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On October 8, 2020, the Conflicts of Interest Board adopted new and important changes to its post-employment rules that restrict former City employees from contacting their former City agencies. The Board, in addition, on May 21, 2021, adopted rules relating to the acceptance of gifts by City employees in certain recurring situations. This article examines these new rules.

Post-employment rules

The post-employment restrictions of Chapter 68 of the City Charter seek to balance two competing City interests: (1) the need to recruit public service talented individuals who may wish to return to or pursue private sector employment after their City service, and (2) the need to prevent former City employees from trading on connections made in while working for the City or using confidential City information for the benefit of themselves or future employers.

The Board, since 1989, has issued 31 advisory opinions, totaling 210 pages, on post-employment restrictions. These advisory opinions provided guidance to former City employees on the application of the post-employment restrictions and the standards by which the Board evaluates applications for the waiver of the post-employment restrictions.

Based on these past advisory opinions, the Board adopted new rules to clarify post-employment restrictions and to make it easier for City employees to understand and comply with the Charter restrictions. The new rules codify certain definitions of terms such as “agency served” and “termination of service.” The Board also established a new “totality of the circumstances” standard for evaluating requests to waive post-employment restrictions. The “totality of the circumstances” standard broadens the factors that the Board may consider when evaluating applications. Prior advisory opinions had established a four-factor test which remains in the rules as a non-exclusive list of factors. The Board also addressed a common situation where a City agency seeks to employ a former City employee as a consultant during the employee’s one-year ban. The new rules allow direct “consulting back” arrangements, but under strict conditions.

Date of Termination of City Service. The starting date for post-employment restrictions depends on when the public servant’s City service ends. The new rules follow the method of calculating the date of termination from City service as set forth in Advisory Opinions Nos. 1998-11 and 2019-1. The rules define the termination of City service as the later of either the last day a former City employee performed official City duties, or the last day the City employee received benefits conditioned upon current City employment after resigning, retiring, or being terminated.

The alternate termination date of the last day the City employee received benefits is based on Advisory Opinion 2019-1. In that opinion the Board was confronted with a situation where a City employee had accrued so much compensatory time that part of the compensatory time had to be paid by placing the City employee on terminal leave of absence status for three months. During the terminal three-month leave of absence, the employee was to do no work for the City, but would continue to receive his City benefits. The employee asked the Board when his one-year ban began: when he stopped working and went on the terminal three-month terminal leave of absence, or when the leave of absence ended.

The Board determined that the City employee remained an employee of the City until his three-month leave of absence terminated. The City employee was still in his City position, was so compensated, and enjoyed continued access to his City healthcare, dental, pension, and commuter benefits. As a result, the Board ruled that the one-year began when the three months were up.

This reasoning is now incorporated formally in the Board's rules.

One-Year Ban. Chapter 68 contains two provisions regarding the one-year ban on contacts with City government by former City employees. The first provision prohibits former City employees from appearing before their former City agency within one year after termination of their service with the City. The second provision applies to specified high officials, including Deputy Mayors, the Corporation Counsel and other similar senior officials, and to elected officials: borough presidents, Comptroller, Public Advocate and council members. These designated officials may not appear before their branches of City government, not just their individual agencies. Thus, designated senior officials may not appear before the entire executive branch, while elected officials may not appear before the Council.

Post-Employment Appearances. The Charter defines an appearance before the former City employee's former agency to be any communication, for compensation, other than those involving ministerial matters. The Board construes appearances to include attending meetings, making telephone calls, sending emails, writing letters, and engaging in similar types of activities. Ministerial matters are administrative matters such as issuing a license, permit or other permission which is carried out in a prescribed manner and which does not involve substantial personal discretion.

Appearances and communications that do not involve agency business are allowed. Under the Board's interpretation the three following communications are allowed and not prohibited: (1) social communications; (2) soliciting a public servant's personal legal business or other types of personal services including asking them to leave City employment to join the former public servant's new firm; and (3) seeking an endorsement for a run for political office.

The new rules address one circumstance where the rules prohibit an appearance before a City a commission or board rather than the former City employee's own agency. This could occur when an official from the former City employee's agency is sitting on a separate City commission or board as a representative of the former City employee's agency. In that situation, the commission or board is treated as if it were the former City employee's agency, and the former City Employee could not appear before that commission or board while the representative of the former City employee was present.

Waivers of the Post-Employment Restrictions. The Board announced in1991 that it would "sparingly, and only in exigent cases" issue waivers of Chapter 68's post-employment restrictions The Board reasoned that former City employees requesting waivers of the post-employment restrictions are seeking to engage in conduct in which the relationships developed in their former City position may influence decision-making by their former City agency. The conduct may also put the former City employee in a position to utilize their superior familiarity with, and ability to navigate, the subtle culture of their former agency. In this way they may be advantaged to achieve preferential treatment for their private employer or become involved in the exact matters on which the former City employee personally and substantially worked while in City service.

