

New York City Conflicts of Interest Board

Notice of Adoption of Final Rules

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Section 1043 of the City Charter and Section 3-907 of the New York City Administrative Code that the Conflicts of Interest Board has adopted Board Rules that create a procedure whereby agency heads may designate public servants to perform work on behalf of not-for-profit organizations and, with the approval of the Conflicts of Interest Board, participate in such organizations' business dealings with the City.

The proposed Rules were published in the City Record on December 18, 2018, and a public hearing was held on January 18, 2019. No testimony or comments were received. The Conflicts of Interest Board now adopts the following Rules.

STATEMENT OF BASIS AND PURPOSE

New York City Charter § 2604(b)(2) provides that “[n]o public servant shall engage in any business, transaction, or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” The Charter Revision Commission, in commenting on this provision at the time it was under consideration, stated that it had

retained this “catch-all” prohibition in recognition of the fact that the specific prohibitions set forth in [Chapter 68] cannot address all conflict of interest situations which may arise in the future and that the [Conflicts of Interest] [B]oard must retain the flexibility to handle new situations as they arise.

Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 175.

In 1998, after numerous requests for advice and enforcement actions, the Board promulgated rules implementing Charter § 2604(b)(2), set forth in Board Rules § 1-13 (“Conduct Prohibited by City Charter § 2604(b)(2)”), identifying what sorts of activities would present a conflict with the proper discharge of a public servant’s official duties. In its rules, the Board prohibits a public servant from “pursu[ing] personal and private activities during times when the public servant is required to perform services for the City” and from “us[ing] City letterhead, personnel, equipment, resources, or supplies for any non-City purpose.” Board Rules §§ 1-13(a) and (b). These rules prohibit any use of City time and City resources on activities for a public servant’s private interests.

The Board’s Rules currently permit City employees to engage in personal and private activities using City time and City resources, but not letterhead, upon a written application by the agency head if the Board determines that the activity furthers the purposes and interests of the City. See Board Rules § 1-13(c). This provision exists because in some situations a public servant’s private activities provide an incidental benefit to the City. See Notice of Adoption of

Rule Identifying Certain Conduct Prohibited by Charter § 2604(b)(2), Statement of Basis and Purpose of Rule at 3; *see also* Advisory Opinion No. 2001-3 at 8-9 (noting “skills training and professional development, public esteem for the legal profession, attorney job satisfaction, and generally a more efficient use of legal resources” as benefits of *pro bono* work by government attorneys, an example of such outside activity).

In the time since the Board promulgated Board Rules § 1-13, many public servants have requested advice about holding positions with firms or engaging in activities which, while not personal and private activities as described above, are also not strictly speaking City work. For example, a public servant may be asked to sit on the board of a not-for-profit which promotes an issue relevant to the public servant’s City work but in the course of that board service take on other responsibilities on behalf of the not-for-profit. Or a public servant could be asked by her supervisor to accept offers to sit on a professional association committee to advocate for adoption of policies which the public servant’s City agency believes are beneficial. Another example is the public servant who may be asked to provide analysis and support to a not-for-profit as part of that not-for-profit’s advocacy on issues related to the City’s policy goals. In each of these situations, an agency has determined that the activity is in the City’s interest and is also part of the public servant’s City job.

However, a public servant’s use of City time and City resources to work on behalf of the not-for-profit would be prohibited by Board Rules §§ 1-13(a) and 1-13(b), which forbid public servants from using City time or City resources for the work of these non-City entities. Under current rules, the mechanism made available by §1-13(c) would not apply because the proposed involvement in a not-for-profit’s activities are not the “personal and private” activities of the public servant, but rather the work of the public servant’s City agency.

These inquiries have arisen with more frequency because, in recent years, City agencies have increasingly made use of and relied upon not-for-profit entities to implement policies and projects that serve the City and its residents. Public servants often serve as staff or board members of these not-for-profit entities or provide other kinds of technical, fundraising, or logistical services to the not-for-profits. In the course of this work, public servants’ use of City time and their City titles, staff, and/or resources, as well as some of their involvement with the City business of these not-for-profits, implicate several provisions of Chapter 68.

Many of these not-for-profits have business dealings with the City, as defined in Charter § 2601(8) (including “any transaction with the city involving the sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but shall not include any transaction involving a public servant’s residence or any ministerial matter”). Examples of such business dealings include, but are not limited to, the following scenarios: contracting with the City to provide services related to a City program; selling training and educational materials to City agencies for use by public servants; applying for and receiving funds from City agencies; applying for permits from City agencies; and leasing space from the City. Some of the public servants working with these entities might have duties involving such business dealings, and a mechanism should be available to address these situations.

