

**STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS**

Advisory Opinion No. 18-XX:

**Reviewing and clarifying the application of
the post-employment provisions of the
Public Officers Law**

INTRODUCTION

The New York State Joint Commission on Public Ethics (“Commission”) issues this Advisory Opinion pursuant to its authority under Executive Law § 94 to address issues that have arisen in numerous requests for guidance, and during the panel discussion hosted in the fall of 2017,¹ regarding the application of the post-employment restrictions in the Public Officers Law. This Opinion clarifies the Commission’s position with respect to applicable precedent, based on many years of experience in applying the law. First, going forward, the Commission will interpret and apply the two-year bar’s “appear or practice” clause pursuant to the holding in Advisory Opinion No. 99-17, that is to say, to prohibit communications and actions that are intended to influence one’s former agency to make a specific decision or to take a specific action. Similarly, the Commission will interpret the backroom services clause to prohibit a former State employee from rendering services in relation to an attempt to influence their former agency with respect to a decision that best advances its mission and the public interest. Finally, when applying the lifetime bar, the Commission will examine various factors discussed herein to determine whether a “project” constitutes a single transaction.

It is intended that this Advisory Opinion will effectively calibrate the balance between: (a) the interest in protecting the public’s confidence in State government; (b) avoiding unnecessary – and unintended – restrictions on the ability of former State employees to practice their profession and earn a living; and (c) recruiting knowledgeable and experienced individuals to State service.

BACKGROUND

The post-employment restrictions in the Public Officers Law (POL) are an important part of the State’s ethics regime. They help promote the public’s confidence in State government by establishing rules that prevent former State employees, after leaving State service, from leveraging relationships and knowledge developed during their State service to benefit

¹ On October 26, 2017, the Commission, together with the Center for New York City Law at the New York Law School, presented a continuing legal education program, “Ethics Law in New York State: History, Enforcement and Leaving State Service.”

themselves or others.² New York’s post-employment restrictions serve the same purpose as similar laws passed on the national level:

[t]he post-employment restrictions can be said to reflect the same intent expressed by Congress when it enacted the federal restrictions on post-employment activities – 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.”³

Crucially, the post-employment provisions are not meant to “preclude one from practicing a given trade, profession or occupation, but rather to prevent a former employee from unfairly trading on contacts and information garnered while in State service.”⁴ Therefore, the post-employment restrictions do not prohibit a former State employee from accepting employment with any particular employer. Rather, they prohibit a former employee from providing certain services to, or on behalf of, private actors. In this way, the statute carefully balances various governmental and public interests, including the interests in recruiting personnel and guarding against certain acts involving, or appearing to involve, the unfair use of prior State employment for private benefit.⁵

The Commission⁶ has been charged with interpreting and enforcing the post-employment restrictions, and a substantial portion of the day-to-day inquiries that the Commission receives stems from applying these rules. They are of significant interest to former, current, and future State employees because they apply to virtually every State employee when leaving State service. Historically, when opining on the post-employment provisions, the Commission has promoted continuity by relying on precedent in the form of Advisory Opinions issued by its predecessor agencies. Over time, however, while addressing numerous inquiries, some of the precedents may not be as clear as they could be about the policy rationale for their conclusions and how to apply them going forward. Additionally, some interpretations of the statutory

² See New York State Ethics Comm’n, Advisory Op. No. 88-01. New York State Ethics Comm’n, Advisory Op. No. 90-19; see also New York State Ethics Comm’n Advisory Op. No. 91-02 (holding that post-employment rules are intended 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 *own* advantage or that of a client.” [Emphasis in original.]

³ New York State Ethics Comm’n, Advisory Op. No. 88-01. The federal two-year bar is discussed in some detail at pp. 10-11, *infra*.

⁴ New York State Ethics Comm’n, Advisory Op. No. 94-02.

⁵ See Memorandum of the U.S. Office of Government Ethics, Sept. 23, 2016, at [https://www.oge.gov/web/oge.nsf/All+Advisories/3741DC247191C8B88525803B0052BD7E/\\$FILE/LA-16-08.pdf?open](https://www.oge.gov/web/oge.nsf/All+Advisories/3741DC247191C8B88525803B0052BD7E/$FILE/LA-16-08.pdf?open).

