



OUTSIDE ACTIVITIES

by

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A. Introduction

Many public servants seek to augment their City incomes by taking on second jobs or investing in businesses. Many public servants also seek to continue the spirit of their public service and volunteer for not-for-profit organizations. This chapter will address the rules that must be followed whenever a public servant seeks to perform any activity outside their City employment, whether that activity is paid or unpaid.

Among the moonlighting activities the Conflicts of Interest Board has specifically addressed are teaching; practicing law; engaging in various kinds of contracting work, such as architecture, engineering, electrical work, and plumbing, which might involve representing private interests before the City; and writing books. Charter §§ 2604(a), (b), and (e), which cover these activities, contain the minimum standards of conduct. Some City agencies promulgate and enforce stricter rules.

The Board has consistently advised that the moonlighting restrictions apply not only to active public servants, but also to those on leaves of absence. In 2001 the Board fined a public servant \$1,000 for working, while on sick leave, at a firm that had a contract with his City agency.^{T¹}

The Conflicts of Interest Board has issued advisory opinions and orders on the following ownership questions, among others: imputed ownership of a spouse's business; blind trusts; ownership of residential co-operatives or condominiums; and ownership of apartments rented to public assistance recipients. The Charter sections which cover these interests are also sections 2604(a), (b), and (e).

Many City employees are involved in, or want to be involved in, volunteering for not-for-profit organizations. Public servants volunteer for religious organizations, bring food to the elderly, work with troubled youth, feed the homeless, and engage in other civic-minded volunteer activities. These activities not only generate goodwill in the City, but also help to improve the quality of life for all City residents. Public servants are not prohibited from volunteering for not-for-profits. There are, however, some restrictions, as discussed below.

B. General Provisions

A public servant shall not engage in any business, transaction, or private employment, or have any financial or other private interest, direct or indirect, which conflicts with the proper discharge of his or her official duties.² For example, a public servant may not pursue outside employment or volunteer activities on City time or use City equipment, supplies, letterhead, personnel, or other City resources for the outside employment or volunteer activity.³ In 2000, the Board fined a housing inspector \$250 for working at a gas station in New Jersey at times when he was required to inspect buildings in New York.⁴ In 2000, the Board also fined the two top officials of the Human Resources Administration \$6,500 and \$8,500 for, among other things, using City resources and their City subordinates in furtherance of their outside private businesses.

In addition, no public servant shall use or attempt to use his or her official City position 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.⁵ “Associated,” as defined in Charter Section 2601(5), includes the public servant's 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.

In Advisory Opinion No. 2002-1, which concerned the financial interests of Mayor Bloomberg, the Board considered whether the major customers of, and the partner of, Bloomberg L. P., the financial services firm of which he was the majority owner, were “associated” with the Mayor within the meaning of the Charter. With respect to the customers, the Board reserved that question, finding that the public disclosure of the identity of the firm's 100 leading customers, none of which accounted for more than 4% of the firm's revenue, relieved the Mayor of any obligation to recuse himself from City matters involving those customers. On the other hand, the Board determined that Mayor Bloomberg was “associated” with Merrill Lynch, the minority partner in his firm, and that Chapter 68 required him to recuse himself from matters involving Merrill.

No public servant shall disclose any confidential information concerning the City which is obtained as a result of the public servant's official duties and which is not otherwise available

to the public, or use any such information to advance any direct or indirect financial or other private interest of the public servant or any person or firm associated with the public servant.⁶ This section does not, however, prohibit the disclosure of information concerning waste, inefficiency, corruption, criminal activity, or conflict of interest.

Finally, full-time public servants are prohibited from representing private interests for compensation before any City agency or from appearing anywhere, directly or indirectly, on behalf of private interests in matters involving the City.⁷ For persons who are public servants but who are not regular, full-time employees of the City, this prohibition extends only to the public servant's own agency. "Appear" is defined in Charter § 2601(4) as making any communication (personally, in writing, or by telephone), for compensation, other than those concerning ministerial matters. "Ministerial matter" means an administrative act, including the issuance of a license, permit, or other permission by the City, which is carried out in a prescribed manner and which does not involve substantial policy discretion.⁸ Although "represent" is not defined in Chapter 68, the phrase "representing private interests before any City agency" means just what it says: acting as a representative of someone to bring issues before a City agency. Such representation is not prohibited, however, in ministerial matters.

C. Outside Activities Where There Are No Business Dealings With the City

1. Moonlighting

A public servant may engage in part-time employment with a person or firm which has *no* business dealings with the City or with any City agency, provided that the public servant complies with those Charter sections discussed above. There are, however, additional restrictions on public servants who engage in the private practice of law or who serve as expert witnesses. These additional restrictions are discussed in section G below.

2. Ownership Interests

A public servant may have an ownership interest in a firm which has *no* business dealings with the City or with any City agency, provided that the public servant complies with the Charter sections discussed in section B above. In addition, Charter § 2604(b)(1) provides that a public servant "shall not take any action as a public servant particularly affecting" an otherwise permitted interest. One little noticed, and not yet interpreted, exception is, however, provided for interests less than \$10,000, where interested action *is* permitted, but must be disclosed to the Conflicts of Interest Board.⁹ Similarly, in the case of an elected official, an interested action is not prohibited, but the elected official must disclose the interest to the Board and, if the matter is before the City Council, on the official records of that body.¹⁰

3. Volunteer Activities

Public servants are generally permitted to volunteer for not-for-profits that have *no* business dealings with the City. However, such public servants must comply with the general provisions of Charter Sections 2604(b)(2), (b)(3), and (b)(4), discussed in section B above.

