

# STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory  
Opinion No. 90-  
19:** Application of the post-employment restrictions of §73(8) of the Public Officers Law to a State employee terminating State service for private sector employment.

## INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [a high level policy-maker] of [a State agency] requesting a formal opinion concerning the application of the post-employment restrictions of §73(8) of the Public Officers Law to his prospective private sector employment.

Pursuant to the authority vested in the State Ethics Commission ("Commission") pursuant to §94(15) of the Executive Law, the Commission concludes that the two-year bar contained in §73(8) does not restrict the private sector post-employment activities, as described by the requesting individual, because those activities are unrelated to his employment with the State agency from which he is terminating, and no appearance, practicing or receipt of compensation for services rendered on a matter before his former agency would occur during that period. The lifetime bar, however, may restrict the requesting individual's post-employment activities with regard to certain employee benefit programs and communications systems because of his involvement with such matters while employed by [another State agency]. To the extent such programs and systems were under his active consideration or were matters in which he was directly involved and personally participated while a State employee, and the individual's private employment would require practice, appearance, communication, or rendering services for compensation before any State agency on such matters, those acts are prohibited by the lifetime bar. The Commission's opinion applies only to the circumstances described. The determination of the lifetime bar will have to be made on a case-by-case basis, and the individual is encouraged to consult with the Commission as to the propriety of any contemplated transaction.

## BACKGROUND

The requesting individual has been a State employee for approximately twenty years, holding progressively responsible positions in [three State agencies]. The requesting individual is currently a [high level policy-maker] for [a State agency] (the "Department"). He has served in that capacity for approximately one year. Immediately prior to holding that position, he was [an upper-level manager] at the Department for approximately two years.

As a [high level policy-maker] of the Department, the requesting individual is responsible for the day-to-day operations of the Department. He is involved in all aspects of policy formulation and management. He has been responsible for "streamlining" the organizational structure and for major changes in the organization's service delivery system. He also has been responsible for changes in a variety of management systems and internal controls. In his previous role as [an

upper-level manager], he was responsible for personnel, employee benefits, labor relations, finance, budget, and other administrative support services for the Department.

The requesting individual will be terminating from State service on [date deleted]. He has accepted a position as Managing Director of [the Company], a private sector benefits communications and marketing firm. [The Company] specializes in automated employee benefits communications programs and marketing employee benefits, with particular emphasis on group Universal Life and Reimbursement Account programs. The requesting individual will be making presentations, managing a benefits communications enrollment program, and responding to Requests for Proposals ("RFPs"). He stated, in his request for opinion, that [the Company] may respond to future RFPs issued by the State, may provide services to the State and may contract with the State, including providing automated employee benefits communications, group Universal Life or reimbursement accounts.

The clients serviced by [the Company] currently include several State governments and large municipalities. [The Company] does not do business with the State of New York at the present time. It has not done business with New York State in the past. [The Company] has not responded to any RFPs issued by the State of New York and has not submitted any bid proposals to the State of New York.

In addition to the opinion concerning post-employment restrictions as they relate to his services performed while at the Department, the requesting individual asked for guidance as to the application of §73(8) to work he performed while employed by [another State agency], from which he terminated service in 1987. While employed by the [other State agency], the requesting individual states that he was responsible for managing all aspects of [a division]. The program included compensation, employee staff communications, training and development and quality of work life initiatives for New York State management employees. As Deputy Director of the [other State agency], he served as a member of the "executive team" which determined overall State employee relations policy. As Assistant Director at the [other State agency], the requesting individual provided program direction for a wide range of activities in [his division]. This included the implementation of new management development and employee benefits programs and the oversight of various quality of work life projects.

## **DISCUSSION**

The 1987 Ethics in Government Act<sup>1</sup> brought significant changes to the post-employment restrictions contained in §73 of the Public Officers Law. According to the memorandum in support of the 1987 legislation, the Ethics in Government Act is designed to limit opportunities for abuse of official positions and eliminate any appearance of undue influence. By its comprehensive provisions, the Act reaches almost all State government officials and employees.

The section of the Act which is relevant to the facts presented in this Advisory Opinion is §73(8), commonly referred to as the "revolving door." The specific purpose of the "revolving door" section is to preclude the possibility that a former State employee may leverage his or her knowledge, experience or contacts gained as a result of State service to his or her advantage or that of a client, thereby securing unwarranted privileges, consideration or action.

The Attorney General has interpreted the "revolving door" section, as it existed prior to amendment of the law,<sup>2</sup> as addressing "the ethics problems that arise when a State employee leaves State service to work in the private sector."<sup>3</sup> According to the Opinion of the Attorney General, the "revolving door" limitation seeks to eliminate any public doubt whether actions by the officer or employee prior to separation from State service were in the public interest.

The post-employment restrictions which comprise the "revolving door" are two-fold. Section 73(8) states, in relevant part:

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. . . .

There is an absolute two-year limitation on any appearance or practice or receipt of compensation for services rendered by the requesting individual before the Department, the former employing State agency, without regard to the subject matter. In actual matters in which the requesting individual had personal involvement at any of the State agencies at which he was employed during his State service, such as personal participation in negotiating specific employee benefit plans, participating in the preparation of specific requests for proposals or negotiating specific contracts for the provision of services, there is a lifetime bar not only in relation to the immediate former employing agency, but also with respect to all State agencies (as defined in §73(g)) concerning that specific subject or transaction.<sup>4</sup> 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 active consideration during the time he was employed in State service.

