POST-EMPLOYMENT RESTRICTIONS

By

Christopher M. Hammer
Deputy General Counsel
NYC Conflicts of Interest Board

A. Introduction

The post-employment restrictions of Chapter 68 of the Charter, contained in Charter § 2604(d), are applicable to all City employees who leave their City jobs for the private sector, without regard to level of responsibility, scope of discretion, or length of time in City service. As stated by the Board in Advisory Opinion Number 95-1, citing Advisory Opinion Number 94-15, these restrictions seek "to prevent former public servants from exploiting public office for personal gain, subordinating the interests of the City to those of a prospective employer, or exerting undue influence on government decision-making."

There are four post-employment restrictions on City employees. These restrictions address: (1) negotiating for a job with a private employer who is involved with a particular matter the City employee is working on in his or her City job; (2) appearing before one's former City agency within one year after leaving City service; (3) working on a particular matter that one worked on personally and substantially as a City employee; and (4) using or disclosing confidential information gained in City service. Each of these restrictions is discussed below.

It should be emphasized that the post-employment restrictions regulate the conduct of present and former City officers and employees, not the conduct of private firms. Therefore, even though a former City employee may not appear before that employee's former City agency for one year after leaving City service and may not work on a particular matter the employee worked on while in City service, the employee's new firm may appear before the employee's former City agency and may work on such a particular matter.

B. Applying For Private Sector Employment

Charter § 2604(d)(1) prohibits public servants from soliciting, negotiating for, or accepting a position with any person or firm who or which is involved in a *particular matter* with the City while the public servants are actively considering, directly concerned, or personally participating in such *particular matter* on behalf of the City. The term "public servant" is defined 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."[1]

Understanding what constitutes a "particular matter" is critical to interpreting the Charter's provisions on post-employment restrictions. Charter § 2601(17) defines "particular matter" as "any case, proceeding, application, request for a ruling or benefit, determination, contract limited to the duration of the contract as specified therein, investigation, charge, accusation, arrest or other similar action which involves a specific party or parties, including actions leading up to the particular matter; provided that a particular matter shall not be construed to include the proposal, consideration, or enactment of local laws or resolutions by the council, or any action on the budget or text of the zoning resolution."

As the legislative history to Chapter 68 makes clear, the drafters of Chapter 68 intended that the term "particular matter" be construed narrowly. The Charter Revision Commission wrote:

> The term particular matter, used in the post-employment prohibitions contained in 2604(d), defines those matters engaged in by public servants during their public employment in relation to which they may not make appearances before city agencies, or accept employment or remuneration for services, after leaving city service. The definition excludes work performed in relation to general subject matters or policy issues where the results apply to categories of individuals rather than a specific party or parties. Moreover, the prohibition which is found in section 2604(d) applies only when the same specific party or parties continue to be involved in the particular matter. Given the permanent nature of the post-employment prohibition, the definition of "particular matter" is intended to be construed narrowly.[2]

In keeping with this definition of "particular matter," the Board determined, in Advisory Opinion Number 93-8, that, where a public servant's work consisted of research and analysis on a public policy issue affecting a large number of City residents and was neither directed at, nor geared to, any individual party or contract, and did not require recommending, or negotiating for, any services to be rendered to the City, his or her work related to a general subject matter or policy issue with broad impact on a class or category of individuals and was thus excluded from the scope of a particular matter. Accordingly, it was permissible for this public servant—whose limited contact with a specific corporation was only to gather data for this research—to solicit, negotiate for, and (if offered) accept a position with that corporation.

Before discussing job opportunities with a private firm, a public servant must be sure that he or she does not currently have any dealings with that firm in his or her City job. For example, if a public servant is reviewing a grant application that ABC Corp. has submitted to the public

servant's agency, the public servant cannot discuss any future employment with ABC Corp. until the public servant's responsibilities with respect to the grant application are completed, or until the public servant's supervisor has, at the public servant's request, assigned the official duties concerning ABC Corp. to another public servant in the agency.

The case of *COIB v. Dempsey*[3] illustrates this point. In *Dempsey*, the Board fined a former Budget Director and Senior Director for Strategy and Program Development for New York City Housing Authority ("NYCHA") $9,500 for negotiating for and accepting a position with a firm while working on NYCHA matters with the firm, including authorizing NYCHA work and payments to it. The successful employment negotiations took place over a ten-month period and included numerous emails and in-person meetings. Similarly, in 2017, the Board fined a former Project Manager at the New York City Mayor's Office of Housing Recovery ("HRO") $6,000 for having several conversations and a first-round interview for a position with a private construction contractor he was overseeing as part of his City duties and also for communicating with HRO on behalf of the firm in his first post-employment year in violation of the one-year appearance ban, discussed in Section C below.[4]

