

Advisory Opinion No. 93-5

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether, consistent with Chapter 68 of the City Charter, he may accept a position as a member of the Board of Directors of a publicly-held, for-profit business corporation (the "Corporation"), while serving as a Deputy Commissioner within a City agency (the "Agency").

Background

The public servant has advised the Board that he is responsible for the overall supervision of a major division within the Agency.

He has also advised the Board that he was approached by a representative of certain stockholders of the Corporation, and asked if he would be interested in serving on the Corporation's Board of Directors. The public servant was introduced to this representative through a family member.

The Corporation is a major public company which has experienced financial difficulties, and is being reorganized. The public servant has represented that a search of the City Comptroller's records shows that the Corporation is not currently a party to any contract with the City. The public servant has further represented that, to the best of his knowledge, the Corporation is not presently engaged in business dealings with the City.

The public servant has stated that his service as a director will require approximately one day's worth of time every five to six weeks, and that he would take an unpaid leave of absence from the Agency on the days in question. He has also stated that his compensation as a director has not been fixed, but would likely fall within a range of \$20,000 - \$25,000 per annum.

Finally, by letter addressed to the Board, the head of the Agency has approved the public servant's acceptance of a directorship with the Corporation, and indicated that he did not view this position as posing any conflict of interest with respect to the public servant's official duties.

Conclusion

For the reasons expressed below, it is the opinion

of the Board that the public servant's acceptance of a position on the Board of Directors of the Corporation, while serving as a Deputy Commissioner within the Agency, would constitute a violation of Chapter 68.

Charter Section 2604(b)(2) provides that no public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.

Any individual who serves as a director of a corporation assumes substantial duties and responsibilities. In general, directors are responsible for the overall management of a corporation's affairs. They must give conscientious consideration to questions placed before them involving the interests of the corporation, and they must act in good faith and with reasonable care. See, e.g. New York Business Corporation Law, §717(a), which provides that directors of New York business corporations shall perform their duties "in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances".

In sum, the duties of a director entail a far greater commitment than simple attendance at meetings

of boards or committees. These duties require that a director become knowledgeable about a corporation's business and financial affairs, its products and services, its facilities and personnel, and its competition and future prospects. In addition to attending formal meetings, a director must carefully evaluate any documents or proposals placed before the board of directors for approval. He or she must also be prepared to oppose any action which is not in the best interests of the corporation. This last obligation is especially important when the corporation is in the process of being reorganized. Reorganization affects the interests of many third parties, including the corporation's shareholders, creditors, suppliers and customers. As such, when a publicly-held corporation is reorganized under federal or state laws, directors are often called upon to make critical and complex decisions including approval of reorganization plans, the sale of assets or securities to raise additional capital, and changes to corporate structure that either enhance or reduce the rights of such parties.

As a high-level appointed official, responsible for a major division within the Agency, the public servant is expected to devote his time and energy to

the general welfare of the City and its residents. If he were to serve as a director of the Corporation, a large, publicly-held corporation in the midst of financial reorganization, the obligations imposed on him could compromise this commitment, and would thus interfere with the proper discharge of his official duties. As such, it is the Board's determination that his acceptance of a directorship with the Corporation, while continuing to serve as a Deputy Commissioner within the Agency, would violate Charter Section 2604(b)(2).

Our determination should not be read to suggest that public servants are in all cases prohibited from serving as directors of corporations. We recognize that in certain cases, a public servant's acceptance of a directorship would not compromise official duties and may even produce valuable benefits for the City.

Chapter 68 itself acknowledges that certain types of directorships contribute to the general welfare of the City, and these directorships are therefore expressly permitted. Charter Section 2604(c)(6) permits a public servant to serve as a director of a not-for-profit organization, even if the organization is engaged in business dealings with the City, provided that certain

precautions are taken to protect the integrity of government decision-making.

In addition, we have construed the provisions of Chapter 68 to permit certain types of directorships that do not, in and of themselves, ordinarily involve a conflict between private interests and public responsibilities. As an example, in our Advisory Opinion No. 92-7, we concluded that a public servant's service on the board of either a cooperative corporation or a condominium would not, in and of itself, constitute a violation of Chapter 68, provided that the public servant does not directly or indirectly communicate with his or her own agency on behalf of such corporation.

Finally, in cases where strict application of Chapter 68 would produce an inequitable result, the Board has invoked the waiver provisions of Charter Section 2604(e), and has allowed a public servant to assume or maintain an otherwise prohibited position with a non-governmental entity. Charter Section 2604(e) permits a public servant to hold a position that would otherwise be prohibited under Charter Section 2604, if the head of the agency or agencies involved approves the position, and if the Board determines that the holding of such position would not

be in conflict with the purposes and interests of the City. A "position", in turn, has been defined to include service as a director of a corporation. See Charter Sections 2601(11) and (18). The Board wishes to stress, however, that given the nature and extent of the responsibilities borne by a corporate director, and the underlying purpose of Charter Section 2604(e),* this Section will only be invoked to permit service as a director in cases where prohibiting the public servant from taking such action would materially and adversely compromise an important City interest, or would work a severe personal or family hardship.

The Board will continue to review the facts and circumstances of any request made by a public servant to serve as a director of a corporation and, where appropriate, will apply the foregoing principles to arrive at a result in conformity with the intent of Chapter 68.

Sheldon Oliensis
Chair

* Charter Section 2604(e) is intended solely "to give relief in otherwise inequitable situations." See Volume Two, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at 184.

Benjamin Gim

Beryl R. Jones

Shirley Adelson Siegel

Robert J. McGuire recused himself from consideration of
this matter.

Dated: January 20, 1993