

STATE OF NEW YORK STATE ETHICS COMMISSION

**Advisory Opinion
No. 90-8:** Application of the post-employment restrictions contained in §73(8) of the Public Officers Law to students.

INTRODUCTION

The following advisory opinion is issued in response to several inquiries concerning the application of §73(8) of the Public Officers Law to students. Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by §94(15) of the Executive Law, the Commission issues this Advisory Opinion, suspending enforcement of the two year bar contained in §73(8) of the Public Officers Law as it affects students (defined herein) who serve in positions with State agencies or who have served in such positions. The Commission has determined that such a suspension is warranted at this time, pending its review of the entire question and the appropriate action to take.

Therefore, the Commission concludes that: (1) from the date of this Advisory Opinion until September 15, 1990, it will suspend the enforcement of the two-year absolute bar of §73(8) with respect to all students who are or were employed by or affiliated with any State agencies and who terminated such a relationship prior to September 15, 1990;

(2) the life-time bar of §73(8) will continue to apply to all such students who terminate their relationship with the State at any time; and

(3) the Commission will issue a final Advisory Opinion on the application of the revolving door to all such students on or before September 15, 1990, or take such other action as it deems appropriate.

This Opinion does not apply to the categories of seasonal employees or temporary appointees who are not students.¹

BACKGROUND

Subdivision 8 of §73 of the Public Officers Law provides in pertinent part:

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

Paragraph (i) of subdivision 1 of §73 defines the term "state officer or employee" to include officers and employees of statewide elected officials; officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies; and . . . employees of public authorities, other than multi-state authorities, public benefit corporations and commissions.

DISCUSSION

The question for the Commission to determine is whether "students" serving in positions with state agencies are covered by the definition of "state officer or employee" for purposes of application of the post-employment restrictions of §73(8) of the Public Officers Law. For purposes of this Opinion, when the Commission refers to "students", it includes only those individuals

- who are matriculated as full-time students at an institution of higher education;
- who attend classes during at least two semesters during the calendar year; and,
- who perform services with the State on less than a half-time basis during the academic year or on a full-time basis for no more than the summer break or other breaks between semesters.²

This Advisory Opinion will apply whether the students receive compensation, are in a work-study or internship program, are volunteers or unpaid.³

Because the season for summer hiring is at hand and many State agencies desire to advise the students whom they hire on the impact of the post-employment restrictions on them, the Commission has been reviewing the application of §73(8) to students.

In considering the question and its ramifications, the Commission is weighing the purpose of the Ethics in Government Act, which significantly strengthened the revolving door restrictions previously in place; the possibility that students might gain access to "insider" information or may form the kinds of associations or ties that the revolving door restrictions are meant to address; whether students are eligible to receive the same benefits as other State employees; and whether any precedent exists for treating students as employees.

The revolving door provision sets the ground rules for what individuals may do with the knowledge, experience and contacts gained in public service after they terminate their employment with a State agency.⁴ The enactment of the revolving door provision was part of a sweeping reform in the Public Officers Law, governing business and professional activities of State officers and employees, to restore the public's confidence in government and to assure that public employees do not use their 'inside' information and contacts to the advantage of their private clients or employers.

The variety of work experiences gained by students serving State government is so broad as to preclude generalization, except to say that there is the potential that certain students, because of

their particular position or the length of time of service, may become familiar with State agencies' inner workings, personnel and specific cases, proceedings, applications, transactions or other matters. However, the Commission concludes it is less likely, in the case of student workers, that the public might reasonably question whether the students carried out their public responsibilities solely to acquire information and contacts to increase their opportunities for private gain once they terminated State service. The motive for most students who serve the State in some capacity is to augment the instruction or training they receive in school and not merely for the compensation they might receive or connections they might make.

Nevertheless, the Commission also recognizes that students utilize their experience with the State not only as an adjunct to their education, but also as a financial support to assist in pursuing their studies. In true terms, however, the service of students is not employment as much as it is a learning environment for the students and a teaching experience for the State employees involved.

