

**STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS**

Advisory Opinion No. 17-01:

Application of the government-to-government exception to post-employment restrictions set forth in Public Officers Law §73(8)(e), to employment with closely affiliated entities.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by [an employee of the New York State Department of Health (“DOH”)]*, concerning the application of post-employment provisions of Public Officers Law §73(8)(a) to the employee’s potential prospective employment by the Research Foundation for Mental Hygiene, Inc. (“RFMH”), a not-for-profit foundation closely affiliated¹ with the New York State Office of Mental Health (“OMH”), the New York State Office for People with Developmental Disabilities (“OPWDD”), and the New York State Office of Alcoholism and Substance Abuse Services (“OASAS”).

The Commission previously has held that post-employment restrictions do not apply to a former State employee who is employed by a corporation closely affiliated with his or her former State agency the purposes of which, as recognized by statute, are to support, supplement or extend the functions and programs of that State agency. New York State Finance Law §53-a(5)(d) defines as a State agency, for purposes of that statute, certain membership corporations that are closely affiliated with specific state agencies and whose purposes are essentially to support, supplement or extend the functions and programs of such state agencies (“Closely Affiliated Entity”). Pursuant to section 53-a(5)(d) each of the following is a Closely Affiliated Entity: Youth Research Inc., the Research Foundation for Mental Hygiene, Inc., Health Research Inc., the Research Foundation of the State University of New York, and Welfare Research Inc. However, the Commission has narrowly applied this post-employment restriction exception, limiting it to only a move from the agency creating the Closely Affiliated Entity to the entity it established.²

In Advisory Opinion No. 95-17, the Commission expressed the concern that, if a State employee could transfer to a Closely Affiliated Entity of *any* State agency, it would result in agencies placing favored former State employees on foundation payrolls to avoid post-employment restrictions, “all without any ethical restraints governing the conduct of State

*The requesting individual’s name and other identifying details have been redacted.

¹ See New York State Finance Law §53-a(5)(d).

² Advisory Opinion No. 95-17, citing Advisory Opinion No. 95-02 which references the relationship between certain closely affiliated entities and specific State agencies in New York State Finance Law §53-a(5)(d).

employees.”³ Since Advisory Opinion No. 95-17 was issued, however, Public Officers Law §74 was amended expressly to cover employees of Closely Affiliated Entities, so that the employees are now subject to the same ethical standard as State employees and must serve the public interest without conflict. Accordingly, this Commission finds it proper to revisit the application of the post-employment restrictions with respect to employment with Closely Affiliated Entities.

Pursuant to Executive Law §94(16), the Commission hereby renders its opinion that the “government-to-government” exception, defined in Public Officers Law §73(8)(e)(5), applies where a former State employee seeks employment by a Closely Affiliated Entity.

BACKGROUND

The [requesting individual] is currently employed by DOH as a [] in the []. The [requesting individual] is not a policy maker. She is [] on implementing the Children's Medicaid Redesign program, a multi-agency project. Specifically, the [requesting individual] collaborates with various State agencies, including the OMH, the New York State Office of Children and Family Services (“OCFS”) and OASAS, in the transition of behavioral health services for adults and children into Medicaid managed care programs,⁴ including the development of Health and Recovery Plans. According to the Children’s Medicaid Redesign Team’s November 2016 quarterly meeting, the Children’s Behavioral Health Managed Care transition is expected to be implemented beginning March 2017 through January 2019.⁵

The [requesting individual] applied for, and was offered, a position as a [] with the RFMH, a not-for-profit foundation, which is a Closely Affiliated Entity, as discussed below. Her position with the RFMH would include working on the Children's Medicaid Managed Care project to support developing and implementing the Medicaid Managed Care⁶ redesign specifically for children’s health and behavioral health. The position encompasses program design, planning, policy and implementation activities, and will facilitate interagency efforts for the Children's Medicaid Redesign program. The [requesting individual’s] responsibilities at the RFMH would also include, among others, participating and leading major OMH efforts to transform the children's behavioral health delivery system, including the design of service delivery, roles of state and local governments, financing of services, performance measures, evaluation of outcomes, and management/monitoring of service systems, all of which would

³ Advisory Opinion No. 95-17.

⁴ See Redesigning New York's Medicaid Program, Behavioral Health Transition to Managed Care, at https://www.health.ny.gov/health_care/medicaid/redesign/behavioral_health/index.htm.

