

Advisory Opinion No. 92-31

The Law Department of the City of New York has requested an opinion as to whether, consistent with Chapter 68 of the City Charter, a practicing attorney and member of a Community Board (the "Community Board"), could be retained by the Community Board to represent it in connection with public improvement projects planned for an area served by that Board.

The attorney in question is a current member of the Community Board, and has been actively involved with a special fund intended to promote public improvement of that area (the "Special Fund"). The Special Fund was created pursuant to an agreement between the City and a real estate developer, and has been funded through payments in lieu of sales tax made by the developer.

Pursuant to a further agreement between City and State economic development agencies, and the Community Board, up to one-half of the monies in the Special Fund may be applied towards public improvement projects proposed by the Community Board, and approved by such agencies.

The Community Board has proposed, and such agencies have approved, 11 separate projects consisting of public improvements such as facade cleaning, additional lighting, and the clean-up of a public square. These projects will, for the most part, be undertaken by not-for-profit organizations, who will receive grants from the Special Fund under grant agreements negotiated by the Community Board. The City economic development agency will retain custody of the Special Fund and will disburse the grant monies as required.

The attorney in question was actively involved in negotiating the agreement between the City and State agencies and the Community Board, securing the Community Board's right to use a portion of the monies in the Special Fund for public improvement projects, and reviewing and approving all 11 grant projects approved to date. The Community Board proposes to retain this individual to negotiate and prepare the actual grant agreements, and this arrangement has been approved by the City and State agencies. The attorney would be compensated for this work out of monies in the Special Fund. The Chairman of the Community Board has also approved the proposed retainer.

For the reasons set forth below, it is the opinion of the Board that it would be a violation of Chapter 68

of the City Charter if this attorney were to be retained by the Community Board in the circumstances and for the purposes described above.

Applicable Law

Charter Section 2604(a)(1)(a) prohibits a public servant who is not a regular employee from having an interest in any firm which such public servant knows or should have known is engaged in business dealings with his or her agency. An "interest" includes a position with a firm, and a "firm" includes a sole proprietorship. See Charter Sections 2601(11), (12).

Charter Section 2604(e) provides that a public servant may hold a position otherwise prohibited by Section 2604(a)(1)(a) if, after written approval by the head of the agency involved, the Board determines that the holding of the position would not be in conflict with the purposes and interests of the City.

Charter Section 2604(b)(3) provides that no public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage.

Proposed Retainer

In the instant case, acceptance of the proposed retainer would result in a public servant holding a position with a firm that will be engaged in business dealings with his or her agency. Although the attorney has secured the written approval of the head of the involved agency (the Community Board), and although the proposed engagement would be to represent the interests of the Community Board, the circumstances surrounding this engagement preclude our approving it under Charter Section 2604(e).

The attorney in question has been a member of the Community Board for 14 years, has served as Chairperson of the Community Board and of various committees of the Community Board, and has been closely involved in many phases of the redevelopment of the area where the projects are to be undertaken. Although the attorney appears well qualified to represent the Community Board and has in fact done so on a voluntary basis in the past, that alone does not entitle the attorney to accept the proposed engagement.

The attorney was directly involved in negotiating the agreement between the City and State agencies and the Community Board, and securing the Community Board's right to apply a portion of the monies in the Special Fund towards projects the Community Board would select.

In these circumstances, the attorney's engagement by the Community Board could give rise to an appearance that after helping the Community Board gain access to a portion of the monies in the Special Fund, she then used her official position to profit from the Special Fund by securing employment as a private attorney for compensation, in contravention of Charter Section 2604(b)(3). Further, the engagement could also give rise to an appearance that the Community Board has chosen to reward a long-standing member with a private consulting contract, rather than seeking out counsel to address a special need.

The Board therefore concludes that acceptance of the proposed engagement would violate Chapter 68 of the City Charter.

Sheldon Oliensis
Chair

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Dated: November 23, 1992