

CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD

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Charter Schools
Moonlighting

Charter Sections: 2604(a)(1)(b)
2604(b)(5) and (b)(6)
2604(c)(6)
2604(e)

Opinions Cited: 98-11, 99-6

Advisory Opinion No. 2000-1

The Chancellor of the New York City Board of Education (the “BOE”) has asked the Conflicts of Interest Board (the “Board”) two questions regarding the charter schools which have recently begun to be established in New York City: 1) whether, and if so, how, the provisions of Chapter 68 of the New York City Charter apply to employees and officers of these charter schools; and 2) whether, and if so how, the provisions of Chapter 68 apply to employees of the BOE who take leaves of absence from their BOE positions to serve as officers or employees of these charter schools.

For the reasons discussed below, it is the opinion of the Board, on the facts presented, that the provisions of Chapter 68 do not apply to officers and employees of charter schools as charter school employees, but that Chapter 68 does apply to BOE personnel on leave as BOE employees.

Background

The New York City Charter Schools Act, Chapter 4 of the Laws of 1998 (the “Act”), authorizes the creation of charter schools in the State of New York. The purpose of the Act is to “authorize a system of charter schools to provide opportunities for teachers, parents, and community members to establish and maintain schools that operate independently of existing schools and school districts. . . .” Education Law (E.L.) Section 2850(2).

Section 2853(1)(a) provides that charter schools shall be “education corporations.” See generally N.Y. Gen. Const. Law §65. Section 2853(1)(c) states that “[a] charter school shall be deemed an independent and autonomous public school, except as otherwise provided in this article. The charter entity and the board of regents shall be deemed to be the public agents authorized to supervise and oversee the charter school.”

To create a charter school, teachers, parents, school administrators, or any community resident may submit an application to one of three chartering entities: (1) the boards of education of school districts (or, in New York City, the Chancellor of the BOE); (2) the Board of Trustees of the State University of New York; or (3) the Board of Regents. After approval of the application by the chartering entity, the application, in the form of a negotiated “charter,” goes to the Board of Regents. The Board of Regents is the only entity authorized to issue a charter. Existing public schools may also apply to become charter schools, referred to as conversion schools. New York City public schools

seeking charter status may apply only to the Chancellor, who will submit approved applications to the Board of Regents.

A charter school may not charge tuition, deny students admission based on intellectual ability, achievement, or aptitude, or be sectarian in its programs or admission policies. In sum, “[a]ny child who is qualified for admission to a public school is qualified for admission to a charter school.” E.L. Section 2854(2)(b).

The school district in which the charter school is located is responsible for paying the full cost of student attendance at the charter school “directly to the charter school.” E.L. Section 2856(1). In New York City, while the BOE has some authority to inspect charter schools, the Chancellor has no power to hire or fire employees of a charter school. However, either the Board of Regents or, in the case of conversion schools, the Chancellor may terminate a charter upon grounds set forth in the Act.

The Act gives charter schools not only autonomy from the BOE, but also exemption from certain state and local laws. In particular, Section 2854(1)(b) provides that:

A charter school shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in this article. A charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education and school districts, including those relating to school personnel and students except as specifically provided in the school’s charter or in this article.

Section 2854(1)(e) goes on to state that “[a] charter school shall be subject to the provisions of articles six [Freedom of Information] and seven [Open Meetings] of the public officers law.”

In addition, Section 2854(3)(a) states that “[a]n employee of a charter school shall be deemed to be a public employee solely for purposes of article fourteen of the civil service law . . . and for no other purposes unless otherwise specified in this article. . . .” (Emphasis added.) Article fourteen, commonly referred to as the Taylor Law, permits public employees to organize, but forbids striking. Also, Section 2854(3)(c) provides that “[t]he employees of the charter school may be deemed employees of the local school district for the purposes of providing retirement benefits, including membership in the teacher’s retirement system and other retirement systems open to employees of public schools.”

In no part of the Act does it state that charter school employees shall be subject to Chapter 68 or to any other state or local ethics provision. Indeed at Section 2851(2)(v), the Act requires that a school’s application to become a charter school shall include “[a] code of ethics for the charter school, setting forth for the guidance of its trustees, officers and employees the standards of conduct expected of them.”

Discussion

In response to the Chancellor’s first question, that is, whether Chapter 68 applies to employees and officials of charter schools, the Board must first determine whether the Legislature intended to exempt charter schools from local conflicts of interest laws. In this regard, while the Board is reluctant to conclude that public employees (and there can be little question that charter school employees are indeed public employees) are exempt

from any ethics regulation,¹ it appears that indeed was the clear intent of the Legislature. Section 2854(1)(b) explicitly exempts charter schools from all state and local laws, rules, regulations, and policies, not specifically set forth in the act. In addition, the Act specifically requires charter schools to adopt their own ethics codes.² For these reasons, the Board concludes in response to the Chancellor's first inquiry that Chapter 68 does not apply to charter schools.

