MISUSE OF CITY OFFICE

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A. Introduction

Public servants are prohibited from using their City positions to obtain any financial gain or advantage for themselves, their immediate family, or their associates. Under the City's ethics law, public servants owe the City a duty of undivided loyalty. In addition, a Conflicts of Interest Board rule specifically prohibits public servants from using City time, letterhead, personnel, equipment, resources, or supplies for any non-City purpose. That rule also prohibits public servants from causing or inducing other public servants to violate the ethics law.[1]

B. Use of City Office for Personal Gain

Charter § 2604(b)(3) prohibits public servants from using or attempting to use their City positions to obtain any financial gain, contract, license, privilege, or other private or personal advantage, direct or indirect, for themselves or for any person or firm with whom or with which they are associated. "Associated" with the public servant means a spouse, domestic partner, child, parent, or sibling of the public servant; 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.[2] A public servant need not be actually aware of the conduct giving rise to a Section 2604(b)(3) violation to be found liable. If that public servant "should have known" of the conduct, he or she is liable for it.[3]

The Board has consistently advised that the prohibition against using one's City position for the benefit of one's "associates" means, among other things, that a public servant must fully recuse himself or herself from all matters that might benefit an associated party. Recusal means, without limitation, not participating in discussions or meetings regarding the matter in question and not receiving copies of relevant documents. If, for example, a public servant's sibling is applying for a job at the public servant's City agency, that public servant will violate the conflicts of interest law not only by sitting on the hiring committee but also merely by forwarding the sibling's resume to the committee. The Charter, however, contains three limited exceptions to the recusal requirement:[4] one specific to community board members, permitting discussion, but not voting, on matters that might advantage an interest of the community board member;[5] one permitting, on disclosure to the Board, actions that benefit an interest with

a value below $10,000;[6] and one permitting, again on disclosure to the Board, certain actions by elected officials that might benefit the official or an associated party.[7]

In Advisory Opinion Number 2009-2, in an examination of the sponsorship by Members of the City Council of discretionary awards of funding to not-for profit organizations, the Board addressed the scope of this last exception and determined that, since the exception applies only to the essential functions of elected officials, it would apply to a Member's *voting* on the budget but would not apply to the sponsorship of discretionary awards. Thus, as to the sponsorship of discretionary awards, the general rule against taking action to benefit one's associates applies, that is, Council Members may not sponsor discretionary awards that might benefit an associated person or organization. The Opinion then addressed a number of scenarios that arise with respect to such possible sponsorships and made determinations that, since they are applications of the general rule, are relevant beyond the context of these discretionary awards. More particularly, the Board determined that a Council Member: (i) could not sponsor funding for an organization that the Member served as a paid employee, officer, or director; (ii) could not sponsor funding for an organization that Member served as an unpaid board member, unless the Member served *ex officio*, that is, as part of his or her official duties rather than as a personal activity; (iii) could sponsor funding for an entity for which the Member was an "honorary," unpaid board member, with no legal rights or responsibilities; (iv) could sponsor funding for an entity where the Member's spouse, domestic partner, parent, child, sibling, or other associated party was a paid officer or employee *only if* it did not appear reasonably likely that the associated party would benefit from that funding; (v) could sponsor funding for an organization where a person "associated" with the Member was an unpaid board member; and (vi) could sponsor funding for an organization where a member of the Member's Council staff had some affiliation, because public servants are not associated with their subordinates within the meaning of the conflicts of interest law.

As noted above, however, the exception that permits an elected official to vote on a matter that would benefit a person or firm "associated" with the official requires that the official disclose the conflict to the Board and also on the official records of the body in question. In 2015 the Board thus fined a former Member of the City Council $9,000 for, among other things, failing to make this required disclosure at the time he voted at the Council on three resolutions concerning a developer of affordable housing, a developer who was also the Member's landlord. In admitting this misconduct, the former Council Member acknowledged that he had violated Section 2604(b)(3).[8]

Because public servants are associated with their children within the meaning of the conflicts of interest law, and because a supervisor inevitably will take actions to benefit his or her subordinates, if only by not firing them, a public servant may not supervise his or her children or other associated persons. In Advisory Opinion Number 2004-3, for example, the Board determined that it would violate Chapter 68 for a person to serve on a community board that employed on the board's staff an "associate" of that person. In 2010 the Board thus fined the former Chief of Staff for a City Council Member $2,500 for directly supervising his daughter, a Councilmanic Aide, during her five-year tenure in the Member's district office.[9] Similarly, because living with another

person unavoidably means having a financial relationship with that person (and thus being "associated" within the meaning of the conflicts of interest law), the Board fined a former principal for the New York City Department of Education $3,000 for supervising his live-in girlfriend, an assistant principal at his school, for one year and eight months.[10]

In 2011 the Board fined a former Senior Supervising Communications Electrician at the New York City Fire Department ("FDNY") $12,500 for supervising his son-in-law from at least 2007, when his son-in-law was a Communications Electrician, until the father-in-law's retirement in 2010. The former Senior Supervising Communications Electrician acknowledged that, both by supervising his son-in-law and by approving overtime for his son-in-law, he violated the City's conflicts of interest law, which prohibits a public servant from using his City position to benefit himself or a person or firm with which he is associated. While the law does not explicitly include a public servant's son-in-law within its definition of "associated" parties, it does include children, including the supervisor's daughter, who plainly benefitted from her husband's continued employment at FDNY and from the overtime that her father authorized for her husband.[11] Similarly, in 2015, the Board imposed a $10,000 fine on the Queens Republican Commissioner of the New York City Board of Elections ("BOE") for using his position to twice promote his daughter's domestic partner to higher positions in the BOE Queens borough office.[12]

In 2015, in imposing a $3,000 fine on the Executive Director of a facility of the New York City Health and Hospitals Corporation ("HHC") for authorizing a 10% pay increase for his brother, who was also employed at the facility, the Board implicitly recognized that a high ranking employee in a City agency will not necessarily be in violation of the ban on supervising an associated person simply because a lower ranking employee in the same City agency is an associated person. The Board emphasized, however, that such a higher ranking employee may take no action to benefit the lower ranking employee and noted that the HHC Executive Director plainly violated that prohibition by approving his brother's raise.[13]

The Board has also made clear that the prohibited "private or personal advantage" need not be financial. In Advisory Opinion Number 93-21, the Board advised that elected officials' nominations of family members to unpaid community board positions would violate § 2604(b)(3), noting that "there is a certain degree of power and prestige in holding such a position." In Advisory Opinion Number 90-6, the Board also advised that elected officials would violate that provision by referring the resume of a family member to a City agency for employment.