⁶ The Commission is the successor to the New York State Ethics Commission (1988-2007) and the New York State Commission on Public Integrity (2007-2011).

language may produce results that unduly restrict individuals' ability to engage in their occupation with correspondingly little or no gain in protecting the integrity of the State government.

HISTORICAL APPLICATION OF THE POST-EMPLOYMENT RULES

The post-employment restrictions as currently constituted were enacted on August 7, 1987, pursuant to § 2 of Chapter 813 of the Laws of 1987. Contained in POL § 73(8)(a), there are two types of post-employment restrictions: a two-year bar on activity before the State agency where a former State employee worked, and a lifetime bar relating to specific matters in which a former employee was personally involved in State service.⁷ The two-year bar and the lifetime bar apply to all former State officers and employees except the four statewide elected officials and officers of State boards, commissions or councils who are uncompensated or compensated on a per diem basis.⁸ The restrictions apply regardless of how long an employee worked for the State,⁹ or the employee's level of responsibility or exercise of discretion in the former state function.¹⁰ There is no exception for workers who were hired on a part-time or seasonal basis.¹¹

The Two-Year Bar

The two-year bar is contained in POL § 73(8)(a)(i):

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.¹²

This provision contains two distinct clauses, each of which restricts former State employees from interacting with their former agency. The first clause prohibits former State employees from appearing or practicing before their former agency (the "appear and practice"

⁷ New York State Ethics Comm'n, Advisory Op. No. 95-19.

⁸ This exclusion from the definition of "state officer or employee" for purposes of POL § 73 is found in § 73(1)(i)(iii).

⁹ New York State Ethics Comm'n, Advisory Op. No. 99-16.

¹⁰ New York State Ethics Comm'n, Advisory Op. No. 91-17.

¹¹ New York State Ethics Comm'n, Advisory Op. No. 94-04. There is a narrow exception for former State employees who were employed "on a temporary basis to perform routine clerical services, mail services, data entry services or other similar ministerial tasks . . ." POL § 73(8)(f). The post-employment restrictions will not prohibit this class of former State workers from providing similar services to a State agency, as an employee of a company that is under contract with the State agency to provide such services. This narrow exception to the post-employment restrictions is rarely invoked.

¹² POL § 73(8)(a)(i).

clause). The second provision prohibits former State employees from receiving compensation for rendering services in relation to any case, proceeding, application, or other matter in aid of others who will appear or practice before their former agency (the “backroom services” clause). Both provisions cease to impact a former State employee two years after such individual’s separation from State service. In 1990, the State Ethics Commission held that “[t]he two-year bar is absolute and bars [a former employee] from any activity before [his former agency] regardless of the subject matter.”¹³

The Appear or Practice Clause

Consistent with its early interpretation of the two-year bar as an absolute prohibition, the State Ethics Commission applied the appear or practice clause quite broadly to include virtually any communication with one’s former agency because, it held a “‘communication’ by a former State employee on behalf of a client or any person amounts to an appearance or practice before his or her former agency prohibited by § 73(8) [that] would be barred whether or not compensation is received for the services rendered.”¹⁴

Under this broad interpretation of the appear or practice clause, prior Advisory Opinions held that prohibited communications with one’s former agency include: submitting a contract proposal to one’s former agency;¹⁵ making a Freedom of Information Law request to one’s former agency on behalf of another individual or entity;¹⁶ submitting a resume to one’s former State agency with respect to a project that has been awarded to a private contractor where the former State agency retains the right to approve the former State employee for the job he is seeking;¹⁷ participating in a colleague’s telephone call to the former agency or advising a colleague to mention the individual’s name in a telephone call to the former agency;¹⁸ and requesting data from one’s former agency, whether or not such data is publicly available.¹⁹

Advisory Opinion No. 94-05 provides a good example of broadly applying the appear or practice clause. In that matter, the former State employee reported that he was being considered for employment with a private company to perform duties essentially the same as those which he was then performing for his former agency; specifically, he would review files at the agency’s

¹³ New York State Ethics Comm’n, Advisory Op. No. 90-19.

¹⁴ New York State Ethics Comm’n, Advisory Op. No. 89-07. The reference to a communication on behalf of “any person” must include the former employee since the post-employment restrictions are understood as intended to prevent a former State employee from gaining undue benefits for himself or others. See n.2, 3 and 5, *supra*. See also, New York State Ethics Comm’n Advisory Op. No. 94-06 (affirming that a “communication” with one’s former agency violates the appear or practice clause).

