

Dual City Employment

Charter Sections: 2601(11), (12)  
2604(a)(1)(a), (b)  
2604(a)(3), (4)  
2604(b)(2), (b)(3), (b)(4)  
2604(e)

Advisory Opinion No. 95-26

The Conflicts of Interest Board (the "Board") has received several requests for opinions as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, public servants<sup>1</sup> who are regular employees<sup>2</sup> of a City agency may contract to

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<sup>1</sup> A "public servant" is defined for the purposes of Chapter 69 as "all officials, officers and employees of the city, including members of community boards, and members of advisory committees...."

<sup>2</sup> A "regular employee" is defined for purposes of Chapter 68 as "all elected officials and public servants whose primary employment, as defined by rule of the Board, is with the City, but shall not include members of advisory committees or community boards." See Charter Section 2601(20).

The Board has defined "primary employment" in Section 1-06(a) of the Rules of the Board as "the employment of those public servants who receive compensation from the City and are employed on a full-time basis or the equivalent or who are regularly scheduled to work the equivalent of 20 or more hours per week." Certain exceptions to this definition, not pertinent to the cases decided in this opinion, are found in Section 1-06(b) of the Rules of the Board.

perform services on a part-time basis for another City agency or, in some cases, the agency by which the regular employees are employed. For the reasons discussed below, it is the Board's opinion that a regular employee may, in the specific instances discussed below, contract to work part-time for his or her own or another City agency, provided that the regular employee complies with the conditions set forth in this opinion.

#### Background

These cases involve two different groups of regular employees (collectively, the "Employees").

##### A. The Examiners

The first group (the "Examiners") are regular employees of two City agencies who seek to work part-time for another City agency, where they would administer and rate examinations for candidates for City positions requiring certain technical expertise. The Examiners would contract individually for their part-time positions and would not hire any employees to assist them in these positions. The Examiners would be hired on an hourly basis, for a maximum of 15 days per year.

The Examiners would do the part-time work at times when they are not required to perform the duties of

their regular City employment. Furthermore, the duties of their regular City jobs are not related in any way to the administration and evaluation of examinations. The Examiners' agencies have approved their part-time work. The agency for which the Examiners seek to work, if its officials decide to contract with the Examiners, will have done so with full knowledge of the Examiners' status, because the agency has been informed that the Examiners are regular employees of other City agencies.<sup>3</sup>

The City agency has complete administrative control over and financial responsibility for the examinations. Thus, the City agency would determine the time and manner in which the Examiners would perform their duties in rating the examinations. The City agency determines the content of the examinations and the standards by which the examinations are to be graded and administers the registration process for the

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<sup>3</sup> Chapter 68 provides the least restrictive conflicts of interest rules to which all public servants must adhere. A City agency may, however, determine that stricter rules are appropriate. For example, in this case, the agencies employing the Examiners as regular employees may refuse to permit them to contract to do the part-time work and/or the contracting agency may refuse to contract with the Examiners, even where a contract would not violate Chapter 68.

examinations. The Examiners would neither solicit individuals to take the examinations nor participate in any other way in the registration process. The City agency would provide the Examiners with work space, materials and equipment for administering and rating the examinations and would provide monitors to assist the Examiners while the examinations were being administered. The Examiners would have no financial or other interest in the number of individuals who take the examinations or who pass the examinations. The Examiners would not know the names or City agencies of the individuals whose examinations they were rating, as the examinations would not identify the names of the individuals taking the examinations.

B. The Teachers

The second group (the "Teachers") are regular City employees who seek to teach a certification course required by a City code at a training institute (the "Institute") which is part of and administered by their own agency. The Teachers would contract individually with their agency for their part-time positions and would not hire any employees to assist them in this work. The Teachers would teach the course in the evening, when they are not required to work at their

regular City jobs. They would be paid on an hourly basis, for a maximum of 231 hours per year.

The Director of the Institute has stated that each of the Teachers has unique qualifications, because of his or her ability to teach the course in a foreign language. In addition, the Director has stated that if the Teachers were not permitted to teach the course, the Institute probably would have to discontinue offering the course, at least temporarily. The agency's acting commissioner has stated that the part-time employment of the Teachers is in the "best interest[s] of the agency."

The Director of the Institute has stated that the City agency "has full administrative responsibility" for the course. The City agency finances the course and determines when the course is to be offered. The course's content and final examination required for certification are mandated by the City's code and the agency. The Institute administers the registration process for the course; the Teachers neither solicit individuals to take the course nor participate in any other way in the registration process. Work space, materials and equipment would be provided by the Institute. The Teachers would not have any financial

or other interest in the number of individuals who take the course or who pass the final examination.

