

# STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory  
Opinion No.  
89-9:**

Whether the [Temporary Commission] is a "state agency" as defined in §73 of the Public Officers Law; whether entering into a contract to provide legal services to a former employing agency constitutes an "appearance" as provided in §73 of the Public Officers Law; whether the post-employment restrictions of §73(8) of the Public Officers Law preclude the [Temporary Commission] from contracting with its former counsel to perform legal services for the [Temporary Commission].

## INTRODUCTION

The following advisory opinion is issued in response to an inquiry whether §73(8) of the Public Officers Law prohibits the former counsel to the [Temporary Commission] from contracting with the [Temporary Commission] to perform "legal services", arguably the same as those he performed as counsel, in a private capacity, as a member of a private law firm.

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 [Temporary Commission] is a "state agency" for the purposes of application of §73 of the Public Officers Law; that the contractual relationship between the [Temporary Commission] and its former employee constitutes an "appearance" for the purposes of application of subdivision 8 of §73 of the Public Officers Law; and that the two-year ban contained in §73(8) applies to preclude the [Temporary Commission] from contracting with its former counsel.

## 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."

In the instant request, the individual asking for an advisory opinion on the applicability of the "revolving door" provision was former counsel to the [Temporary Commission]. By Chapter ] of the Laws of [ ], the [Temporary Commission] was created to undertake a comprehensive review of the [ ] Law and related issues and to provide the Legislature with expert advice and counsel on very complex subject matters. The mandate of the [Temporary Commission] was to develop recommendations and to propose legislative action for comprehensive reform in the [ ] laws which would insure continued funding of local government. Over the past eleven years, since its inception, the [Temporary Commission] has issued reports to the Governor on various [ ] issues, provided information and assistance to the Legislature on [ ] issues and has conducted research projects.

In early 1989, the counsel to the [Temporary Commission] left State employment and joined a private law firm. The [Temporary Commission] did not hire anyone to fill the counsel position and now seeks to secure its former counsel's services for a short period of time. The [Temporary Commission] is due to sunset in [ ] as funding has lapsed; its official sunset date is [ ]. It is the proposed contract between the [Temporary Commission] and its former counsel which forms the basis for the advisory opinion request considered herein.

## DISCUSSION

In order to determine whether or not the proposed contract would be in violation of subdivision 8 of §73 of the Public Officers Law, the Commission must first decide whether the [Temporary Commission] is subject to its jurisdiction. The [Temporary Commission] must fall within the definition of "state agency" in order for a former employee to be covered by the "revolving door" provisions of the Public Officers Law.

Subparagraph (g) of §73(1) 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* . . . (emphasis added)

Of the nine members of the [Temporary Commission], the Governor appoints three.<sup>1</sup> This fact alone brings the [Temporary Commission] within the definition of "state agency" for the purpose of Public Officers Law applicability.<sup>2</sup> In addition, the [Temporary Commission] is wholly funded through the State Purposes Fund, which is typical of all State agencies. The Public Officers Law "revolving door" provision applies to "state officers and employees." Section 73(1)(i) defines the term "state officer or employee" to include:

(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 commissions*. (emphasis added)

The individual who is the subject of this inquiry is a "state employee" for purposes of §73 by virtue of his employment by a commission at least one of whose members is appointed by the Governor.

Section 73(8) of the Public Officers Law imposes restrictions on the professional and business activities of State officers and employees following separation from service. In his approval message upon signing the Ethics in Government Act into law<sup>3</sup>, the Governor stated that it was the intention of the Legislature to put an end to "insider trading" between former state employees and their State agencies. Some employees had used State employment as a training ground and a place to cultivate relationships which, after terminating State service, were used to receive special treatment for private clients and personal gain. In addition, some former employees were using the knowledge gained while in State service to gain unfair advantage for private interests in bidding on State contracts. It was not only these abuses, but also the perception that the former employees may not have been working in the public interest while in State service, that led to the strengthening of the revolving door provisions in the Ethics in Government Act.

In the instant matter, a State employee terminated employment with his State agency and went to work for a private law firm. Because the agency viewed the position as short-term, it did not attempt to find outside candidates. It prepared a contract for obtaining the services of its former employee.<sup>4</sup> The contract was not the subject of competitive bidding.

The post-employment restrictions of §73(8) Public Officers Law impose a two year ban on appearance, practice or receiving compensation for services rendered before an individual's former employing agency in relation to a case, proceeding or application or other matter before the agency, and a lifetime bar on appearance, practice, communication, rendering services or receiving compensation for services rendered before any State agency with regard to matters in which the individual had personal involvement. The question is whether the proposed contract violates either or both of these restrictions.

In order for the two year prohibition to apply, the Commission must determine whether the contractual agreement contemplated constitutes an "appearance", "practice", or services rendered for compensation with regard to any matter. In interpreting this subdivision of the Public Officers Law as it appeared prior to its amendment in 1987, the Attorney General determined that the submission of a contract proposal constitutes an "appearance" within the meaning of the law. In rendering an opinion on the propriety of former Division of Criminal Justice Services ("DCJS") employees bidding on a contract to provide services to their former employing agency, the Attorney General said this about the meaning of "appearance":

In submitting a proposal to provide to DCJS an Automated Fingerprint Identification System, it seems clear that the subject persons, through the "Private Firm" would be appearing before DCJS within the meaning of section 73(7) of the Public Officers Law. These persons are president and vice-president, respectively, of the "Private Firm" and are principal investors. *Any application by the "Private Firm" constitutes an appearance by these persons.* Inevitably, principals of the companies submitting proposals will be required to appear before representatives of DCJS. (emphasis added)<sup>5</sup>

It is argued that the nature of the contract as a "sole-source" contract<sup>6</sup> is enough to bring it outside the meaning of "appearance" as contemplated in the Public Officers Law, but the Commission does not agree; there is no legislative history or other support for this position. There is conceivably more potential or opportunity for a former employee to exert undue influence to obtain a contract where bidding does not occur.

