Advisory Opinion No. 21-01: Applying the two-year bar to a former State employee whose proposed employment entails receiving compensation for preparing and reviewing permit applications to be submitted to his former agency for approval and discussing such applications with his former agency.

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from John Doe, a former DEC employee with the New York State Department of Environmental Conservation (DEC), concerning the application of Public Officers Law §73(8)(a)(i), the two-year bar, to his proposed employment with a private engineering firm. Mr. Doe’s proposed employment would involve preparing and submitting to the DEC for approval the same types of applications for permits that he reviewed and approved as a DEC employee. It is well settled that the two-year bar prohibits a former State employee from accepting compensation for rendering services in relation to the creation or development of an application to be submitted to the employee’s former agency. Mr. Doe has not presented facts or argument that would distinguish this case from the extensive precedent on this question, or that would call for modification or expansion of Commission precedent.

As such, pursuant to the authority vested in the New York State Joint Commission on Public Ethics (“Commission”) by § 94(16) of the Executive Law, for the reasons discussed below the Commission hereby renders its opinion that the two-year bar precludes Mr. Doe from accepting the employment with the engineering firm.

BACKGROUND

Mr. Doe retired from the DEC, [ ], on [ ], 2021, where he most recently served as an [ ]. Mr. Doe’s job duties at the DEC included reviewing and approving applications for permits, together with reports and construction drawings, submitted by engineering firms, contractors, and private citizens.

Mr. Doe has been offered a position at a private engineering firm where his duties would involve working on the same types of applications for permits, reports, and construction drawings described above, in preparation for submitting those documents to the DEC for its approval. Mr. Doe has explained that he would either prepare the documents himself or review documents prepared by others for completeness and compliance with applicable State regulations. Mr. Doe
reports that prior to granting approval, the DEC can, and often does, respond to these applications with comments that must be addressed by resubmitting the application.

Mr. Doe sought guidance from Commission staff to determine if this proposed work is permitted under the Public Officers Law. After consulting with Mr. Doe, Commission staff issued an informal opinion letter concluding that the proposed work would violate the two-year bar in the Public Officers Law, finding that it falls squarely within the type of conduct the two-year bar is designed to prohibit. Mr. Doe subsequently requested staff reconsider his request; the Commission’s General Counsel confirmed staff’s determination. Mr. Doe then requested review by the Commission.

**APPLICABLE LAW**

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

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.

Section 73(8)(a)(ii), known as the “lifetime bar,” states:

No person who has served as a state officer or employee shall after the termination of such service or employment appear, 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.

**DISCUSSION**

The post-employment restrictions are intended to prevent former State employees from utilizing . . . knowledge, experience and contacts gained in State service to the benefit of a private client or to his or her own personal gain.”2 For two years after leaving State service, the two-year bar prohibits former State employees from engaging in activity or communications, or being paid for rendering services, that are intended to influence a decision or action by their former agency or to seek information that is not publicly available from their former agency.3 The “backroom services” clause of the two-year bar prohibits a former State employee from rendering services to a person or entity in connection with a matter before their former agency, even without a personal

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2 Advisory Opinion No. 89-07 at 3.
3 Advisory Opinion No. 18-01.
appearance before the agency, and even if the agency does not know of the former employee’s involvement.\textsuperscript{4}

In accordance with these principles, it has been held, repeatedly and consistently, that participating in drafting or submitting an application to one’s former agency within the two-year bar period violates the two-year bar.\textsuperscript{5} This undisputed proposition applies squarely to Mr. Doe’s proposed employment, which would require him to have direct contact with his former agency, including the submission of permit applications, discussions concerning such applications, and potentially re-submitting revised applications in response to agency comments, all intended to obtain a favorable outcome for his private clients. This is precisely the type of scenario, described in Advisory Opinion 99-17, where an “individual is seeking to influence [his] former agency[,] . . . [and creates] an appreciable risk that the associations and special knowledge which [he] gained during government service could give [him] (or fairly be perceived to give [him]) an unfair advantage.”\textsuperscript{6}

The Commission notes that the two-year bar does not prohibit a former State employee from “provid[ing] services of a general nature to persons who and entities that appear before their former agency.”\textsuperscript{7} In Advisory Opinion 90-03, a former employee proposed to provide general advice to an entity that regularly applied for funding from his former agency, using knowledge he developed while working for the agency. This was held to be permissible because “the former State employee would not be personally working on any proposal or application to be submitted to his former agency . . . and his name would not appear in connection with any such document.”\textsuperscript{8} Similarly, in Advisory Opinion 94-18, it was held that the two-year bar did not prohibit a former State employee from educating his clients on the Medicaid application process and assisting them in improving the quality and quantity of their applications for reimbursement. The former employee would be calling upon knowledge developed in State service but would not work on any specific application to his former agency.\textsuperscript{9}

Accordingly, Mr. Doe could utilize knowledge he acquired through his employment at the DEC to advise an employer generally with an aim to improve the quality of the employer’s permit applications.\textsuperscript{10} Mr. Doe cannot, as he has requested to do, prepare, review, or revise specific applications to be submitted to the DEC for approval or render guidance pertaining to specific applications to the DEC, nor can he allow his name to be included in an application submitted to the DEC.\textsuperscript{11}

\textsuperscript{4} Advisory Opinion 90-07.
\textsuperscript{5} See, e.g., Advisory Opinion Nos. 89-7, 89-09, 90-03, 90-07, 94-06, 97-15, 99-17 see also Advisory Opinion 07-02 (two-year bar held to preclude a former DEC employee receiving compensation for services rendered in connection with the application process for regulatory approval of a utility transmission project).
\textsuperscript{6} Advisory Opinion 99-17 at 4 (citing Advisory Opinions 90-4, 90-21, and 95-28).
\textsuperscript{7} Advisory Opinion 90-03.
\textsuperscript{8} Advisory Opinion 90-03 at p. 6.
\textsuperscript{9} Advisory Opinion 94-18.
\textsuperscript{10} Mr. Doe has suggested that allowing him to work on the applications would help the DEC by heading off time-consuming deficiencies before the applications reach the agency. Such a factor, while notable, is for the legislature to incorporate; the Commission is not in a position to write exceptions into the statute.
\textsuperscript{11} Advisory Opinion 90-03, p. 6.
CONCLUSION

The Commission hereby concludes that Mr. Doe’s proposed private sector employment, i.e., preparing and or reviewing specific applications to DEC, would violate the two-year bar in Public Officers Law 73(8)(a)(i). The Commission notes that the two-year bar does not prohibit Mr. Doe from using the general knowledge he acquired as a State employee in his new employment, and he can share with others his knowledge official DEC procedures and policies regarding applications for permits. The two-year bar prohibits applying that knowledge to a specific application that will be submitted to the DEC.

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:

Camille Joseph Varlack, Chair
Richard F. Braun
William P. Fisher
Daniel J. Horwitz
Marvin E. Jacob
Gary J. Lavine
James W. McCarthy
David J. McNamara
George H. Weissman
James A. Yates

Members

Dated: July 27, 2021

12 Mr. Doe has not presented specific facts implicating the application of the lifetime bar; however, under Public Officers Law Section 73(8)(a)(ii), he would be prohibited from rendering services in relation to any specific application with which he was directly concerned and in which he personally participated, or was under his active consideration while he was employed by the DEC. Conversely, as discussed above, Mr. Doe would not be prohibited by the lifetime bar from using general knowledge he acquired during State service concerning DEC policies and procedures.