

STATE OF NEW YORK STATE ETHICS COMMISSION

Advisory Application of §73(8) of the Public Officers Law, on and after January 1,
Opinion No. 88- 1989, to State officers and employees who terminate prior to January 1,
1: 1989.

INTRODUCTION

The following advisory opinion is issued in response to several requests which have raised the same or similar questions. The question is whether the post-employment restrictions set forth in the recently amended §73(8) of the Public Officers Law will be applied to State officers and employees who have terminated employment from a State agency prior to January 1, 1989 -- the effective date of §§2 through 16 and §§18 and 19 of the Ethics in Government Act of 1987.¹

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 the post-employment restrictions of §73(8) of the Public Officers Law will be applied to officers and employees who leave or have left employment with a State agency prior to January 1, 1989.² However, §73(8) will be applied only to those post-employment activities engaged in on and after January 1, 1989.

The Commission's opinion in this regard is supported by the express language of the Ethics in Government Act of 1987, certain fundamental principles of statutory interpretation and other considerations indicating the Legislature's intent with respect to the application of the recently amended §73(8).

And, because of the general question of statutory interpretation and application of §73(8) involved in this opinion, the Commission states that it will apply this advisory opinion to any similar request and to any complaint alleging a violation of the amended §73(8) on and after its effective date.

DISCUSSION

A. The Newly Established Post-employment Restrictions

As enacted on August 7, 1987, pursuant to §2 of Chapter 813 of the Laws of 1987, the new subdivision 8 of §73 of the Public Officers Law provides, in relevant part, as follows:
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 or her active consideration

This subdivision is generally referred to as the "revolving door" provision, for it sets 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. In short, subdivision 8 of §73, as amended, bars former State officers and employees for two years after termination from appearing or practicing before their former agencies or receiving compensation for any services rendered in relation to any case, proceeding, application or other matter before such agency. Subdivision 8 also permanently prohibits former State officers and employees from appearing, practicing, communicating or otherwise rendering services or receiving compensation for such services in relation to cases, proceedings, applications or transactions in which the employee was directly concerned and personally participated or which were under his or her active consideration. ³

The enactment of this new "revolving door" provision is part of a sweeping reform in New York's conflict of interest and financial disclosure laws that is intended "to restore public trust and confidence in government." (Governor's Memorandum, On Approving Chapters 813 and 814 of the Laws of 1987.) The new subdivision 8 of §73 can be said to reflect the same intent expressed by Congress when it enacted the federal restrictions on post-employment activities-- that "[f]ormer officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies [and] they should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients. Both are forms of unfair advantage." ⁴

B. The Effective Date of §73(8)

Section 26 of Chapter 813 of the Laws of 1987 expressly provides that the new subdivision 8 of §73 of the Public Officers Law, along with certain other amendments enacted by that Chapter, shall take effect on January 1, 1989,

. . . provided, however, that . . . the provisions of subdivision eight of section seventy-three . . . with respect to legislative employees shall apply only to such employees who terminate their service or employment on or after January first, nineteen hundred eighty-nine (emphasis added)

Section 26 of Chapter 813 clearly does not restrict the application of the new post-employment provisions to State officers and employees or members of the Legislature in the same manner as it does for legislative employees. It must be noted that both State officers and employees and members of the Legislature are covered by the same subdivision 8 which covers legislative employees. Nowhere in the Act is an exception carved out for State officers and employees who terminate their employment prior to January 1, 1989. Only with respect to legislative employees is such an exception provided. On its face, therefore, §73(8) applies, as of January 1, 1989, to all former State officers and employees regardless of their termination dates.

This interpretation of the Act is consistent with the principle that ". . . the specific mention of one person or thing [in a statute] implies the exclusion of other persons or thing[s]." In other words, ". . . where a law expressly describes a particular act, thing or person to which it shall [or shall not] apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." ⁵

Application of this principle compels the conclusion that State officers and employees who terminate their employment with a State agency both prior to and after January 1, 1989, were intended to be covered by the "revolving door" restrictions of §73(8).

Had the Legislature intended §73(8) to apply only to State officers and employees who terminate their employment after January 1, 1989, the Act would have so provided, as it did with respect to legislative employees. ⁶ In the absence of any such express provision, it must be concluded that former State officers and employees who have terminated their employment prior to January 1, 1989, were intended to be covered by the new §73(8) as to their activities on and after January 1, 1989.