D. Outside Activities Where There Are Business Dealings with the City

The rules in this area are a little different for full-time public servants (called “regular employees”) and part-time public servants. Regular employees include “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.”¹¹

The Board has defined “primary employment with the city” as “the employment of those public servants who receive compensation from the city and are employed on a full-time basis or the equivalent or who are regularly scheduled to work the equivalent of 20 or more hours per week....” Primary employment with the City’ shall not mean employment of: (i) members of the City Planning Commission, except for the Chair; (ii) interns employed in connection with a program at an educational institution or full-time students; (iii) persons employed on special projects, investigations or programs, in excess of six months but of limited duration, as the Board shall determine.”¹²

1. Moonlighting For Full-time Public Servants (Regular Employees)

No full-time public servant may have a position with a firm that the public servant knows is engaged in business dealings with *any* agency of the City, not just the public servant’s own agency.¹³ “Position” includes not only an officer, director, trustee, employee, or management position with a firm but also an attorney, agent, broker, or consultant to the firm.¹⁴ Consequently, for example, a full-time public servant may not act as an agent or attorney for any firm that does business with any agency of City government. There is an exception to this rule, however, if the firm’s shares are publicly traded; but the exception does not apply if the firm has business dealings with the employee’s own agency.¹⁵

“Firm” means a “sole proprietorship, joint venture, partnership, corporation or any other form of enterprise, but shall not include a public benefit corporation, local development corporation or other similar entity as defined by rule of the board.”¹⁶ Under Advisory Opinion Number 94-1, “firm” includes an individual seeking business on behalf of himself or herself. “Business dealings” with the City means any transaction involving the sale, rental, or disposition 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 does not include any transaction involving a public servant’s residence or a ministerial matter.¹⁷ “Ministerial matter,” as noted above, means an administrative act, including the issuance of a license, permit, or other permission by the City, which is carried out in a prescribed manner and which does not involve substantial policy discretion.¹⁸ Note that a public servant is deemed to know of a business dealing with the City if

he or she should have known of the business dealing.¹⁹

In Advisory Opinion No. 2002-1, the Board noted that the *donor* of a gift to the City will not have “business dealings with the City” within the meaning of Chapter 68, except in unusual cases like the gift of an untested product.

For example, in the case of *Matter of Begel*,²⁰ the former spokesman for the Chancellor of the City Board of Education consented to the Board's finding that, for a short time in 1995, he had held a prohibited consulting position with a firm engaged in business dealings with the Board of Education while he also worked for the Board of Education. The Board imposed no penalty because of mitigating circumstances, including his return of the consulting fee, the short time involved, and his having reported the conflict to the Board.

A special rule exists for NYPD police officers. In its Advisory Opinion Number 98-4, the Board determined that, pursuant to Charter section 2604(c)(5), NYPD police officers may participate in the NYPD Paid Detail Program, which permits police officers in the program to work as part-time security guards for private firms and, in so doing, wear their uniforms.

2. Moonlighting for Part-time Public Servants

For a public servant who is not a regular, full-time employee of the City, the prohibitions that apply to moonlighting, ownership interests, and volunteer activities extend only to the public servant's *own* agency.²¹ That means that a part-time employee may moonlight for a firm that does business with any City agency, *except* the employee's own agency. A special rule exists for appointed members of community boards. Community boards are discussed in detail in Chapter 7.

3. Ownership Interests for Full-time Public Servants

No full-time public servant may have an ownership interest in a firm that the public servant knows is engaged in business dealings with *any* agency of the City, not just the public servant's own agency. Note that a public servant is deemed to know of a business dealing with the City if he or she should have known of the business dealing.²²

As noted above, “firm” means a “sole proprietorship, joint venture, partnership, corporation or any other form of enterprise, but shall not include a public benefit corporation, local development corporation or other similar entity as defined by rule of the board.”²³ Under Advisory Opinion Number 94-1, “firm” includes an individual seeking business on behalf of himself or herself. “Business dealings” with the City means any transaction involving the sale, 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 does not include any transaction involving a public servant's residence or a ministerial matter.²⁴

On its face, section 2604(a)(1)(b) appears overwhelming (no ownership of any firm doing business with the City of New York), especially in light of the democratization of the stock market through pension plans and other deferred compensation devices. The Charter's definitions, however, starting with the definition of "ownership interest," significantly narrow the scope of the prohibition.

"Ownership interest" means an interest in a firm held by a public servant, or by the public servant's spouse, domestic partner, or unemancipated child, which exceeds five percent of the firm or an investment of \$35,000, whichever is less, or five percent or \$35,000 of the firm's indebtedness, whichever is less, and any lesser interest in a firm when the public servant, or the public servant's spouse, domestic partner, or unemancipated child exercises managerial control or responsibility regarding the firm.²⁵ In addition, independent of the above, also excluded are interests held in any pension plan, deferred compensation plan, or mutual fund, the investments of which are not controlled by the public servant, the public servant's spouse, domestic partner, or unemancipated child, or in any blind trust which holds or acquires an ownership interest.²⁶

In Advisory Opinion Number 94-10, the Board examined the investment portfolio of a public servant and determined that his interests in pension funds, deferred compensation plans, and mutual funds were not prohibited ownership interests. Furthermore, the Board determined that, inasmuch as government entities were not "firms," United States government bonds and Treasury notes were not prohibited ownership interests.

