

**STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY**

Advisory Opinion No. 10-05

The lifetime bar set forth in Public Officers Law 73(8)(a)(ii) does not prohibit the former Executive Director of [Agency A] from appearing, practicing, communicating or rendering services before [Agency B] in relation to the imposition of a late fee for failing to file timely a [] statement amendment.

INTRODUCTION

The New York State Commission on Public Integrity (“Commission”) issues this advisory opinion in response to a request submitted by [], the former Executive Director of [Agency A] inquiring as to whether Public Officers Law 73(8)(a)(ii), generally referred to as the “lifetime bar,” prohibits him from representing clients before [Agency B] who wish to challenge the imposition of late fees for failing to timely file [] statements and amendments. The lifetime bar does not preclude [the requesting individual] from appearing before [Agency B] on such matters.

BACKGROUND

From [date] to [date], [the requesting individual] was the Executive Director of [Agency A], a predecessor agency of [Agency B]. During his time as Executive Director, he was deeply involved in all aspects of the creation of the present “late fee program” under which [filers] who fail to timely file their [] statements can be fined by [Agency B]. [The requesting individual] urged passage of the legislation that allowed [Agency A] to assess such fines and was the central figure in creating the administrative rules and apparatus necessary to implement the program. His involvement in, and advocacy for the creation of, this program cannot be disputed.

As part of the program, [Agency B] may assess a late fee to a [filer] who has timely filed his/her [] statement but failed to timely amend that statement to indicate changes in the terms or conditions of the [filer's] retainer or employment. This rule (and accompanying enforcement system) was enacted in [date], along with the rest of the late fee program. Again, [the requesting individual] was deeply involved.

In [date], a decade after the late fee program was in place, [Agency B] assessed a fine against a [filer] who had failed to file an amendment to his [] statement. The [filer] retained [the requesting individual] to contest the fine. [The requesting individual] appeared before [Agency B] and argued both that the fine was improperly assessed in this instance and that the entire late fee program, to the extent that it applied to [] amendments, was beyond [Agency B's] statutory authority.

The question now presented is this: Given [the requesting individual's] involvement with the creation of the late fee program, is he barred from appearing before [Agency B] to argue that a client may not be fined under that program, either because the fine was improperly imposed in that instance or because such fines generally exceed [Agency B's] authority? For the reasons discussed below, we believe no such bar exists.

APPLICABLE LAW

Public Officers Law §73(8)(a)(ii), commonly referred to as “the lifetime bar,” provides:

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 or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.

DISCUSSION

The lifetime bar is a severe restriction that must be imposed with care. Unlike the more commonly imposed two-year bar, which broadly prohibits former State employees from appearing before the agency in which they served, the lifetime bar does not preclude appearance before an agency generally, but is transaction specific. It precludes appearing on both sides of a particular “transaction.” The present request, then, centers on what is meant by a “transaction” within the meaning of the statute.

The language of the statute is instructive. “Transaction” is coupled with “case, proceeding, application.” All of these latter terms describe a particular event with defined parties, subject matter and time horizon. In this context, “transaction” should also be seen as a similarly discrete event, in which particular parties come together to conduct a particular piece of business.

Here, there is no doubt that [the requesting individual] was involved in the passage of the statute authorizing late fees as well as in the creation of the supporting regulatory and administrative program. Had this work been left unfinished, were [Agency B] still in the process of enacting regulations or the administrative scheme to enforce the program, [the requesting individual] would clearly be precluded from seeking to work on such a matter, either by soliciting employment from [Agency B] itself or by seeking employment from a third party involved with the process. This, however, is not the case. The process of creating the late fee program – the transaction here – is long finished. As noted above, transactions are not open ended and this one has run its course: The program is in place and [Agency B] is not seeking assistance or advice on its further creation, amendment or administration.

Instead, [the requesting individual] is seeking to appear before [Agency B] to represent a specific client who has been assessed a late fee. [The requesting individual], in this role, is like any other lawyer. He has no special knowledge of the transaction because the transaction involves a particular [filer] and whether a publicly enacted law and set of rules applies to it. Thus, in this matter, [the requesting individual] is no more or less persuasive than any other legal advocate arguing a case. A bar on [the requesting individual] would not further the purpose of the rule, to prevent the use of inside knowledge for private gain. [The requesting individual] has no inside knowledge of the proceeding at issue – the late fee assessed to his client.¹

A contrary conclusion would essentially make the two-year bar coterminous with the lifetime bar. Senior executives at agencies are routinely involved in legislative and regulatory amendments to their agency’s mandate. If the definition of “transaction” included later appearing before the agency on matters governed by those same amendments, it would effectively create a lifetime bar for those executives. The Legislature did not intend to broadly bar executives for life, but only for two years. It is not this Commission’s place to override such obvious intent.

