

STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory
Opinion No.
90-3:**

Application of §73(8) of the Public Officers Law to a former employee who, within two years of his termination from State service, renders services to provide general information to be used in preparing applications to be submitted to his former agency and other circumstances, and, who, in another circumstance, may be paid from funds received from a legislative appropriation passed through his former State agency.

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from a former State employee regarding the application of the post-employment restrictions contained in §73(8) of the Public Officers Law to specific situations.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by §94(15) of the Executive Law, the Commission hereby renders its opinion that the two year absolute ban on appearing, practicing or rendering services for compensation on behalf of any corporation in relation to any case, proceeding or application or other matter before the individual's former employing State agency, contained in §73(8), does not apply to services performed by a former employee which involve no specific advice or participation in the preparation of any application to be submitted to his former employing State agency(ies). Further, the Commission concludes that the individual may be paid, in whole or in part, from funds received from a legislative appropriation to the private entity which is passed through his former State agency, where that former State agency has no discretion or control, oversight, approval or input in the selection of the employees or consultants of the private entity. The fact that that individual's name may appear as an employee on its payroll voucher does not amount to a prohibited appearance under §73(8).

APPLICABLE LAW

Section 73(8) provides, in pertinent part:

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. 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 personally participated during the period of his service or employment or which was under his or her active consideration

DISCUSSION

The requesting individual has submitted two sets of circumstances concerning his potential future employment. The former employee served as [a high level policy-maker] for [a State agency] and on the board of [a State public benefit corporation]. He resigned from both positions effective []. The two situations he posed will be discussed in order.

Background

In the first circumstance under consideration, the individual will be engaged by a firm, ("Company") a company in the business of developing certain projects, to prepare a general report on how to develop and package certain projects for possible funding under the "Program". The Program is administered by [State agency] pursuant to a service agreement with [public benefit corporation]. The Company has two applications pending before [public benefit corporation] in which the individual was involved during his tenure as a State employee. These applications have no relationship to the general report, the requesting individual will not have any involvement with them and will receive no compensation for any services in relation to such applications.

The individual's job duties will be to prepare a general report analyzing the Program statute, rules and regulations; the Program Manual, which includes the process for applying for Program funds as well as procedures used by the [public benefit corporation] for rating and selecting projects; and, based on his knowledge of the development process, state and local requirements and Program procedures.

The purpose of the report would be to enable applicants to package a proposed project in the most effective manner by clarifying the most critical requirements of the Program and by highlighting the common pitfalls that should be avoided in developing a project. At no time would the individual be involved in any actual application preparation or process; the general report would relate to no specific application or anticipated project, nor would his name appear on any documents to be submitted to his former State agency(ies).

The individual states that his analysis and final report will not include in any form or manner any issues relating to any specific matter, project or application that he was involved with during his tenure at [State agency] or [public benefit corporation] or that may be a matter or application of the Company. Further, he would not review or discuss the two pending Company projects or any documentation related to those projects. Moreover, the report would be general in nature and scope and, therefore, would be of a generic kind so that it potentially could be useful to any applicant in the general public to assist in developing a project for assistance under the Program.

His compensation as a consultant, paid on an hourly basis not to exceed a fixed amount, would not be contingent in any manner upon the funding or continued funding of any project.

Discussion

In Advisory Opinion 89-7, the Commission addressed a related question: whether the post-employment restrictions of §73(8) preclude a former employee from assisting a client in the preparation of a permit or grant application or grant proposal *prior* to the submission of that application or proposal to the former employing State agency.

The Commission concluded in that Opinion that a permit or grant application or contract proposal is under the jurisdiction of a State agency at all times, whether or not the agency physically has the documentation. Therefore, §73(8) does preclude a former employee from receiving compensation for services rendered on a permit or grant application or contract proposal even if such services were rendered prior to the submission of the application or proposal to the former State agency.