¹⁵ New York State Ethics Comm’n, Advisory Op. No. 89-09.

¹⁶ New York State Ethics Comm’n, Advisory Op. No. 89-07.

¹⁷ New York State Ethics Comm’n, Advisory Op. No. 91-17.

¹⁸ New York State Ethics Comm’n, Advisory Op. No. 97-01.

¹⁹ New York State Ethics Comm’n, Advisory Op. No. 94-20.

location and take notes, and would not be “giving direction for change.” The Opinion further described the duties as:

. . . sitting in a room, apart from the claims personnel, and physically looking at files which were pre-requested from the [State agency], and making notes thereon. At no time would [the requesting individual] interact with the claims personnel, nor make requests for information, nor make requests or give direction on the handling of any files at the [State agency].

[The private company] also states that they would like [the requesting individual] to be permitted to call the [State agency] to ask claims questions on behalf of an insured, such as why a claimant is not being paid or whether there has been a recent hearing on the claim.²⁰

This description of the proposed job duties appears to reflect no attempt whatsoever to influence a decision or action of the agency. Nevertheless, the State Ethics Commission found that that these duties exemplified the types of activities that the post-employment restrictions were intended to prevent:

Applying the law to [these] circumstances, it would be a violation of the two-year bar for [the requesting individual] to appear before his former agency by reviewing files there and to receive compensation for that review on cases before the [State agency]. It would also be a prohibited appearance for [the requesting individual] to call his former agency to ask questions on behalf of an insured. *This is the very harm which is addressed by the revolving door provisions.*²¹[Emphasis added.]

The Commission’s predecessors have also held that the appear or practice clause prohibits former State employees from contracting with their former agency, because “such contracting would require contact with the former employing agency which constitutes a prohibited appearance.”²² Indeed, a later Opinion specifically held that the two-year bar is violated when former State employees are compensated for working pursuant to a contract with their former agency, such that the nature of the work they are to perform is irrelevant, as is the fact that they would have no contact with employees of their former agency.²³ These precedents have prohibited all former State employees from rendering services to their former agency

²⁰ New York State Ethics Comm’n, Advisory Op. No. 94-05.

²¹ *Id.*

²² New York State Ethics Comm’n, Advisory Op. No. 90-22; *see also* New York State Ethics Comm’n, Advisory Op. No. 94-21.

²³ New York State Ethics Comm’n, Advisory Op. No. 94-04.

pursuant to an employment or staffing contract, even in positions which do not involve efforts to influence the agency to take any substantive decision or action. For example, under such reasoning, a maintenance worker cannot accept a contractual assignment with his former agency through a staffing agency. It is the Commission's view that this interpretation is excessively strict and unnecessary, as it does not advance the policy objectives of the post-employment rules. As discussed below, that result is not dictated by the statutory language, and it is inconsistent with established precedent applying the appear and practice clause.

The Backroom Services Clause

The backroom services clause of POL § 73(8)(a)(i) prohibits a former State employee from receiving compensation for rendering services to any person or entity "behind the scenes" in relation to any case, proceeding or application or other matter before the individual's former agency. A violation of the backroom services clause may occur even when there is no appearance,²⁴ and even if the former agency does not know of the former employee's participation in the matter.²⁵ This provision safeguards against the former employee's using "inside information" behind the scenes to gain a favorable outcome from his former agency.²⁶ The specific prohibition is on being compensated for providing back room services, so rendering backroom services for free would not violate the two-year bar.

Simply stated, a former State employee violates the backroom services clause of the two-year bar when a person or non-governmental entity pays such former employee to prepare documents, or to assist another person to prepare documents, where it is foreseeable that the documents will be submitted to and reviewed by their former agency.²⁷ The bar applies even if the employee's name does not appear on the documents, and the agency does not know of the individual's involvement in the matter.²⁸ For example, a former State employee may not be compensated for assisting clients to prepare license applications for submission to his former agency.²⁹ A former State employee may not serve as a paid consultant and assist clients to prepare and submit applications for grants from her former agency as "this would constitute the rendition of services for compensation in a matter before her former State agency."³⁰ Prohibited backroom services also include providing behind-the-scenes guidance, such as instructing or advising a colleague to place a telephone call to one's former agency on a matter that is before

²⁴ New York State Comm'n on Pub. Integrity, Advisory Op. No. 08-02.

