

# New York State Ethics Commission

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**Advisory Opinion No. 91-12:** Application of Public Officers Law §73(8) to a former State employee who wishes to participate in bidding on a contract to be let by his former agency; termination of State service defined; effect of substantial change in the scope of a project on the application of the lifetime bar restriction

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## Introduction

The following advisory opinion is issued in response to a request dated January 16, 1991, from a former State employee regarding the application of the post-employment restrictions contained in Public Officers Law §73(8) to specific situations.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission concludes that the lifetime bar applies in this instance to prohibit the former employee from bidding on or participating in the [building] improvement project with his former agency because the project is the same transaction with respect to which the former employee was directly concerned and in which he personally participated during the period of his service or employment with the State.

## Applicable Law

Public Officers Law §73(8) provides, 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 . . .*(emphasis added)

## Background

The former employee worked for [the State agency], a State agency under Public Officers Law §73. He resigned his position [in August 1989].

Among the capital projects to which the former employee was assigned during his employment with [the State agency] is [a building] improvement project. The project involves renovation of [a building, including new construction]. The former employee was involved in the design phase of this project while he was employed by [the State agency]. The design of the project began before he commenced employment with [the State agency] and continued after his termination of service.

The team directing the activities of the consultants and managers on the project reported directly to the former employee who was serving as the [job title]. While he was still employed by [the State agency], the project "consisted of a functional rehabilitation of the [building]. This upgrade included new stairway and elevator installations for egress from [the building]. The project also included a reworking of the HVAC and electrical systems. The changes considered during this period were basically limited to finishwork, such as brass railings, marble floors, etc."<sup>(1)</sup> The former employee stated that he had no involvement with any of the decisions regarding these changes.

According to the former employee, his role in this project was limited to providing guidance for preparing the overall budget and schedule based upon the decisions made by the operating personnel. He presented the schedule and budget information to management, along with various techniques for maintaining [normal use of the building] during construction. He was not in a position to decide upon any facet of the design. His group was only responsible for providing an accurate budget and schedule for the work.<sup>(2)</sup> As a representative of [the State agency], the former employee made presentations to [other State agencies and authorities] on various alternatives which were being considered by [ ] relating to contracts, scope of the project and construction alternatives.

According to the former employee, since he left [State] employment, the functional and finishing aspects of the [building] improvement project have been completely revised by an architectural firm and the primary design consultants have made major changes [ ]. The former employee states that the design was substantially complete when he left State service in 1989, but that since then the primary design consultants "have spent millions of dollars in redesign."

The bid documents for the [building] improvement project were available for inspection beginning February 1991, and bids were expected to be received and opened in June 1991. It is expected that the contract will be awarded and construction will begin in October 1991.

The former employee is currently employed by [a private firm], a construction consulting and management firm. The firm wishes to submit a bid for the [building] improvement project. The former employee would like to participate in the bid preparation and submission process and the work which will result from a successful bid. He categorically states that [the firm] has never previously been involved in any aspect of the [building] improvement project. The former employee asked four questions which the Commission will address in turn.

## **Discussion**

1. *Is the statutory exclusion regarding prior involvement construed narrowly enough to permit my involvement after the two year period has elapsed based upon a significant change in the scope of work of this project since my employment?*

The post-employment activities of former State officers and employees are governed by Public Officers Law §73(8) which bars certain acts by former employees relative to their former State agencies for two years after their termination of employment, to prevent them from utilizing their inside knowledge of State agencies and specific projects for their own benefit or that of clients or from exercising undue influence with State employees at the agency. The Commission stated the following in [Advisory Opinion No. 88-1](#):

This subdivision is generally referred to as the "revolving door" provision, for it 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.

In addition to the two-year bar is the 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 any such services rendered in relation to any case, proceeding, application or transaction with respect to which he was directly concerned and in which he personally participated during the period of his service or employment, or which was under his active consideration.

In the instant case, the Commission must decide whether the former employee's involvement in the [building] improvement project is prohibited by the lifetime bar. The Commission must, therefore, determine whether the [building] improvement project is the *same* transaction with which the former employee was directly concerned and in which he personally participated during the period of his service or employment, or which was under his active consideration then. The Commission concludes that it is the same transaction.

The lifetime bar is a limitation imposed to restrict former employees from using specific insider knowledge about a transaction before a State agency forever. To trigger this limitation, the individual, while employed by the State, must have been directly concerned and personally participated in the same transaction in which he wishes to appear, practice, communicate or otherwise render services following termination from State service. The statutory language is clear that mere acquaintance with or knowledge of a fact or circumstance is insufficient to trigger the lifetime bar. More is needed; the facts must clearly show personal participation and direct concern or active consideration of a transaction.

