

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

Advisory Opinion No. 16-03:

Determination of “former agency” for purposes of the post-employment restrictions of Public Officers Law §73(8); and whether a former employee may respond to a Request for Proposal from his former agency without violating Public Officers Law §73(8)(a)(i)

INTRODUCTION

A former employee of the Metropolitan Transit Authority (“MTA”) and Metro-North Railroad (“Metro-North”) has asked the New York State Joint Commission on Public Ethics (“Commission”) for an advisory opinion to determine which agency or agencies constitute his former agency and whether he may submit a bid pursuant to a Request for Proposal (“RFP”) to the MTA within two-years of leaving State service without violating the post-employment restrictions contained in Public Officers Law §73(8)(a).

Pursuant to Executive Law §94(16), the Commission hereby renders its opinion that, for purposes of Public Officers Law §73(8)(a), Mr. Doe’s* former agency is only the MTA. The Commission further finds that Public Officers Law §73(8)(a)(i) prohibits Mr. Doe from submitting a bid pursuant to an RFP, issued by the MTA, from which a list of vendors will be selected by a committee consisting of representatives from the MTA and each of its subsidiary agencies.

BACKGROUND

Mr. Doe retired from the MTA on [date], 2016. From [date], 2000 to [date], 2014 he was the Vice President of [] at Metro-North Railroad. At Metro-North, Mr. Doe handled all aspects of [] for the railroad, including but not limited to, [] training for all railroad employees. In [date], 2014 he was transferred to MTA headquarters (“MTAHQ”) to work as a manager on various [] projects. Thereafter, from [date], 2014 until his retirement in [date], 2016, Mr. Doe worked in MTAHQ’s [] Department [].

Although Mr. Doe worked exclusively for MTAHQ from [date], 2014 to [date], 2016, he

*The requesting individual’s name and other identifying details have been changed or redacted.

was on the payroll of Metro-North during that time due to pension considerations.

According to the MTA, despite being on Metro-North's payroll, Metro-North had no oversight or control over Mr. Doe's duties and responsibilities during this time. In fact, MTA personnel signed Mr. Doe's time sheets and approved his vacation requests.

Following Mr. Doe's retirement on [date], 2016, he started his own [] company, entitled "Doe []," to provide [] training to organizations.

On March 30, 2016, the MTA issued RFP No. 15493 for an "all-agency" contract to provide management development training for the MTA and its subsidiaries. Mr. Doe would like to submit a bid to provide training to any MTA entity *except* MTAHQ and Metro-North, which he considers his former agencies.

In order to properly analyze this inquiry, it is important to understand the procedure the MTA is utilizing for their RFPs. In an effort to leverage the MTA's size and money, the MTA is moving toward a consolidated procurement model using "all-agency" contracts as opposed to having each agency/subsidiary handling their own procurements. The procurement group within MTAHQ provides for and administers an RFP for an all-agency contract. At the end of the procurement period, a selection committee that is comprised of representatives from MTAHQ as well as each of the MTA's subsidiary agencies reviews and evaluates all the bids. Generally, the committee may award an all-agency contract to one vendor or, as is the case here, compile a list of potential vendors from which the MTA and its subsidiary agencies can choose. Members of the selection committee review all bids and rate them, using a score card or points system, based on a number of factors including operational and financial criteria. Then the bids are officially selected via a vote of the committee members. Each committee member has an equal vote and decisions are made by majority vote. Once awarded, the MTA and each of its subsidiary agencies may utilize the all-agency contract however they choose.

Based on information obtained from the MTA, the RFP in question will be administered by MTAHQ and bids will be selected by a committee made up of representatives from MTAHQ and each of its subsidiaries, including Metro-North. Mr. Doe has asked the Commission to determine: (1) which agency or agencies must be considered his former agency for post-employment restriction purposes; and (2) whether he may, without violating Public Officers Law §73(8)(a), submit a bid to the MTA pursuant to an RFP and from which selections will be made by a committee of representatives from the MTA and each of its subsidiary agencies, including Metro-North.

APPLICABLE LAW

Public Officers Law §73(8)(a) sets forth the restrictions regarding what individuals may do with the knowledge, experience, and contacts gained from public service after they terminate their employment with a State agency. The purpose of these restrictions is “to preclude the possibility that a former State employee may leverage his or her knowledge, experience and contacts gained in State service to his or her advantage or that of a client, thereby securing unwarranted privileges, consideration or action.”¹ The statute contains two different types of restrictions: a “two-year bar” and a “lifetime bar.”²

The two-year bar, contained in Public Officers Law §73(8)(a)(i), prohibits former State officers and employees, for two years following their separation from State service, from (a) appearing or practicing before their former agencies (the “appearance/practice” clause), and (b) rendering services for compensation, in relation to any case, proceeding, application, or other matter before their former agency (the “back room services” clause).³ It is not necessary for the former agency to know that the former employee is working on the matter for there to be a violation.⁴

