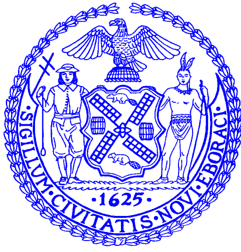

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ADVISORY OPINION 2008-3
Term Limits Use of Position

SUMMARY: Members of the City Council and the Public Advocate will not violate Charter Chapter 68, the City's conflicts of interest law, by participating in the legislative process in relation to the modification, extension, or abolition of term limits, including but not limited to voting for or against any such changes.

OPINION OF THE BOARD

The Conflicts of Interest Board (the "Board") has received inquiries from Public Advocate Betsy Gotbaum and City Council Members Bill de Blasio and Letitia James, through their attorneys,[1] as well as from the Council itself, asking whether, consistent with the provisions of Chapter 68 of the City Charter, the City's conflicts of interest law, Council Members and the Public Advocate may participate in the consideration of currently-pending legislation to alter the City Charter's term limits provisions, Charter Sections 1137 and 1138, by supporting or opposing, and ultimately voting upon, that legislation. For the reasons set forth below, the Board concludes that they may.

[1] The subjects of this opinion have consented to the use of their names and other identifying information. See Charter § 2603(c)(3).

Background

Charter Sections 1137 and 1138 currently limit certain City elected officials, including Council Members, the Public Advocate, the Mayor, and Borough Presidents, to serving no more than two terms; these provisions were enacted as the result of referenda approved by the voters. A bill (Int. No. 845) (the "Bill") has recently been introduced in the City Council to amend these provisions to permit elected officials to serve a maximum of three terms. The Board is advised that, as of this writing, the Council has scheduled committee hearings on the Bill for October 16 and 17, 2008. The Board is also advised that Mayor Bloomberg has publicly supported enactment of the Bill and has said that he will sign it if it is passed by the Council.

The Board has further been advised that Ms. Gotbaum's second term as Public Advocate ends next year, so that under current law she may not run for re-election in the 2009 municipal elections. On the consent of the Council Speaker, Ms. Gotbaum presides over the City Council. The Board is further advised that Mr. de Blasio's second Council term ends next year; that he, too, is therefore barred by current law from seeking re-election in 2009; that he is contemplating running for Brooklyn Borough President in 2009 but would be eligible to run for re-election as a Council Member if the Bill becomes law; and that the incumbent Borough President would also be barred by current law from running for re-election in 2009 but would be eligible to seek re-election if the Bill becomes law. Finally, the Board is advised that Ms. James is completing her first term as a Council Member; that she is eligible under current law to run, and is considering running, for re-election in 2009; that, in contrast, the majority of her fellow Council Members are barred by current law from running for re-election in 2009; and that if the Bill becomes law, and

if Ms. James is re-elected in 2009, she would be eligible, and might choose, to seek a third term thereafter.

Accordingly, Council Members de Blasio and James and Public Advocate Gotbaum, and the Council itself, have requested the Board's advice on whether, as a result of the introduction of the Bill, Council Members and the Public Advocate were to take actions as public servants to participate in the Council's consideration of the Bill, including supporting or opposing it and voting on its adoption, they would violate the City's conflicts of interest law, and in particular Charter Sections 2604(b)(2) and (b)(3). Counsel for Council Members de Blasio and James and Public Advocate Gotbaum has also suggested that, in so doing, they might violate Board Rules Section 1-13(d), which prohibits public servants from intentionally or knowingly aiding, inducing, or causing another public servant to violate any provision of Charter Section 2604.

Relevant Law

Charter Section 2604(b)(2) prohibits a public servant from engaging in "any business, transaction or private employment, or having any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties."

Section 1-13(d) of the Rules of the Board provides that it shall be a violation of Charter Section 2604(b)(2) for a public servant to, among other things, "aid, induce or cause" another public servant to "intentionally or knowingly" violate any provision of Section 2604.

