

Post-Employment Restrictions
Waiver
Contracting with Former Agency

Charter Section(s): 2604(d)
2604(e)

Advisory Opinion No. 95-1

The Conflicts of Interest Board (the "Board") has received a request for an opinion from a former public servant as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, his former City agency (the "Agency") may retain his current employer, a private consulting firm (the "Firm"), in order to obtain his personal services. For the reasons discussed below, it is the opinion of the Board that it would not be consistent with the post-employment restrictions of Chapter 68 for the former public servant to perform such services pursuant to a contract between the Agency and the Firm; however, the former public servant may contract in his personal capacity with the Agency to perform those services.

Background

The former public servant has advised the Board that he has recently retired from City employment, where his official duties involved active participation in major labor relations matters and that, while many of these matters have now been completed, other matters are still pending. The former public servant has

further advised the Board that the Firm, his current employer, represents management in labor relations matters and that its clients include many government entities (though the City's government is not currently among them).

In addition to the foregoing, the Board has received a letter from the head of the Agency, who has advised the Board that the City has been and, for the next several months, will continue to be, involved in several labor relations matters and that this involvement creates a critical need for the former public servant's consulting and training services. Further, in the Agency head's opinion, the former public servant possesses a "greater breadth of experience, knowledge or insight" into this particular kind of matter and that the public servant is "uniquely qualified to guide and review this exercise." Finally, according to the Agency head, the need for the former public servant's services has been compounded by a number of high-level personnel departures and staff reorganizations at the Agency.

Discussion

Chapter 68 of the 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 (7). The purpose of these post-employment restrictions is, among other things, to prevent former 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 No. 94-15.

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."¹

¹ 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."

Charter Section 2604(d)(4) provides that no former public servant "shall appear, whether paid or unpaid, before the City, or receive compensation for any services rendered, in relation to any particular matter involving the same party or parties with respect to which particular matter such person had participated personally and substantially as a public servant through decision, approval, recommendation or other similar activities."² Also, Charter Section 2604(d)(5) provides that no former public servant may disclose or use for private advantage any confidential information concerning the City.

The nature of the work to be performed for the Agency would, by necessity, require the former public servant to appear before the Agency less than one year after the termination of his City employment and to work on particular matters on which he had worked while he was employed by the City. These activities would be in contravention of Charter Sections 2604(d)(2) and

² A "particular matter" is defined in Charter Section 2601(17) as "any case, proceeding, application, request for a ruling or benefit, determination, contract limited to the duration of the contract as specified therein,... or other similar action which involves a specific party or parties, including actions leading up to the particular matter"

(d)(4), in the absence of a Board waiver.

Charter Section 2604(e), which contains the "waiver" provision of Chapter 68, 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 "where justified by compelling circumstances in a particular case." The Board grants such waivers "sparingly, and only in exigent circumstances." See Advisory Opinion Nos. 91-8 and 92-17.

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. 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. See Advisory Opinion No. 94-19.

While some of the above factors are present in the instant case, the Board has concluded that it would be inappropriate to issue a waiver which would allow the Firm to provide services to the Agency in the manner described above. The former public servant's current employer, the Firm, is a private consulting firm which would benefit by obtaining a contract with the City only because of the former public servant's experiences at and relationship to the Agency. Further, if a waiver were to be granted, the Firm would be in a position to obtain City business which was not available to similarly situated companies only because the Firm had retained the former public servant. See Advisory Opinion No. 94-15.

While the former public servant's ability to

appear before the Agency and to work on particular matters on which he worked while he was employed by the Agency would assist the City in completing various labor relations matters, a waiver of the post-employment restrictions cannot be granted solely on the basis that the City may secure benefits from the waiver. While the Agency head has stated that his Agency has a critical need for the former public servant's services, other criteria which would justify a waiver, pursuant to Charter Section 2604(e), of the post-employment restrictions of Chapter 68 are not present in this case. Accordingly, it would be inappropriate to grant such a waiver. Thus, while the public servant may work for the Firm, in so doing he is required to observe the post-employment restrictions in Charter Section 2604(d), which are discussed above.

The Board notes that, while the former public servant may not obtain a waiver from the Board, he may, under other circumstances, provide services to the Agency. Thus, the former public servant could contract directly with the Agency in his personal capacity. See Charter Section 2604(d)(6), which provides that certain of the post-employment restrictions shall not apply to

"positions with or representation on behalf of any local, state or federal agency." See also Advisory Opinion No. 93-12, in which the Board determined that a former public servant could, consistent with Chapter 68, enter into a consulting contract with his former agency to continue working on a project he had started while he was employed by the agency and, in performing his duties under the contract, appear before the agency. In rendering its determination in Advisory Opinion No. 93-12, the Board considered several factors, including, but not limited to, the reasons the former public servant left City service (i.e., whether there was any attempt to circumvent post-employment restrictions of Chapter 68), and the degree to which the agency needed the former public servant's services.

In the instant case, the former public servant retired after having worked at the Agency for many years, and it was the Agency which initially solicited his services, for which, according to the Agency head, the Agency has a critical need. Thus, it would be consistent with Chapter 68 and the Board's Advisory Opinion No. 93-12 for the former public servant to contract directly with the Agency.

Conclusion

It is the opinion of the Board, for the reasons stated in this opinion, that the former public servant may not, as part of his employment with the Firm, provide services to the Agency, which would involve activities in contravention of Charter Sections 2604(d)(2) and (d)(4). He may, however, contract personally with the Agency to provide the services described above.

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