

Advisory Opinion No. 93-12

The head of a City agency (the "Agency") 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, the Agency may enter into a consulting contract with a former employee who resigned from City service earlier this year (the "Former Employee"). Specifically, the head of the Agency has requested an opinion as to whether such a contract would be barred by Charter Sections 2604(d)(2) and (d)(4), which impose limits on the ability of former public servants to appear before their former agencies and/or other City agencies after leaving City service.

Background

The Board has been advised that the Former Employee was one of two principal co-authors of a comprehensive City-wide plan (the "Plan"), intended to address a critical issue facing City government. The Plan was developed in response to State statutory requirements, and it incorporates a large amount of

specialized, highly technical data concerning certain City operations and facilities. The Plan also includes a detailed schedule of tasks that the City must perform in order to comply with State law and implement a long-term solution to the problem it addresses. If the Plan is not properly implemented, the City may be subject to penalties imposed by the State, as well as being faced with the practical dilemma of finding alternative solutions to this problem.

The Board has also been advised that the Plan's other co-author left the Agency and no longer resides in the City. The Former Employee approached the Agency some months ago, and expressed a desire to take an unpaid leave for a period of not less than one year. The Agency was greatly concerned about the loss of his expertise and his familiarity with the Plan, and proposed that he stay on as a part-time employee, to assist the Agency in its efforts to begin implementation of the Plan. While the Former Employee was amenable to assisting the Agency, he wanted to remain at home with his family and felt he needed significant flexibility in terms of working hours.

Finally, the Board has been advised that in light of the Former Employee's requirements, and the Agency's unwillingness to establish a precedent of allowing an

employee to designate his or her home as an assigned workplace, the Agency proposed that the Former Employee resign and become a consultant to the Agency, assisting it in interpreting and implementing the Plan. The Former Employee resigned earlier this year and the Agency now proposes to go forward with the consulting arrangement. The Former Employee's consulting fee will be based on his annual salary, with adjustments to allow for overhead expenses. The actual rate is approximately \$60 per hour, which the Agency represents is significantly less than the fees typically charged by private sector consultants performing comparable duties.

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 Agency to enter into the proposed consulting contract, on the terms and for the purposes described above, and for the Former Employee to appear before the Agency and/or other City agencies in connection with the services he provides under such contract.

Post-Employment Restrictions

As noted in our Advisory Opinion No. 93-8, 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 making certain appearances before their former agencies, from making certain appearances before other City agencies on matters in which they were substantially involved, and from disclosing or using information confidential to the City and not otherwise available to the general public.

Charter Section 2604(d)(2), commonly referred to as the "revolving door prohibition", provides that

No public servant shall, within a period of one year after the termination of such person's service with the city, appear before the city agency served by such public servant; provided, however, that nothing contained herein shall be

deemed to prohibit a former public servant from making communications with the agency served by the public servant which are 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.

Charter Section 2604(d)(4), also known as the "lifetime bar", provides that

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.

The services the Former Employee will be providing, under the proposed consulting contract, are similar to those which he provided as an employee of the Agency: assisting the Agency in interpreting the

Plan, and working with the Agency to arrange for its timely implementation. In performing these services, he will, of necessity, be required to communicate with Agency employees and with other City agencies whose cooperation is needed in making the Plan a reality.

Since the Former Employee played a central role in writing the Plan, and in developing the related technical data, his consulting services relate to a "particular matter" in which he had substantial personal involvement, as an Agency employee, for purposes of Charter Section 2604(d)(4).¹ Furthermore, since the Former Employee's communications with the Agency and with other City agencies will involve interpreting the substance of the Plan and assisting in its implementation by the City, they constitute "appearances" for purposes of both Charter Section 2604(d)(2) and Charter Section 2604(d)(4).²

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;

Charter Section 2601(17).

² "Appear" means to "make any communication, for compensation, other than those involving ministerial

Charter Sections 2604(d)(2) and (d)(4), standing alone, would therefore appear to prohibit the Former Employee from providing services under the consulting contract, and from communicating with the Agency or other agencies with respect to the Plan. Preventing the rehiring of a former employee is not a result that reasonably could have been contemplated by the drafters of the post-employment restrictions in Chapter 68. Moreover, it would work a hardship on the City, as the Agency would lose the benefit of the Former Employee's experience and expertise, and could face delays in implementing the Plan while it searches for and trains a replacement.

The drafters of Chapter 68 recognized that the post-employment restrictions, in addition to preventing corruption and undue influence, could also work to the disadvantage of the public in certain cases, by preventing government from engaging former employees for legitimate purposes, and utilizing their talents and skills in the public interest. For this reason,

matters." Charter Section 2601(4). A "ministerial matter", in turn, is defined as "an administrative act, including the issuance of a license, permit or other permission with the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion." Charter Section 2601(15).

Charter Section 2604(d)(6) was added to Chapter 68 in 1990, with the intent of making it clear that the post-employment restrictions do not prohibit former public servants from accepting positions with, or acting as representatives of, federal, state or local government agencies. Charter Section 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 commenting on this Section, the Charter Revision Commission characterized it as an exception to the post-employment restrictions, and indicated that it covered service as an attorney or consultant to a federal, state or local agency, as well as being employed by such an agency. See Volume Two, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at p. 183-84.

No information has been presented to the Board which suggests that the proposed consulting relationship was intended to circumvent other prohibitions contained in Chapter 68, or would otherwise result in a conflict of interest proscribed

by that Chapter.³ It is therefore the opinion of the Board that the facts and circumstances of this case fall squarely within the scope of Charter Section 2604(d)(6), and that this Section permits the Agency to enter into the proposed consulting contract, and permits the Former Employee to appear before the Agency and other City agencies in performing his duties thereunder. The Former Employee left City service for what appear to be legitimate, personal reasons. The Agency, an arm of local government, has a pressing need for his expertise, which is in many respects unique. The Agency proposes to retain the Former Employee as a consultant, to continue his work on implementing the Plan, both for purposes of avoiding liability to the State, and to

³ Even though Charter Section 2604(d)(6) constitutes an exception to the post-employment restrictions, City agencies may not engage former public servants as consultants where such actions would give rise to an actual or potential conflict of interest otherwise proscribed by the City Charter. As an example, if agency officials sought to engage a former employee, at a higher income level, to avoid budget limitations, or to reward a favored co-worker, such conduct could involve a violation of Charter Section 2604(b)(2), which prohibits a public servant from engaging in any transaction in conflict with the proper discharge of his or her official duties, and Charter Section 2604(b)(3), which prohibits a public servant from using his or her official position to obtain any financial gain or contract for a person or firm associated with the public servant.

address a critical issue facing the City as a whole.
In each case, the beneficiary of his work is the public
at large.

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Dated: April 20, 1993