This rule amendment, a new subdivision (e) of § 1-13, provides a means for a public servant, at the direction of his or her agency head, to use City time and City resources in support of a not-for-profit entity that, among its other purposes, serves a City purpose as part of his or her City agency responsibilities.

First, where a public servant will not be involved in the not-for-profit's business dealings with the City, if any, an agency head may designate, in writing, a public servant to do such work and must publicly disclose such written designation to the Board. There is a limited exception, initially articulated in Advisory Opinion 2009-2, permitting City Council Members to sponsor and vote on discretionary funding for not-for-profits when their involvement with those not-for-profits is part of their official duties. See Advisory Opinion No. 2009-2 at 10-12; see also Advisory Opinion No. 1999-1 at 4 and Advisory Opinion No. 1992-22 at 2 (advising that elected officials do not need a waiver to serve on a not-for-profit board where such board service is part of the elected official's official duties but are still required to disclose pursuant to Charter § 2604(b)(1)(a)).

Second, where a public servant wishes to be involved in the not-for-profit's business dealings with the City, a public servant's agency head must submit a request for Board approval for that public servant's involvement, in a manner similar to the waiver process of Charter § 2604(e). Such Board approval, like a waiver, will be a public document. These public Board documents will be similar to the ones issued pursuant to Board Rules § 1-13(c), whereby the Board approves, upon application by the agency head, an individual public servant's use of City time and City resources for a specific personal and private activity that furthers the purposes and interests of the City.

In either a designation pursuant to Board Rules § 1-13(e)(1) or an application for Board approval pursuant to Board Rules § 1-13(e)(2), an agency head will be required to state that there is a demonstrated nexus between the proposed work on behalf of a not-for-profit, the public servant's City job, and the mission of the public servant's agency; and that such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit. Board Rules § 1-13(e)(3) defines who may submit designations and requests in a manner similar to the waiver provisions of Charter § 2604(e), with the exception of elected officials who, in light of their unique roles and positions in City government, may designate or approve themselves and members of their staff. See Advisory Opinion No. 1999-1 (advising that elected officials may designate in writing members of their staff to serve on a not-for-profit board where such board service is part of the elected official's and the staff member's official duties). Because the definition of "elected official" in Charter § 2601(10) does not include district attorneys, Board Rules § 1-13(e)(3) specifically identifies district attorneys as having the same role and responsibility under this rule as other City elected officials. For the purposes of this rule, members of an elected official's staff include the staff employed in the District Office of a City Council Member.

Text of the Adopted Rule

New material is underlined.

Section 1. Subdivision (e) of Section 1-13 of Chapter 1 of Title 53 of the Rules of the City of New York is re-lettered as subdivision (f) and a new subdivision (e) is added to read as follows:

§ 1-13. Conduct Prohibited by City Charter § 2604(b)(2).

* * *

(e) (1) An agency head may designate a public servant to perform work on behalf of a not-for-profit corporation, association, or other such entity that operates on a not-for-profit basis, including serving as a board member or other position with fiduciary responsibilities provided that:

(a) there is a demonstrated nexus between the proposed activity, the public servant's City job, and the mission of the public servant's agency; and such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit;

(b) the designated public servant takes no part in the entity's business dealings with the City at the entity or at his or her agency, except that Council Members may sponsor and vote on discretionary funding for the entity; and

(c) within 30 days the written designation is disclosed to the Conflicts of Interest Board and will be posted on the Board's website.

(2) A public servant designated in accordance with paragraph (1) of this subdivision may take part in such entity's business dealings with the City at the entity and/or at his or her agency if, after written approval of the agency head, the Board determines that there is a demonstrated nexus between the proposed participation, the public servant's City job, and the mission of the public servant's agency; and that such participation furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit entity.

(3) The designation made pursuant to paragraph (1) and approval made pursuant to paragraph (2) of this subdivision must be by the head of the agency served by the public servant, or by a deputy mayor if the public servant is an agency head. A public servant who is an elected official, including a district attorney, is the agency head for the public servants employed by the official's agency or office. A public servant who is an elected official, including a district attorney, may provide the designation pursuant to paragraph (1) and the agency head approval pursuant to paragraph (2) for him or herself.