The only case that comes close to addressing this matter, *Gormley v. New York State Ethics Commission*, 46 A.D.3d 1078 (3d Dep’t 2007), *aff’d* 11 N.Y.3d 423 (2008), does not in fact deal with the situation at hand. In *Gormley*, the petitioner was compensated for submitting an affidavit that relied upon his insider knowledge of a State Medicaid reimbursement system. As noted above, if [the requesting individual] were to submit a similar affidavit, and rely on insider knowledge concerning the program he helped create, he would be in violation of the

¹ Obviously, if [the requesting individual] were to take himself outside the role of legal advocate and make himself a fact witness by arguing that he has unique knowledge of what was intended by program’s creators (something he has not done) that would fall squarely within the prohibition laid out by *Matter of Gormley v. New York State Ethics Commission*, 46 A.D.3d 1078 (3d Dept. 2007), *aff’d* 11 N.Y.3d 423 (2008), which is discussed further, below.

lifetime ban. As the facts stand, however, [the requesting individual] merely represents a client who wishes to challenge the law and [the requesting individual] is acting as his lawyer in the matter – relying upon the same facts, information and legal theories as any other lawyer.

Although a number of our prior advisory opinions deal with the lifetime bar, again, none deal with the facts at hand. Several of those opinions bar former State employees from becoming involved in the crafting of legislation or regulations (*e.g.* Advisory Opinion No. 92-20, Advisory Opinion No. 93-2, Advisory Opinion No. 97-20). However, in those instances, the legislative/regulatory creation was ongoing and the former employee sought to be involved in that process, not – as here – in arguing about its subsequent applicability as a legal matter. Most of the other opinions from this Commission considering the lifetime bar involve specific, funded, projects that were established by the former employee while in State service and from which the employee then sought employment in the private sector (*e.g.* Advisory Opinion No. 91-12, Advisory Opinion 94-09, Advisory Opinion 95-04, Advisory Opinion 95-06).

In sum, neither the statute nor the cases interpreting it bar [the requesting individual's] appearance here. No doubt, [the requesting individual's] decision to repudiate a system he worked to create may strike some as embittered and hypocritical, but the law does not preclude such motivations. We are the guardians of public ethics, not private morals.

CONCLUSION

The Commission raises no statutory objection to [the requesting individual's] appearing before [Agency B] to object to late fees for his clients and to make any arguments that could be properly made by any legal advocate in that regard.

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

Concur:

Michael G. Cherkasky
Chair
Virginia M. Apuzzo
George F. Carpinello
Andrew G. Celli, Jr.
Richard D. Emery
John T. Mitchell
Mark G. Peters
Joseph A. Spinelli,
Members

Dissent:

John M. Brickman
Hon. Howard A. Levine
Members

DISSENTING OPINION

Because the Commission's advisory opinion does not follow, satisfactorily distinguish, or give a reasonable explanation for its implicit rejection of controlling judicial decisions and overruling of this Commission's own precedent, we respectfully dissent.

It is self-evident that we are bound by the decisions of appellate courts having jurisdiction to review the Commission's determinations, and we have no license to ignore their holdings. We are also bound to follow Ethics Commission opinions (which in any event we have adopted as the opinions of this Commission) until and unless we overrule them expressly, and then we

must explain our reasons for doing so. Executive Law §94(1); *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516, 517 (1985) (“A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious”); *see Borchers and Markell, New York State Administrative Procedure & Practice (2 Ed.)* § 3.15, p. 60 (“One fundamental obligation of agencies when they adjudicate is to decide consistently, or offer a reasoned explanation for departures from precedent”); *see also* NYJUR COURTS §219 (“Where an administrative agency does not follow its own precedents in deciding a case involving essentially the same facts, the agency must set forth its reasons for the departure, or the reviewing court must reverse the agency decision as arbitrary and capricious as a matter of law”). Thus, consistent with controlling judicial authority, the Commission and its predecessor correctly have refused to embrace a literal or narrow view of “transaction” for purposes of construing or applying Public Officers Law §73(8)(a)(ii).

First, we believe that *Matter of Gormley v. New York State Ethics Commission*, 46 A.D.3d 1078 (3d Dept. 2007), *affirmed*, 11 N.Y.3d 423 (2008), must control the Commission’s opinion here and requires a different result. There, the Appellate Division and the Court of Appeals upheld the Ethics Commission’s assessment of a \$3,500 civil penalty against a former employee of the Department of Health (“DOH”) for violating the lifetime bar by submitting an affidavit supporting several nursing homes’ Article 78 proceeding challenging the continued use of RUGS-II, the methodology to determine Medicaid reimbursement rates for nursing homes that the former employee had developed and implemented twenty years before, while he was in State service. In his brief, the former employee suggested that the RUGS-II methodology was not a transaction to which the lifetime bar applied, but the Third Department necessarily disagreed and

found that the RUGS-II was a transaction; otherwise, it would not have and could not have upheld the Commission's assessment of a civil penalty.² Although *Gormley* involved different facts than this matter, the distinctions are not material and the conclusion in *Gormley* as to the scope of "transaction" for purposes of the lifetime bar applies here without qualification.