Violations of Charter § 2604(b)(3) are punishable by civil fines of up to $25,000, plus the Board can order payment to the City of the value of any benefit obtained by the public servant as a result of the violation.[14] Thus, in 2012, the former Director of Central Budget for the New York City Department of Education ("DOE"), who used his City position to obtain a DOE job for his wife, paid the Board a $15,000 fine plus the value of the benefit he received as a result of his violations, namely, the total of his wife's net earnings from her employment at DOE, in the amount of $32,929.29, for a total financial penalty of $49,929.29.[15] The Board may also recommend that the public servant be

suspended or removed from City office or employment.[16] Violations of § 2604 or § 2605 are also misdemeanors that may be prosecuted by a District Attorney's Office.[17]

Consistent with its enforcement dispositions, the Board has also sought to regulate certain private activities of public servants to insure that these public servants do not obtain any advantage by virtue of their offices. For example, in Advisory Opinion Number 95-22, the Board prohibited a public servant from serving as a paid director on two cooperative boards because in his City job he was a manager of an agency that considered matters affecting the co-ops. In Advisory Opinion Number 95-11, a public servant was prohibited from serving on a co-op board on Section 2604(b)(3) grounds because he was in charge of the agency division that administered loans for which the co-op was applying. In Advisory Opinion Number 93-14, a public servant from a regulatory City agency was precluded from continuing to serve on the board of directors of a not-for-profit real estate development corporation if the corporation acquired property subject to the jurisdiction of the public servant's agency. In contrast, in Advisory Opinion Number 2006-4, the Board determined that a City employee may accept a discount offered to government employees by a hotel chain, car rental agency, cellular service provider, or other similar vendor, for the City employee's *private* use, where the discount is available generally to all government employees and the vendor has been made aware that the City employee is not on official business.

In an advisory opinion dealing with sales of beauty products in the workplace (Number 98-12), the Board prohibited public servants from selling anything to their subordinates or from requesting charitable contributions from their subordinates. However, subordinates could sell products to or solicit contributions from their superiors up to $25. In Advisory Opinion Number 2004-2, the Board, applying the ban in Charter § 2604(b)(14) against financial relationships between superiors and subordinates, determined that City superiors and subordinates could not participate together in a *sou-sou*, an informal savings club.

The Board has held that Section 2604(b)(3) prohibits public servants from practicing law in circumstances where their City jobs would give them an advantage. In Advisory Opinion Number 93-23, a law enforcement officer who in his official capacity was deemed a police officer, and who was also an attorney, was not permitted to represent defendants charged with criminal offenses because a perception could be created that he was using his City position to obtain preferential treatment for his private clients. In Advisory Opinion Number 95-17, a public servant who served as a full-time aide to a City Council Member was not permitted to practice law part-time with a firm where more than one-third of the firm's business consisted of matters involving the City and the official duties of the public servant involved working in some of the same areas of the law in which the firm was active and with some of the same City agencies.

The Board has also restricted lobbying by public servants where these activities could appear to violate Charter § 2604(b)(3). For example, in Advisory Opinion Number 94-28, the Board prohibited a City Council Member from contacting City agencies, elected officials, and community boards on behalf of a developer with whom the Council Member had a financial relationship.

In *Holtzman v. Oliensis*,[18] the landmark case construing Section 2604(b)(3), the New York Court of Appeals upheld the Board's finding that the former City Comptroller, Elizabeth Holtzman, had violated Charter § 2604(b)(3) by using her office to obtain a personal advantage in dealing with a creditor of her campaign committee for U.S. Senate. The Court of Appeals upheld the Board's $7,500 fine and Decision and Order that Holtzman's use of her City office to obtain a three-month delay in the debt collection process was the type of impermissible advantage that Charter § 2604(b)(3) prohibited. In *Holtzman*, the creditor's affiliate had responded to the Comptroller's Request for Proposals for City bond business. Holtzman had used this fact to impose a "quiet period" in which the creditor could not discuss with Holtzman the repayment of a loan, which she had personally guaranteed, for three months. Rejecting Holtzman's claims that she was not actually aware of her office's dealings with the creditor, the Court of Appeals held that "[a] city official is chargeable with knowledge of those business dealings that create a conflict of interest about which the official 'should have known.'"[19]

In contrast with *Holtzman*, where the former Comptroller had a business relationship with the lender to her campaign before the lender's affiliate sought bond business with her City office, the Board in 2011 fined a former Borough President $10,000 for hiring an architect to design improvements on his home when the architect was already involved in a project that would require the Borough President's official review. The former Borough President admitted that he did not receive a bill from the architect for two years after the construction work in question was completed and paid that bill only after the press had contacted him about the architect's services.[20] This case and *Holtzman* together stand for the proposition that a public servant may not at the same time have City dealings and personal business or financial dealings with a person or firm. In a 2013 application of this prohibition, in a joint resolution with the Board and the New York City School Construction Authority ("SCA"), an SCA Project Officer agreed to serve a six-week suspension, valued at approximately $10,400, for soliciting a $15,000 loan from an SCA contractor, as well as for soliciting and accepting a part-time position with a firm whose work he supervised for SCA.[21]

In *COIB v. Katsorhis*,[22] the Board found that the former New York City Sheriff violated Charter § 2604(b)(3) by using the supplies, equipment, personnel, and title of his City office to engage in the private practice of law. Finding that his habitual misuse of his City office benefited both Katsorhis and his law firm, with which he had a financial or business relationship, the Board fined him $84,000. Similarly, in 2008, the Board concluded a settlement imposing a $15,000 fine on the former chair of the New York City Civil Service Commission ("CCSC") for using the staff, equipment, and facilities of the CCSC office to perform tasks related to his private law practice.[23]

In *COIB v. Vella-Marrone*,[24] the Board fined a former SCA official $5,000 for using her position to obtain a job at her agency for her husband and for attempting to obtain a promotion for him. A 16-year-old girl was killed in 1998 in the area where Ms. Marrone's husband had removed a security fence at a school construction site. Mr. Marrone had not been the supervisor on that site in the three months prior to the accident.

