



CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

2 Lafayette Street, Suite 1010
New York, New York 10007
(212) 442-1400

Fax: (212) 442-1407 TDD: (212) 442-1443

Nicholas Scoppetta
Chair/Board Member

Anthony Crowell
Board Member

Andrew Irving
Board Member

Burton Lehman
Board Member

Erika Thomas-Yuille
Board Member

Mark Davies
Executive Director

Wayne G. Hawley
*Deputy Executive Director
& General Counsel*

Julia Davis
*Special Counsel &
Director of Financial
Disclosure*

Carolyn Lisa Miller
Director of Enforcement

Alex Kipp
*Director of Training &
Education*

Varuni Bhagwant
*Director of
Administration*

Derick Yu
*Director of Information
Technology*

ADVISORY OPINION NO. 2013-1

Gifts between City Employees

SUMMARY:

1. It will not violate the conflicts of interest law for a City employee to give a gift to or receive a gift from a peer City employee.
2. Except in unusual circumstances, it will not violate the conflicts of interest law for a City superior to give a gift to a subordinate or for a subordinate to accept a gift from a superior.
3. It will violate the conflicts of interest law for a superior to solicit a gift from a subordinate and it will violate the conflicts of interest law for a superior to accept a gift from a subordinate, except on special occasions. On special occasions, such as a wedding or the birth or adoption of a child, a superior may accept an appropriate gift from a subordinate, that is, a gift of the type and value customary to the occasion in question, so long as it is clear that, under all relevant circumstances, it is the occasion and not the superior's position that is the controlling factor in the giving. If a superior has any doubt as to whether the gift is of the type and value appropriate to the occasion, the superior may and should consult with the Board before accepting the gift, and a subordinate may do likewise before offering a gift to a superior.

OPINION OF THE BOARD

The Board has received a number of requests for advice over the years, with increasing frequency more recently, about gifts between City employees. These questions typically arise on such special occasions as a wedding or the birth of a child, but are also posed during the holiday season. In order to summarize the Board's responses, both formal and informal, to these requests for advice and to set forth the standards by which such gifts between City employees will be evaluated, the Board issues this Advisory Opinion.

Relevant Law

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

Charter Section 2604(b)(3) states: "No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant." Charter Section 2601(5) defines those "associated" with a public servant to include "a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest."

Charter Section 2604(b)(5) states: "No public servant shall accept any valuable gift, as defined by rule of the board, from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city, except that nothing contained

herein shall prohibit a public servant from accepting a gift which is customary on family and social occasions.” Charter Section 2601(8) defines “business dealings with the city” to mean “any transaction with the city involving the sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but shall not include any transaction involving a public servant's residence or any ministerial matter.”

Charter Section 2604(b)(14) states: “No public servant shall enter into any business or financial relationship with another public servant who is a superior or subordinate of such public servant.”

Pursuant to the mandate of Charter Section 2604(b)(5), the Board enacted its Valuable Gift Rule, Board Rules Section 1-01. Board Rules Section 1-01(a) defines “valuable gift” to be a gift with a value of \$50.00 or more. Board Rules Section 1-01(c), however, provides the following:

For the purposes of Charter §2604(b)(5), a public servant may accept gifts that are customary on family or social occasions from a family member or close personal friend who the public servant knows is or intends to become engaged in business dealings with the City, when:

- (1) it can be shown under all relevant circumstances that it is the family or personal relationship rather than the business dealings that is the controlling factor; and
- (2) the public servant’s receipt of the gift would not result in or create the appearance of:
 - (i) using his or her office for private gain;
 - (ii) giving preferential treatment to any person or entity;
 - (iii) losing independence or impartiality; or
 - (iv) accepting gifts or favors for performing official duties.

Discussion

It is instructive in considering the application of the conflicts of interest provisions of Charter Chapter 68 to gifts between City employees to first note which of these provisions are *not* applicable. More particularly, Charter Section 2604(b)(5), which prohibits public servants from accepting valuable gifts from persons or firms with, or seeking, business dealings with the City, such as City vendors, does not speak to a gift that one City employee receives from another, because employment by the City does not constitute “business dealings with the city” within the meaning of Chapter 68. Likewise inapplicable is Charter Section 2604(b)(14), the ban on any “business or financial relationship” between a City employee and his or her superior or subordinate, because a gift between people, in contrast with, for example, a loan, does not constitute or establish a business or financial relationship between the gift giver and its recipient.