The changes in the scope and nature of the improvements which occurred after the former employee left State service do not render the project a different transaction from the one with which the former employee was directly concerned and in which he personally participated during the period of his employment. The fact that the exact design of that project has changed does not change the essential nature of the transaction as a reconstruction of the passenger terminal at [the building]. The State agencies, the subject property and the basic concept of reconstruction have not changed to a degree necessary to render this project a different transaction in order to avoid application of the lifetime bar. Despite the representation that the

project has changed significantly and other design consultants have been paid millions of dollars to redesign the project, the Commission finds that the "transaction" in which the former employee was involved continues to exist; the transaction is the continuing reconstruction of [the building].

There has been no significant break in activity during the reconstruction of [the building]. The reconstruction, engaged in during the requesting individual's appointment, is one continuous act or transaction. The fact that the design has been modified since the former employee's departure does not change this transaction into a new one; it is like an amendment to an existing contract which does not change the nature of the transaction but merely modifies its terms. Had the reconstruction project terminated after completing a specific phase and a new effort been initiated, the Commission may have determined that there was no continuing transaction. In this instance, however, the reconstruction is a continuous transaction on which the former employee worked while employed by [the State agency].

This former employee was clearly involved in the transaction to rehabilitate [the building]. The Commission believes that the former employee has more than just passing knowledge concerning the [building] reconstruction project. He served as [in a position] with specific responsibility for the reconstruction project. The level of responsibility of the former employee indicates his active involvement in the nature of personal participation, direct concern and active consideration regarding the reconstruction. The Commission concludes, therefore, that the application of the lifetime bar precludes the former employee's participation in any aspect of [the building] reconstruction project on behalf of his private employer.

2. *Based upon the actual circumstances and agreements contained in my letter of resignation is the effective date of termination for the purpose of determining compliance with the ethics law May 8, 1989 or August 8, 1989?*

The determination of the actual date of termination for the purposes of application of the two-year bar of the revolving door is based upon certain objective criteria, such as the last date on the payroll. In this case, the former employee stated in his letter requesting this opinion that his last day of employment with [the State agency] was August 8, 1989. The former employee was on special assignment from May 8, 1989, until August 8, 1989, and did not perform his duties as a [job title]. The letter of resignation which accompanied the request indicated that, under certain circumstances (which did not occur), the date of termination might precede August 8, 1989. The former employee did not indicate that any of such contingencies had been fulfilled. Therefore, the Commission must conclude that the date of termination is the date on which a former employee was removed from the payroll and ceased employment benefits related to active employment.<sup>(3)</sup> In this case the termination date is August 8, 1989. This question is not material to the application of the "revolving door," however, because the lifetime bar precludes *any* involvement in the project at any time in the past or in the future, regardless of termination date.

3. *Notwithstanding Questions #1 and #2, is it proper for me to participate in the bid process even though a full two years has not elapsed? I would not be receiving any form of "revenue" for this effort but only creating the opportunity to receive "revenue" after the two years has elapsed.*

This case is unlike the circumstances in [Advisory Opinion No. 90-3](#), where a former employee rendered services that involved no specific advice or participation in the preparation of any application or proposal to be presented to his former employer, and, therefore, the post-employment restrictions of §73 did not apply.

In the case at hand, the participation of the former employee in preparing any aspect of any bid document or any other matter with respect to [the building] project is prohibited by the lifetime bar. Therefore, the Commission concludes that the former employee is prohibited by Public Officers Law §73(8) from participating in any aspect of the work on the [building] improvement project, including the preparation of bids.

4. *Is it proper for me to participate after the two year waiting period with my current employer in any capacity on the Project as a salaried employee?*

As indicated previously, the post-employment restrictions contained in Public Officers Law §73(8) prohibit the former employee from ever participating on the [building] improvement project.

### **Conclusion**

The Commission concludes that the former employee is forever prohibited from participating in the bidding or contract work relating to the [building] improvement project by Public Officers Law §73(8). The Commission has concluded that the project is the same transaction as that in which he was directly concerned and in which he personally participated while in State service.

This is a formal opinion of the Commission. Pursuant to Executive Law §94(15), an opinion rendered by the Commission, until and unless amended or revoked, shall be binding on the Commission in any subsequent proceedings unless material facts were omitted or misstated by the person who requested the opinion.

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza

Norman Lamm

Donald A. Odell, Members

Dated: July 29, 1991

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### **Endnotes**

1. Information provided by the requesting individual in a letter dated April 25, 1991.

2. Ibid.

3. Removal from the payroll means that the individual is not reflected in the payroll records of the appointing authority as being eligible to receive payment for services to be rendered prospectively. The receipt of "lagged" paychecks with payment for unused leave accruals does not extend the period "on the payroll" because it involves payment for previously rendered services or accrued benefits.