Indeed, a contrary interpretation would lead to an unreasonable result. If §73(8) were determined to be inapplicable to State officers and employees who terminated their employment prior to January 1, 1989, then no post-employment restrictions would apply to such persons after that date. An analysis of the existing law and its implied repeal by the Ethics in Government Act of 1987 illustrates the reasoning for this conclusion.

Under current law, the post-employment conduct of former State officers and employees is governed by the provisions of existing §73(7). That subdivision contains a two-year bar on the appearance before a State agency or the receipt of compensation for any services rendered by a former State officer or employee ". . . in relation to any case, proceeding or application with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment" Effective January 1, 1989, however, the existing subdivision 7 of §73 is renumbered and amended in the manner provided by the new subdivision 8.

That the post-employment restraints contained in the new §73(8) are more restrictive than those provided under the existing §73(7) is clear. Existing §73(7) was substantially amended by the Ethics in Government Act. Such a substantial amendment must be seen as an implied, if not actual, repeal of any prior inconsistent provisions. ⁷

Where the net effect of the amendment to subdivision 7 is a repeal of that subdivision and where the former §73(7) does not survive past January 1, 1989, a determination that employees who leave before January 1 are not covered by the new subdivision would result in a conclusion that no "revolving door" provision would apply after January 1, 1989, to those State officers or employees. Considering the purpose of the new Ethics in Government Act, such a result could not have been intended without specific language to that end.

Therefore, reading the Ethics in Government Act as a whole, together with the present and new "revolving door" provisions, it must be concluded that the post-employment restrictions

contained in the new §73(8) were intended to apply to all former State officers and employees, regardless of the dates on which they terminate their employment with the State.⁸

Application of the lifetime and two-year proscriptions contained in the new §73(8) to State officers and employees who leave or have left their State agency prior to January 1, 1989, is, in the opinion of the Commission, neither arbitrary nor discriminatory. There is a rational basis for enacting the "revolving door" provision and for applying it to State officers and employees regardless of their termination dates from State service. And, given the compelling interest which the State has in preventing conflicts of interest or the appearance of such conflicts, this conclusion as to the intent of the Legislature to cover individuals who have terminated their State employment prior to January 1, 1989, is, to the Commission, constitutionally sound.

Public events need not be recounted here to point out that the Ethics in Government Act was enacted to restore the confidence of the public in its government and to assure that public employees do not use their "inside" information and contacts to their own advantage or the advantage of their private clients or employers. The new "revolving door" provision is a reasonable restriction intended to achieve a proper legislative purpose and is a legitimate exercise of the State's power to enact laws for the general welfare of the public. See, for example, *Adamec v. Post*, 273 N.Y. 250 (1937) and *Baker v. Regan*, 68 N.Y. 2d 335 (1986).⁹ Moreover, in the Commission's opinion, the application of the new §73(8) to persons who terminate prior to January 1, 1989, does not amount to an ex post facto law. See *United States v. Nasser*, 476 F. 2d 1111 (7th Cir. 1973).

The Commission believes that application of the new §73(8) to all former State officers and employees regardless of their termination dates effectuates the intent of the Legislature in enacting the Ethics in Government Act and is responsive to the compelling interest of the public in limiting the use by former State officers and employees of confidential information and contacts acquired while in office for their own or others' personal gain after leaving the State's employment.

To avoid any question as to when the "count" for the two-year restriction contained in §73(8) begins, it is the Commission's determination that the two-year period will commence on the date that the State officer or employee terminates or terminated employment with his or her State agency. Therefore, for those State officers or employees who leave or have left State service before January 1, 1989, the two-year restriction under the new §73(8) would be for that period of the two years which remains on and after January 1, 1989.¹⁰

Finally, there has been some question as to what activities may be engaged in by State officers and employees who have terminated before January 1, 1989, if the new §73(8) applies to them on and after that date. It is the opinion of the Commission that, where the present §73(7) permits certain appearances or practices before January 1, 1989, those appearances or practices not permitted under the new §73(8) on and after January 1 cannot be continued or pursued after that date. Therefore, after January 1 those officers and employees will be prohibited from appearing, practicing or receiving compensation for any services rendered in relation to any case, proceeding, application or any other matter before their former State agency for the balance of

the two-year period from the date of their termination. After the two-year period has elapsed, the lifetime bar contained in the new §73(8) would apply.

Where specific questions remain as to the coverage of §73(8) to facts and circumstances not covered by this Opinion, individuals subject to §§73, 73-a or 74 of the Public Officers Law may seek an advisory opinion from the Commission.

