

# STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory Opinion No. 90-11:** 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 facility which is regulated by his former employing agency and was one of the facilities for which the requesting individual was responsible as an auditor while a State employee.

## INTRODUCTION

The following advisory opinion is issued in response to an inquiry whether §73(8) of the Public Officers Law prohibits a former employee of a [State agency] from accepting post-State employment with a [regulated entity], a [provider] which is currently regulated and licensed by a [State agency], and which was subject to audit inspections by the requesting individual. The opinion is based on a series of letters from the requesting individual, the issuance of an informal opinion and the request for a formal opinion.

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 employment proposed by the requesting individual is sufficiently remote from his responsibilities at the [State agency]. The position will not involve contact with the former employing agency. The Commission concludes that the proposed employment, as presented by the requesting individual, poses no violation of §73(8) of the Public Officers Law.

## BACKGROUND

The provisions of the Public Officers Law which address the post-employment restrictions are contained in §73(8), which are generally referred to as the "revolving door" provisions. The section that is relevant to the instant inquiry are 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 such 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 Advisory Opinion No. 88-1, subdivision 8 of §73 of the Public Officers Law, the "revolving door" provision, "generally sets the ground rules for what

individuals may do with the knowledge, experience and contacts gained from public service after they terminate employment with the State."<sup>1</sup>

The requesting individual is a former employee of a [State agency] who retired from his position in September, 1988. He held the position of surveyor of [facilities], such as [regulated entities]. The survey area assigned to the requesting individual encompassed all [regulated entities] in a fifteen county area. His responsibilities included technical assistance and consultation relating to rehabilitation therapy for the professional staff in the local [State agency] office regarding all program areas; conduct of surveys and other inspections of assigned [facilities], as assigned, for evaluation of compliance with State and federal regulations and criteria, such as Medicaid and Medicare; conduct of on-site investigation of complaints, such as patient abuse complaints; documentation of all findings; and technical assistance to [regulated entities] in the local area, assisting them in solving service delivery dilemmas.

The individual has been approached by a [private, State-regulated entity] to work in a full-time position. The [regulated entity] is a public provider of health care services, and approximately 90 percent of its residents are Medicaid funded admissions. The facility applies for and receives Medicaid funds, which are administered by the [State agency] in conjunction with the federal government. The requesting individual asserts that the last time he surveyed the [regulated entity] was in 1987.

Until recently, following his retirement, the individual was working on a part-time basis for the [regulated entity], only about three hours a week, with the exception of providing vacation coverage on one occasion. He stopped working part-time while awaiting an opinion from the Commission concerning potential §73(8) violations. The individual would like to provide the following services:<sup>2</sup>

1. Develop and stage in-service education to nursing staff (the requesting individual has already provided two in-service programs on Range of Motion)
2. Assist in planning better coordination of physical therapy with nursing [ ]
3. Instruct and advise the staff therapist and assistants in preventive management
4. Development of an audit procedure to ensure uniform, quality documentation of physical therapy services
5. Improve coordination of services between physical therapy and occupational therapy through in-service and on-going patient care [ ]
6. Keep the administrator informed on [ ] matters as to the direction it should be following. (plan is to expand [ ] services)

The requesting individual has stated that he will not have contact with any employees from his [former State agency] in the performance of his duties with the [regulated entity]. In addition, he indicated that he will have no contact with any State employees and will be working internally in the [regulated entity] with the staff. He has stated that he will have absolutely no involvement with the survey process administered by his former [State agency], and his duties will be focused on the [staff]. He maintained that his "chief function is to improve quality documentation, evaluations, planning in-service and coordination of rehab services with other on-site staff."<sup>3</sup> The

individual would serve strictly as an employee of the [regulated entity], not as a consultant or contractor paid with funds from the State.

## DISCUSSION

The "revolving door" proscriptions contained in §73(8) of the Public Officers Law prohibit the appearance or practice before a former employing 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 within two years of termination from State service. The purpose of the "revolving door" subdivision is 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." (Att'y Gen. Op. No. 84-F20 and 84-F12.) The subdivision seeks to eliminate any public doubt as to whether the actions by the officer or employee prior to separating from State service were in the public interest. (Att'y Gen. Op. No. 84-F20.)

The post-employment restrictions 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 [State agency] without regard to the subject matter.

In matters where the requesting individual had personal involvement, such as personal participation in a survey or program review at the [regulated entity], the requesting individual is subject to the lifetime bar not only in relation to the former employing agency, but also with respect to all State agencies concerning the specific subject matter. The lifetime bar completely prohibits the individual from appearing, practicing, communicating or otherwise rendering services before *any* State agency in a case, proceeding, application or transaction with respect to which the individual was directly concerned and personally participated, or which was under his or her active consideration at the time of State service.

In the instant case, the individual is a [specialist]. He has been offered a position with a [regulated entity] which is a common consumer of [services]. In this case, however, the individual has had previous contact with the specific [regulated entity] in relation to his employment with the State. There is no appearance, however, that the [regulated entity] extended the offer of employment prior to or immediately after termination of the requesting individual's State job, so as to appear to influence or reward the individual. The requesting individual received the position after responding to a newspaper advertisement for the post. Nor is there any appearance that the individual was hired in order to gain inside influence with his former employing State agency in future audits by that [State agency]. The requesting individual has stated that he will have no contact in any matter with his former agency. This must include no participation in the preparation of any documentation or presentation which the [regulated entity] intends to present to the requesting individual's former State agency during the two years since

the former employee's termination. In addition, the employee's former State agency is not a sole provider of funds to the [regulated entity]. It appears that the requesting individual is being hired to provide services within the facility and that those services will not bring him in contact with his former colleagues, nor with the subject matter of his former position with the State.

## CONCLUSION

The Commission finds that the proposed employment by the requesting individual, as described, does not violate the post-employment restrictions of §73(8) of the Public Officers Law. The Commission notes, however, that the individual must be limited from having any contact with the former employing agency which might constitute a prohibited appearance or practice, including any contact with auditors or surveyors from his former employing State agency until two years from termination have lapsed, i.e., until September, 1990. In addition, the lifetime bar described above acts to preclude the requesting individual from appearing, practicing or receiving compensation for any services rendered with respect to any matter in which he had personal involvement, direct concern or actively considered with regard to any State agency.

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 opinion.

All concur:

Elizabeth D. Moore, Chair

Angelo A. Costanza

Norman Lamm

Robert B. McKay, Members

Dated: June 21, 1990

---

## ENDNOTES

1. Advisory Opinion No. 88-1 dealt generally with the question of application of the post-employment restrictions to employees who left State service prior to January 1, 1989, as to acts which occurred on or after January 1, 1989.
2. The duties description was taken from a letter from the requesting individual of October 10, 1989.
3. From a letter dated March 3, 1990, in response to a Commission request for further information following the issuance of an informal advisory opinion and a request which followed for a formal opinion of the Commission.