

Chapter 68 Enforcement: Relevant Sections of the Law

§2603. Powers and obligations.

e. **Complaints.**

1. The board shall receive complaints alleging violations of this chapter.

2. Whenever a written complaint is received by the board, it shall:

(a) dismiss the complaint if it determines that no further action is required by the board; or

(b) refer the complaint to the commissioner of investigation if further investigation is required for the board to determine what action is appropriate; or

(c) make an initial determination that there is probable cause to believe that a public servant has violated a provision of this chapter; or

(d) refer an alleged violation of this chapter to the head of the agency served by the public servant, if the board deems the violation to be minor or if related disciplinary charges are pending against the public servant.

3. For the purposes of this subdivision, a public servant includes a former public servant.

f. **Investigations.**

1. The board shall have the power to direct the department of investigation to conduct an investigation of any matter related to the board's responsibilities under this chapter. The commissioner of investigation shall, within a reasonable time, investigate any such matter and submit a confidential written report of factual findings to the board.

2. The commissioner of investigation shall make a confidential report to the board concerning the results of all investigations which involve or may involve violations of the provisions of this chapter, whether or not such investigations were made at the request of the board.

g. Referral of matters within the board's jurisdiction.

1. A public servant or supervisory official of such public servant may request the board to review and make a determination regarding a past or ongoing action of such public servant. Such request shall be reviewed and acted upon by the board in the same manner as a complaint received by the board under subdivision e of this section.

2. Whenever an agency receives a complaint alleging a violation of this chapter or determines that a violation of this chapter may have occurred, it shall refer such matter to the board. Such referral shall be reviewed and acted upon by the board in the same manner as a complaint received by the board under subdivision e of this section.

3. For the purposes of this subdivision, public servant includes a former public servant, and a supervisory official includes a supervisory official who supervised a former public servant.

h. Hearings.

1. If the board makes an initial determination, based on a complaint, investigation or other information available to the board, that there is probable cause to believe that the public servant has violated a provision of this chapter, the board shall notify the public servant of its determination in writing. The notice shall contain a statement of the facts upon which the board relied for its determination of probable cause and a statement of the provisions of law allegedly violated. The board shall also inform the public servant of the board's procedural rules. Such public servant shall have a reasonable time to respond, either orally or in writing, and shall have the right to be represented by counsel or any other person.

2. If, after receipt of the public servant's response, the board determines that there is no probable cause to believe that a violation has occurred, the board shall dismiss the matter and inform the public servant in writing of its decision. If, after the consideration of the response by the public servant, the board determines there remains probable cause to believe that a violation of the provisions of this chapter has occurred, the board shall hold or direct a hearing to be held on the record to determine whether such violation has occurred, or shall refer the matter to the appropriate agency if the public servant is subject to the jurisdiction of any state law or collective bargaining agreement which provides for the conduct of disciplinary proceedings, provided that when such a matter is referred to an agency, the agency shall consult with the board before issuing a final

decision.

3. If the board determines, after a hearing or the opportunity for a hearing, that a public servant has violated provisions of this chapter, it shall, after consultation with the head of the agency served or formerly served by the public servant, or in the case of an agency head, with the mayor, issue an order either imposing such penalties provided for by this chapter as it deems appropriate, or recommending such penalties to the head of the agency served or formerly served by the public servant, or in the case of an agency head, to the mayor; provided, however, that the board shall not impose penalties against members of the council, or public servants employed by the council or by members of the council, but may recommend to the council such penalties as it deems appropriate. The order shall include findings of fact and conclusions of law. When a penalty is recommended, the head of the agency or the council shall report to the board what action was taken.

4. Hearings of the board shall not be public unless requested by the public servant. The order and the board's findings and conclusions shall be made public.

5. The board shall maintain an index of all persons found to be in violation of this chapter, by name, office and date of order. The index and the determinations of probable cause and orders in such cases shall be made available for public inspection and copying.

