INTRODUCTION

The following advisory opinion is issued in response to an inquiry from the New York State Office for People with Developmental Disabilities (OPWDD), concerning application of the two-year bar to a former OPWDD employee seeking certification by the OPWDD as a family care provider, where the certification process was largely completed, but not finalized, while the individual was employed by the agency.

Pursuant to the authority vested in the New York State Joint Commission on Public Ethics (“Commission”) by Executive Law § 94(16), the Commission hereby concludes on the facts presented here that as the only remaining steps in the family care provider certification process are ministerial in nature, the two-year bar would not be violated if the OPWDD finalized the initial certification of a former OPWDD employee who had completed all other certification requirements prior to her separation from State service.

BACKGROUND

The OPWDD certifies individuals as family care providers so that they may care for developmentally disabled individuals in their home, similar to becoming certified as a foster parent. The OPWDD pays certified family care providers each month for room and board, as well as a stipend to teach skills to the developmentally disabled individual.¹ In March 2019, Jane Doe² a long-time OPWDD non-policymaking employee serving as direct care staff at the [habilitation center], started the process of becoming certified as a family care provider.³

By November 2020, Ms. Doe had completed all the requirements for certification, including thirty hours of training; an initial home visit; several background checks; and submission of a completed, notarized application that included a doctor’s medical report and three references attesting to her ability and fitness to be a family care provider. She had also addressed all issues that had been raised in the initial home safety visit, such as installing additional smoke alarms and carbon monoxide detectors in her residence. The Family Care Unit reviewed Ms. Doe’s application packet, found all items satisfactory, and authorized the final home safety visit in December 2020.

¹ Payment for room and board comes from the Social Security Administration benefits of the developmentally disabled individual. The OPWDD bills Medicaid for the skill-building service and pays family care providers from those funds.
² The requesting individual’s name has been redacted.
³ See discussions, infra, of State Ethics Commission Advisory Opinions 91-11 and 91-15 regarding the permissibility of current OPWDD employees seeking certification under the family care program.
Around this time, Ms. Doe decided to retire; though the scheduled home safety visit was supposed
to occur prior to her retirement, it ultimately took place on March 2, 2021.

Currently, the only remaining step in the certification process requires the OPWDD’s
Department of Quality Improvement (DQI) to review Ms. Doe’s certification packet to ensure that
it is complete and includes all the necessary documentation. The DQI would then send an operating
certificate to Ms. Doe, attesting to her status as a certified family care provider. Upon realizing
the potential post-employment implications of the home safety visit having occurred subsequent
to Ms. Doe’s retirement, OPWDD paused the process and has asked whether the agency can
finalize the certification without causing a violation of the two-year bar.

**APPLICABLE LAW**

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

No person who has served as a state officer or employee shall within
a period of two years after the termination of such service or employment
appear or practice before such state agency or receive compensation
for any services rendered by such former officer or employee on behalf
of any person, firm, corporation or association in relation to any case,
proceeding or application or other matter before such agency.

In sum, for two years after leaving State service, the two-year bar generally 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 from
their former agency any information that is not publicly available. The two-year bar covers both
direct “appearances or practices” before the agency, such as directly submitting applications to or
seeking guidance from one’s former agency, and “backroom services,” which do not require a
personal appearance before the former agency.

**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.” 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

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4 In March 2020, in response to the COVID-19 pandemic, Ms. Doe was redeployed to the OPWDD Individual
Residential Alternatives (OPWDD Group Homes), working overnight shifts instead of the regular day shifts she had
been working at the day habilitation center. She ultimately found the overnight shifts and irregular schedules to be
unsustainable with her personal childcare situation.
5 The delay occurred because the Safety Officer who conducts the visits was on paternity leave for part of
December, and there was a backlog in home visits due to a several-month suspension of home visits during the
COVID-19 pandemic.
6 Advisory Opinion No. 18-01.
7 Advisory Opinion Nos. 90-21, 99-17.
8 Advisory Opinion No. 08-02.
9 Advisory Opinion No. 89-07 at 3.
or to seek information that is not publicly available from their former agency. 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 appearance before the agency, and even if the agency does not know of the former employee’s involvement.

