

Advisory Opinion No. 93-10 (Revised)

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether the conflicts of interest provisions of Chapter 68 of the City Charter apply to administrative law judges for the Parking Violations Bureau (the "PVB").

The public servant has referred the Board to Section 236(2)(d) of the State Vehicle and Traffic Law, which provides that hearing examiners who preside at adjudications of parking violations shall not be considered employees of the city in which their administrative tribunal has been established.

It is our opinion, as more fully set forth below, that even if PVB administrative law judges are not considered City employees, they are City officials, acting in a quasi-judicial capacity for and on behalf of the City. As such, they are "public servants" within the meaning of Chapter 68, and they are subject to certain provisions of Chapter 68 designed to prevent conflicts between their private activities and their official duties.

Parking Violations Bureau

The Board has been advised that the PVB, which is part of the Department of Transportation ("Transportation"), was created in 1972 pursuant to Article 2-B of the State Vehicle and Traffic Law (Chapter 715 of the Laws of 1972). Administrative law judges for the PVB are appointed by the Commissioner of Transportation and serve, on a per diem basis, to adjudicate summonses for parking violations.

After conducting hearings on summonses, administrative law judges may impose fines, which are payable to the PVB. If a decision is appealed, the appeal is directed against The City of New York, not the individual judge who rendered the decision.

Administrative law judges for the PVB are trained and supervised by City personnel, work in City offices, and use City equipment and the services of City employees in carrying out their official duties. The law requires that administrative law judges be attorneys admitted to the practice of law in New York State for a period of at least five years.

History of Treatment of PVB Administrative Law Judges

The Board has also been advised that, at the time

the PVB was created, administrative law judges were classified by the Department of Personnel as non-competitive City employees. Upon further review, the Law Department concluded that administrative law judges for the PVB were not City employees and were therefore ineligible for civil service classification or membership within the New York City Employees' Retirement System. The Law Department relied primarily on Section 236(2)(d) of the State Vehicle and Traffic Law, which provides, in appropriate part, that

d. The commissioner of traffic [in New York City, the Commissioner of Transportation] shall appoint hearing examiners who shall preside at hearings for the adjudication of charges of parking violations. Hearing examiners shall be appointed and shall serve for such number of sessions as may be determined by the commissioner and shall receive therefor, such remuneration as may be fixed. Such hearing examiners shall not be considered employees of the city in which the administrative tribunal has been established. (emphasis added).

The Law Department also noted, however, that notwithstanding the provisions of Section 236(2)(d), administrative law judges could be characterized as City employees for federal tax law purposes.<sup>1</sup>

#### Conclusion

For the reasons expressed below, it is the opinion of the Board that administrative law judges employed by the PVB are "public servants" within the meaning of Chapter 68 of the City Charter. Furthermore, those administrative law judges who are regularly scheduled to work more than 20 hours per week are "regular employees" of the City and, as such, they are subject to those provisions which apply to "regular employees."<sup>2</sup>

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<sup>1</sup> In August 1991, the U.S. Internal Revenue Service determined that PVB administrative law judges were, in fact, employees of the City for federal tax law purposes. This determination was based on a number of factors, including (i) the City's role in training, monitoring and evaluating administrative law judges; (ii) the personal nature of the services performed by administrative law judges; and (iii) the City's ability to terminate administrative law judges without incurring liability.

<sup>2</sup> Chapter 68 defines "regular employees" of the City as "all elected officials and public servants whose primary employment, as defined by rule of the [Conflicts of Interest] [B]oard, is with the city, but

In general, Chapter 68 applies to all "public servants", who are in turn defined as

[A]ll officials, officers and employees of the [C]ity, including members of community boards and members of advisory committees, except unpaid members of advisory committees shall not be public servants.

Charter Section 2601(19).

The legislative history of this provision indicates that it was intended to cover a broad spectrum of persons who act in an official capacity for and on behalf of the City, whether or not such persons receive a salary or other form of compensation:

For the purpose of identifying those individuals who are subject to the conflicts of interest standards [contained in Chapter 68], the term "public servant" has been defined to include all officials, officers and employees of the City,

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shall not include members of advisory committees or community boards." The Board, in turn, has issued a rule which defines "primary employment with the City" as "the employment of those public servants who receive compensation from the City and are employed on a full-time basis or the equivalent or who are regularly scheduled to work the equivalent of 20 or more hours per week." Rules of the Board, § 1-06(a).

whether or not they are salaried or receive compensation in the form of per diem payments, reimbursement for costs, or otherwise. The term includes all elected officials, and all other officers and employees of the city whether appointed or otherwise employed. The only individuals excluded from the application of the conflict of interest standards are unpaid members of advisory committees whether or not they receive reimbursement for costs.

Volume II, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at 153 (emphasis added).

PVB administrative law judges are not simply independent attorneys providing a service to the City. They exercise a wide variety of powers in the name of the City, and control a process that is central to the mission of the PVB. They preside at hearings for the adjudication of parking violations, and in that capacity they are authorized to issue subpoenas to compel the appearance of the officer who issued the violation or of other persons to give testimony. They may also issue a subpoena duces tecum to compel the

production for examination or introduction into evidence of books, records and papers. See New York City Administrative Code, §§ 19-202(d), 19-206(b)(1) and (b)(4).

