New York State
Ethics Commission

Advisory Opinion No. 99-17:	Application of Public Officers Law §73(8)(a)(i) to a former employee of the New York State Department of Transportation who works for a contractor providing services to a city on a project designed and in part funded by his former agency.

INTRODUCTION

This advisory opinion is issued in response to a request by [ ], a former employee of the New York State Department of Transportation ("DOT"). [The former State employee] served as an engineer with DOT [ ] until his retirement in [ ] 1999. He requests advice as to whether he may be hired by [ ], a consulting engineer firm, as a Construction Inspector for field operations on a road construction project involving State Route [ ] in the City of [ ].

Pursuant to the authority vested in the New York State Ethics Commission ("Commission"), by §94(15) of the Executive Law, the Commission concludes that [the former State employee] may work as such a Construction Inspector without violating the two-year bar of Public Officers Law §73(8)(a)(i).

BACKGROUND

This is [the former State employee's] second request for an advisory opinion. As discussed more fully below, his first request sought advice as to whether he could work as [the private company's] resident engineer on the project and resulted in the issuance of an informal opinion concluding that he could not hold that position without violating the State's ethics law.

[The former State employee] has supplied the following facts to the Commission's staff. The reconstruction project was designed by DOT's Region [ ] Design group and will be funded with federal, state, and city monies. The completed design will be turned over to the City of [ ] Engineering Department, which will be responsible for printing plans, advertising for bids, and awarding and administering the contract work. The City of [ ] has selected [the private company] as the Consultant for inspection services on the project.

During the course of the reconstruction project, DOT personnel from the Region [ ] Design Group will make periodic site inspections to ensure compliance with design specifications. However, DOT will not have day-to-day administration of the project, which will, instead, be the responsibility of the City of [ ]. DOT engineers will be consulted only if the project requires design changes or other modifications, or if DOT's expertise is required. According to [the former State employee], it is unlikely that DOT will assign an employee full-time to the site.

As noted above, [the former State employee's] initial request for advice concerned his possible service as resident engineer on the reconstruction project. After reviewing the governing precedents, Commission staff advised [the former State employee] that "it would be hard, if not impossible, for [him] to serve as [the private company's] resident engineer on the reconstruction project" without violating Public Officers Law §73(8)(a)(i), which prohibits a former employee for a period of two years after leaving State service from appearing before his former agency or rendering services for compensation in relation to any matter before that agency. The resident engineer position, staff concluded, would inevitably require [the former State employee] to have significant contacts with his former agency.

Thereafter, by letter dated June 22, 1999, [the former State employee] wrote to the Commission that he was "inclined to agree that [he] could not effectively perform the duties of Resident Engineer and abide by the restrictions set by the Public Officers Law." He noted, however, that he was now considering the position of Construction Inspector for field operations on the project -- a position that would not require him to participate in meetings that might include DOT representatives, write reports that would be submitted to DOT, take part in decisions relating to change orders or progress estimates, or otherwise seek guidance from DOT staff. Rather, the Construction Inspector is responsible for observing the contractor's work and taking measurements to ensure compliance with specifications, keeping daily records of work performed, documenting problems on the job site and payments due the contractor for work completed, and observing the contractor's work zone safety measures and reporting deficiencies to the contractor for corrective action.

On July 22, 1999, Commission staff issued a second informal opinion concluding that [the former State employee] could accept the Construction Inspector position if the duties were as he described them. By letters dated July 28 and September 1, 1999, [the former State employee] then sought a formal opinion from the Commission concerning the matter. He noted that DOT would be reimbursing the City of [ ] for a portion of the engineering costs incurred on the project and inquired whether "this mean[s] that as a [private company] employee on this project that [he] would be appearing and rendering services for compensation before DOT."

APPLICABLE STATUTE

The post-employment restrictions applicable to former State officers and employees establish ground rules for what an individual may do with the knowledge, experience and contacts gained from public service after he terminates his employment with a State agency. As has often been observed, the restrictions are designed to prevent former employees from trading upon the associations and special knowledge they acquire during their state service. The restrictions seek to promote public confidence in government by assuring that government service is not a "revolving door" through which an individual can pass to garner contacts and "inside information" that he can exploit upon returning to the private sector.

At issue here is the post-employment restriction set forth in Public Officers Law §73(8)(a)(i), which provides as follows:

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.

