



CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD

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Advisory Opinion No. 93-15

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board"), as to whether, consistent with Chapter 68 of the City Charter, Members of the New York City Council may engage in certain fundraising activities on behalf of not-for-profit organizations. Specifically, the public servant requests an opinion as to whether the following fundraising activities would be prohibited under Section 2604(b)(2) of the City Charter, by virtue of the Board's prior Advisory Opinion No. 91-10:

1. Soliciting local merchants for contributions of merchandise or money to the City Parks Foundation, for the purpose of beautifying City parks;

2. Erecting signs in residential areas advertising a toy drive being conducted by tenants' councils in public housing projects;

3. Soliciting contributions to a book drive being conducted by a not-for-profit community library operating in a public housing project;

4. Soliciting contributions of time, materials and labor from a private firm doing roadwork in the vicinity, to repair potholes in a park;

5. Soliciting grants or loans from private foundations in support of not-for-profit entities, or donations of employee services from corporate executives;

6. Urging citizens, through a Council Member's newsletter, to visit a local museum which charges admission fees;

7. Soliciting, through a Council Member's newsletter, either volunteers for, or financial support of, a local not-for-profit entity; and

8. Soliciting donations to a coat drive conducted by a charitable organization.

Background

The public servant has advised the Board that Members of the City Council are interested in supporting or enlisting support for not-for-profit organizations that operate in their districts, and see this as part of their traditional role as legislators. The public servant has also advised the Board that Members of the City Council consider this activity as another form of constituent services, and believe that restricting this activity would interfere with their function as community ombudsmen.

Finally, the public servant has advised the Board that, in Advisory Opinion No. 91-10, the Board established guidelines defining the extent to which elected officials may engage in fundraising for not-for-profit organizations, and asks whether under a literal reading of that Opinion, each of the activities listed above would be prohibited pursuant to Chapter 68 of the City Charter. The public servant requests that the Board review each of these activities and, in so doing, clarify the guidelines established in Advisory Opinion No. 91-10, defining permissible and impermissible fundraising activities.

For the reasons expressed below, it is the opinion of the Board that the guidelines established in Advisory No. 91-10 remain correct, and that Opinion is hereby affirmed. However, it is also the opinion of the Board that further clarification of Advisory Opinion No. 91-10 is warranted, to avoid any misunderstanding of those guidelines, and to more clearly differentiate between appropriate fundraising activities and those which would violate the conflicts of interest provisions of the City Charter.

Based on Advisory Opinion No. 91-10, as further clarified herein, it is the opinion of the Board that Members of the City Council may properly engage in

some of the fundraising activities listed above, but not others, as more fully set forth below.

Advisory Opinion No. 91-10

In Advisory Opinion No. 91-10, the Board addressed the question of whether, and to what extent, elected officials and high-level appointed officials could engage in fundraising on behalf of not-for-profit organizations such as community groups, educational institutions, and charities. The Board noted that it was in the City's interest to encourage the financial support of these organizations "inasmuch as their good works help to sustain the life of the City and are indeed indispensable to it." However, the Board also noted that while it was commendable for an elected official or a high-level appointed public servant to give his or her own time or personal financial support to such organizations, "an appearance of impropriety may be created if the nature of the official's involvement is perceived to be coercive or provides an inappropriate opportunity for access to such official."

The Board therefore adopted a distinction previously drawn by the Board of Ethics, between a public servant's "active" role in soliciting contributions for these organizations, and a "passive" role clearly insulated from the direct solicitation of funds. The Board

concluded that it was improper for an elected official to engage in "active fundraising", such as making telephone calls to request contributions, because this form of activity could create an appearance that his or her City office was being used as a lure or as pressure to secure support for the organization in question. In other words, "active fundraising" could easily create a perception, in the eyes of solicitees and of the public at large, that those who seek to do business with the official are expected, or would be well-advised, to make a contribution in order to secure access or favorable treatment. Such a perception could seriously undermine the public's confidence in the fairness and impartiality of its elected officials, and is therefore prohibited under Section 2604(b)(2) of the City Charter, which provides that

No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is conflict with the proper discharge of his or her official duties.¹

¹ Charter Section 2604(b)(2) was intended to give the Board the flexibility to handle situations which present actual or potential conflicts of interest, but which were not covered by other provisions in Chapter 68. See Volume Two, Report of New York City Charter Revision Commission, December 1986 - November 1988, at p. 175.