In *COIB v. Finkel*,[25] the Board fined a member of the New York City Housing Authority ("NYCHA") $2,250 for using his office to help his daughter obtain a computer programming job with a company with a $4.3 million contract with NYCHA.

In *COIB v. Turner*,[26] the Board fined the New York City Human Resources Administration ("HRA") Commissioner $6,500 for hiring his business associate as his first deputy commissioner; for using his executive assistant to perform tasks for his private company; for using City time and equipment for his private work; and for renting an apartment from his subordinate.

In *COIB v. Hoover*,[27] the Board fined the First Deputy Commissioner of HRA $8,500 for using a City subordinate to perform private work for him; for using City resources in furtherance of his private consulting business; for using his position to obtain payment for renting out his apartment to a visiting consultant; and for renting out his apartments to subordinates and to his superior.

In *COIB v. Kerik*,[28] the Board fined former Police Commissioner Bernard Kerik $2,500 for using three New York City police officers to perform private research for him. He used information the officers gathered to prepare a book about his life that was published in November 2001.

In *COIB v. Denizac*,[29] in a joint agreement with the Board of Education ("BOE"), an interim principal was fined $4,000 and admitted that she had asked school aides to perform personal errands for her on school time. Specifically, she asked them to go to a Marshall's Office to deliver payment of her scofflaw fine and also asked them to deliver a loan application on her behalf.

In *COIB v. Sass*,[30] the former Director of Administration of the Manhattan Borough President's Office used her position to authorize the hiring of her own private company and her sister's company to clean her City office. She was found to have violated Sections 2604(a)(1)(a), 2604(b)(2), and 2604(b)(3) and was fined $20,000.

The Board also fined a New York City Department of Buildings employee $1,000 for using a City telephone for his private home inspection business. The employee, a City building inspector, had private business cards printed that showed his City telephone number. As a result of this case, he ceased the practice of using City phones for private business and destroyed all the offending business cards.[31]

In *COIB v. King*,[32] the Board fined a deputy chief engineer at the New York City Department of Transportation ("DOT") $1,000 for asking several DOT contractors to place advertisements in a fundraising journal the proceeds of which would help support the hockey club on which his sons played. Mr. King worked on DOT matters involving the eight contractors who contributed $975 for ads, but represented there was no *quid pro quo* for the donations. In Advisory Opinion Number 2008-6, the Board repeated the admonition that where a public servant has, as Mr. King did, a personal "association" with a not-for-profit organization, such as when the public servant is a member of the organization's board of directors, the public servant may not use his or her City position for the benefit of the organization. In that Opinion the Board cited, as another example of

such impermissible fundraising, a public warning letter it issued in 2008 to an agency head for providing a list that included the representatives of firms with present and potential business before his agency to an out-of-state not-for-profit on whose board the agency head served in order that these individuals might be invited to a fundraising event of the not-for-profit.[33] More recently, in 2013, the Board and the New York City Department of Design and Construction ("DDC") concluded joint settlements with a DDC Assistant Commissioner and with a DDC Program Director who used their City positions to solicit funds from a DDC vendor for a non-profit professional organization in which they held positions. Both the Assistant Commissioner and the Program Director were responsible for overseeing the construction of an Emergency Medical Service Station in Brooklyn, including overseeing the DDC vendor's work on a construction management contract. On two occasions, prior to soliciting funds, the Assistant Commissioner told the DDC vendor that it was at risk of receiving a poor performance evaluation. The Assistant Commissioner agreed to pay an $8,000 fine and resign from City employment; the Program Director agreed to pay a $2,500 fine and be placed on an indefinite probation.[34]

In *COIB v. Blake-Reid,*[35] the Board and the BOE concluded a settlement with a BOE official who agreed to pay a fine of $8,000 for repeatedly directing her subordinates, over a four-year period, to work on projects for her church and for a private children's organization, on City time and using City copiers and computers.

In *COIB v. Mumford,*[36] the Board and the New York City Department of Education ("DOE") concluded a settlement with a DOE teacher who was involved in the hiring and payment of her husband's company to write a school song for the school where she worked. Ms. Mumford was fined $5,000 for the improper payment of $3,500 to her husband's company and an additional $2,500 for the conflicts of interest violation, for a total fine of $7,500. In 2004, the Board fined a Deputy Commissioner of the New York City Office of Emergency Management ("OEM") $3,500 for hiring his girlfriend, with whom he had a financial relationship that included a joint bank account and co-ownership of shares in a cooperative apartment, to take photographs for OEM.[37] Similarly, in 2006 the Board and the DOE reached a three-way disposition with a DOE employee who had twice hired his daughter to work in a youth summer employment program that he supervised. The employee agreed to repay DOE the $1,818 that his daughter had earned and to receive training regarding conflicts of interest.[38]

In *COIB v. Adams,*[39] the Board concluded a settlement with a former officer of a community school board who had testified at an administrative hearing in her official capacity on behalf of her sister, an assistant principal, without disclosing the family connection. Ms. Adams, who had been removed from the community school board by the Chancellor because of this conduct, agreed to pay the Board a fine of $1,500 in settlement of the Board's proceeding.