In Advisory Opinion Number 94-18, the Board determined, among other things, that a public servant could retain his ownership interest in his investments and assets, provided he placed them in a blind trust which had been established in accordance with the Board's Blind Trust Rule (Board Rules § 1-05). The Board also approved blind trust arrangements in Advisory Opinion Numbers 94-25 and 94-26.

In Advisory Opinion Number 2003-7, in its consideration of the financial interests of Deputy Mayor Daniel Doctoroff, both the Board and Deputy Mayor Doctoroff recognized that placing assets into a blind trust will not always fully satisfy the requirements of the City's conflicts law. Taking a cue from the parallel federal ethics regulations, the Board noted that, at the establishment of a blind trust, the public servant knows what assets the trust holds and could therefore take, or could appear to be taking, official action to benefit those assets. Thus, except in the case of a diversified portfolio of readily marketable securities, the public servant will be required to recuse himself or herself from taking official action involving the trust's assets. However, in order that the public servant's recusal will not extend beyond the time when he or she has a beneficial interest in an asset placed into blind trust, the trustee will be permitted to inform the public servant when the trust no longer holds an interest in a particular asset, at which time the public

servant's obligation to recuse with respect to that asset ceases. The Board accordingly determined that the blind trusts established by Mr. Doctoroff satisfied the law, provided that Mr. Doctoroff recused himself from all matters involving certain listed holdings placed into trust unless and until that the trustee informed him that he no longer had a beneficial interest in any particular holding.

Finally, the ownership rule does not apply, by its terms, to ownership in publicly traded companies, defined as "a firm which offers or sells its shares to the public and is listed and registered with the Securities and Exchange Commission for public trading on national securities exchanges or over-the-counter markets."²⁷ This exception does not apply, however, to publicly traded companies having business dealings with the employee's own agency.

Prior to acquiring or accepting an interest in a firm whose shares are publicly traded, a public servant may submit a written request to the head of the agency served by the public servant for a determination whether the firm is engaged in business dealings with the agency. That determination must be in writing, must be rendered expeditiously, and shall be binding on the City and the public servant with respect to the prohibition against having an ownership interest in a firm doing business with the public servant's agency.²⁸

4. Ownership Interests for Part-time Public Servants

For a public servant who is not a regular, full-time employee of the City, the prohibitions discussed above extend only to the public servant's *own agency*.²⁹ This means that a part-time employee may have an ownership interest in a firm that does business with any City agency, *except* the employee's own agency.

The definition of "ownership interest" is discussed in section B above and includes the proviso that the publicly traded shares exception does not apply to shares in a firm which does business with one's own agency. Ownership of such shares, therefore, if valued over \$35,000 and not held in some excepted form such as a blind trust or a pension plan, is prohibited.

A special rule exists for appointed members of community boards.³⁰ Community boards are discussed in detail in Chapter 7.

5. Special Rule for Condominiums and Cooperatives

Public servants may retain their ownership interests in, and generally sit on the Boards of Directors of, the cooperative or condominium apartments where they reside. In Advisory Opinion Number 92-7, the Board observed that mere ownership in a cooperative which does business with the City is *not* proscribed by Chapter 68, since "any transaction involving a public servant's residence" is by the terms of section 2604(8) excluded from the definition of "business dealings with the city." In Advisory Opinion Number 95-25, the Board also stated, among other things, that the

incidents of ownership of real estate, without more, do not constitute business dealings with the City.

Advisory Opinion Number 92-7 notes, however, the potential for misuse of a public servant's City position and therefore advises public servants to comply with Charter § 2604(b)(3) by, among other things, not communicating with their own City agencies on behalf of their condominiums and cooperatives. The opinion further advises agency heads and high-level public servants not to serve on these cooperative or condominium boards when their agency is likely to come into contact with their buildings. One exception to this rule against board membership exists, as pointed out in Advisory Opinion Number 94-27, where the public servant's official duties are sufficiently removed from the regulation of private cooperative corporations and related issues, and the public servant recuses himself or herself, as a cooperative board member, from any matters involving the City. By contrast, in Advisory Opinion Number 95-11, a public servant was not allowed to serve as an officer and as a member of the board of directors of the cooperative corporation where he resided while the cooperative was applying for a loan through the City agency where the public servant was employed.

6. Volunteering for Not-for-Profit Organizations Having Business Dealings with the City

Charter § 2604 (c) (6) provides that a public servant may work as an attorney, agent, broker, employee, officer, director, or consultant for any not-for-profit corporation, or other such entity which operates on a not-for-profit basis, interested in business dealings with the City, subject to certain conditions. First, the public servant may take no direct or indirect part in the organization's business dealings with the City. Recusal, as defined in Advisory Opinion Number 92-5, means not voting on or participating in any matters which involve the not-for-profit's business dealings with the City. This includes, but is not limited to, agency discussions, meetings with City officials, and receiving copies of relevant documents. Higher-ranking officials might not be able to recuse themselves – and thus be unable to obtain a waiver – if, for example, they are required to sign off on all agency contracts. The Board will determine the extent of any required recusal based on the particular facts and circumstances of the particular case and the extent to which recusal is both appropriate and possible.

Second, the public servant's agency must not have any business dealings with the not-for-profit organization, unless the public servant's agency head (or the mayor if the public servant is an agency head) determines that the public servant's proposed activity is in furtherance of the purposes and interests of the City. This approval need not be submitted to the Board. In Advisory Opinion Number 98-8, the Board clarified that public servants who volunteer for not-for-profits that engage in business dealings with the public servant's agency must obtain the approval of the public servant's *agency head*. It is insufficient for the public servant to seek and obtain approval from his or her supervisor, unless the supervisor happens to be the agency head.

