

New York State Ethics Commission

Advisory Opinion No. 95-15: Application of the post-employment restrictions of Public Officers Law §73(8) to an employee of the Office of Real Property Services; application of Public Officers Law §74 to such individual during a leave of absence from his agency.

INTRODUCTION

The following advisory opinion is issued in response to a request by [], an employee of the Office of Real Property Services ("ORPS"), for an advisory opinion regarding: (1) the application of the post-employment restrictions of Public Officers Law §73(8) with respect to his expected future employment with [a large, regulated utility ("utility")], and (2) the application of Public Officers Law §74 to him should he seek a leave of absence from his agency, rather than termination, to take the [private sector] position.

Pursuant to the authority vested in it by Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that: (1) the two-year bar contained in Public Officers Law §73(8)(a) precludes [the requesting individual] from, on behalf of [the utility], submitting cost indices, obsolescence studies or other documents to his former agency or otherwise interacting with his former agency, but does not preclude his working on local assessments or supporting [the utility's] legislative lobbyists; (2) the lifetime bar contained in §73(8)(b) precludes him from continuing to work, on behalf of [the utility], on a committee on which he has served on behalf of his former agency, but permits him to engage in the other activities he proposes after the two year period has expired; and (3) Public Officers Law §74 applies to a State officer or employee while on leave of absence, and precludes [the requesting individual] from engaging, while on leave, in any of the activities in which he wishes to engage except working on local assessments.

BACKGROUND

[The requesting individual] is employed by ORPS as a [], a position he has held for the last ten years. He has been offered a position with [the utility], and has tentatively accepted this position, beginning on [], 1995.

[The requesting individual] previously sought an informal opinion from the Commission. On March 29, 1995, the Commission issued such an opinion, applying the post-employment restrictions of Public Officers Law §73(8) to his situation. This opinion did not, however, address the application of Public Officers Law §§73 and 74 to [the requesting individual] in the event that he took a leave of absence from his agency to take [the utility] position, and it advised him that he could seek a formal opinion on that issue. [The requesting individual] now seeks a formal opinion regarding both the application of the post-employment restrictions, which was

considered in the informal opinion, and the application of Public Officers Law §§73 and 74 should he receive a leave of absence from his agency.

[The requesting individual] is currently responsible for managing the sixteen person staff of the Appraisal and Valuation Support Unit within the Bureau of Valuation Support Services. The primary responsibilities of the unit are research and technical valuation support. The services of the unit can be divided into four major areas: State-owned land valuation and litigation support; commercial and income generating property equalization rate survey and revaluation support; Valuation Help Desk for assessors; and industrial and utility valuation support.

In the first three areas, none of the unit's work has any relevance to [the utility], and there has been no interaction with [the utility]. In the last area - industrial and utility valuation support - [the requesting individual's] unit provides support services to ORPS's Industrial and Utility Bureau on issues pertaining to many utility companies, including [the utility]. There are two areas in which [the requesting individual], as part of his responsibilities, has had direct interaction with [the utility]: the maintenance of [the utility's] cost trending indices from 1990 to date, and a request for functional obsolescence which [the utility] filed with ORPS in 1993.

With regard to his involvement with [the utility's] cost trending indices, every six months [the utility] sends ORPS its indices. This has occurred since an agreement with [the utility] was reached in 1990. At that time, [the requesting individual] was one of several members of ORPS staff who reviewed [the utility] cost indices for reasonableness and accuracy, and found that the indices were verifiable as accurate and suitable for ORPS's needs. Since that time, his unit has had responsibility for maintaining all of ORPS's cost indices files and insuring the accuracy of the indices provided. These indices are used to trend historical cost information maintained and used by ORPS's Industrial and Utility Bureau to meet current assessment year cost levels. Each new cost level requires separate index research and preparation on the part of the index supplier. Because of his past involvement with ORPS's cost indices, his appraisal background, and his familiarity with the index sources, [the requesting individual] is considered an expert in index development and maintenance.