The Commission also compared the status of students, serving in positions with the State, and 'traditional' State employees. Students, by and large, are ineligible for any of the health, retirement or vacation benefits available to all other State employees. Furthermore, the positions to which they are appointed set as a requirement that individuals hired actually be students; in contrast, most 'traditional' State employees must meet certain job qualifications requiring completion of a degree or licensing program. Students do not serve in permanent, competitive positions and are employed for a temporary period on less than a half-time basis.

The Commission is not prepared, at this time, to finally determine the application of the "revolving door" provision to students who serve in positions with State agencies. Interpretation of the statutory language, consideration of the intent of the Legislature and the status of students as employees require further consideration by the Commission before it will render a final Advisory Opinion. Factors that the Commission will examine include how other Ethics Laws and Commissions have treated students under a "revolving door" restriction. For example, Massachusetts, Pennsylvania and Michigan apply the "revolving door" provision to their students. The state of Washington exempts students from the "revolving door" and the federal government does not define students as covered by this provision.

In New York, the Public Employment Relations Board (PERB) is addressing the question of whether graduate assistants and teaching assistants, who are graduate students at the State University of New York, are public employees for the purposes of the Public Employees' Fair Employment Act (the "Taylor Law"). The PERB Director of Public Employment Practices and Representation ("Director") concluded that the employment of graduate assistants and teaching assistants was incident to their academic enrollment and subordinate to their student relationships. Therefore, these students were not public employees under the Taylor Law.⁵ In order to fully examine this issue and permit students to accept appointments with State agencies this summer without potential liability under the "revolving door" provision, the Commission issues this Advisory Opinion.

The Commission does not believe it would be appropriate, pending its final review of this question, to suspend all the post-State employment coverage of students by §73(8) before such a

final determination by the Commission. Actual activities in which students are involved should be subject to the lifetime bar of §73(8), pending its decision. It is important to recognize that, with a final determination, students should not be able to take advantage of their relationship with the State and utilize information they gain from actual transactions on which they work. Therefore, the Commission will not suspend the "lifetime bar" which applies to specific activities before any State agency, not just the former employing agency, with respect to which the student was directly concerned and in which he personally participated during the period of service, or which was under his or her active consideration during that time.

CONCLUSION

In light of the foregoing discussion, the Commission concludes that, from the date of this Advisory Opinion, it will suspend the application of the two-year bar for students who terminate from State service prior to September 15, 1990, and will continue to enforce the lifetime bar restrictions contained in §73(8). On or before September 15, 1990, the Commission will finally address this issue.⁶

In addition, the conclusions of this Advisory Opinion do not affect the restrictions that any code of professional ethics, e.g. for lawyers or engineers, may contain, limiting or disqualifying students because of "revolving door" activities.

This opinion, until and unless amended or revoked, shall be binding on the Commission in any subsequent proceeding.

All concur:

Elizabeth D. Moore, Chair

Angelo A. Costanza

Norman Lamm

Robert B. McKay, Members

Dated: May 10, 1990

ENDNOTES

1. According to the Department of Transportation, for example, approximately 60% of the individuals hired for three to nine months in seasonal positions are college students working toward two or four year college degrees in engineering or applied sciences. The positions are in the non-competitive class of service, are paid an hourly wage and are generally not entitled to State health, vacation, sick leave or retirement benefits.

2. Such students, performing services on this basis, should receive no fringe benefits such as vacation or sick leave, health insurance or retirement benefits.

3. This Opinion does not apply to or affect full-time or part-time employees of the State who may also be students. They will continue to be covered as State employees by §73(8). In their case, enrollment in an academic program is incidental or tangential to their State service.

4. Advisory Opinion 88-2, p.3.

5. See *In the Matter of Communications Workers of America/Graduate Students Employees Union, AFL-CIO and State of New York and United University Professions*, 20 PERB 4063 (1987). The Director's determination, issued September 3, 1987, has been appealed to the Public Employment Relations Board which has not yet issued an opinion. If the Board were to reverse the determination of the Director that graduate assistants and teaching assistants were not employees under the Taylor Law, the Commission would be constrained to find that they are also covered by §73(8) of the Public Officers Law.

6. Should the Commission finally determine that §73(8) of the Public Officers Law does not apply in any way to students as defined herein, the "lifetime bar" would also be found not to have applied during this period of suspension.