The precedent applying the two-year bar that has been developed by the Commission and its predecessor agencies provides relevant, but limited guidance in the matter at hand. In Advisory Opinion 91-11, the New York State Ethics Commission (“Ethics Commission”) determined that current non-policymaking employees of the OPWDD on approved leaves of absence could serve as certified family care providers provided certain conditions were met. Subsequently, in Advisory Opinion 91-15, the Ethics Commission permitted current non-policymaking employees of the New York State Division for Youth to become foster parents (a program similar to family care providers) without any requirement that they take approved leaves of absences from State service. In Advisory Opinion 94-01, the Commission further held that former OPWDD employees could continue to serve as family care providers after their separation from State service, and that they could apply to the OPWDD for re-certification as family care providers without being in violation of the two-year bar.

In Advisory Opinion 94-01, the Ethics Commission noted the distinction between the rigorous review attendant upon initial certification as a family care provider and the more routine process of re-certification as a family care provider: “[A]nyone, including an [OPWDD] employee, who wishes to become certified as a family care provider must pass a comprehensive background check and meet all the agency's other requirements. First-time certification entails a high degree of agency review. Re-certification, on the other hand, is much more routine for both the provider and the agency, consisting mostly of the review of the family care provider and updated information about the home.”

The Ethics Commission looked at the measures in place to ensure that OPWDD employees’ participation in the family care program was free from any conflict of interest, including the fact that designated policymakers and employees involved in the certification and inspection of family care providers were not eligible to participate in the program. Further, the Ethics Commission noted that public policy considerations supported the decision to permit OPWDD family care providers to continue such service after they separate from the State agency, to allow OPWDD clients to continue their integration with a particular family care provider, and to avoid the disruption that would result from terminating “the relationship just because the family care provider is no longer an [OPWDD] employee.”

In Advisory Opinion 94-02, the Ethics Commission held that the two-year bar did not prohibit a former employee of the New York State Department of Health (DOH) from applying to the DOH for re-certification as a health care professional because she was initially certified while she was a DOH employee (and therefore the two-year bar was not an issue at that time), whereas the renewal application consisted largely of updating information that her former agency had

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10 Advisory Opinion No. 18-01.
11 Advisory Opinion 90-07.
12 At that time, the OPWDD was named the Office of Mental Retardation and Developmental Disabilities.
13 Advisory Opinion No. 94-01 at 4.
already reviewed and approved at the time of the original application. The renewal application, therefore, did not constitute a prohibited “appearance” before the DOH.

In Advisory Opinion 98-01, the Ethics Commission held that the two-year bar prohibited a former employee of the New York State Department of Motor Vehicles (DMV) from applying to the DMV for a license to operate a driving school. In that case, however, the license application and operation of the school would be considered not only by the individual’s former agency, but by the particular unit of the agency in the office where that individual had worked; he would be judged by individuals with whom he directly worked while he was a State employee, which the Ethics Commission found to be untenable.

The OPWDD has informed Commission staff that Ms. Doe’s application packet was substantively assessed with a “high degree of agency review” prior to her separation from State service, and the OPWDD has noted that the final home safety visit would not have been scheduled unless Ms. Doe had already passed all the certification requirements. The question now is whether the OPWDD’s certification division can simply complete the final step of Ms. Doe’s certification process by reviewing the packet to ensure that all the required documentation is included and completed. Consistent with the reasoning in Advisory Opinion 94-02, the Commission finds this final remaining step, which is essentially ministerial in nature, would not constitute an “appearance” under the two-year bar.

Moreover, only the delay in the certification process – completely outside Ms. Doe’s control – implicated the post-employment restrictions (as Advisory Opinions 91-11, 91-15, and 94-01 clearly established that there were sufficient controls to avoid a conflict of interests for both current employees to complete the initial certification process and for former employees to complete the recertification process). If a final review of the certification packet reveals that all the documentation is in order, then the OPWDD can certify Ms. Doe as a family care provider without causing a violation of the two-year bar.

CONCLUSION

The Commission hereby concludes that the OPWDD may take the final steps toward granting family care provider certification to Jane Doe without causing a violation of the two-year bar in Public Officers Law § 73(8)(a)(i).

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 the opinion or related supporting documentation.

All concur:

Jose L. Nieves, Chair

Richard F. Braun
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Members

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