⁵ See Children’s Behavioral Health Managed Care Timeline, at https://www.health.ny.gov/health_care/medicaid/redesign/behavioral_health/children/docs/2016-11-03_timeline_slides.pdf.

⁶ See <https://www.medicaid.gov/medicaid/managed-care/index.html>

(Medicaid managed care provides for the delivery of Medicaid health benefits and additional services through contracted arrangements between state Medicaid agencies and managed care organizations (MCOs) that accept a set per member per month (capitation) payment for these services.)

require coordinating with the DOH, the OMH, OASAS, and the OCFS for implementation.⁷ Upon hiring, the [requesting individual's] offices will be located at the main office of the OMH, and she will receive training along with employees of the OMH, as well as have a designated OMH email account.

The RFMH is a not-for-profit foundation, organized for the purpose of assisting and enhancing the research and training objectives of the New York State Department of Mental Hygiene (“Department”) and its component agencies, the OMH, the OPWDD, and OASAS.⁸ Therefore, the RFMH is considered a Closely Affiliated Entity with the OMH, OASAS, and the OPWDD. The RFMH conducts programs in keeping with the research, prevention, and treatment purposes and objectives of the Department, and substantially all of its revenues are derived from federal and state agencies and other grants.⁹ According to the RFMH, employees of the RFMH are not State employees.¹⁰ As a private entity, the RFMH provides its employees with their own benefits, except that employees are eligible to enroll in the New York State Health Insurance Plan.

APPLICABLE LAW

The post-employment restrictions for certain State employees are set forth in Public Officers Law §73(8)(a), which establishes the ground rules for what individuals may do with the knowledge, experience, and contacts gained from public service after they terminate their employment with a State agency. The statute contains two different types of restrictions: a “two-year bar” and a “lifetime bar.”

Two-Year Bar

The two-year bar, contained in Public Officers Law § 73(8)(a)(i), prohibits former State officers and employees, for two years following their separation from State service, from (a) appearing or practicing before their former agency (the “appearance/practice” clause), or (b) rendering services for compensation, in relation to any case, proceeding, application, or other matter before their former agency (the “back room services” clause).¹¹ 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.¹²

⁷ See RFMH’s Children’s Medicaid Managed Care Transition Lead job description, at <https://www.ziprecruiter.com/jobs/research-foundation-for-mental-hygiene-inc-5d21ff25/childrens-medicaid-managed-care-transition-lead-2ca7f3dc>.

⁸ See “About RFMH” at http://corporate.rfmh.org/corporate_info/index.asp?page=about_the_rf.

⁹ See Research Foundation for Mental Hygiene’s 2016 Annual Filing for Charitable Organizations.

¹⁰ This is confirmed by Commission precedent. See Advisory Opinion Nos. 95-17, 95-02, 93-03, and 91-20.

¹¹ Public Officers Law § 73(8)(a)(i) states: “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.”

¹² See Advisory Opinion No. 90-07.

This Commission and its predecessor agencies have determined the appearance/practice clause bars certain activities during the two-year post-employment period include: negotiating a contract with a former agency;¹³ submitting a grant proposal or application to a former agency;¹⁴ representing a client in an audit before a former agency;¹⁵ engaging in settlement discussions with a former agency;¹⁶ or calling a 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.¹⁷

The “back room services” clause of Public Officers Law § 73(a)(8)(i) 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.”¹⁸ The Commission and its predecessor agencies have determined that during the two-year period the clause precludes, among other things, a former State employee 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,”¹⁹ or instructing a colleague to place a telephone call to the individual’s former agency or participating in a telephone call involving the former agency.²⁰ Further, a former State employee may not accept compensation for assisting another person in the creation or development of (i) an application to be submitted to the former employee’s State agency, or (ii) a plan or strategy for influencing a decision of the former employee’s State agency.²¹

Lifetime Bar

The lifetime bar, defined in Public Officers Law §73(8)(a)(ii), prohibits a former State employee from providing services of any kind in relation to any case, proceeding, application, or transaction in which the former employee was directly concerned and in which he or she personally participated or which was under his or her active consideration while in State service.²² When the former State employee provides such services on behalf of any individual or

¹³ Advisory Opinion No. 90-04.

¹⁴ Advisory Opinion No. 90-21.