6. Nothing contained in this section shall prohibit the appointing officer of a public servant from terminating or otherwise disciplining such public servant, where such appointing officer is otherwise authorized to do so; provided, however, that such action by the appointing officer shall not preclude the board from exercising its powers and duties under this chapter with respect to the actions of any such public servant.

7. For the purposes of this subdivision, the term public servant shall include a former public servant.

§2606. Penalties.

a. Upon a determination by the board that a violation of section twenty-six hundred four or twenty-six hundred five of this chapter, involving a contract work, business, sale or transaction, has occurred, the board shall have the power, after consultation with the head of the agency involved, or in the case of an agency head, with the mayor, to render forfeit and void the

transaction in question.

b. Upon a determination by the board that a violation of section twenty-six hundred four or twenty-six hundred five of this chapter has occurred, the board, after consultation with the head of the agency involved, or in the case of an agency head, with the mayor, shall have the power to impose fines of up to twenty-five thousand dollars, and to recommend to the appointing authority, or person or body charged by law with responsibility for imposing such penalties, suspension or removal from office or employment. [Eff. 11/2/2010]

b-1. In addition to the penalties set forth in subdivisions a and b of this section, the board shall have the power to order payment to the city of the value of any gain or benefit obtained by the respondent as a result of the violation in accordance with rules consistent with subdivision h of section twenty-six hundred three. [Eff. 11/2/2010]

c. Any person who violates section twenty-six hundred four or twenty-six hundred five of this chapter shall be guilty of a misdemeanor and, on conviction thereof, shall forfeit his or her public office or employment. Any person who violates paragraph ten of subdivision b of section twenty-six hundred four, on conviction thereof, shall additionally be forever disqualified from being elected, appointed or employed in the service of the city. A public servant must be found to have had actual knowledge of a business dealing with the city in order to be found guilty under this subdivision, of a violation of subdivision a of section twenty-six hundred four of this chapter.

d. Notwithstanding the provisions of subdivisions a, b and c of this section, no penalties shall be imposed for a violation of paragraph two of subdivision b of section twenty-six hundred four unless such violation involved conduct identified by rule of the board as prohibited by such paragraph.

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Chapter 2: *Procedural Rules for Hearings.*

§2-01 Initial Determination.

(a) *Notice.*

If the Board makes an initial determination, based on a complaint, investigation, or other information available to the Board, that there is probable cause to believe that a public servant (which for purposes of Charter §2603(h) includes a former public servant) has violated a provision of Chapter 68 of the City Charter, the Board shall notify the public servant of its determination in writing. The notice shall contain a statement of the facts upon which the Board relied for its determination of probable cause and a statement of the provisions of law allegedly violated. The notice shall afford the public servant an opportunity, either orally or in writing, to respond to, explain, rebut, or provide information concerning the allegations in such notice within fifteen days of service of the notice. The notice shall also inform the public servant of his or her right to be represented by counsel or any other person, and shall include a copy of the Board's procedural rules. A notice of initial determination shall not be required in a proceeding brought pursuant to Section 12-110 of the Administrative Code.

(b) *Request for a stay.*

In response to the Board's notice, the public servant may apply to the Board for a stay of the proceedings, for good cause shown. The Board may grant or deny such request in its sole discretion.

(c) *Admission of facts.*

If, in response to the Board's notice, the public servant admits to the facts contained therein or to a violation of the provisions of Chapter 68 of the City Charter and elects to forgo a hearing, the Board may, after consulting with the head of the agency served or formerly served by the public servant, or, in the case of an agency head, after consulting with the Mayor, issue an order finding a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter, provided, however, that pursuant to Charter §2603(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may recommend to the City Council such penalties as the Board deems appropriate. When a penalty

is recommended, the City Council shall report to the Board what action was taken.

(d) *No probable cause finding.*

If, after receipt of the public servant's response, the Board determines that there is no probable cause to believe that a violation has occurred, the Board shall dismiss the matter and inform the public servant in writing of its decision.

§2-02 Commencement of Formal Proceedings and Pleadings.

