

New York State Ethics Commission

Advisory Opinion No. 91-1: Application of the post-employment restrictions of §73(8) of the Public Officers Law to students.

Introduction

The following Advisory Opinion is issued in response to written inquiries concerning the application of the post-employment restrictions of §73(8) of the Public Officers Law to students who serve with New York State. The inquiries have been submitted by several State agencies, including the Department of Transportation ("DOT"); the Department of Environmental Conservation ("DEC"); and the Department of Health ("DOH").⁽¹⁾

The Commission, in Advisory Opinion No. 90-8, suspended application of the two-year post-employment bar of §73(8) for students who terminated their State service prior to September 15, 1990, in order to provide the Commission with additional time to consider the question of application of §73(8) to students.⁽²⁾ In rendering a final determination as to the status of students, the Commission has weighed the purpose and legislative intent of the Ethics in Government Act of 1987; the possibility that students might gain access to insider information or may form the kinds of associations or ties that the "revolving door" restrictions are meant to address; whether students are eligible to receive the same benefits as "traditional" State employees; and whether any precedent exists for including students within the definition of "employee."⁽³⁾

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 students, who meet the criteria set forth in this opinion, are not included within the definition of "state officers or employees" for purposes of §73 of the Public Officers Law and, therefore, are not subject to either the two-year or lifetime post-employment restrictions of §73(8) or by the provisions contained in §§73-a or 74.

Background

Within DOT are several seasonal positions that are established annually.⁽⁴⁾

These positions are in the non-competitive class of service.⁽⁵⁾ Those hired are paid an hourly wage and are generally not entitled to State health, vacation, sick leave, or retirement benefits. Individuals may be appointed for three to nine months (April 1 through December 31). The positions are, generally, full-time for the duration of the appointment.

According to DOT, approximately 60 percent of the individuals employed in these seasonal positions are college students who are working towards two or four year college degrees in engineering or applied sciences fields.⁽⁶⁾ The remaining 40 percent are generally individuals who

may move back and forth from the public to the private sector in construction related jobs, which are also seasonal in nature.

The DEC retains students in many different capacities including the following: (1) full-time or part-time employees who are also students,⁽⁷⁾ (2) Legal Aides, who must be matriculated in a law school program, and, are either employed part-time during the academic year or full-time during the summer,⁽⁸⁾ (3) Work-Study Students who are eligible for federal grants and who are paid by their schools,⁽⁹⁾ (4) volunteers who receive no compensation although their expenses may be reimbursed,⁽¹⁰⁾ (5) Student Interns who receive an hourly salary and, unlike Legal Aides, are not eligible for any State benefits, and (6) Student Externs who undertake uncompensated internships arranged with their schools and who receive academic credit for work performed. According to the DEC, many of the students, who are employed, are enrolled in professional schools, such as law or engineering schools, and have the expectation of working in the private sector following their graduation.

The Division of Legal Affairs of DOH occasionally uses law student "interns" in its research and hearing preparations. Some of the student interns receive compensation either from DOH or from their law school. The particular intern, who is the subject of the inquiry from DOH, shall be assigned to the Professional Medical Conduct Unit of DOH's New York City office for the 1991 Winter semester and shall not be receiving any compensation from DOH or from the law school involved.

Discussion

Section 73(8) of the Public Officers Law, the State's "revolving door" policy, provides certain restrictions on the post-employment activities of former State officers and employees. This section provides in relevant 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 active consideration. . . .

State officers and employees are subject to a two-year bar on appearing or practicing or receiving compensation for services rendered before their former State agency and a lifetime bar on appearing, practicing, or rendering services for compensation in relation to activities in which the individual personally participated and was directly concerned or which was under his or her active consideration while in State service.⁽¹¹⁾

Section 73(1)(i)(iii) defines "state officer or employee" to include "[o]fficers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies . . ." ⁽¹²⁾ The definition of State officer or employee makes no distinction between full-time and part-time employees. The question is whether students fit within the definition of employee to whom the post-employment restrictions of §73(8) apply.

The two-year bar contained in §73(8) on appearing, practicing, or receiving compensation for services rendered before one's former State agency is intended to prevent a former State employee from using his or her ties and associations with a former State agency for private gain. As the Commission noted in its Advisory Opinion No. 88-1, §73(8) "sets the ground rules for what individuals may do with the knowledge, experience, and contacts gained from public service after they terminate employment with a State agency."