The Chancellor's second inquiry is whether, and if so how, the provisions of Chapter 68 apply to BOE employees on leave from their BOE positions to take positions at Charter schools. The Board is advised that the overwhelming majority of the employees of the New York City "conversion" charter schools are in fact BOE employees on unpaid leaves of absence.³

In answering this second inquiry, the Board notes that as a general matter it is clear that Chapter 68 applies to public servants on leaves of absence, paid or unpaid. In the Board's Advisory Opinion No. 98-11, the Board specifically stated that "public servants who are 'on leave' from their positions . . . are still considered public servants for the purposes of Chapter 68 Even if public servants 'on leave' from their City

¹ Charter schools are not subject to either the Public Officers Law (the "POL") or Article 18 of the General Municipal Law ("Article 18"), two other prominent New York "ethics" codes. State employees are subject to the POL, which is enforced by the State Ethics Commission. Charter school employees are clearly not state employees. Municipal employees outside of New York City are governed by Article 18, but GML Section 800(4) expressly excludes from its jurisdiction New York City and any "school district or other public agency or facility therein."

² See E.L. §2851(2)(v).

³ See E.L. §2854(3)(d), which provides that public school teachers may apply for leave to work at charter schools and that permission to take leave shall not be unreasonably withheld.

positions are not getting paid by the City, they are nevertheless employees of their respective agencies; these public servants may return to City service at the end of their leave without reapplying for a job.”

Thus, for example, a BOE teacher on an unpaid leave from his or her BOE position who during that leave takes a job with a firm that has business dealings with the City would, absent a waiver, violate the moonlighting restriction of Charter Section 2604(a)(1)(b). The Board sees no rationale for distinguishing that BOE employee from the BOE employee who takes a leave and during that leave works at a charter school. An argument that the Legislature has exempted charter school employees from Chapter 68 proves too much, i.e., if an employee would be subject to Chapter 68 in two separate roles, but is exempted in one of those roles, he or she remains subject to Chapter 68 in the other.

Note, however, that the restrictions of Chapter 68 apply only to the BOE employee as a BOE employee. For example, the prohibition of Charter Section 2604(b)(5) against taking gifts from persons or firms doing business with the City means exactly that, i.e., the BOE employee on leave to work at a charter school may not take valuable gifts from persons or firms doing business with the City. Section 2604(b)(5), however, does not prohibit that employee from accepting a valuable gift from a person or firm that does business with the charter school (but not with the City), precisely because, as noted above, a charter school is not a City agency for the purposes of Chapter 68.

It should further be noted that as BOE employees on leave to work at particular charter schools seek the Board’s advice about the applicability of Chapter 68 to their own particular activities, additional considerations will arise. For example, the BOE

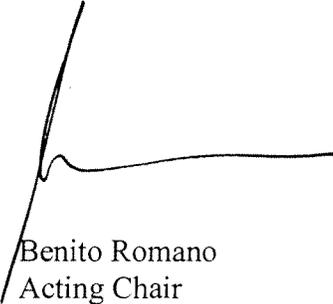
employee on leave to work at a charter school will ask whether by working at the charter school he or she is working at a “firm” engaged in business dealings with City within the meaning of the moonlighting restriction of Charter Section 2604(a)(1)(b). That inquiry will require, first, the relatively straightforward determination of whether the charter school is engaged in business dealings with the City and, second, a more subtle determination as to whether the charter school in question is indeed a “firm” within the meaning of Chapter 68. In that regard, analysis similar to that undertaken by the Board in Advisory Opinion No. 99-6 may well be necessary, to wit, an analysis of whether the charter school is, as CUNY and SUNY were determined to be in that opinion, a “governmental entity” and not a firm, so that outside employment at the charter school would not violate Section 2604(a)(1)(b). A similar analysis might well be appropriate regarding the applicability of Sections 2604(b)(6) and 2604(c)(6), which involve appearing before the City and volunteer work, respectively.

Even if a given charter school were determined to be a firm and not a governmental entity, the Board might, if the approval of the BOE Chancellor were forthcoming, conclude that employment at the charter school by a BOE employee on leave did not conflict with the purposes and interests of the City and might therefore grant the employee a waiver pursuant to Charter Section 2604(e). The Board expresses no opinion on these issues at this time.

Conclusion

For the reasons discussed above, it is the opinion of the Board that charter school officers and employees who have no City or BOE affiliation (e.g., who are not on leave

from City or BOE positions) are not subject to the provisions of Chapter 68. It is further the opinion of the Board that charter school employees who are also BOE employees, including BOE employees on unpaid leaves of absence, are subject to Chapter 68, though only in their BOE role.



Benito Romano
Acting Chair

Bruce A. Green
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Dated: July 15, 2000

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