

New York State Ethics Commission

Advisory Opinion No. 95-2: Application of the revolving door provisions of Public Officers Law §73(8) to employees who leave a State agency for employment by the agency's closely affiliated not-for-profit research foundation.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by [a State employee], at the Institute for Basic Research ("IBR"), a unit of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD"), concerning the application of the post-employment provisions of Public Officers Law §73(8) when IBR employees are transferred to and employed by the Research Foundation for Mental Hygiene ("Foundation"), a not-for-profit corporation.

Pursuant to its authority under Executive Law §94(15), the Commission concludes that the post-employment restrictions of Public Officers Law §73(8) do not apply when IBR employees are transferred to the payroll of the Foundation.

BACKGROUND

[The requesting individual] has requested the Commission's opinion as to the application of Public Officers Law §73(8), the revolving door statute, to employees who leave IBR "to continue as staff paid by" the Foundation. Specifically, [the requesting individual] has inquired as to how this statute applies to Management/Confidential employees, employees in the PS&T bargaining unit, probationary employees and permanent employees serving in provisional or temporary positions. He has also asked whether it makes a difference if they perform the same functions at the Foundation that they performed at IBR or if they perform different functions.

The Foundation is a private not-for-profit corporation that was created by OMRDD and functions as a closely affiliated research arm of the agency. Pursuant to a contract between OMRDD and the Foundation, Foundation employees perform research activities at OMRDD facilities through various public and private grants administered by the Foundation. It is recognized under State Finance Law §53-a as a membership corporation closely affiliated with its founding State agency, OMRDD, whose purpose is essentially to support, supplement or extend the functions and programs of the agency. Provisions of the New York State Civil Service Law permit its employees to participate in the State's pension program.

According to [the requesting individual], the employees in question may continue to serve in the same capacity, but they can be shifted from the IBR payroll to the Foundation payroll. Their salary grade might be the same or higher after this shift in payroll status.

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

The definition of a State officer or employee contained in Public Officers Law §73 does not make distinctions between an employee's negotiating unit, title or grade, or whether an employee is in permanent or temporary status. In [Advisory Opinion No. 91-17](#), the Commission held that the provisions of Public Officers Law §73(8) apply to all former State employees at all levels of responsibility. Therefore, the Commission need only consider the generic issue of whether Public Officers Law §73(8) is applicable when an IBR employee becomes a Foundation employee. Its conclusion will be applicable to all those who are in this situation without regard to their bargaining unit, status or grade level.

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 issue before the Commission is whether §73(8) is applicable when an employee leaves the IBR payroll and is placed on the Foundation payroll. If it is, these employees could not work for the Foundation without violating this section.

In two opinions which dealt with sections other than the revolving door statute, the Commission has held that corporations closely affiliated with State agencies are not State agencies, and their employees are not State employees. In [Advisory Opinion No. 91-20](#), the Commission considered whether it is a violation of Public Officers Law §§73 or 74 for the commissioner of the New

York State Department of Health ("DOH") to receive a salary from DOH's closely affiliated not-for-profit corporation, Health Research, Incorporated ("HRI"), for his services as President of HRI. Based on the special nature of HRI as the research arm of DOH and its relationship with the State agency, the Commission found that the Public Officers Law would not be violated if the commissioner received a salary from HRI. In discussing the issue of whether HRI is part of the Department of Health, the Commission stated that closely affiliated not-for-profit research foundations were not State agencies for purposes of the Public Officers Law. 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⁽¹⁾, and that the creating agencies have maintained some degree of control over the corporations, it held that the corporations are separate and distinct entities. It, therefore, concluded that their employees are not State employees and are not subject to the provisions of the Public Officers Law.

In [Advisory Opinion No. 93-3](#), the Commission applied Public Officers Law §74 to DOH officials serving on the board of directors of a private for-profit corporation formed as a joint venture between HRI and a private sector corporation. The Commission again stated that closely affiliated not-for-profit research foundations are not State agencies for purposes of the Public Officers Law.

Neither of these opinions, however, required the Commission to address the application of the revolving door provisions of Public Officers Law §73(8). In the instant inquiry, the Commission must consider for the first time whether the provisions of this section apply to individuals who leave State service and transfer to a State agency's closely affiliated research corporation.

When dealing with the revolving door statute, the considerations are different from those faced by the Commission when it issued its prior decisions. 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](#), [94-18](#)). When an employee transfers to a State agency's closely affiliated research arm, he or she will not secure unwarranted privileges. Since the interests of the agency and its research arm are similar, the employee's skill and knowledge will continue to be used to benefit the agency. Thus, the purposes of §73(8) are met without imposing any restrictions.

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 the 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's ability to support its research activities.

Any concern that an employee may improperly benefit from the knowledge, experience, and contacts gained in State service can be allayed by applying the revolving door restrictions after the employee transfers out of the Foundation and into the private sector.

CONCLUSION

The Commission concludes that the post-employment restrictions of Public Officers Law §73(8) do not apply when IBR employees are transferred to the payroll 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,
Donald A. Odell, Members

Dated: January 17, 1995

Endnotes

1. These would include Health Research, Inc. (affiliated with the NYS Department of Health), the Welfare Research Institute (affiliated with the NYS Department of Social Services), the Research Foundation for Mental Hygiene, Inc. (affiliated with the NYS Office of Mental Health), and the State University of New York ("SUNY") and the City University of New York ("CUNY") Research Foundations.