

STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory
Opinion No.
90-7:**

Whether §73(8) precludes a former [State employee] may work on projects for her private employer which are partially funded by the [State agency] and which may require professional contact with former colleagues in the [State agency].

INTRODUCTION

The following advisory opinion is issued in response to an inquiry whether §73 or §74 of the Public Officers Law prohibits or limits the work a former State employee may engage in on behalf of her private employer when the projects on which she will be working are partially funded by her former employing agency, and she will be required to have contact with former employing agency.

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 §73(8) of the Public Officers Law prohibits a former State employee from working on projects whose funding is left to the discretion of the employee's former employing agency, and prohibits the former State employee from any contact with former employing agency which might be construed as an appearance as defined therein. In addition, the former State employee is prohibited from all involvement with the former employing agency and all other agencies with regard to any work which was under her active consideration, and in which she personally participated, or with respect to which she was directly concerned, while she served as a State employee.

BACKGROUND

Section 73(8) of the Public Officers Law specifically addresses the issue of termination of State service and one's relationship with his or her former employing agency following such termination. It is this provision which commonly referred to as the "revolving door" section of the Public Officers Law. Section 73(8) 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, form, 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 stated in Advisory Opinion Number 88-1, subdivision 8 of §73, 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."¹

By letter of January 16, 1990, [The Firm], a firm of consulting engineers, requested an interpretation from [a New York State agency] as to the application of the ethics law to a newly hired employee who formerly was employed by [the State agency]. The former employee terminated State service on May 25, 1989. The [State agency] forwarded this request to the Commission. In its request, [The Firm] represented that the newly hired employee was employed with them as an engineer-in-training. The [Firm] stated that she would not be required to represent it with respect to [the State agency] and that she would not be the engineer responsible on any project associated with [the State agency]. Her function was represented as limited to providing technical support to senior engineers within the firm on specific projects.

Specifically, [The Firm] desires to assign the employee in a technical support capacity to assist senior engineers. The projects on which she would be working are partially funded through the approval of applications by [the State]. The projects are the ["A" Program] and the second is the ["B" Program]. The ["A" Program] is funded in the form of a grant. ["A" Program] funds provide approximately 50 percent of the total funding for a given capital improvement project. The applicants for ["A" Program] funds must meet federal eligibility requirements in order to receive the money. The ["A" Program] senior engineer would employ the engineer-in-training to gather field data, perform calculations and assist in analysis. According to the firm, her involvement in these projects would "be totally unknown to the [State agency]" because only the senior engineer who is involved in the project actually signs the submissions and drafts.

["B" Program], according to [The Firm], was a project in which [The Firm] was involved prior to the employment of the affected employee. The ["B" Program] funding is partially from federal sources and partially from State sources. Much of the State money expended on ["B" Program] is revenue gained from the petroleum overcharge restitution requirement placed on major petroleum product manufacturers who overcharged members of the public during the shortages on oil products during the 1970's. The funds are provided with the express understanding that they will only be used for the purpose of completing the studies and are awarded as a result of a system of ranking. The functions of the [Firm] employee would be to gather field data, perform calculations, and to assist in analysis.

The [State agency] has provided some more detail about the ["A" Program and "B" Program], as well as details about the former employee's qualifications, employment history and experience. During her employment with the [State agency], the individual was employed in the [Bureau]. The [State agency] described the duties of the [Bureau] as providing direct technical support to programs in the [State agency] requiring architectural or engineering expertise. The [Bureau] is responsible for reviewing the technical merits of [] conservation projects which receive financial assistance from the [State agency]. The reviews include in depth evaluation of detailed engineering studies. The staff often contacts the architecture or engineering firm which has submitted the study in order to clarify or resolve technical issues. The contact is typically, as stated by the [State agency], between the firm's staff engineers assigned to the project rather than

the professional engineer who is assigned overall responsibility for the study. The [State agency] stated that their former employee had conducted numerous technical reviews which included the "A" and "B" programs. To their knowledge, she had not had any contact with [The Firm] prior to her interview for the position.

The [State agency] included information about the specific duties of the [Bureau], as well as of the former employee now working for [The Firm]. ["A" Program] is a grant program which provides funds to eligible institutions, such as hospitals and schools, for studies in [] conservation measures. The applications for funding are submitted by engineers and architects employed by the institutions, either in-house, or through independent firms. The [State agency] co-funds the studies with the Federal government. One of the responsibilities of the [Bureau] is to review the studies for technical accuracy and feasibility. The ["A" Program] is limited to the studies and the funding review of all eligible applicants for ["A" Program] grants takes place once per year. ["A" Program] is primarily focused on buildings.

Once per year, after a complex system of ranking takes place, certain of the institutions are identified to receive funds to implement capital improvements aimed at [] conservation. The ["B" Program] is the method by which an evaluation of improvements, which might be made to a process within an institution, is made. If a particular institution decides to make these improvements, it is the responsibility of the institution to get the work done. Rather than focusing on structures, the ["B" Program] focuses on the processes within a given structure, and the [] efficiency or conservation possibilities which exist therein.²

The [Bureau] is responsible for ranking applicants for grants and for reviewing the applications for technical accuracy. This includes a review of the relevant assumptions employed by the engineers or architects who prepared the application, a review and independent calculation of the projected costs, and a review and re-calculation of the projected [] savings and costs. In the cases where application information could not be replicated, the calculations and review are done independent of the submission.

