

Advisory Opinion No. 96-2

The Law Department of the City of New York has requested an opinion as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, Dr. Luis Marcos, the newly appointed President of the Health and Hospitals Corporation ("HHC"), may retain his position as a tenured professor of psychiatry at the New York University School of Medicine (the "Medical School"), in light of HHC's business dealings with New York University ("NYU"). For the reasons discussed below, under the particular circumstances here present, it is the Board's opinion that Dr. Marcos may retain his position as a tenured professor at the Medical School, provided that he complies with the conditions set forth in this opinion.

Background

The Medical School is a division of NYU. Since

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the 1970's, another division of NYU, the New York University Medical Center (the "Medical Center"), has had an affiliation contract with HHC (the "Contract").

Under the terms of the Contract, the Medical Center provides physicians and residents to work in three of the sixteen HHC hospitals. The services of these physicians and residents are essential to the operation of these three HHC hospitals. The three hospitals play a major role in providing public health care services in the City. HHC provides funds to the Medical Center to pay for the salaries of these physicians and residents. The Medical School, however, is not a party to these contracts and receives no funds under the contracts.

The Contract is renewed periodically, and Dr. Marcos, as President of HHC, would ordinarily be involved in the renewal negotiations. Also, as President of HHC, Dr. Marcos is a member of several HHC committees which handle aspects of the Contract renewals. Further, Dr. Marcos is a member of the HHC Board of Directors, which reviews the terms of the

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Contract renewals and votes to ratify Contract renewals.

Dr. Marcos has an extensive background in public health. He has been employed by HHC and other City agencies in the field of public health for over twenty years. He started teaching part-time at the Medical School in 1975, and was granted tenure by NYU in 1986.

As a part-time professor, Dr. Marcos does not have duties relating to the administration of the Medical School or NYU.

Dr. Marcos has taken a leave of absence without pay from the Medical School during his service as HHC President. He will not receive any salary, or any other benefits from the Medical School or NYU during the leave of absence, but will retain his position as a tenured professor at the Medical School. Dr. Marcos will occasionally teach classes on public health, on a pro bono basis, at the Medical School, as he does at other medical schools in the metropolitan area. Dr. Marcos is not required to teach at the Medical School in order to retain his position as a tenured professor

at the Medical School.

Maria K. Mitchell, the Mayor's Health Services Administrator and Chair of the HHC Board of Directors, has written to the Board stating that it is her opinion that Dr. Marcos' retention of his tenured position at the Medical School does not conflict with the purposes and interests of the City.

Discussion

Charter Section 2604(a)(1)(b) provides that no regular employee of the City, such as Dr. Marcos, shall have a position with a firm or institution which is engaged in business dealings with the City. Charter Section 2604(e) provides that a public servant may hold an otherwise prohibited position, where the Board has determined that the holding of the position would not conflict with the purposes and interests of the City.

Charter Section 2604(b)(2) provides that no public servant shall engage in any private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper

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discharge of his or her official duties. Charter Section 2604(b)(3) provides that no public servant shall use or attempt to use his or her official position to obtain any private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant. Charter Section 2604(b)(4) provides that no public servant shall disclose any confidential information concerning the City or use any such information to advance any private interest of the public servant or of any person or firm associated with the public servant.

The fact that the Medical Center has business dealings with the City means that Dr. Marcos' tenured teaching position with the Medical School is a prohibited position. See Charter Section 2604(a)(1)(b). Dr. Marcos has requested that the Board issue a waiver which would allow him to retain this position; however, the substantial business dealings which NYU has with HHC make it necessary for the Board to closely scrutinize whether Dr. Marcos' position with

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the Medical School would conflict with the purposes and interests of the City.

While tenured positions with universities or other institutions are and will continue to be subject to the strict scrutiny of the Board, particularly when these institutions do business with a high-level public servant's own City agency, the Board is cognizant of the difficulties inherent in the process of obtaining tenure. Furthermore, a rigid rule which requires individuals to give up tenured positions in order to accept City employment could be inconsistent with the City's interests in that the pool of qualified applicants for positions such as Dr. Marcos' could be severely limited if prospective public servants were forced to choose between City positions, many of which are relatively short-lived, and tenured positions at academic institutions, which generally offer a greater degree of job security than public service. It is clearly in the best interests of the City to retain the services of Dr. Marcos, whose qualifications and experience are vital to HHC.

