

Advisory Opinion No. 92-36

Several active public servants who are applying for Master Electrician's Licenses (collectively, the "Public Servants") have requested an opinion as to whether, consistent with Chapter 68 of the City Charter, they may, while employed by City agencies,

(a) file applications for certificates of electrical inspection with the Bureau of Electrical Control ("BEC"), which is part of the Department of Buildings ("Buildings"), and

(b) attend inspections, by Buildings inspectors, of electrical work covered by such applications.

Each Public Servant has represented that his or her official duties entail the maintenance and repair of electrical equipment, and each has indicated that he or she does not intend to bid on City projects. Each proposes to file such applications and attend such inspections on behalf of private clients, as a further means of earning a livelihood.

For the reasons set forth below, it is the opinion of the Board that it would not be a violation of Chapter 68 of the City Charter for such Public

Servants, while employed by City agencies, to file such applications or attend such inspections on behalf of private clients.

Application Process

Section 27-3018(b) of the New York City Electrical Code requires licensed electricians to file an application for a certificate of electrical inspection before starting any work for the installation, alteration or repair of electrical appliances for light, heat or power. Upon receipt of this application, which is mailed to Buildings with a \$10 filing fee, BEC reviews the application for completeness and the payment of appropriate fees. If the application is complete and the fees are paid, Buildings issues a permit for the proposed electrical work.

Inspections

After the work is completed, the applicant may request an inspection. Prior to 1988, the Electrical Code required that all types of electrical work be individually inspected upon completion. Local Law 73, adopted in 1988, removed the individual inspection requirement for eight categories of minor electrical maintenance work, replacing it with a spot-check inspection system for the licensed electrician's minor

work. Based on a satisfactory outcome of the spot-check review, inspection certificates are issued for all of the licensee's minor electrical work.

Buildings electrical inspectors conduct their inspections in the presence of the licensed electrician or his or her representative and issue violations when, in the judgment of the inspector, the electrical work does not conform to the requirements of the Electrical Code. The electrician may appeal such violations to the inspector's supervisor, who is the Borough Manager, and then to that person's supervisor, who is the General Manager. Further appeal can be made to BEC's nine-member Advisory Board, which includes two Buildings representatives. A certificate of electrical inspection will be issued when a subsequent inspection indicates the outstanding violations have been corrected. Buildings issued 33,576 certificates of inspection in fiscal year 1991.

Conclusion

In its Advisory Opinion No. 92-32, the Board determined that a former public servant could, within one year after leaving City service, file applications for certificates of electrical inspection with BEC, and attend inspections, by Buildings inspectors, of

electrical work covered by such applications. The Board's determination was based on an analysis of Charter Section 2604(d)(2), which prohibits a former public servant from appearing before his or her former agency for a period of one year after leaving City service.

"Appear" means any communication, for compensation, other than those involving ministerial matters. See Charter Section 2601(4). This includes all personal appearances, such as by telephone, letters, testifying at public hearings or attending meetings on behalf of a client. See Volume Two, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at 150, 152.

A "ministerial matter", in turn, means 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. (Emphasis added). See Charter Section 2601(15).

The Board held that the filing of applications for certificates of electrical inspection constituted a ministerial action, since it entails nothing more than submission of a properly completed form and payment of a prescribed fee. Inspections were also held to be

ministerial in nature, since they involve a review of electrical work based on the stated requirements of the Electrical Code, and the issuance of violations when those stated requirements have not been met.

The activities proposed by the Public Servants are identical to those which the Board considered in its Advisory Opinion No. 92-32. However, because the Public Servants are active City employees, these activities must be analyzed under a different provision of Chapter 68. Charter Section 2604(b)(6) provides that no public servant shall, for compensation, represent private interests before any City agency, or appear, directly or indirectly, on behalf of private interests in matters involving the City. The use of the terms "represent" and "appear" should be contrasted with Charter Section 2604(d)(4), which prohibits only appearances by former public servants.

As noted above, "appear" has been defined to include any form of communication for compensation, except for those involving ministerial matters. See Charter Section 2601(4). Chapter 68 does not, however, contain a definition for "represent".