²⁵ See New York State Ethics Comm'n, Advisory Op. No. 90-07.

²⁶ New York State Ethics Comm'n, Advisory Op. No. 99-17.

²⁷ See, *Id.*; see also New York State Ethics Comm'n, Advisory Op. No. 94-06; New York State Ethics Comm'n Advisory Op. No. 97-05 (quoting Advisory Op. No. 94-06); New York State Ethics Comm'n, Advisory Op. No. 99-17.

²⁸ New York State Ethics Comm'n, Advisory Ops. No. 97-05, 94-06

²⁹ New York State Ethics Comm'n, Advisory Op. No. 97-15.

³⁰ New York State Ethics Comm'n, Advisory Op. No. 90-21.

the agency.³¹

Some of this Commission's predecessors adopted an even more expansive interpretation by holding that an individual renders services even if she submits *no* work product to her former agency, and in no way seeks to affect its decision-making. For example, in Advisory Opinion No. 95-31, it was held that when an agency establishes an outsourcing program, the two-year bar prohibits former employees of the agency from working for a private contractor on an outsourcing contract for two years, "as they would be rendering services for compensation in a matter before their former agency." The opinion did not consider the nature of the work to be performed by the former employees, or the fact that they would have no contact with employees of their former agency.³²

Advisory Opinion No. 99-17

Advisory Opinion No. 99-17 marked a turning point for the State Ethics Commission and its interpretation of the two-year bar. It involved a former Department of Transportation (DOT) employee who wished to work for a consulting engineer firm as a "Construction Inspector" on a State road reconstruction project. The former State employee reported that the reconstruction project was designed by a DOT design group and would be funded with federal, State, and city funds. The completed design would be turned over to the local city engineering department, which would be responsible for printing plans, advertising for bids, and awarding and administering the contract work. The city had selected the engineering firm as the consultant for inspection services on the project.

DOT personnel would make periodic site inspections to ensure compliance with design specifications, but day-to-day administration of the project would be the responsibility of the city. DOT engineers would be consulted only if the project required design changes or other modifications, or if DOT's expertise were required. As a private Construction Inspector for field operations on the project, the former employee would be in 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, nor otherwise seek guidance from DOT staff. Rather, as a Construction Inspector, he would be 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.

Before addressing the facts at hand, the State Ethics Commission first discussed a New York State Supreme Court opinion in an earlier matter that overturned the Commission's long-

³¹ New York State Ethics Comm'n, Advisory Op. No. 97-01.

³² New York State Ethics Comm'n, Advisory Op. No. 95-31.

standing interpretation of the appear or practice clause of the two-year bar. The case involved 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, where 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 State Ethics Commission determined that the former employee had violated the two-year bar by "appear[ing]" before DOT within two years of leaving State service. On appeal, however, the State Supreme Court reversed that determination.³³ 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,³⁴ 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. . . .

Upon reviewing the Supreme Court decision, the State Ethics Commission revisited the statute. With respect to the appear or practice clause, the Commission concluded that:

[T]he phrase "appearing or practicing" reaches only efforts to influence a decision of the former agency or to gain information from the agency that

³³ *Helin v. New York State Ethics Commission*, unreported decision of Supreme Court, Albany County, Malone, J., dated May 21, 1999.

³⁴ The lifetime bar is discussed at pp. 12-17, *infra*.

is not generally available to the public. It does not proscribe all contact with the agency.³⁵

The State Ethics Commission also found it appropriate to revisit the backroom services clause. Citing its decision in Advisory Opinion No. 94-20, it recognized that its precedents suggested that the backroom services clause:

. . . could be construed to bar a former DOT employee from working in any capacity for a private contractor on a DOT highway project . . . 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 backroom services clause requires such a result. . . . 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.³⁶

Having adopted these principles, it concluded that the two-year bar would not prohibit the former DOT employee from serving as a Construction Inspector for a contractor on a DOT project. It found that the former State employee would not be involved in project meetings at which DOT employees would be present, would not take part in change order decisions, and would have no need to seek guidance from DOT. His contacts would be with the contractor and not with his former agency, and he would not seek to influence DOT's decisions on the project. Accordingly, the position would not require the former State employee to appear or practice before his former agency.

