STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY

Opinion No. 11-01

For two years following their termination of State service in the Executive Chamber, former Executive Chamber officers and employees are prohibited from appearing or practicing before the Executive Chamber, from receiving compensation for services rendered on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before the Executive Chamber and, pursuant to Public Officers Law §73(8)(a)(iv), from appearing or practicing before any "State agency" as that term is defined in Public Officers Law §73(1)(g).

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INTRODUCTION

[An employee of the Executive Chamber], has asked the New York State Commission on Public Integrity ("Commission") for an advisory opinion clarifying the application of Public Officers Law §73(8)(a)(i) and (iv) to former State officers and employees who served in the Executive Chamber.

Pursuant to Executive Law §95(15), the Commission hereby renders its opinion that, pursuant to §73(8)(a)(i), for two years following the termination of their State service in the Executive Chamber, former State officers or employees who served in the Executive Chamber are prohibited from appearing or practicing before the Executive Chamber or receiving compensation for services rendered on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before the Executive Chamber. In addition, for two years following the termination of their State service in the Executive Chamber, Public Officers Law §73(8)(a)(iv) prohibits such former officers or employees from appearing or practicing before any "State agency" as that term is defined in Public Officers Law §73(1)(g).

BACKGROUND

In Advisory Opinion No. 89-03, the State Ethics Commission, a precursor to the Commission, held that, for purposes of the two year bar, the only former agency of former officers or employees who served in the Executive Chamber is the Executive Chamber. The Public Employee Ethics Reform Act ("PEERA") (Chapter 14 of the Laws of 2007) expanded the two year post-employment restrictions for former Executive Chamber officers and employees by adding Public Officers Law §73(8)(a)(iv), which bars former State officers and employees who served in the Executive Chamber from appearing or practicing before any State agency for two years following their termination from such State service. *See* L. 2007, Ch.14 §26.

In his December 31, 2010 letter to the Commission, [the requesting individual] requests an advisory opinion "to dispel any uncertainty" as to the meaning of §73(8)(a)(iv). [The requesting individual] maintains that the two year prohibition on appearing or practicing "before any State agency" set forth in §73(8)(a)(iv) does not extend the "rendering service" clause, generally referred to as the backroom services clause, set forth in Public Officers Law §73(8)(a)(i), to all State agencies for former Executive Chamber officers and employees. For the reasons set forth below, the Commission agrees.[1]

APPLICABLE LAW

The post-employment restrictions, set forth in Public Officers §73(8)(a), establish the ground rules for what individuals may do with the knowledge, experience, and contacts gained

[1] While primarily relying on principles of statutory construction, judicial decisions and advisory opinions, [the requesting individual] also maintains that any other interpretation of §73(8)(a)(iv) would result in a "hardship . . . exponentially greater for Executive Chamber employees if they could not even prepare documents for submission to *any* state agency."

from public service after they terminate their State employment. The restrictions are of two types – a two-year bar and a lifetime bar. The two year bar set forth in §73(8)(a)(i) provides, 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.

In addition to this provision, Public Officers §73(8)(a)(iv) provides the following with respect to former Executive Chamber officers and employees:

> No person who has served as an officer or employee in the executive chamber of the governor shall within a period of two years after termination of such service appear or practice before any state agency.

Public Officers §73(1)(g) defines the term "state agency" for purposes of the post-employment restrictions, as follows:

> The term "state agency" shall mean any state department, or division, board, commission, or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the state university of New York or the city university of New York, including all their constituent units except community colleges of the state university of New York and the independent institutions operation statutory or contract colleges on behalf of the state.

DISCUSSION

The Commission has long held that the two year bar contained in Public Officers Law §73(8)(a)(i) restricts post-employment activities in two different ways. First, a former State