There remain, however, two relevant provisions: Charter Section 2604(b)(2), the so-called “catch all” provision of Chapter 68, and even more significantly, Charter Section 2604(b)(3), the prohibition against using one’s City position for one’s personal benefit or for the benefit of one’s associates. The Board has indeed found City employees in violation of Charter Section 2604(b)(3) for asking other City employees to make gifts to them¹ and has also found a violation of that provision in the acceptance from another City employee of an unsolicited gift.²

¹ In *COIB v. Kerik*, COIB Case No. 2001-569 (2002), the Board fined the then former Police Commissioner \$2,500 for, among other things, violating Charter Section 2604(b)(3) by asking a New York City Police Department sergeant, who was also a close personal friend of the Commissioner, to perform uncompensated research for him related to his autobiography on the sergeant’s personal time.

² In *COIB v. Mooney*, COIB Case No. 2012-201 (2012), the Board issued a public warning letter jointly with the New York City Department of Sanitation (“DSNY”) to a DSNY District Superintendent who accepted \$800 from her subordinates at a DSNY garage. The money had been collected by and from her subordinates for the purpose of enabling her to repair her personal vehicle, which had been scratched while at the garage; the District

These cases rest on the understanding that the City employees who receive these gifts have used their City positions for their own personal benefit, in violation of Section 2604(b)(3). The evils against which these cases guard include the inappropriate pressure that one City employee may feel to make a gift to another, as well as the loss of necessary impartiality that the gift receiver may experience in his or her dealings with the gift giver.

That said, the Board's advice concerning gifts between City employees has recognized that these evils will not necessarily be present in all gifts between City employees and indeed will be of any substantial concern only in gifts between superiors and subordinates. In this regard, it is important to recognize that, for the purposes of Chapter 68, a City employee's subordinates are not simply his or her direct reports. The Report of the Charter Revision Commission defined the superior-subordinate relationship as follows:

Subordinates are not limited to individuals directly under and reporting to the public servant, but include all individuals in lower positions in the organizational hierarchy of the agency, whose work the public servant has the power to direct or whose terms and conditions of employment the public servant has the power to affect.

See Volume II, Report of the New York City Charter Revision Commission, December 1986 - November 1988, p. 178.

As suggested above, when City employees are *not* in a superior-subordinate relationship, the concerns about express or implied pressure to make a gift, a loss of impartiality, or favoritism as the result of a gift are largely absent, and the Board has accordingly advised that gifts between peers (*i.e.*, not superior-subordinate) will not violate Chapter 68. For example, in

Superintendent did not initiate the collection or solicit the \$800, and she agreed to return the \$800. In the warning letter, the Board advised the District Superintendent that, by accepting an \$800 gift from her subordinates, even a gift that was unsolicited, she used her City position as a supervisor to obtain a personal financial benefit in violation of Charter Section 2604(b)(3).

Advisory Opinion No. 98-12, the Board stated that it would not violate Chapter 68 for City employees who are peers to solicit donations from each other for charitable purposes. Moreover, in the case of gifts *from* superiors *to* subordinates, there is likewise little concern about express or implied coercion to make a gift or about the loss of impartiality or favoritism, so that, in all but the most unusual of circumstances, it will not violate Chapter 68 for a superior to give a gift to a subordinate or for a subordinate to accept a gift from a superior.³ Thus, for example, a superior may on occasion treat his or her direct reports, or even a larger circle of subordinates, to a meal, at the superior's personal expense, in appreciation of their service or as an exercise in team building, except for such unusual circumstances as where these complimentary meals are extremely frequent or extravagant, in which case the repeated acceptance of these gifts might unduly burden the subordinates or their superiors' unusual generosity might compromise the subordinates' primary duty of loyalty to the City.

