



# CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

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## **Definition of Public Servant**

Charter Sections: 2601(19), 2601(a)(1)(b), 2604(b)(5),  
2604(b)(13), 2604(d)(2), 2604(d)(4),  
2604(d)(5), and 2604(e)

Opinions Cited: 93-10

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## **Advisory Opinion No. 2009-4**

The Conflicts of Interest Board (the “Board”) has received an inquiry from a City agency (the “Agency”) regarding the application of the conflicts of interest provisions of Chapter 68 of the City Charter to three attorneys who will be working at the Agency for the coming year pursuant to the Public Service Program (the “Program”) of the private law firms that have hired these attorneys. For the reasons set forth herein, the Board concludes that these attorneys will be public servants of the City within the meaning of Chapter 68 and will therefore, as a general matter, be subject to the provisions of the City’s conflicts of interest law.

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**I. Background**

The Program is a recently organized initiative, prompted by the current economic slowdown, through which private law firms defer the full-time employment of incoming associates by paying them a reduced salary to work for a period of one year in the offices of not-for-profit organizations or governmental entities. Program participants will receive a salary and benefits from the private law firm during this year-long deferral period but will join the offices of and work on projects assigned by the governmental or not-for-profit entity. At the completion of the year, it is expected that the law firm associates will join the law firm as full-time employees, working solely on firm matters.

The Agency intends to accept three Program associates (collectively, the “Associates”) who will spend a year at the Agency working on Agency matters. After one year, one of the Associates (the “Associate”) will be employed by a law firm (the “Firm”) that has a contract with the City to provide legal services to the Agency. While participating in the Program, the Associate will not work on matters at the Agency related to the Firm. However, it is possible that after departing the Program and joining the Firm, the Associate would work on matters related to the Agency and would in the course of such work likely need to communicate with the Agency.

The Agency now asks whether, as a general matter, the Associates will be subject to the provisions of Chapter 68, and, more specifically, what restrictions Chapter 68 would impose, if any, on the Associates, including any restrictions on the Associates’ activities after completing their year at the Agency.

## **II. Relevant Law**

Charter Section 2601(19) defines public servants as “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.”

Charter Section 2604(a)(1)(b) prohibits a public servant whose primary employment is with the City from holding a position with a firm that is engaged in business dealings with the City.

Charter Section 2604(b)(5) prohibits a public servant from accepting a valuable gift from any person or firm that such public servant knows is or intends to become engaged in business dealings with the City.

Charter Section 2604(b)(13) provides that no public servant shall receive compensation, except from the City, for performing any official duty.

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

Charter Section 2604(d)(4) provides that no former public servant shall appear, whether paid or unpaid, before the City, or receive compensation for any services rendered, “in relation to any particular matter involving the same party or parties with respect to which particular matter such person had participated personally and

substantially as a public servant through decision, approval, recommendation, investigation or other similar activities.

Charter Section 2604(d)(5) provides that no public servant shall, after leaving City service, disclose or use for private advantage any confidential information gained from public service that is not otherwise made available to the public.

Charter Section 2604(e) provides that a public servant may hold a position or engage in conduct otherwise prohibited by Chapter 68 if the Board determines, after receiving written approval of the public servant's agency head, that such position or conduct does not involve a conflict with the purposes and interests of the City.

### **III. Discussion**

The Conflicts of Interest Board is presented with the question of whether these Associates are subject to Chapter 68. In making a determination as to whether a person is a "public servant" for purposes of Chapter 68, the Board has previously noted that Charter Section 2601(19), which defines "public servant," is intended "to cover a **broad spectrum** of persons who act in an official capacity for and on behalf of the City, whether or not such persons receive a salary or other form of compensation." See COIB Advisory Opinion No. 93-10 at 5 (emphasis added). In that opinion, the Board held that Chapter 68 applies to the Administrative Law Judges of the Parking Violations Bureau, relying in part on the following from the Charter Revision Commission Report on Chapter 68:

For the purpose of identifying those individuals who are subject to the conflicts of interest standards [contained in Chapter 68], the term "public servant" has been defined to include all officials, officers and employees of the City, whether or not they are salaried or receive compensation in the form of per diem payments, reimbursement for costs, or otherwise. The term includes all elected officials, and all other officers and employees of the city whether appointed or otherwise employed. The only individuals excluded from the application of the conflict of interest standards are unpaid members of advisory committees whether or not they receive reimbursement for costs. See Volume II, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at 153.

