

Post-Employment Restrictions
Waiver
Charter Sections 2604(d)(3)
2604(d)(4)
2604(e)

Advisory Opinion No. 94-19

The Conflicts of Interest Board (the "Board") has received a request from a high-level public servant as to whether, consistent with Chapter 68 of the New York City Charter, he may accept positions with two not-for-profit organizations and, if so, whether he may thereafter appear before the executive branch of the City within one year of his termination of City employment. Specifically, the public servant has requested that the Board waive the post-employment restriction of Charter Section 2604(d)(3), thereby allowing him to appear before the executive branch within one year of his separation from City service.

For the reasons discussed below, it is the opinion of the Board that, under the particular facts here present, a waiver should be granted permitting the public servant to accept employment with the two not-

for-profit organizations and, in performing the duties of that employment, to appear before the executive branch of the City, subject to the conditions set forth below.

Background

A high-level public servant who has worked for the City for approximately two years has sought advice from the Board regarding employment following his City service. In his position with the City, the public servant oversees the implementation of business, industrial and commercial development policies affecting the economic health of the City. The public servant also is responsible for enhancing the City's business climate and increasing business opportunities in the City for all businesses, both domestic and international.

The public servant has further advised the Board that he has had a long career in banking and finance. He has substantial experience in bringing together the private, public and not-for-profit sectors in public-private partnerships.

The public servant has advised the Board that two not-for-profit organizations ("the Organizations") have

offered the public servant employment opportunities. These Organizations have separate, but related and sometimes overlapping, roles. The Organizations' common goal is to benefit the City by developing programs and raising funds to support City government initiatives. In addition, the Organizations collaborate with other not-for-profit organizations to assist the City.

In his capacity with the Organizations, the public servant would be supervising and controlling the philanthropic business affairs of both entities. In addition, the public servant would be personally involved in developing joint projects with the City. The public servant has advised the Board that, in performing his duties for the Organizations, he would need to appear before the executive branch of City government.

The appropriate City authority, in a detailed letter, advised the Board that a waiver of the one-year appearance ban would not conflict with the purposes and interests of the City, that the public servant is uniquely qualified for the position with the Organizations and that the City has a strong interest in seeing that the waiver is granted because the public

servant's expertise would substantially help the City promote its economic growth and development.

Discussion

A. Applicable Chapter 68 Post-Employment Restrictions

Public servants who are contemplating leaving City service and/or those who have left City service are subject to a number of restrictions, commonly referred to as the post-employment provisions. Set forth in Charter Sections 2604(d)(1) through (d)(6), these provisions regulate negotiations for future employment, appearances by former public servants before the City, compensation for work performed on a "particular matter," disclosure of confidential information obtained from City service, and employment with a local, state or federal agency.

The purpose 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. See Advisory Opinion Nos. 93-8, 93-11, 93-12,

93-13, 93-18, 94-7 and 94-15.

Chapter 68 provides that no elected official or the holder of certain appointed positions shall, within a period of one year after the termination of that person's employment with the City, appear before any agency in the branch of City government served by that person.¹ See Charter Section 2604(d)(3). "Appear" means to make any communication, for compensation, other than those involving ministerial matters.² See Charter Section 2601(4). Thus, former public servants may not, for example, make telephone calls, write

¹ The public servant holds one of the positions set forth in Charter Section 2604(d)(3), which governs the appearances of specified public servants before the branch of City government served by the public servant.

The public servant here is in the executive branch.

For the purposes of Charter Section 2604(d)(3), the legislative branch of the City consists of the Council and the offices of the Council; the executive branch of the City consists of all agencies of the City.

Those public servants not covered by Charter Section 2604(d)(3) are subject to the post-employment restriction contained in Charter Section 2604(d)(2). This Charter section provides that public servants may not appear before their former City agencies for one-year following their termination from City service.

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."

letters, have business meetings or engage in similar conduct before the expiration of the one-year appearance ban.

Charter Section 2604(e) contains the "waiver" provision of Chapter 68.³ 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 granted such waivers "sparingly, and only in exigent circumstances." See Advisory Opinion No. 91-8 and 92-17.

The public servant is an executive branch employee and falls within the category of public servants set forth in Charter Section 2604(d)(3), which prohibits the public servant from appearing before any agency in the executive branch of City government for one year following the termination of his City service. Without a waiver from the Board, the public servant is not

³ Charter Section 2604(e) provides that "[a] public servant or former public 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."

permitted to accept the position and appear before the executive branch before the expiration of the one-year appearance ban.

B. Factors Supporting a Waiver

In determining whether to issue a waiver of the post-employment restrictions, the Board 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. See Advisory Opinion No. 94-15. The Board also considers the public servant's qualifications which make him or her particularly qualified for the position with the non-City employer.

The facts of the instant case demonstrate that the City has a close and ongoing relationship with the Organizations. The mission of both entities is to improve the social and economic health of the City and to secure resources and technical assistance and

support for the City. City officials work closely with the Organizations to expand the City's economic development.

The public servant has had a long and impressive career with substantial experience in the private sector. The public servant's past work on public-private initiatives is a model for using private sector financial and personnel resources to address some of municipal government's most fundamental challenges.

The public servant and the City have advised the Board that the public servant's employment with the Organizations is in the City's interests. The public servant's contacts and past experience in the business community are expected to result in an increased number of business investments in the City and to foster stronger private-public initiatives.

The Board notes that while the Organizations would benefit by having the public servant employed by them, the City would be the primary beneficiary if the Board were to issue a waiver of Charter Section 2604(d)(3) because, as discussed above, the City would have increased business activity and enhanced partnerships with the private sector. Further, because the

Organizations collaborate with other not-for-profit organizations, do not generally compete for City funds, and have a unique relationship with the City, issuance of a waiver would not result in placing other not-for-profit organizations at a disadvantage. Finally, based on the representations of the City, the public servant is uniquely qualified to fill the positions with the Organizations, and his appearance before the executive branch within one year of the termination of his City service is essential to performing his duties for the Organizations.

Conclusion

The Board has considered the factors enumerated above for granting a waiver of the post-employment restrictions. The Board has determined, after balancing the factors, that a waiver of the post-employment restrictions contained in Charter Section 2604(d)(3) is appropriate in the instant case.

Accordingly, the public servant may accept employment with the Organizations and, in carrying out his duties for the Organizations, may appear before the executive branch of City government before the expiration of the one-year appearance ban.

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.⁴ 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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⁴ 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"

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