

Agency Served
Post-Employment Restrictions
Waiver

Charter Sections: 2601(3)
2604(d)(2)
2604(d)(4)
2604(e)

Advisory Opinion No. 96-1

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, he may, as an employee of a union representing City employees (the "Union"), appear before his former City agency (the "Agency") and continue working on matters with which he became involved while he was still employed by the City. Specifically, the former public servant is requesting that the Board waive the post-employment restrictions of Charter Sections 2604(d)(2) and (4), thereby permitting him to perform the duties associated with his position with the Union, which involve 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 he was employed by the City.

For the reasons stated in this opinion, the Board has determined that, under the circumstances here present, it is appropriate to grant a waiver permitting 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 with which he was involved while he was employed by the City.

Background

The former public servant worked for the City for more than 25 years. During his first 12 years of City service, the former public servant was employed by the Agency and also performed *ad hoc* duties for the Union as an unpaid officer. However, approximately 12 years ago the former public servant was placed on "release time with pay" and, while still paid by the City, began to work for the Union on a full-time basis.

The Board has been advised by the former public servant that there are three types of "release time" which may be given to City employees for the purposes of working on union matters. These arrangements, set forth in the Mayor's Executive Order No. 75, March 22, 1973, are a long-standing part of the City's labor-

management relations program. These arrangements result from collective bargaining negotiations.

The release time arrangements are:

(1) Ad hoc release time. A City employee who is a union member may work on union matters on an *ad hoc* basis on City time. The employee continues to receive his or her City salary and benefits, paid by the City;

(2) Release time without pay. Under this arrangement, a City employee is released from his or her regular City job duties to work on union business.

The employee is paid by the union, not the City, for this work, but retains seniority within the City and receives credit towards a pension, and the employer's portion is usually paid by the union; and

(3) Release time with pay. A City employee is released from his or her City job duties and is assigned to work for his or her union on a full-time basis. The employee retains seniority, and receives his or her regular City salary and benefits, paid by the City.

Both release time with pay and release time without pay arrangements are made without input from the public servant's City agency and must be approved by the applicable union and the City's Office of Labor

Relations ("OLR"). The arrangement is renewed each year by OLR and the union; if the arrangement is not renewed, the employee returns to his or her City job. While on release time, the affected public servant must submit timesheets signed by the applicable union to OLR through the public servant's agency. In addition, to meet oversight requirements, the public servant must periodically provide a log to OLR indicating the work he or she performed for the union.

While the former public servant who has requested the opinion in this case was on release time with pay, he was the Union's representative and business agent. His responsibilities involved working with all City agencies, including the Agency, and included representing Union members at grievances, working with management officials on contract interpretation, resolving problems or misunderstandings between employees and management officials, and engaging in similar activities.

In November 1995, the City offered an early retirement option, which the former public servant accepted. The former public servant was also offered and accepted a job with the Union to perform the same duties he performed while on release time with pay.

The former public servant has advised the Board that his employment with the Union will involve appearing before the Agency and working on particular matters with respect to which he was personally and substantially involved as a City employee.

The head of OLR, which was the City agency with oversight responsibility over the former public servant's release time activities, has advised the Board that a waiver of the post-employment restrictions of Chapter 68 would be in furtherance of the purposes and interests of the City.

Discussion

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

The Charter provides, in pertinent 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" See Charter Section

2604(d)(2). An "appearance," in turn, is defined as "any communication, for compensation, other than those involving ministerial matters."¹ Charter Section 2601(4).

Chapter 68 further provides that "[n]o person who has served as a 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, investigation or other similar activities." See Charter Section 2604(d)(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

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."

parties, including actions leading up to the particular matter"

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 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 post-employment restrictions are designed to, among other things, ensure that current and former public servants do not exploit their official positions for personal gain, subordinate the interests of the City to those of prospective employers, or exert special influence on government decision-making, either through contact with former colleagues or through access to confidential information. The specific circumstances of this case are such that the purposes of the post-employment restrictions of Chapter 68 would not be compromised if the former public servant were allowed to work for the Union and perform the duties described above.

During the period the former public servant was on release time with pay, the Agency was, as a practical matter, no longer the "agency served" by the former public servant as that term is defined in Chapter 68.²

Although paid by the City through the Agency, he did not perform work for the Agency, did not report at the Agency's offices to perform his Union work, did not become involved in the day-to-day work of the Agency, was not supervised by the Agency, and did not have access to confidential City information. The City, to the extent it had any involvement in his work for the Union, ensured, through OLR, that the former public servant performed services for the Union in accordance with the Mayor's Executive Order No. 75. Thus, while on release time, the agency served by the public servant was, in reality, OLR.

While on release time, the majority of the former public servant's contacts with the City were adversarial, insofar as he represented Union members at grievances. In his dealings with City officials he held himself out as a Union representative, not a City

² The "[a]gency served by a public servant" means (a) in the case of a paid public servant, the agency employing such public servant ... " Charter Section 2601(3).

employee, and represented the interests of the Union and its members including work that would be considered adverse to the City's interests. The City, in effect, paid the former public servant to, in certain instances, work against the interests of the City or at least against the positions taken by City management.

As stated above, the post-employment restrictions are designed to ensure that a current or former public servant does not exert special influence on government decision-making or subordinate the interests of the City. These factors are not implicated in this case.

Conclusion

The Board has determined that, based on the former public servant's representations and on those of the head of OLR, and on the specific circumstances of this case, it is appropriate in this instance to grant a waiver of the post-employment restrictions permitting the former public servant to appear before the Agency less than one year after termination of the former public servant's formal employment arrangement with the City and to work on particular matters with which he was involved while he was on release time with pay. See Charter Section 2604(e).

The former public servant must, however, abide by the other post-employment restrictions contained in Chapter 68. Specifically, to the extent he was ever privy to confidential City information not otherwise available to the public while he was a City employee, including the time he spent on release time with pay, he is prohibited from disclosing or using that confidential information for the private advantage of the Union or its members. See Charter Section 2604(d)(5).

The Board notes that there are a number of public servants on release time. The post-employment restrictions contained in Chapter 68 apply to these employees to the same extent that they apply to all other public servants. Any public servant on release time, whether with pay or without pay, who severs his or her formal employment relationship with the City, obtains work with his or her union and, thereafter, appears before his or her former City agency or works on particular matters would violate the Charter's post-employment restrictions, unless a waiver is sought and obtained from the Board prior to conducting such activities.

The Board has determined that the agency served by

public servants on release time is, in reality, OLR and, accordingly, public servants on release time whose situations are similar to that of the former public servant, must obtain the written approval of the head of OLR and submit such approval to the Board. The Board will then consider post-employment waiver requests by individuals on release time on a case-by-case basis.

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Dated: April 29, 1996