

STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory
Opinion No.
90-16:** Application of the lifetime bar proscriptions of §73(8) of the Public Officers Law to a former State employee who served as Counsel and Deputy Commissioner to [Agency A] and served as a designee of the Commissioner of [Agency A] to [Agency B] and who is now representing a client before [Agency B].

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from a former State employee.¹ The question posed focuses on the application of the lifetime bar provision contained in §73(8) of the Public Officers Law.²

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 lifetime bar, set forth in §73(8), does not apply in the instant case because the matter before the State agency is not a case, proceeding, application or transaction with respect to which the requesting individual was directly concerned and in which he personally participated during the period of his service, nor was the matter under his active consideration during that time. Absent a clear showing that the matter which is currently being presented to the State agency is the same case, proceeding, application or transaction in which this individual personally participated and was directly concerned or actively considered while in State service, the lifetime bar restrictions contained in §73(8) of the Public Officers Law do not apply.

BACKGROUND

In 1981, the individual who is the subject of this Opinion was serving as Deputy Commissioner/General Counsel to [Agency A].³ The Commissioner of the [Agency A] designated the individual to serve as one of his official designees to [Agency B], where the Commissioner served in an *ex officio* capacity as one of the [Agency B] Commission members.⁴ The employee left State service in 1982.

[Agency B] has its basic purpose [] prescribed by law. In carrying out this [] purpose, [Agency B] issues permits which control the development of [] land.

In 1981, an investment group called the [investment group] presented a project application to [Agency B] to develop certain property []. The project application was considered by the Operations Committee, a subcommittee of [Agency B] which has been delegated authority by the [Agency B] Executive Committee to issue a permit for a project without the input of the Commission.⁵ If the proposed project is "substantial" in nature, either in terms of size, impact or expense, the [Agency B] Executive Committee reviews the recommendation of the Operations Committee and votes on the issuance of the permit, but only after review and recommendation of the Operations Committee. The project application by the [investment group] was substantial.

The Operations Committee reviewed it in early March, 1981, and subsequently issued its recommendation to the [Agency B] Executive Committee concerning the issuance of the permit, which contained certain restrictive covenants which run with the land []. The [Agency B] Executive Committee voted favorably on the recommendation to approve the issuance of the permit which included the restrictive covenant at issue.

The individual, in his capacity as a designee of the Commissioner of [Agency A], attended two of the [Agency B] Executive Committee meetings during which a vote was taken with regard to the project application put forth by the [investment group]. The records of those meetings neither indicate that he voted on this matter at all nor that he participated in any discussions, but only that he was present at the meetings. In addition to this individual, the [Agency A] Commissioner had named another employee to serve as an official designee to the [Agency B] Executive Committee. This other employee was also present at the meetings at which votes were taken on the [investment group] proposal. This employee, however, also served on the Operations Committee. The record of the Operations Committee meetings and the [Agency B] Executive Committee meeting indicate that the other employee was actively involved in consideration of the [investment group] permit application. Traditionally, according to this individual and the requesting former employee, the designee of the [Agency A] Commissioner who was more knowledgeable on a particular matter would be the one to discuss the matter with the [Agency B] Executive Committee and cast a vote on behalf of the [Agency A] Commissioner at the [Agency B] Executive Committee meeting where that matter would arise, without regard to the rank or seniority of the designated employee.⁶

In 1983, the [investment group] decided to withdraw from the proposed development and requested the return of certain securities it had posted with [Agency B] in 1981. [Agency B] returned the securities and cancelled the permit to develop the land which it had issued then. At the same time, in conjunction with the agreement to allow the withdrawal of the securities and cancellation of the permit, [Agency B] executed a written agreement with the [investment group], indicating that all proposed development was to cease and that restrictions on certain kinds of development of the land affected by the cancelled permit, the restrictive covenants which had first appeared in the permit issued in 1981, were to continue in perpetuity as to any person or entity which might acquire the subject property from [the investment group]. The original agreement which accompanied the permit was nullified. [Agency B] and [the investment group] then executed a new agreement which included the restrictive covenant which was a part of the 1981 agreement, as well as certain other provisions which were not a part of the 1981 agreement.⁷

In 1988, the [second investment group], which is unrelated to the [investment group], acquired the property on which the [investment group] had planned its 1981 development. The property had been taken from the [investment group] by the Federal Savings and Loan Insurance Corporation ("FSLIC") in relation to a bankruptcy proceeding. The [second investment group] purchased the property from the FSLIC.