In *COIB v. Andersson,*[40] the Board concluded a settlement with the Commissioner of the Department of Records and Information Systems ("DORIS") in which he agreed to pay a fine of $1,000. The Commissioner acknowledged that he had used DORIS records to conduct genealogy research for at least four private clients, in violation of the

prohibition against public servants using City office for private gain and against using City time and resources for non-City purposes.

The Board has fined a number of City supervisors for using their positions as supervisors to obtain benefits for themselves and their associates through the use of their City subordinates to perform personal tasks. For example, in 2004, the Board and the DOE fined an interim acting principal $900 for using a school aide to transport her children.[41] More recently, in 2013, the Board and the DOE concluded a joint settlement with an assistant principal who paid a $6,000 fine to the Board. The assistant principal admitted that, among other things, he misused his position by having a subordinate babysit his three children in the mornings before school and by allowing his daughter to attend the DOE school where the assistant principal worked without enrolling her, thus avoiding payment of non-resident tuition, in violation of Charter § 2604(b)(3).[42]

The Board regularly fines City employees who seek jobs for their associates, or other benefits, from City vendors whose work the employees supervise. For example, in 2006, the Board fined a DOE principal $4,000 for recommending his wife for a position with a DOE vendor, which hired her;[43] fined an HRA contracts manager $1,250 for asking a vendor whose contract he oversaw to help his son find employment;[44] and fined a DDC supervisor $4,500 for soliciting from a DDC vendor whose contract was within her portfolio loans and other financial support for a person with whom the manager had a financial relationship.[45] In 2007, the Board fined the District Manager of a community board $1,000 for recommending her son-in-law for the custodial job at the community board office and, after his hiring, for approving the payments for his custodial work.[46] In 2009, the Board also fined the former Director of the DDC Office of Community Outreach and Notification ("OCON") $2,500 for using her City position to help her two adult children obtain jobs with private companies that did business with DDC. The former OCON Director admitted that she helped her son obtain a position with a DDC vendor by asking the vendor's President whether he knew of any positions in the private sector for her son. She also admitted that she helped her daughter obtain a position with a DDC contracting firm by giving her daughter's resume to a representative of the contractor and then allowing DDC to approve the hiring of her daughter by the contractor.[47]

The Board fined an employee of the housing application unit of NYCHA $2,250 for interviewing his own wife in her application for a NYCHA apartment, for processing her application, and for repeatedly contacting his colleagues to urge them to expedite the application, all without disclosing his relationship to the applicant.[48] Similarly, in 2008, the Board and the DOE concluded a three-way settlement with the then-Deputy Director of Budget for DOE's Region 2 for passing his brother's name on to a DOE colleague so that the brother could be interviewed for a principal's position at the DOE. The settlement provided for a $1,250 fine payable to the Board.[49]

Likewise, in 2009 the Board fined a DOE teacher $1,000 for selling a small, self-composed, framed poem to the parent of a student from her school and attempting to sell five self-composed framed poems to the parent of another student in her class, some of which conduct was done on DOE time.[50] Similarly, the Board in 2011 issued a public warning letter to a DOE teacher who had a second job as a representative for a multi-

level marketing company for placing his business card and a gift certificate for a free needs analysis from his firm inside the envelopes of the holiday greeting cards being sent home to the parents of his school.[51] As noted above, Charter § 2604(b)(3) prohibits a public servant from using his or her office to obtain a private or financial advantage for any person or firm with whom or which the public servant is "associated." In *COIB v. Campbell Ross*,[52] an Assistant District Attorney used her office to obtain a private benefit for her husband by summoning a police officer, who was a witness against her husband in a traffic matter, to a grand jury in an unrelated case in which the officer had no involvement, in order to delay or prevent the officer from testifying against her husband. A spouse is "associated" with the public servant for Charter § 2604(b)(3) purposes under Charter § 2601(5). The Board fined Campbell Ross $1,000. The *Campbell Ross* case is also important because it shows that the personal advantage or privilege obtained by the public servant need not be financial. In a similar case, the Board found that a City official's attempt to use his official position to restore his personal electrical service with Con Edison violated Charter § 2604(b)(3) as an attempt to misuse position to secure a personal advantage.[53]

In 2007, the Board imposed a $4,000 fine upon a member of the City Planning Commission for taking an action to benefit a firm with which the member was associated. The Commissioner cast a vote at the Commission on a zoning change of an area that included a site that was part of a private development plan in which the Commissioner was an investor; the vote on the site in question permitted its use for residential as well as commercial purposes, which conferred a benefit on the private development plan.[54]

In 2012, the Board fined the former Commissioner of the New York City Department of Finance $22,000 for her multiple violations of the City's conflicts of interest law, including several violations related to her use of her City position for her own personal benefit or for the benefit of people with whom she was associated. One such violation illustrates the requirement that, in order to avoid using one's City position for the benefit of an "associated" party, a public servant must recuse himself or herself from -- that is, participate in no way concerning -- any City matters involving the associated party. The former Finance Commissioner failed to meet that standard by involving herself in the employment of her half-brother, who was employed at Finance as a paid summer intern and part-time college aide, including intervening with her half-brother's supervisor concerning supervisory and performance issues. Other "misuse of City position" violations by the former Finance Commissioner involved actions that she ostensibly took in her personal capacity but where she effectively traded on her City position by seeking favors for her "associates" from persons over whom she had some authority in her position at the Department of Finance. In one such case, the former Finance Commissioner sent an e-mail from her Finance e-mail account to the Vice President and General Counsel at a corporation that owned approximately twenty luxury rental apartment buildings in the City, with whom and with which owner she had dealt in her official capacity as Finance Commissioner, asking the Vice President to assist her registered domestic partner in looking for an apartment, which ultimately resulted in the domestic partner renting an apartment in one of the corporation's buildings. The former Finance Commissioner acknowledged that she was "associated" with her domestic partner within the meaning of the City's conflicts of interest law. In another such case,

the former Finance Commissioner sent an e-mail from her Finance e-mail account to a Senior Client Manager at a bank, with whom and with which bank she had dealt in her official capacity as Finance Commissioner, inquiring about the time frame for the bank's decision to extend loan commitments and provide additional financing to a company on whose board of directors she served as a compensated member and about whether that time frame might be extended. As a paid director of the company, the former Finance Commissioner was "associated" with the company within the meaning of the City's conflicts of interest law. Her inquiry on its behalf, to a person with whom she had dealt in her official capacity, therefore was, like her inquiry on behalf of her domestic partner to another person with whom she had dealt in her official capacity, a violation of the ban on using one's official position for the benefit of an associated party.[55]