Charter Section 2604(b)(3) prohibits a public servant from using or attempting to use his or her position as a public servant "to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or

firm associated with the public servant." Charter Section 2601(5) defines those "associated" with a public servant to include a spouse, domestic partner, child, parent, or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.

Charter Section 2604(b)(1)(a) provides as follows:

"1. A public servant who has an interest in a firm which is not prohibited by subdivision a of this section, shall not take any action as a public servant particularly affecting that interest, except that (a) in the case of an elected official, such action shall not be prohibited, but the elected official shall disclose the interest to the conflicts of interest board, and on the official records of the council or the board of estimate in the case of matters before those bodies."

Discussion

At the outset the Board emphasizes that it expresses no view whatsoever on the merits or lack of merits of term limits or the Bill, nor does the Board express any view on whether an extension, if any, should be made by local law or by a referendum or State legislation. The Board limits its advice in this Opinion to the question posed, namely, whether actions taken by Ms. Gotbaum, Ms. James, Mr. de Blasio and other Council Members to support or oppose the Bill would contravene Chapter 68, that is, the conflicts of interest provisions, of the City Charter.

Because the Bill, if enacted, would permit many current City elected officials, including Ms. Gotbaum, Ms. James, Mr. de Blasio, and other Council Members, to seek an additional four-year term that the current law denies them, it would, to that extent, arguably confer a "benefit"

upon them. However, for the reasons set forth below, it is the Board's view that their official actions in participating in a legislative process that might yield them this arguable benefit would *not* confer upon them any "private or personal advantage" within the meaning of Charter Section 2604(b)(3), nor would it constitute a "private interest" in conflict with the proper discharge of their official duties in violation of Charter Section 2604(b)(2). Indeed, the Board believes that it is squarely *within* the proper discharge of Council Members' official duties as legislators (and, in Ms. Gotbaum's case, as an elected official whose duties include presiding over the Council) for them to vote upon, and otherwise participate in the legislative process regarding, a bill lawfully pending before the Council. Accordingly, these elected officials, and indeed any elected official of the City, **will not violate Chapter 68** by participating in this legislative process.

The Board first notes that the framers of current Chapter 68 did not intend to "define the full scope of ethical behavior for public servants" but, rather, only to identify "a definable and crucial subset of ethical behavior." Report of the 1986-1988 Charter Revision Commission, Volume II, p. 148. This crucial subset concerns conflicts between public servants' official duties and, in the main, their *private, financial* interests (and those of their "associates"), not their political interests in serving as public officials or in the terms and conditions of that service. Accordingly, while term-limited elected officials may have a personal political interest in the Bill's outcome, that interest does not fall within the "definable and crucial subset" of Chapter 68 that would disqualify them from participating in consideration and possible enactment of the proposed legislation.

A second tenet that underlies Chapter 68 is the recognition that, in a democratic system of government, elected officials are charged by their constituencies with fulfilling certain basic

duties – and that, in the case of legislators, such as Council Members, there is no duty more fundamental to their office than the obligation to vote upon pending bills lawfully before them. Thus, Charter Section 2604(b)(1) expressly permits Council Members (and other elected officials) to take actions "particularly affecting" their private financial investments in private firms, provided only that they disclose their private interests to the Board and, in the case of Council Members, "on the official records of the council." This provision clearly stands for the proposition that the Charter disfavors disqualifying elected officials from their core legislative function of voting.

Consistent with this underlying tenet, the Board has permitted Council Members to take actions that are intrinsic to their role as elected representatives, but might further their personal financial interests, so long as those financial interests were fully disclosed. Thus, for example, in Advisory Opinion No. 94-28, the Board permitted a Council Member to propose and support legislation (both City and *State* legislation) that could directly benefit a real estate developer with whom the Council Member had a financial relationship. In so doing, the Board noted that the "Charter recognizes this unique function of elected officials in Charter Section 2604(b)(1)(a), which provides that an elected official may take an action as a public servant which affects an interest he has in a firm, provided that the elected official discloses such interest to the Board and on the records of the Council." *Id*. at 5.

