

Post-Employment Restrictions  
Waiver  
Charter Sections: 2604(d)(2)  
2604(d)(4)  
2604(e)

Advisory Opinion No. 94-22

The Conflicts of Interest Board (the "Board") has received a request for an opinion from a public servant as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, he may accept an offer of employment from a biomedical business and technology center of a local university and, if so, whether he may appear before his former City agency. Specifically, he is requesting that the Board waive the post-employment restrictions of Charter Sections 2604(d)(1), (2) and (4), thereby allowing him to accept employment as the Center's Executive Director and to perform the requisite duties associated with that position, which involve appearing before his former City agency less than one year after the termination of his City employment and working on particular matters with which he was involved while he

COIB Advisory Opinion 94-22  
October 3, 1994  
Page 2

was employed by the City.

For the reasons stated in this opinion, the Board has determined that it is appropriate to grant a waiver permitting the public servant to accept employment with the Center and, in performing the duties of that employment, to appear before the Agency less than one year after termination of his City employment and to work on particular matters with which he was involved while he was employed by the City.

#### Background

The public servant has advised the Board that he is employed by a City agency (the "Agency") in a high-level position; that his duties include designing and coordinating initiatives for the disposition and development of City-owned property and managing a staff the members of which negotiate leases and contracts of sale with private individuals and business concerns.

The public servant has also advised the Board that he has been offered the position of Executive Director of a biomedical business and technology center (the "Center"), which will be a component of a large research facility that will house both commercial companies and educational and research facilities of a

local university (the "University") and will be located on City-owned land. Furthermore, he has advised the Board that when the University first inquired as to his availability for this position, he recused himself from all matters between the Agency and the University.

The public servant has advised the Board that in 1989, he started working on the Center project, which is a partnership of the University, the City and the State of New York. The project is intended to provide laboratory space for new and existing private companies that conduct biotechnical research. The Center is the first major effort by the City to develop suitable space for these companies, which represent a growing industrial sector. The public servant was responsible for guiding the Center through the City's public review process, as well as overseeing the City's negotiation of the lease and other documents necessary to allow the project to be developed. His personal involvement in negotiations with the University primarily concerned the business terms of the lease, which was executed in November 1992 by the City and the University. In his letter to the Board, the public servant also stated that this partnership of the City, the State and the

University is intended to benefit each party and that the terms of the lease require that a substantial majority of the profits generated by the Center will be forwarded to the City and the State.

According to the public servant, as the Center's Executive Director, he would be responsible for all facets of both the programmatic and physical development of the Center. Specifically, his duties would include, among other things:

- 1) development of the Center's marketing strategy and leasing activities with technology companies;
- 2) development of support services to tenants of the Center;
- 3) preparation of annual business plans and annual budgets for the Center;
- 4) representation of the Center in relations with the neighborhood, community groups and the City's business community; and
- 5) management of relations with the University's partners in the Center (i.e., the City and the State), which would include obtaining future City and State approvals, as may be

required by the lease, and negotiating future funding agreements with the City.

To the extent that any of these duties, or other duties of the Center's Executive Director, are inconsistent with the post-employment provisions of Chapter 68, the public servant has requested a waiver which would permit him to perform these duties.

The head of the Agency has advised the Board that, in his opinion, a waiver of the post-employment restrictions of Chapter 68 would be in furtherance of the purposes and interests of the City. He has stated, among other things, that the Center is an important economic development project for the City; that the Agency has a particular interest in seeing the public servant become the Center's Executive Director because he has a thorough understanding of the project's political and procedural history, the common goals of the City and the University, and the documents that are intended to guide the development and operation of the Center.

The Board has also received a letter from an executive officer at the University which details the

nationwide search for an individual to serve as the Center's Executive Director. His letter stated, in pertinent part:

During the past year we have conducted a nationwide search for an individual to direct the Center project. A unique set of skills is required. The individual chosen must not only have solid managerial and marketing skills, but also be able to operate within an academic environment, with an understanding of the complexities of large, not-for-profit institutions.... The Center also demands someone who is familiar with the particular challenges posed by working within New York City....everyone who interviewed [the public servant] ...agree that he has the unique combination of skills and experience needed for [the Center].