In 2014, the Board fined the Queens Democratic Commissioner of the New York City Board of Elections (the "BOE") $10,000, the maximum fine then possible, for hiring his wife to work in the BOE Queens Borough Office in order to obtain health insurance for their family.[56]

The Board has also sanctioned public servants who misuse their City positions by using confidential City information for their own personal advantage. In 2008, the Board fined the former Director of Cross Systems Child Planning at the New York City Administration for Children's Services ("ACS") $1,500 for using her ACS position to access information in New York State's confidential CONNECTIONS database. The former Director acknowledged that she obtained confidential information in CONNECTIONS, a confidential database of child abuse and maltreatment investigations, about her own foster child, including case management records and the child's permanency report, which information was not available to other foster parents in that form, and then used the information that she obtained for her own personal benefit as a foster parent.[57]

C. Duty of Undivided Loyalty to the City

Charter § 2604(b)(2) prohibits a public servant from engaging in any "business, transaction or private employment, or hav[ing] any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties." The Board has construed this Section as requiring of all public servants a duty of undivided loyalty to the City. Indeed, "Section 2604(b)(2) reaches all forms of private conduct by public servants that may reasonably cause the public to question the public servant's undivided loyalty to the City."[58] "[T]o determine the scope of a public servant's official duties," within the meaning of Charter § 2604(b)(2), the Board "may properly look at the provisions of other laws, rules or statutes."[59]

Thus, in *COIB v. Rubin*,[60] an Administrative Law Judge ("ALJ") in the Parking Violations Bureau of the New York City Department of Finance publicly admitted that her adjudication of two summonses issued to her father-in-law, where the ALJ dismissed one case and reduced the fine in the other, violated § 2604(b)(2). Although the ALJ did

not obtain any financial gain from her violation, she breached her duty of undivided loyalty to the City.

In Advisory Opinion Number 93-5, the Board refused to permit a high-level appointed official to act as the director of a large, publicly held corporation on Charter § 2604(b)(2) grounds. The Board stated that taking on a director's obligations could compromise the official's commitment to his City job and interfere with the proper discharge of his official City duties. Similarly, in Advisory Opinion Number 93-24, the Board noted that the prohibitions in Charter § 2604(b)(2) are "intended to insure that public servants dedicate their energies, during official working hours, to the welfare of the citizens that they serve."

Under Charter § 2606(d), penalties may be imposed for a violation of Charter § 2604(b)(2) only if the violation involved conduct identified by Board Rule as prohibited by that provision, although, as noted by the Charter Revision Commission, "the board may in some situations adjudicate a public servant to be in violation of paragraph two [of Charter § 2604(b)] without imposing any penalties."[61] Effective August 8, 1998, the Board enacted Board Rules § 1-13, entitled "Conduct Prohibited by City Charter § 2604(b)(2)," to identify conduct that violates Charter § 2604(b)(2). A violation of that rule thus subjects the violator to a civil fine of up to $25,000. Conduct other than that identified in Board Rules § 1-13 may still constitute a violation of Charter § 2604(b)(2), but, under Charter § 2606(d), the Board may not impose any penalties for such other conduct, unless it violates some other provision of Charter § 2604.

Board Rules § 1-13, with limited exceptions, prohibits public servants from (a) performing personal and private activities on City time; (b) using City letterhead, personnel, equipment, resources, or supplies for any non-City purpose; and (c) intentionally or knowingly soliciting, requesting, commanding, inducing, or causing another public servant to violate any provision of Charter § 2604. A 2011 disposition illustrates the prohibition on inducing or causing another public servant to violate the conflicts of interest law: an FDNY Communications Electrician admitted that, by requesting and accepting overtime from his superior, who was his father-in-law, the son-in-law had caused his father-in-law to violate the conflicts of interest law and thus had himself violated the prohibition against soliciting, requesting, commanding, aiding, inducing, or causing another public servant to violate the law. The Board fined the son-in-law $1,500 for this conduct.[62] In 2013, in a settlement with the former Senior Director of the Corporate Support Services ("CSS") Division of the HHC, who paid a $9,500 fine to the Board, the former Senior Director admitted, among other things, that he suggested to a CSS Director that she ask her subordinate, an Institutional Aide, to refinish the floors in her personal residence. The CSS Director paid the Aide $100 for performing this work. The Senior Director acknowledged that, by suggesting that the Director hire her subordinate, an action prohibited by the ban on financial relationships between superiors and subordinates, the Senior Director induced their violation, a violation itself of Board Rules § 1-13. Similarly, in 2015, the Board fined a DOE teacher $1,250 for asking his supervisor, a DOE Assistant Principal, for a $100 loan. Such a loan, which the Assistant Principal declined to make, would have likewise violated the ban on financial relationships between superiors and subordinates, so that by requesting the loan the

teacher violated the prohibition in Board Rules § 1-13 against requesting or soliciting a violation of Chapter 68. In his settlement with the Board the teacher acknowledged having received a public warning letter from the Board two years earlier for having borrowed $500 from a DOE superior.[63]