¹⁵ Advisory Opinion No. 90-04.

¹⁶ Advisory Opinion No. 95-28.

¹⁷ Advisory Opinion No. 99-17.

¹⁸ Advisory Opinion No. 08-02.

¹⁹ *Id.*; see also Advisory Opinion No. 94-06 (“[I]f the former employee can reasonably assume that his/her work product will reach the individual’s former agency, the employee would violate the two year bar by receiving compensation for services rendered on a matter before his former agency.”); Advisory Opinion No. 97-05 (quoting Advisory Opinion No. 94-06).

²⁰ Advisory Opinion No. 97-01.

²¹ Advisory Opinion No. 99-17.

²² Public Officers Law §73(8)(a)(ii) reads as follows: “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 or she personally

entity before any State agency, the bar applies even if the former State employee is not being compensated for his services. When the former State employee is providing such services before any other entity, the lifetime bar prevents that former State employee from being compensated for providing such services.²³ A former State employee's mere acquaintance with a matter is insufficient to trigger the lifetime bar. Rather, the facts must clearly show personal participation, direct concern, or active consideration.²⁴ Questions concerning the application of the lifetime bar are considered on a case-by-case basis.²⁵

That said, Public Officers Law §73(8)(e), the so-called "government-to-government" exception to the post-employment restrictions, also provides:

This subdivision shall not apply to any appearance, practice or communication or rendition of services before any state agency . . . or to the receipt of compensation for such services, rendered by a former state officer or employee . . . which is made while carrying out official duties as an elected official or employee of a federal, state or local government or one of its agencies.

To that end, Public Officers Law §74(1) defines the term "state agency" as follows:

...any state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor or *corporations closely affiliated with specific state agencies as defined by paragraph (d) of subdivision five of section fifty-three-a of the state finance law or their successors (Emphasis added).*

DISCUSSION

As noted, this opinion was requested to determine the applicability of the post-employment restrictions with respect to the [requesting individual's] proposed employment. In her position with the RFMH, the [requesting individual] would be responsible for the program design, planning, policy, and implementation activities relating to the Children's Medicaid Redesign project, which would require collaboration with the DOH as well as with the OMH, OASAS, and the OCFS. Therefore, the [requesting individual] would be required to appear, practice, and/or render services in a matter before the DOH, her former agency. In addition, the [requesting individual] would be working on the same transaction that she was directly concerned with and in which she personally participated while formerly employed by the DOH. The proposed work with the RFMH involves the same purposes, affects the same population, and

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

²³ Advisory Opinion Nos. 11-03, 95-19, 95-16, 95-15, 95-07, 94-18, and 93-11; *Matter of McCulloch v. New York State Ethics Commission*, 285 A.D.2d 236 (3d Dep't 2001).

²⁴ Advisory Opinion No. 91-18.

²⁵ Advisory Opinion No. 90-19.

substantially provides the same services as the work she performed for the DOH.²⁶ Accordingly, unless an exception were applicable, the arrangement with the RFMH would violate both the two-year bar and lifetime bar.

The [requesting individual] has asked that this Commission apply its exception to the various bars in Public Officer Law §73 found in Advisory Opinion No. 95-02, in which the Commission has concluded that employees transferring from a State agency to that agency's closely affiliated research arm become employees under the jurisdiction of their former agency and, therefore, are not subject to the restrictions of Public Officer Law §73(8). Specifically, the [requesting individual] stated that her transfer from the DOH to the RFMH would serve the same interests, those of New York State, even though the RFMH is a Closely Affiliated Entity of the OMH, the OPWDD, and OASAS, not the DOH.

In Advisory Opinion No. 95-02, the State Ethics Commission considered whether the revolving door provisions applied to an employee who left the Institute for Basic Research ("IBR"), a unit of the New York State Office of Mental Retardation and Developmental Disabilities (now referred to as the New York State Office for People with Developmental Disabilities ("OPWDD")), to work for the RFMH. In reaching its conclusion, that the revolving door provisions did not apply, the Commission said:

When an employee transfers to a State agency's closely affiliated research arm, he or she will not secure unwarranted privileges. Since the interests of the agency and its research arm are similar, the employee's skill and knowledge will continue to be used to benefit the agency. Thus, the purposes of §73(8) are met without imposing any restrictions.