(Emphasis added.)

In Board of Ethics Opinions Nos. 388, 400, and 400A, the Board of Ethics, this Board's predecessor entity, examined the case of employees of private firms who, in the wake of the fiscal crisis of the 1970s, joined City agencies to provide temporary assistance and advice, but who continued, as the Associates would here, to receive compensation and benefits from their private employers. The Board of Ethics premised its approval of these arrangements on the requirement that these temporary employees be recused from matters involving their private employers. Specifically, the Board of Ethics emphasized that such arrangements were conditioned on the requirement that "during their City service, [these individuals] will have nothing whatever to do" with the business dealings between the City and their private employers. Board of Ethics Opinion No. 400.

In the case of the Program, the Associates will spend a year working full-time in City offices at the direction of City officials, using City resources, and performing the same duties for the Agency as similarly-situated employees who are on the City payroll.

To suggest that individuals with the identical authority and responsibility as City employees are not themselves public servants, even though they will be performing the same duties for the City as those employees compensated by the City, strikes the Board as incorrect as a matter of law and policy. The Board therefore determines that the Associates will be public servants within the meaning of Charter Section 2601(19) and hence will be subject to the provisions of Chapter 68.

In applying Chapter 68 to the Associates, the Board will be guided, as is its consistent aim, by reason and common sense. Thus, for example, inasmuch as the Associates might be said to have positions at the private law firms, some of which may have business dealings with the City, they may therefore be said to hold positions that would violate Charter Section 2604(a)(1)(b). Moreover, the Associates might be said to be receiving compensation from an entity other than the City for performing their City duties in violation of Charter Section 2604(b)(13). In order to permit the Program to proceed smoothly and efficiently, the Board deems the Agency's request for advice to contain as well a request for a waiver of these restrictions, pursuant to Charter Section 2604(e). Finding that the Associates' holding of such positions and receiving such compensation would not conflict with the purposes and interests of the City, the Board accordingly grants such waivers for these Associates and for all associates participating in the Program at any City agency.

The Board would expect to take a similarly practical approach in considering the application of certain other provisions of Chapter 68. Because the Associates will be, for

most purposes, “public servants,” they will be required to observe most of the basic strictures of Chapter 68, such as the prohibitions on using their City positions for personal or private advantage (see Charter Section 2604(b)(3)), appearing before City agencies or against the interest of the City (see Charter Sections 2604(b)(6) and (7)), maintaining financial relationships with their superiors or subordinates (see Charter Section 2604(b)(14)), and engaging in the political activities prohibited by Charter Sections 2604(b)(9) through 2604(b)(11).

On the other hand, for example, an Associate in the Program who receives an invitation to the Firm’s annual firm-wide outing attended by all Firm associates would probably not be deemed, if the Firm has City business dealings, to have received a gift in violation of Charter Section 2604(b)(5). Such determinations will be made on a case-by-case basis in each situation.

For those Associates who in their first post-employment year after leaving City service may be required to “appear” before the City agency they served while in the Program, a group the Board anticipates will comprise a minority of participants in the Program, the Board will entertain, again on a case-by-case basis, applications for a waiver of Charter Section 2604(d)(2) to permit those appearances that would otherwise be in violation of this provision.<sup>1</sup>

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<sup>1</sup> Even absent a waiver from the Board, some “year one” appearances may be permissible pursuant to the exception, set forth in Charter Section 2604(d)(2), for communications “incidental to an otherwise permitted appearance in an adjudicative proceeding before another agency or body, or a court, unless the proceeding was pending in the agency served during the period of the public servant’s service with that agency.”

Finally, the Board emphasizes that its conclusion that the Associates are “public servants” is limited, as the Board’s jurisdiction is limited, to Chapter 68, the City’s conflicts of interest law. This conclusion should not be read to suggest in any way that the Associates may be deemed City employees for any other purpose.

**IV. Conclusion**

For the reasons set forth in this Opinion, the Board determines that law firm associates who defer their work at their firm to work for a year, at their firm’s expense, for City agencies, will be public servants within the meaning of Charter Chapter 68, the City’s conflicts of interest law, and hence will be subject to the provisions of that law.



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Dated: June 15, 2009

2009-313.ao/jmb