The critical point on which the conclusion rests for this particular inquiry is whether a distinction can be made between services rendered for compensation to prepare general materials to provide generic information to an applicant who desires to apply for funding from the individual's former State agency and the preparation or involvement in the preparation of the actual application itself, even before its submission. Stated another way, should the two year post-employment bar of §73(8) extend to services beyond the actual preparation of the permit or grant application or contract proposal to cover the services expended in the preparation of informational material useful or necessary to the completion of an application by anyone. The individual has made it clear that he does not intend to "appear or practice" before his former agency(ies) within two years of his termination from State service. What remains to be resolved is whether the services he would like to provide as a consultant, and for which he would be paid, are to be rendered ". . . on behalf of any . . . firm, corporation or association in relation to any case, proceeding or application or other matter *before such agency*".

A review of the federal regulations concerning post employment restrictions is useful to establish whether the Commission has any precedent involving similar circumstances (there being no pertinent New York precedent). Part 737 of 5 CFR sets forth the regulations concerning post-employment conflict of interest for certain federal employees. Part 737.1, which sets forth the purpose and policy of those federal regulations, provides:

(c)(2) When a former high level employee assists in representing another by personal presence at an appearance before the Government regarding a matter in dispute, such assistance suggests an attempt to use personal influence and the possible unfair use of information unavailable to others.

. . . .

(c)(5) . . . The statutory provisions are not intended to discourage the movement of skilled professionals in government to and from positions in industry, research institutions, law and accounting firms, universities and other major sources of expertise. Such a flow of skills can promote efficiency and communication between government and private activities, and is essential to the success of many government functions. Instead, only certain acts detrimental to public confidence are prohibited.

As with the policy set forth in the federal regulations, the Commission recognizes the "evil to be avoided" in prohibiting a former employee from appearing, practicing or rendering services for compensation on a matter before his former State agency. However, it is not the Commission's view that the law is intended to preclude a former employee from ever utilizing the expertise gained while in State service. The services proposed to be performed are so removed from the prohibited act of working on a matter actually before an agency that the post-employment restrictions of §73 should not apply.

The instant inquiry may be distinguished from the circumstances found in Advisory Opinion 89-7, since the former employee would be not engaged in actually preparing or submitting an application or proposal to his former State agency. There is nothing *before* the State agency to trigger the application of §73(8). Instead, the individual would perform services to prepare a generalized report to be used by potential applicants to package a proposed project. The individual would not be involved in the actual application process, he would have no role in negotiating the application or potential funding award with his former State agency(ies), and his name would not appear in connection with any application submitted to his former State agency(ies). Finally, his consultant contract with the Company to accomplish the foregoing services is not subject to approval by his former State agency(ies).

In fact, the services he intends to perform could be performed in other ways. The "revolving door" provision would not prohibit him, for example, from publishing a book, holding public seminars, writing commentaries on the law or teaching in a university setting to disseminate the same information for compensation. The information he has obtained as to how the former State agency(ies) operated or what they expect when someone does appear before them is generic information, even though obtained while the individual was employed at the agency(ies). The "evil" to be avoided is the actual involvement in specific applications before the agency(ies). The "revolving door" limitation is not meant to limit a former employee from sharing general knowledge on the operation of his or her former State agency(ies) with anyone--even if that does result in compensation received.

In light of the foregoing circumstances, the two-year bar of §73(8) of the Public Officers Law does not apply to the first circumstance described. *Background*

In the second circumstance, the individual would serve as a consultant to a not-for-profit corporation which engages in activities in New York City, to assist in developing, among other things, a project to be financed by a United States Department under its [Program]. With respect to the [Program] services, the individual may be reimbursed from [Program] funds.

No approvals or involvement in any way of [State agency] or [public benefit corporation] would occur with respect to the [Program] project. In addition, the individual would assist with assessing the needs of the corporation's service area and with developing objectives and programs to address those needs.

In addition to the federal funding mentioned above, the not-for-profit corporation also receives funding for administrative purposes from [State agency] pursuant to a special legislative appropriation. [State agency] has **no** discretion in the corporation's selection as the entity to

receive the funding. That selection solely occurs as a result of the specific appropriation contained in the law. The requesting individual played no role in the appropriation of the funds for the not-for-profit corporation.

[State agency] does not set standards for, nor approve, actual personnel to be hired by the entity which receives the legislative initiative funding. [State agency's] only rules which apply to the circumstance of legislative initiative funding are that directors and members of the organization which receives funding, and their immediate family members, cannot receive any proceeds from the legislative initiative. [State agency] has informed the Commission that, in fact, it plays no more role in the distribution of this appropriation than is set forth here.