This provision contains two distinct clauses that prohibit former State employees for a period of two years after leaving State service from (i) "appearing or practicing" before their former agency and (ii) rendering services for compensation in relation to any case, proceeding, application or other matter before their former agency. The Commission's precedents have interpreted these two clauses expansively in a manner that has sometimes prevented former State employees from obtaining private sector employment in circumstances where there has been little risk that an employee could exploit his former state position to benefit himself or his new private sector employer. Some precedents can be read to bar a former DOT employee from performing even manual labor on a DOT highway project for two years after leaving State service. The Commission takes this opportunity to clarify the law before applying it to the facts of [the former State employee's] case.

DISCUSSION

The Commission has broadly interpreted the first clause of §73(8)(a)(i), which prohibits an individual from "appear[ing] or practic[ing]" before his former agency during the two-year period. The sweep of our precedents is best seen in a recent case involving a former DOT traffic signal mechanic, who left State service in January 1997. Three months later, the former employee began working for a private subcontractor on a State project to improve an interstate highway. His job was to install traffic counters in the new roadway. During the course of the project, the former employee became aware that DOT had refused to accept a load of concrete and had ordered a different grade of concrete instead. After the subcontractor had replaced the concrete, the former employee asked a DOT engineer whether the first load could have been used on the job, and the engineer agreed that it would have met specifications.

Based in part upon his contact with the DOT engineer, the Commission determined that the former employee had violated §73(8)(a)(i) by "appear[ing]" before DOT within two years of leaving State service. On appeal, however, the State Supreme Court set aside that determination. (*Helin* v. *New York State Ethics Commission*, unreported decision of Supreme Court, Albany County, Justice Malone, dated May 21, 1999.) The Court noted that the former employee "did not attempt to influence any DOT employee or capitalize through the use of his stature as a former DOT employee." It wrote:

The Court agrees with petitioner's position that he merely "communicated" with his former agency when he brought the concrete discrepancy to the DOT agent's attention at the [job] site . . . [H]is communication with the DOT agent is not barred by Public Officers Law §73. Contrarily, the Legislature explicitly included a communication prohibition in Public Officers Law §73(8)(a)(ii), the lifetime ban provision, which . . . prohibits, *inter alia*, "communicat[ing]" with a state agency on a project which a person was directly concerned. The fact that the Legislature elected to include the verb "communicate" in subsection (ii) but not subsection (i) of section

73(8)(a) suggests very strongly that the Legislature did not intend to prohibit former employees from "communicating" with their former agency on business they were not involved with during their state employment. Thus, the Ethics Commission's long standing policy of expanding the interpretation of the verbs "appear or practice" to include "communicat[ion]" is not supported by the plain language of the statute.. . .

Having had an opportunity to study the Supreme Court's opinion, we believe that it is appropriate to revisit the statute. Although a bright line rule prohibiting any communication with one's former agency might be easier to administer, the legislature did not enact that rule. The phrase "appearing or practicing" reaches only efforts to influence a decision of the former agency or to gain information from the agency that is not generally available to the public. It does not proscribe all contact with the agency. Thus, for example, an individual during the two-year period may not negotiate a contract with her former agency (Advisory Opinion No. 90-4), submit a grant proposal or application to her former agency (Advisory Opinion No. 90-21), represent a client in an audit before her former agency (Advisory Opinion No. 90-4), or engage in settlement discussions with her former agency (Advisory Opinion No. 95-28). In each of these instances, the individual is seeking to influence her former agency, and there is an appreciable risk that the associations and special knowledge which she gained during government service could give her (or fairly be perceived to give her) an unfair advantage. Nor may an individual call her former agency to seek guidance on how it would be likely to apply a regulation in the future, if the agency would not generally provide such information.

Commission precedents interpreting the second clause of §73(8)(a)(i) also warrant reconsideration. That clause has been referred to as the "back room services" clause because it extends the two-year bar to rendering services "in relation to any case, proceeding or application or other matter before such agency" even in the absence of a personal appearance. For example, the rendering service clause precludes an individual during the two-year period from accepting compensation to prepare documents for a private firm when it is reasonably foreseeable that the documents will be reviewed by her former agency (Advisory Opinion No. 97-5). Nor could an individual accept payment for helping to develop an application that will be submitted to her former agency, or for formalizing a plan for influencing a decision of that agency. This provision safeguards against the former employee's using "inside information" behind the scenes to gain a favorable outcome from his former agency.

