

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

Advisory Opinion No. 20-01:

**Applying the lifetime bar to a former State
employee whose official duties included
monitoring activities over which the state
had no contractual authority**

INTRODUCTION

The following Advisory Opinion is issued in response to an inquiry from Jane Doe¹, a former [] with the New York State Energy Research and Development Authority (NYSERDA), concerning the application of Public Officers Law § 73(8)(a)(ii), the lifetime bar, to her proposed employment with [], the vendor that is under contract with [a federal agency] to perform comprehensive services on [the project]. As the [] for NYSERDA, Ms. Doe's official responsibilities included monitoring the activities of [the vendor]. However, she had no direct interaction with [the vendor], and NYSERDA had no authority to direct or control [the vendor]'s work. Additionally, Ms. Doe's proposed duties for [the vendor] would not require her to communicate with NYSERDA, nor would NYSERDA monitor her proposed work.

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 lifetime bar does not preclude Ms. Doe from accepting the employment with [the vendor].

BACKGROUND

In 1980, Congress passed [a law] (the "Act"), which directed [a federal agency] to conduct a [] project at [a site in New York] in cooperation with New York State. As required by the Act, the [federal agency] and NYSERDA entered into a Cooperative Agreement for carrying out its directives. Under the Agreement, the [federal agency] has the lead and controlling role in managing the [] [the Project], while NYSERDA participates on the Project by monitoring its progress and maintaining the balance of the [] property surrounding the Project premises.

In 2011, the [federal agency] contracted with [the vendor] to lead cleanup and facility demolition activities, and remove [] waste, contaminated equipment, and obsolete structures (the "Contract"). NYSERDA is not a party to the Contract. The Contract was in effect when Ms. Doe was employed by NYSERDA, and it remains in effect today.

Ms. Doe is an environmental scientist with decades of professional experience, including, in the 1990s, serving as the [federal agency]'s [] for [the Project] for four years. More than ten years later, NYSERDA hired her and, in 2012-2014, Ms. Doe served as NYSERDA's [] for [the

¹ The requesting individual's name and other identifying details have been changed or redacted.

Project]. In this capacity, Ms. Doe's primary duties involved monitoring the progress of [the vendor]'s work on the Project and reporting back to her supervisor, also a NYSERDA employee.² In the intervening years, she worked at [] sites elsewhere in the country.

After consulting with Ms. Doe, Commission staff contacted NYSERDA for insight regarding the nature of NYSERDA's role on [the Project]. Staff spoke with agency representatives, including NYSERDA's [] for [the Project], who was Ms. Doe's former supervisor. Staff learned that NYSERDA does not have a direct role in evaluating the performance of [the vendor] under the existing NYSERDA-[federal agency] agreements. NYSERDA can raise with the [federal agency] any issue related to [Project] safety, quality, compliance, cost effectiveness, etc., but it is the [federal agency]'s decision as to how to address the issue. The [federal agency]'s response could involve providing NYSERDA with additional information or analysis, or, if the [federal agency] believes that a change in a work activity is needed (regardless of who identifies the issue), the [federal agency] would require [the vendor] to make a change.

It was confirmed that the Contract governing the [federal agency]-[vendor] relationship that was in effect when Ms. Doe was employed by NYSERDA remains in effect to date, although the scope of work under the Contract is due to come to a close in or around 2023. The work on the next stage will be awarded to a contractor based on competitive bidding.

[The vendor] now wishes to hire Ms. Doe as a Manager to lead the compliance and regulatory affairs scope of its contract with the [federal agency]. Ms. Doe anticipates that this will involve interacting primarily with the federal Environmental Protection Agency and the New York State Department of Environmental Conservation. No interaction with NYSERDA is anticipated, and NYSERDA would not be monitoring Ms. Doe's performance. Ms. Doe has asked whether she can accept the employment with [the vendor] without violating the lifetime bar.

