

Advisory Opinion No. 93-11

A former public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether it would be a violation of Chapter 68 of the New York City Charter for the former public servant, formerly Chief Counsel of the enforcement unit (the "Enforcement Unit") of a City agency (the "Agency"), to appear before the hearings unit of the Agency (the "Hearings Unit") less than one year after leaving City service. The former public servant has also asked the Board to consider whether another attorney in his law firm may properly appear before the Agency prior to the expiration of the one year ban and whether he or she may use the firm's stationery, which contains the former public servant's name in both the list of attorneys in the firm as well as in the firm name itself. Additionally, the former public servant has asked the Board to consider whether he can share in the proceeds from such an appearance.

Background

The Board has been advised that the former public servant worked for the Enforcement Unit, first as its

Legal Director and later as its Chief Counsel, for several years. He now maintains a private law practice, as a partner in a law firm. The firm employs two other attorneys besides the former public servant, one of whom is his spouse.

Since the former public servant is an expert in the laws which are administered by the Agency, he expects to continue handling matters involving such laws. As a result, he may have occasion to represent clients before the Agency.

Similarly, the other attorneys in his firm may also need to represent clients before the Agency. In the course of such representation, these attorneys will use firm stationery which lists the former public servant's name on the letterhead.

Agency Served by the Former Public Servant

Charter Section 2604(d)(2) provides that 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 the public servant.

Charter Section 2601(3) provides that the "agency served by a public servant" means, in the case of a paid public servant, the agency employing such public

servant.<sup>1</sup>

The former public servant maintains that the "agency" which he served for purposes of Charter Section 2604(d)(2) is the Enforcement Unit and not the Agency. In support of his position, the former public servant represents that the Enforcement Unit and the Hearings Unit are entirely independent units that carry out distinct functions.

Without reaching the question of whether there may be instances where an internal unit or division, within a City department or agency, should be treated as a former public servant's "agency" for purposes of Charter Section 2604(d)(2), the facts presented in the instant case lead to a different conclusion.

While the Enforcement Unit and the Hearings Unit are administratively independent, and have different substantive responsibilities, they are both part of an integrated enforcement process, intended to help the City eliminate certain unlawful conduct and prevent it from occurring in the future. The Enforcement Unit is analogous to a prosecuting office. It investigates

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<sup>1</sup> Charter Section 2601(2) defines agency to include a city, county, borough or other office, position, administration, department, division, bureau, board, commission, authority, corporation, advisory committee or other agency of government.

complaints under the laws administered by the Agency, makes findings of probable cause, and presents complaints to the Hearings Unit. The Hearings Unit, in turn, performs a quasi-judicial function. It conducts hearings on complaints, rules on motions, admits or excludes testimony or other evidence, and makes recommendations for Agency action.

The roles of the two units are inter-related. The Enforcement Unit effectively determines the caseload of the Hearings Unit, and is the unit presenting complaints and supporting evidence. Both units ultimately report to the head of the Agency, and members of both units are employed by the Agency. In addition, both units work together (along with other units within the Agency) in setting Agency administrative policy, and in developing Agency rules.

Accordingly, it is the opinion of the Board that the Agency is the "agency" served by the former public servant, for purposes of Charter Section 2604(d)(2), and that it would be a violation of Chapter 68 for the former public servant to appear before the Hearings Unit less than one year after his separation from service at the Agency.

Appearance Before the Agency by Other Attorneys at  
the Firm

With respect to other attorneys at the former public servant's law firm, it is the opinion of the Board that it would not be a violation of Chapter 68 for such other attorneys to appear before the Agency within one year after the former public servant's termination from City service, and to use the firm's stationery which lists the former public servant's name on the letterhead.

As noted in our Advisory Opinion No. 93-8, Chapter 68 contains a series of provisions regulating the conduct of individuals who have left, or are contemplating leaving, public service. See Charter Sections 2604(d)(1) through (d)(7). These provisions, commonly known as the post-employment restrictions, are intended to prevent public servants from exploiting public office for personal gain, subordinating the interests of the City to those of a prospective employer, or exerting special influence on government decision-making, either through contact with former colleagues or through access to special or confidential information. For these reasons, former public servants are prohibited from making certain appearances before

their former agencies, from certain appearances before City agencies generally, and from the disclosure or use of information confidential to the City and not otherwise available to the general public. See Charter Sections 2604(d)(2), (d)(4) and (d)(5).