The prohibition against soliciting a position with a firm whose matter a City employee is handling, while perhaps more often referenced for employees who are looking to leave City service, applies equally to a City employee who is looking for a part-time private sector position. In 2013, in a joint resolution with the Board and the New York City School Construction Authority ("SCA"), an SCA Project Officer agreed to serve a six-week suspension, valued at approximately $10,400, for soliciting and accepting a part-time position with a firm whose work he supervised for SCA, as well as for soliciting a $15,000 loan from an SCA contractor.[5]

Job searches, like any other private activity conducted by a City employee, must be conducted on the public servant's own time and the public servant may not use his or her official City position or City resources, letterhead, equipment, personnel, or materials in connection with his or her job search.[6] Thus, the Board issued a public warning letter to the Chief of the Division of Engineering for the New York City Department of Environmental Protection ("DEP") Bureau of Wastewater Treatment for using his DEP e-mail account to send his resume to nine employers—including one government entity—while he played an oversight role in managing the DEP projects of several of those employers.[7] In 2015 the Board reaffirmed this holding in fining, after a full trial, a former high-ranking official of the New York City Health and Hospitals Corporation ("HHC") $3,000 for misusing his HHC e-mail account by using it to solicit private employment and for addressing this solicitation to executives of a private firm whose contract with HHC the official was responsible for overseeing.[8]

C. <u>One-Year Appearance Ban</u>

Chapter 68 contains two provisions regarding the one-year appearance ban. The first provision, Charter § 2604(d)(2), applies to most public servants. This provision prohibits public

servants from appearing before the City agency served by the public servant within a period of one year after termination of his or her service with the City. The second provision, Charter § 2604(d)(3), applies to a small number of individuals holding specified positions in City government, including elected officials, Deputy Mayors, Director of the Office of Management and Budget, Commissioner of the Department of Citywide Administrative Services, Corporation Counsel, Commissioner of Finance, Commissioner of Investigation, and Chair of the City Planning Commission. The holders of these positions are prohibited from appearing before the branch of City government in which they served within a period of one year after termination of their service with the City. For purposes of this provision, the legislative branch of City government consists of the City Council and the offices of the Council, and the executive branch consists of all other agencies of the City, including the office of Public Advocate.

Consistent with Charter § 2604(d)(3), the Board, in Advisory Opinion Number 92-13, prohibited a former high-level public servant, who held one of the positions listed in Charter § 2604(d)(3), from communicating, on behalf of his private employer, with City agencies in the branch of government he served until one year from the date of his termination from City service.

For purposes of the one-year ban on a public servant's appearances before his or her former agency, the date of termination from City government (and thus the date on which the one-year appearance ban begins to run) is the date on which a public servant effectively stops working for the City. In Advisory Opinion Number 98-11, the Board noted that receiving lagged paychecks or payment for unused leave does not alter or extend the date of termination from City service. The Board also stated that public servants who are "on leave" from their positions—even unpaid leave—are still public servants, subject to all of the restrictions on current public servants contained in Chapter 68. In 2013, for example, the Board fined a former Elevator Mechanic Helper for the New York City Housing Authority ("NYCHA") $1,000 who, while on leave from NYCHA, worked as an Elevator Mechanic Helper for a firm having business dealings with NYCHA.[9]

In the context of the Charter's post-employment restrictions, "'[a]ppear' means to make any communication, for compensation, other than those involving ministerial matters."[10] This includes attending meetings, making telephone calls, sending e-mails, writing letters, and engaging in similar types of activities. The Board accordingly fined a former Administrative Engineer at the New York City Department of Buildings ("DOB") $2,000 for attending, during the first year after he left DOB and on behalf of his private employer, meetings at the Lower Manhattan Construction Command Center at which employees of DOB were present. The former Administrative Engineer admitted that his conduct violated the prohibition against appearing before one's former City agency within one year of terminating employment with the agency.[11] Similarly, in 2015, the Board fined a former First Deputy Press Secretary for the New York City Mayor's Office $2,000 for communicating with her former City agency on two occasions on behalf of her new private sector employer—once by attending a meeting hosted by a Deputy Mayor at City Hall—within her first year of leaving City service.[12] In 2012, the Board

fined a former attorney for the New York City Police Department ("NYPD") $1,000 for, during his first post-employment year, writing a letter on behalf of a client of his private law practice to the New York City Office of Payroll Administration, which letter he copied and sent to the NYPD Payroll Section, seeking correction of alleged excessive payroll deductions. As the former employee admitted, by sending this letter to NYPD during his first post-employment year, he violated the one-year appearance ban.[13]