With respect to students, this concern is only of limited relevance as, typically, students do not form the same type of long-term or even short-term contacts and associations that non-seasonal employees employed on a regular basis develop. Students are generally employed either for the summer or part-time during the school year and for the purpose of financially supporting their education or pursuing practical experience in an area under study. Their positions with the State are of a short and intermittent basis, based on their student status. They seldom have any rights to re-employment by the State or gain permanency in their positions. It is less likely, in the case of students, that the public might reasonably question whether these individuals carried out their public responsibilities solely to acquire information and contacts that would increase their opportunities for private gains once they terminated their State service. Unlike "traditional" State employees, students, appointed by State agencies, are generally ineligible for most benefits, such as health insurance, vacation or sick leave, or retirement plans, that are incident to State employment. ⁽¹³⁾

Employees of the State, who may also be students, are fully subject to the post-employment restrictions of §73(8). Their enrollment in an academic program is tangential to their service on behalf of the State. In other words, these individuals are primarily "state employees" and secondarily "students." This opinion does not provide any relief from the "revolving door" proscriptions to them.

However, for the student interns and research assistants at DOT, DEC, and DOH, their status is reversed. These individuals are primarily "students" and their employment by the State is secondary. At what point does an individual lose his primary status as an "employee" and assumes primary "student" status?

Case law from the area of labor relations, while not directly on point to the present matter or dispositive of the issue, provides a degree of insight into the issue of when an individual, technically "employed" by the State, assumes primary status as a public "employee."

In New York, the Public Employment Relations Board (PERB), in a representation determination, addressed the question of whether graduate assistants and teaching assistants at the State University of New York are public employees for the purposes of organization and collective negotiation under the Public Employees' Fair Employment Act (the "Taylor Law").

The determination was that employment of graduate assistants and teaching assistants was incidental to their academic enrollment and subordinate to their student relationships. Therefore, these students were not public employees under the Taylor Law.⁽¹⁴⁾

In *Byrne v. Long Island State Park Commission*, 323 N.Y.S.2d 442, 66 Misc. 2d 1070 (1971), lifeguards at beaches operated by a State park commission were found not to be "public employees" for Taylor Law purposes.⁽¹⁵⁾ In reaching its conclusion, the court considered that the lifeguards do not work at the beach throughout the year but only during the bathing season without any continuing year-to-year contract. Lifeguards, who are employed during one season, begin their employment at the beginning of the season and end it with the conclusion of that bathing season. In the following year, the previously employed lifeguards have, by custom, a prior call on renewed employment, but they have no guaranteed reemployment rights.⁽¹⁶⁾

A similar conclusion was reached in *Cardo v. Lakeland Central School District*, 592 F.Supp. 765 (1984), where the court upheld the determination of PERB that per diem substitute teachers lacked the continuing employment relationship with their public school districts required for classification as public employees, for purposes of being granted the right to negotiate collectively with their employers concerning the terms and conditions of employment. See also, *In the Matter of Merrick Union Free School District and Merrick Faculty Association*, 19 PERB 4040 (1986), which held "[i]t is primarily because seasonal employment is subject to many uncertainties that there is a need to use objective criteria to determine whether there is sufficient employment nexus between an identifiable group of employees and an employer so as to justify application of the collective bargaining process to the relationship."⁽¹⁷⁾ Indeed, most students (as defined herein) have a casual and occasional relationship with the State agencies they serve.

As the above cases indicate, not all individuals in State service are considered "employees" of the State for purposes of statutes covering State employees.⁽¹⁸⁾ However, the above-mentioned cases demonstrate that the nature of the employment, its duration, and the right for continued employment are important considerations in determining employee status. Applying similar standards to the definition of "state officer and employee" under §73 and considering the subordination of the relationship of a student (as defined) with the State to that of his or her educational pursuits, the Commission concludes that certain "students," who meet the requirements for our definition of student, should not be included within the definition of "employee" for purposes of §73 of the Public Officers Law and, thus, should not be covered under the post-employment restrictions of §73(8).

It is the opinion of the Commission that the Ethics in Government Act was not intended to apply to individuals who were primarily students, as defined herein, and secondarily served in certain capacities with the State. Based on the reasoning and cases provided herein, we conclude that §73 (and, as a result, §73(8)) does not apply to students as defined herein. However, it must be demonstrated that the individual is primarily a "student" and not an "employee." In other words, certain conditions must be met before a "student" can be found not to be an "employee" under this Opinion for purposes of §73 of the Public Officers Law.

First, for an individual to be considered a "student" and not an "employee" for purposes of §73(8) coverage, he or she must be enrolled as a full-time student in an accredited course of

study or on a seasonal recess therefrom. Second, the individual cannot work half-time or more per week during the school year.⁽¹⁹⁾ Third, students who work full-time during the summer or other similar semester breaks shall be limited to one hundred and twenty days (four months) of full-time service for the State during the summer vacation period. Fourth, to be excluded from the definition of "employee," the individual cannot receive any State employee benefits, such as medical, retirement, or vacation benefits or have any right to re-employment.

