

Post-Employment Restrictions
Waiver
Charter Sections: 2604(d)(2)
2604(e)

Advisory Opinion No. 94-15

The Conflicts of Interest Board (the "Board") has received a request from a public servant as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, he may accept employment with a not-for-profit organization (the "NFP") and, if so, whether he may appear before his former City agency (the "Agency"). Specifically, the public servant has requested that the Board waive the post-employment restriction of Charter Section 2604(d)(2), thereby allowing him to appear before the Agency within one year of his separation from City service.

For the reasons discussed below, it is the opinion of the Board that it would not be a violation of Chapter 68 for the public servant to accept employment with the NFP and, in performing the duties of that

employment, to appear before the Agency.

Background

The public servant has advised the Board that he has worked for the Agency for approximately four years.

As a project manager, the public servant's responsibilities involve oversight of capital construction projects at client agencies. The division of the Agency to which the public servant is assigned is organized into nine units involving functionally distinct groups of institutional clients. Each unit operates independently, and project managers work exclusively within their assigned units. The public servant is assigned to the unit responsible for cultural institutions, which includes museums, performing arts organizations and similar institutions.

As a project manager, the public servant is responsible for projects from initiation through the completion of construction. This process involves matching client needs with the budget appropriation, leading the design consultant selection process, overseeing the project to obtain a design that conforms to the scope of the project and the budget, verifying costs, tracking the project's progress through the bid,

award and contract registration stages, supervising construction change orders, and reviewing and approving requests for payments.

The public servant first learned of the position of Associate Manager of Capital Planning and Construction when the NFP published an advertisement in a local newspaper. The public servant applied for, and ultimately was offered, the position. The NFP has business dealings with the Agency. However, the NFP is not now, nor has it ever been, a client of the public servant's unit at the Agency. The public servant has not had any contact, in his professional capacity, with the NFP.

With respect to the public servant's proposed employment at the NFP, the public servant would assist in the overall direction of the NFP's capital construction program, in addition to managing specific projects. The public servant's responsibilities would include preparing building programs and budgets, scheduling projects, coordinating project staff, supervising the design of capital projects, and selecting consultants and contractors. The public servant would function as the NFP's liaison with consultants, contractors, NFP customers and City

agencies, including the Agency, in connection with NFP capital construction projects.

In performing his duties for the NFP, the public servant would need to appear before the Agency. The public servant's agency head, in a detailed letter, has advised the Board that a waiver of the one-year appearance ban would not conflict with the purposes and interests of the City. The Agency head has further advised the Board, as set out below, that the City has a strong interest in seeing that the waiver is granted inasmuch as the City has a financial interest in the NFP.

Discussion

A. Relationship of the NFP to the City

The NFP was created by a special act of the New York State Legislature early in this century. The Act provides that the City will furnish the sites for the NFP, as well as provide the maintenance for these buildings. The Board has been advised that the overwhelming majority of NFP sites are City-owned and no rent or taxes are paid.

The Act empowers the City to acquire property for

the NFP through condemnation or eminent domain proceedings. Further, any City-owned property not being used for public purposes is available as a future NFP site. In addition, the Act mandates that the moneys required for the maintenance of the NFP will be provided from the City's annual budget. The NFP has a line on both the City's annual operating and capital budgets.

NFP employees are members of City municipal labor unions, receive City health benefits, and contribute to the New York State retirement and pension funds. Finally, the NFP is regulated by the New York State Department of Education through the Board of Regents and must comply with the Education Law of New York State.

The NFP has an ongoing relationship with the Agency with respect to the NFP's capital projects. The NFP currently has 70 projects with the Agency's capital program. The City has supplied or will supply \$109 million in design and construction money for these projects. The successful implementation and completion of these projects requires that the NFP be aware of and comply with the City's rules and procedures for construction projects.

The public servant and the Agency advised the

Board that, in the City, it takes slightly more than a year, with the average capital projects, for documents to be produced requesting bids on those projects. In the case of the NFP, this time period has been exceeded by several years. There are substantial delays of several years' duration in many of the NFP's renovation and construction projects.

B. Applicable Chapter 68 Post-Employment
Restrictions

Chapter 68 contains a number of provisions governing the conduct of public servants contemplating leaving City service and/or those who have left City service. These post-employment restrictions are set forth in Charter Sections 2604(d)(1) through (6). The post-employment restrictions apply to conduct which includes negotiations for future employment, appearances by former public servants before their former City agencies, compensation for work performed on a "particular matter,"¹ disclosure of confidential

¹ Charter Section 2601(17) defines a "particular matter" as "any case, proceeding, application, request for a ruling or benefit, determination, contract limited to the duration of the contract as specified therein, investigation, charge, accusation, arrest, or other similar action which involves a specific party or parties, including actions leading up to the particular matter...."

information obtained from City service, and employment with a local, state or federal agency. The purpose of these post-employment restrictions is 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 undue influence on government decision-making. See Advisory Opinion Nos. 93-8, 93-11, 93-12, 93-13, 93-18, and 94-7.