Some precedents, however, are susceptible of the more expansive interpretation that an individual is rendering services even if she submits no work product to her former agency or seeks in no way to affect its decision-making. In Advisory Opinion No. 94-4, for example, the Commission held that a contract between the Department of Taxation and Finance and a private entity for the processing of State personal income tax forms constituted a "matter" before the Department and therefore that a former employee could not work for the contractor during the two-year period regardless of the nature of the work or the fact that he would have no contact with employees of his former agency. The Commission wrote:

In the instant case, the contract between the Department and the contractor, awarded pursuant to competitive bid, would be a matter before the Department. The former State employees would perform certain functions in the processing of the State personal income tax to enable the

contractor to fulfill its contract terms. Moreover, the actual work to be performed by the former employees will involve the processing of State personal income tax returns, which would also constitute a matter before the Department. The former State employees would therefore "receive compensation for. . . services rendered by [them] on behalf of. . . [a] corporation. . . in relation to any . . . matter before [their former] agency" in violation of the two-year bar. [Footnotes omitted.]

This approach -- one that could be construed to bar a former DOT employee from working in any capacity for a private contractor on a DOT highway project -- is overbroad. DOT plays a predominant role not only in the building and reconstruction of State highways and bridges, but also in county and municipal projects, many of which it funds or acts as fiscal agent for the federal government. A rule that DOT's mere involvement in a project is sufficient to make the project a "matter" before the agency would go far to preventing individuals leaving DOT from finding work in the area of their expertise without advancing the goals of the State's ethics law.

More importantly, nothing in the language or legislative history of the back room services clause requires such a result. That clause prohibits an individual during the two-year period from receiving compensation "in relation to any case, proceeding, or application or other matter before such agency." Under well-established principles of statutory interpretation, the term "matter" should be construed in accordance with the terms that immediately proceed it -- *i.e.*, case, proceeding, or application. (McKinney's Statutes §234[b].) Plainly, each of those terms involves an instance in which the agency is involved in the process of rendering a decision that best advances its mission and the public interest. Thus, when an agency awards a contract, promulgates a regulation or adjudicates a claim, there is a matter before the agency. But once a contract has been awarded, the contract itself is not a matter before the agency, and a former employee is not prohibited from working on the contract merely because his former agency has awarded it.

With these principles in mind, we turn to [the former State employee's] request to serve as Construction Inspector on the Route [ ] reconstruction project. In that position, it appears that [the former State employee] will not be involved in project meetings at which DOT employees will be present, will not take part in change order decisions, and will have no need to seek guidance from DOT. His contacts will be with the contractor and not with his former agency, and he will not be seeking to influence DOT's decisions on the project. The Commission concludes that the described position will not require [the former State employee] to appear or practice before his former agency.

Nor does it seem that [the former State employee] will be rendering services on a matter before his former agency. Although [the former State employee's] duties will extend beyond those of a laborer, his job will involve field oversight of the contractor's work. [The former State employee] will report any deficiencies in the contractor's work to [the private company's] resident engineer. The resident engineer will attempt to resolve the issue with the contractor. If unsuccessful, the matter will be brought to the City of [ ] for resolution. Thus, under these circumstances, even [the former State employee's] identification of deficiencies in the contractor's work does not constitute his performance of services on a matter before DOT. In addition, [the former State employee] has provided assurances that he will not help prepare reports that will be submitted to

DOT or otherwise work behind the scenes to assist his new employer to obtain favorable consideration from his former agency.

The discussion above provides a clear answer to [the former State employee's] thoughtful question as to whether his merely working as a [private company] employee on the reconstruction project would be rendering services for compensation before DOT: the reconstruction project itself is not a matter before DOT so [the former State employee] may work on it if he otherwise conducts himself in a manner consistent with this opinion.

CONCLUSION

The Commission concludes that Public Officers Law §73(8)(a)(i) precludes a former employee, for two years after leaving State service, from appearing or practicing to influence a decision of the former agency; it does not proscribe all communication with the agency. In addition, a former employee must not, within two years of leaving State service, render services for compensation on a case, application, proceeding or other matter, where the services are meant to influence a decision of the agency.

The position of Construction Inspector does not require [the former State employee] to appear or practice before his former agency; nor will he be rendering services on a matter before his former agency.

This opinion, unless and until 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:

Paul Shechtman, Chair
Robert J. Giuffra, Jr.
Henry G. Gossel
Lynn Millane
O. Peter Sherwood, Members

Dated: December 17, 1999