The Board, in evaluating the many requests for waivers, has sought to balance the rationale for enforcing the post-employment restrictions of the Charter with the asserted need for a particular former City employee to

engage in otherwise prohibited conduct to further an identified City interest.

The Board traditionally considered four factors when evaluating requests for post-employment waivers: (1) the relationship between the City and the City employee's private employer; (2) the benefits to the City as opposed to the City employee if the waiver were granted; (3) the likelihood of harm to other organizations similar to, or in competition with, a City employee's prospective employer if the waiver were granted; and (4) the extent to which the former City employee has unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person.

Based on its experience in evaluating waiver requests, the Board decided that a "totality of the circumstances" standard would better reflect the Board's process in evaluating an application to waiver the post-employment restrictions.

The new rules explicitly adopt a totality of the circumstances test and list the historic four factors as factors to be considered. The Board in adopting the new rules explained the rationale behind the four factors.

1.The relationship between the City and the former City employee's private employer: When a former City employee's work for a private employer involves furthering an interest identical to that of the City, there are diminished concerns about the former City employee using their special access or knowledge to the detriment of the City's interests. The Board has historically been more likely to grant requests for waivers for former City employees who work for entities that the City controls or effectively controls. For example, the Board looked favorably upon requests to work for City affiliated not-for-profits when those entities were created by City agencies and had a governing structure that involved public officials as officers or board members.

Additionally, in the past the Board has granted waivers in situations where the former City employee's private employer operates as a public-private partnership with the City and devotes substantial private resources to support the work of a City agency. In a 2008 Advisory Opinion the Board stated that when the City and a private employer share an identity of interest, the City benefits from encouraging former City employees to effectively remain in public service by working for that private employer.

2.The benefits to the City as opposed to the former City employee if the waiver were granted: When a former City employee is uniquely suited to perform work that would benefit the City, rather than their private employer, the proposed post-employment activities do not conflict with the purposes and interest of the City. The Board wrote in a 2012 Advisory Opinion that, in evaluating a request for a waiver of the post-employment restrictions, the Board looks for a demonstration of the benefit to the City, not to the new employer. The potential benefit to the City has been articulated in two ways: either by virtue of the former City employee's unique technical or professional expertise or because at a small not-for-profit, there is no other employee able to do the prohibited work. In 1992 the Board, for example, granted a waiver of the post-employment restrictions to work for an entity when the former City employee's expertise would help remedy contractual disputes between the entity and the agency.

3.The likelihood of harm to other organizations similar to, or in competition with, a former City employee's prospective employer if the waiver were granted: Former City employees who have worked for the City for brief periods of time are less likely to have developed the type of connections that could afford them undue influence or unfair access, the Board has issued post-employment waivers for these public servants more readily. The Board for example granted waivers to former City employees who worked for the City for only 40 or 36 days respectively, or who served only as a paid summer intern. Additionally, City employees whose City service was part-time on a consultative body have been granted post-employment waivers more frequently in light of the limited role they played in City government.

4.The extent to which the former City employee has unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person: A former City employee communicating with their former agency on behalf of a private employer shortly after departing may pose a risk of harm to firms similar to or in competition with that private employer, given the former City employee's familiarity with, and ability to navigate, the processes of their former agency. To mitigate this risk, the Board has

stated that it will continue to disfavor requests in which the former City employee proposes to communicate with units or divisions at the former agency with which they worked regularly. Additionally, the Board will continue to disfavor requests for waivers for former City employees who wish to communicate with their former agencies to seek new business for their private employers in the forms of licenses, permits, grants, or contracts.

Additional Considerations on Waivers. The Board announced two negative considerations in the new rules with respect to applications for waivers of the post-employment restrictions. First, the Board will decline to issue waivers when the request is made after undue delay. The Board's decision-making is hindered by a lack of time to evaluate the specific circumstances of the request as well as complications that often accompany such requests. The most common complication encountered is where the former City employee has already accepted or started a job that requires otherwise prohibited communications. The Board emphasized this factor as a warning and to ensure that self-created exigencies do not take precedence over other relevant factors. Second, the Board will decline to issue waivers when a former City employee violated Section of 2604(d)(1) of the Charter while applying for outside employment. This section of the Charter requires a City employee to recuse themselves from any matters involving a private employer while soliciting or negotiating for a position with that employer.

Consulting for a Former City Agency. In a major change, Board adopted new rules that allow agencies to directly hire former City employees under "consulting back" arrangements, but under strict conditions.

A City agency occasionally seeks the services of a former City employee during the former City employee's one-year ban. City agencies often accomplished this by employing the former employees as a consultant through an intermediary entity, rather than contracting directly with the former City employee. Agencies, for example, arranged to pay the former City employee through a temporary staffing agency already under contract with the City agency.

The Board's new approach to consulting requests had been informed by Charter § 2604(d)(6), the so-called "government-to-government" exception. The government-to-government exception eliminates the one-year ban when the former City employee's new position is with any local, State or federal agency as opposed to a private entity. The Board reasoned that many of the circumstances where an agency seeks to hire a former City employee as a consultant are motivated by City purposes similar to those that support the government-to-government exception.