(a) *Determination of probable cause.*

If, after consideration of the public servant's response, the Board determines that there remains probable cause to believe that a violation of the provisions of Chapter 68 of the City Charter has occurred, and the public servant has not elected to forgo the hearing, the Board shall hold or direct a hearing to be held on the record to determine whether such violation has occurred.

If the public servant is subject to the jurisdiction of a state law provision or collective bargaining agreement which provides for the conduct of a disciplinary hearing by another body, the Board shall refer the matter to the appropriate entity. The hearing shall be conducted in accordance with the rules of that entity.

The Board may also refer a matter to the public servant's agency if the Board deems the violation to be minor or if other disciplinary charges are pending there against the public servant.

(b) *Petition.*

The Board shall institute formal proceedings by serving a petition on the public servant. The petition shall set forth the facts which, if proved, would constitute a violation of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, as well as the applicable provisions thereof which are alleged to have been violated. The petition shall also advise the public servant of the public servant's rights to file an answer, to a hearing, to be represented at such hearing by counsel or any other person, and to cross-examine witnesses and present evidence.

(c) *Answer.*

(1) *General rule.*

The public servant shall answer the petition by serving an answer on the Board within eight days after service of the petition, unless a different time is fixed by the Board. The public servant shall serve the answer personally or by certified or registered mail, return receipt requested.

(2) *Form and contents of answer.*

The answer shall be in writing and shall contain specific responses, by admission, denial, or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if any. The public servant may include in the answer matters in mitigation. The answer shall be signed and shall contain the full name, address, and telephone number of the public servant. If the public servant is represented, the representative's name, address, and telephone number shall also appear on the answer, which shall be signed by either the public servant or by his or her representative.

(3) *Effect of failure to answer.*

If the public servant fails to serve an answer, all allegations of the petition shall be deemed admitted and the Board shall proceed to hold a hearing in which prosecuting counsel shall submit for the record an offer of proof establishing the factual basis on which the Board may issue an order. If the public servant fails to respond specifically to any allegation or charge in the petition, such allegation or charge shall be deemed admitted.

(d) *Amendment of pleadings.*

Pleadings shall be amended as promptly as possible upon conditions just to all parties. If a pleading is to be amended less than twenty-five days before the commencement of the hearing, the amendment may be made only on consent of the parties or by leave of the Board, if the Board is conducting the hearing, or by leave of a Board member or Administrative Law Judge, if the Board member or Administrative Law Judge is conducting the hearing.

§2-03 Hearing.

(a) *Conduct of hearings generally.*

Hearings shall be conducted by the Board or, upon designation by the

Board, by a member of the Board or the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (OATH), or such administrative law judge (ALJ) as the Chief Administrative Law Judge shall assign.

(b) *Subpoenas.*

Subpoenas requiring the attendance of a witness and subpoenas *duces tecum* requiring the production of books, papers, and other things may be issued only by (i) the Administrative Law Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the hearing is conducted by the Board or by a member of the Board, upon application of a party or upon the Administrative Law Judge's or the Board member's own motion. In addition to or in lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an order directing the party or person under the control of a party to attend or produce.

(c) *Conduct of hearings by OATH.*

If the Board refers a hearing to OATH, a copy of the petition shall also be sent to OATH at the time the public servant is served with the petition. OATH shall conduct the hearing in accordance with its rules, as set forth in Title 48 of the Rules of the City of New York, except as otherwise provided by these Rules.

(d) *Conduct of hearings by the Board or by a Board member.*

(1) *Generally.*

The Board may hear a case or may designate a member of the Board to hear a case, make findings of fact and conclusions of law, preside over pre-hearing matters and adjournments, and make recommendations to the Board for the proposed disposition of the proceeding. When a hearing is conducted by the Board, the hearing shall be presided over by the Board's Chair or by his or her designee. The Board or Board member shall conduct the hearing, including such pre-hearing matters as conferences, discovery, and motion practice, in conformance with the rules and procedures of OATH, as set forth in Title 48 of the Rules of the City of New York, except as otherwise provided by these rules.