So too here, voting on the term limits Bill is squarely within the "unique function" of elected legislators that the framers of Chapter 68 did not mean to impede. If Council Members are not prohibited by Chapter 68 from voting on legislation that affects their private financial interests, so long as those interests are disclosed, *a fortiori* they cannot be prohibited from voting

on legislation that affects the terms and conditions of their service as Council Members. And such an "interest" does not require any specific act of "disclosure," because it is plainly apparent on the face of the legislation.[2]

Indeed, the courts have recognized that it is squarely within the authority of the City Council to enact laws regarding term limits, and that a voter referendum under City Charter Section 38 or Municipal Home Rule Law Section 23(2) is not required to enact such laws. *See Golden v. New York City Council*, 305 A.D. 2d 598, 762 N.Y.S. 4102d 410 (2d Dep't 2003). Given this judicial authority, to hold that all Members of the Council who would arguably benefit by being enabled to run for another term are disqualified by Chapter 68 from voting on such a law would deny to the people's elected representatives one of the powers afforded them by State and local law. [3]

The Board precedents cited by counsel for Council Members de Blasio and James and Public Advocate Gotbaum are fully consistent with both of these tenets underlying Chapter 68. Thus, for example, the Board has found violations of Chapter 68 where a public servant supervised a person with whom the public servant had a private financial relationship, a violation

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[2] It is nevertheless worth stating that the disclosure requirement of Charter Section 2604(b)(1)(a) clearly does not apply to any Council Member's vote on the Bill. Here, the bill to extend term limits does not at all relate to any Council Member's "interest in a firm," much less "particularly affect" any such interest.

[3] By the same token, the Board rejects the suggestion of counsel for Council Members de Blasio and James and the Public Advocate that the members of this Board are disqualified from rendering a valid and objective opinion on the question posed herein, simply because they were appointed by the Mayor (with the consent of the Council) and could be re-appointed by the Mayor were he to be re-elected for another term. There is no basis for concluding that the Charter, having established the Board as a body so appointed, bars the Board from discharging its duty to construe Chapter 68 in matters involving the interests of the Mayor and the Council Members. The six-year terms which Board members serve, which are longer than the terms of any Mayor or Council Member, address the issue of the relationship between the Board members on the one hand and the Mayor and Council Members on the other.

of the express terms of Charter Section 2604(b)(14) (*COIB Case No. 2005-442*); used City letterhead for the public servant's personal affairs, again in plain violation of Charter Section 2604(b)(2) as interpreted in Board Rules Section 1-13 (*COIB Case No. 2008-501*); acted on a matter that would benefit a not-for-profit that the public servant served as a paid consultant, again a textbook violation of Charter Section 2604(b)(3) (*Advisory Opinion No. 94-17*); or engaged, on City time, in such partisan political activity as distributing political campaign material, also a plain violation of Board Rules Section 1-13 (*Advisory Opinion No. 95-24*). In each one of these cases, the interest served by the public servant's official actions was a *personal, private* interest, not an interest in the terms and conditions of his or her public office, and in none of them was the public servant an elected official expressly discharging the core duties for which he or she was elected.

In contrast with these violations of definable, and defined, standards relating to personal, private interests, an interpretation of Chapter 68 that would prohibit elected officials from considering or voting on a bill modifying or extending (or even abolishing) term limits would extend the scope of Chapter 68 far beyond any workable interpretation of the law. If Council Members voting on a bill to extend their permissible terms were held to be unlawfully using their positions to obtain a "financial gain" or "other private or personal advantage" in violation of Charter Section 2604(b)(3), or to be acting "in conflict with the proper discharge of [their] official duties," in violation of Charter Section 2604(b)(2), it must follow that they could not vote on *any measure* affecting the terms and conditions of their public service as Council Members. So, for example, they would likewise violate the law by voting on pay raises for themselves – a bill that the Council in fact recently passed, without (so far as the Board is aware)