In Advisory Opinion Number 2008-1, the Board stated that the ban on appearances before the "agency served" by the former public servant prohibits communications, 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 official capacity as a representative of that agency. Ministerial matter "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."[14] The Board in 2009 thus fined a former high-level public servant, one of whose agencies served was the Hudson Yards Development Corporation ("HYDC"), for making a presentation during his first post-employment year to a panel on which the HYDC President sat in her official capacity.[15] In contrast, as the Board stated in Advisory Opinion Number 2009-5, where the public servant in question is approached in his or her *personal* capacity, communicating with that current public servant in the former public servant's first post-employment year will not implicate the one-year ban. For example, an attorney who has left City service may in her first post-employment year contact a former colleague to seek the colleague's personal legal business and may likewise approach a former colleague to seek his or her endorsement of a candidate for elective office, since such political endorsements are, the Board observed, personal rather than official acts. Purely social interactions, such as meeting for lunch, or other non-work-related contact with former colleagues are permissible both because they are communications with one's former colleagues in their personal, not their official, capacities and because they are not compensated communications. If, however, the conversation on such an occasion turns to business that the former employee's new private sector employer has with his or her former City agency, a violation of the one-year appearance ban may well occur.

In order to enforce these provisions, the Board can and, as noted above, does impose fines against former public servants for actions taken after leaving City service. In 2007 the Board fined a former New York City Department of Transportation ("DOT") employee $2,000 for appearing regularly before DOT during his first post-employment year on behalf of his private employer to coordinate which streets should be milled and resurfaced.[16] In 2008 the Board and the New York City Department of Education ("DOE") concluded three-way settlements with five former DOE technology staff developers in which three agreed to fines of $1,500, one a fine of $2,500, and the fifth a fine of $5,000. These employees admitted that, when they left the DOE, they formed and jointly owned a firm to market and sell products to the DOE and that, during their first post-employment year, they organized a conference for DOE employees at which they made technology presentations.[17] Also in 2008 the Board fined the former Director of the Mayor's Office of State Legislative Affairs $12,000 for making

compensated appearances, in the form of numerous e-mails, to various public servants in the Mayor's Office concerning a number of items of pending or prospective legislation of interest to several clients of his law firm, at which he was a partner.[18] In 2016, the Board entered into a joint disposition with DOT and a former DOT Executive Deputy Agency Chief Contracting Officer ("ACCO"), who paid a $5,000 fine for, within one year of leaving City service, twice appearing before DOT on behalf of his new private-sector employer. In each of those prohibited appearances, the former Executive Deputy ACCO contacted former DOT subordinates seeking confidential City information.[19]

The meaning of "agency served by such public servant," a phrase used in Charter § 2406(d)(2), depends on the particular facts at issue. Therefore, in the case of a *paid* public servant, this phrase means the agency employing the public servant. However, in the case of an *unpaid* public servant, it means the agency employing the official who appointed the unpaid public servant, with certain exceptions.[20]

The Board, in Advisory Opinion Number 93-11, made it clear that when a former public servant was employed by a unit or department within an agency, the "agency served by such former public servant" is the entire agency, and not just the unit in which the former public servant was employed. Although the former public servant worked only for an agency's Enforcement Unit, he served the entire agency, including the agency's Hearings Unit, and it would be a violation of Chapter 68 for the former public servant to appear before the agency's Hearing Unit less than one year after the termination of his service at the agency.

In Advisory Opinion Number 2007-1, the Board noted that, while for former members of the Community Education Councils of the DOE their "agency served" is the entire DOE, it would, in light of their limited powers, evaluate applications for waivers of the one-year appearance ban as if their agency served was the *DOE district* they served and would therefore typically grant such waivers on the condition that former members not appear during that year before that district.

Advisory Opinion Number 93-11 also made clear that the one-year ban is personal to the former public servant himself or herself and for that reason does not prohibit appearances by other employees of the former public servant's new firm: "With respect to other attorneys at the former public servant's law firm, it is the opinion of the Board that it would not be a violation of Chapter 68 for such other attorneys to appear before the Agency within one year after the former public servant's termination from City service, and to use the firm's stationery which lists the former public servant's name on the letterhead."[21]

When a former public servant serves more than one agency within the year prior to terminating his or her service with the City, Board Rules § 1-07 prohibits the former public servant from "appear[ing] before each such City agency for a period of one year after the termination of service from each such agency."[22] This rule requires calculation of the one-year ban for each such agency served by the former public servant, resulting in two or more different dates on which the one-year ban expires. For example, in Advisory Opinion Number 93-30, a

former public servant worked at a City agency ("Agency A") from September 19, 1991, until December 30, 1992, and a different City agency ("Agency B") from December 31, 1992, to September 3, 1993, at which time the public servant left his City position for private sector employment. The former public servant sought Board permission to appear before Agency A within one year of his termination of City employment. The Board, applying Board Rules § 1-07, determined that the one-year ban on the public servant appearing before Agency A would not expire before December 30, 1993, one year after the public servant left that agency. Because the Board did not grant the former public servant a waiver, he could not appear before Agency A until after that date. Had the former public servant in this case sought to appear before Agency B, under Board Rules § 1-07, he could not have done so until the one-year ban with respect to that agency expired on September 3, 1994.