With regard to [the requesting individual's] involvement with [the utility's] application for functional obsolescence, on November 11, 1993 [the utility] presented ORPS with a request for functional obsolescence on its metallic cable inventory throughout the State. The request included a report of over 500 pages that explained [the utility's] need for a reduction in special franchise assessment due to the change in use from metallic cable to fiber optic cable. A team of four ORPS experts, including [the requesting individual], was assigned to address the valuation issues and make recommendations to ORPS's legal and executive staff. His role was to analyze [the utility's] application of appraisal principles, to assist in evaluating the merit of the request and to propose, with the other members of the team, a compromise position on ORPS's part. [The requesting individual] devoted a total of fifteen days to this project between November 1993 and November 1994. Although the issue remains unresolved, he has had no involvement since November 1994.

[The requesting individual] expects that, in the future, [the utility] may have similar requests for functional obsolescence in which he would be asked to participate. The format of those requests

would likely be similar to the request submitted in 1993 because the same procedures are generally followed in functional obsolescence analysis. However, each new valuation year requires that a new study with completely new and updated facts be prepared and presented, completely divorced from any prior statistical presentation.

Based on the employment offer presented to [the requesting individual] by [the utility], he expects to be asked to perform the following duties:

(1) His primary role would be that of a company real property tax representative. He would be asked to estimate market value for thousands of properties [the utility] owns in the State to determine if the current assessed value on these properties, established by local assessors, represents a reasonable estimate of their fair market value, to assist in the filing of grievances to challenge local assessments, and to reach settlements with local assessors.

(2) As a secondary responsibility, he may be asked to assist other [utility] staff in lobbying efforts on legislation that may affect [the utility's] property tax burdens. He would advise [utility] legal staff, giving them the benefit of his technical knowledge and expertise, to help them fully understand the valuation issues on which they would lobby the State Legislature.

(3) Another area of his responsibility will be in assisting other [utility] staff in the technical preparation of the cost indices that are supplied to ORPS and used to trend original company costs to current reproduction or replacement cost levels. His primary role will be to assist in their technical preparation because of his familiarity with their construct.

(4) He also expects to be called upon when new functional obsolescence studies are to be presented to ORPS and the assessment community in future assessment years for new assessment rolls that are annually developed at January 1st valuation levels. He will be asked to help in the preparation of necessary documents and assist with the presentation to ORPS and to local assessors. ORPS is responsible for all assessment of special franchise property located in the public right-of-way, and local assessors are responsible for assessment on a private right of way. In addition to functional obsolescence studies and presentations, an issue with which [the requesting individual] has had past familiarity, he expects other technical valuation studies and presentations to be prepared where he will be called upon because of his expertise.

(5) Over the long term, he expects to interact with ORPS regularly to represent [the utility] on issues that center around obsolescence studies, cost index support, market values of properties, and other areas which would draw upon his experience in technical valuation support and his appraisal background.

(6) The final area of potential concern involves Real Property Taxation Administration Committee on Utility Valuation. [The requesting individual] has been an active member of the committee for the last six months and would like to maintain his involvement. The ad hoc committee has approximately 36 members, and is a joint project of local assessors, county real property tax directors, ORPS staff and utility companies, including [the utility], working together with the goal of improving utility assessment practices in New York State. The committee is described as a joint effort to improve past assessment practices and communication between the

interested parties, and is preparing a white paper on issues of concern. For example, one proposal under the committee's consideration suggests transferring all utility valuation determinations from local assessors to ORPS.

APPLICABLE LAW

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

(a) 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.

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

This provision, generally referred to as the "revolving door", 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 purpose of the revolving door statute 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 to that of a client, thereby securing unwarranted privileges, consideration or action. 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 the State agency that employed a former employee: there is a total ban for two years on any appearance or practice before the former employing agency or receipt of compensation for any services rendered by the former employee in relation to any matter before such agency. The Commission has interpreted the term "appearance" broadly. For example, the Commission has held that a communication by a former State employee with his or her former agency on behalf of a client or any other person amounts to a prohibited appearance ([Advisory Opinion No. 89-7](#)). Other prohibited appearances include preparing documents which are to be presented before the former agency, or representing a client in reviews by the agency (Advisory Opinion Nos. [90-4](#), [90-21](#)). Further, a former employee may not perform services for a private entity if the former employee's work product is submitted to the former agency ([Advisory Opinion No. 90-21](#)). The two-year bar restricts not only appearances, but also the rendering of services for compensation on any matter before the former agency. Thus, the law prohibits "back room" services on a matter before a former agency for which a former employee is paid; it is not necessary for the former agency to know that the former employee is working on the matter for there to be a finding of a violation ([Advisory Opinion No. 90-7](#)).

