

New York State Ethics Commission

Advisory Opinion No. 93-11: Determination of "former agency" for purposes of application of the post-employment restrictions of Public Officers Law §73(8).

Introduction

The following advisory opinion is issued in response to an inquiry forwarded by the New York State Office of Alcoholism and Substance Abuse Services ("OASAS") from the Administrator of [a private facility], concerning the application of the post-employment restrictions of Public Officers Law §73(8) to a former employee of the New York State Division of Substance Abuse Services ("DSAS"). DSAS recently consolidated with the New York State Division of Alcoholism and Alcohol Abuse ("DAAA") to form OASAS. OASAS also seeks clarification as to whether Public Officers Law §73(8) allows the agency to utilize the former employee in question as a "resource person" in a non-paid capacity.

The Commission must determine whether OASAS is to be considered the employee's former agency for purposes of the post-employment proscriptions contained in Public Officers Law §73(8) and what effect these proscriptions will have on the former employee in his present position with [the private facility].

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission hereby renders its opinion that OASAS is the individual's former State agency, for the purpose of Public Officers Law §73(8). The Commission determines that the appearance, practice or rendering of services for compensation by the former DSAS employee before OASAS on behalf of [the private facility] would violate the two-year bar. The lifetime bar would also apply to prohibit compensated services rendered by the former employee on any transaction with respect to which the individual was directly concerned and in which he personally participated or which was under his active consideration during his service at DSAS. The Commission further determines that Public Officers Law §73(8) does not preclude OASAS from calling upon the former employee to provide historical information and perspective concerning program origin and operations, if such information is provided on an unpaid basis.

Background

In 1977, functions of the former Department of Mental Hygiene were transferred to a newly created Office of Alcoholism and Substance Abuse ("Office") to provide "the administrative framework to improve response to the disease of alcoholism and the problem of alcohol abuse, substance abuse, and substance dependence."⁽¹⁾ The Office consisted of a Commission on Alcohol and Substance Abuse Prevention and Education ("ASAPE"), DAAA and DSAS. Among its duties, DAAA was responsible for assisting the Governor in developing policies to meet the

needs of alcoholics and alcohol abusers and to facilitate their rehabilitation and functioning in society.⁽²⁾ DSAS was responsible for developing policies to improve substance abuse services in New York State.⁽³⁾ ASAPE's three members, appointed by the Governor, were the chair and chief executive officer, the director and chief executive officer of DAAA, and the director and chief executive officer of DSAS.⁽⁴⁾ The chair and all directors were authorized to hire employees and set compensation, prepare budget requests, promulgate rules and regulations necessary to carry out their duties, and enter into agreements and contracts. Each entity was also required to carry out very separate and distinct statutory duties and responsibilities.⁽⁵⁾ As a result of this statutory framework, both DAAA and DSAS functioned and operated as separate State agencies. In fiscal year 1992-93, DAAA employed 636 employees and had a total annual budget of approximately \$114 million. DSAS employed 345 employees and had an annual budget of \$280 million.⁽⁶⁾

The Governor proposed and, in 1992, the Legislature enacted the consolidation of DAAA and DSAS into OASAS to address the problem of chemical dependency, provide programs and services to the growing number of special populations⁽⁷⁾ and to coordinate the State's prevention and treatment policies and programs. Effective June 23, 1992, OASAS was charged with the "responsibility for assuring the development of comprehensive plans, programs and services in the areas of research, prevention, care, treatment, rehabilitation, education, and training of persons who abuse or are dependent on alcohol and/or substances and their families."⁽⁸⁾ The Commissioner of OASAS is authorized to, among other things, execute the policies of the State concerning alcoholism and substance abuse services, hire employees, adopt regulations and receive and distribute federal funding in support of facilities, programs and activities for alcoholism, substance abuse and chemical dependence services.

This consolidation also resulted in the transfer and assignment of all "functions and powers . . . and all of the obligations and duties of [DAAA] and [DSAS] . . . to [OASAS] and the commissioner of that office."⁽⁹⁾ Employees of DAAA and DSAS were similarly transferred to OASAS "without further examination or qualification and . . . retain their respective civil service classification and status."⁽¹⁰⁾ The continuity clause of this legislation also states:

For the purpose of succession to all functions, powers, duties, and obligations transferred and assigned to, devolved upon and assumed by them, pursuant to this act, the office established pursuant to this act shall be deemed and held to constitute the continuation of the division of alcoholism and alcohol abuse and the division of substance abuse services with respect to the functions and powers herein transferred.⁽¹¹⁾

The legislation provides for the continuation of "all rules, regulations, acts, orders, determinations, licenses, operating certificates and decisions of [DAAA] and [DSAS]" as the rules and actions of OASAS.⁽¹²⁾ Existing rights and remedies provided by each agency were not lost, impaired, or affected as a result of the consolidation.⁽¹³⁾ Similarly, pending legal actions against each agency were affected only to the extent that such cases would be defended or prosecuted in the name of OASAS.⁽¹⁴⁾

The former State employee who is the subject of this inquiry served as the [] at DSAS. In this position, the individual had "primary responsibility for assisting the Associate Director of [] in the overall operation of the Bureau of []." Specific duties included:

Assisting the Bureau Director in coordinating, managing and directing the day-to-day operation of the bureau.