### **The two-year bar**

The requesting individual is terminating his service from the Department and, for two years subsequent to the date of that termination, he cannot appear, practice or receive compensation for services rendered in relation to any matter before his former employing Department. The two-year bar is absolute and bars him from any activity before the Department regardless of the subject matter. Therefore, he may not represent his future employer before the Department in any of its enterprises during this period. Nor, may he receive any compensation for services rendered to his future employer in relation to any matter before the Department, even though he may not personally appear or practice before it.

The two-year bar does not apply to the requesting individual in regard to appearing, practicing or receiving compensation for services rendered before [other State agencies]. He terminated his services from [those other State agencies] more than two years ago.<sup>5</sup>

### **The lifetime bar**

The lifetime bar applies to the requesting individual with regard to each State agency with which he was employed, regardless of his date of termination of service with each agency.

Specifically, with respect to the [other State agency], where he engaged in activities which may appear to be similar to those in which he will engage with his prospective employer, the lifetime bar must be carefully observed. For example, the requesting individual states, that, at the [other State agency], he was "[r]esponsible for managing all aspects of the [division]. This program included compensation, *employee benefits, communications*, training and development and quality of work life initiatives for nearly 20,000 New York State [ ] employees."<sup>6</sup> (Emphasis added.)

The requesting individual, as the Managing Director for [the Company] after termination from State service, will be involved with marketing employee benefits and communications services. [The Company] markets voluntary employee benefit programs. The firm designs, implements and administers benefit programs with a particular emphasis on Universal Life programs. [The Company] describes the process as follows:

[The Company] uses various insurance carriers depending on the needs of the client organization. Prior to choosing an insurance carrier and negotiating a Universal Life program that meets the specific needs of the client, [the Company] helps clients develop a comprehensive analysis and ranking of insurance carriers.

The services of benefit consulting firms, as well as advertising and communication firms, are used to ensure that clients receive state-of-the-art employee communication programs.

Experience has shown that a good communication process is necessary if employees are to understand their current benefits and to take advantage of the opportunities offered by Universal Life. Client organizations that offer [the Company] benefit programs to their employees are offered a state-of-the-art program to communicate other benefit coverage. This communication process is tailored to the specific needs of the client organization.<sup>7</sup>

The Public Officers Law restriction on post-employment activities includes a lifetime bar which provides that a former employee may not appear, practice, communicate or otherwise render services before any State agency or receive compensation for services rendered in relation to any case, proceeding, application or transaction with respect to which he was directly concerned and personally participated during the period of his service or employment, or which was under his active consideration at such time. The lifetime bar is an extraordinary limitation imposed to restrict former employees from using specific inside knowledge about a case, proceeding, application or transaction at any time, and before any State agency, forever. In order to trigger this limitation, the individual must clearly have participated in and been directly concerned with

the same matter, or must have had the same matter under his active consideration while employed.

In the instant case, the requesting individual has stated that, although his future employer has not previously contracted to provide services or answered a State RFP, it is possible that [the Company] would do so in the future. In 1985, the requesting individual, while employed by the [second former State agency], was involved in "discussions and investigations" of services administered by [the Company-type] providers. He must be aware that the lifetime bar may limit his work in relation to the State on behalf of [the Company], if the matter which brings him in contact with the State of New York is one in which he personally participated and was directly concerned while in State service, or was under his active consideration.<sup>8</sup> The determination of whether the lifetime bar applies in such instances is one which must be made on a case-by-case basis; therefore, the Commission cannot, with precision, indicate those matters from which the requesting individual would be permanently barred before any State agency.

### CONCLUSION

The Commission concludes that, based on the facts presented, the requesting individual is not restricted by the two-year bar contained in §73(8) of the Public Officers Law from appearing, practicing or receiving compensation for services rendered on matters before the [State agencies], from which he has been terminated for more than two years. He is, however, barred from any such activity before the Department for two years from his termination from it.

Further, he is permanently barred from appearing, practicing, communicating or receiving compensation for services rendered before *any* State agency in relation to actual matters in which he was directly concerned and personally participated or which were under his active consideration while employed at the Department, the [former State agency] or any other State agency during his public service. The requesting individual is encouraged by the Commission to seek guidance as to the application of the lifetime bar in specific situations as they arise in order to avoid potential violation of the lifetime bar provision of the Public Officers Law, §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 opinion.

All concur:

Elizabeth D. Moore, Chair

Angelo A. Costanza

Norman Lamm, Members

Dated: August 9, 1990

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## ENDNOTES

1. The Ethics in Government Act was enacted pursuant to Chapter 813 of the Laws of 1987, effective January 1, 1989, and amended by Chapter 108 of the Laws of 1988 and Chapter 242 of the Laws of 1989.
2. The "revolving door" was previously contained in §73(7) of the Public Officers Law. When the law was amended, it was renumbered §73(8) thereof.
3. Att'y Gen. Op. No. 84-F20 and 84-F12.
4. Public Officers Law, §73(1)(g) states that "[t]he term 'state agency' shall 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."
5. As a result of Advisory Opinion No. 88-1, sustained by the decision of the Court of Appeals in *Forti v. New York State Ethics Commission*, 75 N.Y.2d 596 (1990), the Ethics in Government Act of 1987 applies to all former State officers and employees, regardless of when they terminated their service with a State agency, to all acts in which they engage on or after January 1, 1989, the effective date of the Act.
6. Taken from the requesting individual's resume, which was submitted with his request for opinion.
7. From the [the Company] profile submitted with the request for opinion.
8. While the requesting individual has not provided information as to his duties at the [former State agency], he is similarly constrained by the lifetime bar as to any activity before any State agency.