APPLICABLE STATUTE

Public Officers Law § 73(8)(a)(ii) sets forth the lifetime bar:

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

² Ms. Doe performed additional duties for NYSERDA, for example serving for a time as [] Control Officer and supporting a county project where NYSERDA performed [] screening of soil, equipment, and demolition material associated with the replacement of a bridge located within an area potentially impacted by historical [] operations [on the site]. These activities are tangential, at most, to the [federal agency]-[vendor] contract and are not relevant to this lifetime bar analysis.

The two-year bar, set forth at Public Officers Law § 73(8)(a)(i), does not apply because Ms. Doe left State service more than two years ago.

DISCUSSION

The post-employment restrictions set ground rules for what individuals may and may not do with the knowledge, experience, and contacts gained from public service after they terminate employment with a State agency.³ The rules are intended to prevent former State employees from leveraging their State service to their own advantage or that of a client, thereby securing unwarranted privileges, consideration or action.⁴ They also help to eliminate public doubt as to whether State employees' actions are motivated by a concern for the public interest or by considering their private business interests after leaving State service;⁵ and to prevent former State employees from receiving special treatment or creating the impression that former State employees enjoy the favor of former colleagues, when dealing with them in their official capacities.⁶

The post-employment provisions are not intended to “preclude one from practicing a given trade, profession or occupation . . .,”⁷ and they do not prohibit a former State employee from accepting employment with any particular employer. Application of the lifetime bar requires balancing the various public and private interests, including the State’s interests in recruiting personnel, guarding against acts that can degrade public confidence in government, and avoiding excessive restrictions on the professional endeavors of former State employees in ways that do not involve, or appear to involve, the unfair use of prior State employment for private benefit.⁸

Recently, in Advisory Opinion No. 18-01, the Commission refined this balance in application of the lifetime bar in the context of large, multi-year projects. As discussed in that Opinion, the Commission’s predecessor agencies consistently held, correctly in this Commission’s estimation, that in light of the potential expansiveness of the lifetime bar, the acts that the lifetime bar prohibits are “very specific,”⁹ and application of the lifetime bar must be determined on a case-by-case basis.¹⁰ However, over the years, Advisory Opinions tended to regard such projects as single transactions and applied the lifetime bar even after a long passage of time, and when the individual’s participation in the project was in connection with an earlier, completed, or otherwise distinct phase.

Advisory Opinion No. 18-01 addressed this overbreadth, and explicitly held that “[a] large

³ Advisory Opinions No. 99-16, 95-17, 91-17, 88-1.

⁴ Advisory Opinions No. 95-19, 94-05, 90-04, *citing* Attorney General Opinion No. 84-F12; 84-F20.

⁵ Advisory Opinion No. 89-08, *citing* Attorney General Opinion No. 84-F20.

⁶ Advisory Opinion No. 89-07, *citing* Attorney General Opinion No. 84-F20.

⁷ Advisory Opinion No. 94-02.

⁸ Advisory Opinion No. 18-01, *citing* Memorandum of the U.S. Office of Government Ethics, Sept. 23, 2016, at [https://www.oge.gov/web/oge.nsf/All+Advisories/3741DC247191C8B88525803B0052BD7E/\\$FILE/LA-16-08.pdf?open](https://www.oge.gov/web/oge.nsf/All+Advisories/3741DC247191C8B88525803B0052BD7E/$FILE/LA-16-08.pdf?open).

⁹ New York State Joint Comm’n on Pub. Ethics Advisory Op. No. 18-01, *citing* New York State Ethics Comm’n, Advisory Op. No. 91-02.

¹⁰ *Id.*, *citing* New York State Ethics Comm’n, Advisory Op. No. 90-19.

infrastructure construction project is not necessarily a single transaction for lifetime bar purposes.”¹¹ It further indicated that this principle can be applied to any scenario where it is appropriate under the facts presented.¹² The Opinion set forth a non-exhaustive list of factors the Commission will consider when determining whether the lifetime bar applies in the context of a large project: (1) the general nature of the project; (2) the phases of the project involved; (3) the nature of the work performed as a State employee and the nature of the work projected to be performed; (4) the extent to which the projected work constitutes a continuation of the earlier work; (5) the identities of other persons and/or entities directly involved in the earlier work and in the projected work; and (6) intervening changes in design, methods, or technology.

