CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD
2 Lafayette Street, Suite 1010
New York, New York 10007
(212) 442-1400
Fax: (212) 442-1407 TDD: (212) 442-1443



**Waiver of Post-Employment Restrictions**

Charter Sections: 2601(4), 2601(15), 2601(17), 2604(d)(2), 2604(d)(4), 2604(d)(5), 2604(d)(6), 2604(d)(7), 2604(e)

Opinions Cited: 91-8, 92-17, 93-8, 93-13, 94-7, 94-15, 94-19, 94-21, 97-1, 2000-2, 2003-4

## Advisory Opinion No. 2008-4

In Advisory Opinion 2000-2, the Conflicts of Interest Board (the "Board") reexamined post-employment waivers in light of the growing phenomenon of "public-private partnerships." In that opinion, the Board considered when it would be appropriate to grant waivers of both Chapter 68's one-year ban on appearances before one's former agency and its lifetime ban on involvement in particular matters in which one had been substantially involved as a public servant, where the former public servant now worked for a not-for-profit entity involved in a joint endeavor with his or her former City agency. The Board then concluded that, in the case of such a "public-private partnership," it would relax somewhat the historic four-part "exigent circumstances" standard for granting post-employment waivers, on the

premise that the public servant "effectively remains in public service" when employed by an entity involved in such a partnership.

The Board has now determined that it would be useful to review the accumulated experience of the past eight years to clarify what the Board will and will not deem to be a public-private partnership, and the consequences for the Board's determination on whether or not to grant a post-employment waiver.

**Relevant Law**

Charter Section 2604(d) contains a number of provisions restricting the conduct of public servants who have left, or are contemplating leaving, City service. These provisions, referred to as the post-employment restrictions, are intended to prevent public servants from exploiting public office for personal gain, from exerting special influence on government decision-making by virtue of their "inside knowledge" or personal relationships developed during City service, and/or from subordinating the interests of the City to those of a prospective or new employer. See Advisory Opinion No. 93-8, at 2.

Charter Section 2604(d)(2) (the one-year appearance ban) provides: "No former public servant shall, within a period of one year after termination of such person's service with the city, appear before the city agency served by such public servant...." An "appearance" is defined as "any communication, for compensation, other than those involving ministerial matters."[1] See Charter Section 2601(4).

[1]A "ministerial matter" is defined in Charter Section 2601(15) as "an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion."

Charter Section 2604(d)(4) (the lifetime particular matter ban) provides: "No person who has served as a public servant shall appear, whether paid or unpaid, before the city, or receive compensation for any services rendered, in relation to any particular matter involving the same party or parties with respect to which particular matter such person had participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities." A "particular matter" is defined as "any case, proceeding, application, request for ruling or benefit, determination, contract limited to the duration of the contract as specified therein, investigation, charge, accusation, arrest, or other similar action which involves a specific party or parties, including actions leading up to the particular matter; provided that a particular matter shall not be construed to include the proposal, consideration, or enactment of local laws or resolutions by the council or any action on the budget or text of the zoning resolution." See Charter Section 2601(17).

Charter Section 2604(d)(5) provides: "No public servant shall, after leaving city service, disclose or use for private advantage any confidential information gained from public service which is not otherwise made available to the public."

Charter Section 2604(d)(6), referred to as the "government-to-government exception," provides: "The prohibition on negotiating for and having certain positions after leaving city service, shall not apply to positions with or representation on behalf of any local, state, or federal agency."

The post-employment provisions of Charter Section 2604(d) may be waived by the Board under certain circumstances. Thus, Charter Section 2604(e) provides: "A public servant or former public servant may hold or negotiate for a position otherwise prohibited by this section, where the holding of the position **would not be in conflict with the purposes and interests of**

**the city**, if, after written approval by the head of the agency or agencies involved, the board determines that the position involves no such conflict. Such findings shall be in writing and made public by the board." (Emphasis added).