The Board has indicated, in a variety of contexts, that maintaining public confidence in the integrity of

By way of contrast, the Board concluded that an elected official could engage in "passive fundraising", such as being listed as a member of an honorary committee for a fundraising event, because this form of conduct was unlikely to involve, or be perceived as, a misuse of public office. Being listed as a member of such a committee is not generally viewed as a request for contributions, or as a suggestion that those who choose not to contribute risk official disfavor at the hands of the individual so named. ²

"Active" Fundraising

It is the Board's view that the distinction between "active" and "passive" fundraising remains valid, and that, at a time of increased public cynicism over the

government decision-making is one of the primary goals of Chapter 68. Accordingly, the Board has invoked Charter Section 2604(b)(2) to prohibit certain conduct which, while well-intentioned, could give rise to an appearance of pressure, favoritism or unfair advantage in dealing with City agencies and officials. See, e.g., Advisory Opinion No. 92-33, and Advisory Opinion No. 93-9.

² It is important to note that Advisory Opinion No. 91-10, and this Opinion, deal solely with fundraising activities on behalf of not-for-profit organizations such as community groups, educational institutions and charities. Political fundraising is governed by a specific provision within Chapter 68 (see Charter Section 2604(b)(12)), and is discussed in detail in our Advisory Opinion No. 93-6.

integrity of government officials,³ those who hold elective office must avoid any suggestion that their official actions are motivated by, or are susceptible to being influenced on account of, anything other than the public interest. The Board therefore affirms Advisory Opinion No. 91-10, and the conclusion expressed therein that pursuant to Charter Section 2604(b)(2), elected officials may not engage in "active" fundraising on behalf of not-for-profit organizations.⁴

Nonetheless, in view of the public servant's request for an opinion, and other requests for advice and

³ The Board notes, as an example of this disturbing trend, the results of a poll conducted by the New York State Commission on Government Integrity, indicating that only 27% of the voters in New York State believe that "most people who run for public office are honest". See Restoring the Public Trust: A Blueprint for Government Integrity, Vols. I and II, New York State Commission on Government Integrity (September 1990) at p. 78.

⁴ In addition to its discussion of elected officials, Advisory Opinion No. 91-10 also held that, under certain circumstances, high-level appointed public servants could engage in "active" fundraising for not-for-profit organizations. Such solicitations could not be directed at persons or firms likely to come before the public servant's agency or be affected by his or her official action. In addition, such solicitations were required to be free from any implication that the public servant would be obtaining any direct or indirect personal benefits, and could not otherwise create a perception that the public servant's office was being used "as a lure or as pressure."

Although the instant request deals specifically with Members of the Council, who are elected officials for purposes of Chapter 68, our affirmance of Advisory Opinion No. 91-10 also extends to the conclusions reached therein with respect to high-level appointed public servants.

guidance received since the publication of Advisory Opinion No. 91-10, the Board believes it appropriate to provide further clarification as to the meaning of "active" fundraising, in order to minimize any uncertainty in applying the principles set out in that Opinion. "Active" fundraising cannot be defined by simply asking whether or not a public servant took any action whatsoever which resulted, or could result, in contributions being made to a not-for-profit organization. Under such an approach, virtually any role in a fundraising campaign could be characterized as "active", and would therefore be prohibited under Chapter 68.

As stated in Advisory Opinion No. 91-10, the focus must instead be on whether or not a public servant's involvement "is perceived to be coercive or provides an inappropriate opportunity for access to such official." In other words, the principal concern is whether or not the public servant's actions would create an appearance that he or she is using the power of public office to pressure others into contributing, taking official action on the basis of whether or not a contribution has been made, or allowing contributors to have access to City government in a manner not enjoyed by the general public. Any fundraising activity which would create such an appearance constitutes "active" fundraising. Other

activities which do not create such an appearance would not.

