

STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory
Opinion No. 90-
21:** Application of the post-employment restrictions of §73(8) of the Public Officers Law to a former State employee who anticipates future contact with her former State agency.

INTRODUCTION

The following advisory opinion was requested after issuance by the Commission of an informal advisory opinion on February 9, 1990, concerning the application of the post-employment restrictions contained in §73(8) of the Public Officers Law.¹ The requesting individual is a [former position] with the Division of Library Services at the New York State Library which is part of the State Education Department ("SED"). She worked with the New York State Program for the Conservation and Preservation of Library Research Materials.

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) of the Public Officers Law to each of the requesting individual's specific inquiries.

BACKGROUND

The requesting individual served as a [former position] assigned to the Program for Conservation and Preservation of Library Research Materials ("Program").² The Program, which provides State funding for libraries and other organizations engaged in efforts to preserve deteriorating library research materials, is administered by the Division of Library Development of SED, with technical assistance, in part, from the federal government's Office of Preservation of the National Endowment for the Humanities. The purposes of the Program are to encourage the proper care and accessibility of research materials, to promote the use and development of guidelines and technical standards for conservation/preservation work; and to support the growth of local and cooperative activities within the context of the emerging national preservation program. All grant activities must be completed within one year of the grant award.

The Program provides an annual grant of \$90,000 for library preservation to each of the eleven research libraries located in New York State as designated by law.³ In addition, the Coordinated Preservation Projects Program provides \$350,000 annually for cooperative conservation/preservation programs among the comprehensive research libraries.

The Discretionary Grant Program for the Conservation/Preservation of Library Research Materials provides grants for projects to preserve unique library research materials in the collections of libraries, archives, historical societies and similar agencies within New York State other than the eleven research libraries. This program awards \$500,000 annually through competitive grants.

Subdivision 8 of the Public Officers Law provides, in relevant part, the following:

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 active consideration. . . .

As the Commission noted in its Advisory Opinion No. 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 their employment with a state agency." Thus, for the two years following her termination from State service, the requesting individual cannot appear, practice, or render services for compensation before SED on any matter that is before it, and she is forever barred from appearing, practicing, communicating, or rendering services for compensation before any State agency in any actual matter in which she was directly concerned and personally participated or which was under her active consideration during her employment with the State.

DISCUSSION

1. The first question asked by the requesting individual is:

Whether it would be a violation of §73(8):

- a. to serve as a preservation officer in one of the eleven comprehensive research libraries where one of her responsibilities would be to write and submit grant proposals to the Conservation/Preservation Program at SED each year; or
- b. to work as a private consultant and assist applicant institutions in the preparation of preservation grant proposals to be submitted to the Conservation/Preservation Discretionary Grant Program at SED.

The requesting individual may not appear before SED in any manner for two years after her termination from the agency. In addition, she may not receive compensation for any services rendered in relation to any matter before her former agency for the two year period, unless she is an employee of a federal, State or local government or one of its agencies.⁴ The two-year bar will apply to *any* matter before her former agency, notwithstanding to which program administered by SED she desires to submit proposals.

The definition of appearance, for purposes of interpreting the Public Officers Law, has been broadly construed.⁵ The Attorney General, in rendering an opinion concerning an "appearance" under the "revolving door" provision prior to its amendment in 1987, determined that participation in the submission of a response to a Request for Proposal by former employees of the Division of Criminal Justice Services ("DCJS") to provide services to their former agency

constituted an "appearance" within the meaning of the law as it was then written. Specifically, the Attorney General stated:

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 §73(7) of the Public Officers Law.⁶ These persons are president and vice-president, respectively, of the "Private Firm" and are principle 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.)⁷

Therefore, the requesting individual is prohibited during the two-year post-employment period from writing, preparing or submitting grant proposals to the Conservation/Preservation Program or to any other SED program, unless she is an employee of a federal, State or local government agency.⁸ Further, if the requesting individual receives compensation for her services in assisting any party, within two years of her termination from SED, in applying for or preparing an application for a grant from the Conservation/Preservation Program, she would also violate the two-year bar of the "revolving door" provision.

