

CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

2 Lafayette Street, Suite 1010
New York, New York 10007
(212) 442-1400

Fax: (212) 442-1407 TDD: (212) 442-1443

Steven B. Rosenfeld
Chair/Board Member

Monica Blum
Board Member

Kevin B. Frawley
Board Member

Angela Mariana Freyre
Board Member

Andrew Irving
Board Member

Mark Davies
Executive Director

Wayne G. Hawley
*Deputy Executive Director
& General Counsel*

Julia Davis
*Special Counsel &
Director of Financial
Disclosure*

Carolyn Lisa Miller
Director of Enforcement

Alex Kipp
*Director of Training &
Education*

Ute O'Malley
*Director of
Administration*

Derick Yu
*Director of Information
Technology*

Post-employment Restrictions

Charter Sections: 2601(4), 2604(b)(6) and (d)(2)

Board Rules: 1-07

Advisory Opinion No. 2008-1

The Conflicts of Interest Board (the "Board") has in recent years received several requests for opinions from former public servants regarding the post-employment restriction on appearing before one's "agency served" for one year following the termination of one's City service, when the public servant in question has served more than one City agency. In particular, questions have arisen as to the application of the one-year appearance ban when service with the two City agencies runs, at least in part, simultaneously rather than only sequentially. This opinion addresses that issue.

Background

Charter Section 2604(d)(2) provides that "no former public servant shall, within a period of one year after termination of such person's service with the city, appear before the city agency served by such public servant."

As defined in Charter Section 2601(4), “appear” means to make any communication, for compensation, other than those involving ministerial matters.

Board Rules Section 1-07 states that “[f]or the purposes of Charter §2604(d)(2), when a former public servant has served more than one agency within one year prior to the termination of such person's service with the City, the former public servant shall not appear before each such City agency for a period of one year after the termination of service from each such agency.”

Discussion

Board Rules Section 1-07 clearly governs a public servant who changes City jobs within a year before departing altogether from City service – for example, on February 13 a Department of Transportation (“DOT”) supervisor moves to become an Assistant Commissioner at the Department of Design and Construction (“DDC”) and then leaves City service on December 15. In such a case, the Rule would prevent appearances before *both* DOT *and* DDC within the one year period, measured in each case from the end of service in each capacity – *i.e.*, from February 13 as to appearances before DOT and from December 15 as to appearances before DDC. But the plain meaning of the Rule also applies to the situation where a public servant occupies two or more different City positions *simultaneously*.

There are, generally stated, two ways by which a public servant may simultaneously hold multiple City positions. In the first (“*de jure*”), the simultaneous positions occur as a matter of law – that is, a statute designates the holder of one City position as the holder of a second City position. For example, Section 653(1) of the Private Housing Finance Law

designates the Commissioner of the City's Department of Housing Preservation and Development ("HPD") as the chairperson of the New York City Housing Development Corporation ("HDC") and also provides that the Commissioner of the City's Department of Finance ("DOF") shall be a board member. Similarly, Section 7384(1) of the Unconsolidated Laws provides that the Commissioner of the City's Human Resources Administration ("HRA") shall serve as a member of the governing board of the New York City Health and Hospitals Corporation ("HHC"). In each case, these Commissioners serve two City agencies at the same time: one serves HPD and HDC; one serves DOF and HDC; and one serves HRA and HHC. When their service as Commissioner ends, their service at the other agency likewise ends.

From time to time, public servants are also appointed, in the discretion of the appointing authority, to serve a second City agency ("*de facto*"). For example, the current Commissioner of the New York City Department for the Aging ("DFTA") has been appointed by the Mayor to serve on the board of HHC. Similarly, high-ranking officials of HHC and of the New York City Housing Authority ("NYCHA") have been appointed to the Panel for Educational Policy of the Department of Education ("DOE"). The DFTA Commissioner thus serves both DFTA and HHC, while these two members of the DOE's panel serve both the DOE and, respectively, HHC and NYCHA. When these officials leave their primary City positions, they may also leave their second City positions – but need not necessarily do so, since the second position is not, as a matter of law, linked with the first.

Whether a public servant holds two City positions *de jure* (such as the HPD Commissioner who serves both HPD and HDC) or *de facto* as a matter of the appointing authority's discretion (such as the DFTA Commissioner who also serves HHC as a board

member), the restriction of Charter Section 2604(d)(2) applies to *both* positions. Such public servants serve *two* City agencies for the purposes of this provision, and accordingly may appear before *neither* such agency during their first post-employment year. When, as is typically the case, the service to each such agency ends at the same time, the one-year ban on appearances before each agency will run concurrently. But if the official leaves one City position before the other, as is possible in the case of a *de facto* discretionary appointment, then, as provided for in Board Rules Section 1-07, the official may not appear before each agency for one year from the date when the service to that agency ends. Thus, if, for example, the DFTA Commissioner on the HHC board leaves his full-time City position for the private sector, but retains his part-time HHC board position, he may not appear on behalf of his new private employer before DFTA for one year after his service *to that City agency* ends. See Board Rules Section 1-07. He likewise may not appear on behalf of his new private employer before HHC, since as a *current*, albeit part-time, public servant, he is prohibited by Charter Section 2604(b)(6) from appearing before the City agency that he currently serves. So, too, he may not, per Charter Section 2604(d)(2), appear before HHC for one year following the eventual end of his service to that agency.

The foregoing application of Board Rules Section 1-07 to cover simultaneous positions, both *de jure* and *de facto*, is fully consistent with the purpose underlying Charter Section 2604(d)(2) – to prevent former public servants from exerting special influence on government decision making through contact with former colleagues. An individual who has served more than one City agency, whether simply by virtue of his or her primary City position or because of a discretionary multiple appointment, will have developed relationships at the second (or third) agency that can be exploited every bit as much as

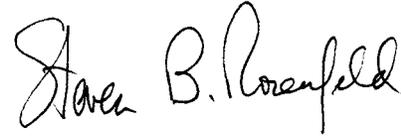
contacts at the primary agency. Accordingly, use of such relationships to benefit the former public servant should be barred for a year after completion of service to each agency.

The Board also cautions that the restriction on appearances during the first post-employment year means that former City officials may not communicate, other than on ministerial matters, with *any* officers or employees of their former agencies acting in their official capacities. This means, without limitation, that former public servants may not attend meetings attended by officers or employees of such agencies as representatives of their agencies. Thus, for example, while a former HPD Commissioner could communicate in his first post-employment year with the Department of Finance, including with the Finance Commissioner acting in that capacity, he could not communicate with the Finance Commissioner in her capacity as an HDC board member, because both HDC and HPD are “agencies served” by the former HPD Commissioner. As noted, this means that the former HPD Commissioner may not, in his first post-employment year, attend any meeting also attended by the Finance Commissioner (or any other HDC board member) in her capacity as an HDC board member.

Conclusion

A public servant who serves multiple City agencies, whether *de facto* or *de jure*, may appear before none of those City agencies for one year after the service to *each* such agency ends. A prohibited appearance is any compensated communication, other than on

ministerial matters, with any officer or employee of the City agency in question, where that officer or employee is acting in his or her capacity as a representative of that agency.

A handwritten signature in black ink that reads "Steven B. Rosenfeld". The signature is written in a cursive style with a large, looped initial 'S'.

Steven B. Rosenfeld
Chair

Monica Blum
Kevin B. Frawley
Angela Mariana Freyre
Andrew Irving

Dated: August 19, 2008