The Commission has advocated that the Legislature specifically apply only the two- year bar contained in §73(8) to students as defined herein.⁽²⁰⁾ We believe that students should be barred for life from appearing before any State agency on a case or transaction in which he or she was directly concerned and personally participated. We will pursue this legislative proposal, even though by this opinion we have exempted students (as defined) from the definition of employee covered by both the "revolving door" and lifetime bar proscriptions.

Conclusion

The Commission has determined that students who meet the criteria established in this Opinion are not "employees" for purposes of §73 of the Public Officers Law and, thus, not subject to the post-employment restrictions of §73(8) of the Public Officers Law. This conclusion is based on the fact that the students who qualify for exclusion from the definition of "employee," under the parameters provided for in this Opinion, are primarily "students" rather than "employees" for purposes of §73 of the Public Officers Law.

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.

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza

Norman Lamm

Donald A. Odell, Members

Dated: January 10, 1991

Endnotes

1. Numerous other State agencies have expressed an interest in the outcome of the Commission's application of §73(8) to students.
2. The Commission, in that Advisory Opinion, continued to apply the lifetime bar of §73(8) to students who terminated their State service on or before September 15, 1990, pending resolution

of the matter. For purposes of Advisory Opinion No. 90-8, the Commission defined students to include only those individuals who are matriculated as full-time students at an institution of higher education, who attend classes during at least two semesters during the calendar year, who perform services with the State and receive compensation from the State on a less than half-time basis during the academic year or on a full-time basis for no more than the summer break between semesters and who receive no fringe benefits such as vacation or sick leave, health insurance or retirement benefits.

The Commission, in Advisory Opinion No. 90-20, extended the suspension of the two year bar of §73(8) until January 15, 1991. The Commission continued to define "students" as it had in the prior Advisory Opinion and continued to subject students to the lifetime bar provision of §73(8).

3. In addition, the Commission has surveyed the federal government and other states as to whether their laws impose post-employment restrictions on students after they terminate their public service. Some states impose no or minimal post-employment restrictions on their employees. Other states and the federal government exempt from their "revolving door" provisions a whole class of employees which would also include most students. Other states, and in particular, Massachusetts, New Jersey, and Connecticut, provided the Commission with either formal or informal opinions that students would be covered under their equivalent of the "revolving door."

4. The exact titles and job qualifications are the following:

Transportation Construction Inspector I (TCI-1) - Two years of appropriate construction experience or the completion of one year in an engineering or engineering technology program in a two or four year college.

Transportation Construction Inspector II (TCI-2) - One season as a TCI-1, or completion of three years of appropriate construction experience or two years of college described above.

Transportation Construction Inspector III (TCI-3) - Two seasons as a TCI or equivalent employee in construction with DOT, one of which must have been at the TCI-2 level or equivalent.

Typical TCI - 1 or 2 Task Statement

Generally, under the supervision of a Department of Transportation Engineer-in-Charge, a Transportation Construction Inspector will be physically assigned to one or more construction projects each season to perform the following inspection or inspection related tasks: field office activities, earthwork inspection, on site concrete inspection, structural inspection, drainage inspection, asphalt pavement inspection, and plant inspection.

5. If these seasonal positions were in the competitive class of service, then, pursuant to §4.4 of the Rules and Regulations of the Department of Civil Service, those individuals who had previously had these seasonal positions are given a priority at the time of re-appointment to the seasonal position.

6. Of the 246 "students" DOT expected to employ in TCI positions in 1990, 61 were to be hired for three months, 180 were to be employed between three and six months, and 5 were anticipated to serve for more than six months.

7. The DEC has cited the example of a Pure Waters Grants Analyst who is employed by DEC at 70 percent time and attends law school in the evenings.

8. The individuals who occupy these positions are eligible for State health, vacation, and retirement benefits if they meet certain criteria regarding numbers of hours worked per week. The DEC has informed the Commission staff that, generally, the law students employed by DEC do not work enough hours per week to qualify.

9. The DEC reimburses the schools for 25 percent of the student's salary.

10. The DEC requires these individuals to complete an ME-6 Form which states that the individuals are covered by §17 of the Public Officers Law which provides for the defense and indemnification of State officers and employees while acting within the scope of their official duties.

