

STATE OF NEW YORK STATE ETHICS COMMISSION

Advisory Application of §73(8) of the Public Officers Law to former State employees
Opinion No. 90- or State employees on leave without pay who serve as representatives to an
1: employee organization.

INTRODUCTION

The following advisory opinion is issued in response to an inquiry by the Civil Service Employees Association, Inc. ("CSEA") as to whether the post-employment restrictions of §73(8) of the Public Officers Law, the State's "revolving door" provision, apply to employee organization representatives who are either (1) State employees on employee organization leave and for whom CSEA reimburses the State, (2) State employees on leave without pay from the State who are employed by CSEA, or (3) State employees who have terminated their service with the State and are now employees of CSEA.

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 §73(7) applies to State employees on employee organization leave or State employees on leave without pay who serve as employee organization representatives for CSEA. However, State employees who have terminated their State service and are now employed by CSEA are subject to the "revolving door" provisions of the Public Officers Law and the corresponding restrictions on post-employment activities.

BACKGROUND

The 1987 Ethics In Government Act¹ brought significant changes to §73 of the Public Officers Law. According to the memorandum in support of the 1987 legislation, the "Ethics in Government Act" is designed to limit opportunities for abuse of official positions and eliminate any appearance of undue influence. By its comprehensive provisions, the Act reaches almost all government officials and employees.

One particular change instituted by the Act is relevant for the facts presented in this Advisory Opinion. Subdivision 7 was added to §73 of the Public Officers Law to provide new prohibitions on the receipt of compensation for practicing, appearing or rendering services by current State officers and employees in relation to any case before any State agency in connection with (1) the purchase, sale or rental of property, goods and services, or any contract for such, (2) ratemaking, (3) rulemaking, (4) obtaining grants of money or loans, (5) franchises, or (6) licensing.

Of concern for this discussion is the exception found in subdivision (7)(e) of §73 which reads as follows:

Nothing contained in this subdivision shall prohibit a state officer or employee from appearing before a state agency in a representative capacity on behalf of an employee organization in any matter where such appearance is duly authorized by an employee organization.²

Thus, the restrictions on appearing and practicing before a State agency, as outlined in §73(7), would not apply to appearances by current State employees who are acting as representatives of their employee organization.

The Taylor Law³ provides that public employees have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and to have their grievances arising thereunder addressed. CSEA is a duly certified employee organization which represents approximately 107,000 employees of the State of New York as their negotiating agent pursuant to the Public Employees Fair Employment Act.

CSEA now argues that, if current State employees are permitted to appear before State agencies as representatives of their employee organization by the exception granted to them by §73(7)(e), then State employees on organization leave who are reimbursed by CSEA or on leave without pay should be granted the same right without limitation. CSEA is requesting that the Commission extend the exemption that the law specially provides to current State employees in §73(7) to former State employees, who are representatives of an employee organization, and who would otherwise be subject to the "revolving door" provisions of §73(8) of the Public Officers Law.

DISCUSSION

A. State Employees on Organization Leave and whose Salary is Reimbursed by CSEA

Employee organization leave is the means by which State employees who are also representatives of employee organizations may receive time off for employee organization activities. Such leave is a term and condition of employment that is subject to collective negotiations between the State and the employee organizations which represent State employees.⁴ This leave is also statutorily provided.⁵ Article 4 of the current Agreements between the State and CSEA⁶ provide different circumstances under which employee organization leave may be granted to employees in the CSEA negotiating units.

A State employee on employee organization leave is treated as an employee for all purposes incident to State employment. The employee's health insurance, retirement, sick leave, and vacation benefits continue irrespective of the classification of being on organization leave. In fact, an employee on organization leave is treated no differently than one on annual leave or personal leave - the employee receives pay during the leave and the employee organization leave is approved for a period of time during which the employee continues in employee status. Employee organization leave merely permits certain State employees to be paid for their official work as CSEA (or other employee organization) representatives without otherwise affecting their status as State employees.