## Background

In a series of advisory opinions in its first decade, the Board applied Charter Section 2604(e) to grant waivers of the post-employment restrictions, including the one-year appearance ban, "where justified by compelling circumstances in a particular case." However, the Board warned that it would grant such waivers "sparingly, and only in exigent circumstances." See Advisory Opinion Nos. 91-8 and 92-17. In these opinions in the 1990s, the Board identified four factors to be considered in respect to determining whether there were such "exigent circumstances": (1) the relationship of the City to the public servant's prospective employer; (2) the benefits to the City if the waiver were granted; (3) the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver were granted; and (4) the extent to which the public servant had unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person. See generally Advisory Opinion Nos. 94-15 and 94-19.

In Advisory Opinion No. 2000-2, however, noting that City agencies had been increasingly developing "public-private partnerships" with not-for-profit organizations that perform services recognized to be in the City's interests, the Board carved out an important exception to the strict application of this four-factor test. The Board reasoned that if the former public servant is working in a public-private partnership, the harms that the law was designed to prevent were less likely to be present. Although the former City employee has not continued

with another branch or agency of government, thus literally triggering the government-to-government exception of Charter Section 2604(d)(6), he or she has "effectively remained in public service," thus at least coming within the purpose of that exception. See Advisory Opinion No. 2000-2, at 5. In such cases, the Board concluded, the four waiver factors need not all be satisfied when "one or more of the factors are particularly compelling." *Id.* at 4. When the City and such not-for-profit partners share an "identity of interest," the City benefits from encouraging former City employees to effectively remain in public service by working for them, so a waiver of the post-employment restrictions will generally be granted. *Id.* at 5.

**Discussion**

The Board's recent experience with respect to requests to waive the post-employment restrictions suggests the need to provide more specific public guidance for future post-employment waiver applicants, and for the agency heads whose approval of these applications is a necessary prerequisite to any waiver by the Board. In particular, the Board believes it will be helpful to define "public-private partnerships" with greater clarity.

As noted in Advisory Opinion No. 2000-2, a public-private partnership may be found to exist where the City's interest is so deeply aligned with the actions of the private entity, whether in regard to the overall mission of the private entity itself, or to the applicant's duties and role with the private entity. As a general matter, however, the Board has not simply looked to whether the not-for-profit entity provides an important public service; indeed, by that standard, an overwhelming number of the City's not-for-profits could be deemed partners of the City. Instead, in determining whether the former public servant has "effectively remained in public

service," the Board looks for indicia that the new employer is truly engaged in a joint public interest venture with the City, and is not merely a vendor providing services to a City agency.

The dichotomy between "partner" and "vendor" is easy enough to state, but it is not so easy to draw the line between the two when considering the range of entities, and of relationships between those entities and the City, that have been presented to the Board in recent waiver requests. These waiver requests have in fact revealed a continuum, ranging at one extreme from private entities that are virtually indistinguishable from City agencies to, at the other extreme, entities that, while providing critical services, are at bottom simply City vendors.

At one end of the continuum are entities for which a former public servant will not even require a post-employment waiver: entities that, while nominally private, have been determined to be "an arm of City government for purposes of Charter Section 2604(d)(6)," the government-to-government exception to the post-employment restrictions. For example, in Advisory Opinion No. 97-1, the Board concluded that the Brooklyn Public Library was "an arm of City government," citing such earlier Opinions as Nos. 93-13, 94-7, and 94-21, which made similar determinations, on a case-by-case basis, regarding certain local development corporations and business improvement districts.

Only slightly removed from arms of City government are certain not-for-profit entities so closely linked with City agencies and offices that the Board has approved them pursuant to Advisory Opinion No. 2003-4 as City-affiliated not-for-profits eligible to be the beneficiaries of public servants' fundraising from the private sector. Such "City-affiliated" not-for-profits are typically entities that were originally created by public officials for the express purpose of supporting programs of the City, or of specific City agencies, and whose governing structure continues to involve public officials, acting *ex officio* by virtue of their City positions, as officers

and board members. While such entities are not "arms of City government" for the purposes of Charter Section 2604(d)(6), the Board has, on the authority of Advisory Opinion No. 2000-2, regularly granted post-employment waivers to former City employees who resigned their City positions to join the payroll of such affiliated entities.