Moreover, the individual's job would involve field oversight of the work by the contractor – not any work performed by DOT. The former State employee would report any

³⁵ New York State Ethics Comm'n, Advisory Op. No. 99-17.

³⁶ *Id.* (emphasis added).

deficiencies in the contractor's work to the company's own resident engineer. The resident engineer will attempt to resolve the issue, and, if unsuccessful, the matter would be brought to the City administering the project for resolution. Under these circumstances, the individual would not be performing services on a matter before DOT.

The principal points to be drawn from Advisory Opinion No. 99-17 are that: (1) the appear or practice clause does not apply to all attempts to communicate with one's former agency but, rather, it only captures attempts to influence a decision or action of one's former agency; and (2) the backroom services clause does not prohibit all work for a private entity on a matter involving one's former agency, but is, rather, limited to scenarios where the agency would be rendering a decision that best advances its mission and the public interest. Advisory Opinion No. 99-17 also suggests that an interpretation of the post-employment rules may be overbroad when it restricts a former State employee's professional activities while failing to serve the policy goals underlying the rules.

The Two-Year Bar Going Forward

In Advisory Opinion No. 99-17, the State Ethics Commission applied new, less restrictive standards for identifying prohibited conduct. Going forward, the Commission will interpret and apply the "appear or practice" clause as its predecessor did in Advisory Opinion No. 99-17, that is to say, to prohibit communications and actions that are intended to influence one's former agency to make a specific decision or to take a specific action. Similarly, the Commission will interpret the backroom services clause to prohibit rendering services to a person or entity in connection with a matter before their former agency in which the agency would be rendering a decision that best advances its mission and the public interest. These standards are less restrictive than what had become a near-blanket prohibition on all communication and services, but they are consistent with and they advance the purposes and intent behind the two-year bar.

Notably, applying the State's two-year bar will remain comparatively strict. The federal analogue of the two-year bar, for example, prohibits a former federal government employee from communicating or appearing before any federal agency or court, on behalf of another person or entity, on a matter in which the United States is involved or has an interest, which was pending under his or her official capacity within one year of leaving government service, but these actions are not prohibited if done on the former employee's own behalf, or on a matter in which the United States is not involved and has no interest, or which was not pending before the former employee in his or her official capacity.³⁷ There are no comparable exceptions in applying New

³⁷ 18 U.S.C. § 207(a)(2) provides as follows:

TWO-YEAR RESTRICTIONS CONCERNING PARTICULAR MATTERS UNDER OFFICIAL RESPONSIBILITY.—

Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court,

York's two-year bar.

The Charter of the City of New York broadly prohibits most former City employees from “making communications” with their former agencies, but for only one year following the termination of their employment.³⁸ Elected officials and other specified high-ranking officials also may not, for one year, “appear” before any agency within the branch of city government in which they served, e.g., the executive or legislative branch.³⁹ Neither the federal government nor the City of New York impose a restriction analogous to New York's backroom services clause.

As noted, the two-year bar's purpose is not to preclude one from practicing a given trade, profession or occupation, but, rather, to prevent a former employee from unfairly trading on contacts and information garnered while in State service to engage in specific conduct that is intended to influence an official decision.⁴⁰ Going forward, former State employees may be permitted to engage in employment that requires some measure of contact with their former agency, but the two-year bar will prohibit them from attempting to substantively influence any official decision or action by the agency, or to seek from their former agency any information that is not publicly available.⁴¹

The backroom services clause will not prohibit a former State employee from rendering services to a private entity in relation to a contract with his or her former agency, where the former employee does not participate in preparing work product, or otherwise provide guidance, intended to influence an official decision of the former agency. For example, a former employee of the DOT may assist an engineering firm that is considering a response to a DOT Request for Proposal (RFP) to determine whether the firm has the resources to perform the services outlined

or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

- (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
- (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
- (C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

See also, U.S. Office of Government Ethics, *After Leaving Government*, <https://www.oge.gov/web/oge.nsf/Resources/After+Leaving+Government>.

³⁸ New York City Charter, Chapter 68, § 2604(d)(2).

³⁹ New York City Charter, Chapter 68, § 2604(d)(3).

⁴⁰ *See* New York State Ethics Comm'n, Advisory Op. No. 94-02.