The Charter carves out an exception to the one-year ban for certain appearances by a former public servant in adjudicative proceedings. Specifically, the "litigation exception" of Charter § 2604(d)(2) permits a former public servant's communications with the agency formerly served by the former public servant, provided that: (1) the communications are incidental to an otherwise permitted appearance in an adjudicative proceeding before another agency or body, or a court; (2) the proceeding was not pending in the agency served during the period of the former public servant's service with that agency; and (3) the appearance does not involve the lifetime particular matter ban, discussed below in Section D. In 2017, the Board fined a former DOE attorney $1,750 for communicating with his former DOE supervisor on three occasions during his first post-employment year about a special education case being handled by his new law firm. Because the case had been pending at DOE while he was a DOE employee, he failed to satisfy all the conditions of the "litigation exception."[23]

While this exception applies most often to lawyers, the Board, in Advisory Opinion Number 96-6, determined that a former public servant who was not an attorney may, within one year after leaving City service, serve as a paid expert witness in cases involving his former agency that are before other adjudicative bodies or courts and incidental thereto communicate with his former agency, provided that (1) the cases were not pending in the agency while he was employed there; and (2) he never serves as a paid expert witness concerning any particular matter on which he had worked personally and substantially during his tenure with the agency.

D. Lifetime Particular Matter Bar

Former public servants are permanently barred from appearing, whether in a paid or unpaid capacity, "before the city, or receiv[ing] 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."[24]

The lifetime bar differs from the one-year ban not only because it is a permanent prohibition but also because it involves work on a "particular matter." Thus, the lifetime bar provides that a former public servant may not appear before *any* City agency on the *particular matter* involving the same party or parties that he or she worked on personally and substantially while a public servant, *whether or not the former public servant receives any compensation* for the appearance. Further, a former public servant may not receive compensation for any services rendered in relation to the particular matter he or she worked on personally and substantially while a public servant, *even if the services do not involve an appearance* before the City.

In view of the permanent nature of this prohibition, a public servant's degree of involvement with a particular matter must have been personal and substantial in order for this provision to apply. Activities that make only insignificant contributions to the final disposition of a matter, "such as typing a contract or performing other ministerial matters, do not constitute a sufficient level of involvement for the lifetime ban to apply."[25]

The Board has had several opportunities to consider the question of what constitutes "personal and substantial" involvement in a particular matter. In Advisory Opinion Number 96-7, the Board determined that a former public servant who was the hearing officer in the early stages of a matter may not become involved as private counsel on the same matter. As a hearing officer, her involvement had been personal and substantial in that she had conducted pretrial conferences, scheduled the case for trial, granted various adjournment requests, and performed other tasks that could have affected the outcome of the proceeding. In addition, the possibility that as a hearing officer she had access to confidential information concerning the party that would now be her adversary could create the appearance of impropriety.

Because of such factors as the passage of time or the volume of matters that a former public servant had handled while in City service, a former public servant might not recall participating as a public servant in a given matter. In 2010, the Board addressed this possibility in a public warning letter to a former Commanding Officer at the NYPD Office of Labor Relations who, after retiring from the NYPD, was retained as an expert witness in a lawsuit against the City, in which lawsuit he had personally and substantially participated while at the NYPD. While the former Commanding Officer represented to the Board that he did not recall participating in the matter while at the NYPD, the public letter made clear that public servants have a *duty to conduct a reasonable inquiry* to determine whether they have ever personally and substantially participated in a particular matter on which they are considering working after leaving City service. With respect to the former Commanding Officer, that reasonable inquiry required that he ask the NYPD *and* the New York City Law Department Labor and Employment Division, which participated in the City's defense, whether he had participated in the lawsuit in any way.[26]

In 1998, the Board fined a former Resident Engineer of the New York City Department of Citywide Administrative Services $3,000 for consulting for pay for a private firm on the same City project on which he had worked personally and substantially as a City employee.[27] As a public servant, the Resident Engineer had been in charge of the project and approved contract changes,

signed documents, and approved payment requests, change orders, and estimates involving the private firm for which he worked as a consultant after leaving City service. The Board reached a similar result in 2005 when it fined a former Agency Chief Contracting Officer for the New York City Human Resources Administration ("HRA") $3,000 for working on behalf of his new private employer on issues related to two contracts in each stage of whose award he had been involved while at HRA, as well as for calling a high-ranking HRA official within one year of leaving HRA to discuss one of these contracts.[28] The former public servant's involvement in those contracts while he was a City employee included signing documents related to the recommendation for the award of the contracts and signing of the contracts on behalf of HRA. In 2009 the Board fined a former Director of Environmental Review and Watershed Management at the New York City Department of Environmental Protection ("DEP") $2,000 for violating the "lifetime particular matter ban." The former Director admitted that, while a DEP employee, he was in charge of a DEP program into which a specific development was seeking admission and that he met with the development's representatives on multiple occasions to discuss the requirements for participation in the program. The former Director then left DEP and took a job in the private sector where he worked on part of the development's application for the same DEP program in which he had, as a DEP employee, participated personally and substantially through decision, approval, recommendation, and other similar activities.[29]