All concur:

Elizabeth D. Moore, Chair

Joseph J. Buderwitz, Jr.

Angelo A. Costanza

Norman Lamm

Robert B. McKay, Members

Dated: November 21, 1988

Endnotes

1. The Ethics in Government Act was enacted pursuant to Chapter 813 of the Laws of 1987. Sections 2 through 16 of Chapter 813, effective January 1, 1989, add §73-a to the Public Officers Law, §94 to the Executive Law, §80 to the Legislative Law, §§810, 811, 812 and 813 to the General Municipal Law, amend §§73, 76, 78 and 88 of the Public Officers Law, §166 of the Executive Law, and §§806 and 808 of the General Municipal Law, and repeal former §80 of the Legislative Law and §88(2)(d) of the Public Officers Law.
2. The terms "State officer and employee" and "State agency" are used as defined in §73(g) and (i) of the Public Officers Law.
3. The new post-employment restrictions contained in §73(8) of the Public Officers Law are similar to those enacted by Congress in 1978 for certain former officers and employees of the Federal Government. The latter post-employment restrictions are codified in 18 U.S.C. §207.
4. 1978, U.S. Code and Administrative News, p. 4247.
5. This is the time-honored maxim *expressio unius est exclusio alterius*. *McKinney's Statutes*, §240. That section, additionally, states that ". . . unless it indicates a different intent, a statute naming several classes of persons to be benefited thereby, will not be construed to benefit others."
6. It is worth noting, in this connection, that the United States Congress, in enacting the federal Ethics in Government Act of 1978, specifically addressed the applicability of that Act's post-employment restrictions to individuals leaving government service prior to July 1, 1979, the effective date of that Act. Section 502 of Pub.L. 95-521 expressly provided that the more restrictive post-employment restraints established by the Act would "not apply to those individuals who left Government service prior to the effective date of the amendments [July 1, 1979]" Former employees who terminated their employment with the Federal Government prior to the effective date of the Act were

intended to be covered by the former, less restrictive provisions of 18 U.S.C. §207. See S. Rep. No. 170, 95th Cong., 1st Sess., p. 49 (1977).

No similar expression of legislative intent is found in the newly amended §73 of the Public Officers Law, in Chapter 813 of the Laws of 1987 or in the legislative history of New York's new Ethics in Government Act.

7. Under basic principles of statutory construction, by enacting an amendment of a statute changing its language, the Legislature is deemed to have intended to materially change the law. The provisions of the old law which are inconsistent with the new law are impliedly repealed. In the enactment of the new subdivision 8 the Legislature did not enact a savings clause to provide statutorily, nor indicate in any legislative history, that the coverage of employees who left before January 1, 1989, would be continued under the present subdivision 7. Where no savings clause exists, the repeal of a statute wipes out the law as if it never existed. See, McKinney's Statutes, §§193, 194 and 411. See also, footnote 5, supra, where Congress did provide such a savings clause and expression of legislative intent with respect to certain federal employees.
8. The historical development of the Ethics in Government Act of 1987 also compels this conclusion as to the intent of the Legislature. In 1986 the Assembly passed a bill [A.11547] to amend §73 of the Public Officers Law. That bill contained an effective date of January 1, 1987, without limitation. In that same year the Senate introduced a bill at the request of the Governor to amend §73. That bill proposed an effective date of the January 1 next succeeding its enactment without any other limitation. Neither bill passed both houses.

In 1987, an ethics bill [S.4661], which was passed by both houses of the Legislature and vetoed by the Governor, contained an effective date of January 1, 1989, with the limitation that the proposed post-employment restrictions would apply only to those legislative employees who terminated their employment on and after January 1. The bill which became law, S.6441, contained the same effective date with the same limitation for legislative employees. Tracing this history, it is clear that the intent of the Legislature was to only restrict the application of the "revolving door" provisions to legislative employees who terminated on and after its effective date and not to so limit its application for the other persons covered by the same subdivision 8.

9. Further, it must be pointed out that the Ethics in Government Act was signed into law on August 7, 1987. The ability to minimize any impact of the new law, whatever one might consider that impact to be, existed for almost two years.
10. As an example, if a State officer or employee terminates service at the end of business on June 30, 1988, that officer or employee will have completed a six-month period after his or her termination on December 31, 1988, and will have only one and one-half years of the two-year period left under the new §73(8).