Under the lifetime bar, a former employee is prohibited from appearing, practicing, communicating or otherwise rendering services before any State agency, or receiving compensation for such services rendered anywhere, 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. Under the two year bar, the specific matter is irrelevant, and the central question is whether it is before the former agency. For the lifetime bar, the agency is irrelevant; the central question is whether the transaction is one on which the former employee worked while in State service. The determination of whether the lifetime bar applies is one which must be made on a case-by-case basis ([Advisory Opinion No. 90-22](#)).

Public Officers Law §74 contains the code of ethics for State officers and employees. The code of ethics found in Public Officers Law §74 provides minimum standards against which State officers and employees are expected to gauge their behavior. It addresses both actual conflicts of interest and their appearance. Subdivision 2 contains the rule with respect to conflicts of interest:

No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Standards which are contained in subdivision 3 include the following:

(a) No officer or employee of a state agency . . . should accept other employment which will impair his independence of judgment in the exercise of his official duties.

. . . .

(c) No officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

(d) No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

(e) No officer or employee of a state agency . . . should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

. . . .

(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

DISCUSSION

Application of Two-Year Bar:

For a period of two years from his termination from State service, [the requesting individual] is prohibited from appearing or practicing before ORPS, and from rendering services for compensation on any matter before ORPS.

The following represents the Commission's determinations as to the application of the two year bar to the specific duties that he anticipates performing for [the utility]:

(1) [The requesting individual's] primary role as a company real property tax representative would not be restricted, since it would involve only appearances on matters before local assessors. As assessment of real property is a local government function, it is the Commission's understanding that he would not appear or practice before ORPS, nor would he render services on any matter before ORPS. However, should ORPS play a role in any local property assessment -- for example, if ORPS were to be asked by a municipality to assist in a revaluation project -- then the two-year bar could be implicated. In such a case, [the requesting individual] may seek additional guidance from the Commission based upon the specific facts of the case.

(2) His role in assisting [utility] staff in lobbying efforts would likewise not be precluded, as it should not cause him to appear before ORPS or render services on a matter before ORPS. His advice and assistance to [utility] legal staff would be in support of its lobbying the State Legislature. However, he would be prohibited for two years from assisting [utility] staff in lobbying ORPS -- for example, for any change in its regulations or on any legislation in which ORPS is involved -- since this would involve his rendition of services on a matter before ORPS.

(3) [The requesting individual] may not for a period of two years assist other [utility] staff in the technical preparation of telephone cost indices that are supplied to ORPS, as he would be rendering services on a matter before his former agency.

(4) The two year bar would also prohibit him from the preparation of functional obsolescence studies or other technical valuation studies or the presentation of those products to ORPS.

(5) Likewise, he may not interact with ORPS on any issues on behalf of [the utility] during the two year period.

(6) With regard to the Real Property Taxation Administration Committee on Utility Valuation, the Commission need not address the application of the two year bar because, as discussed below, the lifetime bar would prohibit his continued involvement.

Application of Lifetime Bar:

The lifetime bar prohibits [the requesting individual] from appearing, practicing, communicating or otherwise rendering services before *any* State agency, or receiving compensation for such services rendered *anywhere*, in relation to any case, proceeding, application or transaction involving a matter in which he was directly concerned and personally participated or which was under his active consideration while in State service (Advisory Opinion Nos. [92-20](#), [93-11](#), [93-12](#)). He may engage in those activities permitted by the Commission in this section of the opinion immediately upon leaving State service if they are not precluded by the two year bar, or two years after leaving State service if they are so precluded.