⁴¹ The focus on efforts to influence official action is further supported by Advisory Opinion No. 95-23, where the State Ethics Commission held that a former employee of the Department of Transportation (DOT) could apply to the DOT for certification as a minority business enterprise (“MBE”) within her two-year bar period. The DOT's role was merely to apply standards for eligibility that were formulated by the federal government, as the agency merely acted as the federal government's agent by reviewing and determining MBE applications for contracts in which the DOT was not directly involved. Moreover, appeals of adverse decisions would be made to the federal government. Under these circumstances, where the DOT's discretion was greatly restricted and the potential for improper influence was negligible, the two-year bar did not prohibit such contact.

in the RFP or to calculate the costs to the firm of performing the services, so long the former State employee's work remains internal to the firm and is not provided to the former State agency. Since the issue is not a matter before the State agency, it does not fall within the scope of the backroom services clause. However, the backroom services clause would prohibit the former DOT employee from participating in calculating prices, determining construction methods, or preparing or assisting in the preparation of any aspect of a proposal that is to be submitted to the DOT in response to the RFP.

The Lifetime Bar

The lifetime bar is contained in POL § 73(8)(a)(ii):

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.⁴²

The lifetime bar prohibits a former State employee from providing services in relation to any case, proceeding, application, or transaction in which the former employee was directly concerned and in which he or she personally participated, or which was under his or her active consideration while in State service; it does not apply due to a mere acquaintance with the matter at issue.⁴³ When the former State employee provides such services before a State agency, the bar is absolute and applies regardless of whether the former State employee is compensated for the services. When the former State employee is providing services before any non-State entity, the lifetime bar prevents the former State employee from receiving compensation for those services, but such services may be rendered for free.⁴⁴

Applying the lifetime bar requires identifying the specific "proceeding or application or other matter" involved. Therefore, as the State Ethics Commission recognized in Advisory Opinion No. 90-19, applying the lifetime bar requires examining the specific facts and circumstances of each instance:

⁴² POL § 73(8)(a)(ii).

⁴³ New York State Ethics Comm'n, Advisory Op. No. 91-18.

⁴⁴ New York State Comm'n on Pub. Integrity, Advisory Op. No. 11-03; New York State Ethics Comm'n Advisory Ops. No. 95-19, 95-16, 95-15, 95-07, 93-11, 94-18.

The determination of whether the lifetime bar applies . . . is one which must be made on a case-by-case basis; therefore, the Commission cannot, with precision, indicate those matters from which the requesting individual would be permanently barred before any State agency.⁴⁵

Indeed, consistent with precedent, the lifetime bar must be applied much more narrowly than the two-year bar:

Comparing the language of the lifetime bar with the two-year bar . . . the Commission notes that the two-year bar precludes certain services “in relation to any case, proceeding or application or *other matter*”; the lifetime bar speaks to “case, proceeding, application or *transaction*.” It seems clear that the two-year bar, which is absolute with respect to a former employee's former State agency, was meant to prohibit the widest possible scope of activities. The lifetime bar, which applies to the prohibited activities before all State agencies, is narrower in scope. The prohibited acts are very specific.⁴⁶ (Emphasis added.)

In practice, however, the lifetime bar has not always been applied in this manner. Specifically, the issue of whether “transactions” are the same has presented difficulties when applied in the context of “projects” – endeavors that are large, multifaceted, and tend to continue for an extended time period. For example, Advisory Opinion No. 91-12 considered a former State employee who, during his employment with the State, was assigned to a project that involved renovating a building, including new construction. The former employee was involved in the design phase of this project, which had begun before he commenced employment with the State and continued after his termination of service. According to the former employee, his role in this project was limited to providing guidance for preparing the overall budget and schedule based upon the decisions made by the operating personnel. He presented the schedule and budget information to management, along with various techniques for maintaining normal use of the building during construction. He did not decide upon any facet of the design, as his group was only responsible for providing an accurate budget and schedule for the work. The design was substantially complete when he left State service, but subsequently the primary design consultants had spent “millions of dollars in redesign.”⁴⁷

Subsequently employed by a private construction consulting and management firm, the former employee wished to participate in preparing and submitting a bid for the construction and the work which would result from a successful bid. The State Ethics Commission held that deciding whether the lifetime bar prohibited his participation required determining “whether the

⁴⁵ New York State Ethics Comm’n, Advisory Op. No. 90-19.