A prominent example of such a City-affiliated not-for-profit is the Fund for Public Schools, an organization created by the Department of Education ("DOE"), with a board of directors headed by the Chancellor, whose purpose is to raise private funds to support the work of the DOE. Public servants leaving the DOE to join the payroll of the Fund for Public Schools have in many cases continued doing work similar to the work they performed while on the DOE payroll, and at salaries little different from their final City salaries. Indeed, in judging whether a former public servant "effectively remains in public service" for the purpose of post-employment waivers, the Board as a matter of course considers the individual's salary before and after he or she left the City's payroll.

In granting post-employment waivers to former public servants who leave their City jobs to work for such affiliated not-for-profits, the Board has recognized that the ability of employees of such private entities to communicate with the agencies that created and govern them is inherent in the *raison d'etre* of such entities, and in the nature of the public service in which they are engaged; accordingly, requiring such former public servants to wait even the relatively brief one year before being able to have communications with their former agencies might well undermine that purpose. Likewise, where the former public servant essentially continues his or her previous City work under the auspices of the private entity, enforcing the lifetime "particular matter" ban would also likely be counter-productive. Accordingly, the Board has frequently

granted waivers in such cases, recognizing that such applicants have in fact "effectively remained in public service."[2]

One step removed on the continuum are those not-for-profit entities that, although not created and governed by the City, nevertheless exist to support specific City agencies or programs. These entities raise private funds that they spend to support the programs of City agencies; but rather than turn these funds over to the City, they themselves operate programs in cooperation with City agencies and in direct support of their programs, at no charge to the agencies. Examples of such entities, again in the area of public education, are New Visions for Public Schools ("New Visions") and New Leaders for New Schools ("New Leaders"). Here again, DOE employees leaving to take positions with New Visions and New Leaders would necessarily need to communicate with the DOE in their first post-employment year in order to further their new employer's mission in support of the DOE, such as helping to establish new schools and recruiting and training new principals.

The Board has also granted waivers to public servants departing City service to work for not-for-profits whose missions are not dedicated exclusively to a particular City agency, upon finding that the specific work in which the former public servant will be engaged for the not-for-profit similarly involves bringing private resources to support and enhance the work of a City agency, at no charge to the City. In one such case, a waiver was granted to a City employee who left City service to work for a not-for-profit dedicated to preserving valuable architecture throughout the world. The City owned one such structure, which was managed by the former

[2] While the Board has granted waivers of the one-year appearance ban and the lifetime particular matter ban of Charter Sections 2604(d)(2) and (d)(4), respectively, it has not granted waivers of the prohibition in Charter Section 2604(d)(5) against disclosing confidential City information.

public servant's agency. At the not-for-profit, the former public servant's duties were to include working with the former agency to obtain and apply private resources for the restoration and preservation of this property, at no charge to the City. Obviously, such a joint enterprise would necessarily require communications between the former public servant and staff of his former agency. The Board viewed this relationship as the sort of public-private partnership envisioned in Opinion No. 2000-2 and granted a waiver of the one-year appearance ban – but *limited* to communications concerning the specific project of preserving this property.

However, even where the new employer is such a "City partner," the Board will still consider whether the former public servant, and not one of his or her new colleagues, is the only one qualified or available to make appearances on behalf of his new employer before his or her former City agency during the relatively brief one-year "cooling off" period. Indeed, in many cases, by the time the Board receives these requests for waivers, several months of the one year have already elapsed and there is little harm to the organization or the employee in waiting the remainder of the year before beginning communications with the former agency.