Third, the public servant may work for the organization only during his or her own time.

Fourth, the public servant may not receive any compensation for this work.

Problems arise with volunteer activities in certain situations, in particular, when a public servant becomes involved in a not-for-profit organization's business dealings with the City; when an agency head becomes involved with an organization which is funded by his or her own agency; or when a public servant serves *ex officio* on an organization's board of directors. In such cases, which are decided on a case-by-case basis, public servants who are not elected officials must apply for *waivers* from the Board (which are discussed below) and *recuse* themselves, if appropriate, from business dealings between the City and the not-for-profit organization. Note that in cases involving *ex officio* board membership, recusal probably would not be required.

In Advisory Opinion Number 99-1, the Board considered a request from public servants who are also elected officials regarding their *ex officio* membership on boards of directors and also asking whether they may designate members of their staff to serve *ex officio* in their place. The Board determined that elected officials may serve *ex officio* without first obtaining a waiver from the Board and that they may also designate, in writing, members of their staffs to serve on their behalf as *ex officio* members or directors of not-for-profit organizations.

The Board, in Advisory Opinion Number 98-8, determined that public servants who are volunteering for not-for-profits that engage in business dealings with their agencies do not need either agency head approval or Board approval where the public servant has no policy-making or administrative authority at the not-for-profit. In other words, no approvals are required if the public servant, for example, merely works with the client population served by the not-for-profit, even if the public servant's agency provides funds to that not-for-profit, unless the public servant has contact with the not-for-profit as part of his or her City duties. On the other hand, providing volunteer assistance in submitting grant papers to the federal government for that same not-for-profit would be considered policy-making. Therefore, agency approval would be required, as would a waiver from the Board if the public servant intended to be involved in the not-for-profit's business dealings with the City.

In its Advisory Opinion Number 98-10, the Board considered whether a public servant could provide pro bono legal services to a community school board, which is part of the Board of Education. The Board determined that providing pro bono services to another City agency would not violate Chapter 68, provided that the public servant recuse herself from performing any work on behalf of her agency that involved the community school board and likewise that she recuse herself from performing any work on behalf of the community school board that involved her agency.

E. Waivers for Moonlighting and Volunteer Positions

For both full-time and part-time public servants, waivers may be obtained pursuant to Charter § 2604(e). This section provides that a public servant may hold an otherwise prohibited position when the public servant obtains the written approval of the public servant's agency head

and the Board then determines that the position would not conflict with the purposes and interests of the City. The Board prefers that the approval be more than a rubber stamp and that, in any but the most routine cases, the agency head explain why he or she believes no conflict exists.

In determining whether to grant a waiver, the Board considers, among other things, the hours and compensation involved and whether there is any possible relationship between the public servant's official duties and his or her outside activities.

Teaching waivers are particularly common. Many public servants hold adjunct or part-time teaching positions with colleges and universities located in New York City. Many private universities, such as New York University and Columbia University, have some kind of business dealings with the City. Most public servants who are teaching in the City will, therefore, require a waiver. However, in Advisory Opinion Number 99-6, the Board determined that public servants teaching at CUNY or SUNY colleges do not require waivers because these government institutions are not “firms,” as defined in Charter § 2601(11).

In Advisory Opinion Number 98-7, the Board determined that a waiver was required for a public servant who, as sole proprietor, is a consultant with an ongoing relationship to his customer firms and therefore has a position with those firms. Based on the written approval of the public servant’s agency head, a waiver was granted.

Upon obtaining the waiver, the public servant may accept the position with the firm, but is still bound by the restrictions on using City time, City resources, and confidentiality, and with any additional restrictions set forth in the waiver letter. The Board usually requires that the public servant not be involved, directly or indirectly, in City matters on behalf of the private employer. This includes, but is not limited to, not participating in discussions on behalf of the private employer that may involve the City, not attending meetings with City officials and others to discuss the private company, and not receiving copies of relevant documents. This is generally a “two-way” recusal, meaning that as a public servant the same restrictions would apply in dealing with the private employer.

F. Orders Allowing Ownership Interests

Charter §§ 2604(a)(3) and (a)(4) set forth the procedure for obtaining an “order” from the Board allowing a public servant to hold an otherwise prohibited ownership interest. Under Charter § 2604(a)(3) the individuals who may apply to the Board for an order include:

1. An individual who, prior to becoming a public servant, has an otherwise prohibited ownership interest; or
2. A public servant who has an ownership interest and did not know of a business dealing which would cause the interest to be prohibited, but has

- subsequently gained knowledge of that business dealing; or
3. A public servant who holds an ownership interest which, subsequent to the public servant's acquisition of the interest, enters into a business dealing which would cause the ownership interest to be prohibited; or
 4. A public servant who, by operation of law, obtains an ownership interest which would be prohibited.

Charter Section 2604(a)(3) requires that these individuals either divest themselves of the ownership interests or disclose the interests to the Board and comply with the Board's order. In Advisory Opinion Number 98-3, the Board determined that reporting an ownership interest on financial disclosure reports does *not* satisfy the disclosure requirement.

If the public servant discloses his or her ownership interest to the Board, then, pursuant to Charter § 2604(a)(4), the Board shall issue an order setting forth its determination as to whether the interest, if maintained, would conflict with the proper discharge of the public servant's official duties. Section 2604(a)(4) sets forth the following factors for the Board to consider in making its determination: the nature of the public servant's official duties; the manner in which the interest may be affected by any action of the City; and the appearance of conflict to the public. In addition to the foregoing factors, the Board takes into account the financial burden on the public servant which would be caused by the Board's decision.