1. The second question is:

Whether it would be a violation of §73(8):

- a. to work as a private consultant and conduct needs assessment surveys, workshops and possible conservation treatments for institutions that were using Conservation/Preservation Discretionary Grant funds to pay her consultant fees; or
- b. to conduct, in February 1991, an educational workshop for a regional library system funded by a grant that was awarded by the requesting individual's former office while she was employed at SED.

Under the two-year bar of §73(8), the requesting individual could not perform any of the proposed activities if, pursuant to contract or regulation, SED is required to approve her appointment to be hired as a private consultant to perform these duties. Nor could the requesting individual perform services for a private entity if her work product, pursuant to contract or regulation, would have to be submitted to or approved by SED. Such submission would result in an appearance before her former State agency in violation of §73(8) of the Public Officers Law.⁹

Beyond the two-year post-employment period, it appears there would be a violation of the lifetime bar of §73(8) if the funds to pay the requesting individual to conduct the educational workshop or any other service were from grants, the application for which she was directly concerned and in which she personally participated or which was under her active consideration while she was employed by SED. The requesting individual would be personally benefitting from a grant awarded under her authority while in the employ of the State. In the event of a project in which she was directly concerned and personally participated or was under her active consideration, the requesting individual would be precluded from rendering any services before any State agency relative to these projects.

If the requesting individual was not involved in the grant applications or approvals which provided the funds for the proposed activities and if her retention as a consultant will not require approval or certification by SED, there would be no §73(8) violation for her to perform these services as long as the services were of a general educational nature and were not specifically designed to assist the libraries in dealing with specific matters before or to go before SED.

3. The third question is:

Whether it would be a violation of §73(8) to be retained as a consultant by SED for a particular project.

The requesting individual is prohibited from serving as a paid consultant to SED during the two-year post-employment period as this would constitute the rendition of services for compensation in a matter before her former State agency.¹⁰ SED may employ the requesting individual as a part-time employee to perform these services without a violation of §73(8) occurring.

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

Angelo A. Costanza

Norman Lamm

Donald A. Odell, Members

Dated: November 15, 1990

ENDNOTES

1. The request for a formal opinion was received by the Commission on July 23, 1990.

2. According to the New York State Department of Civil Service Announcement, [former position] perform the following duties:

[p]rovide professional assistance to various libraries, library systems, and library organizations; inspect libraries seeking a charter or registration for compliance with the Education Law and Regulations of the Education Department; and serve as consultants in special library programs. They review and evaluate ongoing programs; coordinate the resources and programs of various libraries and/or other institutions; and work directly with library groups, librarians, trustees, government representatives and lay persons in matters relating to the establishment, operation and improvement of library service, and may administer portions of State and Federal aid programs.

3. These are the libraries: Columbia University Libraries, Cornell University Libraries, the Research Libraries of the New York Public Library, the New York State Library, New York University Libraries, the libraries of the four

SUNY centers at Albany, Binghamton, Buffalo, and Stony Brook, Syracuse University Libraries and the University of Rochester Libraries.

4. The exemption provided by §73(8) does not cover former employees who are retained as private consultants to a federal, State or local government agency. See Advisory Opinion No. 89-5.

5. Advisory Opinion No. 89-11, p.4.

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

7. Att'y Gen. Op. No. 86-F6.

8. See Commission's Advisory Opinion No. 89-7, where the Commission concluded 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 permit, application or proposal to the former employing agency. The Commission concluded that a specific permit or grant application or contract proposal is under the jurisdiction of a particular agency and, therefore, is *before* the State agency, at all times, whether or not the agency physically has received the documentation or was contacted on the matter.

9. See Commission's Advisory Opinion No. 89-2, where the Commission found that a current State employee's certification of a grant to obtain funds from SED constituted an "appearance" for purposes of §73(7) of the Public Officers Law.

10. This conclusion is consistent with the Commission's Advisory Opinion No. 89-9, where the Commission held that the post-employment restrictions of §73(8) of the Public Officers Law preclude a State agency from contracting with a former employee to consult with the agency, irrespective of whether the relationship is beneficial to the former employing agency. The Commission had proposed, as part of the 1990 Governor's Program Bill #258, that the "revolving door" be modified to allow the State agencies to contract with former State officers and employees in limited circumstances when it is necessary to serve the interests of the State. The Program Bill has not been acted upon by the Legislature.