

STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY

Advisory Opinion No. 10-04

Advisory Opinion No. 06-01 is clarified to the extent that the 30-day recusal period set forth in the post-government employment guidelines is set aside for those State officers and employees who may be subject to layoffs, or who have the option of accepting a position at a reduced salary or in another location in lieu of a layoff, provided the employee recuses from all matters pertaining to any private entity with which the employee has employment-related discussions.

INTRODUCTION

Advisory Opinion No. 06-01 provided guidance to a State officer or employee pursuing potential post-government employment opportunities with prospective employers with whom he or she, or whose agency, has matters pending. Advisory Opinion No. 06-01 did not, however, contemplate circumstances in which State agencies would be required to lay off employees from State service or offer State employees another position at a reduced salary (referred to as “bumping”) or at another location in lieu of a layoff.

Pursuant to its authority under Executive Law §94(15), the New York State Commission on Public Integrity (“Commission”) issues this advisory opinion to clarify that the 30-day recusal period set forth in Advisory Opinion No. 06-01 will be set aside for State officers or employees who have been targeted for layoffs, or State officers or employees who, having been notified that they will be laid off, may opt for bumping, relocation or layoff, because their position will be eliminated due to economy, consolidation or abolition of functions, curtailment in activities or other reduction in the State workforce. A State officer or employee in such circumstances who pursues potential post-government employment opportunities must recuse from any matters pertaining to any private entity with which he or she has employment related communications either for the duration that the employee remains employed by the agency, if targeted for layoff, or until the employee accepts another State position, if targeted for bumping or relocation. After such an employee accepts a new State position, if he or she engages in post-government

employment communications with a private-sector employer who has matters before the State employee in the new position, he or she must abide by the guidelines set forth in Advisory Opinion No. 06-01.

BACKGROUND

The Department of Environmental Conservation (“DEC”) has asked the Commission to reconsider the 30-day recusal period set forth in Advisory Opinion No. 06-01 with respect to employees who have been targeted for layoffs. In Advisory Opinion No. 06-01, the Commission articulated guidelines for a State officer or employee to follow when engaging in communications with a prospective employer, with whom he or she, or whose agency, has matters pending, regarding potential post-government employment. The Commission articulated the following as guidelines:

- § A State officer or employee may not solicit a post-government employment opportunity with any person that has a specific matter pending before him or her; and may only solicit an employment opportunity from such a person, 30 days from the time a matter is closed or the officer or employee ceased involvement as a result of recusal or reassignment;
- § A State officer or employee who receives an unsolicited employment-related communication from any person that has a specific pending matter before him or her (a) may not pursue employment with the person or (b) must recuse him or herself from the matter and any further official contact with the person, and wait 30 days after such recusal before entering into post-government employment communications with the person; and
- § A State officer or employee must promptly notify his or her supervisor and the agency ethics officer of any such employment-related communication, whether or not the State officer or employee intends to pursue the employment opportunity.

According to DEC, the 30-day recusal period required by Advisory Opinion No. 06-01

creates an untenable situation for two groups of employees who may be potentially subject to lay-offs. First, for employees who will be laid-off, the 30-day recusal period prevents employees from searching for outside employment until close to the time that the person will actually be leaving State service and, under certain circumstances, until after the person has been laid-off. Second, with respect to employees who are subject to a vertical “bump” downward or relocation across a county line, an employee who accepts the bump or relocation has the option of deciding before December 31 whether he or she would prefer to accept a layoff. An employee would likely decide not to accept the bump or relocation only if the person was able to secure other employment. The limited time frame that is available for individuals to choose whether to accept the bump, relocation or layoff, in combination with the 30-day recusal period, leaves little, if any, time for a DEC employee to search for private sector employment in order to make an informed decision about which option to choose without potentially violating the Public Officers Law.

DISCUSSION

In articulating the guidelines set forth in Advisory Opinion No. 06-01, the Commission sought to balance the competing interests of permitting State officers and employees to pursue post-government employment opportunities in the private sector with the need to maintain the integrity of State government. Relying on Public Officers Law §73(5), the Commission interpreted the “broad definition of gift” in Public Officers Law §73(5)(a), which includes “a promise,” to include a promise of future employment, saying that a promise of future employment could be considered an inducement or reward for official action, or inaction, on the part of a State officer or employee. The Commission also stated that a solicitation or an invitation of post-government employment may create the appearance of a substantial conflict of interest with the proper discharge of a State officer’s or employee’s duties in the public interest, in violation of Public Officers Law §§74(2) and 74(3)(a),(b),(d),(f) and (h).