In Advisory Opinion Number 2009-1, an opinion explicitly confined to City elected officials, the Board determined that such officials could, contrary to the general prohibition against the use of City resources for private or personal purposes, make certain use of their official City vehicles for non-City purposes. More particularly, elected officials for whom the New York City Police Department has determined that security, in the form of an official vehicle and security personnel, is required may make any lawful use of the official vehicle and security personnel for personal purposes, including pursuit of outside business or political activities, without any reimbursement to the City, provided that such use is not otherwise a conflict of interest and further provided that the elected official is in the vehicle during all such use. Elected officials for whom security protection has not been mandated by the Police Department, but whose duties require them to be constantly available to respond to the needs of constituents and to public emergencies, may make any lawful use of their allotted City vehicles and/or drivers within the five boroughs, including pursuit of outside business or political activities, without reimbursement to the City, provided that the use is not otherwise a conflict of interest and further provided that the elected official is in the vehicle during all such use. Outside the five boroughs within a range permitting timely return to the City, such elected officials may use the vehicle and/or driver for any lawful personal purpose, including pursuit of outside business or political activities, with reimbursement to the City. If, however, the elected official can clearly demonstrate that the particular use outside the City's limits was for official business, reimbursement to the City is not required.

As with any ethics law, Board Rules § 1-13 must be interpreted in light of reason, experience, and common sense. A brief telephone call to a friend or doctor would not constitute a violation of the rule. Running an outside business from one's City office would, as would spending an afternoon at the beach during City time.[64] The Board accordingly 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, a fine that might well have been higher but for the inspector's agreement to resign from City service.[65] The Board also fined a former school custodian $1,000 for using, for his private business, personnel and equipment paid for by the DOE.[66] In 2005 a DDC employee agreed to pay the Board a fine of $3,000 and to serve a 25-day suspension without pay for using his City phone on City time for approximately 2,000 calls related to his private business.[67] In 2007, the Board and HRA entered into a three-way settlement in which an HRA Associate Staff Analyst was suspended for thirty days without pay, valued at $4,450, for using his City computer to do work for his private real estate practice during his City work hours.[68]

As noted, the conflicts of interest law does not prohibit certain *de minimis* personal use of City resources, and some City agencies (but not all) will in fact permit such limited use. In an effort to describe that permissible use with more particularity, the City's Department of Information Technology and Telecommunications, in consultation with the

Department of Investigation and the Law Department, developed a "Policy on Limited Personal Use of City Office and Technology Resources," commonly known as the Acceptable Use Policy ("AUP"), that sets forth in some detail permissible, and impermissible, uses of such City resources as computers, telephones, copiers, and email. The Board has reviewed that policy and determined that the permissible uses described therein will not violate Chapter 68. In addition, the Board has long advised that certain impermissible uses described in the AUP will likewise violate Chapter 68 even at the lowest level of use, that is, there is a zero tolerance policy for these uses. Thus, for example, there is no acceptable or permissible level of use of City time or resources in connection with a City employee's outside job or private business or for a political campaign. While there is no permissible amount of *City time* that may be devoted to a paid activity, the conflicts of interest law does not place any limits on the amount of *non-City time* a City employee may spend on such activity. That said, in judging whether it is credible that the restriction against any use of City time will be observed, the Board, in responding to requests for advice about proposed outside work, "regularly inquires about the demands and the schedule of proposed outside work."[69]

Where a charitable or philanthropic activity, such as the annual toy collection drive or the Combined Municipal Campaign, is sanctioned by the Mayor as a *City activity*, neither Charter § 2604(b)(2) nor Board Rules § 1-13 comes into play. Accordingly, City employees may use City time, letterhead, and resources in connection with that activity.[70]

Furthermore, in drafting the Rule, the Board recognized that certain public service activities, such as volunteering one's services for a professional organization, may in some instances further the City's interests. For example, a public servant's uncompensated participation on a bar association committee not only may help the public servant meet his or her obligations to the legal profession but also may reflect favorably upon the City and the public servant's agency, may assist in the professional development of the public servant, and may provide him or her with new insights into the performance of his or her City job, all to the City's benefit. Accordingly, to cover such situations, the Rule contains a limited exception to the prohibition against use of City time, equipment, personnel, resources, or supplies for a non-City purpose.

Thus, Board Rules § 1-13(c) permits an agency head to apply to the Board for permission for the employees of the agency to engage in such activities during normal working hours and to use City equipment, resources, personnel, and supplies—but not City letterhead—in connection with the activity. If, however, the activity has a direct impact upon another City agency, then the employee's agency head must give the head of that other agency at least ten days' written notice before approving the employee's request. For example, the Corporation Counsel could seek the approval of the Board for attorneys in the Law Department to attend bar association committee meetings during the day and even to type and photocopy a bar association report on City computers and photocopiers—but not to use Law Department letterhead. If, however, the work of the bar association committee has a direct impact upon another City agency, such as the Juvenile Justice Committee might for ACS, then the Corporation Counsel would have to give the head of that other agency at least ten days' written notice before approving the employee's request.[71]

Once a type of activity has been approved by the Board for the employees of a particular agency under this provision, other employees of that agency who wish to engage in the same type of activity need obtain approval only from their agency head. Additional approval from the Board is not required.[72]

As noted above, Board Rules § 1-13(c) will *not* permit the use of City letterhead even for Board-sanctioned public service activities. Chapter 68 indeed prohibits any use of City letterhead for a non-City purpose. The Board fined a NYCHA superintendent $500 for writing a letter on NYCHA letterhead to the Police Department in support of a fellow NYCHA employee's petition to annul the revocation of the fellow employee's gun permit.[73] The Board similarly issued public warning letters to 17 Sanitation Department employees who used City letterhead to write letters in support of a Sanitation colleague who was scheduled to be sentenced for a felony drug charge.[74] In 2011 the Board fined the former Vice-Chairman of NYCHA $2,000 for using NYCHA letterhead and his NYCHA subordinate for personal, non-City purposes. The former Vice-Chairman admitted using NYCHA letterhead on two occasions for purely personal purposes: once to write a letter to the Executive Director of Prudential Douglas Elliman praising the Prudential broker who handled the sale of his apartment, and who was also a personal friend of thirty-five years, and then to write a letter to a federal judge seeking leniency for a family friend about to be sentenced on one count of distribution of child pornography.[75]

