

New York State Ethics Commission

Advisory Opinion No. 94-4: Application of Public Officers Law §73(8) to certain former seasonal, temporary employees of the Department of Taxation and Finance who may seek to be hired by a private entity with which the Department will contract to perform certain functions in the processing of the State personal income tax.

Introduction

The following advisory opinion is issued in response to a request from the New York State Department of Taxation and Finance ("Department") as to whether the post-employment provisions of Public Officers Law §73(8) would prohibit certain former seasonal, temporary employees of the Department from accepting employment with a private entity with which the Department will contract to perform certain functions in the processing of the State personal income tax.

Pursuant to its authority under Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that the seasonal, temporary employees of the Department are State employees subject to the post-employment restrictions of Public Officers Law §73(8). Moreover, if such employees were to obtain employment with the contractor and perform services on the project, such employees would violate the two year bar of the post-employment restrictions as they would "receive compensation for . . . services rendered . . . on behalf of any person, firm, corporation, or association in relation to any case, proceeding or application or other matter before [their former] agency."

Background

After a two-year study, the Department has decided to contract with a private entity to handle certain functions in the processing of the State's personal income tax. The work to be contracted comprises the collection of paper tax returns through a system of lockboxes and the receipt of electronically filed returns, and the deposit of remittances and data capture of information from the returns. The Department will retain responsibility and authority for all "sophisticated" tax processing functions, such as tax return verification, refund processing, auditing, billing and tax collection.

Under the current practice, each tax season the Department hires approximately 1,400 workers, primarily mail and supply helpers, clerical and data entry operators. These individuals are appointed to temporary positions, most for a duration of five months. They are paid an hourly wage and are not entitled to State health insurance or leave benefits.⁽¹⁾ They may, however, join the State retirement system (permanent employees *must* join the retirement system). The

positions are generally full-time positions for the duration of the appointment. Individuals serving in these positions are represented by the Civil Service Employees Association.

The seasonal, temporary workers perform routine, repetitive tasks, including manually sorting envelopes, extracting the contents and sorting returns based upon form number, document type and category (State tax v. City/State tax); segregating returns with remittances for forwarding to the depository bank; reviewing all returns for completeness; batching returns for forwarding to data entry; and data entry.

The Department's seasonal, temporary employees also perform two limited functions with respect to the estimated personal income tax processing. These duties are reviewing documents and remittances forwarded to the Department by the current contractor bank because the contractor bank determined that such returns could not be processed; and returning documents to the contractor bank for processing when such documents have been sent to the Department in error.

Under the proposed privatization plan, the contractor estimates that it will require approximately 1,100 seasonal, temporary employees during the peak of the processing season.⁽²⁾ The contractor has further indicated that it would likely hire some of the Department's former seasonal, temporary employees if Public Officers Law §73(8) would not prohibit such employment.⁽³⁾

The contractor has proposed training programs to enable the temporary staff to adapt to new work processes and technologies. This staff would use technologies rather than manual processes to eliminate the "conveyor belt approach" where a single process is repeatedly performed by the same employee. Individuals hired by the contractor would perform the following tasks: receipt and automated extraction of returns, presorted by those returns containing remittances and those not containing remittances, for immediate forwarding to an identification area; utilization of scanning equipment to enter receipt of individual taxpayer returns; utilization of technologies for remittance processing; utilization of images for on-line balancing, i.e. determining if the enclosed remittance matches the amount stated to be paid with the return; data entry workstation approach whereby employees would be required to enter data and interact with the system to correct computational errors on returns; utilization of imaging and optical character recognition technologies for data capture; and on-line error resolution of scanned images using optical character recognition workstations.

With regard to estimated personal income tax processing, temporary staff would perform the following functions: receipt and automated extraction of returns and remittances; utilization of technologies for remittance processing; utilization of imaging and optical character recognition technologies for data capture; and utilization of images for on-line balancing and return error resolution.

The contractor would arrange for a number of functions to be located at a single workstation and performed by an individual employee, unlike the Department's existing environment in which the functions are reduced to hundreds of very simple manual processes. The individuals hired by the contractor would not have contact with any of the employees from the Department in connection with the performance of their duties with the contractor. The Department states that if any issues

needed to be resolved with respect to the work performed by the contractor, the Department would deal directly with the contractor's supervisory/management staff. The Department further states that to the best of its knowledge, none of the contractor's supervisory/management staff would be recruited from the seasonal, temporary employees formerly hired by the Department.

