

# New York State Ethics Commission

---

**Advisory Opinion No. 95-17:** Application of the revolving door provisions of Public Officers Law §73(8) to employees who leave a State agency for employment by the closely affiliated not-for-profit research foundation of an agency under contract with the former agency.

---

## INTRODUCTION

The following advisory opinion is issued in response to requests submitted by the [requesting individual], a former employee of the Department of Social Services ("DSS"), and by her former agency concerning the application of the post-employment provisions of Public Officers Law §73(8) to her potential employment by the State University of New York Research Foundation ("Foundation"), a not-for-profit corporation, to perform services under agreements between the State University of New York ("SUNY"), the Foundation and DSS.

Pursuant to its authority under Executive Law §94(15), the Commission concludes that the post-employment restrictions of Public Officers Law §73(8) preclude the [requesting individual] from performing services for DSS as an employee of the Foundation.

## BACKGROUND

The [requesting individual] retired from the DSS on [date] after having served in the [] agency's Office of Human Resource Development ("OHRD"). In her request to the Commission, she indicated that she wished to continue to serve OHRD one or two days each week. DSS, which supports the [requesting individual]' continued service, advised the Commission that her salary would be paid by the Foundation with funds provided by DSS pursuant to a Memorandum of Understanding ("MOU") between DSS and SUNY, and a contract between SUNY and the Foundation.

In accordance with the MOU, SUNY assists DSS in conducting extensive statewide training programs (250 courses annually) for approximately 60,000 staff members of local social service districts and provider agencies. DSS has spent about \$67 million dollars (\$35 million in fiscal year 94-95 and \$32 million the previous year) to have SUNY develop and deliver these specialized programs. In accordance with the policies of its Board of Trustees, SUNY has enlisted the Foundation to administer SUNY's obligations under the MOU. The Foundation is a private not-for-profit corporation that was created by SUNY and functions as its closely affiliated research arm.<sup>(1)</sup> SUNY and the Foundation have entered into Comptroller's Contract No. C113239 to complete the three way arrangement.

DSS contends that if the [requesting individual] becomes an employee of the Foundation and continues her service at DSS through this arrangement, the Foundation's special relationship with

SUNY would make the revolving door statute inapplicable to her. She would thereby be able to continue to work for DSS without violating this statute.

### **APPLICABLE STATUTE**

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. . . .

### **DISCUSSION**

Public Officers Law §73(8), generally 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. Public Officers Law §73(8)(a) contains a two-year absolute bar on an employee's appearing, practicing or rendering services for compensation in any matter before his or her former agency. Public Officers Law §73(8)(b) permanently prohibits former employees from appearing before any agency or rendering compensated services with regard to matters in which they were directly concerned and personally participated.

The Court of Appeals elaborated on the purpose of the post-employment provisions in *Forti v. NYS Ethics Commission; Kuttner v. Cuomo, et al.*, 75 NY2d 596 (1990):

In general, the purpose of "revolving door" provisions such as those at issue here is to prevent former government employees from unfairly profiting from or otherwise trading upon their contacts, associations and special knowledge that they acquired during their tenure as public servants . . . The underlying premise is that "[f]ormer officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies [and] they should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients. Both are forms of unfair advantage" . . . (PL 95-521, Senate Report, *reprinted in* 1978 US Code, Cong & Admin News 4216, 4247). (*Forti* at p.605).

Clearly, the [requesting individual] would be appearing before her former agency under the proposed arrangement, and she might well be working on the same transactions as those on

which she formerly worked. Therefore, the arrangement would be violative of §73(8) unless an exception were applicable. The question before the Commission is whether a previously recognized exception should be extended to the circumstances presented here.

In two opinions that dealt with provisions of Public Officers Law §73, but not with subdivision (8), the Commission held that corporations closely affiliated with State agencies are separate from the agencies, and their employees are not State employees.<sup>(2)</sup> While the Commission recognized that a number of State agencies have benefitted from the creation of separate not-for-profit corporations which administer and receive research grants, and that the creating agencies have maintained some degree of control over these corporations, it held that the corporations are distinct entities. Neither of these opinions, however, required the Commission to address the application of the revolving door provisions of §73(8).

