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CONFLICTS OF INTEREST BOARD

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Community Boards

Charter Sections: 2601(1), 2601(19), 2604(b)(1)(b), 2800

Opinions Cited: 93-10, 2003-5

Advisory Opinion No. 2004-1

The Conflicts of Interest Board (the "Board") has received a request for advice that raises the question of whether so-called "public members" of community board committees, who are specifically not members of the community board itself, are subject to the conflicts of interest provisions of Charter Chapter 68.

For the reasons set forth below, the Board determines that these "public members" are not public servants and are therefore not restricted in their actions by the provisions of Chapter 68.

Background

The City Charter gives community boards express authority to establish committees on matters relating to their duties and responsibilities. Committees allow community boards to function more effectively by studying matters in some depth before submitting them to the full board. The City Charter expressly allows community boards to include on such

committees persons who are not members of the board, so-called “public members,” although the committee chair must be a community board member appointed by the Borough President. See Charter Section 2800(i). These “public members” are simply selected for committee membership by the community board itself, based on their interest and/or experience in particular community issues. For example, in the case under consideration here, the “public member” of the Traffic, Transportation and Safety Committee of a community board is a licensed professional engineer and the executive director of a consulting firm that performs traffic planning studies.

The Board is informed that as many as several hundred such public members serve on committees of the fifty-nine community boards throughout the City, and thus have a voice and a vote on community board committees, but no vote at the community board itself. Further, while much of the work of a community board may occur in its committees, a community board is not required to establish committees, is not mandated to refer any matters to the committees it does establish, and is free to disregard the recommendation of its committee on any matter it does choose to refer to committee.

Here, the inquiry to the Board concerns a public member of a community board committee who operates a business that consults on matters related to the committee’s jurisdiction. The committee from time to time considers whether the community board should recommend that the City retain consultants to perform planning studies and analyses, services which the public member’s firm is well-equipped to provide. The public member, being knowledgeable on this subject matter, plays an active role in the deliberations of the committee and has advised the committee that certain such studies are, in his opinion, warranted. If the committee should recommend to the community

board that the City seek such consulting services, the community board might accept that conclusion – albeit in a vote on which the public members of its committees do not participate. Then, the responsible City agency might seek to engage such consultants, in conformity with the City’s procurement rules. In such a procurement process, the Board is informed, it is foreseeable that the public member’s consulting firm might submit a proposal. Clearly, if the public member is a “public servant” subject to Chapter 68, this use of his public office to benefit his own consulting firm could violate Charter Sections 2604(b)(1) and (b)(3). Whether such public members are in fact “public servants” is the question to be decided here.

Relevant Law

Charter Section 2800(i) authorizes community boards to establish “committees on matters relating to its duties and responsibilities. It may include on such committees persons with a residence or significant interest in the community who are not members of the board, but each such committee shall have a member of the board as its chairperson.”

Charter Section 2601(19) states that “public servant” means “all officials, officers and employees of the City, including members of community boards and members of advisory committees, except *unpaid members of advisory committees shall not be public servants.*” (Emphasis added.)

Charter Section 2601(1) in turn defines “advisory committee” to mean any “entity constituted to provide advice or recommendations to the city and having no authority to take a final action on behalf of the city or take any action which would have the effect of conditioning, limiting or requiring any final action by any other agency, or to take any action which is authorized by law.”

Discussion

While the Board has never previously considered the question presented here, it has in the past considered whether particular categories of individuals were “public servants” subject to the provisions of the City’s conflicts of interest law. In Advisory Opinion No. 93-10, the Board considered whether administrative law judges for the Parking Violations Bureau (the “PVB”) were public servants. In ruling that PVB administrative law judges are public servants, and thus subject to Chapter 68, the Board relied heavily on the fact that the judges “exercise a wide variety of powers in the name of the City, and control a process that is central to the mission of the PVB.” The same can hardly be said about the community board committee members at issue here. While public committee members may provide helpful insight and analysis – even specific recommendations -- the actions of the committees are in no way controlling on the community board. The public members of community board committees do not exercise the same wide powers as PVB administrative law judges, whose decisions are legally enforceable by the PVB.

Similarly distinguishable is Advisory Opinion No. 2003-5, in which the Board determined that members of the Voter Assistance Commission (“VAC”) were public servants and not merely “unpaid members of advisory committees” within the definition of Charter Section 2601(19). In determining that the VAC was not an advisory committee, the Board specifically relied on the VAC’s ability to appoint a City official, the voter assistance “Coordinator,” who has “the authority to adopt rules in furtherance of VAC’s mission.” That appointment ability, the Board ruled, gave VAC the “authority to take a final action on behalf of the city.” The Board also stated that since the VAC had

legal authority to expend City funds and to “undertake activities for the purpose of encouraging and facilitating voter registration,” it had the authority to “take any action which is authorized by law” within the meaning of Section 2601(1). In a footnote, the Board contrasted the VAC with the advisory committee to the City’s Department of Juvenile Justice (the “DJJ”), which has power only to advise, recommend, and submit an annual report of its activities to the Mayor.

The role of public members of community board committees is much closer to the DJJ advisory committee than to the VAC. Unlike the VAC, which has the power to appoint a City official and to expend City funds on voter registration activities, community board committees have no authority to take any “final action on behalf of the city.” Indeed, Section 2800(i) of the City Charter, which grants community boards authority to establish committees, does not give such committees any power to act. Unlike the VAC, which is given legal authority to “undertake activities for purpose of encouraging and facilitating voter registration,” community board committees are given no legal authority to act and are thus unable to “take any action which is authorized by law.”

The Board accordingly concludes that the powers of the public members of community board committees are purely advisory, so that these members are not public servants within the meaning of Charter Section 2601(19). These public members are therefore not subject to the City’s conflicts of interest law. Thus, in contrast to the appointed members of the community board, the public committee members may vote on matters before their committee that might result in a direct and personal economic gain to themselves or their associates. See Charter Section 2604(b)(1)(b). In particular, in the

case before the Board, the public member is free to urge the committee to recommend that the City engage traffic consultants and then to have his firm bid to be selected to provide such services.

Conclusion

“Public members” of community board committees who are not members of the community board itself are not public servants within the meaning of Charter Section 2601(19), and hence are not subject to the provisions of the City’s conflicts of interest law.



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2004-262.ao/jz

OPINION SUMMARY

OPINION NO: 2004-1

DATE: 11/8/04

CHARTER SECTION(S) INTERPRETED:

2601(1), (19)
2604(b)(1)(b)
2800

SUBJECT(S): Community Boards

OTHER OPINION(S) CITED: 93-10, 2003-5

SUMMARY: "Public members" of community board committees who are not members of the community board itself are not public servants within the meaning of Charter Section 2601(19) and hence are not subject to the provisions of the City's conflicts of interest law.