On the other hand, the Board, in Advisory Opinion Number 92-38, determined that a former public servant could work on a contract between her present employer, a private consulting firm, and a subsidiary of a state public authority, for a demand study for certain services required by persons with disabilities (the "State Study"). The Board reasoned that, although the former public servant, in her capacity as a City employee, had attended a preliminary meeting where the State Study was discussed, her involvement in the project had not been substantial. The Board determined that her participation in the State Study, and her receipt of compensation for work performed on the Study for the private consulting firm, would not violate Charter § 2604(d)(4).

Under certain circumstances the definition of "particular matter" requires further clarification. For example, in Advisory Opinion Number 95-23, the Board determined that with respect to bills before the State Legislature, the "particular matter" would be limited to a particular bill that was introduced, or re-introduced, during a particular legislative session. If the bill were introduced in a subsequent legislative session, with whatever amendments or modifications it might include, this new bill would be considered a different matter.

In Advisory Opinion Number 96-6, the Board determined that specifications drafted by a public servant and used by his former agency for purchasing vehicles did not constitute a particular matter on which the former public servant worked. Therefore, the public servant could serve as a paid expert witness in cases in which he would be asked to testify about the specifications, subject to the other post-employment restrictions. The Board reasoned that, since the guidelines were general and were not drafted in connection with any specific party or parties, they were not a particular matter. The Board noted, however, if the former public servant had

direct involvement with specific parties in such cases, while he was a public servant, he would not have been permitted to serve as a paid expert witness in cases involving those specific parties.

For some public servants, the definition of "particular matter" requires greater specificity than is found in Charter § 2601(17). For this reason, a special rule, Board Rules § 1-12, was devised to define "particular matter" as it applies to public servants involved in real estate tax assessment. Former public servants who, as public servants, were involved in certain activities relating to real estate tax assessments may not appear, whether paid or unpaid, before the City, or receive compensation for any services rendered, in relation to a proceeding involving a tax year or the immediately subsequent tax year for a given parcel of property with respect to which the public servant engaged in the activity. The Rule covers those former public servants who, as public servants, served on or were employed by the Tax Commission, the Department of Finance, the Comptroller's Office, or the Law Department. The activities that trigger the ban on appearing before the City or receiving compensation for services rendered are: (1) the hearing of an application for correction of assessment for taxation ("protest") from any real estate tax assessment; (2) the review of any proposal to settle or offer to reduce the assessment with respect to any such protest; or (3) participation personally and substantially in (i) the preparation or review of an appraisal, (ii) the review, analysis, or recommendation of a real estate tax assessment, or (iii) the conducting of a tax certiorari proceeding, which shall include but not be limited to its negotiation, settlement, trial, or review.

E. Ministerial Matters

While the Charter imposes certain limitations on post-employment activities, it makes clear that none of the provisions contained in Charter § 2604(d) "shall prohibit a former public servant from being associated with or having a position in a firm which appears before a city agency or from acting in a ministerial matter regarding business dealings with the city."[30] Accordingly, the Board ruled in Advisory Opinion Number 91-19 that a former City employee may make a Freedom of Information Law ("FOIL") request on behalf of a private entity to his former agency within a year after the termination of his City service, inasmuch as the request constitutes a ministerial matter. However, the former City employee must not bypass FOIL procedures at his former agency by going directly to the party having the records he seeks or otherwise request or receive treatment that is in any way different from anyone else who makes a FOIL request to the agency.

F. Working for a Firm that Does Business with the Former Public Servant's Former City Agency

It is important to note that nothing in the post-employment restrictions of Chapter 68 prohibits a former public servant from accepting a position (1) with a firm with which the former public servant had prior contact as a public servant; (2) with a firm that has business dealings with the former public servant's former City agency; or even (3) with a firm that is involved in a particular matter with which the former public servant was previously involved, provided that in all such instances the former public servant acts in accordance with the restrictions discussed in this chapter.

G. Government-to-Government Exception

The Charter expressly exempts negotiations for positions with other governmental agencies from the post-employment restrictions. Charter § 2604(d)(6) provides that the "prohibitions on negotiating for and having certain positions after leaving city service, shall not apply to positions with or representation on behalf of any local, state or federal agency."

