

# STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory  
Opinion No.  
90-4:**

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 private not-for-profit service provider which is regulated by and receives funds from the former employing State 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 of [a New York State agency] from accepting employment with [a private not-for-profit provider of services], when that provider is regulated by and receives funding and program support from the [State agency]. The opinion is based upon the former employee's representation that he has removed himself from all matters involving the [not-for-profit provider] for the past few months.

Pursuant to the authority vested in the New York State Ethics Commission (hereinafter "Commission") by §94(15) of the Public Officers Law, the Commission hereby renders its opinion that the proposed employment with the [not-for-profit provider] is restricted by both the "revolving door" and the "lifetime bar" provisions of §73(8) of the Public Officers Law, to the extent that the former employee cannot render any service for compensation in regard to licensing, certification, programming, contracting, fiscal issues, or any other matters before his former employing State agency and cannot appear or practice before such agency. The former employee, also, cannot appear, practice, or render any services in relation to activities with which he had personal involvement, while employed by his [State agency], before any [State agency].

## 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."<sup>1</sup>

The requesting individual has been employed by the State of New York for twenty years. During that time, he worked in several positions within the [State agency] and its predecessor agencies. His current position is that of Downstate Chief of the Bureau of Contract Management and Fund Allocation for agency.

The agency is generally responsible for carrying out the powers and duties enumerated in State statutes. These duties include responsibility for administering all state and some federally funded services and programs sponsored by private for-profit and not-for-profit providers.

The responsibilities of the Downstate Chief of the Bureau of Contract Management focus on managing approximately thirty offices which administer the contract and funding responsibilities of the agency. This involves contact with licensed providers of services throughout New York City and Long Island. The unit for which the Downstate Chief has been responsible monitors the providers for compliance with mandates concerning delivery of services. In addition, the unit provides technical assistance, from time to time, concerning providers' desires to provide an increased quality of assistance to affected individuals.

The requesting individual has been offered a position with [a not-for-profit provider of services]. The provider is funded by Medicaid, the New York City Office for the Aging, and by the State and federal government, all of that funding being channelled through the [State agency]. The [State agency] has contact with the [not-for-profit provider] in relation to the quality of service provided to the clients. Funding depends upon the numbers of clients to be served, and upon the programs which will be offered. In order to preserve the quality of service and maintain program integrity, the agency has oversight functions which include review of the credentials of individuals hired to administer programs. There are several review teams from the [State agency] which regularly interact with provider employees. The teams do the following:

1. Program Review: monitoring for minimum compliance with State and Federal standards necessary for funding;
2. Quality Assurance: concentration on quality of services and relevance of the services to the problems presented by the client and the environment;
3. Field Audits: Financial review only;
4. Contract Management: the contract manager visits the site two times per year and monitors compliance with guidelines covering topics such as physical plant deficiencies, procedures, and waiting lists.

In his current position as Downstate Chief of the Contract Management unit, the requesting individual administers the fourth of the teams listed above. This requires that he interacts, to a limited but regular extent, with most of the service providers under his jurisdiction. He has represented that, in audits of the not-for-profit provider, he has been involved only to the extent of questions of program placement and new service protocols. He stated that his contact has been primarily through staff; however, he has had some direct involvement. For example, the requesting individual and his immediate supervisor had yearly contract discussions with this provider. In addition, information was shared with the requesting individual on an informal basis by former staffers at the [not-for-profit provider] until 1985. With regard to the future programming and funding of the [not-for-profit provider] with the [State agency] provided funds,

the requesting individual indicated that he was invited and did attend approximately three or four of the formal discussions.

The position which has been offered to the requesting individual at the [not-for-profit provider] is that of Senior Vice President for Program Operations. The position requires that the requesting individual be responsible for obtaining funding for the provider and for assisting the provider in being better prepared for audits and reviews conducted by the [State agency] in the areas of services, programs and vocational training. He will also, on a sporadic basis, be responsible for the negotiation of contracts to provide specific services. The funding for the services will come from his [State agency].

The Commission was informed by the requesting individual that, in anticipation of leaving the State for the position at the [not-for-profit provider], the requesting individual removed himself from matters requiring contact with that provider. The requesting individual also discussed with his prospective employer the clear conflict between the position at the [State agency] and the position with the provider with regard to negotiation of program funding. The Commission has also been advised by the requesting individual that the provider has acceded to a restriction on the requesting individual's contact with his [State agency] in any matters dealing with funding from that agency for provider services for a period of two years from the date of termination from the [State agency].

