

Advisory Opinion No. 93-23

A public servant has written to the Conflicts of Interest Board (the "Board") requesting an opinion as to whether, consistent with the provisions of Chapter 68 of the City Charter, he may represent defendants who have been charged with criminal offenses in the criminal court system within the City, in light of his employment by a City agency (the "Agency") that is charged with the enforcement of certain criminal laws.

Background

The public servant has advised the Board that, in addition to his City employment, he is a licensed attorney; that he is admitted to the Bar of the State of New York but that he does not work for the Agency as an attorney; and that, in his official capacity, he is deemed a police officer pursuant to the Criminal Procedure Law and, as such, his duties include investigating the facts and circumstances of certain potential criminal offenses, and providing testimony in criminal court, when necessary or appropriate, as to the results of his investigations.

For the following reasons, it is the opinion of the Board that it would be a violation of Chapter 68 for the public servant to represent defendants charged with criminal offenses in the criminal court system within the City, while maintaining his position as a public servant with the Agency.

Duties of the Public Servant

Pursuant to statute, the public servant, and others holding the same position, are vested with the powers and duties of police officers under State law. Police officers, subject to certain conditions and limitations, are entitled to exercise various powers, including the power to execute warrants of arrest, make warrantless arrests, and take fingerprints. See Criminal Procedure Law, Sections 120.10, et seq.; 140.10; and 160.10.

These public servants may, at the direction of the head of the Agency, investigate, examine and inquire into certain potential criminal offenses. In connection with their investigations, the public servants are authorized and empowered to issue subpoenas to compel the testimony of witnesses.

In addition, these public servants are called upon to investigate certain specific and recurring violations of criminal law, the prosecution of which

may be dependent upon oral or written evidence submitted by them. If so directed by the head of the Agency, these public servants may also act as the arresting police officers in such cases.

In sum, the duties of the public servant, and others holding the same position, involve contact with the criminal court system, and with parties involved in criminal proceedings such as judges, jury members, police and other law enforcement personnel, witnesses, and prosecutors.

Charter Restrictions

Charter Section 2604(b)(3) provides that no public servant shall use or attempt to use his or her position to obtain any private advantage, direct or indirect, for the public servant or any person or firm associated with the public servant. As noted in our Advisory Opinion No. 93-21, this Section is intended, among other things, to prevent City employees from abusing the public trust by exerting official influence to secure financial gain or special treatment for themselves, family members, or for persons with whom the employee enjoys a business or financial relationship.

Charter Section 2604(b)(7) provides that no public servant shall appear as attorney or counsel against the

interests of the City in any litigation in which the City is a party, or in any action or proceeding in which the City or any employee of the City, acting in the course of his or her official duties, is a complainant. This Section, among other things, is intended to insure that the City's interests in adjudicative proceedings are considered in a fair and impartial manner, and are not compromised by the knowledge, experience, or contacts of a public servant appearing on behalf of a party whose interests are adverse to the City, and who may attempt to use such knowledge, experience or contacts to secure a private advantage.

It is the Board's determination that because of the public servant's status as a police officer, and his contact with the City's criminal court system in the course of discharging his official duties, it would be a violation of Chapter 68 for him to represent defendants charged with criminal offenses within that system, even if the offenses do not relate to specific criminal laws which the Agency is charged with enforcing.

As an investigator, arresting officer, and/or witness, the public servant would become known to judges and prosecutors, and would be in a position to

use his contacts and knowledge of the criminal justice system, obtained through public service, in order to secure more favorable treatment for the defendants that he represents. At the very least, the degree of familiarity with court and law enforcement personnel, along with the practices of police and public prosecutors, creates a perception of capitalizing on an official position in order to secure more favorable treatment for clients. Such a perception would be unacceptable under Charter Section 2604(b)(3).

In addition, in many criminal cases, the complaining witness is a City police officer acting in the course of his or her official duties. If the public servant were to represent the defendant in such a case, this could create an appearance of the complaining witness' testimony being influenced by the presence of a professional colleague. Furthermore, if the public servant's official duties were known or became known to the judge or jury, they might be inclined to give greater deference to the arguments presented by the defense, in light of counsel's status as a law enforcement officer. In either case, the City's interests in punishing offenders and deterring future criminal conduct could be compromised, in contravention of Charter Section 2604(b)(7).

In conclusion, the Board wishes to point out that its determination in this case is limited to the public servant's proposed work as a criminal defense counsel, in the manner described in this Opinion. The public servant is not prohibited from working on non-criminal matters as a private attorney, provided that he does so in accordance with the requirements contained in the Board's Advisory Opinion No. 91-7, which governs the private practice of law by public servants generally.

Sheldon Oliensis
Chair

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Dated: July 20, 1993