In Advisory Opinion Number 99-3, the Board determined that the government-to-government exception applied to a public servant's communications with his former City agency in his role as a consultant to the State of New York during the first year after his departure from City service. The public servant wanted to resign from his agency to take a position with a private firm. As part of his duties at the firm, the public servant would manage a project on which the firm worked pursuant to a contract with a State agency and that would entail communication with his former City agency. The Board, relying on the "representation on behalf of any local, state or federal agency" language in Charter § 2604(d)(6), determined that the public servant would be acting as a consultant to and a representative of the State in his communications with his former City agency and thus those communications were not prohibited by Charter § 2604(d)(2).[31]

1. Hiring Former Agency Employees as Consultants

In certain situations, a City agency may contract with former employees to perform identified tasks. The Board, in Advisory Opinion Number 93-12, analyzed this type of situation under the provisions of Charter § 2604(d)(6) and permitted a City agency to contract, under certain circumstances, with former employees as consultants. Such a consulting arrangement allows the former employee to appear before his or her former City agency before the expiration of the one-year appearance ban and to work on particular matters. This consultancy would not violate the Charter, provided that the consulting relationship was not intended to circumvent other prohibitions contained in Chapter 68 and would not otherwise result in a conflict of interest under Chapter 68. The consulting arrangement must be for legitimate City reasons and may not be offered as a reward to a favored co-worker, to engage a former employee at a higher income

level, to avoid budget limitations, or to otherwise engage in an actual or potential conflict of interest. In the case before the Board in Opinion Number 93-12, the City agency could enter into a consulting contract with the former public servant within one year of his resignation because of his unique expertise on a critical issue facing City government and because there was no evidence that the consulting relationship was intended to circumvent the prohibitions contained in Chapter 68.

A former public servant, however, may not perform services for his or her former City agency pursuant to a contract between the former public servant's agency and his or her current private employer. Such services may be performed only pursuant to a personal contract between the former public servant and his or her former City agency. In Advisory Opinion Number 95-1, the Board refused to grant a waiver of the post-employment restrictions to a former public servant who sought permission to have his former agency retain his current employer, a private consulting firm. The head of the City agency wanted to obtain the former public servant's personal services because of his unique qualifications and because the agency was experiencing staffing problems, but the former public servant was now employed by the private firm. The Board, in denying the request for a waiver, reasoned that, if it granted the waiver, the private firm would benefit by obtaining a contract with the City because of the former public servant's experience and relationship with the City and the firm would have a competitive advantage over similarly situated companies only because it had retained the former public servant. The Board noted that the former public servant could contract directly with the agency in his personal capacity for his services.

2. Treating Quasi-Governmental Entities as Arms of Government

In certain situations, a public servant's prospective private employer may, for purposes of Chapter 68, be considered an arm of government. If the Board determines that the prospective employer is an arm of government, then, pursuant to Charter § 2604(d)(6), the public servant may appear before his or her former City agency before the expiration of the one-year appearance ban and work on particular matters. The Board has not adopted a blanket rule regarding its treatment of quasi-governmental entities as arms of government. Instead, it considers these entities on a case-by-case basis.

The Board has had several opportunities to determine whether a prospective employer was an arm of government. For example, in Advisory Opinion Number 94-7, the Board held that a local development corporation might in some circumstances be considered an arm of government for purposes of Chapter 68. To make this determination, the Board considered: (1) the manner in which the corporation was formed; (2) the degree to which the corporation is controlled by government officials or government agencies; and (3) the purpose of the corporation. Similar treatment is found in Advisory Opinion Number 93-13.

The Board applied these factors in concluding in Advisory Opinion Number 94-21 that a business improvement district ("BID") may, under certain circumstances, be considered an arm of government under Charter § 2604(d)(6). The Board determined in Advisory Opinion Number

97-1 that the Brooklyn Public Library is an arm of government for purposes of Charter § 2604(d)(6).

H. Waivers

A public servant or former public servant may hold or negotiate for a position otherwise prohibited by the post-employment restrictions where the holding of the position would not be in conflict with the purposes and interests of the City. However, to do so, the public servant must obtain written approval by the head of the agency or agencies involved, and the Board must determine that the position involves no conflict with the purposes and interests of the City. Under Charter § 2604(e), such findings shall be in writing and made public by the Board. However, the Board has consistently stated that such waivers will be granted sparingly and only when justified by compelling circumstances in a particular case. Thus, in Advisory Opinion Number 93-30, the Board denied a public servant's request for a waiver where no compelling circumstances justified the appearance before his former agency within one year of termination of his City service.

In determining whether to issue a waiver of the post-employment restrictions, the Board considers several factors, including, but not limited to: (1) the relationship of the City to the public servant's prospective employer; (2) the benefits to the City (as opposed to the public servant) if the waiver were to be granted; and (3) the likelihood of harm to other organizations or companies similar to, or in competition with, the public servant's prospective employer if the waiver were to be granted. In Advisory Opinion Number 94-15, the Board granted a former public servant's request for a waiver after reviewing these factors and determining that government decision-making would not be compromised by the waiver.