PRESENT CIRCUMSTANCES

The [second investment group] is proposing a substantial development of the [] land which it purchased in 1988 from the FSLIC and has an application before [Agency B] requesting a permit for such development. At issue, among other things, will be the restrictive covenant which was imposed by [Agency B] in 1981 upon the [investment group]-owned land, and which was continued in 1983 as part of an agreement with the [investment group] to cease development of the land in return for certain securities. The restrictive covenant imposed in 1981 was duly recorded.⁸ The restrictive covenant, which was imposed in a subsequent agreement when the [investment group] reclaimed its security in 1983, was the same covenant recorded in 1981.

The outstanding claim is that the former State employee, who left State service approximately nine years ago, was involved with the original [investment group] permit and the restrictive covenant imposed in 1981 in his capacity as a designee of the [Agency A] Commissioner to [Agency B], and that such involvement triggers the application of the lifetime bar to preclude his current activities with respect to [the second investment group].⁹ Specifically, the claim is the following:

If [the former employee] continues as advocate for the [second investment group] he will be advocating to his former [Agency B] peers a legal position in derogation of the Advice and Recommendations on which he voted and the all-critical covenant imposed pursuant to the Permit and the Advice and Recommendations. Whether he now recalls the covenant or how it was created, and whether he now recalls any personal involvement with the covenant is irrelevant. The standard embodied in Section 73(8) of the Public Officers Law is whether [the former employee] is appearing before [Agency B] in relation to a *case, proceeding, application or transaction* with which he was *directly concerned* and in which he *personally participated* while a voting designee. His appearance is most certainly "in relation to" the [investment group]'s project which spawned the critical covenant, on which he voted twice. And it would be unfair to [the public interest group] and others who will advocate a literal interpretation of that covenant for [the former employee], as the attorney for the [second investment group], to advocate any interpretation at all, given his prior involvement.¹⁰

The lifetime bar, which is found in §73(8) of the Public Officers Law, applies to certain post-employment activities of former State employees, states:

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 . . .

FINDINGS AND CONCLUSION

As a result of an investigation by the Commission and interviews with other involved individuals, including employees who were serving on the [Agency B] Executive Committee at the time this matter was considered, the Commission has determined that the former State employee was one of the representatives of the [Agency A] Commissioner, an *ex officio* [Agency B] member, at the time the original restrictive covenant was imposed in 1981. He, along with

another [Agency A] employee, regularly attended the meetings of [Agency B] and voted on matters before it. [Agency A] has only one vote to cast on matters before the [Agency B] Executive Committee; the two designees would alternate casting the [Agency A] vote, depending upon which individual had the particular knowledge or expertise on the matter, and the direction of the [Agency A] senior staff if the issue before the [Agency B] Executive Committee involved an [Agency A] policy matter or presented a potential conflict with matters under [Agency A] jurisdiction.