## **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 have been applied. 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." (Op.No. 84-F20; 84-F12.) The subdivision seeks to eliminate any public doubt as to whether actions by the officer or employee prior to separating from State service were in the public interest. (Op.No. 84-F20.)

In the instant request, the individual is leaving State service to work for a private concern specializing in matters which were the focus of his twenty year career with the State. In his position with the [not-for-profit provider], he anticipates necessary contact with his former employing agency, in matters which include program evaluation, contract negotiations, funding requests, auditing, and compliance. These are clearly matters which the "revolving door" was enacted to address. The "evil" of using knowledge and contacts to the benefit of a private interest or client is unavoidable in the instant case.

The requesting individual is, because of his State employment, well known in the area of his expertise. In the nearly twelve years he served with the State agency, he has been involved with a great many programs and had contact with many individuals within and outside of the agency. Without a doubt, the very people who depended on his expertise while he was an agency employee, or were subject to his supervision, could be involved in reviews, audits, and program evaluations of the [not-for-profit provider] as well as negotiations with it. The responsibilities of the individual in the position with the provider encompasses all of these activities.

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 the [State agency] without regard to the subject matter.

In matters where the requesting individual had personal involvement, such as personal participation in specific contract negotiations or program compliance matters, he 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. The lifetime bar 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 which was under his or her active consideration at the time of State service.

The matters in which the requesting individual anticipates involvement fall both within the two-year restriction, where one may not appear before one's former employing agency, and the lifetime bar which precludes acts before *any* State agency where he was involved in the actual matter while still a State employee. The determination of which section applies must be made on an issue-by-issue basis.

A former State employee is absolutely barred for two years after his or her termination from any appearance, for any purpose, before his former State agency. The restriction affects not only appearances or practicing before the former State agency, but also the receipt of any compensation for any services in relation to any matter before that State agency. For example, the individual could not appear before [his former State agency] to negotiate contracts, participate in field audits of the [provider], represent the provider during quality assurance or program reviews for two years from his termination with [his State agency]. Nor could he receive any compensation, or have any of his compensated services with the provider be attributed to, the preparation of or involvement in the preparation of specific material in response to any matter before the [State agency] during that two year period.

The lifetime bar would be applied to any case, application, proceeding or transaction with which the individual had been directly concerned and personally involved or which he had under active consideration while he was employed with the [State agency]. In those activities, he could not appear, practice, communicate or otherwise render services before *any* State agency at any time. In addition, he could not receive compensation for such services either. For example, even though the requesting individual apparently has removed himself from contact with the provider in anticipation of leaving, he would still be barred from any services before any State agency in

relation to those activities in which he was directly engaged or had supervision over during the oversight the provider at all times he was employed by the [State agency].<sup>2</sup>

This does not mean that the former State employee cannot provide general information concerning the requirements of his former agency in order for the provider or any other service provider to be properly certified or involved with State agency funding, etc. Such general information must be unrelated to any specific case and involve, in effect, a general explanation of the law, policy or procedures involved in such agency actions. The requesting individual cannot advise this provider as to the specific application of such information to a matter before the [State agency] during his two years after termination or, at any time, as to any "lifetime" barred activity. The provision of such general information would be similar to writing a book in which the agency regulation or oversight of service providers was explained or holding seminars to provide such explanation. In each of these circumstances, actual services for any entity in relation to an actual matter before the agency could not occur and, in the case of these two examples, would not likely occur.

The [State agency] is so intimately involved in the life and function of this service provider, the requesting individual will be clearly restricted in any activities on behalf of the provider in relation with his former State agency. In order to avoid the appearance of impropriety, the requesting individual will have to be diligent in his awareness of any matter or transaction which may bring him into contact with his former employing agency.

The Commission finds, based upon the representations of the requesting individual as to his former and anticipated job responsibilities, that the two-year ban and the lifetime bar apply to the employment contemplated by the requesting individual. The requesting individual may accept employment with the [not-for-profit service provider], but he is prohibited from participating in matters which are precluded by the post-employment restrictions of §73(8).

As the Attorney General opined in relation to two former State employees appearing before their former employing 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 of 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.<sup>3</sup>

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: February 15, 1990

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## **ENDNOTES**

1. Advisory Opinion 88-1 dealt generally with the question of application of 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. It is of little significance that the requesting individual only performed one aspect of the oversight of the provider while employed with the [State agency]. The "revolving door" covers all relationships with one's former State agency and is not limited only to contacts or involvement with one's prior specific area of responsibility.
3. Section 73(7) of the Public Officers Law was the immediate predecessor of §73(8) which contains the post-employment restrictions form state officers and employees.