In addition to these factors, the Board considers the public servant's particular skills and qualifications that make him or her uniquely suited for the position with the prospective employer. For example, in Advisory Opinion Number 91-8, the Board granted a waiver of the one-year appearance ban in the case of a former public servant who was offered a position with a firm that had a contract to manage certain sites operated by his former agency, where the agency head represented to the Board that the availability of the former public servant's expertise as an employee of the firm would materially help the agency's efforts to meet certain court-imposed deadlines.

In Advisory Opinion Number 96-1, the Board granted a waiver of the one-year appearance ban and the lifetime bar to a former public servant who had accepted employment with the same municipal union for which he had worked full-time on release time with pay while in City service. The Board also determined that the "agency served" by the public servant for purposes of Chapter 68 was, in reality, the New York City Office of Labor Relations ("OLR"), not the agency from which he was on release time. Public servants on release time whose situations are similar to that of the former public servant in this case and who wish a waiver of

the post-employment restrictions must (1) apply to the Board for that waiver and (2) obtain the written approval of the head of OLR in support of the waiver request. The Board will consider such waiver requests on a case-by-case basis.

The Board has issued waivers of the one-year appearance ban to retired DOE employees to provide special education services as independent providers. Generally, such waivers are not issued unless there is a shortage of individuals qualified to provide the special education services.

In Advisory Opinion Number 2000-2, the Board recognized that City agencies developed partnerships with not-for-profit organizations that perform services deemed to be in the City's interest, so that, in considering whether to waive the post-employment restrictions for a City employee going to work at such an organization, the Board will not require that its historic criteria for evaluating such requests all be satisfied. Rather, depending on the specific circumstances of a case, the Board may grant a waiver when one or more of these factors are particularly compelling.

In Advisory Opinion Number 2008-4, the Board reviewed its experience with applications for post-employment waivers in the wake of Opinion Number 2000-2 and noted that not all applications on behalf of City employees leaving City service to work for worthy not-for-profit organizations fall within the more permissive "public-private partnership" standard of that Opinion. Instead, when an organization's relationship with the City is more accurately described as that of a compensated provider of goods or services—that is, as a vendor—the application is judged under the historic, more stringent "exigent circumstances" standard. The Board has denied waiver applications as failing to meet this historic standard when a primary argument made by the former public servant is that it would be extremely difficult to perform the duties of his or her new position without a waiver of the post-employment restrictions, a hardship that the Board has viewed as self-created and thus an unconvincing attempt to bootstrap oneself into a favorable outcome. On the other hand, when the prospective employer is a City-affiliated not-for-profit, or at least one that contributes private resources to the City in a joint venture with a City agency, the entity will be more likely deemed a "partner," and the application for a post-employment waiver will accordingly be evaluated under the less stringent standard of Opinion Number 2000-2.

In Advisory Opinion Number 2012-2, the Board noted that, in its experience, potential employers of departing City employees were more likely to be judged vendors to, rather than partners of, the City, so that the historic "exigent circumstances" test was the more likely test to be applied to applications for post-employment waivers. Furthermore, because under that standard waivers would be granted sparingly, the Board cautioned that departing public servants would be well advised to seek a waiver *before* leaving City service to accept a private sector job in which otherwise prohibited conduct is critical to the performance of the position's duties.

I. Confidential Information

Section 2604(d)(5) of the Charter prohibits a former public servant from using for private advantage or disclosing any confidential information gained from public service that is not otherwise made available to the public. The Board fined the former General Counsel to the New York City Taxi and Limousine Commission ("TLC") $2,000 for disclosing, after he left City service, confidential information he gained while at TLC. The former General Counsel admitted that, after he left City service, he prepared and executed an affidavit in which he revealed that he had expressed disagreement with and to TLC's First Deputy Commissioner concerning application of the rules regarding alternative fuel medallions that were bid on at a TLC auction, a disagreement that was not public at the time the affidavit was prepared.[32] To encourage former public servants to reveal malfeasance or waste in City government, however, the Charter does not "prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest."[33]

J. Agency Advice to Departing Employees

To ensure that public servants are aware of their obligations regarding post-employment activities, agencies should take certain steps with respect to their employees. First, prior to becoming a public servant, candidates for City employment should be advised of the post-employment restrictions. In fact, it may be appropriate to discuss this topic during the initial job interview. Second, agencies should periodically remind their employees of the post-employment restrictions, whether by posting the applicable Charter provisions on agency bulletin boards, by e-mail notifications, or by some other method. Third, the Board recommends that each departing employee's post-employment plans be reviewed by an agency attorney, or by someone in Human Resources who is versed in the conflicts of interest law, to ensure that the public servant is adhering to the post-employment prohibitions and to encourage the public servant to request an opinion from the Board if he or she has specific questions concerning the proposed job offer.