A decision by the Board permitting the retention of an otherwise prohibited ownership interest is, as noted above, issued in the form of an "order," which, like the Board's advisory opinions, is a document available to the public. In the case of those orders which the Board determines may be of greater public interest, the Board issues these as a "combined" order and advisory opinion, since advisory opinions are more widely distributed.

In Advisory Opinion Number 94-13 and Order Number 45, a prospective public servant was permitted to enter City service notwithstanding her husband's ownership interest - attributed to the prospective public servant by Charter § 2601(16) - in a firm that did business with the City, though not with her City agency. The Board also approved ownership interests in Advisory Opinion Number 97-3, where the spouse's firm had operated for several years before seeking City business, and Advisory Opinion Number 98-2, where the public servants were marketing their product to their own agency.

In Advisory Opinion Number 94-11 and Order Number 44, a recently appointed public servant was permitted to retain his ownership interests in real property because, among other reasons, his official City duties did not concern the kind of property he owned. In Advisory Opinion Number 92-35, a public servant was allowed to retain an ownership interest in a partnership which owned apartments and received housing assistance payments from the City because the public servant had no ability to obtain an advantage for the partnership in its business dealings with the City or procure tenants more easily or on more favorable terms than other owners of rental property.

In issuing an order pursuant to section 2604(a)(4), the Board may require “such other action as it deems appropriate which may mitigate” a conflict. The Board frequently attaches such conditions to its orders, most often requiring the public servant to recuse himself or herself from acting on matters involving the private firm's business dealings with the City.

In Advisory Opinion Number 92-5, prospective part-time commissioners were permitted to enter City service and retain ownership interests in firms which had business dealings with their commission, but recusal was required. Recusal, as defined in Advisory Opinion Number 92-5, means not voting on or participating in any matters which involve the private firm's business dealings with the commission. This includes agency discussions, meetings with City officials, and receiving copies of relevant documents. Similarly, in Advisory Opinion No. 95-12, a public servant was allowed to retain his ownership interest in buildings located in districts subject to the regulatory authority of his City agency, provided that he disclosed these interests to his City agency and recused himself from any matters involving these buildings which might, in the future, come before his agency.

The Board, in Advisory Opinion Number 95-21, also allowed public servants to retain their spouses' ownership interests (which were attributed to the public servants) in firms which did business with the City, provided, among other things, that these firms did not seek any new City business and that the public servants had no official contact with these firms. In contrast, in Advisory Opinion Number 95-10, the Board determined that, while a public servant could retain his imputed ownership interest in his spouse's newly formed company, if the company sought to engage in business dealings with the City, the public servant could not remain an employee of the City. The Board found that the close proximity of time between the company's incorporation and its pursuit of City business would create an appearance that the company was formed to take advantage of the public servant's position with the City.

In Advisory Opinion Number 95-29, HRA employees were permitted to rent property that they owned to recipients of public assistance, under certain conditions. Similarly, in Advisory Opinion Number 98-13, HPD employees were permitted to rent apartments they owned to recipients of federal Section 8 funds, again under certain specified conditions.

G. Special Situations

1. Temporary Employment

In Advisory Opinion Number 98-5, the Board discussed the issue of temporary employment. A public servant may register with, and work for, temporary agencies, provided that the agencies do not engage in business dealings with the City. Whenever a public servant works during any twelve-month period for more than 30 days for any individual firm that is a client of the temporary agency, whether the 30 days are consecutive, the public servant is

deemed to have a “position” with that client firm. Thus, before working for more than 30 days within a twelve-month period for the firm, the public servant must determine whether the firm is engaged in business dealings with the City and, if so, must either refrain from further work for the firm or obtain a waiver from the Board.

2. Private Practice of Law and Expert Testimony

No public servant may appear as an attorney or as counsel against the interests of the City in any litigation in which the City is a party, or in any action or proceeding in which the City, or any public servant of the City, acting in the course of official duties, is a complainant. In 2001, the Board fined a Board of Education employee \$700 for appearing as an attorney on behalf of a private client in litigation in which the Administration for Children’s Services was a party.³¹ If a public servant is not a regular, full-time employee, this prohibition is limited to the public servant’s own agency. Special rules exist in Charter § 2604(b)(7) for elected officials and their employees acting in an official capacity as attorneys.

In addition, Charter § 2604(b)(8) prohibits a public servant from giving opinion evidence as a paid expert against the interests of the City in civil litigation brought by or against the City. If a public servant is not a regular, full-time employee, this prohibition is limited to the public servant’s own agency.

Four advisory opinions bear on the issue of the private practice of law by City officers and employees. Advisory Opinion Number 91-7 provides that a public servant may engage in the private practice of law, provided that he or she complies with the relevant provisions of Chapter 68, including the requirements that the public servant conduct the practice during off-duty hours; that the public servant not use City office space or equipment for his or her practice; and that the public servant not do private legal work for persons or firms which have business dealings with the City.

In Advisory Opinion Number 93-23, the Board determined that a public servant who, as part of his official duties, was charged with the enforcement of certain criminal laws could not, in his private law practice, represent defendants who had been charged with criminal offenses in the City. In Advisory Opinion Number 95-17, the Board determined that a public servant who was an aide to a member of the City Council could not work part-time for a private law firm, where a substantial portion of the firm’s business involved the City and the specific duties of the public servant involved working in some of the same substantive areas of law in which the firm was active.