11. Law students performing services for the State would be covered under professional guidelines from disclosing confidences obtained as a result of their State service. Under Disciplinary Rule 1-104(A) of the Code of Professional Responsibility, as amended effective September 1, 1990, which covers the professional standards of lawyers in New York State, a lawyer "shall be responsible for a violation of the Disciplinary Rules by another lawyer *or for conduct of a non-lawyer* employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer . . ." (Emphasis added.) In addition, under Disciplinary Rule 4-101(D), a lawyer "shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client . . ." This prohibition would cover matters subject to the lifetime bar of §73(8).

12. Section 17 of the Public Officers Law, which provides for the defense and indemnification by the State of State officers and employees, defines an employee as "[a]ny person holding a position by election, appointment or employment in the service of the state, whether or not compensated, or a volunteer expressly authorized to participate in a state-sponsored volunteer program, but shall not include an independent contractor." Section 17, unlike the definition of employee contained in §73 of the Public Officers Law, would clearly encompass students who perform services for the State, since they serve by appointment or as volunteers. The broad definition of State officer and employee, under §17 of the Public Officers Law, would be consistent with the intent of the Legislature to provide for the defense and indemnification of all persons performing services for the State with the exception of independent contractors.

13. One law school has argued that law students should be exempted from the two- year post-employment proscription of §73(8) for the following reasons: their employment is related to their educational experience, the hours they work are limited, the period of their employment is brief, compensation is usually awarded on an hourly rather than salary basis, there is an economic

necessity for many students to undertake part-time or summer employment during law school, and law students do not receive any types of benefits in addition to an hourly salary.

14. See *In the Matter of Communications Workers of America/Graduate Students Employees Union, AFL-CIO and State of New York and United University Professors*, 20 PERB 4063 (1987). The Director's determination, issued September 3, 1987, has been appealed to the Public Employment Relations Board which has not yet issued an opinion. If the Board were to reverse the determination of the Director that graduate assistants and teaching assistants were not employees under the Taylor Law, the Commission may review this Advisory Opinion and its conclusions in light of that decision.

15. The overwhelming proportion of lifeguards were members of Local 381 of the AFL-CIO [now Council 82], with which, since 1963, the State has dealt as the lifeguards' representative, even though there had been no PERB certification for that negotiating unit. Although the State voluntarily recognizes the negotiating unit containing lifeguards, it has not so recognized the negotiating unit for State University graduate and research assistants. Such voluntary recognitions of lifeguards do not alter the court finding that Taylor Law rights do not exist for lifeguards as a matter of law.

16. A later PERB decision rejected the court's determination and concluded that the lifeguards may be subject to the Taylor Law provided that, as a minimum, they were engaged for a six week work year, a twenty hour work week, and sixty percent of the lifeguards returned each season. See *In the Matter of State of New York and NYS Employees Council 50 and Civil Service Employees Association, Inc.*, 5 PERB 3022 (1972).

17. In that case, PERB dismissed a petition by the Merrick Faculty Association for certification as the representative of a school district's summer school employees. There, PERB, noted that "a casual and occasional employment does not provide a sufficient relationship between the employer and the employees to warrant the application of the collective bargaining process."

18. For additional support for this statement, see *Reid v. New York State Department of Correctional Services*, 387 N.Y.S.2d 589, 54 A.D.2d 83 (3rd Dept. 1986), in which it was held that inmates of correctional institutions are not employees of the State as to be entitled to workers' compensation benefits for injuries sustained while working within the correctional institution. While the court did not state specifically why prisoners were not covered, the court did consider that all other states that have addressed the issue have denied prisoners' workers' compensation benefits and that the only cases where benefits were provided were special circumstances where the inmate had been contracted out to a private employer. In addition, an injured inmate in New York State already possesses the right to seek compensation for his injuries in the Court of Claims.

See also *Prisoner's Labor Union at Bedford Hills v. Helsby*, 354 N.Y.S.2d 694, 44 A.D.2d 707 (2nd Dept. 1974) in which it was decided that correctional facility inmates, although "employed" within the facility, are not public employees for purposes of the Taylor Law.

19. Standard 305 of the American Bar Association's Standards limits a full-time law student's employment during the school semester to 20 hours per week. Failure to comply with these provisions may jeopardize a student's credit for law school or the right to sit for the bar examination and the employer's right to use placement services at the student's law school.

20. See Commission's 1991 Legislative Proposal #2. The following agencies have filed written statements of support for the proposal to exempt students: the Public Employment Relations Board, Division of Probation and Correctional Alternatives, Department of Civil Service, Department of Environmental Conservation, Division of Alcoholism and Alcohol Abuse, Office of Rural Affairs, Department of Correctional Services, Division of Human Rights, Housing Finance Agency, Department of Taxation and Finance, Office for the Aging, State Police, Adirondack Park Agency, and City University of New York.