CSEA's specific inquiry deals with §4.8(a)(1) of the same Agreement. This section provides that the State must grant a total of 750 workdays of employee organization leave during each year to CSEA as a whole for the use of employees attending internal organization affairs. Section 4.8(a)(1) additionally provides:

In the event that CSEA exceeds the 750-workday employee organization leave maximum described herein, CSEA shall reimburse the State for the actual cost of the involved employee(s)' salary.

In addition, a State employee organization may obtain approval for the full or part-time leave of one of its representatives and fully reimburse the State for the appropriate salary and fringe benefits. Such an individual would also continue as a State employee during this time.⁷

The Commission finds that it is of no consequence that CSEA, in any given year, may have to reimburse the State for certain employees' salaries as long as the employee is on approved organization leave. These employees continue in full employment status as State employees, regardless of the reimbursement of their salary, with all the corresponding health, retirement and other benefits including application of the exemption granted to them pursuant to §73(7)(e). The legislature's intention, in enacting §73(7)(e), clearly was to allow State employees, regardless of whether they were on paid employee organization leave, to appear before State agencies as duly authorized representatives of employee organizations without violating §73 to effectuate the State's policy to promote harmonious and cooperative relationships between the government and its employees.⁸

B. State Employees on Leave without Pay from the State and who are Employees of CSEA while on Leave

Unlike current State employees on employee organization leave, the status of State employees who are on leave without pay from the State and who are employed as employee organization representatives during their leave period was not directly addressed by the 1987 Ethics in Government Act.

Pursuant to the authority vested in it under §6 of the Civil Service Law, the State Civil Service Commission has issued regulations covering leave without pay for State employees.⁹ A permanent employee may, in the discretion of an appointing authority, be granted a leave of absence without pay for a period not exceeding two years. Such leave may be extended beyond two years with the approval of the Civil Service Commission. Nothing contained in the Civil Service Law or the rules or regulations established by the Civil Service Commission restrict the type of activities, employment or otherwise, that a person may perform during the unpaid leave period. Furthermore, the person is under no obligation to return to State service, however, the leave of absence is predicated upon the return of the employee and protects his or her employment status.

The Commission concludes that a State employee on leave without pay is still in State service for the purpose of §73 of the Public Officers Law and remains so until the employee has terminated employment with the State or has been terminated from such employment by appropriate State action. This conclusion is consistent with other provisions of the law which treat employees on

leave without pay as if they were still in State service.¹⁰ Thus, a State employee on leave without pay is subject to the prohibitions contained in §73 and the exceptions contained in §73(7) and, not having terminated State employment, is not subject to the "revolving door" provisions of §73(8) of the Public Officers Law.

This conclusion is not affected by the fact that the employee receives payment directly from the employee organization. The Commission concludes that a State employee, who is a representative of CSEA and on leave without pay, may appear before any agency of the State on behalf of CSEA under the exemption provided for in §73(7)(e). It must be noted that the exemption on appearing and practicing before an agency is strictly limited to the above situation where the State employee is acting as a representative of the employee organization whose negotiating unit contains his or her position during the leave without pay period.¹¹ Any other type of compensated appearance or practice or rendition of services before a State agency by the State employee on leave without pay would be subject to the provisions of §73(7).

C. Former State Employees

CSEA has inquired whether, in light of the exemption granted to current State employees under §73(7)(e), former State employees who are employed by CSEA following their termination of State service are exempt from the revolving door provisions of §73(8).

In responding to this inquiry, it is of utmost significance that subdivisions 7 and 8 of §73 of the Public Officers Law have two distinct purposes. Section 73(7) applies to current State officers and employees and contains restrictions on their compensated appearance, practice or rendition of services other than in their official capacity before any agency in relation to certain activities. In sum, the provision seeks to eliminate conflicts of interest between the concurrent public and private duties of State officials and employees.

Section 73(8) pertains to the prohibitions following an individual's termination from State service. The "revolving door" provision prevents State officers and employees from appearing or practicing or rendering services for compensation before their former agency for two years and from ever appearing, practicing, or otherwise rendering services in relation to matters in which they were directly concerned or personally participated while in State service or over which they had supervision during employment.