Advisory Opinion No. 18-01 never anticipated a purely mechanical application of the enumerated factors. The list of factors was stated to be non-exhaustive, and the Opinion was careful to note that “[g]oing forward, the Commission will consider such questions, as it must, on a case-by case basis.”¹³ For the following reasons, the Commission finds that the specific circumstances present in this case lead to a conclusion that Ms. Doe’s proposed work is not prohibited by the lifetime bar.

Here, some of the factors from Advisory Opinion No. 18-01 weigh against considering the work performed by Ms. Doe for NYSERDA to be part of the same transaction as the work she proposes to perform now for [the vendor]. First, the nature of the Project is such that it involves multiple parties over a significant period of time,¹⁴ so it is among the very types of projects that the discussion in Advisory Opinion No. 18-01 was intended to address. Second, the nature of Ms. Doe’s work for NYSERDA and her proposed work for [the vendor] are sufficiently different such that the principal concerns of the lifetime bar are not implicated here. While both her former and proposed work relate to the Project, they do not directly relate to each other. NYSERDA’s role and interest in the Project is limited. NYSERDA is neither a party to the Contract governing the Project, nor does it oversee performance under the Contract.¹⁵ Ms. Doe’s duties for NYSERDA involved monitoring [the vendor]’s activity and reporting back to her supervisor (who might or might not convey to the [federal agency] any concerns raised to by Ms. Doe), but she did not deal directly with [the vendor]. Third, the work Ms. Doe proposes to perform for [the vendor] is not a continuation of her earlier work for NYSERDA. In fact, she would have no interaction with NYSERDA, and NYSERDA would not be involved in or monitor her proposed work.¹⁶

Further, in addition to the factors in Advisory Opinion No. 18-01, the Commission considered Ms.

¹¹ New York State Joint Comm’n on Pub. Ethics Advisory Op. No. 18-01, p. 17.

¹² *Id.* n.56.

¹³ *Id.* at 17.

¹⁴ In addition to the performance contract between the [federal agency] and [the vendor], NYSERDA’s limited role is laid out in a Cooperative Agreement with the [federal agency], executed in 1980 (with a subsequent amendment and supplements). This is the only party with whom NYSERDA has privity.

¹⁵ Again, NYSERDA’s role is circumscribed by the Cooperative Agreement with the [federal agency].

¹⁶ It is anticipated that the compliance and regulatory aspects will involve the [federal agency] and the New York State Department of Environmental Conservation.

Doe’s specific work history and experience. As noted above, the post-employment restrictions in the Public Officers Law are intended to prevent a former employee from unfairly trading on contacts and information garnered while in State service, but they are not meant to “preclude one from practicing a given trade, profession or occupation.” Here, Ms. Doe’s tenure with NYSERDA was not her first experience on [the Project], as she previously served as the [federal agency]’s [] on the site for four years. She has extensive additional experience in []. Moreover, while she worked at NYSERDA she had no direct contact with [the vendor]. Under these facts, there can be no reasonable inference that [the vendor]’s current job offer arises out of unfair trading on contacts and information she developed while working for NYSERDA.

CONCLUSION

The Commission concludes that Ms. Doe may engage in the proposed employment with [the vendor].

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.

Concur:

Michael K. Rozen
Chair
James E. Dering
Colleen C. DiPirro
William P. Fisher
Marvin E. Jacob
Gary J. Lavine
James W. McCarthy
David J. McNamara
George H. Weissman
James A. Yates

Dissent:

Robert Cohen

Absent:

Daniel J. Horwitz

Dated: August 11, 2020