

Advisory Opinion No. 93-24

Two public servants have written to the Conflicts of Interest Board (the "Board"), requesting opinions concerning the propriety of certain proposed political activities. Specifically, each public servant has requested an opinion from the Board as to whether, consistent with Chapter 68 of the City Charter, he may serve as a paid consultant to a campaign organization supporting a candidate for an elective office of the City.

Background

The first public servant is a computer associate at a City agency, who was approached by a campaign organization and asked to serve as a paid computer consultant. The public servant wishes to undertake this activity after normal working hours, and represents that the work involved is totally unrelated to his official duties as a City employee. His services as a consultant would include computer programming and election data analysis.

The second public servant is a high-level appointed official, who serves on his agency's

executive staff. He wishes to use accrued annual leave time and serve as a paid consultant to a different campaign organization. He also represents that his work as a consultant will be unrelated to his official duties. His services as a consultant would include the preparation of working papers on various campaign issues, excluding matters under the supervision of his agency. Upon expiration of his accrued annual leave, he plans to rejoin his agency and resume his usual duties, with the possibility of continuing to work as a consultant during evening hours and on weekends.

For the following reasons, it is the opinion of the Board that it would not be a violation of Chapter 68 for these two public servants to serve as paid consultants to campaign organizations, provided that in pursuing this outside activity, they each observe and abide by the restrictions and limitations imposed pursuant to Sections 2604(b)(2), 2604(b)(3) and 2604(b)(4) of the City Charter, and more fully set out below, and provided further that in the case of the second public servant, he observes and abides by the provisions of Charter Section 2604(b)(12), which prohibit him from requesting any person to make or pay any political assessment, subscription or contribution to the organization he will be assisting, or the

candidate which it supports.

Political Activities

Chapter 68 was first added to the City Charter in 1975, as a result of a State-sponsored charter revision initiative. The State Charter Revision Commission declined to prohibit public servants from engaging in political activities generally, noting that "[t]he development of strong political institutions is vital to the preservation of democratic government."

Preliminary Recommendations of the State Charter

Revision Commission for New York City (June 1975) (the "Preliminary Report"), at p. 166. By the same token, however, the Commission recognized that certain forms of political activity, which would be perfectly acceptable if undertaken by private citizens, would give rise to serious questions of divided loyalty and misuse of public office if engaged in by City

employees. The Commission noted that

[T]he essential distinction between legitimate political activities and proper conduct for public employees has become blurred in recent years. In particular, there have been instances when substantial numbers of City employees took time off from their jobs during working hours to participate in political campaigns. Although technically sanctioned under the guise of compensatory or annual leave time, this practice has impaired the normal functioning of government and is resented by civil servants. There have also been well-publicized instances of City

employees being "encouraged" or "induced" by high-level officials to devote time to political campaigns.

The Commission [therefore] believes the [New York City] Charter should enunciate ethical standards that discourage political activity of City employees disruptive of City business. Also, City officials should be explicitly prohibited from coercing or intimidating subordinates into engaging in political activity under any circumstances.

Preliminary Report, at p. 166.

With this backdrop, Chapter 68, as originally drafted, imposed a series of restrictions on the political activities of public servants, intended to prevent City employees from being forced to participate in political campaigns, or to make political contributions. Specifically, former Charter Sections 2604(c)(4) and 2606 prohibited City officers and employees from coercing any other officer or employee to engage in political activities, and/or to pay any political assessment, subscription or contribution under threat of prejudice to his or her rank, salary or other job related status.¹

¹ Former Charter Section 2604(c)(4) provided that

No member of the board of estimate or the [city] council or other officer or employee of the city or any city agency, whether paid or unpaid: ...

(4) shall coerce or attempt to coerce, by intimidation, threats or otherwise, any officer or employee of the city or of any city agency to engage in political activities;

When Chapter 68 was revised in 1990,² these restrictions were retained and strengthened. In addition to prohibiting coercion aimed at forcing a City employee to engage in political activities, or to make a political contribution under threat of prejudice to rank, salary or other job related status, Charter Sections 2604(b)(9) and (b)(11) also prohibit a public servant from requesting that any subordinate participate in a political campaign, or make any political contribution whatsoever.³ Charter Section

Former Charter Section 2606 provided that

No council member or other officer or employee of the city shall, directly or indirectly, pay or promise to or compel, request or induce any person to pay any political assessment, subscription or contribution under threat of prejudice to or promise of or to secure advantage in rank, compensation or other job related status or function or in consideration of his having been or being nominated, elected, appointed or employed as such officer or employee, under the penalty of forfeiting his office or employment.

