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CONFLICTS OF INTEREST BOARD
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Waiver of Post-Employment Restrictions

Charter Sections: 2601(4), 2601(15), 2601(17), 2604(d)(2), 2604(d)(4), 2604(d)(6), 2604(e)

Opinions Cited: 91-8, 92-17, 93-8, 94-15, 94-19, 2000-2, 2008-4

Advisory Opinion No. 2012-2

Over the past twenty years the Board has issued a number of Advisory Opinions setting forth the standards for issuing waivers of the post-employment restrictions of Chapter 68 of the City Charter, the City's Conflicts of Interest Law. Those restrictions prevent former public servants of the City from appearing before the City agencies at which they were employed within one year of leaving City service, and permanently prohibit them from appearing before the City, or receiving compensation for services, relating to any "particular matter" in which they "personally and substantially" participated while in City service. See Charter Sections 2604(d)(2) and (4).

Charter Section 2604(e) permits the Board to waive those restrictions, after receiving written approval of the former public servant's agency head, upon a finding that the otherwise prohibited conduct "would not be in conflict

with the purposes and interests of the City." But the Board has long advised that waivers of the post-employment restrictions are granted "sparingly, and only in exigent circumstances." See Advisory Opinion Nos. 91-8 and 92-17. Most recently, in Opinion No. 2008-4, the Board specified the circumstances under which such waiver requests would be analyzed pursuant to that "exigent circumstances" test rather than a more permissive "public-private partnership" test applicable when the former public servant is employed by a not-for-profit entity affiliated with the City.

In the years since 2008, the Board has considered a number of applications for post-employment waivers, most of which the Board determined should be analyzed under the historic exigent circumstances test. But those applications have exposed some lingering confusion as to what constitutes "exigent circumstances," and what must be shown in order to meet that standard. Accordingly, the Board now issues this Opinion to provide guidance to public servants about what will and will not satisfy the exigent circumstances test, so that departing public servants can better plan for any post-City employment they may be contemplating.

Relevant Law

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, from exerting special influence on government decision-making by virtue of personal relationships developed during City service, and/or from subordinating the interests of the City to those of a private employer. See Advisory Opinion No. 93-8 at 2.

Charter Section 2604(d)(2) (the one-year appearance ban) provides: "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...." An "appearance" is defined as "any communication, for compensation, other than those involving ministerial matters."[1] See Charter Section 2601(4). Section 2604(d)(2) thus prohibits not only personal appearances, but also letters, telephone conversations, and e-mails with personnel of the former agency.

Charter Section 2604(d)(4) (the lifetime particular matter ban) provides: "No person who has served as a 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." A "particular matter" is defined as "any case, proceeding, application, request for 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." See Charter Section 2601(17).

Charter Section 2604(d)(6), referred to as the "government-to-government exception," provides: "The prohibition on negotiating for and having certain positions after leaving city

[1] A "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."

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 by the Board under certain circumstances. Thus, Charter Section 2604(e) provides: "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." (Emphasis added.)

Background

In a series of advisory opinions in its first decade, the Board applied Charter Section 2604(e) to grant waivers of the one-year appearance ban and the particular matter ban "where justified by compelling circumstances in a particular case." However, the Board warned that it would grant such waivers *"sparingly, and only in exigent circumstances."* See Advisory Opinion Nos. 91-8 and 92-17 (emphasis added). In these opinions in the 1990s, the Board identified four factors to be considered in respect to determining whether there were such "exigent circumstances": (1) the relationship of the City to the public servant's prospective employer; (2) the benefits to the City if the waiver were granted; (3) the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver were granted; and (4) the extent to which the public servant had unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person. See generally Advisory Opinion Nos. 94-15 and 94-19.

In Advisory Opinion No. 2000-2, however, noting that City agencies had been increasingly developing "public-private partnerships" with not-for-profit organizations that perform services recognized to be in the City's interests, the Board carved out an important exception to the strict application of this four-factor test. The Board reasoned that, if a former public servant leaves City employment in order to work in such a public-private partnership, the harms that the law was designed to prevent were less likely to be present. In such cases, although the former City employee has not continued with another branch or agency of government, thus triggering the government-to-government exception of Charter Section 2604(d)(6), he or she has "effectively remained in public service," thereby furthering the purpose of that exception. See Advisory Opinion No. 2000-2 at 5. The Board therefore concluded that, in "public-private partnership" situations, the four waiver factors need not all be satisfied when "one or more of the factors are particularly compelling." Id. at 4. When the City and such not-for-profit partners share an "identity of interest," the City benefits from encouraging former City employees to effectively remain in public service by working for them, so a waiver of the post-employment restrictions will generally be granted. Id. at 5.