The following represents the Commission's determinations as to the application of the lifetime bar to the specific duties that he anticipates performing for [the utility]:

- (1) The lifetime bar would not restrict [the requesting individual] from challenging any local assessment of [utility] property because he was never directly concerned with and personally participated in or actively considered any such assessments while in State service. He may, thus, raise these challenges as long as they do not involve ORPS during the two year bar period.
- (2) The lifetime bar would not restrict him from assisting other [utility] staff with regard to the valuation issues on which they lobby the State Legislature. [The requesting individual] notes that this responsibility would be completely different from any past experience he has had. As the Commission stated in [Advisory Opinion No. 91-2](#), a former State employee may utilize his or her knowledge of past policies and procedures to provide advice on new transactions. The lifetime bar does not restrict the use of his knowledge in providing advice on any new transactions, provided that the knowledge used is general knowledge and not "insider information" which would not otherwise be available.
- (3) With regard to the preparation of the cost indices that are supplied to ORPS,⁽¹⁾ new trending indices are presented to ORPS every six months. The indices are used to trend historical cost information to current assessment year cost levels. Each new cost index requires separate index research and preparation on the part of the supplier. The biannual submissions do not modify existing indices and are not dependent on any previous index; rather, they are completely recalculated. Therefore, each new cost trending index is a new transaction for purposes of the lifetime bar (*see*, [Advisory Opinion No. 95-7](#), in which the Commission held that successive utility rate cases should be considered different "cases, proceedings, applications, or transactions" for the purposes of Public Officers Law §73[8][b], given that the Public Service Commission, in considering whether to change rates for a specified future period, must re-estimate every component of a utility's revenue requirements for the new rate period).
- (4) Similarly, each new functional obsolescence study to be presented to ORPS coincides with each new valuation year. For each valuation year, a new study with new and updated facts, completely divorced from any prior statistical presentation, must be prepared and presented. Since each new valuation year creates the need for a new study with new facts and analysis, each such study would be a new transaction for purposes of the lifetime bar. [The requesting individual] may, therefore, render services on a study once the two year bar has passed.

(5) Over the long term, [the requesting individual] expects to interact with ORPS regularly to represent [the utility] on issues that center around obsolescence studies, cost index support, market values of properties, and other areas which would draw upon his experience in technical valuation support and his appraisal background. Since he is not in a position to present to the Commission specific facts, the Commission is unable to render a definitive opinion. As noted above, the guiding principle is that the lifetime bar would not prohibit his work on these issues provided that they do not involve the same transaction in which he was directly concerned and personally participated or which he actively considered while in State service. Since the lifetime bar is applied on a case-by-case basis, [the requesting individual] should seek the Commission's guidance in the future with regard to any specific transactions to which it may be applicable.

(6) With regard to the Real Property Taxation Administration Committee on Utility Valuation, [the requesting individual] has personally participated in the work of this Committee toward the end of developing a white paper. He has, in fact, written a technical resource paper for the Committee which will be included in the white paper. It is the Commission's understanding that the ad hoc Committee will likely dissolve after completion of the white paper. The Commission concludes that the Committee's work in the development of this white paper is a transaction in which [the requesting individual] personally participated while in State service, and the lifetime bar prohibits his continued involvement with respect to this paper once he leaves State service.⁽²⁾

Application of Public Officers Law §74:

As an alternative to terminating his State service, [the requesting individual] is considering requesting a leave of absence of from 3 to 12 months in duration when he takes [the utility] position. In [Advisory Opinion No. 90-1](#), the Commission held that a State employee on leave without pay is still in State service for purposes of Public Officers Law §73, and remains in such service until he or she either terminates employment with the State or is terminated from such employment by appropriate State action. Thus, the post-employment restrictions of subdivision 8 of §73 do not apply to an employee on leave until the leave status is terminated. Therefore, for purposes of the two year bar, [the requesting individual's] period of preclusion would begin to run only when his leave from ORPS is concluded.

This does not mean, however, that an employee on leave is free from ethical constraints. As noted above, in [Advisory Opinion No. 90-1](#), the Commission concluded that a State employee on leave without pay is subject to all of the prohibitions contained in §73. To reach this conclusion, it relied upon other provisions of the law which treat employees on leave without pay as if they were still in State service. For example, Civil Service Law §52 allows any such employee to compete in a promotional examination for which he or she would otherwise be eligible based on prior State service. In addition, an employee on leave of absence is permitted to continue health insurance coverage (4 NYCRR 73.2).