The requesting individual may be paid as a staff person for the corporation, or as a consultant, from funding channelled through [State agency] by the legislative initiative.

Discussion

With respect to the [Program] project described above, and assuming the individual's services would be funded only with federal money, no §73(8) post-employment restriction applies. The individual's services would be rendered for a private entity, and any potential appearance would be before a federal agency. There is no question of an appearance or practicing or rendering services for compensation on a matter before his former agency(ies).

Similarly, with respect to the individual's services to assess needs and develop programs to address those needs, no §73(8) violation occurs, since the individual would not be involved with the preparation of any application or other matter which would be required to go before [State agency]. There would be no appearing, practicing or receiving compensation for services rendered on a matter before his former State agency(ies).

It is not fatal to this conclusion that the funding to pay the individual is directed by legislative initiative through [State agency] to the corporation, and that the individual's name may appear on a voucher submitted to his former agency to be paid as an employee or as a consultant. The [State agency] has no role in securing the legislative add-on for its budget to fund the individual's potential employing corporation. Except for insuring that the corporation's members and directors and their immediate families do not receive any money from the proceeds of the legislative initiative, the [State agency] exercises no role in the selection of the corporation's staff or consultants, and makes no judgment as to the competence or character of the staff or consultants.

Under the circumstances described, the [State agency] might not be aware (since individually-named employees are not necessarily listed on vouchers submitted for payment) that the requesting individual was performing services for the corporation, since he would not, and for two years, cannot be working in relation to and would have no occasion for any appearance, practice or rendering services for compensation on any case, proceeding or application or other matter before such State agency. Even, if the requesting individual's name appeared on such a payroll voucher, the Commission would view that as a ministerial matter only, where no substantial personal discretion is permitted.¹

CONCLUSION

The State Ethics Commission concludes that a former State officer or employee, within two years of termination from State service, may be employed or retained to prepare a general report to be used by potential funding applicants to his former State agency, as long as the former State employee would not be personally working on any proposal or application to be submitted to his former agency, would have no role in negotiating the terms of the application or proposal or the potential funding award, and his name would not appear in connection with any such document submitted to his former State agency.

With respect to any services engaged in by a former State officer or employee which are funded through a federal grant, no §73(8) restriction applies, since any potential appearance would only be before a federal agency.

Finally, there is no §73(8) violation in circumstances where services are to be provided by a former State officer or employee to a not-for-profit corporation which is funded in large part through an appropriation from a legislative initiative directed to the corporation by the employee's former agency, even if the former employee's name may appear on a voucher to be submitted to the former agency. This conclusion is limited to circumstances where (1) the former State employee, while still employed in State service, had no role in obtaining the legislative initiative for the corporation; (2) where the former agency exercises no discretion in the choice of the recipient of the legislative initiative and exercises no role in the selection, approval or disapproval of staff or consultants to the recipient of the legislative funding, and (3) the services to be provided by the former State employee require no work to be performed on any application or proposal or other matter to be submitted to the former agency.

Inasmuch as the circumstances submitted by the requesting individual to the Commission for consideration did not include any situations where the lifetime ban of §73(8) would apply, the Commission did not address the application of the lifetime ban. Of course, the lifetime ban would apply, as stated above, to preclude any appearance, practicing, communicating or rendering of services before any State agency or receiving compensation for such services in relation to any case, proceeding, application or transaction with respect to 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.

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 an opinion.

All concur:

Angelo A. Costanza
Norman Lamm
Robert B. McKay, Members

Dated: February 15, 1990

ENDNOTES

1. In support of this finding, see §73(13) of the Public Officers Law which provides: "For the purposes of this section, a . . . state officer or employee . . . who is a member, associate, retired member, of counsel to, or shareholder of any firm, association or corporation shall not be deemed to have made an appearance under the provisions of this section solely by the submission to a state agency or city agency of any printed material or document bearing his or her name, but unsigned by him or her, such as by limited illustrations the name of the firm, association or corporation or the letterhead of any stationery, which pro forma serves only as an indication that he or she is such a member, associate, retired member, of counsel to, or shareholder."