There remains, however, the question of the circumstances under which a superior may accept a gift from a subordinate. In this regard, because the potential for coercion and favoritism is present, the Board has, as noted above, found City superiors in violation of Chapter 68 for soliciting and/or accepting gifts (whether of goods or of services) from their subordinates.⁴ The Board has nevertheless advised that, on certain special occasions, gifts *appropriate* to the

³ The corresponding federal regulation on gifts between executive branch employees indeed speaks only of gifts to superiors; that is, the federal rules do not limit gifts to subordinates from their superiors. See 5 C.F.R. Section 2635.301ff.

⁴ The Charter elsewhere recognizes the power imbalance between superiors and subordinates by forbidding superiors from requesting their subordinates to engage in political activities or make political contributions, while not banning such requests by subordinates of their superiors. See Charter Sections 2604(b)(9)(b) and 2604(b)(11)(c).

occasion, that is, gifts of the type and value customary to the occasion in question, may be accepted by a superior from a subordinate, so long as it is clear that, under all relevant circumstances, it is the occasion and not the superior's position that is the controlling factor in the giving. Accordingly, on the occasion of the birth of a child to a superior, the Board has advised subordinates that they may purchase baby gifts of an appropriate value for their boss. The Board has similarly advised superiors who are marrying that they may invite subordinates to their wedding and may accept wedding gifts from these subordinates of a type and value appropriate to the occasion.⁵ For occasions that are more frequent, including such annual events as birthdays and the holidays, superiors may accept gifts of smaller value, in essence gifts where the "thought of giving" has greater value than the gift itself.⁶

A superior presented a gift from a subordinate may of course decline to accept it. Moreover, if the superior has any doubt as to whether the gift is of the type and value appropriate to the occasion, that is, if the superior has any question as to whether by accepting the gift he or she will violate Chapter 68, the superior may and should consult with the Board before accepting the gift. A subordinate contemplating a gift to a superior may likewise seek and obtain the Board's advice. Accepting a gift from a subordinate in violation of the conflicts of interest law

⁵ In the case of invitations to weddings and other events where it is customary for the invited guests to bring a gift, a superior who extends such an invitation to subordinates might include a "no gifts, please" request. And subordinates who propose to make a gift to their superior on a special occasion when gifts are customary might choose to purchase a group gift, mindful that the group gift's value should be no greater than the combined value of the gifts that each subordinate could permissibly give separately.

⁶ The federal regulations reach a similar result, permitting gifts "appropriate to the occasion" on such "special, infrequent occasions" as marriage or the birth or adoption of a child, but not at Christmas, noting that "Christmas occurs annually and is not an occasion of personal significance." That said, the federal regulations would permit a nominal Christmas gift to a superior under a general exception for gifts on occasions on which gifts are typically given if the gift has a value of \$10 or less. See 5 C.F.R. Sections 2635.304(a)(1) and (b)(1).

exposes the superior to a fine up to \$25,000 per violation, as well as the disgorgement of the value of the gift. See Charter Sections 2606(b) and 2606(b-1).

Conclusion

- 1) It will not violate the conflicts of interest law for a City employee to give a gift to or receive a gift from a peer City employee.
- 2) Except in unusual circumstances, it will not violate the conflicts of interest law for a City superior to give a gift to a subordinate or for a subordinate to accept a gift from a superior.
- 3) It will violate the conflicts of interest law for a superior to solicit a gift from a subordinate and it will violate the conflicts of interest law for a superior to accept a gift from a subordinate, except on special occasions. On special occasions, such as a wedding or the birth or adoption of a child, a superior may accept an appropriate gift from a subordinate, that is, a gift of the type and value customary to the occasion in question, so long as it is clear that, under all relevant circumstances, it is the occasion and not the superior's position that is the controlling factor in the giving. If a superior has any doubt as to whether the gift is of the type and value appropriate to the

occasion, the superior may and should consult with the Board before accepting the gift, and a subordinate may do likewise before offering a gift to a superior.

Nicholas Scoppetta
Chair

/s/

Anthony Crowell
Andrew Irving
Burton Lehman
Erika Thomas-Yuille

Dated: November 7, 2013