² At a general election held on November 8, 1988, the New York City electorate approved a revised Chapter 68, entitled Conflicts of Interest. Revised Chapter 68 took effect on January 1, 1990.

The revision of Chapter 68 was part of a much broader restructuring of City government generally, under the direction of a new Charter Revision Commission appointed by the Mayor in 1986 (the "City Charter Revision Commission").

³ Charter Section 2604(b)(9) provides, in

appropriate part, that

No public servant shall

(a) coerce or attempt to coerce, by intimidation, threats or otherwise, any public servant to engage in political activities, or

(b) request any subordinate public servant to participate in a political campaign. For purposes of this subparagraph, participation in a political campaign shall include managing or aiding in the administration of a campaign, soliciting votes or canvassing voters for a particular candidate or performing any similar acts which are unrelated to the public servant's duties or responsibilities.

The City Charter Revision Commission notes that subparagraph (a) is derived from former Charter Section 2604(c)(4). Subparagraph (b) is a new provision, intended "to protect public servants from the actual or perceived pressure to respond to a request from a superior to engage in campaign work." Volume Two, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at p. 178.

Charter Section 2604(b)(11) provides that

No public servant shall, directly or indirectly,

(a) compel, induce or request any person to pay any political assessment, subscription or contribution, under threat of prejudice to or promise of or to secure advantage in rank, compensation or other job-related status or function, or

(b) pay or promise to pay any political assessment, subscription or contribution in consideration of having been nominated, elected or employed as such public servant or to secure advantage in rank, compensation or other job-related status or function, or

(c) compel, induce or request any subordinate public servant to pay any political assessment, subscription or contribution.

The City Charter Revision Commission notes that

2604(b)(12), an entirely new provision, prohibits certain high-level public servants, and those charged with substantial policy discretion, from requesting any person to make or pay a political assessment or contribution for any candidate for elective office of the City, or for any City elected official who is a candidate for other elective office.⁴

Consulting Services

The first public servant states that he was approached by a campaign organization and asked to

subparagraphs (a) and (b) derive from former Charter Section 2606. Subparagraph (c) is a new provision, "prohibit[ing] a public servant from requesting a subordinate to pay any political assessment, subscription or contribution." Id., at p. 179.

⁴ Charter Section 2604(b)(12) provides, in appropriate part, that

No public servant, other than an elected official, who is a deputy mayor, or head of an agency or who is charged with substantial policy discretion as defined by rule of the [Conflicts of Interest Board, shall directly or indirectly request any person to make or pay any political assessment, subscription or contribution for any candidate for an elective office of the city or for any elected official who is a candidate for any elective office;

The City Charter Revision Commission notes that this prohibition stems from a strong concern that "actual or implied coercion which may exist when people in policy-making positions raise money for political campaigns."

Volume Two, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at p. 179. See also Advisory Opinion No. 93-6.

serve as a computer consultant. He represents that he was not pressured by any City officer or employee into offering his services to the organization, and that in light of his personal interest in working on the campaign, he would be willing to volunteer his services if the Board determines that he may not receive compensation for this activity.

The second public servant states that he wishes to work for a campaign organization using his accrued annual leave time,⁵ and he has made a formal request

⁵ We note that non-tenured employees in Mayoral agencies are required to use annual leave if they elect to run for public office. See Mayoral Directive 91-7, dated July 9, 1991. The underlying reason for this Directive is stated as follows:

Possible conflicts of interest problems are created when city employees run for elective office. An employee may be involved either directly or indirectly in matters at issue in an election. For such an individual to be actively employed by the city while running for elective office creates the appearance of impropriety. Traditionally, to avoid these problems, city employees have taken a leave of absence during their candidacy.

Mayoral Directive No. 91-7, dated July 9, 1991, at p. 1 (Statement of Policy).

Although this Directive applies to candidates, not participants in a campaign, the second public servant is a non-tenured employee and his plans appear to be consistent with the intent of the Directive. By using accrued annual leave and avoiding any involvement in matters under the supervision of his agency, he would be taking steps to avoid the appearance of a conflict between his official responsibilities, and the

to his agency for approval of this activity.

