Post-Employment Restrictions

Charter Sections 2604(d)(2), 2604(d)(6), and 2604(e)

Advisory Opinion No. 99-3

The Conflicts of Interest Board (the "Board") has received a request from a public servant about to resign from City service as to whether he may, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, have non-ministerial communications with his former agency during the first year following his resignation. Specifically, he has asked whether, as the employee of a firm which pursuant to a contract with the State of New York has undertaken an environmental review of a proposed State project, he may have such communications with his former City agency in the course of conducting that review for the State.

For the reasons discussed below, it is the opinion of the Board that, on the facts presented, his proposed activity constitutes "representation on behalf of" the State within the meaning of Charter Section 2604(d)(6), the "government to government" exception to the post-employment restrictions of Chapter 68. He may accordingly have communications with his former City agency in execution of that State contract within one year of leaving City

service, communications which, but for this exception, would be prohibited by Section 2604(d)(2).

Background

The public servant has advised the Board that he is the director of a unit in his City agency (the "Agency") and that he will shortly resign from City service to take a position at a private firm (the "Firm") whose business includes the analysis of the environmental impact of public works. At the Firm his position will involve the day to day management of a major environmental review project (the "Project"). The Firm is undertaking the Project pursuant to a contract with a State agency, which is considering whether and how to undertake a major construction program.

As part of his duties at the Firm, the public servant anticipates that he will find it necessary to have communications with Agency staff. More particularly, in the course of the Project, he advises that it is necessary to identify the public work under consideration, and feasible alternatives thereto, and to evaluate the environmental impacts of each. In the course of that evaluation, it is also typical, for both political and technical reasons, to brief interested public and private entities and individuals about the progress of the study and to obtain their feedback. He anticipates that it will be necessary for him to communicate with Agency staff for these and similar purposes.

The public servant further advises that at the Agency he has had no involvement in any aspect of the Project. He also advises that he has had no Firm matters before him at the Agency.

Discussion

Charter Section 2604(d)(2) provides that "[n]o former public servant shall, within a period of one year after termination of such person's service with the city, appear before the city agency served by such public servant…."

Charter Section 2604(d)(6), the so-called "government-to-government" exception to the post-employment rules, 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." (Emphasis added.) Regarding Section 2604(d)(6), the Charter Revision Commission Report at page 184 states that "[t]his would include any employment with or service provided as an attorney or consultant to such agency." (Emphasis added.)

While none of the Board's Advisory Opinions concerning Section 2604(d)(6) discusses the "representation on behalf of" language of that provision, on its face it seems plain that, since the public servant will be acting

as a consultant to, and indeed a representative of,[1] the State in his communications with the Agency, his conduct falls within the government-to-government exception. One line of Advisory Opinions concerning Section 2604(d)(6) does however suggest a distinction between a former public servant consulting personally with a government agency and his private employer contracting with the agency to provide his services. See Advisory Opinions Nos. 93-12 and especially 95-1, the so-called "consulting back" opinions. In those opinions, the Board approved as a form of government-to-government work, a former public servant consulting back personally, but not through any private employer, with his or her former City agency, a circumstance which occurs when, for example, projects require completion. The Board in fact noted in Advisory Opinion No. 95-1 that if the agency had contracted with the former public servant's private firm, a waiver of the post-employment rules would have been required, and further stated that a waiver would likely not have been granted. The Board there expressed its concern, often expressed in its analysis of post-employment waivers, for the competitors of the former public servant's private employer.

The relevant question, therefore, is whether this requirement of personal contracting may and should be read into the "representation" language of Section 2604(d)(6). For a variety of reasons, the Board will not so read the "representation" language. First, since the Commission Report

[1] Section 2604(d)(6) speaks of "representation on behalf of" a government agency. The Board notes that many, if not most, vendors of services will not "represent" government within the meaning of Section 2604(d)(6).

plainly states that an attorney providing service to a government agency would be within the scope of Section 2604(d)(6), the permissibility of such representation should not turn on whether the retainer agreement is with the attorney personally or with his or her firm. Second, and perhaps more importantly, the "contracting back" opinions deal with communications otherwise prohibited by Section 2604(d)(2) by former public servants who were in contract with their own former City agency. If communications incidental to contracting with one's former agency were permissible when one was an employee of a contracting firm, then the exception would threaten to eat up the rule---the firm employing a former employee would obtain a contract with the employee's former agency, and the employee would be able to communicate with the agency because of that contract.[2] In contrast, in situations like the instant case where the contract is with a different agency (here, in fact, with a State agency), there is no appearance of special access or undue influence in the obtaining of the contract. To interpret Section 2604(d)(6) to permit the public servant here to communicate with his former agency as a State consultant would accordingly be consistent with the purposes of that provision. The Board noted in Advisory Opinion No. 93-13 that Section 2604(d)(6) "was added to the Charter because it was recognized that, in addition to preventing corruption and undue influence, the post-

[2] While the Board here finds that the former public servant's activity falls within Section 2604(d)(6), such activity would violate Chapter 68 if undertaken pursuant to his firm's contract with his former City agency. In such cases, neither the "consulting back" Advisory Opinions Nos. 93-12 and 95-1, nor the instant "representative" opinion, will obviate the need for a waiver pursuant to Section 2604(e), which waiver the Board might not necessarily grant. See, e.g., Advisory Opinion No. 95-1, where the Board declined to issue a waiver.

employment restrictions could also work against the public interest by prohibiting government agencies from legitimately engaging the expertise and experience of former public servants."

Conclusion

The Board accordingly determines that the government-to-government exception of Section 2604(d)(6) will apply to the public servant's communications with his former City agency in his role as a consultant to the State. He may therefore have such communications during the first year following his departure from City service.

Benito Romano

Acting Chair

Bruce A. Green

Jane W. Parver

Dated: October 29, 1999

99-206.ao/wh