It is imperative for the public servant to raise post-employment issues with the Board before negotiating for or accepting a position with a prospective private employer so that the Board can properly evaluate the request and provide guidance in a timely manner. Supervisors in each agency should be advised that employees may request the reassignment of work to other staff so that the employees may submit a resume to, interview with, or otherwise solicit, negotiate for, or accept a position from a company with which they are involved in their City job.

Public servants have a duty to comply with the Charter's post-employment provisions and may be sanctioned for their failure to do so. Charter § 2606 provides that if the Board determines that a violation of the Charter has occurred, the Board, after consultation with the appropriate agency head, may impose fines of up to $25,000 per violation and may order payment to the City of any gain or benefit obtained by the violator as a result of his or her

violation. A violator of the conflicts of interest law may also be subject to criminal prosecution by a District Attorney's Office.

It might be useful for a public servant to consider the following questions when leaving City employment:

1. Have you reviewed the post-employment restrictions in Charter § 2604(d)?

2. Does your new employer conduct business with your City agency, appear before your City agency, or intend to conduct business with your City agency? If the answer to any of these questions is yes, are you aware that you are prohibited in your private sector job from appearing before your former agency for one year?

3. Does your new position involve working on any particular matter, involving the same party or parties, on which you worked personally and substantially as a public servant, either through decision, approval, recommendation, investigation, or other similar activities? If yes, are you aware that:

    a. You are prohibited from appearing (with or without pay) before any City agency in relation to that particular matter; and

    b. You are prohibited from receiving compensation (with or without an appearance before the City) for any services rendered in relation to that particular matter?

A soon-to-be-former public servant should carefully consider these questions to determine whether he or she is in danger of violating the Charter's post-employment restrictions.

---

[1] Charter § 2601(19).
[2] Volume II, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION, DECEMBER 1986 – NOVEMBER 1988, at 152-153.
[3] *COIB v. Dempsey*, COIB Case No. 2016-161 (2017).
[4] *COIB v. Scharff*, COIB Case No. 2016-599 (2017).
[5] *COIB v. Giwa*, COIB Case No. 2013-306 (2013).
[6] Charter § 2604(b)(2); Rules of the Conflicts of Interest Board ("Board Rules"), Vol. 12, Title 53, RULES OF THE CITY OF NEW YORK §§ 1-13(a) and (b). *See also* Charter § 2604(b)(3).
[7] *COIB v. Maracic*, COIB Case No. 2006-756 (2008).
[8] *COIB v. Hagler*, COIB Case No. 2013-866 (Order Dec. 2, 2015), *adopting* OATH Index. No. 581/15 (June 17, 2015).
[9] *COIB v. Romeo*, COIB Case No. 2012-808 (2013).
[10] Charter § 2601(4).
[11] *COIB v. Reid*, COIB Case No. 2008-547 (2010).
[12] *COIB v. Wood*, COIB Case No. 2014-495 (2015).

[13] *COIB v. Pawar*, COIB Case No. 2011-765 (2012).
[14] Charter § 2601(15).
[15] *COIB v. Sirefman*, COIB Case No. 2008-847 (2009).
[16] *COIB v. McHugh*, COIB Case No. 2004-712 (2007).
[17] *COIB v. 5 Former DOE Employees*, COIB Case Nos. 2001-566 through 2001-566d (2008).
[18] *COIB v. Piscitelli*, COIB Case No. 2007-745 (2009).
[19] *COIB v. Syed*, COIB Case No. 2015-740 (2016).
[20] Charter § 2601(3).
[21] Advisory Opinion Number 93-11 at 5.
[22] Board Rules § 1-07.
[23] *COIB v. Qamer*, COIB Case No. 2017-112 (2017).
[24] Charter § 2604(d)(4).
[25] Volume II, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION, DECEMBER 1986 – NOVEMBER 1988, at 183.
[26] *COIB v. McCabe*, COIB Case No. 2008-129 (2010).
[27] *COIB v. Fodera*, COIB Case No. 1996-404 (1998).
[28] *COIB v. Bonamarte*, COIB Case No. 2002-782 (2005).
[29] *COIB v. Benson*, COIB Case No. 2007-297 (2009).
[30] Charter § 2604(d)(7).
[31] The Board drew a distinction between this case and Advisory Opinion Numbers 93-12 and 95-1, discussed in Section G of this chapter. In those opinions, the Board permitted former public servants to consult for their former agencies personally, but not through their private employers. The Board declined to read the "personal contracting" requirement into the "representation" language found in Charter § 2604(d)(6).
[32] *COIB v. Mazer*, COIB Case No. 2005-467 (2007).
[33] Charter § 2604(d)(5).