In Advisory Opinion No. 2001-3, the Board comprehensively reviewed the restrictions on the outside practice of law, both compensated and uncompensated. While tracking much of Advisory Opinion No. 91-7, the Board also addressed the provision of legal services to superiors or subordinates, finding it prohibited, whether compensated or not. The Board further stated that

it will not be a violation of Chapter 68 for a public servant to perform otherwise permitted outside legal work without written approval from his or her City agency, whatever Advisory Opinion No. 91-7 might otherwise have suggested. Finally, the Board noted that the use of City time and resources for outside *pro bono* legal work might be permissible, if the approval set forth in Board Rules Section 1-13(c) was obtained.

3. Representing Private Interests Before the City: Architects, Engineers, Electricians, Plumbers, Planners, and Others

The Board receives many requests for opinions from public servants who are architects, engineers, electricians, plumbers, and others whose work would involve representing private interests before the City. Their outside work typically would be subject to the inspection and approval of the Department of Buildings and, on occasion, other City agencies.

In Advisory Opinion Number 92-36, the Board determined that public servants who are electricians may file applications with the Department of Buildings for certificates of electrical inspection, and attend inspections of electrical work covered by these applications. These activities are permissible because they are ministerial in nature. However, anything beyond these activities, such as appealing violations, would require discretion on the part of the City employees and would be prohibited.

In Advisory Opinion Number 95-6, the Board determined that architects and engineers who were City employees could affix their professional seals to architectural plans and, either personally or through an expediter, file the plans with the City, since such appearances would be ministerial. Any greater involvement would have constituted prohibited appearances, though these public servants were advised that they could use expeditors to take their plans through the approval process.

For City employees who moonlight as plumbers, the Board has adopted the reasoning of the Board of Ethics Opinion No. 664 and has determined certain filings for smaller jobs to be permissible “ministerial” appearances before the Department of Buildings, but has found filings for larger jobs to be impermissible. In 2002 the Board fined an employee of the Housing Authority \$800 for seventeen of these prohibited filings in connection with his outside plumbing business.³²

A special rule exists for City Planning Commissioners, who are high-level public servants with Citywide policy discretion. These Commissioners cannot, in connection with their private professional practices, appear before the City Planning Commission or before any other City agency on matters which could, in the future, require the involvement or approval of the City Planning Commission.³³ They may, however, be involved in ministerial matters, including the filing of plans with the Department of Buildings. In addition, in Advisory Opinion Number 93-32, a member of the City Planning Commission was advised that his private firm could be

listed as a qualified contractor for possible City contracts, provided that he and his firm acted in strict accordance with the City Planning Commission rule and other relevant provisions of Chapter 68.

The Board has also addressed other appearances before City agencies. In Advisory Opinion Number 94-24, the Board determined that a high-level public servant's law firm could not appear before the public servant's agency, except with respect to cases where the firm's withdrawal would cause a hardship for the clients. In addition, a public servant who was a City Council member was advised, in Advisory Opinion Number 94-28, that he could not assist a real estate developer with whom he had a financial relationship by contacting City agencies, elected officials, and others on the developer's behalf. In Advisory Opinion Number 95-15, the Board determined that a public servant could not work part-time for a business improvement district because such work would have required her to make frequent and substantive appearances before other City agencies.³⁴

4. Independent Contracting and Other Freelance Work

The Board frequently receives requests for opinions concerning other kinds of part-time work, including work as an independent contractor or freelance work. Such work, if performed on the public servant's own time, without the use of City resources, will generally not violate Chapter 68. If, however, a freelancer has an "ongoing relationship" with a client firm which itself has business dealings with the City, then a Board waiver will be necessary.³⁵ See section E, above. In addition, the moonlighting City worker may not provide his or her service to someone who is a City subordinate or superior, because the Charter prohibits business or financial relationships between superiors and subordinates.³⁶ In 2000, in a case where a City manager purchased a computer from a subordinate, the Board fined the manager \$1,000 for violating this provision.³⁷ Similarly, in 2001, the Department of Correction, after consulting with the Board, found a violation where a City employee with an outside business sold tee shirts to his City subordinates; the employee forfeited five vacation days.³⁸

5. City-Related Outside Employment

In recognition of the City's severe budget limitations and reduced resources, the Conflicts of Interest Board has issued several opinions allowing public servants to be compensated by private or non-City entities for services which are in furtherance of the City's interests. The Board issues these opinions on a case-by-case basis after consideration of all the relevant facts and circumstances. Each case presents its own unique situation.

In Advisory Opinion Number 95-16, a Police Department employee was allowed to accept compensation from the police union for his work assisting the Department in calculating retirement benefits for other Department employees. In Advisory Opinion Number 95-19, employees of the Department of Mental Health, Mental Retardation and Alcoholism Services

were allowed to accept private Family Court appointments to conduct custody and visitation evaluations for which the Department could no longer afford to pay, with certain restrictions.

In one advisory opinion, Number 95-26, the Board determined that when a City employee performs part-time services for another City agency, or additional part-time work for his or her own agency, beyond his or her regular City duties, the specific factual situation determines whether the employee needs a waiver from the Board. For example, the Board ruled that no waivers were required to permit City employees from one agency to administer and rate examinations for candidates for City positions at another City agency and for other City employees to teach a certification course at a City training institute administered by their own agency. Generally, this part-time work would be considered dual employment with the City rather than “business dealings with the City.” The Board addresses this kind of situation on a case-by-case basis and requires that the City employee obtain the approval of the City agencies involved.