Similarly, in *McCulloch v. New York State Ethics Comm'n*, 285 A.D.2d 236 (3d Dep't 2001), the Third Department agreed that, as used in the lifetime bar statute, "transaction" should not be construed and applied literally and thus upheld the Ethics Commission's application of the lifetime bar to penalize a former senior planner for the Tug Hill Commission for administering a grant for a town in Oneida County for which the former employee had prepared a successful application while in State service. The Third Department agreed with the Ethics Commission that the grant constituted a transaction on which the former senior planner had worked as a State employee, relying on the Governor's memorandum in support of the lifetime bar provision, Governor's Program Bill Mem. Bill Jacket, L. 1987, ch. 813, at 7, *cited in McCulloch*, 284 A.D.2d at 241.

It is inappropriate, in our view, for this Commission, in an Advisory Opinion, to adopt a construction of a critical statutory term that is inconsistent with the view taken by the Court of Appeals and the Appellate Division with direct jurisdiction over us.

Several Ethics Commission Advisory Opinions have also determined that "transaction" should not be construed and applied literally and narrowly in this context, determining that former employees had been involved in "transactions" within the meaning of the lifetime bar.

² In the Court of Appeals, the former DOH employee abandoned his contention that he had not violated the lifetime bar and argued only that his violation was not knowing and intentional. The Court of Appeals affirmed the Third Department's finding that substantial evidence supported the Ethics Commission's determination that the former DOH employee knowingly and intentionally violated the lifetime bar by submitting the affidavit.

Such Advisory Opinions include Nos. 92-20 (former State agency director barred from lobbying on behalf of client regarding bills, first introduced in a different legislative session, on which he worked during his State tenure; legislation held to be a transaction with respect to which the lifetime bar applies); 93-02 (former State employee's participation in the development of legislation prohibited his participation, after leaving State service, in the development of regulations authorized by the legislation) ("Regulations are inextricably connected to the enabling legislation they seek to effectuate. The knowledge, experience and expertise gained in drafting a statute become invaluable tools when seeking to shape the regulations needed to accomplish the mission of that statute. This knowledge may also be used to influence and effectuate significant policy determinations that were not otherwise articulated or successfully incorporated into the original statute. Certainly the use of 'insider' knowledge in either manner constitutes the very evil that [the lifetime bar] is designed to address."); 95-26 (former agency employee barred from performing activities related to programmatic and budgetary matters that would amend, modify, or repeal initial decisions in which she was involved during State service, and from activities relating to modification of policies and procedures that she reviewed or on which she commented while at the agency, since her proposed post-employment work would have involved the same transaction); and 97-20 (reconsidering 96-24 R) (former employee who drafted regulations related to "continuation of the base" could not participate in the specific segment of a task force that was established to review and revise the same "continuation of the base" regulations that were still in effect; Commission found that the proposed work would relate to a transaction on which the former employee worked in State service, and deemed it important that the subject regulations remained in effect).

The unduly narrow reading of “transaction,” in terms both of time and scope, adopted by the majority cannot be reconciled with Commission precedents and the majority has not really attempted to do so. Nor has the majority offered a reasoned explanation for disregarding the precedents. It merely adopts a different interpretation which largely was accomplished by reason of changes in the composition of the Commission.

It is noteworthy that despite the broader reading of “transaction” in Commission precedents for two decades, the feared conversion of the two-year statutory ban to a lifetime ban for agency counsel and executive directors – the majority’s principal justification for its decision – has not occurred.

Here, for seven years after the [] Act amendment, [the requesting individual] personally, actively, and directly participated in the [Agency A’s] development, implementation, administration, and enforcement of the late fee program that the statutory amendment authorized, creating and implementing policies, procedures, and related internal control documents, as well as published Guidelines and practices. Based on the policies, practices and procedures that he created and implemented, during [the requesting individual’s] tenure [Agency A] repeatedly imposed late fees on [filers] who filed untimely [] statements, [] amendments, and other required reports. As the majority concedes, [the requesting individual’s] “involvement in, and advocacy, for . . . this program cannot be disputed” (Opinion, p. 1).

Under all of the circumstances, and in light of judicial decisions and this Commission’s previous advisory proceedings and enforcement actions, none of which have been distinguished or shown to be erroneous, we believe that we must determine that [the requesting individual’s] representation of his client on a claim that there is no statutory authority to impose a late fee for

an untimely [] statement amendment is in relation to a transaction on which he worked while in State service, and hence requires application of the lifetime bar.³

Therefore, we respectfully dissent.

Date: December 9, 2010

³ In reaching our view of the matter, we have given no consideration to our independent belief that it would be unseemly for [the requesting individual] to argue, whether to this Commission or a court, the invalidity of our enforcement of the [] late fee program. The only concern of this Commission is whether the proposed conduct falls within the statutory proscription of Public Officers Law §73(8)(a)(ii). Other issues are for other fora or other agencies. Determining whether, for example, the proposed conduct of [the requesting individual] (who is an attorney) violates Rule 1.9 of lawyers' Rules of Professional Conduct (22 NYCRR Part 1200, Rule 1.9[a], [c][1], or [c][2]) lies outside the jurisdiction of this Commission.