In her position as a [State employee], she was responsible for conducting the reviews of submissions in the "A" and "B" programs. She was responsible for making the independent calculations and for checking all specifications in the applications. In doing so, she was frequently called upon to discuss the submission with the engineering firm or architecture firm which had made the submission. A necessary part of her job was to interact with other engineers from the firms which had prepared the studies and applications to clarify the work. The usual procedure involves an early call from the reviewer, such as this former employee, to discuss the details with the supporting engineering staff. Later, a formal letter would follow addressed to the principal of the firm which would lead to discussions with the senior engineer, but only as a formality.

When asked about the nature of contact between the former employee and her new employer, the supervisor indicated that he had no formal record of her having reviewed any of the applications or studies submitted by [The Firm], but that records had not always been kept and might not reflect all of the work performed by the individual. He stated that any work in which she participated as a preparer for [The Firm], on either an "A" or "B" Programs, would necessarily

lead to contact with the [State agency]. The nature of the work requires that kind of interaction. The only exception, in his opinion, was if there was another person who worked with her; however, he stated that her level of competency did not demand assistance. Insofar as [The Firm's] representation that the projects that she was working on were funded before her tenure with them, the [State agency] representative stated that some of the work was funded before her starting date, but that the nature of the project requires constant contact and negotiation with the [State agency] to discuss specifications on the application, and calculations submitted in support of applications, which are submitted on an annual basis. Thus, despite the grant of funds before she arrived, the project requires continued relationships between the [The Firm] engineer developing the study or calculations and data, and employees of the [Bureau].

DISCUSSION

The "revolving door" and "lifetime bar" apply to the activities of the former employee of the [State agency], now employed with [The Firm], with respect to her involvement in the projects which are partially funded by or reviewed by her former agency.³ The "revolving door" specifically prohibits her from appearing or practicing before her former agency for compensation on behalf of a firm in relation to any matter before the agency for a period of two years from the date of termination.

Clearly, any work performed by this former employee which involves engineering details, calculations and data supporting an application for funding by the [State agency] for an [] conservation study or improvement, undertaken on behalf of the [Firm], constitutes the rendering of services for compensation on behalf of a firm in a matter before the former employing agency. [The Firm] states that the former [State employee] employee would be "totally unknown" to the [State agency]. That is not a criterion for the Commission to find that the "revolving door" provision has not been violated. The Commission has previously indicated in other Advisory Opinions that a former employee cannot receive any compensation for work on behalf of anyone in relation to any matter before her former agency. The "A" and "B" projects are funded, in whole or part, by the [State agency] as grants awarded pursuant to an application filed by an institution or person, in this case, [The Firm]. The grants or approved applications are matters before the [State agency] and subject to its continued review and approval. It does not matter that the affected individual's work on these matters is "totally unknown" to the [State agency]. The key is whether the former employee is receiving compensation for services performed in relation to any matter before her former agency within two years of termination of employment. The [State agency] has stated that the nature of the former employee's work with [The Firm] leads to contact with it. The fact that this former employee works on the project and another "fronts" for her with the [State agency] does not mitigate the "revolving door" violation.

The fact that this former employee did not work on these specific projects while at the [State agency] and did not review or approve [The Firm's] application for such funding is not a factor in whether the "revolving door" provision applies to her under the circumstances here.⁴ The issue is whether she is compensated for a matter before her former agency.

And, because the request in this matter raises the possibility that the former employee may be involved in assisting in the preparation of applications for the [State agency] funding for future

activities, the Commission desires to emphasize that she may not receive compensation for participation in, or advising on, or preparation of any [firm] application to the [State agency] for grant funding. In addition to receiving no compensation from such activity, she cannot receive any net revenues earned for any work on such projects.

For these reasons, the former [State agency] employee is prohibited from any participation in "A" Program or "B" Program which are funded in any way by the [State agency] for two years after her termination with the [State agency].

In addition, the lifetime bar applies in relation to any matter in which the former employee was directly concerned and in which she personally participated during her employment with the [State agency], or which was under her active consideration. If she was involved in any specific "B" Program or the review of any "A" Program which is currently being, or in the future to be, handled by [The Firm], the lifetime bar totally prohibits her involvement in any of those projects in any capacity, and with regard to *all* State agencies.

Thus, §73(8) of the Public Officers Law prohibits certain activities which [The Firm] has anticipated assigning to the former [State employee]. In addition, the firm and the former employee must be aware that the ban on her appearances with regard to matters in which she had personal participation or active consideration is a *lifetime* bar.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the requesting individual 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: April 23, 1990

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 the effective date of the Commission and the legislation, which was January 1, 1989.

2. For example, rather than focusing on the energy efficiency of the outside skin of a building in terms of heat loss or retention, the ["B" Program] focuses on the energy produced in a process such as the laundering process at a hospital. Specific ways in which to make this laundering process more energy efficient are the focus of the ["B" Program]

3. For the two-year bar, the question of whether the projects were funded before or after the employee's departure is irrelevant.

4. We note that the [State agency] was unable to ascertain whether the affected individual worked on these specific [Firm] applications while employed at Energy. If she has, several serious questions would be raised under §73 and §74 of the Public Officers Law. For the purposes of this Opinion, we will assume that the former employee had no contact with [The Firm] on these or other projects projects prior to her termination.