This approach can best be illustrated by comparing several of the activities listed above. As an example, by asking a group of local merchants to contribute merchandise or money for the beautification of public parks, a Council Member would be targeting a specific group or class of constituents that are likely to have some form of dealings with the Member or with City government. An appeal of this type could well be viewed as a form of pressure to contribute, or as an implicit warning that those who fail to do so run the risk of the Council Member's disapproval. For this reason, the appeal would properly be characterized as "active" fundraising on the part of the Council Member.⁵

⁵ A similar concern was noted by the Board in considering whether City agencies could solicit gifts from private sector firms in support of agency programs. In Advisory Opinion No. 92-21, the Board held that City agencies could solicit such gifts, provided that care was taken to insure that their acceptance did not impair public confidence in government or in the integrity of government decision-making. The Board identified certain factors to be considered in determining whether or not a solicitation was appropriate. These factors include whether or not the donors have business dealings with the City, and whether the donors have an interest in matters awaiting determination by the agency in question. In other words, a campaign targeted or directed at firms doing business with the City, or having current business before the agency, could be perceived as an attempt to secure a quid pro quo: contributions to the City in exchange for favorable official action.

Conversely, by urging individuals and families to visit a local museum or volunteer for community service, through a district newsletter distributed to the public at large, a Council Member is reaching out to a general, untargeted audience which may or may not include persons or firms likely to seek access to the Member or to City government. More importantly, a solicitation of this type is not generally perceived as being coercive, or as suggesting that a contributor would enjoy some special status if he or she decides to follow the Council Member's suggestion. For this reason, it would not be proper to characterize the solicitation as impermissible "active" fundraising on the part of the Council Member.

Specific Activities

Based on the foregoing analysis and clarification of Advisory Opinion No. 91-10, it is the opinion of the Board that the following activities listed above constitute "active" fundraising, and may not be engaged in by Council Members: Soliciting contributions of merchandise or money from local merchants for the purpose of beautifying public parks; and soliciting contributions of time, material and labor from a private firm doing roadwork in the vicinity, to repair potholes in a park. Each of these situations involves a direct, targeted appeal, to persons or firms who are likely to perceive

the appeal as coercive or as suggestive of special treatment or access.

By applying these same principles, it is the opinion of the Board that the following activities listed above do not constitute impermissible "active" fundraising, and may be engaged in by Council Members: erecting signs in residential areas advertising a toy drive being conducted by tenants' councils in public housing projects; soliciting contributions to a book drive being conducted by a local not-for-profit community library operating in a public housing project; urging citizens, through a Council Member's newsletter, to visit a local museum that charges admission; soliciting, through a Council Member's newsletter, either volunteers for, or financial support of, a local not-for-profit entity; and soliciting donations to a coat drive. In each case, our opinion is conditioned on the premise that the appeal or solicitation is general and is directed to the public at large, rather than being targeted at specific individuals or firms,⁶ and that no other circumstances exist which would create an appearance of coercion, special treatment, or improper access.

⁶ As an example, we would reach a very different conclusion if the coat drive were directed at garment manufacturers located within the City, or at retailers located within the Council Member's district.

Finally, it is the determination of the Board that in the case of soliciting grants or loans from private foundations in support of not-for-profit entities, or donations of employee services from corporate executives, the facts presented in the public servant's request for an opinion are insufficient for the Board to reach a determination. There are undoubtedly situations in which such activities may be appropriate, just as there are situations in which such activities may create an actual or potential conflict of interest. Each situation would need to be judged on its own facts and circumstances, including the manner in which the solicitation is conducted; the size and sophistication of the potential donors; the extent to which the donors are engaged in business dealings with the City; and whether or not the resulting donations or gifts are for the benefit of a not-for-profit organization or the City generally. The Board will review any proposed activity of this type and apply the principles set out in Advisory Opinion No. 91-10, and in this Opinion, to reach a conclusion consistent with the letter and intent of Chapter 68.



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