Analyzing the [] treatment modality and making recommendations regarding utilization, waiting lists, emerging problems, etc.

Reviewing and assessing State, federal and municipal regulations and preparing recommendations regarding new legislation impacting on [] treatment.

Preparing administrative bulletins/correspondence to local service providers outlining Division policy and/or direction.

Coordinating the review and analysis of [] Treatment Programs operating budgets.⁽¹⁵⁾

The employee left DSAS and terminated State service on [], prior to the consolidation of DSAS and DAAA and began working as Director of Administrative Services for [the private facility] on [].

The [private facility] focuses primarily on [] addiction.⁽¹⁶⁾ This facility is regulated and licensed by OASAS. [The private facility] has an annual operating budget of \$3.5 million, with approximately \$800,000 of the total provided by the State.⁽¹⁷⁾ In his current position as Director of Administrative Services, the individual is responsible for directing and managing the activities of [the private facility's] administrative staff. He is also required to coordinate and assist in the preparation of the annual budget and negotiate with State, local and federal agencies (e.g., OASAS, New York State and City Health Departments, and the federal agencies []) in establishing program budgets and Medicaid eligibility.⁽¹⁸⁾

Discussion

Public Officers Law §73(8) provides, in relevant part, that:

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.

The Commission noted in [Advisory Opinion No. 88-1](#) that Public Officers Law §73(8), often 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. The post-employment restrictions of §73(8) are of two types: the two-year bar and the lifetime bar.

The two-year bar is absolute with respect to appearing, practicing or receiving compensation for services rendered before a State agency which employed the former employee. The lifetime bar applies to appearing, practicing, communicating or rendering services or receiving compensation at any time with respect to cases, proceedings, applications or transactions with which the individual was directly concerned and in which he or she personally participated or which was under his or her active consideration while a State employee. It should also be noted that for purposes of §73(8), the term "appearance" has been broadly interpreted by the Commission. A prohibited appearance may include preparing documents for clients which are presented before the former agency or which the agency will review or approve.

Former State agency

In analyzing the application of the post-employment restrictions of Public Officers Law §73(8), the Commission must first determine whether OASAS is the employee's "former State agency." It is clear from the enabling legislation that the powers, duties, responsibilities, rights and liabilities of DSAS were fully assumed by the newly created OASAS and that DSAS no longer exists as a State agency. OASAS stands in DSAS' stead and operates the same programs, implements the same regulations, interacts with the same (albeit larger) client population as did DSAS. As DSAS' successor agency, OASAS has many of the same personnel overseeing the former DSAS programs. Therefore, the former employee has the opportunity to use his insider knowledge and expertise on behalf of clients or a subsequent employer with OASAS as he would have had with DSAS--the kind of behavior the post-employment provisions are meant to prohibit. Accordingly, for purposes of the application of Public Officers Law §73(8), the "former agency" of a DSAS employee is OASAS. In this particular case, from [February 19, 1992] (i.e., the date the individual left State service) to June 23, 1992 (i.e., the effective date of the DAAA/DSAS consolidation), DSAS alone was the former agency of this individual. For the remaining [20] months of the two year bar period, the former agency is OASAS.

It is also important to recognize that actions, favorable or otherwise, taken by OASAS officials on matters presented by the former DSAS employee may "raise suspicion among the public" that such determinations are based on favoritism or the relationship which the OASAS employer had with this former employee, a violation of Public Officers Law §74(3)(h). By designating OASAS as the former agency of both DSAS and DAAA employees, this inherent appearance of a conflict of interest concerning the actions of current OASAS employees is also avoided.⁽¹⁹⁾

Application of Public Officers Law §73(8)

The Commission must now consider what effect the post-employment proscriptions will have on the former DSAS employee in his present position with [the private facility]. The former DSAS employee may not appear, practice or receive compensation for services rendered before OASAS on behalf of [the private facility] or any other person, firm, corporation, or association as to any matter for a period of two years following his termination from State service. The individual must recuse himself from any involvement with OASAS including fiscal and budgetary

negotiations and programmatic issues including the preparation of any applications to or reimbursements from OASAS. The former employee may, however, provide assistance to [the private facility] by providing a general explanation of the law or of OASAS policies and procedures.⁽²⁰⁾

The former DSAS employee would also be prohibited from appearing, practicing, communicating or otherwise rendering services before any State agency or receiving compensation for such services anywhere in relation to any case, proceeding, application or transaction with which he was directly concerned or personally participated, or which was under his active consideration during his State service.