At the other end of the spectrum – and clearly on the side of the line where waivers will *not* be granted under the "public-private partnership" test – are those entities that, while arguably providing services that support important City programs and services, do so only for payment, under contracts with the agencies they support. Such entities may be for-profit businesses, industry trade groups, or not-for-profit social services agencies. Examples of such entities are child welfare and foster care agencies who receive substantial City funds under contracts with the Administration for Children's Services and small not-for-profits that work in the City's less affluent neighborhoods, providing such services as the development of affordable housing and

the availability of health insurance. In such cases, because these organizations rely on the City for substantial portions of their funding, the Board has determined that they must be considered vendors, not City partners, for the purposes of analyzing the applications for post-employment waivers. The Board has therefore analyzed these applications under the historic, four-part "exigent circumstances" test and has, more often than not, found that these applications fail to satisfy that standard. In such cases, while the former public servants are not prohibited from working at the "vendor" not-for-profits (see Charter Section 2604(d)(7)), they may not communicate with their former City agency during their first post-employment year and may not work on any of the particular matters on which they worked while in City service.

As noted above, the distinction between those private entities that will be viewed as partners and those that will not is not precise. In fact, a given entity may, over time, shift positions along the continuum. New Visions, for example, while continuing to devote substantial private resources to support the work of the DOE, has in the last several years entered into contracts with the DOE that provide for it to receive funding from the City for some of the services it provides. Depending on the particular work they will be doing, waivers for DOE employees leaving to take positions at New Visions will now be analyzed in light of its hybrid status as both a partner and a vendor.

Similarly, in a recent case involving a not-for-profit that worked closely with a City agency in support of its mission, the Board denied a waiver to a long-time employee of the agency who proposed, after retirement, to work for that not-for-profit in its support of the agency. The Board noted that the not-for-profit, while receiving considerable private funding in support of its work, also held contracts with the City agency worth many millions of dollars. The Board therefore determined that the not-for-profit was more a vendor than a partner of the

City and accordingly analyzed the post-employment waiver application under the "exigent circumstances" test. While appreciating the value of the not-for-profit's contributions to the City agency, the Board found no compelling reason for the former public servant to communicate with his former City agency during his first year of retirement, since other employees of the not-for-profit were available to make those communications. The Board also considered the possibility that other not-for-profits that competed for the City's contracts might be disadvantaged if this former public servant were permitted to communicate with his former colleagues on behalf of his new employer without waiting the required one year after leaving City service. In sum, despite the clear City interests being advanced by the not-for-profit's work, the Board found that the purposes underlying the post-employment restrictions – preventing former public servants from exploiting their know-how and contacts derived from City service to benefit themselves and their new employers – took precedence over any public benefit that might be derived from waiving those restrictions.

**Conclusion**

Over its first decade, the Board sparingly granted waivers of the post-employment restrictions of Chapter 68 for former public servants seeking to work for private entities, requiring a showing of "exigent circumstances" under a four-factor test that considered: (1) the private entity's relationship to the City; (2) the waiver's benefits to the City; (3) the chance of harming competing private entities; and (4) the public servant's particular skills. In Advisory Opinion No. 2000-2, however, the Board articulated a different standard for former public servants who "effectively remain in public service" by working for private "partners" of the City.

In such cases, the Board announced, all of the four historic factors need not be satisfied, and waivers would be granted if any one of them were especially compelling.

In its post-employment waiver determinations since 2000, the Board has not treated all applications for employees leaving City service to work for worthy non-profit organizations as falling under the more permissive "public-private partnership" standard of Advisory Opinion No. 2000-2. Instead, when an organization's relationship would be more accurately described as one of a compensated provider of goods or services – that is, as a vendor – the application is judged under the historic "exigent circumstances" standard. On the other hand, when the prospective employer is a City-affiliated not-for-profit, or at least one that contributes private resources to the City in a joint venture with a City agency, the entity will more likely be deemed a "partner," and the application for a post-employment waiver will accordingly be evaluated under the less stringent standard of Opinion No. 2000-2.

Steven B. Rosenfeld

Steven B. Rosenfeld
Chair

Monica Blum
Kevin B. Frawley
Angela Mariana Freyre
Andrew Irving

Dated: October 27, 2008

2007-300ao/wh/ak