In Advisory Opinion Number 2013-2, however, the Board recognized that use of City letterhead for letters of reference may, in certain circumstances, advance the interests of the City and not just the personal interests of the involved parties. The Board accordingly advised that, while it will typically violate the conflicts of interest law for a City employee to use City letterhead for a reference letter for a fellow City employee, if the writer is the superior of that City employee or is otherwise authorized by that City agency's leadership to write a reference letter with respect to that employee, use of City letterhead will be permissible. But, even when City employees are barred from using City letterhead for a reference letter for a colleague, they are permitted, the Board noted, to send reference letters in their personal, non-City capacities using their personal stationery.

D. Coercion of Subordinates

Chapter 68 contains several provisions that seek to protect City employees from undue coercion by their superiors. For example, Charter §§ 2604(b)(9)(b) and 2604(b)(11)(c) forbid a public servant from even *requesting* a subordinate to engage in political activity or to make a political contribution. In 2006, the Board fined a former Assistant Commissioner of the New York City Department of Sanitation $2,000 for, among other violations, recruiting his subordinates to work on a mayoral campaign.[76] In addition, Charter § 2604(b)(14) prohibits a superior and subordinate from entering into a business or financial relationship. This provision, for example, prohibits loans between superior and subordinate; forbids a lease or sub-lease between superior and subordinate; and prohibits a sale of a car between superior and subordinate.

In actions to enforce this provision, the Board has fined an assistant principal $1,000 for borrowing $1,000 from a subordinate; fined a Housing Authority supervisor $1,750 for selling a car to his subordinate for $3,500, a disposition in which he also agreed to forfeit annual leave with a value of $1,600; fined an assistant principal $2,800 for preparing, for compensation, the income tax returns of several of his subordinates; and fined a New York City Department of Homeless Services supervisor $1,500 for renting an apartment for six months to a subordinate.[77]

Even if the financial relationship exists prior to the superior-subordinate relationship, once the parties become superior and subordinate they must take immediate steps to end the financial relationship. In 2008, the Board and the DOE concluded two three-way settlements with a DOE principal and a DOE assistant principal, each fined $500 by the Board for continuing to jointly own and share a mortgage on a time share unit after the DOE principal became the assistant principal's supervisor.[78]

Since marriage is, among other things, a financial relationship, Charter § 2604(b)(14) prohibits a superior from being married to his or her subordinate. The Board imposed a $1,000 fine on a City Council Member who, having married his Chief of Staff, continued to employ her in that capacity, as his subordinate, for eight months after their marriage. The Board took the occasion of the publication of this disposition to remind public servants that a marriage is a "financial relationship" within the meaning of Chapter 68 and also that such a relationship between a superior and a subordinate is prohibited even if the superior-subordinate relationship precedes the marriage.[79]

To protect subordinates from undue pressure, Chapter 68 prohibits a superior from borrowing money from a subordinate to pay an expense that the City itself could pay. In 2007 the Board issued a public warning letter to a DOE assistant principal for asking two of his subordinates to charge to their personal credit cards $525 and $845 respectively to enable the assistant principal to attend a DOE-related function.[80]

While Charter § 2604(b)(14) serves, among other purposes, to protect subordinates from coercion from superiors, the Board will nevertheless in the appropriate case sanction the subordinate as well as the superior. In 2006, the Board fined both a supervising mechanic *and* his subordinate mechanic ($750 for the former and $460 for the latter) for engaging in a prohibited superior-subordinate financial relationship. The subordinate sold a vintage Corvette to his superior for $14,000 and also performed a brake repair, for $400, on another car owned by the superior.[81]

In 2007, the Board fined a former supervisor of roofers at the DOE $2,000 for recommending three of his subordinate roofers for private roofing work and then accepting commissions from the subordinates for his referrals.[82] Note that the violation of the conflicts of interest law lies not in referring one's subordinates for paid outside work, but rather for accepting compensation in connection therewith.

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[1] In *COIB v. Lucks*, COIB Case No. 2008-962 (2009), the Board fined a New York City Department of Education principal $1,500 for allowing one of his subordinates to hire

and supervise her children and for allowing another subordinate to hire and supervise her brother.

[2] Charter § 2601(5).

[3] *Holtzman v. Oliensis*, 91 N.Y.2d 488, 673 N.Y.S.2d 23 (1998).

[4] Charter § 2604(b)(1).

[5] Charter § 2604(b)(1)(b); *see also* Advisory Opinion Number 91-3.

[6] Charter § 2604(b)(1)(c).

[7] Charter § 2604(b)(1)(a).

[8] *COIB v. Dilan,* COIB Case No. 2011-201 (2015).

[9] *COIB v. Reid*, COIB Case No. 2008-246 (2010).

[10] *COIB v. Piazza*, COIB Case No. 2010-077 (2010).

[11] *COIB v. Zerillo*, COIB Case No. 2010-285 (2011).

[12] *COIB v. Michel,* COIB Case No. 2014-317 (2015).

[13] *COIB v. Hagler*, COIB Case No. 2013-866 (Dec. 2, 2015), *adopting* OATH Index. No. 581/15 (June 17, 2015).

[14] By vote of the electorate on November 2, 2010, the maximum fine was raised from $10,000 to $25,000 per violation and the disgorgement provision added.

[15] *COIB v. Namnum*, COIB Case No. 2011-860 (2012).

[16] Charter § 2606(b).

[17] Charter § 2606(c).

[18] 91 N.Y.2d 488, 673 N.Y.S.2d 23 (1998).

[19] 91 N.Y.2d at 497.

[20] *COIB v. Carrión*, COIB Case No. 2009-159 (2011).