⁴⁶ New York State Ethics Comm’n, Advisory Op. No. 91-02 (underlining added).

⁴⁷ New York State Ethics Comm’n, Advisory Op. No. 91-12.

[building] improvement project is the *same* transaction with which the former employee was directly concerned and in which he personally participated during the period of his service or employment, or which was under his active consideration then.”

The State Ethics Commission concluded that it was the same transaction and the former employee was prohibited “from ever participating on the [building] improvement project”:

The changes in the scope and nature of the improvements which occurred after the former employee left State service do not render the project a different transaction from the one with which the former employee was directly concerned and in which he personally participated during the period of his employment. The fact that the exact design of that project has changed does not change the essential nature of the transaction as a reconstruction of the passenger terminal at [the building]. The State agencies, the subject property and the basic concept of reconstruction have not changed to a degree necessary to render this project a different transaction in order to avoid application of the lifetime bar. Despite the representation that the project has changed significantly and other design consultants have been paid millions of dollars to redesign the project, the Commission finds that the "transaction" in which the former employee was involved continues to exist; *the transaction is the continuing reconstruction of [the building]*.⁴⁸

The Opinion did not consider whether the former employee’s prior involvement in the project was limited to the design phase, or that his specific official responsibilities related to budget and scheduling issues, and it did not examine, at all, his specific proposed responsibilities in the construction phase. Every aspect of the entire project was held to constitute a single transaction to which the lifetime bar applied.

Advisory Opinion No. 95-06 involved a former employee of the New York State Department of Environmental Conservation (DEC) who was assigned as Project Engineer on a remedial investigation and feasibility study of a municipal landfill, pursuant to a consent order. The DEC released its remedial investigation report and feasibility study subsequent to the requesting individual's departure from State service. Thereafter, the DEC issued a proposed remedial action plan (PRAP) which described the remedial alternatives considered for the site, identified the alternative preferred by DEC, and provided the rationale for this preference. The PRAP solicited public comments pertaining to all the remedial alternatives evaluated, as well as the preferred alternative. After holding a public hearing on the PRAP, and receiving other comments on the PRAP, the DEC issued a Record of Decision outlining the specific work proposed to be done. Pursuant to a new consent order, the former State employee’s private

⁴⁸ *Id.* (emphasis added).

sector employer was awarded – after a bidding process – the engineering contract for the remediation work. The former employee asked if he would be permitted to participate in this aspect of the project.

It was determined that the lifetime bar prohibited him from participating in the remediation stage of the project:

. . . despite all the intervening events, the essence of the transaction—its subject and purpose, the parties interested and affected, and the ultimate goal—remains constant. It addresses the same landfill's cleanup as originally studied when [the requesting individual] was the Project Engineer. Therefore, the Commission concludes that [the requesting individual's] performance of services as an environmental engineer pursuant to the amended consent order would constitute his rendering services on a transaction on which he worked while in State service.⁴⁹

In reaching its conclusion, the State Ethics Commission did not consider the fact that the requesting individual's participation in the initial stage of the project was limited to investigation, or that he left State service before the final remediation plan was even selected. It found that the relevant transaction encompassed the entire project from initial investigation through final construction, and the lifetime bar prohibited the former employee's involvement in all aspects of the project.

In Advisory Opinion No. 97-09, the requesting individual was a former employee of DOT who had participated in the planning stages and early construction phase of a highway construction project that was projected as a three-stage project. His involvement was largely limited to "Stage I", although some elements of his work were relevant to the later phases. Specifically, between 1970 and 1984, he was required to review the design recommendation for the project, and coordinate the technical review of structural plans. His unit also reviewed the structural plans to insure compliance with certain standards and to ensure the data agreed with that used for highway design. All this work concerned the larger project then under consideration. Subsequently, the project was downsized to Stage I, while the balance of the original project – unofficially referred to as Stages II and III – was left for design and construction at a later date.

