New York State
Ethics Commission

Advisory Opinion No. 97-1:	Application of the two-year bar of Public Officers Law §73(8)(a)(i) to former employees of the Medicaid unit of the New York State Department of Social Services considering the transfer of the Medicaid function to the Department of Health.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by [ ], an employee of the State Department of Health ("DOH"), Office of Medicaid Management. She inquires as to whether, given the two-year bar provision of Public Officers Law §73(8)(a)(i), former employees of a unit of the State Department of Social Services ("DSS") that was transferred to DOH may appear, practice or render services for compensation in relation to a matter before that unit within DOH.

Pursuant to its authority under Executive Law §94(15), the New York State Ethics Commission ("Commission") hereby renders its opinion that the "former agency" of former employees of the DSS unit is both DSS and the new unit in DOH. Therefore, these former DSS employees are barred for two years from termination of their State service from appearing, practicing or rendering services in relation to a matter before DSS or the DOH unit.

[The requesting individual] further inquires as to whether, if such former employees are barred from placing telephone calls to the DOH unit, a colleague at their place of employment may call the unit and state that the call was placed at the direction of a former employee.

Pursuant to its authority under Executive Law §94(15), the Commission hereby renders its opinion that a former employee barred from appearing before the DOH unit may not participate in such a telephone call by instructing or advising the colleague, as, by doing so, the former employee would be rendering services for compensation in relation to a matter before his or her former agency.

BACKGROUND

Medicaid is a program established under Title XIX of the Federal Social Security Act (42 USCA §1396 et seq.) with funding shared by the Federal, State and local governments. On the State level, DSS was, until October 1, 1996, designated as the single State agency responsible for administering the program in New York. On August 8, 1996, Chapter 474 of the Laws of 1996 was approved, transferring responsibility for the program to DOH, effective October 1, 1996.[(1)] Section 240 of Chapter 474 provided:

Transfer or employees. Upon the transfer of functions from [DSS] to [DOH] pursuant to this act, provisions shall be made for the transfer to [DOH] of those employees of [DSS] who are engaged in carrying out the functions herein transferred in accordance with the provisions of section 70 of the civil service law. Employees so transferred shall be transferred without further examination or qualification and shall retain their respective civil classifications and status.

In addition, Chapter 474 provided for the transfer of records related to the Medicaid program from DSS to DOH; the continuance of all rules, regulations, acts, decisions, determinations and orders of DSS with respect to the Program; the substitution of DOH for DSS in all relevant contracts and other documents; the substitution of DOH for DSS in any pending legal actions and proceedings upon application to the appropriate court; and the transfer of certain appropriations and liabilities to DOH. (See Chapter 474, §§241-245.)

As a result of this legislation, approximately 250 employees in DSS' Division of Health and Long Term Care were transferred on October 3, 1996 to DOH to comprise its new Office of Medicaid Management. Since the transfer, the unit has largely remained intact. It is managed by many of the same individuals and is located in the same office space as was the former DSS unit.

In her request, [the requesting individual] asks whether it is permissible for former DSS employees who retired or otherwise left the Medicaid program prior to the transfer and who now work for providers receiving Medicaid reimbursement to conduct business with their former colleagues and subordinates who are employed by DOH in its Office of Medicaid Management. She also asks whether a former DSS employee may direct other employees of the provider for which he or she works to place calls to DOH, particularly when those other employees indicate that they are calling at the direction of the former employee.

APPLICABLE STATUTE

Public Officers Law §73(8)(a)(i) provides:

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, part of what is 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. It contains a two-year absolute bar on a former employee's appearing, practicing or rendering services for compensation in relation to any matter before his or her former agency.

DISCUSSION

I. <u>The "former agency" of former DSS employees whose work related to the Medicaid program.</u>

Since Public Officers Law §73(8)(a)(i) bars former State officers and employees from taking certain actions in relation to matters before their former agency, it is critical in understanding the breadth of the restrictions to determine a former employee's "former agency." Usually, this is a simple matter, easily understood. However, it becomes complicated in a case such as this, where a program, along with the employees responsible for the program, has been transferred to a new agency.

The Commission has held that former employees may have more than one former agency (Advisory Opinion Nos. 90-22 and 95-19). In Advisory Opinion No. 90-22, the Commission considered an agency employee who worked as an administrator of another agency as a significant and regular assignment. Even though his service to the second agency was uncompensated, the Commission held that both were his "former agency" for revolving door purposes.

The Commission has also addressed the determination of a "former agency" where State agencies were reconfigured. In Advisory Opinion No. 93-11, the Commission concluded that where the newly created Office of Alcoholism and Substance Abuse Services ("OASAS") became the successor to the former Division of Substance Abuse Services ("DSAS") and the Division of Alcoholism and Alcohol Abuse ("DAAA"), and the two merged agencies went out of existence, OASAS became the former agency of all DSAS and DAAA employees. Thus, any DSAS or DAAA employee who left State service before the merger was barred from appearing, practicing or rendering services on matters before OASAS.

In Advisory Opinion No. 96-7, the Commission considered a different type of reorganization. The New York State Medical Care Facilities Finance Agency ("MCFFA"), which had been a separate legal entity even though it was staffed by employees of the New York State Housing Finance Agency ("HFA"), was consolidated with the New York State Dormitory Authority ("DA"). MCFFA continued its separate legal existence, but the DA succeeded to its powers, duties and functions. The DA's Board of Directors became the Board of MCFFA. Some HFA employees who performed services for MCFFA were transferred to the DA.

The Commission held that a former HFA employee who had been assigned exclusively to MCFFA matters had as his former agency both HFA and MCFFA. In addition, performing a functional analysis for §73(8)(a)(i) purposes, the Commission held that the former employee could not appear, practice or render compensated services on a matter before the DA if the matter was within the authority of MCFFA prior to the consolidation.