Further, the Commission recognized the "special relationship" between closely affiliated entities and State agencies, as follows:

Critical to this analysis is the close affiliation of these types of corporations to the State agencies to which they relate. State law recognizes this special relationship and permits employees of the closely affiliated entities to participate in the State retirement system and elect to receive State health insurance. This statutory recognition exists for no other such private entities which contract with or perform services on behalf of the State. State policy endorses this special relationship and the Commission recognizes it as well.

In its analysis, the Commission relied upon Advisory Opinion No. 91-20, which did not involve the application of the post-employment restrictions; however, it addressed the nature of

²⁶ See Advisory Opinion 94-09 (despite the facts that funding sources and procedures in the current programs were considerably different from the predecessor programs at issue, the Commission determined that both programs affected the same or substantially the same population, provided the same or substantially the same types of services, and had the same goals, and thus concluded that the program was a transaction on which the former State employee worked while he was at the State agency).

Closely Affiliated Entities in relation to State agencies. In that opinion, the Commission recognized that a number of State agencies have benefitted from the creation of Closely Affiliated Entities, and that the creation of such entities allows the State to maintain some degree of control over them. It also accepted that employees of Closely Affiliated Entities are not State employees and, at the time, were *not subject to the provisions of the Public Officers Law (emphasis added)*,²⁷ but nevertheless found that employment by a Closely Affiliated Entity did not pose a conflict under Public Officers Law §§73 or 74 with concurrent employment by the agency that created the Closely Affiliated Entity.

The Commission and its predecessors applied Advisory Opinion No. 95-02 to subsequent requests addressing the application of post-employment restrictions to former State employees seeking employment at Closely Affiliated Entities created by their former agencies.²⁸ In these opinions, the Commission concluded that, where a State employee's skills and knowledge will continue to be used for the benefit of the State agency, then the purposes of Public Officers Law §73(8) are met, and the post-employment restrictions do not apply.

However, in Advisory Opinion No. 95-17, the Commission, declined to extend the exception to a State employee seeking employment with a not-for-profit research foundation closely affiliated with a State agency other than the employee's own former agency. The Commission determined that the "special relationship" acknowledged in Advisory Opinion No. 95-02 only functioned between the foundation and the agency that created it. The Opinion suggested a State agency might have little in common with a foundation that was created by another State agency, and therefore have diverging interests. In distinguishing its analysis from Advisory Opinion 95-02, the Commission stated:

To extend the Commission's recognition of the special circumstances found in Advisory Opinion No. 95-2 to *any* State agency (rather than only to a closely affiliated agency) would permit agencies to place favored former employees on foundation payrolls in avoidance of the proscriptions of §73(8) and in contravention of the spirit of the revolving door restrictions.²⁹ Such an exception would permit former employees to be favored, as they could immediately appear before their former colleagues at their former agencies and perform the same or similar functions they performed while in State service, *all without any of the ethical restraints governing the conduct of State employees*. Such a circumstance would, in sum, violate the very purpose of the revolving door restrictions (Emphasis added).

²⁷ Advisory Opinion No. 95-02.

²⁸ See Advisory Opinion Nos. 05-04 and 02-03.

²⁹ In a footnote, the Commission noted that Advisory Opinion No. 95-02 concerned an employee who moved from an agency payroll to the payroll of the agency's closely affiliated corporation. It did not concern an individual who retired from State service. That opinion should be restricted to its facts and not be deemed applicable to retired individuals (superseded by Advisory Opinion No. 02-03 to apply to retirees).

In the prior cases, the Commission was concerned with diverging interests between the entities as well as former State employees transferring to Closely Affiliated Entities without assurance that such employees would be subject to the ethical standard of State employees; however, in the case at bar, amendments to the law, as discussed below, allay such concerns.

Since the issuance of Advisory Opinion No. 95-17, there has been additional statutory recognition of the special nature of Closely Affiliated Entities. Specifically, the Public Employee Ethics Reform Act (“PEERA”) of 2007 amended Public Officers Law §74(1) to expand the definition of a “state agency” to include those corporations closely affiliated with a specific State agency as set forth in New York State Finance Law §53-a(5)(d). As a result, employees of Closely Affiliated Entities are now public officers bound by the State’s Code of Ethics and subject to the Commission’s jurisdiction.³⁰

As such, employees of Closely Affiliated Entities are subject to the same ethical standard as State employees, which is set forth in Public Officers Law §74(2):

No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his or her *duties in the public interest (Emphasis added)*.

