

Advisory Opinion No. 93-19

A public servant has requested the following opinions from the Conflicts of Interest Board (the "Board"), on behalf of a proposed Mayoral appointee (the "Appointee") to the Environmental Control Board ("ECB"):

(1) whether, for purposes of Chapter 68 of the City Charter, the "agency served" by Mayoral appointees to ECB is ECB itself, rather than the Department of Environmental Protection ("DEP"); and

(2) whether, consistent with Chapter 68, the Appointee may continue certain consulting work he is currently engaged in if his appointment to ECB is approved.

Background

The Board has been advised that the Appointee is an expert in a certain professional field, and is proposed for appointment to fill the seat on ECB reserved pursuant to the City Charter for an expert in such field.

ECB was established in 1968 to serve as an

independent tribunal that adjudicates claims under the City Charter, Administrative Code, and other provisions of law relating to a variety of "quality of life" matters within the jurisdiction of the Departments of Buildings, Consumer Affairs, Environmental Protection, Fire, Health, Parks and Sanitation. The ECB consists of thirteen members, seven of whom are ex officio, and six of whom are appointed by the Mayor with the advice and consent of the City Council. The ECB's budget is part of DEP's annual appropriation, but it does not report to and is not supervised by DEP.

Finally, the Board has been advised that the Appointee currently works on several consulting projects for private firms, through the auspices of a foundation (the "Research Foundation"), and also serves as a part-time consultant to a private professional firm (the "Private Firm"). The projects the Appointee works on involve DEP, but do not involve ECB.

For the following reasons, it is the opinion of the Board that

(1) for purposes of Chapter 68, the "agency served" by the Appointee is ECB, not DEP; and

(2) the Appointee may, consistent with Chapter 68, continue his current consulting work for the Research Foundation and for the Private Firm after his

appointment to ECB, provided that he recuses himself from any consideration of, or involvement in, any matter before ECB which relates to or may affect any Research Foundation project in which he is involved, and any matter in which the Private Firm appears before ECB.

"Agency Served" by Appointee

Chapter 68 of the City Charter contains a variety of provisions governing the conduct of public servants, both during and after their period of service with the City. Many of these provisions, in turn, require an identification of the "agency served" by the public servant, so that they may be properly interpreted and applied. As an example, in order to insure that former public servants do not exploit their official positions for personal gain, subordinate the interests of the City to those of a prospective employer, or exert special influence on government decision-making, Charter Section 2604(d)(2) provides that a former public servant may not, for a period of one year after leaving City service, appear before the "agency served" by such public servant.

Chapter 68 defines the "agency served" by a public

servant as follows:

(a) [I]n the case of a paid public servant, [the agency served by the public servant is] the agency employing such public servant [and] (b) in the case of an unpaid public servant, [the agency served by the public servant is] the agency employing the official who appointed such unpaid public servant unless the body to which the unpaid public servant has been appointed does not report to, or is not under the control of, the official or the agency of the official that has appointed the unpaid public servant, in which case the agency served by the unpaid public servant is the body to which the unpaid public servant has been appointed.

Charter Section 2601(3).

In analyzing the status of a Mayoral appointee to ECB, the Charter therefore directs us to examine who appoints the public servant, which person the public servant reports to, and what agency pays the public servant.

As noted above, ECB was established in 1968, to act as an independent tribunal and adjudicate violations of the Charter, the Administrative Code and any rules and regulations relating to:

- (a) the cleanliness of the streets;
- (b) the disposal of wastes;
- (c) the provision of a pure, wholesome and adequate supply of water;
- (d) the prevention of air, water and noise pollution;
- (e) the regulation of street peddling;
- (f) the prevention of fire and danger to life and property therefrom which are within the jurisdiction of the Fire Department and which the Fire Commissioner shall designate by rule or regulation;
- (g) the construction, alteration, maintenance, use, occupancy, safety, sanitary condition, mechanical equipment and inspection of buildings or structures within the City which are within the jurisdiction of the Department of Buildings and which the Commissioner of Buildings shall designate by rule or regulation;
- (h) the response to emergencies caused by releases or threatened releases of hazardous substances;
- (i) the use and regulation of all property subject to the jurisdiction of the Department of Parks and Recreation; and

(j) the reporting of information relating to the amount, location and nature of hazardous substances, including the labelling of hazardous substances.

