

Political Fundraising

Charter Sections: 2604(b)(3), (9), (11), and (12)

Opinions Cited: 92-25, 93-6, 95-13

Advisory Opinion No. 2001-1

In a case of first impression, a high-ranking public servant has requested the Board's advice concerning soliciting contributions in support of the public servant's campaign for an elective office of the City. In more particular, the public servant asks whether Charter Section 2604(b)(12), which, among other things, prohibits appointed public servants with substantial policy discretion from directly or indirectly asking **anyone** for contributions to a candidate for City elective office, applies when the public servant is the candidate and, if so, precisely what conduct is prohibited by that provision.

Background

The public servant is a high-ranking appointed official who has been designated by his agency, pursuant to Board Rules Section 1-02, as a public

servant “charged with substantial policy discretion.” The public servant has announced his intention to seek City elective office in the municipal elections to be held in 2001. The public servant further informs the Board that among his opponents for the office which he seeks is a City elected official. The office which they seek is not the office which his opponent currently holds, *i.e.*, his opponent is not running for re-election but is running for a different City elective office.

The Board further notes that there appear to be other high-ranking public servants similarly situated, namely, they are appointed public servants identified by their agencies as being charged with substantial policy discretion; they have announced an intention to seek City elective office in the 2001 elections; they have likely opponents who are currently serving the City as elected officials; and the office for which they will likely compete is not the office which their opponent, the elected official, currently holds.¹

Discussion

Charter Section 2604(b)(12) reads as follows:

No public servant, other than an elected official, who is a deputy mayor, or head of an agency or who is charged with substantial policy discretion as defined by rule of the board, shall directly or indirectly request any person to make or pay any political assessment, subscription or contribution for any candidate for an elective office of the city or for any elected official who is a candidate for any elective office; provided that nothing contained in this paragraph shall be construed to prohibit such public servant from speaking on behalf of

¹ The explanation for this circumstance, one that in the Board’s history appears to be a new phenomenon, is that the 2001 election is the first in which the recently enacted term limits law will prevent City elected officials from seeking re-election.

any such candidate or elected official at an occasion where a request for a political assessment, subscription or contribution may be made by others.

The Charter Revision Commission in its comment on this provision stated the following:

The prohibition recognizes the actual or implied coercion which may exist when people in policy-making positions raise money for political campaigns....The prohibition applies to any request, whether made “directly” or “indirectly.” Individuals subject to the prohibition cannot escape its application by having others make the solicitations on their behalf. The provision makes clear, however, that speaking on behalf of an elected official at a function where solicitations may be made by others is not in and of itself prohibited.

See Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, pp. 179-180.

The history of the provision also includes the following colloquy during a meeting of the Charter Revision Commission indicating that the drafters realized that the prohibition would apply when the policy-making official was himself or herself the candidate, and further indicating that the drafters believed that if the prohibition was too onerous, the candidate had the option of resigning from public service:

COMMISSIONER BETANZOS: What happens if one of the Deputy Mayors, a head of an agency, decides he wants to run for office. According to this—

MR. LANE: They may not do this solicitation.

COMMISSIONER BETANZOS: They are going to go through this run for office, without—

COMMISSIONER GRIBETZ: He could resign.

See Transcript of August 10, 1988, Meeting of the New York City Charter Revision Commission, p. 168.

The Board's advisory opinions interpreting Section 2604(b)(12), none of which involves a case where the appointed public servant charged with substantial policy discretion is the candidate, shed little light on the questions presented.²

In light of the above, the Board for several reasons determines, first, that the language of Section 2604(b)(12) prohibiting a public servant with substantial policy discretion from soliciting a campaign contribution "for any candidate" cannot reasonably be construed not to reach the public servant who is himself the candidate. This is the natural reading of the provision, and nothing in its language suggests otherwise; the Charter Revision Commission transcript, if slight, suggests that the drafters so intended; and, perhaps most persuasively, the evil sought to be prevented, namely, the coercive use of office, is certainly as likely to be present when one is soliciting contributions for one's own campaign as when one is asking for a third party's campaign.

We recognize the arguable unfairness of applying this prohibition to a high-ranking appointed public servant who happens to be running against an elected official, who by the terms of the Charter is not prohibited from fundraising. It may seem even more unfair when the elected official is

²These opinions include Opinion No. 92-25, where the Board stated that service by an appointed public servant with substantial policy discretion as an officer or director of a political action group would violate that provision, since the group was a political fundraising organization; Opinion No. 93-6, where the Board determined that the mere listing of a public servant's name, along with several dozen others, on an invitation to a political fundraiser did not in and of itself constitute a solicitation prohibited by Section 2604(b)(12); and Opinion No. 95-13, where the Board determined that a high-ranking official could not host a political fundraiser in his home, though his non-public servant spouse could, but where the Board further determined, relying substantially on the proviso permitting speaking at fundraising events, that the public servant could attend the event without violating Section 2604(b)(12).

running, not for re-election, but for a new office, because it may not seem unreasonable to require such a candidate to resign his elected office before fundraising. The Charter however permits no such interpretation. Likewise, under the Charter, to carve out an exception for a high-ranking appointed official running against an elected official would overstep the line between interpreting and rewriting the law.³ The Board therefore determines that Section 2604(b)(12) does apply when a public servant charged with substantial policy discretion is running against a City elected official, even one not seeking re-election.

Next, as to the precise meaning of the prohibition when the appointed public servant charged with substantial policy discretion is the candidate, the Board determines the following:

- (1) The prohibition on direct solicitation means that the public servant cannot personally speak with, call, write to, or otherwise communicate with anyone to ask for a contribution to his or her campaign.
- (2) The prohibition on indirect solicitation means that individuals and groups associated with the public servant candidate, including without limitation his or her campaign committee, may similarly not solicit contributions from anyone on behalf of the campaign.

³ The Board notes that such an exception, again arguably, might be contrary to the purpose of the provision. An appointed official can misuse his position in support of his campaign fundraising, whoever his opponent. As for an elected official running for office, it is commonly understood that elected officials will retain their office while they campaign, whether for reelection or for a higher elective office.

Thus, when a public servant with substantial policy discretion is a candidate for City elective office, the Board concludes that Section 2604(b)(12) essentially limits his or her fundraising to the accepting of unsolicited contributions.

Because the Board has not previously spoken on this issue, because its determination, as compelled as it appears to the Board to be, may well have been unexpected not only by the public servants affected but by disinterested observers as well, and in order to give public servant candidates and their City agencies the opportunity to make any necessary transitions, the Board will suspend enforcement of this interpretation until April 1, 2001. More particularly, the Board will not initiate enforcement proceedings under Charter Section 2604(b)(12) against any public servant for soliciting contributions for his or her own campaign on account of any such solicitation occurring prior to April 1, 2001. In all other respects, Section 2604(b)(12), as well as all other Charter provisions touching on political activities, including without limitation Sections 2604(b)(3), (b)(9), and (b)(11), will naturally continue to be enforced.

Conclusion

As stated above, the Board is constrained to conclude that the prohibition in Charter Section 2604(b)(12) against appointed public servants charged with substantial policy discretion requesting contributions for candidates for City elective office applies even when the public servant is the

candidate, and even when the public servant is running against a City elected official for an office other than that which the elected official holds. The Board also determines that the prohibition means that both the public servant candidate and those acting on his or her behalf, including without limitation his or her campaign committee, may not solicit contributions from anyone. As also stated, the Board effectively suspends this interpretation until April 1, 2001.

Benito Romano

Acting Chair

Bruce A. Green

Jane W. Parver

Dated: January 30, 2001