

# New York State Ethics Commission

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**Advisory Opinion No. 91-18:** Application of the lifetime bar post-employment restrictions of Public Officers Law §73(8) to a former State employee who anticipates future contact with his former State agency.

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## Introduction

The following advisory opinion was requested after issuance by the State Ethics Commission ("Commission") of an informal advisory opinion dated January 7, 1991, concerning the application of the lifetime bar provision of the post-employment restrictions contained in Public Officers Law §73(8) to a former State employee who terminated State service more than two years ago.

Pursuant to the authority vested in the Commission pursuant to Executive Law §94(15), the Commission concludes that the lifetime bar contained in Public Officers Law §73(8) does not restrict the private sector post-employment activities described by the requesting individual as long as they do not involve or require his appearance, practice, communication or other provision of services before a State agency or receipt of compensation for such services rendered by him on behalf of any entity in relation to a 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. The Commission's opinion addresses only the circumstances described. The determination concerning whether the lifetime bar precludes activities not described must be made on a case-by-case basis, and the requesting individual is encouraged to consult with the Commission as to the propriety of any future contact with the State.

## Background

The requesting individual was employed until October 1988 by the [State agency] as a System Safety Specialist I in the System Safety Department and specialized in fire protection and life safety. His duties, as described in his original letter to the Commission, were the following:

- Managed Fire Safety Program
- Provided fire protection engineering and design services
- Designed and reviewed plans for equipment systems and facilities
- Performed in-house fire and building code consulting
- Developed design guidelines and specifications for facilities and mobile equipment systems
- Conducted exiting studies for transit facilities
- Investigated major fires and related transit system incidents

- Recommended, designed and managed the development of fire suppression systems to protect subway token booth clerks
- Developed Policy/Instructions for flammable and combustible liquids, compressed and liquefied petroleum gasses
- Coordinated the development of training and certification programs for [State agency] employees in regard to hazardous operations
- Prepared and managed the prototype contract for the installation of fire detection and suppression systems for subway token booths
- Assisted in reviewing prototypes for the Subway Undercar Fire Suppression System
- Developed Scope of Services for the survey contract for rapid and surface transit facilities for compliance with fire and building codes

While considering the individual's initial request for an informal opinion, the Commission requested additional information concerning his involvement in any bid process or contract on behalf of [State agency]. He provided the following information in a letter dated November 12,1990:

#### Involvement in Preparation of Bid or Response to an RFP

I would be involved in the preparation of the scope of services and cost estimates and would assist in the preparation of the entire proposal for the contract to be submitted to [the State agency].

#### Project Services

In addition to being project engineer on the team, I would coordinate the field operations for our work, as well as participate in the review and design, if any, of fire protection systems and code analyses for facilities. Also, I would participate in the drafting and review of reports, analyses and interpretations of codes and standards.

#### Current Job Responsibilities

I am currently employed by [the company] as an Associate Consulting Engineer in the [ ] Office. I am involved in the project management, engineering and design of fire protection systems and features of building construction. I review the fire protection aspects of construction and shop drawings for design performance and compliance, provide fire protection and life safety analyses and evaluations, computer modeling, and general fire and building code consulting.

#### Contact with [the State agency]

During the bidding process, the only contact I would have with [the State agency] would be with the [State agency] designated contract administrator (who is identified as the contact person by the [State agency]). Upon award of the contract, as project manager for [the company], I would maintain contact with the [State agency] contact person and if requested, with his designated agents.

### **Discussion**

The question raised by the requesting individual concerns the application of the post-employment restrictions contained in Public Officers Law §73(8) to a former employee who has been out of State service for more than two years, and who anticipates contact with his former State agency in relation to submitting bids for contracts and preparation of applications to provide services to the former State agency.

The post-employment restrictions of the Public Officers Law have two components. One component, not relevant to the instant case, is the two-year bar which prohibits certain contact or receipt of pay for services rendered by a former State employee before his former State agency within two years of termination of State service.<sup>(1)</sup> The other component is the lifetime bar which restricts certain contact or receipt of compensation for services rendered before *any* State agency in relation to transactions in which a former State officer or employee was directly concerned and in which he personally participated during his service, or which was under his active consideration. The lifetime bar provides, in relevant part:

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 personally participated during the period of his service or employment, or which was under his or her active consideration.

The lifetime bar is a limitation imposed to forever restrict former employees from using insider information about transactions in which they were involved 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 or she wishes to appear, practice, communicate or otherwise render services following termination of 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 lifetime bar applies to former employees without regard to termination date, but only as to post-employment acts on or after January 1, 1989.<sup>(2)</sup> In this case, the requesting individual terminated State service in 1988 and is subject to the lifetime bar only with regard to his post-employment activities on or after January 1, 1989.