Among the activities the Commission has determined are prohibited by the appearance/practice clause during the two-year period: negotiating a contract with a former agency;⁵ submitting a grant proposal or application to a former agency;⁶ representing a client in an audit before a former agency;⁷ engaging in settlement discussions with a former agency;⁸ or calling a 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.⁹

The “back room services” clause of Public Officers Law §73(8)(a)(i) precludes a former employee from being compensated for rendering services in relation to any case, proceeding or application or other matter before the individual’s former agency, “even in the absence of a personal appearance.”¹⁰ Thus, a former State employee may not accept compensation for assisting another person in the creation or development of (i) an application to be submitted to the former employee’s State agency, or (ii) a plan or strategy for influencing a decision of the

¹ Advisory Opinion No. 89-05.

² Since the Commission finds that Mr. Doe’s participation in the RFP response would violate the two-year bar, it is unnecessary to analyze the impact of the lifetime bar on his situation.

³ Public Officers Law Section 73(8)(a)(i) reads 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.”

⁴ Advisory Opinion No. 90-07.

⁵ Advisory Opinion No. 90-04.

⁶ Advisory Opinion No. 90-21.

⁷ Advisory Opinion No. 90-04.

⁸ Advisory Opinion No. 95-28.

⁹ Advisory Opinion No. 99-17.

¹⁰ Advisory Opinion No. 08-02.

former employee's State agency.¹¹

DISCUSSION

Former Agency

In Mr. Doe's situation, it is necessary to first determine his former agency. Generally, an individual has only one former agency and would, therefore, be prohibited from appearing, practicing, or rendering services for compensation in any matter before that State agency for a two-year period. In some circumstances, however, an employee may have more than one former agency.¹²

With respect to former employees of the MTA and its subsidiaries and affiliates, a former employee of a particular MTA subsidiary or affiliate may appear before a different MTA subsidiary or affiliate without violating the two-year bar.¹³ Given the relationship between the MTA and its affiliated agencies, however, an employee may have more than one former agency within that structure, depending upon the individual's job responsibilities.¹⁴ If an individual is subject to the decision-making and oversight processes of more than one agency, or if the employee's duties to another agency or agencies are "sufficiently significant and regular," the additional agency or agencies are also deemed to be the individual's former agency.¹⁵

Because Mr. Doe's job responsibilities at MTAHQ were sufficiently significant and regular, it is clear that the MTA must be considered his former agency.¹⁶ Whether Metro-North must also be considered his former agency simply by virtue of the fact that Mr. Doe is on Metro-North's payroll is less clear.¹⁷

Previous Advisory Opinions have provided useful guidance on what constitutes a "former agency," yet none have specifically addressed the issue we have before us. For example, in Advisory Opinion No. 95-33, the Commission analyzed whether employees of the MTA should be considered employees of only the MTA, or, alternatively, of all the MTA's affiliated agencies for purposes of determining their former agency. The Commission held that senior MTA employees "whose current responsibilities include actively and routinely managing significant

¹¹ Advisory Opinion No. 99-17.

¹² Advisory Opinion Nos. 90-12 and 90-22.

¹³ Advisory Opinion Nos. 95-04 and 03-04.

¹⁴ Advisory Opinion Nos. 95-33 and 06-05.

¹⁵ Advisory Opinion Nos. 99-01 and 02-02.

¹⁶ Advisory Opinion No. 03-04.

¹⁷ Mr. Doe states that he considers both MTA *and* its subsidiary, Metro-North, to be his former agencies and seeks a determination that all other MTA subsidiaries are not his former agencies. He seems to be under the misunderstanding that Commission staff had suggested that *all* MTA subsidiaries are also his former agencies, which was not the case. In fact, for purposes of the post-employment restrictions, the Commission finds that only MTA (and *none* of its subsidiaries) shall be considered his former agency.

projects or matters involving one or more MTA affiliates or subsidiaries may be considered to be an employee of the MTA and the other MTA entity.”

In Advisory Opinion No. 99-1, the former agency of a senior MTA employee who had significant involvement with the capital programs of the New York City Transit Authority (“NYCTA”) would be both the MTA and the NYCTA, given the employee’s job responsibilities. The Commission noted that the MTA employee is “involved with the NYCTA in deciding which of its capital projects will go forward after assessing its needs and budget, and she follows the progress of the NYCTA’s capital projects. This places her well within the NYCTA’s decision making and oversight process.” In addition, the Commission found that former senior MTA officials who “actively and routinely manage significant projects or matters involving an MTA entity ordinarily will be deemed to be former employees of both MTA and the entity.”

