

Advisory Opinion No. 93-8

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether, consistent with Chapter 68 of the New York City Charter, he may solicit, negotiate for, and (if offered) accept a position with a private corporation (the "Corporation"), while still employed in City service. Background

The public servant has advised the Board that he is employed by a City agency (the "Agency"), and that the City contracts with the Corporation for certain services. These contracts are negotiated by another City agency, and the public servant has no involvement in the negotiations.

The public servant has also advised the Board that he conducts research and prepares analyses that may be considered by the other City agency in negotiating with the Corporation and other providers of similar services. However, his research and his work product are general in scope, and address a public policy issue that applies to a large number of City residents. He

represents that his contact with the Corporation is limited, and is in the nature of gathering data for his research.

Finally, the public servant has advised the Board that the position he seeks to negotiate for deals solely with the Corporation's internal affairs and plays no role in the contract negotiations between the City and the Corporation.

For the following reasons, it is the opinion of the Board that it would not be a violation of Chapter 68 of the City Charter for the public servant to solicit, negotiate for, and (if offered) accept such a position with the Corporation.

Post-Employment Restrictions

Chapter 68 contains a series of provisions regulating the conduct of individuals who have left, or are contemplating leaving, public service. See Charter Sections 2604(d)(1) through 2604(d)(7). These provisions, commonly known as the post-employment restrictions, are intended to prevent public servants from exploiting public office for personal gain, subordinating the interests of the City to those of a prospective employer, or exerting special influence on government decision-making, either through contact with

former colleagues or through access to special or confidential information. For these reasons, the post-employment restrictions prohibit former City employees from certain appearances before their former agencies, from certain appearances before any City agency on matters in which they were substantially involved, and from the disclosure or use of information confidential to the City and not otherwise available to the general public. See Charter Sections 2604(d)(2), (d)(4) and (d)(5).

Although most of the post-employment restrictions deal with individuals who have already left City service, Chapter 68 also recognizes that a conflict of interest may be created when a public servant chooses to solicit or negotiate for a new position outside of City government, while still employed by the City. This is particularly true when a public servant chooses to negotiate for a position with a person or firm that he or she is actively dealing with in the scope of his or her official duties. In such a situation, the public servant may be tempted to subordinate the interests of the City in exchange for obtaining favor in the eyes of a prospective employer. Accordingly, Charter Section 2604(d)(1) provides, in appropriate

part, that

No public servant shall solicit, negotiate for, or accept any position ... (ii) with any person or firm who or which is involved in a particular matter with the city, while such public servant is actively considering or is directly concerned or personally participating in such particular matter on behalf of the city.

Charter Section 2604(d)(1)(ii) (emphasis added).

Particular Matter

The issue presented in this case is whether the public servant's work at the Agency constitutes active consideration, direct concern or personal participation in a "particular matter" in which the Corporation is also involved, for purposes of Charter Section 2604(d)(1).

Chapter 68 defines a "particular matter" as [A]ny 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.

Charter Section 2601(17) (emphasis added).

In commenting on this definition, the drafters of Chapter 68 noted that Charter Section 2604(d)(1), along with the other post-employment restrictions, places significant (and sometimes permanent) constraints on the ability of public servants to find new employment after leaving City service. For this reason, the drafters urged that the term be construed narrowly, to preserve a careful balance between protecting the integrity of government and respecting the rights of former public servants to seek new opportunities in keeping with their talents and abilities. In particular, the drafters made clear that a "particular matter" does not embrace general or public policy analysis which may impact on a class or category of individuals, as opposed to a specific party or parties:

The term particular matter, used in the post-employment restrictions 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.

Volume Two, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at 152-153 (emphasis added).

Based on the public servant's representations, it is the Board's determination that the public servant is not actively considering, directly concerned, or personally participating in a particular matter involving the Corporation. His work consists of research and analysis on a public policy issue which affects a large number of City residents. It is neither directed at, nor geared to, any individual party or contract, and does not require his recommending, or negotiating for, any services to be provided to the City. In sum, his work relates to a "general subject matter" or "policy issue" which has broad impact and is thus excluded from the scope of a particular matter.

The public servant may therefore solicit, negotiate for, and accept the position at the Corporation which he has described. If the position is offered to him and he accepts employment at the Corporation, he is obligated to abide by the other

post-employment restrictions contained in Chapter 68. These include a prohibition against appearing before his former agency for a period of one year after leaving City service, except for communications involving ministerial matters (see Charter Section 2604(d)(2)); a prohibition against his appearing before any City agency, at any time after he leaves City service, in relation to any particular matter involving the same party or parties which respect to which particular matter he participated personally and substantially as a public servant (see Charter Section 2604(d)(4)); and a prohibition against his disclosing or using for private advantage any confidential information gained from public service and not otherwise available to the public (see Charter Section 2604(d)(5)).

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