[21] *COIB v. Giwa*, COIB Case No. 2013-306 (2013).

[22] COIB Case No. 1994-351 (1998).

[23] *COIB v. Schlein*, COIB Case No. 2006-350 (2008).

[24] COIB Case No. 1998-169 (2000).

[25] COIB Case No. 1999-199 (2001).

[26] COIB Case No. 1999-200 (2000).

[27] COIB Case No. 1999-200 (2000).

[28] COIB Case No. 2001-569 (2002).

[29] COIB Case No. 2000-533 (2001).

[30] COIB Case No. 1998-190 (1999).

[31] *COIB v. Hahn*, COIB Case No. 1998-102 (1998).

[32] COIB Case No. 1998-508 (2001).

[33] *COIB v. Cosgrave*, COIB Case No. 2007-290 (2008).

[34] *COIB v. Devgan*, COIB Case No. 2013-177 (2013); *COIB v. Shah*, COIB Case No. 2013-177a (2013).

[35] COIB Case No. 2002-188 (2002).

[36] COIB Case No. 2002-463 (2003).

[37] *COIB v. Berkowitz*, COIB Case No. 2004-180 (2004).

[38] *COIB v. Whitlow,* COIB Case No. 2005-590 (2006).

[39] COIB Case No. 2002-88 (2003).

[40] COIB Case No. 2001-618 (2004).

[41] *COIB v. McKen*, COIB Case No. 2004-305 (2004).

[42] *COIB v. L. Castro*, COIB Case No. 2013-097 (2013).
[43] *COIB v. Golubchick,* COIB Case No. 2004-700 (2006).
[44] *COIB v. Okowitz,* COIB Case No. 2005-155 (2006).
[45] *COIB v. Morros,* COIB Case No. 2004-234a (2006).
[46] *COIB v. Martino-Fisher,* COIB Case No. 2005-505 (2007).
[47] *COIB v. Dodson*, COIB Case No. 2007-330 (2009).
[48] *COIB v. Vale,* COIB Case No. 2006-349 (2007).
[49] *COIB v. Namnum*, COIB Case No. 2007-723 (2008).
[50] *COIB v. Murrell*, COIB Case No. 2008-481 (2009).
[51] *COIB v. Cooks*, COIB Case No. 2011-250 (2011).
[52] *COIB v. Campbell Ross*, OATH Index No. 538/98, COIB Case No. 1997-76 (Order Dec. 22, 1997).
[53] *COIB v. Ungar*, COIB Case No. 1990-383 (1992).
[54] *COIB v. Williams*, COIB Case No. 2004-517 (2007).
[55] *COIB v. Stark*, COIB Case No. 2011-480 (2012).
[56] *COIB v. Araujo,* COIB Case No. 2013-426 (2014).
[57] *COIB v. Siegel*, COIB Case No. 2007-672 (2008).
[58] Decision and Order at 27, in *COIB v. Holtzman*, COIB Case No. 1993-121 (April 3, 1996), *aff'd sub nom., Holtzman v. Oliensis*, 240 A.D.2d 254, 659 N.Y.S.2d 732 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 488, 673 N.Y.S.2d 23 (1998).
[59] Findings of Fact, Conclusions of Law, and Order at 6, *COIB v. Katsorhis,* OATH Index No. 1531/97, COIB Case No. 1994-351 (Sept. 17, 1998).
[60] COIB Case No. 1994-242 (1995).
[61] Volume II, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION, DECEMBER 1986 – NOVEMBER 1988, at 175-176.
[62] *COIB v. LaBella*, COIB Case No. 2010-285a (2011).
[63] *COIB v. Butz*, COIB Case No. 2014-894 (2015).
[64] "Statement of Basis and Purpose," in "Notice of Adoption of Rule Identifying Certain Conduct Prohibited by Charter § 2604(b)(2)," p. 4, published in *City Record*, July 9, 1998 ("Statement of Basis and Purpose"). More recently, the Board approved as consistent with Chapter 68 a model Acceptable Use Policy (the City's "Policy on Limited Personal Use of City Office and Technology Resources"). This Policy outlined what sorts of minimal personal use of City equipment, especially personal computers, a City agency might choose to permit.
[65] *COIB v. Lizzio*, COIB Case No. 2000-254 (2000).
[66] *COIB v. Powery*, COIB Case No. 2004-466 (2005).
[67] *COIB v. Carroll*, COIB Case No. 2005-151 (2005).
[68] *COIB v. Tulce*, COIB Case No. 2007-039 (2007).
[69] Advisory Opinion Number 2012-1, footnote 2, at page 13.
[70] Statement of Basis and Purpose at 4.
[71] Statement of Basis and Purpose at 3-4.
[72] Board Rules § 1-13(c)(1).
[73] *COIB v. Lucido,* COIB Case No. 2007-362 (2007).
[74] *COIB v. 17 Named Individuals*, COIB Case Nos. 2007-187/a-p (2007).
[75] *COIB v. Andrews,* COIB Case No. 2011-156 (2011).

[76] *COIB v. Russo*, COIB Case No. 2001-494 (2006).

[77] *See respectively COIB v. Ross*, COIB Case No. 1997-225 (1997); *COIB v. Vazquez*, COIB Case No. 2004-321 (2005); *COIB v. Gutman*, COIB Case No. 2004-214 (2005); *COIB v. Hall*, COIB Case No. 2006-618 (2007).

[78] *COIB v. Richards*, COIB Case No. 2006-559 (2008); *COIB v. Cross*, COIB Case No. 2006-559a (2008).

[79] *COIB v. Sanders*, COIB Case No. 2005-442 (2007).

[80] *COIB v. Anderson*, COIB Case No. 2007-002 (2007).

[81] *COIB v. Marchesi*, COIB Case No. 2005-271 (2006); *COIB v. Parlante*, COIB Case No. 2005-271a (2006).

[82] *COIB v. Della Monica*, COIB Case No. 2004-697 (2007).