

Advisory Opinion 08-02

It would be a violation of Public Officers Law §73(8)(a)(i) for [a] former [title] of [a] New York State [Agency] to [provide services to] a person in connection with [a matter before the Successor Agency] within two years of the former [Title's] departure.

INTRODUCTION

[], a former [title] of the New York State [Agency A], has requested an advisory opinion, asking whether, during [his or her] two-year post-employment period, [he or she] may [provide services to] a person in connection with a matter before the [Successor Agency to Agency A]. Pursuant to its authority under Executive Law §94(15), the Commission on Public Integrity (“Commission”) renders its opinion that [the former State employee] may not [provide services to] any person in connection with a matter before the [Successor Agency] within two years of leaving [Agency A] since [he or she] would be rendering services on a matter before [his or her] former agency in violation of Public Officers Law §73(8)(a)(i).

BACKGROUND

[The former State employee] served as [title] of [Agency A] from [] through [], when [he or she] left State service. [Agency A] was created pursuant to [Agency A's Governing Statute] and its jurisdiction was limited to the application of [the law applicable to Agency A]. [The former State employee] is now a member of [an organization] that [provides services] to a public benefit corporation (“Corporation”).

In [month and year], the [Successor Agency] contacted the Corporation's Executive Director and Chief Executive Officer (“CEO”) to arrange to speak with him in connection with [a matter before the Successor Agency] (“Matter”). [The Matter] about which the [Successor Agency] sought to speak with the CEO was then and remains confidential pursuant to [the Successor Agency's Governing Statute].

After [the former State employee] indicated orally and via e-mail to the [Successor Agency] that [he or she] planned to accompany the CEO at the [meeting] and provide [services] to the Corporation in connection with the [Matter], [Successor Agency] staff responded to [the former State employee] via e-mail that [his or her provision of services to] the Corporation in connection with the [Matter], including accompanying the CEO to a [Successor Agency meeting], would constitute a prohibited appearance before [the former State employee's] former agency in violation of the two-year post-employment restriction set forth in Public Officers Law §73(8)(a)(i) under Ethics Commission precedents.

Thereafter, the Commission received a letter from [the former State employee] dated March 4, 2008, supplemented by a letter dated May 30, 2008, requesting an advisory opinion and final determination of the Commission, pursuant to Executive Law §94(15), concerning the application of the Public Officers Law to [his or her] circumstances. Specifically, [the former

State employee] asked whether the [Successor Agency] was [his or her] “former agency” for purposes of the post-employment restrictions set forth in Public Officers Law §73(8)(a)(i). For the reasons set forth below, we conclude that the [Successor Agency] is [the former State employee's] former agency for purposes of applying this statutory provision. Therefore, because it is well-settled that [the former State employee's] [provision of services to] the Corporation in connection with the [Matter], including accompanying the CEO at a [Successor Agency meeting], would constitute an appearance before the [Successor Agency], such [provision of services] would violate Public Officers Law §73(8)(i).

APPLICABLE LAW

The [Successor Agency's Governing Statute], set forth in Chapter [] of the Laws of [], became law on [date] and, in pertinent part, became effective on [date]. Among other things, [the Successor Agency's Governing Statute] established the [Successor Agency]. [The Successor Agency's Governing Statute] also [transferred] the powers, duties and functions of [Agency A] and [Agency B], as exercised by their respective [officials] and staff, to the [Successor Agency]. [] With respect to these matters, [the Successor Agency's Governing Statute] contains [provisions that indicate the Successor Agency shall be the continuation of the prior agencies, and all matters before the prior agencies shall be deemed transferred to the Successor Agency]. [Moreover, the respective authority of the prior agencies was transferred to the Successor Agency.]

[Redacted]

[Redacted]¹

DISCUSSION

A. The [Successor Agency] is [THE FORMER STATE EMPLOYEE'S] Former Agency

Under [the Successor Agency's Governing Statute], [], the [Successor Agency] is [the former State employee's] former agency. This determination is also supported by Ethics Commission precedent, which is binding on the Commission pursuant to Executive Law §94(1).

In Advisory Opinion No. 93-11, the Ethics Commission held that, for purposes of applying Public Officers Law §73(8), the New York State Office of Alcoholism and Substance Abuse Services (“OASAS”) was the former agency of a former employee of the New York State Division of Substance Abuse Services (“DSAS”).² In a legislative action contained in the Laws of 1992, Chapter 223, OASAS was created when the New York State Legislature consolidated DSAS and the New York State Division of Alcoholism and Alcohol Abuse (“DAAA”). The statute that created OASAS also contained provisions that are functionally identical to the provisions of [the Successor Agency's Governing Statute] reproduced and discussed above, such as provisions for the transfers of functions, employees and pending actions and proceedings, as well as for continuity of authority, existing rights and remedies.

Similar to [the former State employee's] circumstances, the former DSAS employee, who was the subject of Advisory Opinion No. 93-11, resigned before the legislative consolidation. In concluding that OASAS was this employee's former agency, the Ethics Commission found it determinative that

actions, favorable or otherwise, taken by the OASAS officials on matters presented by the former DSAS employee may “raise suspicion among the public“ that such determinations are based on favoritism or the relationship which the OASAS employer has with this former employee . . . By designating OASAS as the former agency of both DSAS and DAAA employees, this inherent appearance of conflict of interest concerning the actions of current OASAS is also avoided.