(2) *Disposition conferences and agreements.*

If disposition of the proceeding is to be discussed at a conference, the Board shall designate an individual, other than a Board member

participating in the hearing, to conduct the conference. During disposition discussions, upon notice to the parties, the person conducting the conference may confer with each party and/or representative separately. Board members shall not be called to testify in any proceeding concerning statements made at a disposition conference.

(3) *Order of proceedings.*

Prosecuting counsel shall have the burden of proof by the preponderance of the evidence, shall initiate the presentation of evidence, and may present rebuttal evidence. The public servant may introduce evidence after prosecuting counsel has completed his or her case. Opening statements, if any, shall be made first by prosecuting counsel. Closing statements, if any, shall be made first by the public servant. This order of proceedings may be modified at the discretion of the Board or Board member.

§2-04 Decisions and Orders.

(a) *Report to the Board.*

When a hearing has been conducted by either OATH or a member of the Board designated to hear the case, a report of recommended findings of fact and conclusions of law and recommendations for the disposition of the proceeding shall be issued and forwarded, along with the original transcript of the proceeding and all documents introduced into the record, to the Board for review and final action. The report shall not be made public. A copy of the report and recommendation shall be sent to all parties and their counsel or other representative in order to afford them the opportunity to comment before final action is taken by the Board. If prosecuting counsel or the public servant wishes to comment, he or she shall do so within ten days of service of the report and recommendation.

(b) *Finding of violation.*

If after the hearing and upon a consideration of all the evidence in the record of hearing, including comments, the Board finds that a public servant has engaged in conduct prohibited by Chapter 68 of the City Charter, the Board shall consult with the head of the agency served or formerly served by the public servant, or in the case of an agency head, consult with the Mayor. Where the Board finds a violation of Chapter 68 or section 12-110 of the Administrative Code, the Board shall state its final findings of fact and conclusions of law and issue an order imposing any penalties it deems appropriate under either statute. The order shall include notice of the public

servant's right to appeal to the New York State Supreme Court. Alternatively, in the case of a violation of Chapter 68, the Board may state its findings and conclusions and recommend a penalty, if any, to the head of the agency served by the public servant or former public servant or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter §2603(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may state its findings and conclusions and recommend to the City Council such penalties as the Board deems appropriate. When a penalty is recommended, the head of the agency, Mayor, or City Council shall report to the Board what action was taken.

(c) *Consultation by agency.*

In instances where the Board does not hold a hearing and instead refers a matter to the public servant's agency, that agency shall consult with the Board prior to issuing its final decision.

(d) *Dismissals.*

If, after the hearing and upon consideration of the record, the Board finds that a public servant has not engaged in acts prohibited by Chapter 68 of the City Charter or section 12-110 of the Administrative Code, the Board shall state its findings of facts and conclusions of law and shall issue an order dismissing the petition. The order shall not be made public.

§2-05 General Matters.

(a) *Appearances before the Board.*

(1) A party may appear before the Board in person, by an attorney, or by a duly authorized representative. The person appearing for the party shall file a notice of appearance with the Board. The filing of any papers by an attorney or other representative who has not previously appeared shall constitute the filing of a notice of appearance by that person and shall conform to the requirements of paragraphs (2) and (4) of this subdivision.

(2) The appearance of a member in good standing of the bar of a court of general jurisdiction of any state or territory of the United States shall be indicated by the suffix "Esq." and the designation "Attorney for (person represented)." The appearance of any other person shall be indicated by the designation "Representative for (person represented)."

(3) Absent extraordinary circumstances, no application shall be

made or argued by any attorney or other representative who has not filed a notice of appearance.

(4) A person may not file a notice of appearance on behalf of a party unless the person has been retained by that party to represent the party before the Board. Filing a notice of appearance constitutes a representation that the person appearing has been so retained.

(b) *Withdrawal and substitution of counsel.*

(1) An attorney who has filed a notice of appearance shall not withdraw from representation without the permission of the Board, upon application. Withdrawals shall not be granted unless upon consent of the client or when other cause exists, as delineated in the applicable provisions of the Code of Professional Responsibility.

