

# STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory**            Whether the post-employment restrictions of §73(8) of the Public Officers  
**Opinion No. 89-**    Law prohibit a former Assistant Counsel to the Governor from appearing or  
**3:**                      practicing before the [Board].

## INTRODUCTION

The following advisory opinion is issued in response to an inquiry whether §73(8) of the Public Officers Law prohibits an Assistant Counsel to the Governor from appearing before the [Board] within two years after his termination from service as Assistant Counsel; further, whether the individual was directly concerned with and personally participated in a particular application while an Assistant Counsel which would preclude his appearance or practice in that application forever.

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 neither the two-year ban nor the life-time post-employment restriction of §73(8) of the Public Officers Law act to prohibit the former Assistant Counsel to the Governor from appearing and practicing or receiving compensation for services rendered before the [Board] generally, or with respect to the [application], after his termination from service as an Assistant Counsel.

## BACKGROUND

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. . . .  
As the Commission noted in its Advisory Opinion Number 88-1, subdivision 8 of §73, generally referred to as the "revolving door" provision, "sets the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate employment with a state agency."

In order to determine whether the two year ban applies in this case, the Commission must determine the agency from which the employee terminated and the agency before which the employee intends to appear; in this case, the [Board]. If the Board is found to be the same State

agency from which the State employee terminated, the two-year ban would apply. In this case, the requesting individual terminated from the Executive Chamber.

### *Executive Chamber*

The Executive Chamber was created by Article 2 of the Executive Law as the Office of the Governor. (§2 of the Executive Law.) A Secretary and Counsel to the Governor were also established. (§4 of the Executive Law). The Executive Chamber is an entity separate and distinct from the Executive Department, which was established by Article 3 of the Executive Law, with the Governor as its head.<sup>1</sup> (§30). While there are a multiplicity of entities established within the Executive Department, the Executive Chamber is not among those so contained.

### *The [Board]*

Pursuant to [ ] law, the [Board] is located within the Department of [ ], which is not part of the Executive Department.<sup>2</sup> It consists of seven members, one of whom is the Commissioner [a State agency], an entity which is part of the Executive Department. The Board is responsible for issuing certificates permitting certain construction in the State. Any four of seven members of the Board constitute a quorum and can act as the Board. Therefore, the Commissioner of [a State agency] cannot solely influence the outcome nor is he or she required to participate in final decisions.

## **DISCUSSION**

Since the Commission has determined that the agency from which the employee terminated is the Executive Chamber, the Commission concludes that an Assistant Counsel to the Governor may not for two years after termination from such service, appear or practice or render services for compensation before the Executive Chamber on behalf of any person, firm, corporation or association in relation to any case, proceeding, application or other matter before it. Since the Board is not part of or in the Executive Chamber, and the Executive Chamber is not part of or in the Executive Department, there is no violation of the two year ban contained in §73(8).

Further, mere presence of one Executive Department officer on the Board does not change the character of the Board or make it a part of the Executive Department. There are a number of boards and councils on which heads of State departments sit by virtue of the position which they hold. The fact that these individuals serve on such boards and councils solely because of their position does not make those boards and councils part of the State agency from which the department head comes. To find otherwise would compromise the integrity and independence of those boards and councils.

The second issue which the Commission was asked to address was whether the lifetime restriction of §73(8) applies to the individual in this case, with respect to the particular proceeding (the "Project").

The facts are these. While an Assistant Counsel to the Governor, the individual has been responsible for issues in certain areas. The individual had regular contact with three agencies.

There have been no Board applications since approximately 1980 until the one at issue in this opinion.<sup>3</sup> The Board has not conducted any proceedings during the time that the individual has been employed as Assistant Counsel.

As part of his duties as Assistant Counsel, the individual negotiated on behalf of the Governor in connection with certain legislation which, when enacted, would have a direct impact on regulatory or project-specific decisions of these agencies. At no time, has any of his legislative work been related, directly or indirectly, to the Project at issue.

