

Advisory Opinion No. 93-18

A former public servant has requested that the Conflicts of Interest Board (the "Board") issue a waiver of certain post-employment restrictions contained in Chapter 68 of the City Charter. Specifically, the former public servant requests that the Board waive the provisions of Charter Section 2604(d)(2), allowing him to appear before his former City agency (the "Agency"), within one year after his separation from City service.

Background

The Board has been advised that the former public servant was employed by the Agency for approximately 4-1/2 years. During his service at the Agency, he worked on various projects and programs directly related to the Agency's mission.

The Board has also been advised that the former public servant's duties included financial review of new project proposals, as well as overall project management of several large projects.

The former public servant recently accepted a new position with a large for-profit corporation (the "Corporation"). His responsibilities at the Corporation will include working with not-for-profit and for-profit organizations, to arrange for public and private financing of various projects of the type he dealt with at the Agency.

The former public servant represents that the City and the Corporation share a common goal with respect to advancing these projects, and that he wishes to communicate with the Agency in order to facilitate participation by the Corporation in Agency programs. He therefore requests that the Board waive the provisions of Charter Section 2604(d)(2), and allow him to communicate with the Agency within one year of his separation from City service.

By letter addressed to the former public servant, the head of the Agency approved his request for a waiver of Charter Section 2604(d)(2), provided that the purpose of his communications with the Agency is "to help establish the participation of [the Corporation] with the Agency in [certain Agency programs] or to undertake other efforts on behalf of the Corporation relating to [projects of the type promoted by the Agency]".

For the following reasons, it is the opinion of the Board that the facts and circumstances of the instant case do not warrant the granting of a waiver. Therefore, Charter Section 2604(d)(2) applies to the former public servant and he is prohibited from appearing before the Agency for a period of one year after his separation from City service, except for communications involving ministerial matters.

Post-Employment Restrictions

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, the post-employment restrictions prohibit City employees from certain appearances before their former agencies, from certain

appearances before any City agency on matters in which they were substantially involved, and from the disclosure or use of information confidential to the City and not otherwise available to the public.

One of the post-employment restrictions, Charter Section 2604(d)(2), provides, in appropriate part, 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

An "appearance", in turn, is defined as "any communication, for compensation, other than those involving ministerial matters." Charter Section 2601(4).

Although the one year appearance ban is expressed in absolute terms, the Board previously concluded, in Advisory Opinion No. 91-8, that it was authorized and empowered to grant waivers of this prohibition pursuant to Charter Section 2604(e).¹ However, because of the

¹ Charter Section 2604(e) provides that a public servant or former public servant may hold a position which is otherwise prohibited by various provisions in Chapter 68 (including the post-employment restrictions) if, after receiving the written approval of the head of the agency or agencies involved, the Board determines that the holding of such position would not be in conflict with the purposes and interests of the City.

The legislative history of this Section indicates that it was intended to authorize the Board to grant

importance of the post-employment restrictions, and their role in preventing corruption and conflicts of interest, the Board also concluded that waivers should be granted when justified "by compelling circumstances". In addition, the Board determined that waivers should be granted "sparingly, and only in exigent cases".

In Advisory Opinion No. 91-8, the Board went on to deny a waiver request from a former public servant who argued that communications with his former agency "would be in furtherance of agency objectives". He also provided a letter from his former agency head, stating that such communications would not be in conflict with the City's interests. The Board determined that many former public servants could provide similar justifications, and that to grant a waiver under these circumstances "would seriously dilute this post-employment restriction and run counter to the Charter Revision Commission's intent".

The Board has granted requests for a waiver in cases where a former public servant's expertise was critical in helping his former agency meet certain

relief "in otherwise inequitable situations". Volume II, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at p. 184.

court-imposed deadlines, and where a former public servant's background would help resolve pending contractual disputes between his former agency and his new employer, a not-for-profit entity, thereby insuring that the not-for-profit complied with complex City and State regulations, and preserving State funding to the City for services delivered by the not-for-profit. See Advisory Opinion Nos. 91-8 and 92-17.

Turning to the facts of the instant case, the former public servant has not provided the Board with any indication that his ability to appear before the Agency, within one year after his separation from City service, is in any way justified by compelling circumstances. Although his position at the Corporation may help to advance Agency goals, this, in and of itself, does not support the granting of a waiver and is analogous to the argument which was rejected in Advisory Opinion No. 91-8.

The former public servant has therefore been advised that his request for a waiver is denied, and that he is prohibited from appearing before the Agency for a period of one year after his separation from City service, except for communications involving ministerial matters. See Charter Section 2604(d)(2).

He has also been advised that he is required to

observe and abide by Charter Sections 2604(d)(4) and (d)(5), which apply at all times after a public servant leaves City service, and which are not limited in duration. Charter Section 2604(d)(4) provides that a former public servant may not appear, whether paid or unpaid, before any City agency on, 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 participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities. Charter Section 2604(d)(5) provides that a former public servant may not disclose or use for private advantage any confidential information gained from public service which is not otherwise made available to the public.

Sheldon Oliensis
Chair

Benjamin Gim

Beryl R. Jones

Robert J. McGuire

Shirley Adelson Siegel

Dated: June 22, 1993