### Discussion

Chapter 68 of the New York City Charter contains a number of provisions governing the conduct of public servants who are contemplating leaving City service or who have left City service. These provisions, referred to as the post-employment restrictions, are set forth in Charter Sections 2604(d)(1) through (6).

The Charter provides, in part, that "[n]o 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."<sup>1</sup> Charter Section 2601(4). Charter Section 2604(e) contains the "waiver" provision of Chapter 68 and 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."

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 Nos. 91-8

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<sup>1</sup> 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."

and 92-17.

The Board considers a number of factors in determining whether to issue a waiver of the post-employment restrictions, including, but not limited to, the relationship of the City to the public servant's prospective employer and the benefits to the City (as opposed to the public servant) if the waiver were to be granted. See Advisory Opinion No. 94-15. The Board also considers the public servant's particular skills and qualifications which make him or her uniquely suited for the position with the prospective employer.

In this case, the Center is in fact a partnership of the City, the State and the University. One of the Center's goals is to offer suitable research space for biotechnology companies and to present an opportunity for major new commercial development of science-related businesses in the City. The City and State have contributed most of the financing for the construction of the Center's first building and will oversee the construction and operation of the building. The City and State will share in the profits generated by the Center. Thus, the Center project is essentially a joint venture, with each of the entities involved

having a vested interest in its success.

With respect to the public servant's proposed employment with the Center, his duties would include managing and overseeing the Center's collaboration with both the business community and the City, which would involve, among other things, obtaining City approval for future projects and negotiating funding agreements.

The public servant's experience at the Agency indicates that, as the University's executive officer stated in his letter, he "understand[s] the dynamics of developing and managing a complex project within New York's urban environment, with its diverse interest groups and communities."

#### Conclusion

The Board has determined that the City would be a primary beneficiary if the Board were to issue a waiver of the foregoing post-employment restrictions, thereby permitting the public servant to accept the position as the Center's Executive Director and to perform the duties of that position, which would involve, among other things, communicating with the Agency concerning the Center's operations less than one year after the

termination of the public servant's City employment and working on particular matters with which he was involved as a City employee. Further, the Center is the product of a unique collaboration with the City and in fact is closely identified with the City's interests. Finally, based on the public servant's representations, and those of the head of the Agency and the University's executive officer, discussed above, the public servant is uniquely qualified, with the particular, requisite experience, to fill the position with the Center, which involves, by necessity, appearing before the Agency less than one year after the termination of his City employment and working on particular matters with which he was involved while employed by the Agency.<sup>2</sup>

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<sup>2</sup> While the one-year appearance ban and the prohibition on working on particular matters after the termination of City employment, contained in Charter Sections 2604(d)(2) and (d)(4), respectively, would, in the absence of a waiver, apply to the public servant's post-employment activities, the Board has determined, based on the public servant's representations, and those of the Agency's head and the University's executive officer, that a waiver is appropriate in these circumstances. Specifically, the Center's Executive Director would be required to have regular contact with the Agency and its officials. Furthermore, given the broad range of activities with respect to the Center in which the public servant has engaged, it would be impossible to isolate "particular matters" from which the Center's Executive Director

The Board has thus determined, based on the public servant's representations and the approval of the head of the Agency, that it is appropriate to grant a waiver permitting the public servant to accept employment with the Center and, in performing the duties of that employment, to appear before the Agency less than one year after termination of the public servant's City employment and to work on particular matters with which he was involved while he was employed by the Agency. See Charter Section 2604(e).

The public servant must, however, abide by the other post-employment restrictions contained in Chapter 68. Specifically, he 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).

Sheldon Oliensis  
Chair

Beryl R. Jones

Jane W. Parver

Benito Romano

Shirley Adelson Siegel

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could recuse himself.

COIB Advisory Opinion 94-22  
October 3, 1994  
Page 13

Dated: October 3, 1994