Advisory Opinion No. 06-01 contemplated the situation when a State officer or employee, of his or her own volition, seeks employment with a private entity. It did not contemplate or address a circumstance in which State agencies would be required to reduce the

number of employees and cut expenditures by either laying off employees, or offering employees positions at a reduced salary or at another location in the State. In these circumstances, a State officer or employee, not of his or her own choice, has to make critical employment decisions in a very limited time span. The one factor that is certain is that he or she will no longer continue working in his or her current State position; his or her salary, primary work location and/or duties and responsibilities will change after a date certain.

In these circumstances, the Commission concludes that the basis for recusing for 30 days from matters with private entities prior to pursuing post-government employment opportunities with those same entities is not applicable for employees who have been targeted for layoffs or for employees who may opt for bumping, relocation or layoff because their position will be eliminated due to economy, consolidation or abolition of functions, curtailment in activities or other reduction in the State workforce. In such cases, the affected individuals will no longer be either employed by their agency or will be employed in a different position with different responsibilities, perhaps in a location that is different from their current primary work site. Therefore, the concern that a promise of future employment by a private entity could be considered an inducement or reward a State officer or employee is significantly reduced, if not eliminated, as is the possibility that the solicitation of post-government employment may create the appearance of a substantial conflict of interest with the proper discharge of a State officer or employee's duties in the public interest, since the individual will no longer be in his or her current position.

On the other hand, while the concerns underlying the basis for requiring recusal for 30 days from matters with private entities with a State officer or employee having employment communications is significantly reduced, it is not completely eliminated. A State officer or employee must still abide by Public Officers Law §§ 73 and 74 in the course of seeking private employment and must ensure that the solicitation of employment with a private entity who has matters before the State employee does not create the appearance of a substantial conflict of interest, even for a short period of time. Therefore, employees who have been targeted for layoffs or employees who may opt for bumping, relocation or layoff because their positions will be eliminated due to economy, consolidation or abolition of functions, curtailment in activities or other reduction in the State workforce must recuse from all matters pertaining to any private

entity prior to engaging in employment communications with such private entity.¹ The duration of the recusal will be either for the period that the employee remains employed by the agency, if targeted for layoff, or until the employee accepts another position, if targeted for bumping or relocation. In this way, the State officer or employee will no longer have any contact with this private entity in his or her official capacity. This will minimize the risk that the promise of future employment would be considered an inducement or reward for the State officer or employee, or that there will be a substantial conflict of interest with the State officer or employee's official duties.² Moreover, as set forth in Advisory Opinion No. 06-01, in either circumstance, such a State officer or employee must promptly notify his or her supervisor and the agency ethics officer of an employment-related solicitation from a private sector entity with whom he or she has one or matters pending, whether or not he or she intends to pursue the employment opportunity.

CONCLUSION

The Commission concludes that the 30-day recusal period set forth in Advisory Opinion No. 06-01 will be set aside for employees who have been targeted for layoffs, or employees who may opt for bumping, relocation or layoff, because their positions will be eliminated due to economy, consolidation or abolition of functions, curtailment in activities or other reduction in the State workforce. However, a State officer or employee in these circumstances who pursues potential post-government employment opportunities must recuse from any matters pertaining to that private entity either for the duration that the employee remains employed by the agency, if

¹ Public Officers Law §73(8)(b)(i) provides for an automatic exemption for non-policymakers from the two-year bar in Public Officers Law §73(8)(a)(i) when employment was terminated because of economy, consolidation or abolition of functions, curtailment in activities or other reduction in the State workforce. Policymakers who are terminated under these circumstances are required to obtain Commission approval for an exemption. The set aside of the recusal period does not obviate the responsibility of a policymaker to seek the Commission's approval for an exemption from the two-year bar, nor does the reduction of the recusal period grant implicit approval for an exemption for any policymaker. All requests for exemptions from the two-year bar for policymakers will be considered on a case-by-case basis according to the standards set forth in Public Officers Law §73(8)(b)(ii).

² After such an employee accepts another State position, if he or she engages in post-government employment communications with a private-sector employer, he or she must abide by the guidelines set forth in Advisory Opinion No. 06-01.

targeted for layoff, or until the employee accepts another position, if targeted for bumping or relocation. After such an employee accepts a new State position, if he or she engages in post-government employment communications with a private-sector employer who has matters before the State employee in the new position, he or she must abide by the guidelines set forth in Advisory Opinion No. 06-01.

All concur:

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