The Department argues that Public Officers Law §73(8) should not prohibit the former seasonal, temporary employees from accepting employment with the contractor. The Department contends that (1) these individuals should not be considered State employees for purposes of Public Officers Law §73(8), and (2) even if such individuals are considered to be State employees, they would not be performing any duties that would constitute a prohibited appearance.

Applicable Law

Public Officers Law §73(1)(i) states, in relevant part, that:

The term "state officer or employee" shall mean:

(iii) officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies other than officers of such boards, commissions, or councils who receive no compensation or are compensated on a per diem basis;

Public Officers Law §73(8) states, 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.

Discussion

Public Officers Law §73(8), generally referred to as the "revolving door" provision, sets forth 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 precludes a former State officer or employee from appearing or practicing before his or her former agency or receiving compensation for services rendered in relation to any case, proceeding, application or other matter before his or her former agency within two years of termination. The lifetime bar applies to prohibit the former employee from appearing, practicing, communicating or otherwise rendering services before any State agency or receiving compensation for such services in relation to any case, proceeding, application or transaction

involving a matter in which he or she was directly concerned and personally participated or which was under his or her active consideration while in State service.

The provisions of Public Officers Law §73(8) contain no exception for part-time, seasonal or temporary employees. In [Advisory Opinion No. 91-1](#), the Commission considered whether §73(8) applies to transportation construction inspectors seasonably employed by the Department of Transportation. In that opinion, the Commission noted that approximately 60% of the individuals employed in these seasonal positions are college students working toward two- or four-year college degrees in engineering or applied sciences fields, while the remaining 40% generally are individuals who moved back and forth from the public to the private sector in construction-related jobs. The Commission concluded that those individuals who are primarily students (whose employment with the State was subordinate to their educational pursuits) and who meet the Commission's definition of "student" should not be included within the definition of "employee" for purposes of §73 of the Public Officers Law and, thus, should not be covered under the post-employment restrictions of §73(8).

To be considered a "student" and not an "employee" for purposes of §73(8) coverage, an individual must meet the following test: (1) he or she must be enrolled as a full-time student in an accredited course of study or on a seasonal recess therefrom; (2) an individual cannot work half-time or more per week during the school year; (3) students who work full-time during the summer or other semester breaks shall be limited to 120 days (four months) of full-time service for the State during the summer vacation period; and (4) the individual cannot receive any State employee benefits, such as medical, retirement or vacation benefits or have any right to re-employment ([Advisory Opinion No. 91-1](#)).

Using that opinion as a guide in the instant case, it cannot be said that the seasonal, temporary employees of the Department have a "primary purpose," such as full-time educational pursuits, to which their employment with the State is subordinate. Moreover, unlike individuals who meet the Commission's definition of "students," these employees are eligible to participate in the State retirement system.⁽⁴⁾ The Commission determines that, without a specific statutory exemption, these seasonal, temporary employees of the Department are employees for purposes of §73(8) coverage.

The Commission has previously held that Public Officers Law §73(8) applies to all former State employees without regard to level of responsibility or exercise of discretion assigned to their former State position. In [Advisory Opinion No. 91-17](#) ⁽⁵⁾, the Commission stated that:

[n]othing in the statute, as cited above, limits the application of either provision [two-year bar or lifetime bar] according to the level of responsibility or the exercise of discretion which is required by the State job from which the employee terminated State service. In the absence of any indication to the contrary, we must conclude that the two-year bar and the lifetime bar both apply universally because the opportunity to develop contacts, gain knowledge or experience or otherwise use State service as a training-ground for private sector work is not limited to those in the top-levels of government.

Having determined that the seasonal, temporary employees of the Department are employees for purposes of §73(8) coverage, the Commission must examine whether the proposed employment would violate the two-year or lifetime bar provisions. Under the two year bar, former employees may not "appear or practice before [their former] agency or receive compensation for any services rendered by [them] on behalf of any person, firm, corporation, or association in relation to any case, proceeding or application or other matter before such agency."

In the instant case, the contract between the Department and the contractor, awarded pursuant to competitive bid, would be a matter before the Department. The former State employees would perform certain functions in the processing of the State personal income tax to enable the contractor to fulfill its contract terms.⁽⁶⁾ Moreover, the actual work to be performed by the former State employees will involve the processing of State personal income tax returns, which would also constitute a matter before the Department. The former State employees would therefore "receive compensation for . . . services rendered by [them] on behalf of . . . [a] corporation . . . in relation to any . . . matter before [their former] agency" in violation of the two-year bar.⁽⁷⁾

The instant case does not appear to raise any issue under the lifetime bar of the revolving door, since the filing of tax returns each year is a different transaction.