The report of the Charter Revision Commission indicates that Charter Section 2604(b)(6) was derived from two provisions in former Chapter 68, which ceased

to be effective on January 1, 1990: former Charter Section 2604(b)(4), which prohibited public servants from representing private interests before any City agency, and former Charter Section 2604(c)(5), which prohibited public servants from appearing on behalf of private interests before their respective agencies. See Volume Two, Report of the New York City Charter Revision Commission, supra, at 177.

Our predecessor agency, the New York City Board of Ethics, considered the meaning of former Charter Section 2604(b)(4) in its Opinion No. 664. In that Opinion, the Board of Ethics held that active City employees, who held either a Master Plumber's or Master Electrician's License, could file certain documents with Buildings without violating the prohibition against representing private interests before a City agency. Specifically, the Board of Ethics held that an active City employee holding a Master Plumber's License could file an Application for Plumbing Alteration and Repair Slip, relating to minor replacements or additions to an existing plumbing system. The Board of Ethics noted that no other documents need to be filed for this minor work, and concluded that the filing of the Application did not rise to the level of an "appearance before a City agency".

The Board of Ethics further held that an active City employee holding a Master Electrician's License could file an application for inspection and certification because like the Application for Plumbing Alteration and Repair Slip, "[this] falls far short of [an appearance] ... and does not constitute representing private interests before a City agency."

The Board of Ethics distinguished the facts before it from those presented in its Opinion No. 56, which held that an active City employee could not file a Plumber's Affidavit with Buildings, because this document would be submitted as part of the building permit process, along with detailed plans and specifications. In essence, Opinion No. 664 is based on the premise that certain communications with City agencies are so routine in form and limited in discretion that they should not be considered as either a representation of private interests, or as an appearance before a City agency. In practical terms, the Board of Ethics excluded what are now referred to as "ministerial matters" from the scope of representation, as well as from appearance.

We accept the reasoning of Board of Ethics Opinion No. 664, insofar as it excludes ministerial matters from the scope of representation, as well as from

appearance. We agree that certain communications are so routine in form and lacking in substantial discretion that they should not invoke the prohibitions contained in Charter Section 2604(b)(6), governing active public servants, just as they would not invoke the prohibitions contained in Charter Section 2604(d)(2), governing former public servants.

We are therefore of the opinion that the Public Servants may, while remaining employees of City agencies, file applications for certificates of electrical inspection with BEC, and attend inspections of electrical work covered by such applications.

We note, however, that appeals of violations issued at an inspection would stand on a different footing, just as they would with respect to former public servants. Appeals involve the interpretation of Electrical Code requirements, either by internal Buildings personnel, or by a special Advisory Board, which includes Buildings' representation. They would also likely involve discussions, meetings and negotiations between Buildings and the licensed electrician as to how the violation should be corrected. Thus, the Public Servants may not be personally involved in the appeal of any violation resulting from an electrical inspection while they

remain active City employees. The resolution of any such appeal would involve Buildings' "substantial personal discretion" and involvement by the Public Servants would constitute a prohibited appearance under Charter Section 2604(b)(6).

We also note that as active City employees, certain other provisions of Chapter 68 apply to any activities the Public Servants might undertake as electricians, should they obtain the licenses they are seeking. These provisions must be observed at all times, even in the context of filing an application or attending an electrical inspection of the type treated in this opinion. These include Charter Section 2604(b)(2), which prohibits a public servant from engaging in any employment in conflict with the proper discharge of his or her official duties, Charter Section 2604(b)(3), which prohibits a public servant from using his or her official position to secure any financial gain or other personal advantage, and Charter Section 2604(b)(4), which prohibits a public servant from divulging any confidential information concerning the City obtained as a result of his or her official duties and not otherwise available to the general public. Thus, any work undertaken by the Public Servants should be performed only during times when

they are not required to perform official duties for the City (see Charter Section 2604(b)(2)), and they may not, in the course of performing any such work, divulge any such confidential information to a third party, or use any such confidential information to advance their own financial or other private interests (see Charter Section 2604(b)(4)).

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Dated: December 15, 1992