The factors the Board outlined in Advisory Opinion Number 95-26 to determine whether a position is in the nature of a second City job or an independent contractor include: the extent to which the City controls and finances the program in which the employee would work part-time; whether the City employee negotiates for the second City position as part of an ongoing commercial enterprise; whether the employee’s part-time work would be subject to the City agency’s control; the degree to which the employee would have autonomy to determine the manner in which the part-time work would be performed; whether the City or the employee provides work space, materials, and equipment; whether the employee has any financial or other interest in the outcome of the part-time work; and whether the employee is paid on an hourly basis or on a per-job basis.

6. Working for a Firm Which is a City Subcontractor

In Advisory Opinion Number 99-2, the Board determined that a public servant may work part-time for a firm which subcontracts to perform City business, where the Board determined that the subcontractor itself is not engaged in business dealings with the City. The Board will look to several factors to determine whether the subcontractor is engaged in business dealings with the City. Those factors include: whether the subcontractor receives any payment directly from the City; whether the subcontractor reports to the City on any matters; and whether the subcontractor’s work on the City contracts is being done at a City site or off-site. A public servant may thus work part-time for a subcontractor not engaged in business dealings with the City even if the contractor is engaged in such business dealings.

7. Paid Positions with Not-for-Profits

The Board also receives requests concerning paid positions with not-for-profit organizations that have business dealings with the City. When a public servant has a paid

position with a not-for-profit, he or she is no longer volunteering for the not-for-profit. As such, the provisions contained in Charter § 2604(c)(6) would not apply to the work performed on behalf of the not-for-profit.

The public servant would be considered to have a second or part-time job and to be subject to the rules applicable to moonlighting. The moonlighting provisions are discussed above.

The Board has, however, considered an unusual situation involving the Department of Parks & Recreation. In Advisory Opinion Number 92-34, the Board determined, pursuant to Charter § 2604(e), that several employees of the Department of Parks & Recreation could work as paid consultants to a not-for-profit organization whose primary function was to provide financial assistance to the City in support of its parks system. The Board granted the waivers based on the fact that the primary purpose of the organization was to provide such assistance, the proposed consulting work was in furtherance of that purpose and not to secure any private advantage, and the Parks Commissioner, in her approval letter, expressly determined that the consulting work by the employees was in the interest of the City.

8. Fundraising on Behalf of Not-for-Profit Organizations

For most public servants, fundraising for charitable or not-for-profit organizations is permissible, provided that the public servant does this on his or her own time and does not use his or her official position to assist the fundraising efforts.³⁹ However, as discussed below, there are restrictions on the fundraising activity of elected and high-level appointed public servants.

Advisory Opinion Number 91-10 discusses charitable fundraising activities of elected officials and high-level appointed public servants. Elected officials and their spokespersons may not take an “active” role in fundraising, which includes making telephone calls, signing letters, or otherwise becoming directly involved in soliciting for a charitable group. An elected official, however, may serve as the chair or a member of an honorary committee for a fundraising event, or be honored at that event, when the official’s involvement is limited to having his or her name listed on the invitation and attending the event (“passive” fundraising).

High-level appointed public servants may engage in “passive” fundraising but may also engage in more active fundraising if: (1) they are not soliciting persons or firms who are likely to come before their own agencies or be affected by their official actions; (2) the solicitation is free from any indication that the public servant is obtaining any personal benefit; and (3) the public servant does not appear to be using his or her position as a public servant as a “lure” or as “pressure” to force persons or firms into contributing.

Advisory Opinions Numbers 93-15 and 95-7 address fundraising by elected officials and high-level public servants in a variety of fundraising situations. These opinions expand on

Advisory Opinion Number 91-10 and, in examining whether a public servant's involvement in fundraising activities is permissible, continue to focus on whether that involvement is perceived to be coercive or provides an inappropriate opportunity for access to the public servant. In addition, in Advisory Opinion Number 95-7, the Board noted that since the mission of a high-level public servant's agency was related to the mission of the not-for-profit for whose event the public servant wished to sell tickets, the public servant could not sell the tickets, as this would have created the appearance that the City was endorsing the not-for-profit.

The Board further considered the issue of fundraising on behalf of not-for-profit organizations in Advisory Opinion Number 98-14. In this Advisory Opinion, the Board considered the extent to which elected officials and high-level appointed public servants may solicit individuals and businesses to contribute to particular not-for-profit organizations. The Board determined that elected officials and high-level appointed public servants may not write to local merchants or individuals asking them to contribute to a not-for-profit. They may, however, send letters to the not-for-profit attesting to the good works of the not-for-profit, or offering other comment about the not-for-profit and its mission. The not-for-profit may thereafter reprint or publish the public officials' letters in the not-for-profit's fundraising solicitations, newsletters, or other publications. These public officials may also provide oral statements, for attribution, to the not-for-profit for use in the not-for-profit's fundraising efforts.

In Advisory Opinion Number 93-26, the Board determined that the District Attorney of Kings County and his employees could engage in activities involving solicitations and fundraising on behalf of a not-for-profit which raises funds for the support of social and educational programs of the District Attorney's Office. This permission was conditioned on compliance with the relevant provisions of Chapter 68 and the Board's Advisory Opinion Numbers 91-10 and 93-15, among others.

In Advisory Opinion Number 95-2, the Board determined that a high-level public servant could not allow his official City title to be used to promote a book published by a not-for-profit, because this would give the impression that the City recommended the purchase of the book.