Chapter 68 provides, in 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 such public servant..." Charter Section 2604(d)(2). An "appearance," in turn, is defined as "any communication, for compensation, other than those involving ministerial matters."² Charter Section 2601(4).

Charter Section 2604(e) contains the "waiver" provision of Chapter 68. Charter Section 2604(e) provides that "a public servant or former public

² A "ministerial matter" is defined in Charter Section 2601(15) as "an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion."

servant may hold or negotiate for a position otherwise prohibited by this section, where the holding of the position would not be in conflict with the purposes and interests of the city, if, after written approval by the head of the agency or agencies involved, the board determines that the position involves no such conflict."

The Board has applied Charter Section 2604(e) and granted waivers of the post-employment restrictions, including the one-year appearance ban, "where justified by compelling circumstances in a particular case." The Board has in the past granted such waivers "sparingly, and only in exigent circumstances." See Advisory Opinion Nos. 91-8 and 92-17.

C. Factors Supporting A Waiver

The Board, in determining whether to issue a waiver of the post-employment restrictions, considers a number of factors, including, but not limited to: the relationship of the City to the public servant's prospective employer; the benefits to the City (as opposed to the public servant) if the waiver were to be granted; and the likelihood of harm to other organizations or companies similar to, or in

competition with, a public servant's prospective employer, if the waiver is granted.

The facts of the instant case demonstrate that the NFP has an ongoing relationship with the City. The NFP has a line on the City's annual operating and capital budgets and is housed in City-owned facilities. NFP employees receive health benefits provided by the City, are part of the New York State retirement system and are members of municipal labor unions. In addition, the NFP has a public educational purpose.

In using the City's capital funds, the NFP must comply with the City's procedures for the use of those funds. The NFP is engaged in a substantial number of construction projects which require adherence to procedures established and enforced by the City. Failure by the NFP to understand and adhere to the Agency's established procedures has, to date, resulted in a significant delay in initiating and completing construction and renovation projects. Moreover, the Agency has advised the Board that the NFP's failure to adhere consistently to the City's established rules and procedures has resulted in a direct and significant economic loss to the City.

The City is required under the Act to provide for

the maintenance of the NFP from its annual budget. The public servant and the Agency have advised the Board that donations from the private sector reduce the amount of funds needed from the City treasury for the NFP. However, because there have been substantial delays of up to several years on NFP projects, the private sector has become reluctant to provide monetary support for additional projects without assurance that the funds will be put to appropriate use, to wit: that NFP projects will be implemented and completed within a reasonable time period. The Agency has advised the Board that, in this era of fiscal constraint and budget shortfalls, private sector support for these necessary renovation and construction initiatives is essential.

The public servant, the Agency and the NFP have advised the Board that the public servant's expertise in City procedures for capital construction projects will provide the NFP with the guidance it needs to implement and complete NFP projects in a timely manner.

Further, the NFP and the Agency work closely together to enable the NFP to obtain funding for and to engage in construction and renovation projects.

Although the NFP would benefit from the public servant's knowledge of the applicable City procedures,

this would not confer an unfair advantage to the NFP over other not-for-profit organizations. The Board notes that, in this instance, the mission of the NFP is unique in the City. Further, the fact that the NFP will become better equipped to comply with City rules and procedures is not detrimental to other not-for-profit organizations, inasmuch as these organizations are not competing for the City budget funds earmarked for the NFP.

Conclusion

For the reasons discussed above, the Board has determined that a waiver of Charter Section 2604(d)(2) is warranted and that the public servant may accept employment with the NFP.

The Board has considered the extent to which the public servant, in appearing before his former Agency prior to the expiration of the one-year period set forth in Charter Section 2604(d)(2) would be in a position to unduly influence government decision-making. As discussed above, one of the purposes of the post-employment restrictions is 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." See Advisory Opinion 93-12.

Under the circumstances of this case, the Board has determined that government decision-making would not be compromised if the Board waives the restrictions set forth in Charter Section 2604(d)(2), inasmuch as the public servant's contacts with the Agency would be with a unit other than the unit to which he was assigned while employed by the Agency. Further, the public servant has not worked on any NFP projects while employed at the Agency. Finally, the Agency and the public servant have specifically advised the Board that because of the public servant's position at the Agency, the public servant would not be in a position to divulge confidential information obtained during City service, nor would the public servant's proposed position with the NFP require such disclosure. See Charter Section 2604(d)(5).³

³ Charter Section 2604(d)(5) provides in part that "no public servant shall, after leaving city service, disclose or use for private advantage any confidential information gained from public service which is not

The public servant must, however, abide by the other post-employment restrictions contained in Chapter 68. The public servant is prohibited from appearing before any City agency, or working for compensation, at any time after he leaves City service, in relation to any particular matter involving the same party or parties with respect to which particular matter he participated personally and substantially as a public servant. See Charter Section 2604(d)(4). The public servant also is prohibited from disclosing or using for private advantage any confidential information gained from public service and not otherwise available to the public. See Charter Section 2604(d)(5).

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Dated: June 2, 1994

otherwise made available to the public;"