The federal government has restrictions on post-employment activities<sup>7</sup> which are similar to those which exist in New York State.

The federal government has carved out an exception to its strict prohibitions of the revolving door. The exception, enunciated in 18 USC Section 207(i) subsection (f) states:

(f)The prohibitions of subsections (a), (b) and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

The federal government thus provides an opportunity for someone with specialized knowledge or expertise to, under limited circumstances, avoid the consequences of the revolving door restrictions. New York State law does not provide any exception to the applicability of the "revolving door" provisions of the Public Officers Law; it applies without regard to an individual's area of specialty or expertise, and without regard to the unique circumstances.

The Legislature in New York was aware of the federal Ethics in Government Act when making the sweeping changes in the State Ethics laws enacted in 1987.<sup>8</sup> It chose not to carve out a similar exception to the "revolving door" provisions of the Public Officers Law to allow State agencies to contract with former employees for specialized services. Despite the obvious desirability to the contractor and the former employing agency of a special exception to the Public Officers Law for individuals who possess unique talents which are not readily available from other sources, the Commission cannot create such an exception without clear statutory authority.

A common misconception about the purpose of the Act has generated an argument that any appearance by a former employee which "benefits" the subject agency is not precluded. This is not the case. The Commission has determined that the "revolving door" provisions of §73(8) do apply to preclude a State agency from hiring a former employee to consult with the agency concerning a particular project about which the employee has expertise. It is of no consequence for the purposes of applying the provisions of the Act that the relationship is beneficial to the former employing agency.

Consistent with interpretations of the Attorney General on the meaning of "appearance", and §73(8) of the Public Officers Law, the Commission deems the proposed contractual relationship between the former employee and his employing State agency to constitute an "appearance" with regard to a matter before the [Temporary Commission] for the purposes of applying the "revolving door" provisions. Thus, the two-year ban would preclude the former employee from entering into the proposed contractual relationship.<sup>9</sup> There is no prohibition, however, against other members of the former employee's law firm (who were not employees of the [Temporary Commission]) from fulfilling any of the obligations provided in the proposed contract, as long as

the former employee receives no compensation and does not share in the net profits received from any such services rendered.

The Commission concludes that the proposed contract between the [Temporary Commission] and its former counsel constitutes an "appearance" as contemplated by the Public Officers Law, and that such appearance is prohibited by the two year post-employment restriction of §73(8). It is not necessary to reach a conclusion concerning application of the lifetime bar of §73(8).

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: November 20, 1989

---

## ENDNOTES

1. Section [ ] of Ch. [ ], L. [ ]. Three members are appointed by the Governor; two members are appointed by the Temporary President of the Senate; one by the Senate Minority Leader; two by the Speaker of the Assembly, and one by the Minority Leader of the Assembly.

2. Cf. Op. Atty. Gen. 82-F20 where the Temporary State Commission on Banking, Insurance and Financial Services was deemed not subject to Section 73 of the Public Officers Law because it did not fall within the definition of "state agency". It is important to note that the provisions of Section 73 of the Public Officers Law were deemed not to apply only to the private members and staff of the Temporary Commission on Banking, Insurance and Financial Services. This opinion may be distinguished from the instant one in that the composition and mission of the two commissions is substantially different.

In a second opinion, which cited the opinion above, the Attorney General deemed the "private sector members and staff of the commission . . . subject to section 74, but not section 73 of the Public Officers Law." Op. Atty. Gen. 84-F8.

3. Approval Message dated August 7, 1987.

4. The published version of this opinion omits the text of the contract.

5. Op. Atty. Gen. 86-F6, p. 25.

6. A "sole source" contract is one in which the contracting agency claims that only one source is available to provide the specific service required. In cases such as this, the approval of the Comptroller is necessary. Section 174 of the State Finance Law contains the general provisions concerning the letting of contracts by state agencies. It states in relevant part, Contracts . . . with a state department or institution, or other agency of a department, shall be let to the lowest responsible bidder, as will best promote the public interest, taking into consideration the reliability of the bidder...". Section 7.7 of the Rules and Regulations of the State Division of Audit and Control provide that personal service contracts must be subject to competitive bidding ". . . on all transactions which lend themselves to competition." The contract which is the subject of this opinion was not the subject of competitive bidding.

7. See the [Appendix](#).

8. The provisions to the federal Ethics in Government Act discussed here were enacted in 1978.

9. Of course, the [Temporary Commission] could hire the requesting party as a temporary or part-time employee to perform appropriate services. In that employment capacity, he would not be subject to the "revolving door" ban.

---

## APPENDIX

### NOTE 7

Section 207 of title 18, United States Code. A former federal employee is permanently restricted from the following:

(1) PERMANENT RESTRICTIONS.-Any person who is an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States (including the Government Printing Office and the General Accounting Office), including the President, the Vice President, and any special Government employee, and who, after his or her service or employment with the United States Government terminates, knowingly-

(A) acts as agent or attorney for, or otherwise represents, aids, or advises any other person (except the United States) concerning any formal or informal appearance before, or

(B) makes, with the intent to influence, any communication on behalf of any other person(except the United States) to, any department, agency, court, or court-martial of the United States, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter-

(i) in which such person knows that the United States is a party or has a direct and substantial interest,

(ii) in which the person participated personally and substantially as such officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, and

(iii) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in subsection (g).