In his position with [the State agency], the requesting individual was responsible for fire protection and line safety. He managed the Fire Safety Program, provided fire protection engineering and design services, designed and reviewed plans for equipment systems and facilities, designed fire suppression systems in token booths for subway clerks, designed and inspected equipment systems in facilities or for mobile use, and performed in-house fire and building code consulting, and developed preliminary scope of services for an outside consultant to perform inspection and survey duties at [State agency] facilities which would require analysis of fire and life safety code compliance with respect to the New York City Building Code and

other generally accepted fire protection guidelines and performed other duties as described earlier in this opinion.

The post-employment work which would bring the requesting individual into contact with [the State agency] has been described by the individual in his letters as involving bidding and working on projects for the [State agency] which are new, rather than continuing old projects on which the requesting individual had previously worked.<sup>(3)</sup> The Commission must decide whether the projects on which the requesting individual wishes to bid and participate actually constitute different transactions from those with respect to which the requesting individual was directly concerned and in which he personally participated during the period of his service or employment, or which were under his active consideration.

The requesting individual did not supply the Commission with any specific information concerning the contract on which his firm is currently interested in bidding. He indicated that no current projects or contracts existed. Because the Commission must make a case-by-case determination on lifetime bar matters, it cannot do more than generally describe the prohibitions which result from application of the lifetime bar. The Commission generally concludes that involvement of the requesting individual as a [State agency] employee in design and inspection of [ ] fire suppression systems precludes his participation in any contract work related to the design and inspection of these [ ] fire suppression systems for the [State agency]. The Commission believes that involvement of the requesting individual in the design of equipment systems and his inspection and review of such systems in specific facilities and mobile units precludes his participation in any contract work related to the design, review, inspection or analysis of the fire and life safety systems in such facilities or mobile units for the [State agency] on which he previously worked. The Commission believes that the requesting individual was directly concerned and personally participated in the development of training and certification for employees in regard to hazardous operations and that he is precluded from doing any contract work in regard to the same training or certification with [the State agency]. He is precluded from working on any modification or extension of existing projects, training, designs, reviews, inspections or other transactions on which he worked while with [the State agency].

In each of these instances, the requesting individual was directly involved in the actual design, implementation, inspection, review or analysis of the projects. His knowledge regarding the projects is not cursory but, rather, is specific and significant. Such knowledge would, necessarily, place him in a position of great advantage with regard to preparing bid proposals or in dealing with [the State agency]. It is this knowledge and resulting advantage which was gained solely because of his previous employment by [the State agency] which he may not sell for private profit. Thus, the lifetime bar applies to all such activities, whether specifically mentioned herein or not.

The former employee is not precluded from working on designing *new* equipment systems, inspection or analysis of new facilities or mobile units or contract work with regard to design, review, inspection or analysis of fire and life safety systems for facilities or mobile units on which he did not previously work. The Commission has previously determined that the lifetime bar provisions of §73(8) do not preclude a former State employee from appearing, practicing, communicating or rendering services for compensation on new and separate matters or

transactions, notwithstanding the fact that the State employee may have been directly concerned or personally participated in a similar or related transaction while he or she was in State service.

### **Conclusion**

This former [State agency] employee had more than passing knowledge of the fire and life safety systems which were used in facilities and mobile units throughout [the State agency] and certain training and certification matters. His level of involvement in such matters is now strictly limited by the lifetime bar in Public Officers Law §73(8) to matters with which he was not directly concerned or in which he did not personally participate. He is precluded from bidding or working on matters which are modifications or extensions of his work with [the State agency]. He is not, however, precluded from working on new projects in the field of his expertise.

The determination concerning whether the lifetime bar precludes activities not specifically described by the requesting individual must be made on a case-by-case basis, and the requesting individual is encouraged to consult with the Commission as to the propriety of any future contact with the State.

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 and supporting documentation.

All concur:

Joseph M. Bress, Chair

Angel A. Costanza

Donald A. Odell, Members

Dated: September 16, 1991

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### **Endnotes**

1. The requesting individual left State service ~~in October 1988~~ [more than two years ago].
2. In *Forti v. State Ethics Commission* and *Kuttner v. State Ethics Commission* the New York State Court of Appeals determined that the post-employment restrictions of the Ethics in Government Act of 1987 apply to employees who terminated State service prior to the effective date of January 1, 1989, with respect to their acts on or after January 1, 1989.
3. The Commission determined in Advisory Opinion No. 91-10 that changes in the scope and nature of a specific project which occurred after a former employee left State service do not render the specific project to be for the purposes of the lifetime bar, 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 Commission stated that the fact that the exact design of a project has changed does not change the essential nature of the transaction, especially when there is no significant break in activity during the period after termination.