(2) Notices of substitution of counsel served and filed more than twenty days prior to a hearing before the Board or before a member of the Board may be filed without leave of the Board or Board member. Notices of substitution of counsel served and filed less than twenty-one days prior to a hearing before the Board or before a member of the Board may be filed only with the permission of the Board or Board member, which permission shall be freely given, absent prejudice or substantial delay of the proceedings.

(c) *Service of petition by Board.*

A petition shall be served on the public servant

(i) in the manner provided in Section 312-a, or subdivisions 1, 2, or 4 of Section 308, of the New York Civil Practice Law and Rules for service of a summons or

(ii) by both certified mail, return receipt requested, and first class mail to the public servant's last known residence or actual place of business or

(iii) in such manner as the Board directs, if service is impracticable under paragraphs (i) and (ii) of this subdivision, or

(iv) in any manner agreed upon by counsel to the Board and the public servant or his or her representative.

Service of other documents by Board.

Notices, orders, and all other documents, except petitions and subpoenas, originating with the Board shall be served on the public servant

by personal delivery to the public servant or

by first class mail to the public servant's last known residence or actual place of business or

by overnight delivery service to the public servant's last known residence or actual place of business or

by telephonic facsimile (FAX) or similar transmission or

by leaving the paper at the public servant's last known residence with a person of suitable age and discretion or

in such manner as the Board directs, if service is impracticable under paragraphs (1), (2), (3), (4), or (5) of this subdivision, or

in any manner agreed upon by counsel to the Board and the public servant or his or her representative. Where the public servant has appeared by a representative, all papers served by the Board subsequent to that appearance shall be served upon the representative by one of the methods provided in paragraphs (1)-(7) of this subdivision.

(e) *Computation of time.*

The computation of any time period referred to in these rules shall be calculated in calendar days, except that when the last day of the time period is a Saturday, Sunday, or public holiday, the period shall run until the end of the next following business day. Where a period of time prescribed by the rules set forth in this chapter is measured from the service of a paper and service of that paper is made in the manner provided by paragraph (ii) of subdivision (c) or paragraph (2) of subdivision (d) of this section, five days shall be added to the prescribed period.

(f) *Confidentiality.*

All matters relating to complaints submitted to or inquired into by the Board, or any action taken by the Board in connection therewith or hearings conducted by the Board or OATH, shall be kept confidential unless the public servant waives confidentiality and the Board determines that confidentiality is not otherwise required. Hearings conducted by the Board or by OATH shall be public if requested by the public servant. Final findings, conclusions, and orders issued upon a violation of Chapter 68 shall be made public.

(g) *Ex Parte communications with Board.*

(1) After service of the petition in a case, counsel conducting the prosecution of the case on behalf of the Board shall not communicate *ex parte* with any member of the Board concerning the merits of the case, except as provided in paragraph (2) of this subdivision.

(2) Counsel conducting the prosecution of a case on behalf of the Board may communicate *ex parte* with the Board, or any member thereof, with respect to ministerial matters involving the case or on consent of the respondent or respondent's counsel or in an emergency.

(h) *Disposition by agreement.*

At any time after the service of a notice of probable cause in a proceeding brought pursuant to Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section 12-110 of the Administrative Code, the public servant and the Board may agree to dispose of the case by agreement. For this purpose, the Board or any Board member designated by the Board may conduct a disposition conference, provided that, when the Board or a member of the Board conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-03(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be confidential and shall be inadmissible at trial of any case. If a disposition by agreement is reached, it shall be reduced to writing and signed by the public servant or his or her representative and the Board or, in the discretion of the Board, placed on the record. When a disposition by agreement contains an acknowledgment that a public servant's conduct has violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, that disposition by agreement shall be made public by the Board.

(i) *OATH rules.*

In the event of any inconsistency between these rules and the rules of the Office of Administrative Trials and Hearings, these rules shall govern.