The Commission explained the reasons for its taking a functional approach as follows:

If [the former HFA employee's] bar were only as to MCFFA, he, unlike other former State employees, would be free to deal with his former colleagues, who are now DA employees, on the same types of matters on which they worked while he was in State service. If his bar were to the entire DA, as successor to MCFFA, he would be unfairly prohibited from working with employees in an agency different from his former agency on matters unrelated to his prior work. Thus, if the Commission were to engage in its customary analysis and define the two year bar by agency, a fair result could not be achieved. Under these unique circumstances, the Commission

will define the two-year bar by function rather than agency. It recognizes that this functional analysis has the potential to cause significant uncertainty with regard to the breadth of the restrictions imposed on a former employee, and it takes this approach in these unusual circumstances only because it believes there is no alternative approach that leads to an equitable result.

The transfer of the Medicaid program presents neither a merger nor a consolidation of agencies, as discussed in these opinions; instead, there has been a transfer of a particular function. Yet, the rationale for applying a functional approach seems applicable.

If a former DSS employee who worked on Medicaid were restricted only from appearing or rendering services on matters before that agency, he or she would be free to appear before former colleagues, now employed by DOH. This would defeat the purpose of the revolving door subdivision to preclude the possibility that a former employee may leverage his or her knowledge, experience and contacts gained in State service to his or her advantage or to the advantage of a client. Barring such an individual's appearance before all of DOH, on the theory that former colleagues are now employed by that agency, would be a far too broad restriction that is not necessary to achieve the objectives of the statute.

Given these considerations, the Commission concludes, as it did in Advisory Opinion No. 96-7, that a "former agency" for purposes of §73(8) can be less than an entire agency. Here, logic dictates that the former agency of an individual formerly employed in the Division of Health and Long Term Care within DSS is DSS, as the agency in which the individual previously worked, and the unit of DOH that has assumed the responsibility for the Medicaid program. Therefore, the two year bar precludes such an individual from appearing, practicing or rendering services for compensation on a matter before DSS or the Office of Medicaid Management in DOH for two years after his or her separation from State service. Critically, this would preclude such a former DSS employee from having telephone conversations or personal meetings with DOH employees on Medicaid- related business during the two year post-employment period. The bar would not preclude the former DSS employee from appearing or rendering services on matters before any unit of DOH other than the Office of Medicaid Management.

II. A former employee's participation in a telephone call to his or her former agency.

The second question raised by [the requesting individual] concerns telephone calls made by colleagues of a former employee to his or her former agency. She poses the situation where a former DSS employee whose State work concerned the Medicaid program now works for a provider, which is permissible under the revolving door statute. In order to avoid a violation of the two year bar, the former employee asks a fellow employee to call the Office of Medicaid Management because it is necessary for the provider to be in touch with the agency. She asks whether the prohibition on appearances is violated if the employee who calls states that he is calling at the direction of the former employee or if the former employee advises the caller.

Unfortunately, there is no simple response to this inquiry. The Commission has held that a former employee of an agency may, after leaving State service, work for an entity which has regular contacts with the agency; for example, it may be licensed by, monitored by or funded by

the agency. However, the former State employee may not appear before his or her former agency or engage in any other activity in violation of the revolving door statute. (See Advisory Opinion No. 90-4).

The Commission has advised that in these situations an employee of the private entity other than the former State employee should handle all matters that require direct contact, including telephone calls, with the State agency. By implementing such procedures, violation of the revolving door restrictions is avoided. (See Advisory Opinion No. 96-8). Thus, if the former employee does not call, he or she is usually in compliance with the law.

[The requesting individual] has raised the problem of the calling individual's identifying the former employee when calling or being instructed by the former employee. She notes that to permit this would enable the former employee to take advantage of relationships developed and/or knowledge or experience gained through State service. The Commission agrees, and notes that its prior opinions would preclude a former employee from directing the calling employee to mention his or her name or from participating in the conversation indirectly by instructing the caller. The Commission has held that the prohibition contained in §73(8)(a)(i) against rendering services for compensation precludes a former employee from working on a matter before a prohibited agency even if his or her participation is not known to the agency. (Advisory Opinion No. 90-7). The Commission stated in that opinion that "The fact that this former employee works on the project and another `fronts' for her with the [State agency] does not mitigate the `revolving door' violation."

In the situation posed by [the requesting individual], the former employee would violate the rendering services restriction if he or she were to participate in the matter of the telephone call to his or her former agency. The Commission would view giving direction or advice to the person calling, whether it is to mention the name of the former employee or otherwise, as participation in the matter. Thus, it is precluded.

Finally, the Commission recognizes that the person calling might, without any direction, mention the name of the former employee, possibly to obtain favorable treatment. While this would be unfortunate, it would not result in a violation on the part of the former employee, as that person did not participate in the matter. The agency receiving the call can make it clear, however, that it considers the reference inappropriate, thereby sending the message that attempts at undue influence will not succeed.

CONCLUSION

The Commission concludes that the former agency of former employees of DSS' Division of Health and Long Term Care unit is both DSS and the Office of Medicaid Management in DOH. Therefore, former DSS employees of that Division are barred for two years from termination of their State service from appearing, practicing or rendering services on any matter before DSS or that office at DOH.

Individuals subject to the two-year bar may not participate in a telephone call with their former agency where the call is placed by a colleague at their current place of employment. This

precludes them from instructing or advising the colleague placing the call, as they would be rendering services for compensation in relation to a matter before their former agency.

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:

Evans V. Brewster,
Angelo A. Costanza,
Robert E. Eggenschiller,
Donald A. Odell, Members

Dated: February 10, 1997

Endnote

1. Chapter 474, §238.