Now, under the new rules, an agency may directly contract with a former agency employee without prior Board approval, and even assign the former City employee to work on a matter that the former City employee had worked on personally and substantially while employed by the City. The agency may do so only if the agency can meet the following conditions:

– The consulting arrangement is made for the purpose of continuing or completing work left unfinished by the former City employee at the time their City service terminated, or for training their replacement, or for filling a vacancy until a replacement can be hired;

– The duration of the consulting arrangement is no longer than reasonably necessary;

– The former City employee has technical, professional, or other subject-matter expertise or skills not otherwise available among the agency's employees;

– The compensation is comparable to what the former City employee last earned at the agency; and

– Within 30 days the written approval of the agency head is disclosed to the Conflicts of Interest Board, which approval will be posted on the Board's website.

Where a proposed consulting arrangement between a City agency and a former City employee does not meet all the requirements above, the former City employee will need a waiver from the Board.

The new rules also address the situation where the former City employee is employed not directly, but through a private firm. In that circumstance, the agency must meet the five criteria above and, in addition, establish that the former City employee played no role in the recommendation or selection of the private firm in their prior work as a City employee. The agency then must submit the information on the consulting arrangement to the Board for its approval. The Board will approve the consulting arrangement if it finds that the proposed consulting arrangement would provide a benefit to the City distinct from the benefit to the former City employee or to the private firm.

Gifts to City employees

The Conflicts of Interest Board has issued 29 advisory opinions concerning acceptance of gifts by City employees. On May 18. 2021, the Board amended the existing gift rules to codify some of its prior advisory opinions and to clarify rules in certain recurring situations.

Gifts to Enhance Agency Morale. Occasionally the City is offered blocks of free tickets for entertainment, sporting, and cultural events. The Board had given limited approval of the acceptance of such offers as a way to promote office morale or reward good performance. Historically, the Board had advised that donated tickets for use by City employees could be accepted if: (1) approved by and distributed in a manner approved by an agency head; and (2) the donation did not raise significant concerns of a conflict of interest, such as the donor having a project pending before the accepting City agency or the donor having any role in selecting the public servants who will attend.

The four factors in the adopted rule were designed to allow the acceptance of gifts to benefit the workforce and still safeguard against the efforts of donors to target public servants involved in their City business or reward public servants for providing them with favorable determinations. The four factors that must be met are:

– the attending City employees may not be among the senior management employees or elected officials who are required to file annual financial disclosure reports;

– the offer of free attendance was not solicited by any City employee;

– the method of selecting the City employees who will attend the event must be approved in writing by the agency head; and

– the City employees attending the event are not involved in the consideration of any pending particular matter, legislative proposal, action on the City budget, or text of the zoning resolution in which the offeror of tickets or the host of the event is a party or has an interest.

Donations for Personal Emergencies. In 1992 the Board provided advice to City employees seeking to raise funds for medical expenses to help an injured City employee. The funds could be raised from firms that were regulated by the City employees' agency or may have matters before the injured City employee, provided that all funds were collected by a third party not connected to the agency and that the donors' identities were not revealed to the City employee or to any other agency employee.

The new rule codifies this advice to allow the solicitation and acceptance of what would otherwise be prohibited contributions, provided that the contributions address the need caused by the emergency. The rule covers personal emergencies such as an accident, sickness, or being the victim of a crime.

Gifts between Public Servants. The Conflicts of Interest Board, in dealing with gifts between City employees, has attempted to provide practical guidance while still protecting against the corrupting influence of gifts between City employees. The Board in 2013 advised that City employees who are peers may give gifts to each other, and that a superior City employee may give a gift to a subordinate. The Board reasoned that in both scenarios, the recipient of the gift has no authority in their City job over the giver. On the other hand, as a general matter a City employee may not accept a gift from a subordinate. The new rule incorporates the prior

advice while adhering to the general prohibition against City employees accepting gifts from their subordinates, with two exceptions.

– a superior City employee may accept a gift from a subordinate on a special occasion marking a major life event, such as a wedding, the birth or adoption of a child, or retirement, where the gift is appropriate to the occasion; and

– a City employee may accept gifts, other than gifts of cash or cash equivalents, on other events, such as holidays or birthday, from their subordinates, or a group of subordinates, where the total value of the gift is $10 or less.

The Board limited the total value of the gifts collected from groups of employees to $10 for fear that in a large agency many small gifts might collectively total hundreds of dollars.

Disposition of Impermissible Gifts. The Board in the new rules clarified the steps a City employee must take to dispose of an impermissible gift. The City employee must first attempt to return the gift. If the gift cannot be returned, the City employee's agency head may, after providing written notice to the inspector general for the agency: (a) direct the item to be donated to the agency or acceptable entity, or to the Mayor's Fund to Advance New York; share the item within the agency; or destroy the item.\

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