anyone suggesting that the Council Members violated Chapter 68 by voting for that measure. Similarly, if Council Members cannot vote on term limits, they would likewise be prohibited from voting to limit the amount of campaign contributions that they may receive, and concomitantly to permit certain contributions (again, a bill that the Council recently passed); from voting to limit the amount of gifts that they may receive from lobbyists, and to permit certain gifts (also a recently passed bill)[4]; or even from voting to purchase more comfortable chairs for the Council chamber, or to give City Hall a new paint job.[5] In addition, the logic of the notion that Chapter 68 prevents Council Members from voting to extend term limits also suggests that elected officials may never act on matters properly before them if their actions would have implications for their personal political prospects; such a conclusion would bring democratic government to a halt.

A review of analogous authorities in other jurisdictions supports the Board's conclusion. For example, while cases challenging determinations by legislators to increase their own salaries often turn on the interpretation of legislation specific to that question, in the absence of such specific legislation, it has been held that general conflicts of interest laws do not prohibit such action. The following language of the Court of Appeals of Ohio, Fifth District, in a decision overturning an opinion of the Ohio Ethics Commission, is instructive:

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[4] While the recently enacted bills with respect to campaign contributions and gifts from lobbyists might be described as yielding a "disadvantage" to most if not all Members of the Council, as noted, the legislation also permits certain contributions and gifts, and the act of voting on those bills surely implicated the interests of Council Members – which would also be implicated if the Council were to vote on legislation relaxing or repealing the restrictions of the pay-to-play or lobbyist gift laws

[5] Concluding that Chapter 68 precludes elected officials from taking action to extend term limits or otherwise improve the conditions of their offices would also have implications for appointed officials, who would likewise presumably be precluded from requesting a raise, applying for a promotion or for another City position, or seeking reappointment.

> "The act of voting a pay raise, even for the benefit of oneself, cannot be considered the acceptance of something of value that will influence one's public actions, substantially, improperly or otherwise. It is the act of a pay raise and the potentially self-serving nature of it that may be found to be offensive but not pursuant to this statute. The voters will have the ultimate say as to the propriety of the timing of the pay raise."

Coleman. v. City of Canton, No. 1997CA00303, 1998 WL 401026, at *3 (Ohio Ct. App. May 4, 1998).

So, too, with term limits legislation. A legislator's act of voting for, or against, extending his or her own ability to seek another term cannot be considered either using the legislator's office to "obtain any financial gain . . . or other personal or private advantage" for the legislator (Charter Section 2604(b)(3)); nor can it be considered an act "in conflict with the proper discharge of" the office of legislator (Charter Section 2604(b)(2)).[6] And if the electorate believes there is something unseemly or even outrageous in such actions, then (in the words of *Coleman, supra),* "the voters will have the ultimate say" – because, in the final analysis, the Bill does not guarantee any public official a third term; it would merely allow the voters to decide whether another term is merited. That is the democratic system our State and local laws have erected – and nothing in Chapter 68 disables that system.[7]

[6] Nor, by extension, would the Public Advocate's participation in that same legislative process violate either of these Sections.

[7] Because the act of voting on lawful legislation is thus so clearly *within* Council Members' official duties, the Board need not decide whether any actions taken, or reported to have been taken, by any member of the Executive Branch in regard to the term limits issue have violated or will violate Chapter 68; rather, the Board is convinced that, simply by supporting and voting on a Bill properly before the Council, a Council Member cannot be held to have "aid[ed], induce[d] or cause[d]" any Executive Branch actions in arguable violation of Board Rules Section 1-13(d)(1).

Conclusion

Members of the City Council and the Public Advocate will not violate Charter Chapter 68, the City's conflicts of interest law, by participating in the legislative process in relation to the modification, extension, or abolition of term limits, including but not limited to voting for or against any such changes.

/s/

Steven B. Rosenfeld
Chair

Monica Blum
Kevin B. Frawley
Angela Mariana Freyre
Andrew Irving

Dated: October 15, 2008