

Service as Officer of Not-For-Profit Organization
Charter Sections 2601(11), (12), (18), (19), (20)
2604(a)(1)(a)
2604(b)(2), (b)(4)
2604(e)

Advisory Opinion No. 94-6

The Conflicts of Interest Board (the "Board") has received a request for an opinion as to whether an uncompensated high-level public servant may continue to serve as President and Chief Executive Officer of a not-for-profit community service organization (the "Organization"), which receives funding from several City agencies, including the public servant's own agency (the "Agency").

For the reasons discussed below, the Board has determined that, because of the particular circumstances of this case, the public servant may retain his position with the City and continue to perform services for the Organization, subject to certain conditions.

Background

The Board has been advised that each year the

Organization receives funding for various types of social service programs from a number of City agencies.

Since 1987, one such program has been funded indirectly by the public servant's agency. That funding occurs as follows. First, the Agency receives money from the State earmarked for that type of program (\$12 million in fiscal year 1993). The Agency then allocates that money to a charitable not-for-profit entity (the "Entity"), which adds one million dollars of its own funds to the program. After reviewing its staff recommendations, the Entity's Advisory Board sends to the Agency, in the form of a contract, the Entity's recommendations as to how the total funds should be allocated. The Agency votes on the contract and then issues a resolution authorizing distribution of the funds to the Entity. Generally, the Agency makes few, if any, changes in the proposed allocation of funds. In 1993, the Entity distributed these funds to over 200 not-for-profit entities and school-based programs. The Organization received \$89,000 of this money. In the past, the public servant has been a signatory to the contract allocating such funds to the Organization. He also serves on the Entity's Advisory Board.

Discussion

The official here falls within the definition of public servant set forth in Charter Section 2601(19) but is not a regular employee as that term is defined in Charter Section 2601(20). A "public servant" is defined in Charter Section 2601(19) as "all officials, officers and employees of the City, including members of community boards and members of advisory committees, except unpaid members of advisory committees shall not be public servants." Although unpaid, the official here is not a member of an advisory committee and is therefore a public servant. "Regular employees" are defined in Charter Section 2601(20) as "all elected officials and public servants whose primary employment, as defined by rule of the Board, is with the City, but shall not include members of advisory committees or community boards." Since his work for the City is uncompensated and part-time, and since he is primarily employed as the President and Chief Executive Officer of the Organization, the official here is not a "regular employee."

Charter Section 2604(a)(1)(a) provides that no public servant shall have an interest in a firm which such public servant knows is engaged in business

dealings with the agency served by such public servant.

An "interest", in turn, is defined as an ownership interest in a firm or a position with a firm. See Charter Section 2601(12). A "firm" includes a partnership, corporation or any other form of enterprise. See Charter Section 2601(11). A "position" is defined in Charter Section 2601(18) as an officer, director, trustee, employee, or any management position in a firm.

The public servant may not, therefore, have a position with an entity engaged in business dealings with the Agency. Since the Organization receives funding through the Agency, the public servant's position with the Organization would be prohibited by Charter Section 2604(a)(1)(a). However, Charter Section 2604(e) provides that a public servant may hold or negotiate for a position otherwise prohibited by Chapter 68 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 involved, the Board determines that the position involves no such conflict. By letter to the Board, the Mayor gave his approval for the public servant to maintain his position with the Organization,

stating that the position would pose no conflict with the purposes and interests of the City.

There are a number of factors which suggest that the interests of the City will not be jeopardized if the public servant retains his position with the Organization. The Board has been advised that the funds which the Organization receives through the Agency constitute approximately one tenth of one percent of the Organization's budget for 1993, a very small percentage. Similarly, the program for which these funds are allocated represents a minute portion of the public servant's responsibilities as Chief Executive Officer of the Organization, and his position and responsibilities are not predicated on this funding. Finally, the funding must be approved first by the Entity, and thereafter the Agency's approval is routine and essentially pro forma.

The Board has determined that potential conflicts of interest may, in certain instances, be avoided if the public servant recuses himself or herself from involvement in the particular matter at issue. See, e.g., Advisory Opinion Nos. 92-8 and 92-9. The Board has determined that, where recusal is to be used to avoid conflicts of interest, it must be effective. For

recusal to be effective, the public servant must be insulated from involvement in the matter at issue. Recusal means that the public servant will not participate in meetings, have discussions with public servants and others, receive and/or review relevant documents or otherwise be involved in the particular matter. See Advisory Opinion No. 92-8. In this case, the City's interests are best protected if recusal extends to both the public servant's official capacity as a public servant and to his position or involvement with the not-for-profit organization.

The public servant has agreed to recuse himself from the Agency's consideration of and voting on the Organization's funding. As a member of the Entity's Advisory Board, he has similarly agreed to recuse himself. He has also stated that he will recuse himself in his position with the Organization from participating in decisions related to Agency funding, including signing the contract allocating such funds, and their administration; he will delegate these responsibilities to the Organization's professional full-time staff.¹

¹ Since the public servant is not a regular employee, he is not prohibited from having an interest in a firm which he knows is engaged in business

Conclusion

The Board finds that the circumstances of this case are such that the above-described recusal will be effective. Accordingly, based on the public servant's representations and on the written approval of the Mayor, it is the determination of the Board that the public servant's position with the Organization would not conflict with the purposes and interests of the City. See Charter Section 2604(e). The public servant may, therefore, retain his position with the City and continue to perform services for the Organization, provided he does so on his own time and does not divulge any confidential information. See Charter Sections 2604(b)(2) and (b)(4).

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dealings with City agencies other than his own. See Charter Section 2604(a)(1)(b). Therefore, he need not recuse himself with respect to funding of the Organization by City agencies other than his own.

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