Finally, in a comprehensive 24-page opinion, the Board in Advisory Opinion No. 2003-4 determined that, subject to certain safeguards, elected officials and indeed all public servants could solicit gifts *to the City and to those not-for-profits corporations closely affiliated with City agencies and offices* which had been "pre-cleared" by the Board. The safeguards imposed on such "fundraising for the City" are the following: 1) that a City official may not engage in direct, targeted solicitation of any prospective donor who the official knows or should know has a specific matter either currently pending or about to be pending before the City official or his or her agency and where it is within the legal authority or duties of the soliciting official to make, affect, or direct the outcome of the matter; 2) that all solicitations must make clear that the donor will receive no special access to City officials or preferential treatment as a result of a donation; and 3) that each City agency or office must twice a year file a public report with the Board setting forth certain

information concerning the gifts received during the reporting period, including the identity of the donor and the nature and approximate value of the gift received. For other beneficiaries, that is, for not-for-profits that had not been determined by the Board to be closely affiliated with the City, the Board stated that the fundraising question would, at least initially, be addressed on a case-by-case basis.

What Advisory Opinion No. 2003-4 clearly did not change, however, is the Charter's core prohibition against using one's City position for one's outside, *personal* advantage. This prohibition, for example, bars a City employee from seeking contributions to his or her favorite charity from persons or firms with whom the employee deals in his or her City job. See *COIB v. King*,⁴⁰ where the Board fined a deputy chief engineer at DOT \$1,000 for asking several DOT contractors to place advertisements in a fundraising journal for his sons' hockey club.

9. Teaching and Writing

There is a special rule for those public servants who seek to teach courses and write books or articles for compensation, whether the entity for which they seek to teach engages in business dealings with the City or not.

In the Board's Advisory Opinion Number 99-4, the Board determined that it would be a violation of Chapter 68 for a public servant to teach a course for compensation about the workings of his agency and in particular about recent new initiatives at the agency. The first factor to be considered in making determinations regarding teaching for private compensation is whether the public servant could reasonably have been assigned to teach that course as part of his or her official duties. Under this test, a public servant who wishes to teach a course for compensation about new initiatives at his or her agency may not do so since he or she could reasonably have been assigned to teach that course as part of his or her official duties. Other factors the Board will look to are: (1) in teaching the class, the public servant does not divulge any confidential City information; (2) the public servant does not utilize City time, resources, personnel, or equipment for the teaching or the preparation of any materials to be used for the course; (3) the public servant does not use his or her position as a public servant to obtain a disproportionate rate of pay for teaching a course or to obtain compensation except from the City for performing his or her official duties; and (4) the public servant does not use his or her official title or position in any marketing of the course, although such information may be listed as part of biographical information about the public servant.

In its Advisory Opinion Number 99-5, a companion opinion to Number 99-4, the Board used a similar test to determine that it would be a violation of Chapter 68 for a public servant to write a book for compensation the subject matter of which is related to his official duties where this writing is something he might reasonably have been assigned to perform as part of his City job.

¹ *COIB v. Bert Camarata*, COIB Case No. 99-121 (2001).
² Charter § 2604(b)(2).
³ *See* Rules of the Conflicts of Interest Board (“Board Rules”), Vol. 12, Title 53, RULES OF THE CITY OF NEW YORK § 1-13.
⁴ *COIB v. Lizzio*, Case No. 2000-254.
⁵ Charter § 2604(b)(3).
⁶ Charter § 2604(b)(4).
⁷ Charter § 2604(b)(6).
⁸ Charter § 2601(15).
⁹ Charter § 2604(b)(1)(c).
¹⁰ Charter § 2604(b)(1)(a).
¹¹ Charter § 2601(20).
¹² Board Rules § 1-06(a) and (b).
¹³ Charter §§ 2601(12), 2604(a)(1)(b).
¹⁴ Charter § 2601(18).
¹⁵ Charter § 2604(a)(1)(a) and (b). *See also* Board Rules § 1-04; Charter § 2604(a)(2).
¹⁶ Charter § 2601(11).
¹⁷ Charter § 2601(8).
¹⁸ Charter § 2601(15).
¹⁹ Charter § 2604(a)(6).
²⁰ *Matter of Begel*, COIB Case No. 96-40.
²¹ Charter § 2604(a)(1)(a).
²² Charter § 2604(a)(6).
²³ Charter § 2601(11).
²⁴ Charter § 2601(8).
²⁵ Charter § 2601(16), as amended by Board Rules § 1-11.
²⁶ Charter § 2601(16) and Board Rules § 1-05 (“Definition of Blind Trust”).
²⁷ Board Rules § 1-04.
²⁸ Charter § 2604(a)(2).
²⁹ Charter § 2604(a)(1)(a).
³⁰ Charter §§ 2604(a)(1)(a) and 2604(b)(1)(b).
³¹ *COIB v. Wilma Hill-Grier*, COIB Case No. 2000-581 (2001).
³² *In re James Loughran*, COIB Case No. 2000-407 (2002).
³³ Board Rules § 1-09
³⁴ *See also* Advisory Op. No. 99-5.
³⁵ *See* Advisory Opinion No. 98-7.
³⁶ Charter Section 2604(b)(14).
³⁷ *COIB v. Rosenberg*, Case No. 99-358.
³⁸ *In re Ronald Jones*, COIB Case No. 98-437 (2001).
³⁹ *See* Charter §§ 2604 (b)(2) and (b)(3).

⁴⁰ COIB Case No. 98-508.

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