In the circumstances at issue in Ethics Commission Advisory Opinion No. 93-11, OASAS, following the statutory mandate to consolidate and merge the jurisdiction and functions of the two former agencies, in practice, operated in an integrated manner. The [Successor Agency], following its statutory mandates similarly operates in an integrated manner. Former [Agency A] and [Agency B] staff collaborate [in their work at the Successor Agency]. The [] and [] of the former agencies are now integrated and are under the direct management of the [Successor Agency's] General Counsel. [Successor Agency personnel] are responsible for matters related both to the [laws applicable to Agency A and Agency B].³

Moreover, during [the former State employee's] []-year tenure as [title at Agency A], [he or she] collaborated extensively with four professionals who continue to serve the [Successor Agency] as members of the [Successor Agency's unit responsible for the Matter]. These four individuals were designated as policy-makers before the consolidation, including when [the former State employee] was [a title at Agency A], continuing as such after the consolidation of the two agencies. These individuals serve in the following capacities: [].

Three out of four of the aforementioned individuals are directly involved in the [Matter]. In addition, most of the former [Agency A]'s administrative and clerical personnel, including a number of individuals who served in those capacities when [the former State employee] was [a Title at Agency A], some of whom directly reported to [the former State employee], continue to serve in similar capacities for the [Successor Agency]. Finally, a [] who served [Agency A] while [the former State employee] was [Title] of [Agency A] is now one of the members of the [Successor Agency].

Under these circumstances, the same analysis and concerns that led the Ethics Commission to conclude in Advisory Opinion No. 93-11 that OASAS was the former agency of the former employee apply in this case and require the same result.⁴ Those concerns were cited in *Forti v. State Ethics Commission*, 75 N.Y. 2d 596, 605 (1990), where the Court of Appeals agreed that the risk of a former State officer or employee securing an unfair advantage or exercising undue influence is an underlying rationale for the “two-year bar.” The Court stated:

[Former] 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” citing (Pub.L. 95-521 [Ethics in

Government Act], Sen. Rep. No. 95-170 reprinted in 1978 U.S. Code, Cong. & Admin. News 4216, 4247).

B. Applicable Post-Employment Restrictions

The pertinent post-employment restrictions, found in Public Officers §73(8)(a)(i), set the ground rules for what individuals may do with the knowledge, experience, and contacts gained from public service within two years after they terminate their employment with a State agency, 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, known as the “two-year bar,” prohibits former State officers and employees, for two years following their separation from State service, from (a) appearing or practicing before their former agencies, or (b) rendering services for compensation, in relation to any case, proceeding, application or other matter before their former agency (the so-called “back room services” clause). 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 (See, Suggested Opinion No. 90-7).

For the two-year bar, the specific matter is irrelevant; the central question is whether it is before the former agency. The Commission has interpreted the phrase “appear or practice” to preclude an individual during the two-year period from representing a client in an audit before the individual's former agency (See, Advisory Opinion No. 90-4); engaging in settlement discussions with the individual's former agency (See, Advisory Opinion No. 95-28); or calling the individual's 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 (See, Advisory Opinion No. 99-17).

The second clause of the two-year bar, referred to as the “back room services” clause, precludes a former employee from 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. Thus, for example, the “back room services” 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 the individual's former agency (See, Advisory Opinion No. 97-5).

In [the former State employee's] case, [providing services to] the Corporation in connection with the [Matter], including accompanying the CEO at a [Successor Agency meeting], would be a prohibited appearance before [the former State employee's] former agency. [The former State employee] is also prohibited from performing any “back room services” in connection with the [Matter]. With regard to the “back room services” component of the two-year bar, the Ethics Commission held in Advisory Opinion No. 97-5, that, while a former State employee may be

retained by a firm to review papers the firm has obtained from the individual's former agency, the former employee may not prepare documents for the firm if it was foreseeable that such documents would ultimately be reviewed by the individual's former agency.

While pursuant to Public Officers Law §73(10), [the former State employee's] [organization] is not precluded from [providing services to] the Corporation in connection with the [Matter], [the former State employee] is prohibited from any involvement with [such services]. Moreover, if [the former State employee's] [organization] continues with the [services] at issue, [the former State employee] must comply with Public Officers Law §73(10) (See also, Advisory Opinion No. 90-14.), which prohibits [him or her] from sharing in the [organization's] net revenue from such [services].

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
John Feerick,
Chair
Daniel R. Alonso
Virginia M. Apuzzo
John M. Brickman
Andrew G. Celli, Jr.
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Daniel J. French
David L. Gruenberg
Hon. James P. King
Hon. Howard A. Levine
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John T. Mitchell
Members

Dated: June 19, 2008

Footnotes

¹ [Footnote Redacted.]

² Executive Law §94(1) states, in pertinent part, “This section shall not revoke or rescind any regulations or advisory opinions issued by [the Ethics Commission].”

³ [Pursuant] to []Law § [], the [Matter before the Successor Agency is presently confidential.] []

⁴ It would not be practical for the [Successor Agency] to set up a firewall separating former [Agency A] staff from that portion of the [Matter] in which [the former State employee] seeks to provide [services]. Moreover, the Commission does not believe that the Public Officers Law permits, let alone requires, [the Successor Agency] to make such an accommodation. As discussed above, an important purpose of Public Officers Law §73(8)(a)(i) is to minimize the risk that it will appear that a former employee of an agency is being treated in a manner that is materially different from the agency's treatment of others. Finally, the Commission has determined that Ethics Commission Advisory Opinions Nos. 96-07 and 97-01 neither require nor suggest a different determination than the one the Commission has made in this instance.