In light of Dr. Marcos' position as a tenured professor at the Medical School, his involvement in the negotiation, review or ratification of the Contract or Contract renewals could create the appearance that Dr. Marcos was using his City position to obtain a private advantage for the Medical Center or NYU. For example, Dr. Marcos' involvement in the Contract negotiations could give rise to an appearance that the Medical Center was obtaining more favorable terms under the Contract than it would have obtained if Dr. Marcos had not been involved. Therefore, Dr. Marcos may not participate in the negotiation, review or ratification of the Contract renewals while he retains his position as a tenured professor at the Medical School. See Charter Sections 2604(b)(2) and (b)(3).

The Board has thus determined that if Dr. Marcos were to recuse himself from participation in all matters concerning the negotiation, review or ratification of the Contract or Contract renewals, it would not be inconsistent with the purposes and interests of the City for Dr. Marcos to retain his

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position as tenured professor at the Medical School. Such recusal would serve to diminish the potential appearance problems discussed above. The Board understands such recusal to mean that Dr. Marcos would not vote on the ratification of the Contract or on any Contract renewals, that he would not be involved, directly or indirectly, in any meetings or discussions concerning the negotiation, review or ratification of the Contract or any Contract renewals and that he would not receive any documents concerning these matters. See Advisory Opinion No. 92-5.

The Board has also determined that Dr. Marcos may be involved in the day-to-day management of services provided by the Medical Center under the Contract (and any Contract renewals). Dr. Marcos' involvement in the day-to-day management of the services provided under the Contract is in furtherance of the City's interests because, as stated above, he has an extensive background in public health. In addition, because the services provided under the Contract are essential to the operation of the three HHC hospitals, Dr. Marcos'

involvement in the day-to-day management of these services is a major component of his position as HHC President. Since, with the recusal described above, Dr. Marcos would not have any involvement in the negotiation of the terms of the Contract or in the approval of the Contract, Dr. Marcos' involvement with the Contract would be limited to ensuring that the pre-existing terms of the Contract were carried out properly. Thus, Dr. Marcos would be less likely to be perceived as using his official position to obtain a private advantage for the Medical School or any other division of NYU.

Dr. Marcos may also teach classes on public health, on a pro bono basis, at the Medical School and other medical schools. Dr. Marcos expects to teach, on a pro bono basis, at the Medical School and other schools. Such teaching activities are not required in order for him to retain his tenured position. Dr. Marcos' teaching serves the public interest, because it could lead to increased medical student interest in the field of public health.

If Dr. Marcos recuses himself from involvement in the negotiation, review or ratification of the Contract or Contract renewals, as described above, he still must comply with the other relevant provisions of Chapter 68. Thus, he may not use his City position to obtain any financial gain, contract, license, privilege or other private advantage, direct or indirect for himself or for any person or firm associated with him, including NYU or any of its divisions; he may not use City equipment or other City resources in connection with any non-City work; and he may not disclose or use for private advantage any confidential information concerning the City. See Charter Sections 2604(b)(3) and (b)(4), respectively. See also Charter Section 2604(b)(2).

Conclusion

It is the Board's determination, based on Dr. Marcos' representations and on Ms. Mitchell's written approval, that it would not conflict with the purposes and interests of the City for Dr. Marcos to retain his

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position as a tenured professor at the Medical School, provided that he recuses himself from any matters concerning the negotiation, review or ratification of the Contract and Contract renewals in the manner described above. See Charter Section 2604(e). If Dr. Marcos recuses himself in such a manner, he may be involved in the day-to-day management of services provided by the Medical Center to HHC under the Contract and any Contract renewals. With such recusal, Dr. Marcos may also teach classes at NYU and other academic institutions on a pro bono basis on the subject of public health. Dr. Marcos must continue to comply with Charter Sections 2604(b)(2), (b)(3) and (b)(4), as described above.

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