Discussion

It is the opinion of the Board that, for the reasons discussed below, it would be consistent with Chapter 68 for the Employees to contract with the City to provide part-time services in the manner described above, inasmuch as such work for the City would be in the nature of a second City job, and their part-time work would not constitute having an interest in a firm engaged in "business dealings with the City" for the purposes of Chapter 68.<sup>4</sup> Charter Sections 2604 (a)(1)(b) of Chapter 68 generally prohibit a regular employee from having an "interest in a firm which such regular employee knows is engaged in business dealings with the City." An "interest" is defined for purposes of Chapter 68 as "an ownership interest in a firm or a position with a firm." See Charter Section 2601(12). A "firm" is defined in Charter Section 2601(11) as "a

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<sup>4</sup> This opinion would also apply if the Teachers were part-time, rather than regular employees, of their agency, as Charter Section 2604(a)(1)(a) states that "no public servant [including a part-time public servant] shall have an interest in a firm which such public servant knows is engaged in business dealings with the agency served by such public servant...."

sole proprietorship, joint venture, partnership, corporation and any other form of enterprise, but shall not include a public benefit corporation, local development corporation or other similar entity...."

When individuals contract with a City agency to provide services as part of a commercial activity, they may be deemed to have an interest in a "sole proprietorship" or "firm" which is engaged in business dealings with the City. As such, their interests -- both ownership interests in and positions with -- the "firm" would be prohibited. See Charter Section 2604(a)(1)(b). In such situations, these individuals would be required to seek from the Board both an order, which would allow them to retain their otherwise prohibited ownership interest, and a waiver, which would allow them to hold an otherwise prohibited position. See Charter Sections 2604(a)(3), (a)(4) and (e).

In making the determination that the Employees' proposed part-time work would be in the nature of dual employment with the City rather than having an interest in a firm engaged in "business dealings with the City," the Board has considered the nature and circumstances of the proposed part-time work. The City agencies

which would hire the Employees to do the part-time work have administrative and financial control over the programs on which the Employees would work. The Employees would not work independently from the agencies and would have little discretion in the time and manner in which they would perform the part-time work. The Employees would contract individually with the City agencies, not as part of an ongoing commercial enterprise. The Employees would be paid on an hourly basis, not on a per-job basis.

The contents of the examinations and the course are determined by the City agencies and, in the case of the examinations, also by a City code. The City agencies oversee the registration process for the examinations and the course; the Employees do not solicit or recruit individuals to take the examinations or the course. Work space, materials and equipment used by the Employees in administering the examinations and the course are provided by the City. The Examiners are assisted by monitors who are provided by the City.

None of the Employees has any financial or other interest in the number of individuals taking the examinations or the course nor do the Employees have any financial or other interest in the results of the



examinations or the course.

In addition, the Director of the Institute has stated that the Teachers have unique qualifications and that their employment by the Institute is in the best interests of the agency which would employ the Teachers. The Employees have the approval of the agencies which employ them as regular employees to contract for the part-time positions, and the agencies with which the Employees would contract have been informed by the Employees that they are regular employees of another City agency.

The Board's determination that the Employees may contract for the part-time positions is, however, subject to the relevant provisions of Chapter 68: that the Employees may work on the part-time jobs only during times when they are not required to perform services which are part of their regular City employment; that the Employees may not use their official positions to obtain any personal advantage for themselves or the individuals taking the examinations or the course; and that the Employees may not disclose or use for private advantage any confidential information obtained as a result of their employment with their agencies. See Charter Sections 2604(b)(2),

(b)(3) and (b)(4) respectively.

In the future, any City employees who seek to contract for part-time work with a City agency -- whether the one for which they work or another City agency -- must contact the Board for a determination as to whether this part-time work would be consistent with Chapter 68. The Board must determine, on a case-by-case basis, whether a City employee's proposed second position with the City is in the nature of dual employment with the City or constitutes having an interest in a firm which is engaged in "business dealings with the City."

The factors that the Board will consider are, among others: to what extent the City controls and finances the program in which the employee would work part-time; whether the City employee negotiates for the second City position as part of an ongoing commercial enterprise; whether the employee's part-time work would be subject to the City agency's control; the degree to which the employee would have autonomy to determine the time and manner in which the part-time work would be performed; whether the City or the employee provides work space, materials and equipment; whether the employee has any financial or other interest in the

result of the part-time work; and whether the employee is paid on an hourly basis or on a per-job basis. In situations where the proposed second City employment involves teaching, or administering examinations, the Board will also consider whether the City or the Employee is responsible for the registration for the course or examinations.

In addition, the Board will require any regular City employee who also seeks to work part-time for the City to obtain the permission of the agency for which the City employee works as a regular employee, and to inform the prospective contracting agency of the individual's status as a City employee. Again, as noted in footnote three, officials of a City agency may determine that, notwithstanding the Board's opinion, it is appropriate for that agency to adopt a stricter standard.

#### Conclusion

It is the opinion of the Board that the Employees may contract for the part-time work described above, provided that they do so in accordance with the conditions specified in this opinion. In the future, the Board will consider similar requests by City employees on a case-by-case basis.

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