Based on its experience since the issuance of Opinion No. 2000-2, the Board in Advisory Opinion No. 2008-4 defined with greater clarity what it would consider a public-private partnership. The Board noted that it had "not simply looked to whether the not-for-profit entity provide[d] an important public service [because], by that standard, an overwhelming number of the City's not-for-profits could be deemed partners of the City. Instead, in determining whether the former public servant has 'effectively remained in public service,' the Board looks for indicia that the new employer is truly engaged in a joint public interest venture with the City, and is not merely a vendor providing services to a City agency." See Advisory Opinion No. 2008-4 at 5-6.

The Board observed that the line between "partner" and "vendor" is not always a clear one and that there is a "continuum, ranging at one extreme from private entities that are virtually indistinguishable from City agencies to, at the other extreme, entities that, while providing critical services, are at bottom simply City vendors." Id. at 6. Following issuance of Advisory Opinion No. 2008-4, the Board denied a number of waiver applications on the ground that the applicant's new employer was either clearly a vendor to the agency, or fell closer on the continuum to a vendor than a true partner of the City, and thus a showing of "exigent circumstances" was required. That, in turn, produced a number of waiver requests in which it appeared to the Board that the post-City job requirements had been specifically tailored to *require* communications with the former City agency, and therefore, the requestors contended, the requisite "exigent circumstances" were present. Because the Board does not agree that the "exigent circumstances" test can be met in that manner, it determined to clarify that test in this Opinion, as well as to give guidance about the timing of requests for post-employment waivers.

Discussion

Experience with post-employment waiver applications over the past twenty years has convinced the Board that the overwhelming majority of not-for-profit entities that provide services to City agencies, as important as these entities' services typically are, will be considered vendors rather than partners of the City under the standards enunciated in Advisory Opinion No. 2008-4. Accordingly, the majority of post-employment waiver applications for City employees leaving City service for positions in the not-for-profit sector is likely to be judged on the historic four-part exigent circumstances test.

As noted above, the four factors to be considered in respect to determining whether there are exigent circumstances are: (1) the relationship of the City to the public servant's prospective employer; (2) the benefits to the City if the waiver were granted; (3) the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver were granted; and (4) the extent to which the public servant had unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person.

As to the first of these factors, the relationship of the prospective employer to the City, virtually all the applications that the Board has reviewed under the "exigent circumstances" test have involved not-for-profit entities that contract with the City to provide goods or services. By virtue of these contractual relations and the support that the agency heads have provided for these waiver requests, the City in each case has demonstrated a relationship with the prospective employer that is important to the City, so that this factor has not as a practical matter distinguished one application from any of the others.

In determining whether the second factor, the benefit to the City if the waiver were granted, has been satisfied, the Board looks for a demonstration of the benefit *to the City*, not to the new employer, if the former City employee were permitted to communicate with his or her former City agency in the first year after leaving City service or to work on a particular matter in which he or she was involved for the City. The employer's creation of a job description that would mandate such communications or such work by the occupant of the position, as beneficial as such communications or such work might be *to the employer*, cannot be deemed to constitute a showing of a benefit *to the City*.

The third factor, likelihood of harm to competitors if the waiver were granted, is one to which the Board is particularly sensitive, because a core purpose of the post-employment restrictions is to preserve a level playing field among those seeking to provide goods or services to the City. In this regard, even if the proposed communications with a former City agency would not take place in the procurement stages of a matter, but instead occurred during the execution phase of a previously awarded contract, a waiver could afford an opportunity for the former public servant to trade on personal relationships developed during public service, to the unfair advantage of the new employer, for example by obtaining change orders.

