

STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory
Opinion No.
89-8:**

Application of the post-employment restrictions of §73(8) of the Public Officers Law to a former State employee of [a State agency] seeking employment with a consulting firm doing business with certain State agencies including the [former employing agency].

INTRODUCTION

The following advisory opinion is issued in response to an inquiry whether §73(8) of the Public Officers Law prohibits a [former employee] for [a New York State agency] from engaging in consulting activities which would necessarily include appearances and compensated services on behalf of clients before his former State agency. The opinion is based upon the former employee's representation that he anticipates terminating all employment relationships with the State of New York, including a part-time position with [another State agency]. 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 the proposed consulting activities by a former employee of a State agency, to the extent these activities would require him to appear or practice before that department, are prohibited by the "revolving door" provision of §73(8) of the Public Officers Law for a period of two years after his termination from State employment.¹

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. 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 who requested this opinion has served as an employee responsible for three broad categories of duties:

1. Design, initiation, supervision, interpretation, and reporting of certain experimental studies at the [employing agency] related to determining potential health risks present at the certain waste sites;
2. Basic research; and
3. Academic responsibilities.

The individual has regularly published the results of his work in peer-reviewed journals and has presented such work at conferences in his field of expertise.

The position for which the individual wishes to apply is that of a consultant with a private consulting firm. The firm specializes in work including waste site remediation projects and plant sitings. The individual's responsibilities on behalf of the firm or a client of the firm would include the following activities which might require professional or business interaction with his former employing agency:

1. Development, review and presentation of health and/or environmental risk assessments. Such efforts may be in support of permit applications, hazardous waste site remediation projects, real estate transactions, plant sitings, or other similar matters that might involve New York State regulatory action or approval;
2. Development, review, and presentation of other documentation requiring his expertise. Such efforts may be in support of permit application, hazardous waste site remediation projects, real estate transactions, plant sitings, or other similar matters that might involve New York State regulatory action or approval;
3. Expert testimony or other litigation support in the areas of his expertise which may involve appearances before New York State agencies or legal representatives;²
4. Participation in proposal development in efforts to solicit contracts, grants, or other awards. Such applications for contracts, grants, or awards may be directed to New York State agencies or may require approval by or appearances before New York State agencies; and
5. Other activities requiring expert input in the areas of his expertise, risk assessment, or environmental science, which may require professional, official, or business contact with New York State officials.

DISCUSSION

In reviewing the application of the "revolving door" proscriptions 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 former §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 instant request, the individual intends to leave State service and work for a private firm specializing in matters which were the focus of his career with the State. In his position with the firm, the individual anticipates necessary contact with his former employing agency, in matters which include bidding on contracts, litigation, permit applications and funding requests. These are clear examples of the kinds of activities which the "revolving door" provisions were enacted to prevent. The "evil" of misusing knowledge and contacts to the benefit of a private client or employing firm is unavoidable in the instant case.

The individual is well known as an expert in his field of expertise and has been working for [his former employing agency] in this area for approximately nine years. In that time he has been involved in a great many projects and has been influential not only in the area of research, but also in academia. Without a doubt, the very people who depended on his expertise while he was an agency employee could be involved in reviewing and approving applications which would be submitted by him in his private capacity. There is little question of the potential that this individual could receive special treatment compared to that granted a person unknown to the former employing agency.

The post-employment proscriptions contained in §73(8) of the Public Officers Law are two-fold. There is an absolute two-year limitation on any appearance or practice or receipt of compensation for services rendered before the former agency without regard to the subject matter.³

In matters where the individual has personal involvement, such as personal participation in an experiment or active consideration of the merits of specific grant requests or of particular research projects, the individual is subject to the "lifetime bar" not only in relation to his former employing agency, but also with respect to all State agencies concerning the specific subject matter. This section of the Public Officers Law completely prohibits the individual from appearing, practicing, communicating or otherwise rendering services before *any* State agency on a case, proceeding, application or transaction with respect to which the individual was directly concerned and personally participated or was under his or her active consideration during the time of State service.

