



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 11

June 4, 1992

Application of revolving door prohibition to former members of governing bodies of regulatory agencies. (AOR-4)

The Texas Ethics Commission has been asked to consider whether section 7A(a) of article 6252-9b, V.T.C.S., applies to a former member of a governing body of a regulatory agency who left employment with the agency before the effective date of the act.

Section 7A, which contains the so-called "revolving door" prohibitions, provides in part as follows:

(a) A member of the governing body or executive head of a regulatory agency may not make, with the intent to influence, any communication to or appearance before an officer or employee of the agency in which the person served, before the second anniversary of the date the person ceases to be a member of the governing body or executive head of the agency, on behalf of any person in connection with any matter on which the person seeks official action.

(b) A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility. This subsection does not apply to a rule-making proceeding that was concluded before the officer's or employee's service or employment ceased.

V.T.C.S. art. 6252-9b, § 7A(a), (b). In short, subsection (a) applies to a former board member or executive head of a regulatory agency and prohibits the former board member or executive head from communicating with the agency in an attempt to influence agency action for a period of two years. Subsection (b) applies to a former officer or employee and prohibits, forever, the officer or employee from performing work relating to matters in which the former officer or employee participated during his tenure with the agency.

Subsection (b) expressly states that it is applicable only to an officer or employee who ceases service or employment on or after January 1, 1992. Subsection (a), in contrast, contains no such statement. The absence of such a statement in subsection (a) has led to the suggestion that subsection (a) applies to a person who ceased service before January 1, 1992. If that were so, a person whose term on the board of a regulatory agency ended in December 1990 would be prohibited from appearing before the agency until December 1992. The requestor has asked the commission to consider whether the prohibition set out in subsection (a) applies to a former board member of a regulatory agency who ceased service before January 1, 1992, or whether it only applies to a person who ceased service on or after that date.¹

After reviewing different versions of the ethics bills that were considered by the legislature in 1991, we conclude that the difference in language between subsection (a) and subsection (b) was not intended to signify a difference in application, but rather was a by-product of the committee process of piecing the different versions of the bill together. During the 1991 regular session two ethics bills were introduced, one in each house of the legislature,

containing several "revolving door" prohibitions similar to those that were eventually adopted in section 7A of article 6252-9b. S.B. 1, Acts 1991, 72d Leg., ch. 304, § 3.06, at 1318-19; H.B. 1, 72d Leg. (1991). The two revolving door prohibitions in House Bill 1 each contained an express statement that it applied to a person "who ceases service or employment . . . after January 1, 1992." H.B. 1, 72d Leg. (1991) (section 3.05 of the unenacted bill proposed adding section 7A to article 6252-9b, V.T.C.S.; subsections (b) and (d) of proposed section 7A contained the revolving door prohibitions). The revolving door prohibitions in Senate Bill 1, in contrast, contained no such language. The ethics bill that was ultimately adopted contained one revolving door prohibition written in language that came largely from House Bill 1 and one revolving door prohibition that came largely from Senate Bill 1. Thus the legislative history tends to controvert the suggestion that the two provisions were intentionally worded differently so that they would operate differently. Therefore, we do not think it is appropriate to conclude, simply on the basis of the different language of subsection (b), that subsection (a) applies to a person who ceased service before January 1, 1992.

The critical language in subsection (a) is that it applies to a person who "ceases to be a member" of a governing body. The use of the word "ceases" rather than "has ceased" indicates that the cessation must be after the effective date of Senate Bill 1. *See Trio Indep. School Dist. v. Sabinal Indep. School Dist.*, 192 S.W.2d 899 (Tex. Civ. App.--Waco 1946, no writ) (statute speaks as of effective date). Further, it is a general rule of statutory construction in Texas law that statutes are intended to operate prospectively. *Ex parte Abell*, 613 S.W.2d 255 (Tex. 1981). Any doubt is to be resolved in favor of prospective application. *Id.* In one sense, subsection (a) would operate prospectively even if it applies to persons who ceased service before January 1, 1992, since it would still only prohibit acts occurring on or after January 1, 1992. In another sense, however, it would operate retroactively because it would place prohibitions on a person because of a status acquired before January 1, 1992. There is probably no constitutional impediment to such a construction. *See generally State v. Project Principle, Inc.*, 724 S.W.2d 387 (Tex. 1987) (regarding unconstitutionality of retroactive legislation that affects vested rights and holding that licensed teachers may be required to take examination to retain license); *Bryant v. State*, 457 S.W.2d 72 (Tex. Civ. App.--Eastland 1970, writ ref'd n.r.e.) (right to practice law may be affected by subsequent legislation). Nonetheless, we think such a construction is contrary to the general principle of prospective application of statutes. *See Coastal Indus. Water Auth. v. Trinity Portland Cement Division, General Portland Cement Co.*, 563 S.W.2d 916 (Tex. 1978) (holding that statutes will be applied prospectively even when there is no constitutional impediment against retroactive operation). In light of those considerations, we conclude that subsection (a) of section 7A of article 6252-9b applies only to a person who ceases service with the state on or after January 1, 1992.

SUMMARY

Subsection (a) of section 7A of article 6252-9b, V.T.C.S., which prohibits a former board member or executive head of a regulatory agency from communicating or appearing before the agency to influence any agency action for two years after the end of the person's tenure with the agency, applies only to a person who ceases service with the state on or after January 1, 1992.

¹ The question is not resolved by reference to the language in Senate Bill 1, which states that Senate Bill 1 (the source of section 7A of article 6252-9b) applies to a "gift, contribution, expenditure, honorarium, compensation, reimbursement, benefit, or other thing of value offered, made, received, or accepted" on or after January 1, 1992. S.B. 1, Acts 1991, 72d Leg., ch. 304, § 8.01, at 1337. That provision does not speak directly to the question before us since the focus of the question is the effect of a provision in regard to a status acquired before January 1, 1992.