In the Board's experience, it has been the final factor, the asserted presence of "unique skills or experience suited to the particular position," that has most often been the focus of efforts to satisfy the "exigent circumstances" test. The former employee seeking the waiver, or the former agency, or both, frequently contend that the former public servant is particularly well suited to occupy the private sector position, is familiar with the particulars of the job, knows the ins-and-outs of the vendor's relationship with the agency, and can therefore more efficiently handle the job than someone who has not come from a position at the agency. But those are precisely the reasons why the post-employment restrictions exist – to *guard against* exploiting relationships and know-how developed during years of City service for the benefit of the private employer and to the detriment of the City. Thus, the Board will require a showing that it is absolutely necessary for furtherance of *the City's interests* that the former public servant be the person to communicate with the former City agency during the post-employment year rather than other employees of the new employer. In this regard, the size of the private sector entity and the number of other available employees will be relevant factors for the Board to consider. But the Board will again be skeptical where it appears that the private sector job has been specifically

designed so that only the former public servant, rather than a different employee of the private sector firm, can efficiently occupy the position and make the required communications with the former City agency within the one-year period. Likewise, before it will waive the "particular matter" ban, the Board must be satisfied that there is no one else who can reasonably work at the firm on that particular matter and thus satisfy *the City's* interests in furthering the matter. Were it otherwise, vendors and the public servants they seek to hire could bootstrap their way into virtual repeal of the post-employment restrictions.

This distinction between benefit to the City on the one hand and benefit to the departing employee and the new employer on the other has been clearly presented in several recent cases in which the Board has considered whether to grant a post-employment waiver. In one such case, a waiver was granted because the City agency was able to show that the vendor's financial affairs were in disarray, and that there was an immediate, pressing need for a person well-versed in the agency's fiscal standards and processes to take charge of those affairs so that the vendor could continue fulfilling its obligations under crucial City contracts. In contrast, a waiver was denied where, although it was stated that the former employee's position at her new employer required regular communication with her former City agency and that she could not adequately perform her duties and might lose her job if she could not communicate with the City agency, it was not shown that the *City's needs* required that only this former employee, and no other employee of the organization, could handle agency communications for one year. Nor was there an explanation as to why her new employer's many competitors would not potentially be harmed by permitting such first-year communications with the City agency. Accordingly, while it was clear that granting the waiver would be in the interest *of the former employee*, and presumably the

former employee's new employer, the Board concluded that the requisite exigent circumstances had not been demonstrated.

In other recent cases, it appeared to the Board that the former public servant seeking a waiver had accepted a private sector job that had been specifically designed, perhaps in coordination with the former City agency, in order to fit the applicant's particular qualifications and experience. On that basis, it was then argued that no other employee of the new employer was qualified or available to communicate with the agency. The Board was not convinced that the *City's interests* necessarily required only the former public servant, and no one else, to make the communications during the first post-employment year.

These cases also illustrate the importance of a public servant seeking and obtaining a post-employment waiver *before* accepting a position that will require either communications with the former agency within the first year or work on a particular matter in which the public servant was personally and substantially involved. The exceptional case of true public-private partnerships aside, the Board reiterates its historic advice that *post-employment waivers will be granted sparingly*. A public servant who accepts a private sector position on the assumption that a post-employment waiver will be granted is likely to be disappointed. Applications for post-employment waivers, submitted with the written approval of the agency head of the departing City employee, should therefore be made well before the employee's departure from City service and should document the specific facts demonstrating that the requisite exigent circumstances are truly present and have not been recently tailored to fit the particular waiver applicant.

Conclusion

On the written application of the agency head, the Board will consider whether to grant waivers of the post-employment restrictions of Charter Chapter 68, but will continue to grant such waivers sparingly. Unless it is shown that the departing public servant will be taking a position with a not-for-profit organization that can be truly characterized as a "partner" of the City (and few employers are), the Board will continue to require a showing of "exigent circumstances" under its historic four-part standard. In applying the exigent circumstances test, the Board will look for a showing that it is *in the City's interest* that the former public servant, rather than another employee of his or her new employer, be the person to communicate with the former City agency or work on the particular matter. And the Board will scrutinize these applications carefully, to be satisfied that such an exigent need has not been custom-made to fit the particular waiver applicant. Finally, precisely because these applications will be granted sparingly, 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.

Steven B. Rosenfeld
Chair

Monica Blum
Andrew Irving
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Dated: June 22, 2012

Erika Thomas-Yuille did not participate in the consideration or decision of this matter.

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