See Charter Section 1404(c)(1). ECB is also authorized and empowered to promulgate rules and regulations on certain matters pertaining to air and water pollution, and to concurrently enforce, with the Board of Health, those provisions of the City's Health Code which the Board of Health designates. See Charter Sections 1404(b) and (c)(2).

The ECB is composed of thirteen members, seven of whom serve in an ex officio capacity: the Commissioner of Environmental Protection (who also serves as Chair), and the Commissioners of Sanitation, Buildings, Health, Police, Fire and Consumer Affairs. See Charter Section 1404(a). These members receive no compensation for their service on ECB.

The remaining six members are appointed by the Mayor, with the advice and consent of the City Council.

They may not be otherwise employed by the City, and are required to possess the following qualifications: one is to have broad general background and experience in the field of air pollution control; one is to have background and experience in the field of water

pollution control; one is to have background and experience in the field of noise pollution control; one is to have background and experience in the real estate field; one is to have background and experience in the business community; and one is to be a member of the public. These six members receive a statutory per diem of \$150 per day while performing work for ECB. See Charter Section 1404(a).

When an alleged violation of law is brought before ECB, the parties appear before an ECB hearing officer (or an individual member of ECB), who conducts an administrative hearing and issues a decision. If any party files exceptions to the determination of the hearing officer (or member of the ECB, as the case may be), ECB reviews the matter and may then either adopt, modify or reverse such determination. If no exception is filed, the hearing officer's recommended decision and order is automatically adopted by ECB without further action, after a thirty day period for filing exceptions has expired. See Section 31-55, Rules of ECB. Final orders of ECB are entered as civil judgments and may be enforced in the same manner as the enforcement of money judgments entered in civil actions. See Charter Section 1404(d)(1)(e).

The structure and function of ECB demonstrate that

it is an independent, quasi-judicial body established to conduct fair and impartial hearings into certain alleged violations of the law. Its private members, including the Appointee, are appointed by the Mayor with the advice and consent of the City Council. Although the Commissioner of Environmental Protection serves as the Chair, he or she has no role in selecting or approving members.

In addition, ECB is not supervised or controlled by DEP, or by any of the other Departments that are represented through ex officio membership. ECB is expressly authorized and empowered to hire its own staff (within the limits of its appropriation), to promulgate its own rules and regulations for the purpose of carrying out its duties, to conduct hearings and impose civil penalties within the limits of applicable law, and to apply in its own name for judicial enforcement of any decision, order or subpoena it issues. See Charter Sections 1404(a), (c)(3), (d)(1) and (d)(3).

Finally, although ECB's budget is included within DEP's annual appropriation, for administrative purposes, the compensation payable to ECB members is fixed by statute and is therefore not within DEP's control. See Charter Section 1404(a).

Based on these facts, it is our determination that the "agency served" by a Mayoral appointee to ECB is ECB itself, not DEP. Consistent with this analysis, we conclude that if the Appointee's appointment to the ECB is submitted to and confirmed by the City Council, the "agency served" by the Appointee, for purposes of Chapter 68, would be ECB.

Consulting Activities

The Appointee is currently working on three consulting projects for and on behalf of the Research Foundation. These projects involve studies of various issues lying within the Appointee's area of professional expertise. Each of these projects was initiated by a private firm, which had entered into a contract with DEP to investigate a certain problem. The private firm, in turn, subcontracted a portion of the work to the Research Foundation, which is a not-for-profit corporation established to administer certain types of research projects for business and government. The Appointee receives no additional compensation for his work on these projects, and none of the three projects in question involve ECB.

In addition to his work for the Research Foundation, the Appointee serves as a part-time

consultant to the Private Firm in an area where he has expertise. The Private Firm works on projects for the DEP and, from time to time, the Appointee is asked to consult on these matters. The Board has been advised that the Private Firm does not appear before ECB.

