

Post-Employment Restrictions
Waiver

Charter Sections: 2601(4), (5), (17), 2604(d)(2), (d)(4), (d)(5), (d)(6), 2604(e)
Opinions Cited: 93-8, 93-13, 94-7, 94-15, 94-19

Advisory Opinion No. 2000-2

The Conflicts of Interest Board (the "Board") has received a request from a former City employee for a waiver of Charter Section 2604(d)(2), which prohibits a former public servant from appearing before her former City agency (the "Agency") for one year following her resignation from City service. The former public servant works for a not-for-profit organization (the "NFP"), as the director of one of its centers (the "Center"). Because the Agency has assigned some of its staff to work at the Center, the former public servant must, as part of her job, communicate with these public servants and hence "appear" before the Agency. For the reasons discussed below, it is the opinion of the Board that, under the particular facts here present, a waiver shall be granted permitting the former public servant to appear before her former agency within the one year period, subject to the conditions set forth below.

Background

The former public servant advises the Board that the NFP, among its other myriad activities, operates multi-disciplinary centers which are designed to respond in an

efficient and comprehensive manner to matters familiar to the public servant from her work at the Agency. The centers represent a partnership between the NFP and several City agencies, including the Agency, and will be staffed by employees of the NFP and public servants, including some Agency staff. The former public servant was hired by the NFP to develop the Center and ultimately to serve as its director when it opens. She will be responsible for the management of the Center's operations, which includes supervising the NFP staff who work at the Center, as well as orchestrating the activities of the public servants, including employees of the Agency, who have been assigned to the Center.

Although the Agency has committed some of its staff to the Center and the Agency has several contracts (worth approximately two and a half million dollars per annum) with the NFP for other programs, the NFP does not receive funding from the Agency to operate the Center. In addition to funding from private sources, the Center receives some City moneys from sources other than the Agency. Furthermore, the NFP currently runs two other centers, neither of which receives funding from the Agency, but does not intend, at this time, to open any additional centers.

The Commissioner of the Agency has stated his opinion that permitting the former public servant to appear before the Agency prior to the expiration of the one-year appearance ban would not conflict with the purposes and interests of the City.

Discussion

Charter Section 2604(d) contains a number of provisions restricting the conduct of public servants who have left, or are contemplating leaving, City service. These

provisions, referred to as the post-employment restrictions, are intended to prevent public servants from exploiting public office for personal gain, exerting special influence on government decision-making, and/or subordinating the interests of the City to those of a prospective employer. See Advisory Opinion No. 93-8, p. 2.

Charter Section 2604(d)(2) provides, in pertinent part, that "[n]o 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...." An "appearance" is defined as "any communication, for compensation, other than those involving ministerial matters."¹ See Charter Section 2601(4).

Charter Section 2604(d)(6) provides: "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."

The post-employment provisions of Charter Section 2604(d) may be waived under certain circumstances. "A public servant or former public servant may hold or negotiate for a position otherwise prohibited by this section, where the holding of the position would not be in conflict with the purposes and interests of the city, if, after written approval by the head of the agency or agencies involved, the board determines that the position involves no such conflict. Such findings shall be in writing and made public by the board." See Charter Section 2604(e) (emphasis added.)

Historically, the Board has identified four factors to consider before granting a post-employment waiver: (1) the relationship of the City to the public servant's

¹A "ministerial matter" is defined in Charter Section 2601(15) as "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."

prospective employer; (2) benefits to the City if the waiver were to be granted; (3) the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver is granted; and (4) the public servant's particular skills that make him uniquely suited or particularly qualified for the position with the prospective employer. See generally Advisory Opinions Nos. 94-15, 94-19.

In a separate series of opinions also providing relief from the post-employment restrictions, the Board has identified a series of factors that it considers in determining whether an organization may be deemed an "arm of government" under Charter Section 2604(d)(6), the above-cited "government-to-government exception," and thereby be excepted from the post-employment rules. See Advisory Opinion No. 93-13 at 5. See also Advisory Opinion No. 94-7. These factors are as follows: (1) the manner in which the corporation was formed; (2) the degree to which the corporation is controlled by government officials or agencies; and (3) the purpose of the corporation. Id.

In cases where the organization employing the former public servant falls short of the government-to-government exception, but where a post-employment waiver may be appropriate, the Board now determines that the four waiver factors described above, while not exhaustive, need not all be satisfied. Depending upon the specific circumstances of the case, the Board may grant a waiver when one or more of the factors are particularly compelling. In this regard, the Board notes that, increasingly, City agencies have been developing public-private partnerships with not-for-profit organizations that are performing services deemed to be in the City's interest.² In certain instances, such partnerships are so significant to the welfare of the City that the City is

² This opinion does not address public-private partnerships between the City and for-profit firms.

well served to encourage former City employees to remain effectively in public service and to lend the expertise that they have developed in City service to these not-for-profits. Specifically, when the City and the not-for-profits share an identity of interest, the harms that the post-employment provisions were intended to address may be absent or at least negligible, and a waiver of the post-employment restrictions shall be granted accordingly.

In the instant case, the Agency has a particularly strong relationship with the NFP, given that the missions and constituencies of the Agency and the NFP significantly overlap and that the Agency awards nearly two and a half million dollars in funding to the NFP. Moreover, the Agency, as well as other City agencies, has demonstrated, by dedicating staff, resources, and leadership to the Center, a determination that the NFP is operating in the City's interest. Finally, because the Centers are not funded by the Agency and, in addition, because the NFP does not plan to open another center at this time, it is unlikely that the former public servant's appearance before the Agency on behalf of the NFP would harm other not-for-profits competing with the NFP for City dollars. Indeed, the Board has reviewed the strength of the relationship and the commonality of interests of the NFP and the Agency and has assured itself that competitors of the NFP would not be disadvantaged by the former public servant's appearance before the Agency.

Based on the totality of the circumstances herein presented, the Board has determined that it would not conflict with the purposes and interests of the City for the former public servant to appear before the Agency prior to the expiration of her one-year appearance ban so that she may operate the Center. Accordingly the Board grants her a waiver, provided that she does not appear before the Agency to seek funding for the

Center during the same one-year period. She is further advised that she must abide by the other post-employment restrictions contained in Chapter 68. Specifically, she may not appear, whether paid or unpaid, before the City, or receive compensation for any services rendered in relation to any particular matter³ involving the same party or parties with respect to which she participated personally and substantially at the Agency through decision, approval, recommendation or other similar activities. See Charter Section 2604(d)(4). Also, she is prohibited from disclosing or using for private advantage any confidential information gained from public service, which is not otherwise available to the public. See Charter Section 2604(d)(5).

Date: July 28, 2000

Benito Romano
Acting Chair

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³ "Particular matter" means 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. See Charter Section 2601(17).