The drafters of Chapter 68 also recognized, however, that any post-employment restrictions placed significant (and sometimes permanent) constraints on the ability of public servants to find new employment after leaving City service. For this reason, the post-employment restrictions are narrowly drawn, balancing the need to protect the integrity of government and the rights of former public servants to seek new opportunities in keeping with their talents and abilities.

Charter Section 2604(d)(2) provides that "[n]o public servant shall, within a period of one year after termination of such person's service with the [C]ity, appear before the [C]ity agency served by such public servant; ... ." (emphasis added). The language of the prohibition is limited to the former public servant himself or herself; it does not discuss or deal with any firm or entity employing the former public servant.

In reviewing the history of this provision, it is

clear that its limited scope was intentional. In commenting on Charter Section 2604(d)(2), members of the Charter Revision Commission noted that it was intended to prohibit a "personal appearance" by a former public servant before his or her agency. It was not intended to impose "vicarious disqualification" on a firm employing a former public servant. See Minutes of the New York City Charter Revision Commission, Public Meeting of February 11, 1988, at p. 95. The members recognized that it was virtually impossible for firms engaged in certain professions to avoid dealing with City government, and that to prohibit a public servant from joining such a firm because it practiced before his or her former agency would effectively bar the individual from future employment. Such a position, in turn, would discourage individuals from entering public service, for fear of jeopardizing their means of supporting themselves and their families. Id. at pp. 96-97. The Charter Revision Commission therefore limited the one year appearance ban to appearances by the former public servant himself or herself. See Volume Two, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at p. 182.

It also added an express provision to Chapter 68, making clear that a former public servant is not prohibited from assuming a position with a firm that appears before City agencies, including (by definition) the agency served by the former public servant. Specifically, Charter Section 2604(d)(7) provides that

Nothing contained in [the post-employment restrictions] shall prohibit a former public servant from being associated with or having a position with a firm which appears before a city agency or from acting in a ministerial matter regarding business dealings with the city.

For these reasons, it is our view that it would not be a violation of Chapter 68 for another attorney in the former public servant's law firm to appear before the Agency within one year after the former public servant's termination from City service, and to utilize the firm's stationery, provided that the former public servant himself does not appear before the Agency in connection with the matter at issue. Extending the one year appearance ban to other

attorneys at the firm would result in disqualifying the firm from dealing with the Agency, simply because of the former public servant's status as a former City employee. It would also discourage the firm, or any firm with a practice before the Agency, from employing the former public servant or other former Agency employees, because of the potential loss of income from otherwise permissible business dealings with the Agency. This is exactly the situation which the drafters of Chapter 68 sought to avoid, in attempting to strike a balance between preventing conflicts of interest and respecting the rights of individuals to earn a livelihood.

It is also our view that it would not be a violation of Chapter 68 for the former public servant to share in the proceeds of an appearance by another attorney at his law firm, before the Agency, within one year after the former public servant's termination from City service, provided that he does not thereby receive compensation for services rendered on a particular matter falling under Charter Section 2604(d)(4). Charter Section 2604(d)(4) prohibits a public servant from

appear[ing], whether paid or

unpaid, before the city, or receiv[ing] 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 action. (emphasis added)

This prohibition is separate and distinct from the one year appearance ban in Charter Section 2604(d)(2), and it applies at all times after a public servant leaves City service. Therefore, if the former public servant in this case performed services at his law firm on a particular matter which falls within the scope of Charter Section 2604(d)(4), he may not receive compensation for such services even though other attorneys handled any necessary appearances before the Agency and he himself did not personally appear.

Finally, the Board wishes to stress that its conclusions in this case are based on the assumption

that any appearance before the Agency, by another attorney from the former public servant's law firm, is a bona fide appearance by an attorney qualified to handle the matter at issue, and that such attorney is actually responsible for handling the matter rather than simply acting on instructions from the former public servant. Different conclusions would be reached if the facts suggested that the attorney was merely an alter ego for the former public servant, camouflaging an otherwise impermissible appearance.

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Dated: March 15, 1993