filing will have received compensation for services rendered in relation to an application, etc., before the agency.
9. The Freedom of Information Law guarantees the right of the public to have access to the public documents of a State agency. The law does not require any individual to appear by attorney or representative to obtain such information. The preclusion of such an appearance, etc., by a former State employee does not adversely affect a potential client--in that such client is able to make his or her own request for such information.
10. See footnote 1 and corresponding text.
11. This interpretation is consistent with the principle that the specific mention of one person or thing [in a statute] implies the exclusion of other persons or thing[s]. McKinney's Statutes, §240. Clearly, the Legislature could have extended the exemption from the application of the revolving door restriction to include not only employees of governments and elected government officials but also paid consultants to government entities. It did not make that extension.

12. §2 of the General Municipal Law defines "municipal corporation" to include counties, towns, cities and villages.

13. Section 73(1)(g) defines the term "state agency" to mean any state department, or division, board, commission or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the state university of New York or the city university of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the state.