officer or employee is prohibited from "appearing or practicing" before his or her former agency, regardless of whether he or she is compensated, for two years following his or her separation from State service in such agency (*See, e.g.,* Advisory Opinion No. 89-7). Second, a former State officer or employee is also prohibited from "rendering services for compensation" on a matter before his or her former agency on behalf of any person, firm, corporation, or association (*See,* Advisory Opinion No. 99-07). This second aspect of the two year bar is generally referred to as the backroom service clause, since it extends the two year bar to services rendered on matters before one's former agency, even when such service does not involve a physical appearance before that agency. (*See,* Advisory Opinion No. 99-17). Thus, for example, the backroom services clause precludes an individual during the two year period after leaving State service from accepting compensation to prepare documents on behalf of a private firm when it is reasonably foreseeable that the documents will be reviewed by his or her former agency (*See,* Advisory Opinion No. 97-5). Participation in the preparation of reports, drawings, specifications, applications and other documents submitted to the former agency would also constitute prohibited backroom services, regardless of whether the former agency knows that the former employee worked on the matter (*See,* Advisory Opinion No. 90-7). Backroom services can also include participating in a telephone call with one's former agency on behalf of an employer or instructing or advising a colleague placing such a call to the former agency (*See,* Advisory Opinion No. 97-1) or receiving compensation for reviewing the files of one's former agency regarding cases before the former agency, even if the review takes place off of the agency premises (*See* , Advisory Opinion No. 94-5).

On its face, Public Officers §73(8)(a)(iv) reiterates the first clause of the two year bar - the "appear or practice" clause – but does not include the second, or backroom services, clause. It is a well-established principle of statutory construction that, "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded."[2] Thus, the plain language of subsection (iv) does not support construing to prohibit former Executive Chamber officers and employees from providing backroom services in matters before every State agency. Construing this statute otherwise would ignore the natural and obvious meaning of the statute's words, resulting in an artificial or forced construction and, thus, violating established principles of statutory construction.[3]

Comparing the language of subsection (iv) with that of subsection (i), the Legislature appears to have intended to impose additional post-employment restrictions on former Executive Chamber officers and employees by prohibiting their ability to "appear or practice" before any State agency, but not to prohibit such former officers and employees from "rendering services" for compensation before any State agency.

In addition, the purposes underlying the post-employment restrictions do not militate in favor of construing subsection (iv) to prohibit a former Executive Chamber officer or employee from providing backroom services in a matter before any State agency, rather than limiting such a prohibition to the Executive Chamber. The Commission has consistently held that the post-

[2] McKinney's Statutes §240.

[3] McKinney's Statutes §94

employment restrictions are intended to avoid a former State employee's misuse of the knowledge and contacts he or she made while in State service to benefit a private client. *See,* Advisory Opinion Nos. 89-05, 90-03, 90-22, 94-8, 96-15, 97-15, 99-07, and 99-13. The Commission has also recognized that the purpose of the revolving door restrictions is to prevent former government employees from unfairly profiting from or otherwise trading upon the contacts, associations and special knowledge they acquired during their tenure as public servants. Employees of the Executive Chamber are often placed in the unique position of dealing with numerous State agencies on a variety of issues. Cloaked with the authority, respect and influence of a Chamber appointment, a prohibition on "appearing or practicing" before any State agency for two years following one's separation from the Executive Chamber would limit one's ability to trade on this influence to benefit oneself or one's client. Although influence, knowledge and expertise can still be wielded even in the context of backroom services, as evidenced by the inclusion of the backroom services clause in Public Officers Law 73(8)(a)(i), for a former Executive Chamber officer or employee, this "evil" is paramount when dealing with the Executive Chamber itself. Regardless of the rationale for doing so, the Legislature has clearly chosen not to extend the backroom service clause to the expanded post-employment prohibition contained in Public Officers Law 73(8)(a)(iv) applicable to former officers and employees of the Executive Chamber. The Commission may not interpret this provision to extend its application beyond its plain meaning.

CONCLUSION

The Commission concludes that former employees of the Executive Chamber are prohibited for two years following their termination of such service from appearing or practicing before the Executive Chamber or receiving compensation for services rendered on behalf of any

person, firm, corporation or association in relation to any case, proceeding or application or other matter before the Executive Chamber. In addition to this prohibition and pursuant to Public Officers Law §73(8)(a)(iv), former employees of the Executive Chamber are also prohibited for two years following their termination from such service from appearing or practicing before any "State agency" as that term is defined in Public Officers Law §73(1)(g).

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 the opinion or related supporting documentation.

All concur:

Mitra Hormozi
Chair

Hon. Richard J. Bartlett
John M. Brickman
Vernon Broderick
George F. Carpinello
Richard D. Emery
Hon. Howard A. Levine
John T. Mitchell
Mark G. Peters
Members

Dated: February 15, 2011