Administrative law judges are also authorized to make determinations of charges, either sustaining or dismissing them. Judgments sustaining or dismissing charges are entered on a judgment roll maintained by the PVB, together with records showing the payment or non-payment of any penalties imposed. A charge may not be established except upon proof by a preponderance of the evidence. See New York City Administrative Code, §§ 19-206(b)(2) and 19-207(a).

If a party wishes to challenge a judgment made by an administrative law judge, he or she may appeal the judgment to an appeals board within the PVB. Further review may be obtained by commencing an action pursuant to Article 78 of the Civil Practice Law and Rules. See New York City Administrative Code, §§ 19-208(b) and 19-209.

In its Opinion No. 639 (1982), our predecessor agency, the New York City Board of Ethics, concluded that hearing officers employed by a City agency, on a

per diem basis, were quasi-judicial officers of the City and were therefore "officers of the City" subject to former Charter Sections 2604(b)(4) and (b)(5).<sup>3</sup>

The Board of Ethics noted that the hearing officers in question were authorized to conduct hearings; to issue subpoenas and discovery orders; to rule upon offers of proof and receive evidence; to regulate the course of hearings; to consider and rule on procedural motions; and to make and file recommended decisions and orders.

In its Opinion No. 659 (1984), the Board of Ethics concluded similarly that a per diem hearing officer at a City agency was an "Officer of the City" because of his powers and responsibilities and was therefore subject to former Charter Section 2604(c).<sup>4</sup>

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<sup>3</sup> Former Charter Sections 2604(b)(4) and 2604(b)(5) provided that no "salaried officer or employee of the City or any City agency" shall either (i) represent private interests before any City agency or (ii) appear as attorney or counsel against the interest of the City or any City agency in any litigation to which the City or any City agency is a party, or in any action or proceeding in which the City or any City agency, or any officer or employee of the City or any City agency, acting in the course of his official duties, is a complainant. These Sections were superseded and replaced by current Charter Sections 2604(b)(6) and (b)(7).

<sup>4</sup> Former Charter Section 2604(c) provided, in



We affirm Board of Ethics Opinion No. 639 and Opinion No. 659, and we find the reasoning expressed therein to be applicable in the instant case. By virtue of their powers and duties, PVB administrative

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appropriate part, that no "officer or employee of the city or any city agency, whether paid or unpaid" shall engage in any business or transaction or private employment, or shall have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his official duties, or shall appear, directly or indirectly, on behalf of private interests in matters involving the City agency in which he serves or before any City agency affecting matters involving the City agency in which he serves. These prohibitions have been replaced and superseded by current Charter Sections 2604(b)(2) and (b)(6).

In its Opinion No. 659, the Board of Ethics distinguished between the persons subject to former Charter 2604(b) ("salaried officer[s] or employee[s] of the city or any city agency") and those subject to former Charter Section 2604(c) ("officer[s] or employee[s] of the city or any city agency, whether paid or unpaid"). The Board of Ethics modified its prior holding in Opinion No. 639, and indicated that because former Charter Section 2604(b) applied only to "salaried" officers or employees of the City, whether or not that Section applied to an agency hearing officer would depend on the facts and circumstances of the case, including the manner in which the hearing officer is paid and the nature and extent of his or her powers.

As noted above, current Chapter 68 does not distinguish between individuals on the basis of whether or how they are paid.

law judges are City officials, acting in a quasi-judicial capacity for and on behalf of the City. They are an integral part of the adjudicatory process within the PVB, and the judgments they render constitute decisions of the agency, enforceable in accordance with law. They are therefore "public servants" within the meaning of Chapter 68.

As a result of this characterization, PVB administrative law judges must observe and adhere to a number of provisions within Chapter 68, intended to insure that their private activities do not come into conflict with their official duties. These include, among others, Charter Section 2604(a)(1)(b), which prohibits administrative law judges who are regular employees of the City from performing legal work for any person or firm which has business dealings with the City; Charter Section 2604(b)(6), which prohibits administrative law judges who are regular employees from representing private interests, for compensation, before the City, or appearing directly or indirectly before the City on behalf of private interests in matters involving the City; and Charter Section 2604(b)(7), which prohibits administrative law judges

who are regular employees from appearing as counsel against the interests of the City in any action in which the City is a party.

As to those administrative law judges who are not regular employees of the City, they are prohibited from performing private legal work for any person or firm which has business dealings with their agency, Transportation; from representing private interests, for compensation, before Transportation, or appearing directly or indirectly before Transportation on behalf of private interests in matters involving the City; and from appearing as counsel against the interests of the City in any action in which Transportation is a party.

See Charter Sections 2604(a)(1)(a), (b)(6) and (b)(7), respectively.

Charter Section 2604(b)(3) prohibits all administrative law judges from using their official positions to secure any private or personal advantages for themselves or for any persons or firms with whom they are associated.

Further, all former administrative law judges are prohibited from appearing before Transportation within one year after the termination of their PVB service,

and are prohibited from appearing before any City agency on, or receiving compensation for services rendered in relation to, any particular matters in which they were personally and substantially involved while at the PVB. See Charter Sections 2604(d)(2) and (d)(4).

Sheldon Oliensis  
Chair

Benjamin Gim

Beryl R. Jones

Robert J. McGuire

Shirley Adelson Siegel

Dated: January 31, 1994