OASAS has asked the Commission to consider the question of whether the post-employment proscriptions of Public Officers Law §73(8) restrict the ability of an agency informally to solicit information from a former employee regarding a particular program with which that employee dealt while in the agency. The Commission has previously held that the lifetime bar does not prohibit a State agency from contacting a former officer or employee to provide, without fee, information gained while in State service. In Advisory Opinion No. 91-2 the Commission stated:

[T]he Commission will not interpret the lifetime bar in such a way as to hamstring State agencies from obtaining needed information. The Commission believes that it was not the Legislature's intent to preclude State agencies from contacting former State officers or employees concerning matters with which they dealt while in State service or employment. Where the State agency seeks certain information from a former officer or employee about his acts as an officer or employee, and no compensation is provided, we would not find such communication to be barred under the lifetime bar provision--because the agency seeks such information solely for its use and not for any other advantage.⁽²¹⁾

There, the Commission needed to address the lifetime bar, only since the two year bar for the affected individual had already expired. Here, OASAS wishes to contact the former employee within two years of his termination from State service to discuss matters within the former employee's responsibilities while in State service. The reasoning of Advisory Opinion No. 91-2 applies here with the same result. The Commission will not interpret Public Officers Law §73(8) to preclude State agencies from speaking with former employees within two years of termination from State service on matters within that former employee's knowledge, so long as that communication is not compensated. Both OASAS and the former employee must be careful to limit such discussions to matters involving the former employee while he was at the agency. Such discussions should not be masquerades to permit the former employee or the agency to deal with any matter involving [the private facility].

Conclusion

The Commission concludes that, for purposes of applying Public Officers Law §73(8), the "former State agency" of this DSAS employee is OASAS, and therefore the two-year bar will apply to all post-State employment activities with OASAS. The former employee is also subject to the lifetime bar restrictions and is prohibited from engaging in any activity concerning any matter in which he was directly concerned and personally participated, or which were under his

active consideration during the time of his State service. The Commission finds no violation of the two-year bar under the limited circumstances where the State agency contacts a former officer or employee to obtain, without fee, information from that employee concerning matters in which he was involved while employed.

This opinion, until and unless amended or revoked, shall be binding on the Commission in any subsequent proceeding.

All concur:

Joseph M. Bress, Chair

Barbara A. Black

Angelo A. Costanza

Robert E. Eggenschiller, Members

Date: March 8, 1993

Endnotes

1. Mental Hygiene Law §19.01(a) - "Declaration of Legislative Intent" as added by Chapter 978 of the Laws of 1977. The law specifically mandated three "autonomous offices": the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities, and the Office of Alcoholism and Substance Abuse. Each functions independently, yet remains part of the Department of Mental Hygiene. See also Mental Hygiene Law §5.01 as added by L. 1977, c. 978.

2. Mental Hygiene Law §19.07(a). The duties of DAAA included operation of 13 residential alcoholic treatment centers, administration of State and federal resources for alcoholism-related functions, review new programs and construction projects, provision of training on alcoholism and issuance of credentials to alcoholism counselors.

3. Mental Hygiene Law §19.07(b). The duties of DSAS included "planning, developing, administering funding and regulating a comprehensive statewide network of more than 570 substance abuse programs . . . monitoring substance abuse trends . . . promoting public awareness of the substance abuse problem . . . and research into the physical and psychological effects of substance abuse."

4. Mental Hygiene Law §19.05 (a) through (d). While ASAPE was statutorily authorized from 1977 until 1992, it was never functional as an entity.

5. See, for example, Mental Hygiene Law §19.07 (a),(b) and (c).

6. Budgets include capital funds and "local assistance" funds distributed to localities in addition to funds for the agencies' operations.

7. "Special populations" include, among others, persons with HIV infection, the homeless and veterans with post-traumatic stress disorder.

8. L. 1992, c. 223

9. A. 10208-A §66-Transfer of functions.

10. Id. §67-Transfer of employees.

11. Id. §68-Continuity of authority.

12. Id. §70-Continuation of Rules and Regulations.

13. Id. §72-Existing rights and remedies.

14. Id. §73-Pending actions and proceedings.

15. Job specifications for [] provided by OASAS.

16. Many clients of [the private facility] have both drugs and alcohol-related addictions. While [the private facility] will address both types of dependencies, the primary focus of treatment is on the [] dependency. [the private facility] does not receive funding to provide [] treatment and counseling services.

17. Approximately \$2.5 million of the [the private facility's] budget is derived from Medicaid reimbursement. The remaining \$200,000 comes from patient fees and other sources.

18. Job specification for Director of Administrative Services. [the private facility]--Program Manual.

19. The Commission concludes also that OASAS is the former agency for DAAA employees who left within two years of the consolidation of the agencies, for that portion of their two year bar which remains. The Commission realizes that its conclusion that OASAS is the former agency for both DAAA and DSAS employees may result in a hardship in certain circumstances. It may have been possible, for example, for a former DSAS employee to appear before DAAA before the consolidation. As a result of the consolidation of agencies and this advisory opinion, this avenue of opportunity is foreclosed. It should also be noted that the Office of Alcoholism and Substance Abuse, of which both DAAA and DSAS were a part, functioned independent of any other State agency. OASAS is therefore the only State entity that can logically be recognized as the former State agency of former DAAA and DSAS employees.

20. See [Advisory Opinion No. 90-4](#).

21. [Advisory Opinion No. 91-2](#) p.11