

New York State Ethics Commission

Advisory Opinion No. 95-28: Restrictions on post-employment activity for purposes of §73(8)(a)(i) of the Public Officers Law concerning practice before the Division of Tax Appeals.

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [a former attorney at] the Department of Taxation and Finance ("Department") and currently an attorney in private practice, concerning the application of Public Officers Law §73(8)(a)(i) to his post-employment activities. Specifically, [the requesting individual] asks whether, during the two year period following his termination from State service, when he represents a client before the Division of Tax Appeals ("Division"), he may engage in discussions, including settlement discussions, with Department staff, or request or subpoena documents from the Department.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by §94(15) of the Executive Law, the Commission hereby renders its opinion that [the requesting individual], when representing a taxpayer before the Division, may apply to the Division for a subpoena duces tecum for Department documents, but may not request documents from the Department or engage in settlement or other discussions with Department attorneys.

BACKGROUND

Prior to March 1, 1995, [the requesting individual] served as [an attorney at] the Department. Following his termination from State service, he joined the law firm of [], where he is now affiliated.

[The requesting individual] currently represents a taxpayer in a proceeding before the Division. When [the requesting individual] sought to communicate with an attorney from the Department with regard to this proceeding, he was advised that it was the Department's position that such communication is unlawful.⁽¹⁾ The Department informed [the requesting individual] that, based on its interpretation of the two year bar and Commission [Advisory Opinion No. 91-13](#), it believes that employees of the Department are prohibited from "discussing tax matters with former employees of the Division of Taxation for two years after leaving the Division of Taxation" and that it would "not be able to discuss tax matters with [the requesting individual]."⁽²⁾

[The requesting individual] was also denied an audit report which he claims is pertinent to his client's case. In failing to supply the report to him, the Department again cited the two year bar of §73(8). In response, [the requesting individual] asked the Division's Chief Administrative Law Judge to issue a subpoena duces tecum for the audit report. Upon issuance of the subpoena by the

judge, [the requesting individual] personally delivered it to the Department. The Department, having received the subpoena, asked the issuing judge to withdraw it on two grounds: (1) the subpoena was issued contrary to the Division's Rules of Practice⁽³⁾ and, (2) "the Public Officers Law prohibits the Division from engaging in such contacts with [the requesting individual]."⁽⁴⁾ With regard to the second argument, the Department stated that while the Commission has determined that former employees of the Department may practice before the Division during the two year bar period, this authority does not allow them to appear "in any capacity" before the Department. The Department's letter further stated that it considered its compliance with the subpoena would be in violation of §73(8), subjecting a Department employee to potential penalties under §73(14).⁽⁵⁾

In a letter to the Commission, the Department expressed its concerns about [the requesting individual's] contact with Department attorneys. It noted that as [an employee of] the Department, [the requesting individual] had [certain responsibilities in] the Department.⁽⁶⁾ Moreover, the Department argues that [Advisory Opinion No. 90-18](#) specifically prohibits a former employee from appearing before the Department to secure documents in connection with a matter before the Division.

It is [the requesting individual's] position that the Department has misconstrued the Commission's opinions interpreting the two year bar with regard to appearances by former Department employees before the Department in the context of proceedings pending before the Division. He seeks this opinion to resolve the current disagreement.

APPLICABLE STATUTE

Public Officers Law §73(8)(a)(i) 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.

DISCUSSION

To begin, the Commission notes that there are several matters over which there is no dispute. Both [the requesting individual] and the Department agree that since [the requesting individual] served as [an attorney] for the Department prior to leaving State service, the Department constitutes his former agency for purposes of the two year bar, and he cannot appear, practice or render services for compensation on matters before the Department. Both [the requesting individual] and the Department also agree that, following the Commission's [Advisory Opinion Nos. 90-18](#) and [91-13](#), the Division is not [the requesting individual's] former agency, as it constitutes an entity separate from and independent of the Department. He may, therefore, appear and practice before the Division.

The disagreement arises because [the requesting individual] argues that representing a taxpayer before the Division necessarily requires communication with a Department attorney. Since Department and Petitioners' attorneys are adversarial in Division proceedings, communication is needed to work out schedules, request and exchange documents, discuss settlement, etc. [The requesting individual's] position is that his unarguable ability to practice before the Division is meaningless if he cannot speak with his adversary.

The Department argues that the two year bar precludes [the requesting individual]' communicating with Department personnel on any matter, and there is no exception for Division proceedings.

The Commission has never addressed the specific question presented. However, it has addressed the same question within the context of litigation brought in a court.

In Advisory Opinion Nos. [89-7](#) and [92-22](#), the Commission held that, subsequent to the initiation of litigation, a former employee of an agency may participate in the settlement of a State or federal court action even if settlement negotiations require direct contact with the agency's staff. In such a situation, the former employee's appearance is in the court case, which is a matter before the court, not on a matter before the former agency. This principle was announced by the Commission, in [Advisory Opinion No. 89-7](#), as follows:

A former DEC employee, within two years of termination from State service, may participate in the settlement of an action in state or federal court on behalf of a client, even if such settlement negotiations require direct contact with DEC staff. The representation of a client, as long as the matter is in a court proceeding and does not involve a case, proceeding, application other matter or transaction which is *before* the former employing agency, would not violate the "revolving door" provision.

It could be argued that since the Division serves the same purpose as a court and is structured like a court -- that is, it is an independent, neutral forum for the resolution of disputes guided by established legal principles -- the Commission should follow these opinions in the present case.

However the Department correctly argues that the Commission has treated the Division differently from the courts. In [Advisory Opinion No. 90-18](#), which authorized a former Department employee to appear before the Division, the Commission included the following sentence:

...

However, his appearance before the Division cannot include appearances before the Department to obtain material or support for his Division activities.

This demonstrates that the Commission has placed more stringent restrictions with regard to appearances before an attorney's former agency when he or she appears before the Division than when the attorney appears before a court. The Commission was aware of the problem presented by [the requesting individual] when it issued [Advisory Opinion No. 90-18](#), and it concluded that

a request for documents to the Department is precluded. Clearly, if a request to obtain materials is precluded, other more substantive discussions, such as settlement discussions, are also precluded.

With regard to the subpoena, [the requesting individual's] application was made to a judge of the Division, not to the Department. Since practice before the Division is permissible, there is no Public Officers Law bar to his applying and arguing for issuance of a subpoena by the Division directing the Department to provide documents to him.

CONCLUSION

The Commission concludes that, during the two year period following his termination from State service, [the requesting individual], when representing a taxpayer before the Division, may apply to the Division for a subpoena for Department documents, but may not request documents from the Department or engage in settlement or other discussions with Department attorneys.

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.

Concur:

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

Abstain:

Joseph M. Bress, Chair

Dated: October 2, 1995

Endnotes

1. Request letter dated June 26, 1995.
2. Letter from the Department to [the requesting individual], dated June 20, 1995.
3. It is not within the jurisdiction of the Commission to consider the merits of this legal argument.
4. Letter from [] to [], dated July 19, 1995.
5. [] letter to [].

6. Letter from [] to the Commission dated August 31, 1995.