In this particular case, the Commission has determined that the other [Agency A] employee was involved in reviewing the 1981 permit application and in deciding issues relating to the restrictive covenant at issue as part of his duties on the Operations Subcommittee. This other [Agency A] employee, who was the other designee of the Commissioner at the time, and the requesting individual, both confirmed to the Commission that the established practice between the two [Agency A] designees, when application reviews were presented to the full Commission, was to allow the more knowledgeable person to discuss the matter presented to the [Agency B] Executive Committee at the [Agency B] Executive Committee meeting and vote on behalf of the [Agency A] Commissioner. Two days prior to the [Agency B] Executive Committee meeting, the [Agency A] senior staff would meet with the designees to discuss the agenda for the [Agency B] Executive Committee meeting if the agenda for the upcoming meeting involved [Agency A] policy issues or potential conflicts concerning matters under [Agency A] jurisdiction. The staff would decide the Commissioner's vote and would direct that the designees cast the vote for the Commissioner accordingly. With rare exception, the vote was cast as had been discussed with senior staff and the Commissioner. The [Agency A] staff did not review or discuss permit applications concerning development projects unless an [Agency A] policy issue was involved. According to the interviews and documentation received, the [investment group] permit application was not an exceptional case, and the vote on the application was cast by the other [Agency A] employee. In this case, the other [Agency A] employee, who concurrently sat on the Operations Committee and actively participated in and was directly concerned with the decision of the instant permit. He, and not the individual who is the subject of this Opinion, cast the votes on behalf of the Commissioner at the Executive Committee level because of his special interest and knowledge concerning the issue and his position on the Operations Committee.

In the instant case, interviews with [Agency B] Commissioners then serving and the minutes of the [Agency B] meetings confirm that the other [Agency A] employee voted on the [investment group] application. There was one instance in which this other employee to whom the Commissioner had delegated responsibility for this particular matter was not present when the [Agency B] Executive Committee voted on the "Advice and Recommendation" of the Operations Committee concerning the permit application amendment in 1981. The record of that meeting does not show that a vote was cast on the instant permit by the individual who is the subject of this inquiry. He has stated that he did not discuss the matter with the [Agency B] Executive Committee and did not involve himself in any aspect of the permit approval. In addition, it is clear that the [Agency A] employee who sat on the Operations Committee did all of the work relative to the [investment group] permit and any restrictive covenants contained therein. There is no evidence in the record that the individual, who is the subject of this Opinion and who is currently representing [second investment group] was directly concerned with and personally

participated in any application or transaction relating to the restrictive covenant, nor is there a scintilla of evidence that this particular matter was ever under his active consideration.¹¹

The records of the actions taken by the subcommittee and the [Agency B] Executive Committee reflect that all votes on the [investment group] permit were unanimous and were not subject to specific discussion concerning the restrictive covenant at [Agency B] Executive Committee level. Mere presence in a room, without any evidence of substantive involvement or participation, is not either direct concern and participation or active consideration of a matter in relation to a transaction, case, application or proceeding and does not establish facts which trigger the lifetime bar.

The claim, which raised this lifetime bar issue, is that the restrictive covenant which was imposed by [Agency B] in 1981 and which will be a topic of discussion between [Agency B] and the [second investment group] represented by the former State employee, was a matter considered by [Agency B] while the former employee was acting as an [Agency B] Executive Committee member and should constitute the *same* transaction for the purposes of the lifetime bar.

In order for a former State employee to be subject to the restrictions contained in the lifetime bar, he must appear, practice, communicate or otherwise render services before any State agency or receive compensation for any such services rendered on behalf of a client in relation to a specific case, proceeding, application or transaction with respect to which he was directly concerned *and* in which he personally participated while in State service, *or* which was under his active consideration. In the instant case, the facts are clear that the former State employee is appearing before [Agency B] in relation to an application for a project permit on behalf of his client, the [second investment group]. There was no application by the [second investment group] to [Agency B] while the former employee was the [Agency A] designee to [Agency B]. The Commission does not regard this application as the *same* case, transaction, proceeding or application at that which was considered by the [Agency B] Executive Committee in 1981. It is a different and new application by a different entity. The instant permit involved in this new application, as earlier stated, was not one in which the former employee was directly concerned and personally participated, nor did he have it under his active consideration at that time. Therefore, the lifetime bar could not apply, in any event, to the representation of the [second investment group] by this former [Agency A] employee.