The matters in which the requesting individual anticipates being involved fall both within both the two-year proscription, where he will appear, practice or receive compensation for services rendered with regard to the matters he described before his former State agency, and the lifetime bar before *any* State agency where he was involved in the actual case, proceeding, application or transaction. The determination of which section applies would have to be made on an issue-by-issue basis. However, it is clear that the employment with the private firm is limited by the "revolving door" provisions of the Public Officers Law whenever that employment would

require an appearance, practice, rendering services for compensation before, or communicating with the former employing agency with respect to cases, applications, proceedings and transactions.⁴

In the event that the requesting individual is required to appear or practice before any other State agency in circumstances where, pursuant to statute, regulation or policy, the other State agency must utilize the expertise of former employing agency to reach its own decisions on those particular applications, proceedings or matters before it, the requesting individual is barred from any of the proscribed activities in relation to any portion of the matter which would necessarily be reviewed by the former employing agency. For example, in deciding whether or not to grant certain permits or licenses, [other State agencies] frequently utilize the [former employing agency] to perform risk assessment activities. The [former employing agency] evaluates the proposals for the potential risk posed to persons impacted by the potential project. To the extent that the other agencies involve the [former employing agency] and rely on that agency's input in decision making, a matter submitted to that other department or agency (e.g. permit or license applications) technically is "before" the [former employing agency] to that extent, so as to trigger the proscriptions of §73(8) of the Public Officers Law.

Insofar as the work of the requesting individual would require an *actual appearance* or an appearance through submission of any materials before the [former employing agency] in circumstances where the other agency utilizes the [former employing agency] for assessment of a project before it will take action, such an appearance would be prohibited by the "revolving door" provisions of §73 of the Public Officers Law.

However, if the requesting individual has no reason to know or anticipate that [his former employing agency] would be brought in by the other department or agency to consult on a particular matter and there is no statute, law or policy providing for such other agency involvement, there is no revolving door violation if the former employee's materials are reviewed by a current employee [of his former employing agency] within two years of the former employee's termination from State service.

In conclusion, the Commission finds that the two-year ban and the lifetime bar apply to the employment contemplated by the individual.⁵ The individual may accept employment with the consulting firm; he may not participate in projects precluded by the post-employment restrictions of §73(8). As the Attorney General stated in Opinion 86-F6 concerning two former State employees appearing before their former State agency,

(o)ne of the purposes of §73(7) is to remove any doubt in the public's perception as to whether actions by an employee or officer prior to separation from the State were solely in the public interest (1984 Op Atty Gen 46). The Legislature decided to eliminate the potential for impropriety or the appearance of impropriety by prohibiting State officers and employees, for a period of two years after the termination of State service, from appearing as to certain matters before the State agencies that employed them (*ibid.*). In our view, the public reasonably might question whether the subject persons carried out their public responsibilities solely in the public interest or whether they consciously or otherwise acted to further their private business

objectives. It is this potential for abuse and appearance of impropriety that forms the underpinnings for the two-year rule expressed in §73(7) of the Public Officers Law.⁶

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 same prohibition would result if such activities required such an appearance, practice communication or other service rendered before the agency for which the individual worked part-time. As the requesting party made no representation that his consulting activities would require or result in appearances before such agency, we do not specifically address that State agency in this opinion. However, in general, our opinion is also applicable to any activities by this individual before the agency where he had been employed in a part-time capacity.

2. The "revolving door" provision limits activities of former State employees before State agencies. It does not limit such appearances, e.g., expert testimony involving or against a former State agency or any State agency in litigation in the State court system. Such an appearance in a court of this State is not barred by the "revolving door" provision, even though the appearance or testimony may be adverse to one's former State agency.

3. As indicated *Supra.*, the "former agency" of the requesting individual would include both agencies with which the individual was employed. If this individual failed to terminate his relationship with the agency where he worked part-time and engaged in outside consulting, appearances, practice, communications, etc., before any State agency for compensation in connection with the purchase of services or a contract for such, licensing, obtaining of grants of money, ratemaking, adoption or repeal of a rule or regulation or any franchise as provided under the Public Officers Law, there would be a violation of §73(7) if such activities were not in the proper discharge of his official duties.

4. According to the requesting individual, the agency where he was employed on a part-time basis is not one of the agencies before which the individual would conduct any of those activities.

5. The "revolving door" provision does not prohibit the employment of any former State employee by any private employer. The provision bars the activities of that former employee in relation to any appearances or other activities (by him or his private employer which utilizes his name or work product) before his or her former State agency or *any* State agency with regard to those activities in which the individual was personally involved or which were under his active consideration or direct supervision while employed.

6. Section 73(7) was the predecessor "revolving door" provision to the present §73(8) of the Public Officers Law.