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NYS COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT

540 BROADWAY
ALBANY, NEW YORK 12207
ethics.ny.gov

SANFORD N. BERLAND
EXECUTIVE DIRECTOR

PHONE: (518) 408-3976
FAX: (518) 408-3975
ethics@ethics.ny.gov

Advisory Opinion No. 25-XX:

Finding that compliance with Public Officers Law Section 73(8-b) satisfies the requirements in Public Officers Law Section 73(4)(a) with respect to a former employee of the certifying agency who is currently employed by another State agency

INTRODUCTION

The following advisory opinion is issued by the New York State Commission on Ethics and Lobbying in Government ("Commission"), pursuant to Executive Law § 94(7)(c). On December 11, 2024, staff received a submission from [a state agency] seeking leave pursuant to Public Officers Law § 73(8-b) to contract with a recently retired agency employee, [ ], to render services to [the agency] notwithstanding that the post-employment provisions in the Public Officers Law prohibited [the former employee] from contracting with or otherwise providing services to her former employing agency. This request was presented to the Commission at its meeting on December 18, 2024, and was approved. In line with the request, Commission staff informed [the state agency] that it could contract with [the former employee] for a term not to exceed six months, at an hourly rate of $58.00 and a maximum payment of $13,920.

Unbeknownst to Commission staff, after leaving [the agency]'s employ, [the former employee] had accepted employment with [another state agency]. This fact become known to staff on February 21, 2025, when staff received a request from [the former employee], now as an [employee of the second agency], with [the second agency]'s approval, for approval of an outside activity, i.e., approval to render contractual services to [first agency] as an outside activity. According to information subsequently obtained from [first agency]'s ethics officer, [the former employee] started her job with the [second agency] on December 16, 2024. Thus, when the Commission approved the 8-b application, [the former employee] was a State employee again.

This raised the question of whether Public Officers Law § 73(4)(a) applied to [the former employee] when she entered into the contract with [the first agency]. Section 73(4)(a) provides, in pertinent part, that no State officer or employee can contract to provide goods or services to any State agency unless the contract is let after public notice and competitive bidding. Since [the former

employee] was a State employee when she entered into the contract with [the first agency], there were questions as to whether Section 73(4)(a) invalidated the contract and whether Section 73(8-b) is available when the former agency employee is currently employed elsewhere in State government. The Commission hereby concludes that in the situation presented, Section 73(8-b) applies notwithstanding that the certifying agency's employee is currently employed by another state agency and both satisfies and trumps the provisions of Section 73(4)(a). [The former employee] may render contractual services to [the first agency] as an outside activity with respect to her regular employment with [the second agency].

APPLICABLE LAW

Public Officers Law § 73(4)(a) prohibits a State officer or employee from entering into a contract with any State agency absent public notice and a competitive bidding process:

> [N]o statewide elected official, state officer or employee, member of the legislature, legislative employee or political party chairman or firm or association of which such person is a member, or corporation, ten per centum or more of the stock of which is owned or controlled directly or indirectly by such person, shall (i) sell any goods or services having a value in excess of twenty-five dollars to any state agency, or (ii) contract for or provide such goods or services with or to any private entity where the power to contract, appoint or retain on behalf of such private entity is exercised, directly or indirectly, by a state agency or officer thereof, unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding.

On its face, this provision appears to apply to the contract between [the first agency] and [its former employee], since [the former employee] was a State employee working with the [second agency] when she entered into the contract, which was valued at over $25.

However, Public Officers Law § 73(8-b) permits a State agency to seek leave to contract with a former employee who is otherwise prohibited by the post-employment restrictions from entering into an employment contract with their former agency. Section 73(8-b) states in relevant part:

> Notwithstanding the provisions of subparagraphs (i) and (ii) of paragraph (a) of subdivision eight of this section, a former state officer or employee may contract individually, or as a member or employee of a firm, corporation or association, to render services to any state agency if, prior to engaging in such service, the agency head certifies in writing to the commission on ethics and lobbying in government that such former officer or employee has expertise, knowledge or experience with respect to a particular matter which meets the needs of the agency and is otherwise unavailable at a comparable cost. . . . The commission on ethics and lobbying in government must review and approve all certifications made pursuant to this subdivision.