The Code of Ethics is clear. Employees of Closely Affiliated Entities serve the same interest as State employees. It is statutorily-recognized that Closely Affiliated Entities and their employees must serve the public interest and, therefore, employment with these entities satisfies the government-to-government exception to the revolving door provisions in Public Officers Law §73(8).

The government-to-government exception furthers the public interest because the former State employee continues to work in a public capacity:

[i]n both situations, the "client" is the same: the public-at-large. There would be no benefit to the public if a former State employee, serving the citizens of this State in another public employment capacity, as a local government employee, were precluded from appearing or practicing before his or her former State agency. The "evil" to be avoided -- the misuse of knowledge and contacts to the benefit of a private client--would not be a possibility.³¹

Similarly, a former State employee who moves to any Closely Affiliated Entity would be working in the interests of the agency which created the foundation, and, therefore, by extension,

³⁰ See paragraph 28 of Chapter 14 of the laws of 2007 (Public Employee Ethics Reform Act (PEERA)).

³¹ Advisory Opinion No. 89-05.

in the interests of the public. Moreover, such employees' conduct is always governed by Public Officers Law § 74 and as such, they remain under the Commission's jurisdiction.

Indeed, the government-to-government exception applies when a former State employee accepts employment with *any* other governmental agency, no matter how diverse the interests of the two government entities. For example, under the government-to-government exception, we have held that the post-employment restrictions do not apply when a former State employee becomes employed by a municipality that is under the jurisdiction of the State.³² A former employee of the State Education Department ("SED") may serve as the superintendent of a public school and continue to interact with his former agency or even work on specific matters in which the employee was involved while an SED employee, notwithstanding any conflicting interests that exist between the two entities.³³ Further, the Commission's predecessor has held that the government-to-government exception applied to a former State employee in his post-employment capacity with a Coalition, which the Commission found to be "governmental in nature."³⁴ Other factors to be considered in determining whether the government-to-government exception applies are (1) the manner in which the corporation was formed; (2) the degree to which the corporation is controlled by the government officials or government agencies; and (3) the purpose of the corporation.³⁵

In applying the government-to-government exception to the [requesting individual's] employment with the RFMH, the Commission finds that the [requesting individual] will continue to serve the public interest in transferring to a Closely Affiliated Entity created by a State agency other than her former agency and will comport herself within the State's ethical restraints. The Commission recognizes that, since Advisory Opinion No. 95-17, changes to the Public Officers Law have alleviated the concerns of the Commission's predecessors. Specifically, employees of Closely Affiliated Entities are now subject to the same ethical restrictions as State employees. The Commission also recognizes that the RFMH was created by the State for the purpose of supporting the OMH, the OPWDD, and OASAS. Here, the [requesting individual] would be working in the interests of those agencies which created the foundation, and, by extension, in the interests of the public. More importantly, the [requesting individual] will bring her knowledge of the Children's Medicaid Redesign project to the RFMH, which will benefit multiple State agencies, including her former agency, and undoubtedly the public at large.

³² Advisory Opinion No. 89-05; *See also* Advisory Opinion No. 94-01.

³³ Advisory Opinion No. 90-23.

³⁴ Advisory Opinion No. 98-17.

³⁵ Advisory Opinion No. 00-06, citing City of New York Conflicts of Interest Board opinions 94-7 and 93-13; *See also Eisenberg v. Goldstein*, No. 21381-87 (Sup. Ct., Kings County, Feb. 26, 1988) and *Siani v. Research Foundation of the State University of New York*, 2007 NY Misc LEXIS 9122 (NY Sup. Ct. 2007) (where the term "agency" as defined in Public Officers Law § 86(3), for purposes of disclosure under the Freedom of Information Act, includes private, not-for-profit entities created by State agencies).

CONCLUSION

This opinion, unless and until amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and acted in good faith unless material facts were omitted or misstated in the request for the opinion.

Concur:

Michael K. Rozen, Chair

David A. Renzi

Robert Cohen

Dawn L. Smalls

Marvin E. Jacob

George H. Weissman

Seymour Knox, IV

Hon. Penny M. Wolfgang

J. Gerard McAuliffe, Jr.

Absent:

Gary J. Lavine

Hon. Renee R. Roth

Dated: May 23, 2017