The individual, while employed by the State, never reviewed any of the documents submitted by [applicant] in the [proceeding]. Neither did he then review any of the papers or documents which may have been prepared by or on behalf of [applicant] and used for any other purpose outside the [proceeding] itself.

The individual learned of the [project] proceeding before the Board through a discussion about the impact of the expiration date of the Board as contained in the law<sup>4</sup> with an attorney for [applicant] who had called to ask about the operation of the sunset of the statute. He responded to the call in the same manner as he had previously responded in conversations with legislative staff, and would subsequently respond in meetings with legislative staff, with interest groups, and in public forums. In the conversation, the specifics of the [project] were never discussed.

The [project] proceeding is mentioned in two monthly reports filed by the [Department] with the Executive Chamber. The information the requesting individual received in those reports was of a strictly informational nature available to any number of people to read.

In early 1985 the individual attended one meeting where the project was discussed. Principles of the [project], a staff member of [a State agency], a Governor's staff person and the individual attended. The meeting occurred about two years prior to any [filing]. No members of the Board attended the meeting. A State official who was present at the meeting confirmed to a staff member of the Commission that the purpose of the meeting was to explain [applicant's] interest in investing in the State and to present the economic development potential of the [project] only. The merits of the application could not have been discussed because there was no application at the time. The requesting individual attended the meeting as an observer at the request of the Governor's staff person. The individual was not required to and did not perform any task as a result of the meeting, nor did he have any responsibility for the matter at any time.

The individual never participated in the actual review of nor worked on the application either in his capacity as Assistant Counsel or with the Department.

The "lifetime" bar contained in 73(8) of the Public Officers Law applies to a specific case, proceeding, application or transaction with respect to which a 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*" (emphasis added). Personal participation and direct concern in a specific case, etc., requires more than awareness of or informal conversation concerning the circumstances involved. An individual must have actually participated in and been directly concerned with the substance of the case, application, proceeding or transaction or

have actively considered the substance of it. The receipt of two general reports or the attendance at one meeting, remote in time before the filing of the actual application, where no substantive discussion nor decision affecting a particular application occurs does not rise to direct concern and personal participation in the application. Nor, can one conclude that the case was under the individual's active consideration in any substantive way at all.

Given the foregoing circumstances, the Commission concludes that, while a State employee, the individual was not directly concerned with, did not personally participate in or have the proceeding before the Board under his active consideration. Therefore, the lifetime restriction of §73(8) does not apply to his appearance or practicing in this particular proceeding.

This opinion, until and unless amended or revoked, shall be binding on the Commission in any subsequent proceeding concerning the individual who requested the opinion and who acted in good faith, unless material facts were omitted or misstated.

All concur:

Elizabeth D. Moore, Chair

Joseph J. Buderwitz, Jr.

Angelo A. Costanza

Norman Lamm

Robert B. McKay, Members

Dated: June 16, 1989

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## ENDNOTES

1. Within the Executive Department are the following divisions: the Division of the Budget, the Division of Military and Naval Affairs, the Office of General Services, the Division of State Police, the Division of Parole, the Division of Housing, the Division of Alcoholic Beverage Control, the Committee Against Discrimination, the Director of Safety, the Director of Veterans' Affairs, the Office of Planning Services and the State Civil Defense Committee. The Governor is empowered to establish, consolidate or abolish additional divisions and bureaus. (§31 of the Executive Law.) Among other entities established within the Executive Department are the Governor's Office of Employee Relations, the Office of Business Permits and Regulatory Assistance, the Office of Advocate for the Disabled, the Adirondack Park Agency and the Office of Rural Affairs.
2. The Department of [ ] is established by [ ] law.
3. The [application] was filed with the Board in April, 1987, the final application was filed in October, 1988.
4. The law provides: "This act [adding this article; and enacting provisions set out as notes under this section] shall take effect immediately [Aug.4, 1978] and shall continue in full force and effect only until January first, nineteen hundred eighty-nine; provided,

however, that the provisions of this act shall remain operative and continue in full force and effect with regard to application filed on or before December thirty-first, nineteen hundred eighty-eight."