DISCUSSION

Section 73(4)(a), which applies to current State employees, is an important provision that balances the state's need to acquire necessary goods and services for the lowest cost against the need to prevent the appearance of a conflict of interest when a State officer or employee seeks to

do business with the state. By requiring that such business be conducted only pursuant to an open and competitive bidding process, the State can obtain necessary goods and services, while the competitive bidding requirement helps to ensure that the best bid wins the contract. Based on a plain reading of the statute, permitting [the employee], an active State employee, to enter into what is, in effect, a sole source contract[1] with [the first agency] can be seen as violating the letter and spirit of Section 73(4)(a).

However, despite re-joining the State workforce with the [the second agency] after leaving [the first agency]'s employ, [the employee] was still subject to the two-year bar set forth in Public Officers Law § 73(a)(i) as a former employee [of the first agency].[2] (The government-to-government exception to the post-employment restrictions – set forth at Section 73(8)(e) – does not apply to [the employee]'s situation because she is not working for [the first agency] in her capacity as an employee [of the second agency].) The two-year bar's prohibition on appearing and practicing before one's former agency prevented [the employee] from entering into a contract with [the first agency] or preparing specific material in response to any matter before [the first agency during that two-year period.[3]

The fact that [the employee] was employed by the [second agency] did not change the calculus for [the first agency] in any way. [The employee] was still a former employee [of the first agency] who was prohibited from contracting with [that agency], while [that agency] still had a need that could only be filled at reasonable cost by contracting with [its former employee]. Section 73(8-b) was intended by the legislature to alleviate exactly this tension. The sponsor's memorandum accompanying the proposed bill reflects that this Commission's predecessor agency, the State Ethics Commission, supported the proposal:

> [T]he commission understands that the post-employment restrictions have, in some instances, worked to the detriment of the state by precluding an agency from retaining the services of a former state employee where the former employee has special expertise and could perform the services in a more cost-effective manner. . . . This proposal recognizes the state's interest in obtaining expertise at reasonable cost in such situations.[4]

The State Ethics Commission further noted that the post-employment restrictions made

> [n]o distinction between the former employee's working in the interest of the state and against its interests. This bill would allow such a differentiation in some cases. By linking the exception to a particular matter, requiring agency head certification and review and approval by the commission, this bill includes sufficient safeguards that will allow the state to obtain needed expertise while preventing agencies from providing a "golden parachute" to an employee who leaves his or her position.[5]

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[1] *See* Advisory Opinion 89-09

[2] *See* Advisory Opinion 95-19 (holding that when a State employee leaves one agency and joins another, the two-year bar is measured from the dates the former employee left each agency). Thus, [the former employee]'s two-year bar with respect to [the first agency] began to run on the date she left [that agency].

[3] Advisory Opinion 90-04.

[4] Sponsor's memorandum, L.2004 ch. 523.

[5] *Id*.

Notably, nothing in the history of the provision or in its rationale suggests that the reference to "former state officer or employee" in Section 73(8-b) was intended to preclude its application to former agency employees who had had subsequently become employed by a different state agency. Assuming, as here, that the currently employing agency also approved the arrangement or had no objection to it, which is the prerogative of any agency, there would be no reason to deprive the former agency of the limited but important benefit to it conferred by Section 73(8-b).

As noted above, [the employee] joining the [second agency] did not change the fact that she was a former employee [of the first agency] who was prohibited by the post-employment restrictions from contracting with [that agency]. In [that agency]'s submission to the Commission, the head of the agency certified, as required by Section 73(8-b), that the former employee has "expertise, knowledge or experience with respect to a particular matter which meets the needs of the agency and is otherwise unavailable at a comparable cost." This certification effectively eliminates the need to apply Section 73(4)(a) to the situation because it establishes that competitive bidding would not generate a better option. Notably, the statute grants authority to seek such relief to the agency itself; the former employee cannot apply. This certification, with the Commission's oversight, helps to ensure that there is no appearance of undue influence or favorable treatment. Section 73(4) is designed to address a concern that is not present here.

CONCLUSION

Under the circumstances presented, Section 73(8-b) applies and both satisfies and trumps Section 73(4)(a). This result preserves the option for [the first agency] to contract with its former employee while alleviating the conflict-of-interest concerns addressed in Section 73(4)(a).