When the former employee left State service in 1987, there was still no serious discussion of progressing to Stages II and III, although it was generally recognized that at some point Stages II and III would have to be built. Ten years later, DOT advertised for consultant firms to submit expressions of interest in the design of Stages II and III of the project, and the former employee asked whether he could work on those aspects of the project. It was determined that his

⁴⁹ New York State Ethics Comm'n, Advisory Op. No. 95-06.

participation in Stages II and III were prohibited by the lifetime bar:

In [the requesting individual's] case, it is clear that he personally participated and was directly concerned with Stage I of the highway project, which was completed in 1989. However, this was not a project where Stage I was first designed and completed, with Stages II and III to be proposed at a later date. Rather, the initial design of the interchange project, beginning in 1970, was for the entire project. Between 1970 and 1984, work on the interchange assumed that the then proposed project would be constructed. [The requesting individual] played a role in those early years. . . . With this history, the individual stages of the project cannot each be viewed as a separate transaction. [The requesting individual], at the early stages, worked on essentially the same project on which he now seeks to work.⁵⁰

The individual's inquiry to the State Ethics Commission was triggered by DOT's solicitation of bids for the design of Stages II and III. However, the individual's involvement – which had ended *more than 13 years earlier* in design issues that had applicability to Stages II and III – barred his participation in the entire project.

Advisory Opinions Nos. 97-09, 91-12 and 95-06 did not distinguish or acknowledge the holding in Advisory Opinion No. 91-02: the lifetime bar only “prohibit[s] acts [that] are very specific.”⁵¹ All three Opinions held that the lifetime bar prohibited former State employees from every activity related to large projects in which they had played limited roles regardless of when such roles were played.

The Lifetime Bar Going Forward

The State Ethics Commission recognized that the lifetime bar of POL § 73(8) is an “extraordinary limitation” intended to restrict former employees from using “specific inside knowledge about a case, proceeding, application or transaction”⁵² A mere “acquaintance with or knowledge of a fact or circumstance is insufficient to trigger the lifetime bar. More is needed – active involvement in the nature of *both* personal participation *and* direct concern or active consideration of the transaction.”⁵³ Generally this means that the lifetime bar will attach only to “very specific” acts.⁵⁴

⁵⁰ New York State Ethics Comm'n, Advisory Op. No. 97-09.

⁵¹ *See, supra* at p.11.

⁵² New York State Ethics Comm'n, Advisory Op. No. 91-02, *citing*, New York State Ethics Comm'n Advisory Op. No. 90-16.

⁵³ New York State Ethics Comm'n, Advisory Op. No. 91-02 (emphasis in original).

⁵⁴ *See, Id.*

It is the view of the Commission that the line of Opinions addressing the lifetime bar's application to projects reflects an expansive interpretation of the term "transaction" that is not mandated by the statute and departs from the precedent established in Advisory Opinion No. 91-02. While most "projects" may be sufficiently discrete to constitute a single transaction for lifetime bar purposes, applying this concept across the board produces prohibitions of excessive scope that have caused undue hardship for some former State employees and State agencies seeking talent in the private sector.

A large infrastructure construction project is not necessarily a single transaction for lifetime bar purposes.⁵⁵ For example, a State employee who participated in a ground-level environmental study on a project need not automatically be barred for life from participating with a private contractor, years later, in inspection work on the same "project" absent a showing of "both personal participation *and* direct concern or active consideration" with respect to the inspection work.⁵⁶ The lifetime bar demands greater specificity.

Going forward, the Commission will consider such questions, as it must, on a case-by-case basis.⁵⁷ A non-exhaustive list of factors the Commission will consider when determining whether the lifetime bar applies in the context of a large project include: (1) the general nature of the project; (2) the phases of the project involved; (3) the nature of the work performed as a State employee and the nature of the work projected to be performed; (4) the extent to which the projected work constitutes a continuation of the earlier work; (5) the identities of other persons and/or entities directly involved in the earlier work and in the projected work; and (6) intervening changes in design, methods, or technology.

CONCLUSION

The post-employment restrictions are a key part in promoting public confidence in State government, and maintaining – in fact and appearance – the integrity of official decisions and actions. The purpose of this Advisory Opinion is not to narrow the application of the post-employment restrictions, but to clarify and resolve certain difficulties and ambiguities in the restrictions' application. The Commission will henceforth apply the post-employment rules consistent with this Opinion.

⁵⁵ This analysis is not limited to construction projects. Since the lifetime bar is applied on a case-by-case basis, this analysis may be applied to any scenario where it is appropriate under the specific facts presented.

⁵⁶ *Id.*

⁵⁷ New York State Ethics Comm'n, Advisory Op. No. 90-19.