The Appointee, along with the other appointed members of ECB, is a public servant for purposes of Chapter 68, but is not a "regular employee" of the City.¹ As such, the propriety of his outside consulting activities must be reviewed under Charter Section 2604(a)(1)(a), which provides, in appropriate

¹ Charter Section 2601(20) defines "regular employee" as including:

[A]ll elected officials and public servants whose primary employment, as defined by rule of the [Conflicts of Interest B]oard, is with the [C]ity, but shall not include members of advisory committees or community boards.

The Board, in turn, has promulgated formal rules defining "primary employment with the City" as

[T]he 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, Section 1-06(a). The Board went on to provide that for purposes of Charter Section 2601(20), "the term compensation shall not mean reimbursement for expenses or per diem payments to members of commissions and boards." Rules of the Board, Section 1-06(c).

part, that a public servant who is not a "regular employee" is prohibited

[from having] an interest in a firm which such public servant knows is engaged in business dealings with the agency served by such public servant;

An "interest", in turn, is defined as either an ownership interest in, or a position with, a firm, including a position as a consultant. See Charter Sections 2601(12), (16) and (18).

As a consultant, the Appointee holds a position with the firms who have engaged his services through the Research Foundation, and with the Private Firm. Although all of these firms are engaged in business dealings with DEP, none of them are engaged in business dealings with ECB, the agency served by the Appointee.

Accordingly, the Appointee may act as a consultant to these firms without violating Charter Section 2604(a)(1)(a).

Furthermore, to avoid any suggestion that the integrity of ECB decision-making has been compromised by his outside activities, the Appointee has offered to recuse himself, as a member of ECB, from any consideration of or involvement in any matter before the ECB that relates to or may affect any Research

Foundation project he is involved in. If the Private Firm were to appear before ECB on any matter, the Appointee would also recuse himself from any consideration of, or involvement in such matter.

We conclude that such recusal is warranted, and is an appropriate means of protecting the integrity of ECB, while allowing the agency to benefit from the Appointee's knowledge and experience.

Because of the complex and technical nature of matters considered by many City boards and commissions, including ECB, their enabling statutes frequently provide that certain members must be drawn from scientific and professional disciplines.² Individuals working in these disciplines possess knowledge and experience that is critical for the enforcement of City

² By way of example, the Charter requires that the Landmarks Preservation Commission consist of eleven members. The members must include at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor. See Charter Section 3020(1).

The Art Commission consists of eleven members. The members include the Mayor, the President of the Metropolitan Museum of Art, the President of the New York Public Library, the President of the Brooklyn Museum, one painter, one sculptor, one architect and one landscape architect, all of whom shall be residents of the City, and three other residents of the City, none of whom shall be a painter, sculptor, architect, landscape architect, or active member of any other profession in the fine arts. See Charter Section 851(a).

laws that are interpreted and administered by such boards and commissions. At the same time, however, it is often difficult to find qualified candidates who are willing to serve in the public interest, but who do not have business dealings with the City in some other capacity. For this reason, although Chapter 68 mandates a strong policy against avoiding any appearance of conflict of interest (see Charter Sections 2604(b)(2) and (b)(3)), this must be carefully balanced against the equally important public policy of insuring that City boards and commissions are able to attract and retain their required complement of experts. See Advisory Opinion No. 93-17.

In the instant case, the Appointee has a professional background in a certain field, and has been proposed to fill the seat on ECB reserved for an expert in that field. ECB is charged with administering a variety of complex laws relating to matters falling within the Appointee's area of expertise. By recusing himself from any consideration of, or involvement in, any matter before ECB relating to any Research Foundation project in which he is involved, or any matter in which the Private Firm is to appear before ECB, the Appointee is taking appropriate steps to insure that his actions as a member are not

perceived as being motivated or influenced by considerations of self-interest, while permitting ECB to draw upon his professional expertise for the benefit of the public at large.

We note, in conclusion, that recusal means that the Appointee may not vote on, or otherwise involve himself in, directly or indirectly, any such matters. This includes, but is not limited to, participating in ECB discussions, attending meetings on behalf of ECB with City officials or others, and receiving copies of relevant documents, with respect to any such matters. See Advisory Opinion No. 92-5.

Sheldon Oliensis
Chair

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Date: June 22, 1993