In each case, no evidence has been presented to the Board which suggests that the public servant was pressured by any City officer or employee into offering his services to a campaign organization, or to any other political organization. Although the candidate each public servant is assisting has some connection, past or present, to the City agency employing such public servant, there is no indication that the candidate, or any official of the agency in question, has exerted influence to secure the public servant's services or has otherwise pressured him to participate in a political campaign. In sum, there is no basis to conclude, in either case, that the services of the public servant have been coerced or obtained in a manner which would otherwise violate Charter Section 2604(b)(9).

Moreover, the first public servant is not charged with substantial policy discretion, as defined by rule of the Board,⁶ and he is therefore not subject to the

political goals of the candidate he is assisting.

⁶ Pursuant to the Board's rules, a public servant is deemed to have substantial policy discretion, for purposes of Charter Section 2604(b)(12),

if he or she has major responsibilities and exercises independent judgement in connection with determining important agency matters. Public

prohibition against soliciting political contributions set out in Charter Section 2604(b)(12). The second public servant is charged with substantial policy discretion, but has stated that he will not be involved in the solicitation of political contributions, in accordance with such prohibition.

It is therefore the conclusion of the Board that Chapter 68 would not, as a general matter, prohibit either public servant from serving as a paid consultant to a campaign organization, in the manner and for the purpose described in this Opinion. Nonetheless, as active public servants, each public servant is subject to certain provisions of Chapter 68 which are applicable to all City employees, and which place limitations on outside affiliations and activities generally, including political activities.

Charter Sections 2604(b)(2), 2604(b)(3) and 2604(b)(4) provide that a public servant may not engage in private employment which is in conflict with the proper discharge of his or her official duties; may not

servants with substantial policy discretion include, but are not limited to: agency heads, deputy agency heads, assistant agency heads and public servants in charge of any major office, division, bureau or unit of an agency.

Rules of the Board, Section 1-02.

use his or her official position to secure any private advantage, direct or indirect, for the public servant or for any person or firm associated with the public servant; and may not disclose any confidential information concerning the City, or utilize such information to advance any direct or indirect financial or other private interest.

These prohibitions are, among other things, intended to insure that public servants dedicate their energies, during official working hours, to the welfare of the citizens that they serve; that they do not misuse the power of public office for their own benefit or for the benefit of those with whom they enjoy a personal or financial relationship; and that they do not capitalize on confidential or special information, to the detriment of the City and the public at large.

Although these prohibitions apply to all outside activities undertaken by public servants, they have a special relevance to participation in electoral politics. Political campaigns often require extensive time commitments, and generate intense personal interest in, and enthusiasm for, parties, candidates and issues. Numerous opportunities may arise in which an individual public servant may be tempted, out of feelings of loyalty or political idealism, to take

actions which subordinate the interests of the City as a whole in favor of those of an individual candidate.⁷ In addition, the increasing level of activity as election day draws near may infringe upon the effort required of a public servant to properly discharge his or her official duties.

For these reasons, it is also the conclusion of the Board that if either public servant chooses to serve as a paid consultant to a campaign organization, he must diligently observe and abide by the provisions of Charter Sections 2604(b)(2), 2604(b)(3) and 2604(b)(4), which impose the following restrictions and limitations: He may not perform services as a paid consultant for such organization except during times when he is not required to perform services for the City, and he may not use City facilities, equipment, software, or supplies in performing such services. See Charter Section 2604(b)(2). In addition, he may not

⁷ As an example, a public servant with access to sensitive information concerning a City agency or program might be tempted to use that information to help advance the cause of a candidate, or of some legislative measure which is being considered by the electorate.

Another example would be the use of City telephones to make campaign-related calls, for purposes such as polling, public relations, or soliciting contributions or volunteers.

use his official position with the City to secure any private advantage for himself, for the campaign organization he is assisting, for the candidate supported by that organization, or for any other person or firm with whom he is associated. See Charter Section 2604(b)(3). Finally, he may not disclose to the campaign organization, or to any other person or firm, any confidential information concerning the City obtained during the course of his official duties, and he may not use such information to advance his own financial or other private interests, or those of the organization, the candidate supported by the organization, or any affiliated person or firm. See Charter Section 2604(b)(4).

Furthermore, because of the nature of his position at a City agency, the second public servant must continue to observe and abide by the provisions of Charter Section 2604(b)(12), which prohibit him, directly or indirectly, from requesting any person to make or pay any political assessment, subscription or contribution to the campaign organization he is assisting, or to the candidate supported by that organization.

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Chair

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Dated: August 6, 1993.