



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 44

September 9, 1992

Applicability of "revolving door" prohibitions to a former officer of a regulatory agency under various situations. (AOR-12)

The Texas Ethics Commission has been asked several questions about the application of section 7A(a) of article 6252-9b, V.T.C.S. Section 7A contains what are called "revolving door" prohibitions. Subsection (a) of section 7A places certain limitations on former members of regulatory agencies:

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.

See [Ethics Advisory Opinion No. 11](#) (1992).

For conduct to be prohibited under section 7A(a) of article 6252-9b, the former executive director or former board member must be making an appearance before or in some other way communicating to an officer or employee of the regulatory agency. This communication or appearance must be made with an intent to influence. It also must be made in connection with a matter that the person on whose behalf the appearance is being made seeks official action. V.T.C.S. art. 6252-9b, § 7A(a).

The requestor has asked whether a communication or appearance by a former board member on his own behalf would be a communication or appearance "on behalf of any person" for purposes of the provision in question.¹ Communications or appearances "on behalf of any person" include communications or appearances on the former officer's own behalf. See 18 U.S.C. § 207 (federal revolving door prohibitions apply to communications on behalf of any *other* person).

In the first situation presented, the officer or employee contacts a former board member of the regulatory agency for advice or information. The requestor does not clearly state whether the former board member has the intent to influence the agency officer or employee. However, just because the former board member is not the one who initiated the contact does not relieve the former board member of the section 7A(a) restrictions. If the former board member does not seek or intend to influence the agency officers or employees, but merely supplies information, section 7A(a) would not apply.

In the second situation presented, the former board member initiates contact with current agency officers, employees, or board members. The former member discusses some matters that are related to the agency's regulatory authority over him and some matters that are not related. Another topic of discussion is agency business that could have a financial impact on the former board member. The initial question is whether the former board member made the communication with the intent to influence the employees or officials. The question is not how persuasive the former member was in his communication or appearance, but rather what was intended by the communication. The topic discussed and the type of presentation made by the former board

member could, of course, be evidence of an intent to influence, irrespective of disavowals. Also, the fact that the former board member was the one who initiated the contact could indicate an intent to influence.

If there is an intention to influence action, the next element that must be present to make this a prohibited communication or appearance is that the communication or appearance was "in connection with any matter on which the person seeks official action."² V.T.C.S. art. 6252-9b, § 7A(a). This element does not consider whether official action is ultimately taken, but whether official action is being sought by the former member. If there is an intent to influence official action, then the communication is prohibited by section 7A(a).³

In the final situation presented, the former board member is communicating with or appearing before the agency with an actual intent to influence agency action. This situation meets the intent element of the inquiry as to whether this communication or appearance is prohibited under section 7A(a). This communication is prohibited if intent is present and official action is sought.

SUMMARY

For two years after the date a former board member of the governing body of a regulatory agency ceases to be a member of the agency, that person is prohibited from making an appearance before or communicating with current officers and agency employees, with the intent to influence, on behalf of any person in connection with any matter on which the person seeks official action. The prohibition applies to appearances or communications that the former official makes on his own behalf, except as limited by the due process clause of the United States Constitution. The prohibition applies regardless of whether the former official initiates the contact with his former agency or whether the action sought is ever taken.

¹ Under the due process requirements of the federal Constitution, a former officer may in some circumstances be entitled to appear before or communicate with his former board. U.S. Const. amend. XIV; see *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (failure to afford respondent opportunity to present complaint held to be a denial of due process). In such cases, section 7A must yield.

² This would exclude attempts to influence current agency officers or employees in regard to matters outside the agency's authority. For example, an attempt to persuade an employee to vote for a certain political candidate would not be an attempt to influence agency action.

³ We note that a person could seek to persuade the agency to take no action on an issue. An agency decision to not take action on a particular matter could constitute official action.