



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

CHAPTER # 640
APPROVAL # 46

OCT 07 2008

MEMORANDUM filed with Senate Bill Number 8699, entitled:

"AN ACT to amend the education law and the retirement and social security law, in relation to professional services providers"

A P P R O V E D

During the past year, an investigation by the New York State Attorney General revealed significant abuses in the New York State pension system. Such abuses included independent contractors participating in our employee pension system, and recently retired school district employees returning to their same positions and receiving both pension and salary. This bill was introduced in response to the findings of the Attorney General's investigation, and institutes a wide variety of important reforms to the public pension system. Among other provisions, it forbids attorneys from acting both as employees and independent contractors of school districts and boards of cooperative education; fosters greater disclosure through additional reporting requirements; creates additional civil and criminal enforcement remedies; and clarifies the requirements that must be met before a public employer may hire an individual who continues to receive a New York public pension. I am grateful to the Attorney General for having brought these issues to light, and to the sponsors for having so quickly advanced a legislative response. I am proud to be a part of this reform effort, and to sign this legislation into law.

One section of the bill amends Retirement and Social Security Law (RSSL) § 211, which allows state agencies and local governments to obtain permission (via a so-called "211 waiver") to employ an individual while that individual also receives a New York State or local government pension. This provision has played an important role in New York's workforce management, particularly in the law enforcement arena, although it is also crucial for filling other jobs, such as nurses and school bus drivers. Some parties have sought assurance that the bill would allow for continued use of 211 waivers when necessary. I believe the sponsors have been careful to ensure that it does, while at the same time addressing the abuses found in the investigation.

The import of this portion of the legislation is clear and unmistakable: the public must be protected from improper "double-dipping," especially in these trying economic times, while employers must perform their governmental functions using the best available talent, giving careful thought and consideration to all factors in hiring. I trust that the Civil Service Commission and other officers, commissions and boards authorized to approve waivers will fulfill their obligations to see that the public is served by the implementation of this legislation and that the agencies of government continue to have the tools necessary to protect the public interest.

Already under present law, 211 waivers may only be obtained under limited circumstances. They may only be granted for periods of up to two years, and the prospective employer must show that qualified, non-retired persons are not readily available for recruitment. Some have expressed concern, however, that the hiring of retirees under a 211 waiver, when their services are legitimately needed, will be unduly restrained by a provision in the bill that would bar a retiree from "return[ing] to work in the same or similar position for a period of one year following retirement." Here, the specific abuse uncovered in the Attorney General's investigation was that employees retired and then immediately returned to a position with essentially the same functions. When this occurs, the employee is able to have his or her cake and eat it – to retire and continue in the same capacity as a full time employee, with the taxpayers footing the bills for both pension and compensation payments.

I strongly share the goal of the sponsors to end this practice. This provision need not, however – and should not – be read to bar an employer from hiring a recent retiree under a 211

waiver merely because the same types of skills are required for the new position and the work the individual previously performed. For example, nothing in this language would bar a recently retired police officer from receiving a 211 waiver to work as an investigator in a district attorney's office. Indeed, the productive use of the investigative skills possessed by such an officer is the epitome of what section 211 seeks to achieve.

Other concerns have been raised about the bill's requirements that a prospective employer seeking a 211 waiver prepare a "detailed recruitment plan to fill such vacancy on a permanent basis," and (unless the waiver is needed to meet a sudden or unexpected circumstance), attest that it has "undertaken extensive recruitment efforts to fill such vacancy and as a result thereof, has determined that there are no available non-retired persons qualified to perform the duties of such position." Again, I think this is a salutary provision requiring employers to fully and openly explain the need for such waivers, but it would not prohibit appropriate 211 waivers, such as those used currently by law enforcement bodies. Waivers issued under RSSL § 211 have always been temporary, and the employing authority at issue must look for qualified, non-retired candidates during their pendency. The bill requires that such recruitment efforts be set forth in a plan. It does not mandate the contents of the plan, nor does it require that recruitment efforts be undertaken even when it is clear they would be fruitless. Rather, it requires a reasonable effort to find non-retired personnel, albeit with greater specificity as to the requirement that there be prior disclosure of the intended recruitment efforts.

As to the requirement that there be "no available non-retired persons qualified to perform the duties of such position," the key here is that the available alternative to retirees must be "qualified." When there are qualified active employees available, there should be no need for a 211 waiver. In contrast, when an extensive law enforcement background is needed to carry out the responsibilities of a position, and the only available individuals that possess those skills are retirees, the prospective employer will be eligible under this law to hire them.

Finally, I note that the bill contains a grandfather clause which will ensure that agencies currently hiring numerous individuals under 211 waivers will not face extensive turnover of their experienced employees. The amendments to RSSL § 211 do not apply to individuals "to whom waivers were granted prior to the effective date of this act." Thus, any individual for whom a 211 waiver is in effect upon enactment will remain subject to the previous § 211 standards. The bill also wisely provides for the issuance of 211 waivers in certain exigent circumstances, as an alternative to the standard 211 process set forth in the bill.

I urge the New York State Civil Service Commission and all officers, commissions and boards authorized to approve waivers to issue regulations and other guidance consistent with this message.

As the above makes clear, the crafters of this legislation have taken on a complex and difficult issue. While I fully respect the concerns expressed about this bill, I am confident that this bill allows the continued use of 211 waivers where warranted, while addressing the very real problems in the pension system unearthed by the Attorney General's investigation.

The bill is approved.