In [Advisory Opinion No. 95-2](#), the Commission recognized that when dealing with the revolving door statute, the considerations were different from those it faced when it issued its prior decisions. It concluded that employees transferring from a State agency to its research arm do not, at the time of transfer, become former State employees subject to the restrictions of §73(8). In reaching that conclusion the Commission said:

*Critical to this analysis is the close affiliation of these types of corporations to the State agencies to which they relate. State law recognizes this special relationship and permits employees of the closely affiliated entities to participate in the State retirement system and elect to receive State health insurance. This statutory recognition exists for no other such private entities which contract with or perform services on behalf of the State. State policy endorses this special relationship and the Commission recognizes it as well. Therefore, for the purposes of Public Officers law §73(8), employees of the Foundation are considered to be employees under the jurisdiction of the State agency involved to avoid the application of the revolving door provisions. Employees may be shifted from one payroll to another depending upon available funding sources. A rigid application of Public Officers Law §73(8) would create an unworkable situation, as it would stymie the State ability to support its research activities. (emphasis supplied).*

DSS suggests that the conclusion in [Advisory Opinion 95-2](#) should be extended to the situation presented here. It contends that the [requesting individual] should be able to leave DSS and go on the payroll of the Foundation even though the Foundation is closely affiliated with SUNY, rather than DSS. DSS argues that if the [requesting individual] were a SUNY employee, she would be permitted to transfer to the Foundation and then render services under the MOU to DSS.

The Commission does not agree that [Advisory Opinion 95-2](#) is applicable here. The purpose of the "revolving door" restrictions 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." (See, e.g., Advisory Opinions Nos. [90-11](#), [91-2](#) and [94-18](#)). As noted above, the Commission has twice held that closely affiliated not-for-profit research foundations are not State agencies, and their employees are not State employees for purposes of the Public Officers Law. [Advisory](#)

[Opinion 95-2](#), in dealing with §73(8), determined that there was an exception to this principle in a narrow situation, relying on the special relationship, recognized in statute,<sup>(3)</sup> between an agency creating a foundation and the foundation it established.

The [requesting individual] and DSS argue that the special recognition afforded research foundations in [Advisory Opinion No. 95-2](#) should extend to contracting agencies and the former employees of those agencies when they are placed on foundation payrolls. However, in such a situation, the Foundation and the agency have little more in common than the agreements that bring them together. To extend the Commission's recognition of the special circumstances found in [Advisory Opinion No. 95-2](#) to *any* State agency (rather than only to a closely affiliated agency) would permit agencies to place favored former employees on foundation payrolls in avoidance of the proscriptions of §73(8) and in contravention of the spirit of the revolving door restrictions.<sup>(4)</sup> Such an exception would permit former employees to be favored, as they could immediately appear before their former colleagues at their former agencies and perform the same or similar functions they performed while in State service, all without any of the ethical restraints governing the conduct of State employees. Such a circumstance would, in sum, violate the very purpose of the revolving door restrictions.<sup>(5)</sup>

## CONCLUSION

Pursuant to its authority under Executive Law §94(15), the Commission concludes that the post-employment restrictions of Public Officers Law §73(8) preclude the [requesting individual] from performing services for DSS as an employee of the Foundation.

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. See Finance Law §53-a(5)(d).

2. See [Opinions No. 91-20](#) and [93-3](#).

3. See State Finance Law §53-a(5)(d) which defines as State agencies for purposes of that statute certain membership corporations closely affiliated with specific state agencies and whose purposes are essentially to support, supplement or extend the functions and programs of such state agencies, specifically: Youth Research Inc., the Research Foundation for Mental Hygiene, Inc., Health Research Inc., the Research Foundation of the State University of New York, and Welfare Research Inc.

4. Advisory Opinion No. 95-2 concerned employees who moved from an agency payroll to the payroll of the agency's closely affiliated corporation. It did not concern an individual, like [the requesting individual], who retired from State service. That opinion should be restricted to its facts and not be deemed applicable to retired individuals.

5. [The requesting individual] has another option. Pursuant to Retirement and Social Security Law §§211 and 212, [the requesting individual], even though retired, may continue her employment with DSS without suspension or diminution of her retirement allowance while earning up to \$11,200 in a calendar year. The State Civil Service Commission must approve such employment upon the written request of DSS. While the Commission recognizes that such approvals are not easily obtained, the §211 procedure is recognized in law and is preferable to manipulating the State Ethics Law to permit otherwise prohibited conduct.