While both subdivisions are concerned with conflicts of interest and the general preservation of the public's trust in public employees, they apply to two different and distinct sets of circumstances. A specific type of activity may be a violation of §73(7) if carried out while the individual is in State service, while it might not violate §73(8) if conducted in the post-employment period.¹²

Section 73(8) provides no exceptions for Taylor Law activities. The only exception that the Legislature has permitted to the "revolving door" provisions is to former State officers and employees who leave State service and exercise their official duties as elected officials or as employees of a federal, State or local government or one of its agencies.¹³

In conclusion, the Legislature had the opportunity to exempt former State employees who leave State service and become employed by employee organizations from the "revolving door" provisions of §73(8) and it did not do so. Absent any such enunciated intention, the Commission will not read into the exemption provided for in §73(7)(e) any further meaning than that contained in the provision's plain language.¹⁴

CONCLUSION

The Commission finds that State employees on approved employee organization leave and State employees on approved leave without pay are included within the exemption granted to current State employees, under §73(7)(e) of the Public Officers Law, to appear as representatives of an employee organization before a State agency without invoking any of the conflict of interest provisions of that subdivision. As these employees are still in "state service", the post-employment prohibitions of §73(8) do not apply. Each such appearance must be duly authorized by the employee organization.

Former State employees, who are employed as employee organization representatives following their termination from State service, are subject to the "revolving door" provisions of §73(8) of the Public Officers Law. The exemption granted by the Legislature to current State employees, under §73(7), does not apply to former State employees.

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 an opinion.

All concur:

Elizabeth D. Moore, Chair

Angelo A. Costanza

Norman Lamm

Robert B. McKay, Members

Dated: February 15, 1990

ENDNOTES

1. The Ethics in Government Act was enacted pursuant to Chapter 813 of the Laws of 1987 effective January 1, 1989 and amended by Chapter 108 of the Laws of 1988 and Chapter 242 of the Laws of 1989.

2. The other exceptions to the §73(7) prohibition on appearing or practicing or rendering of services before a state agency by current State employees are the following: (1) appearances in connection with a ministerial matter, (2) public advocacy by legislative members and their staffs, (3) public advocacy by political party chairpersons acting in their official capacity, and (4) internal research or discussion of a matter where a client is not charged and the person does share in the net revenues generated by the matter.

3. See §200 *et seq.* of the Civil Service Law; commonly known as the Taylor Law.
4. See *City of Albany v. Helsby*, 48 AD2d 998, 370 NYS2d 215, *affirmed* 38 NY2d 778, 381 NYS2d 866, 345 NE2d 338 (1975).
5. See §46 of Chapter 283 of the Laws of 1972.
6. The agreements between the State and CSEA run from April 1, 1988 through March 31, 1991.
7. See §46 of Chapter 283 of the Laws of 1972.
8. See §200 of the Civil Service Law.
9. The rule for Nonmanagerial/Confidential Employees in New York State Departments and Institutions is contained in 4 NYCRR 22.1. The rule for Management/Confidential Employees appears at 4 NYCRR 29.1. The two rules are identical in substance.
10. For example, §52 of the Civil Service Law allows any employee on leave of absence from his position to compete in a promotional examination for which he would otherwise be eligible on the basis of his actual service before commencement of the leave of absence. In addition, an employee on leave of absence is permitted to continue health insurance coverage in accordance with 4 NYCRR 73.2.
11. Section 73(7)(e) must be construed narrowly. A State employee on approved leave without pay may serve as an employee representative only for the employee organization that he or she was represented by at the time he or she went on leave without pay status.
12. For example, a current State employee could not appear before any State agency on behalf of a private client in any matter pertaining to the obtaining of a grant of money or loans. He or she could represent the same client following his termination of service from the State as long as his appearance was not in front of his former agency and as long as the subject of the grant or loan was not a matter in which he personally participated or was directly concerned during State employment.
13. See Chapter 242 of the Laws of 1989.
14. However, former State employees who are employed by an employee organization may appear before State agencies other than their former State agency during the two years after their termination. Such activity cannot occur before any State agency in relation to a case, application, proceeding or transaction in which that former employee was directly concerned and personally involved or which was under his or her active consideration during employment. The "revolving door" limitation applies to a former State employee who is employed by an employee organization as it would to the activity of any former employee employed by any private entity.