Pursuant to that opinion, [the requesting individual], during the period of his leave of absence, could not sell goods or services with a value of over \$25 to any state agency unless pursuant to public notice and competitive bid (subdivision 4 of §73); nor could he receive compensation for appearing or rendering services before any State agency in connection with certain matters, including the purchase, sale, rental or lease of real property, the obtaining of grants or loans, or

licensing (subdivision 7 of §73). Thus, [the requesting individual] could not appear on behalf of [the utility] before any State agency, not only ORPS, in connection with prohibited matters while on leave.

The Commission has never specifically addressed the question of whether §74 applies to employees on leave of absence. However, there is no reason why a different result should be reached from that applied in the case of §73. If an individual on leave without pay is still in State service for purposes of §73, then such individual is also in State service for purposes of §74.

It would be illogical to conclude that Public Officers Law §§73 and 74 do not apply to State employees on leave of absence, as an unintended loophole would be created. Active State employees are restricted by §§73 and 74, and former State employees are restricted by the post-employment restrictions of §73(8). An employee on leave who has the benefit of a guaranteed return to his or her State position, together with such other benefits as the ability to compete in a promotional examination and to continue health insurance, should not be able to avoid the types of ethical constraints on engaging in various activities that are imposed on active State employees and former State employees.

How §74 applies to an individual on unpaid leave of absence must be determined on a case-by-case basis. The following represents the Commission's determinations as to the application of the provisions of this section to the specific duties that [the requesting individual] anticipates performing for [the utility] while on leave from ORPS:

(1) His primary role as a [utility] real property tax representative would not be precluded by section 74, provided that ORPS was not in any way involved in a local assessment. If ORPS were involved, he would be precluded from representing [the utility] since he would still be an employee of the agency. For example, if ORPS had been asked by a municipality to assist in a revaluation project, he could not represent [the utility] on issues related to that revaluation.

(2) Section 74 would prohibit [the requesting individual] from assisting [utility] staff in lobbying on legislation that may affect [the utility's] property tax burdens, since it is likely that ORPS would have a position on any such legislation. As he would still be an ORPS employee, there would be a conflict of interest in his receiving compensation for participating in [the utility's] lobbying efforts.

(3) He would be prohibited from assisting in the technical preparation of [the utility's] cost indices that are supplied to ORPS, since ORPS is still his employing State agency.

(4) He would likewise be precluded from preparing functional obsolescence studies and other technical valuation studies which are submitted to ORPS.

(5) Similarly, he could not interact with ORPS on any issues on behalf of [the utility] while he is on leave.

(6) Finally, Public Officers Law §74 would preclude him from representing [the utility] in the Real Property Taxation Administration Committee on Utility Valuation. There would clearly be a violation for him to represent any viewpoint other than that of his employing State agency.

CONCLUSION

The Commission concludes that: (1) the two-year bar contained in Public Officers Law §73(8)(a) precludes [the requesting individual] from, on behalf of [the utility], submitting cost indices, obsolescence studies or other documents to his former agency or otherwise interacting with ORPS, but does not preclude his working on local assessments or supporting [the utility's] legislative lobbyists; (2) the lifetime bar contained in §73(8)(b) precludes him from continuing to work, on behalf of [the utility], on a committee on which he has served on behalf of ORPS, but permits him to engage in the other activities he proposes after the two year period has expired; and (3) Public Officers Law §74 applies to a State officer or employee while on leave of absence, and precludes [the requesting individual] from engaging, while on leave, in any of the activities in which he wishes to engage except working on local assessments.

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,
Angelo A. Costanza,
Robert E. Eggenschiller, Members

Donald A. Odell abstained.

Dated: May 31, 1995

Endnotes

1. This analysis applies only after the two year bar period has expired.
2. Should the Committee continue after the completion of the white paper, and should [the requesting individual] wish to then serve on the Committee, he should seek the Commission's guidance at that time.