The Commission is sympathetic to the Department's position but is constrained by the language of Public Officers Law §73(8). Many have argued that the opportunity for a former employee who served in the lower salary ranks of State service to reap private gain from relationships with State employees or knowledge of the State system, in contravention of the post-employment restrictions, does not exist. Others argue that imposing the revolving door on such former employees works an unreasonable hardship on them. For former employees below SG-18,⁽⁸⁾ the effect of the revolving door restrictions can be particularly harsh and limit their options. Considering the effect, but mindful of the need to maintain at least a minimum post-employment restriction for such former employees, the Commission has proposed in 1992, 1993 and 1994, legislation which sets a one-year absolute bar for former employees below SG-18.⁽⁹⁾ Those legislative proposals have not gone forward in the legislative process. In 1991 the Commission's proposed legislation would have exempted former employees from application of the revolving door in circumstances when an agency head stated that the former employees had qualifications in specific discipline necessary to the fulfillment of the agency's mission, that the contract was for the benefit of the State and the State Comptroller so certified. The proposal, if it had been passed by the Legislature, would have ameliorated this situation. While the Commission has attempted to legislatively address the anomaly of the instant situation, it has no choice under the present law but to come to the conclusion it has.

Conclusion

The provisions of Public Officers Law §73(8) contain no exception for part-time, seasonal or temporary employees. Therefore, the seasonal, temporary employees of the Department are State employees subject to the provisions of Public Officers Law §73(8). The two-year bar of §73(8) would be violated if such employees were to obtain employment with the contractor and render services on the project to perform certain functions in the processing of the State personal income tax.

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 or related supporting documentation.

All concur:

Joseph M. Bress, Chair

Barbara A. Black
Robert E Eggenschiller
Donald A. Odell, Members

Dated: February 25, 1994

Endnotes

1. Those individuals who remain with the Department for more than six months may be eligible for health insurance benefits. If an individual were to remain for nine months, he or she would be entitled to leave benefits.
2. The peak processing time estimated by the contractor is approximately two to three weeks, in contrast with the Department's peak processing time of two to three months.
3. The Department would still need to continue recruitment for approximately 300 seasonal, temporary workers.
4. These temporary employees are considered employees for the purposes of the State's Taylor Law and, as such, can be no less considered here unless express language were present.
5. In that opinion, the Commission stated in a footnote that, while the application of the post-employment restrictions to seasonal employees had not been addressed in a formal opinion, the Commission had previously concluded in an informal opinion that Public Officers Law §73(8) does not expressly permit an exception for seasonal employees. In that informal opinion, it was concluded that because the employment of a seasonal employee is not casual or occasional, because the seasonal employee is considered to have a "primary status" as a public employee, and because the seasonal employee is eligible for certain benefits and privileges which are commensurate with State employment, the Commission should not distinguish between a seasonal and a permanent employee for the purposes of applying the post-employment restrictions.
6. The Commission disagrees with the Department's argument that the fact that the nature of the work the employees would perform for the contractor is more sophisticated than the repetitive tasks they performed for the Department should weigh in the outcome of the inquiry. The

statutory prohibition does not go to the type or quality of work done or its level of difficulty or sophistication; it goes to the receipt of compensation for *any* services rendered in relation to a matter before the former agency.

7. The Department's reliance upon the "appearance" clause of the two-year bar is misplaced, as the former employees' proposed employment would violate the "render services for compensation" clause of the bar. Under this clause, the nature of the work to be performed by the former employees is irrelevant, as is the fact that they would have no contact with employees of the Department. The issue is whether the former employees receive compensation for services rendered on a matter before their former agency (*see, e.g., [Advisory Opinion No. 90-7](#)*). Nor is it relevant, as the Department argues, that their wages would not be dependent upon the number of returns processed.

8. SG-18 is often characterized as the first grade level in the "professional" series of titles. As of April 1, 1994, the hiring rate for individuals in SG-18 is \$33,156. For individuals in SG-1 through SG-17, the hiring rates range from \$13,913 to \$33,023.

9. The federal government similarly imposes varying post-employment restrictions based on the former officer or employee's rank upon termination.