The lifetime bar is an extraordinary limitation imposed to restrict former employees from using specific inside knowledge about a case, proceeding, application or transaction at any time, and before any State agency, forever. In order to trigger this limitation, the individual must have participated in and been directly concerned with the same transaction, or must have had the same matter under his active consideration. The statutory language clearly evidences legislative intent that mere acquaintance with or knowledge of a fact or circumstance is insufficient to trigger the lifetime bar. More is needed--active involvement in the nature of *both* personal participation *and* direct concern or active consideration of the issue. The Commission finds, based upon a thorough investigation of the facts, that the instant case does not evidence involvement by the former State employee which rises to the level of direct concern and personal participation or active consideration necessary to sustain a finding that the individual should be subject to the

lifetime bar, and as previously stated, the case, application, proceeding or transaction is not the same as that which existed with the [investment group] in 1981.

The Commission, therefore, finds that the former State employee is not subject to the lifetime bar with regard to his representation of the [second investment group] in the application currently pending before [Agency B]. The former employee's representation of the [second investment group] does not constitute a prohibited appearance pursuant to §73(8) of the Public Officers Law. The former State employee was not directly concerned with nor did he personally participate in the disposition of the restrictive covenant in 1981, and the covenant was not under his active consideration, nor is the current application the same case, application, proceeding or transaction, thus, the lifetime bar does not apply.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and acted in good faith unless material facts were omitted or misstated in the request for opinion.

All concur:

Elizabeth D. Moore, Chair

Angelo A. Costanza
Norman Lamm, Members

Dated: August 22, 1990

ENDNOTES

1. This Advisory Opinion is also issued in response to a complaint filed by an individual, in which it is alleged that the former State employee is violating §73(8) of the Public Officers Law. The conclusions of this Advisory Opinion also respond to that complaint.

2. The Opinion concerns the application of the post-employment restrictions in §73(8) of the Public Officers Law to a former State employee who is beyond the two-year period during which certain compensated practice or appearances before the former employing State agency are limited, but who is still subject to the lifetime bar with respect to matters in which he was directly concerned and in which he personally participated, or which were under his active consideration during his service with the State.

The application of the "revolving door" provision of the Public Officers Law to employees who left State service prior to January 1, 1989, was challenged in two separate suits against the Commission, and in each, the New York Court of Appeals held that the application of the provisions to officers and employees who terminated from State service before January 1, 1989, as to acts engaged in on or after the effective date of §73(8) is constitutional. See *Forti v. NYS Ethics Commission* and *Kuttner v. Cuomo*, 75 N.Y.2d 596 (1990).

3. This inquiry only concerns the former employee's actions while employed at [Agency A] and not with any acts which occurred during his employment with [Agency B], where he had served previously as Executive Director until 1979.

4. Pursuant to law, the Commissioner of [Agency A] is designated as one of the members of the [Agency B]. The Commissioner is permitted to designate a representative or representatives to act on his behalf, if he so chooses, who may vote in his absence.

5. The Operations Committee consists of members of the Executive Committee of [Agency B], who work with members of the staff of [Agency B] on project and permit reviews. Much of the work is routine and does not require the involvement of the Executive Committee. The Operations Committee reviews the project and permit applications and prepares summaries and recommendations which are submitted to the Executive Committee for a vote during their regular meeting. [Agency B] receives an average of eight applications for permits per month which must be reviewed by the full Commission. Other applications, which are received, may be routinely processed without Executive Committee approval or input.

6. This information was gathered from several Ethics Commission staff interviews with the employee and from minutes of [Agency B] Executive Committee meetings.

7. The former State employee was not a State employee in 1983 and had no involvement in the 1983 agreement.

8. The restrictive covenant is contained in a document entitled, "Declaration of Restrictions By [investment group] as to Certain of its Lands," and was filed in the County Clerk's Office in 1981.

9. This claim was filed, with notice to the former State employee, by an attorney who represents another party involved in the present [Agency B] proceeding. Although this Advisory Opinion is issued to the former State employee at his request, it also considers and resolves the outstanding complaint.

10. Letter from [adversary] to the State Ethics Commission concerning the [second investment group].

11. See also Advisory Opinion No. 89-3 for a further discussion of the lifetime bar.