Of particular relevance is Advisory Opinion No. 03-04, which analyzed whether an individual with sufficiently significant and regular duties with the Long Island Railroad (“LIRR”) should also be considered a former employee of the MTA. Similar to Mr. Doe, the former employee had been placed on MTA’s payroll due to pension considerations. As a senior official at LIRR, the former employee oversaw major capital programs, including planning, renovation and construction projects. Regarding the MTA, the former employee had duties related to the MTA’s All-Agency Deferred Compensation Plan and its Excess Liability Fund. Based on the foregoing, the Commission concluded that the MTA was his former agency, in addition to LIRR, because he had “provided ‘continuing service’ to the MTA on a significant and regular basis.” While the decision noted that the individual was on the MTA’s payroll for pension purposes, that fact does not appear to have factored in the decision.

Given the multiple Advisory Opinions relating to “former agency,” the Commission, in this Advisory Opinion, clarifies what constitutes a former agency for post-employment restriction purposes. As the Commission analyzes this issue, it is cognizant of the fundamental purpose of the two-year bar which is to prevent former employees from receiving an unfair advantage or an appearance of such simply because of their contacts within and/or knowledge of their former agency. The potential for such unfair advantage is predicated upon a person having had regular and significant contact or interactions with an agency. With that in mind, the Commission provides herein a set of factors that should be considered in determining whether the nature of a person’s duties and responsibilities with respect to a second agency are such that the second agency should also be considered the person’s former agency. Such factors include, but are not limited to, whether: (1) the person was subject to the oversight and decision making processes of a second agency; (2) he actively and routinely managed significant projects or matters relating to a second agency; and/or (3) his duties to a second agency were sufficiently significant and regular. Whether a former employee was on an agency’s payroll may be a factor

to consider since it could relate to oversight; however, that fact, standing alone, does not make an agency a “former agency.”

Based on the information provided, at the time of his departure from State service, Mr. Doe had not performed any duties for Metro-North or managed any projects or matters relating to Metro-North for approximately two years and, consequently, cannot meet the “sufficiently significant and regular” standard. Further, Metro-North had no oversight over Mr. Doe and could not assign any duties or responsibilities to him. In fact, the MTA, not Metro-North, approved his time sheets and vacation requests. Mr. Doe’s only relevant connection to Metro-North was being on its payroll. The Commission concludes that being on an agency’s payroll, in and of itself, is not sufficient to constitute a former agency. Therefore, Metro-North should not be considered his former agency for post-employment purposes.

Based on the foregoing, Mr. Doe’s former agency is only the MTA, as it is the only agency which had oversight over Mr. Doe and to which his duties were sufficiently significant and regular at the time he retired. Consequently, he is precluded from appearing, practicing, or rendering services for compensation on matters before the MTA for two years following his separation from State service.

Two-Year Bar

Turning to the application of the two-year bar to Mr. Doe’s circumstances, the Commission must determine whether responding to the RFP in question would constitute a prohibited appearance in violation of the two-year bar. The two-year bar provides a “cooling off” period during which time a former employee is prohibited from appearing or practicing or rendering services for compensation before their former agency or agencies. The receipt of grants, contracts or similar benefits from a former employee’s agency is precisely the type of undue advantage, or the appearance of such, which the two-year bar is designed to prevent.

As discussed above, the submission of applications to a former agency as well as contracting with a former agency within two years of leaving such agency constitutes a prohibited appearance.¹⁸ Likewise, the submission of a bid in response to an RFP issued by a former agency within the two-year bar period would constitute a prohibited appearance. Because MTAHQ administers the RFP, any response to the RFP would clearly constitute a matter before MTAHQ and, thus, a prohibited appearance. This decision does not address whether the composition of the MTA’s all-agency contract selection committee would preclude former employees of the MTA’s subsidiary agencies from submitting bids or otherwise appearing before the all-agency committee.

¹⁸ Advisory Opinion Nos. 90-04 and 90-21.

CONCLUSION

The Commission concludes that Mr. Doe's former agency, for post-employment restriction purposes, is the MTA. The Commission further concludes that Public Officers Law §73(8)(a)(i) prohibits Mr. Doe, for two years from the date of his departure from State service, from submitting a bid pursuant to an RFP that will be administered by the MTA and awarded by a selection committee consisting of representatives from the MTA and each of its subsidiary agencies. Such a submission would constitute a prohibited appearance before his 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 acted in good faith unless material facts were omitted or misstated in the request for the opinion.

Concur:

Daniel J. Horwitz, Chair

David A. Renzi

Seymour Knox, IV

Michael A. Romeo, Sr.

Hon. Eileen Koretz

Hon. Renee R. Roth

Gary J. Lavine

George H. Weissman

Hon. Mary Lou Rath

Absent:

Marvin E. Jacob

Dawn L. Smalls

Michael K. Rozen

Dated: June 28, 2016