

New York State Ethics Commission

Advisory Opinion No. 94-5: Application of Public Officers Law §73(8) to a former employee of [a State agency].

Introduction

The following advisory opinion is issued in response to a request by [], a former employee of [a State agency], concerning the post-employment restrictions contained in Public Officers Law §73(8). On [], the Commission issued an informal opinion which applied the post-employment restrictions to [the requesting individual's] proposed employment upon termination of State service. That informal opinion stated, *inter alia*, that Public Officers Law §73(8) applies to any person who has served as a State officer or employee, regardless of grade level or whether an individual was designated by his or her appointing authority as a policy maker. [The requesting individual] subsequently left State service and has requested a formal opinion of the Commission.

Pursuant to its authority under Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that Public Officers Law §73(8) applies to any person who has served as a State officer or employee, as defined in §73(1)(i), regardless of grade level or whether an individual has been designated as a policymaker. The two-year bar thus precludes [the requesting individual] from appearing, practicing or rendering services for compensation before the [State agency] within two years of his termination. It would be a violation of the two year bar for [the requesting individual] to appear before his former agency by reviewing files there and to receive compensation for that review on cases before the [State agency]. It would also be a prohibited appearance for [the requesting individual] to call his former agency to ask questions on behalf of an insured. The lifetime bar prohibits [the requesting individual] from rendering compensated services on any transaction with respect to which he was directly concerned and in which he personally participated or which was under his active consideration during his service at the [State agency].

Background

[].

[The requesting individual] was employed by the [State agency] from 1986 until [], 1993. He last served in the title of [] (SG-9). In that position, [the requesting individual] reviewed medical and compensation files involving payment of bills to []. His performance evaluation states that he authorized and controlled continuing bi-weekly payments to [] and audited, adjusted and approved payment of [] bills.

At the time he first requested an opinion, [the requesting individual] indicated that he was being considered for employment with [a private company]. [The requesting individual] informed the Commission that the duties of this position were to be essentially the same as those which he was then performing for the [State agency]; specifically, [the requesting individual] would review files at the location of the [State agency]. He stated that this review of files would consist of "making notes of files" and would not involve "giving direction for change."

The Commission's executive director issued an informal opinion on September 16, 1993 which applied the post-employment restrictions of §73(8) to [the requesting individual's] proposed employment. This opinion stated, *inter alia*, that it would be a prohibited appearance for [the requesting individual] to review files at the location of his former agency, and that he could obtain employment with a private employer provided that he had no involvement with and received no net revenue from cases, proceedings, applications or other matters before the [State agency]. [the requesting individual] left State service on [] and is currently employed by [the private company].

[]⁽¹⁾. [The private company] is paid on a retainer basis by its clients, most of whom are [serviced by] the [State agency]. [The private company] describes its role as that of representative for those [serviced by the State agency], stating that on a daily basis, they provide [] assistance to their clients, often in the form of facilitating the actual claims examining done at the [State agency]. [The private company] states that:

In order for us to remain current on the day-to-day status of [the State agency] claims files, it is necessary for us to have a person in our employ visit the offices of the [State agency] several times a week, in order to review certain claims files, and to transcribe information or data from those files [], so that upon return to our office, our claims manager may send written requests to the [State agency] offices regarding action we believe should be taken on specific claims files.

[The private company] states that, upon hiring [the requesting individual], they intended for him to perform the task of file review at the [State agency's] district offices:

In its simplest form, this would involve him sitting in a room, apart from the claims personnel, and physically looking at files which were pre-requested from the [State agency], and making notes thereon. At no time would [the requesting individual] interact with the claims personnel, nor make requests for information, nor make requests or give direction on the handling of any files at the [State agency].

[The private company] also states that they would like [the requesting individual] to be permitted to call the [State agency] to ask claims questions on behalf of an insured, such as why a claimant is not being paid or whether there has been a recent hearing on the claim.

Applicable Law

Public Officers Law §73(1)(i) states:

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; and

....

Public Officers Law §73(8) states:

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 enactment of this provision was part of a sweeping reform intended to restore public trust and confidence in government. The purpose of the revolving door subdivision is to preclude the possibility that a former State employee may leverage his or her knowledge, experience and contacts gained in State service to his or her advantage or that of a client, thereby securing unwarranted privileges, consideration or action. The subdivision seeks to eliminate any public doubt as to whether actions by the officer prior to separating from State service were in the public interest.

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, practicing or receiving compensation for services rendered before the State agency which employed the former employee 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.

Public Officers Law §73(8) applies to any individual who fits within the statutory definition of the term "state officer or employee," regardless of grade level or whether an individual has been designated by his or her appointing authority as a "policy maker."⁽²⁾ The Commission, therefore, has no discretion to consider such factors.

Applying the law to the requesting individual's circumstances, it would be a violation of the two year bar for [the requesting individual] to appear before his former agency by reviewing files there and to receive compensation for that review on cases before the [State agency].⁽³⁾ It would also be a prohibited appearance for [the requesting individual] to call his former agency to ask questions on behalf of an insured. This is the very harm which is addressed by the revolving door provisions.

[The requesting individual's] employment with [the private company] is permissible provided that he has no involvement with, and receives no net revenues from, cases, proceedings, applications or other matters before the [State agency] for a period of two years from termination.⁽⁴⁾

The lifetime bar applies to prohibit compensated services rendered by [the requesting individual] on any transaction with respect to which he was directly concerned and in which he personally participated or which was under his active consideration during his service at the [State agency].

The Commission is sympathetic to [the requesting individual's] position but is constrained by the language of Public Officers Law §73(8). The Commission recently stated in [Advisory Opinion No. 94-4](#):

Many have argued that the opportunity for a former employee who served in the lower 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, 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. Those legislative proposals have not gone forward in the legislative process. Without legislative action, the Commission has determined that it may not reach a result different from the one reached in this opinion (footnotes omitted).

Conclusion

The Commission concludes that Public Officers Law §73(8) applies to any person who has served as a State officer or employee, as defined in §73(1)(i), regardless of grade level or whether an individual has been designated by his or her appointing authority as a policy maker. The two-year bar thus precludes [the requesting individual] from appearing, practicing or rendering services for compensation before the [State agency] for a period of two years from [termination]. It would be a violation of the two-year bar for [the requesting individual] to appear before his former agency by reviewing files there and to receive compensation for that review on cases before the [State agency]. It would also be a prohibited appearance for [the requesting individual] to call his former agency to ask questions on behalf of an insured. The lifetime bar applies to prohibit compensated services rendered by [the requesting individual] on any transaction with respect to which he was directly concerned and in which he personally participated or which was under his active consideration during his service at the [State agency].

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. [].

2. *See*, [Advisory Opinion No. 91-17](#) ("Nothing in the statute . . . limits the application of [the revolving door] 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").

3. The [State agency's] files are not available to members of the public for inspection. *See*, [Advisory Opinion No. 89-7](#) ("A Freedom of Information Law request made on behalf of a client or other person would be an appearance or practice before the former agency which is prohibited by §73[8]").

4. Public Officers Law §73(10) provides that a former State employee may be employed by a firm which does business with his former agency as long as he does not share in the net revenues which are generated by restricted activities. The Commission has defined net revenues as gross revenues received from restricted activities minus fixed operating expenses ([Advisory Opinion 90-14](#)).