



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

Steven B. Rosenfeld
Chair/Board Member

Monica Blum
Board Member

Andrew Irving
Board Member

Burton Lehman
Board Member

Erika Thomas-Yuille
Board Member

Political Activities: Campaign Related Activities

Charter Sections: 2604(a)(1)(b), 2604(b)(2), 2604(b)(3), 2604(b)(4),
2604(b)(6), 2604(b)(9), 2604(b)(11), 2604(b)(12),
2604(b)(14), 2604(e), and 2606(d)

Board Rules: 1-13(a) and 1-13(b)

Opinions Cited: 95-13, 2001-2, 2003-6, and 2009-1

Advisory Opinion No. 2012-5

Mark Davies
Executive Director

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

Julia Davis
*Special Counsel &
Director of Annual
Disclosure*

Carolyn Lisa Miller
Director of Enforcement

Alex Kipp
*Director of Training &
Education*

Varuni Bhagwant
*Director of
Administration*

Derick Yu
*Director of Information
Technology*

The Conflicts of Interest Board (the “Board”) has recently received a number of questions from public servants, including in particular from current City elected officials who anticipate being candidates for elective office in the near future, asking whether, consistent with Chapter 68 of the City Charter, the City’s conflicts of interest law, they and their subordinate City employees may engage in certain campaign-related activities. Because the Board anticipates similar questions in the upcoming City election year, the Board publishes this Opinion to provide guidance to public servants and to the public about whether certain campaign-related activities would violate Chapter 68.

Before addressing the particular questions presented, the Board will first identify the relevant law, rules, and previous Board opinions.

Relevant Law

Charter Section 2604(a)(1)(b) prohibits a City employee from holding a position with a firm that is engaged in business dealings with any agency of the City.

Charter Section 2604(b)(2) provides that “[n]o public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” This section has been described as Chapter 68’s “‘catch-all’ prohibition” (Volume II, *Report of the New York City Charter Revision Commission, December 1986-November 1988* at 175).

However, the Board may not seek or impose a penalty for its violation, unless “such violation involved conduct identified by rule of the board.” Charter Section 2606(d).

Pursuant to that provision of the Charter, the Board has adopted Rules of the Board Sections 1-13(a) and (b), which prohibit the use of City time and City resources for any non-City purpose. Moreover, while the Board has held that these Rules do not prohibit certain limited personal use of City time and resources (for example, a call during the City work day to schedule a doctor’s appointment, or the use of the City copier to copy a child’s report card, will not violate Chapter 68), it has made clear that political activities *always* fall within the prohibition on use of City time or resources, that is, there is no “incidental use” exception for political activities.¹

¹ An exception to this flat ban, enunciated in Advisory Opinion No. 2009-1, permits those City elected officials who are provided with a City-owned car to perform their official duties to make any lawful use of the official vehicle 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. For the subset of these elected officials for whom the NYPD has *not* determined that security in the form of an official vehicle and security personnel is required, such permissible use of a City vehicle for personal purposes is limited to use within the five boroughs; all other personal use of City vehicles by such officials, including for political purposes, requires reimbursement to the City.

Charter Section 2604(b)(3) prohibits a public servant from using or attempting 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 2604(b)(4) prohibits a public servant from disclosing confidential City information and also from using such information for the public servant’s private advantage.

Charter Section 2604(b)(6) prohibits City employees from making compensated communications on behalf of private interests with any agency of the City, other than communications limited to ministerial matters.

Charter Sections 2604(b)(9)(b) and (11)(c) prohibit a public servant from asking a subordinate public servant to participate in a political campaign or to make a political contribution. However, Section 2604(b)(9)(b) provides that it will not violate Chapter 68 for a public servant to request a subordinate public servant to “speak on behalf of a candidate, or provide information or perform other similar acts, if such acts are related to matters within the public servant’s duties or responsibilities.” Furthermore, while a public servant may not *request* a subordinate to engage in political activity, the Board has held that public servants are free to volunteer to work on or contribute to political campaigns, including the political campaign of their City superiors. See Advisory Opinion No. 2001-2 at 7-8; Advisory Opinion No. 2003-6 at 9-10.

Charter Section 2604(b)(12) prohibits certain high-level appointed public servants, including those charged with substantial policy discretion, from requesting any person to make a political contribution to any candidate for elective office of the City or to any City elected official who is a candidate for any elective office.

Charter Section 2604(b)(14) prohibits a City superior and subordinate from entering into a business or financial relationship.

Charter Section 2604(e), the waiver provision of Chapter 68, provides that a public servant may hold a position or engage in conduct otherwise prohibited if the Board determines, after receiving written approval of the public servant's agency head, that such position or conduct does not involve a conflict with the purposes and interests of the City.

In Advisory Opinion No. 2003-6, the Board determined that Charter Section 2604(a)(1)(b), the provision that prohibits public servants from holding a position at a firm that is engaged in City business dealings, does not prohibit them from working for the campaign of a candidate for City elective office. Thus, it is not necessary to obtain a waiver from the Board in order for City employees to work for political campaigns. The Board also concluded in that Opinion that public servants may work on their superiors' election campaigns, even for compensation, without violating the ban in Charter Section 2604(b)(14) on business or financial relationships between superiors and subordinates. However, City employees who accept compensation for working for a campaign are prohibited by Charter Section 2604(b)(6) from communicating with City agencies (including the Campaign Finance Board ("CFB")) on behalf of the campaign, absent a waiver from the Board. With limited exceptions, City employees who work for campaigns without compensation may make these communications without a Board waiver.

Discussion

A considerable number of the questions recently presented to the Board implicate the absolute ban, referenced above, on the use of City time or resources for political activities. A

second group of questions involve the Charter's restrictions on political or financial relationships between superior and subordinate City employees. A final question involves the restriction on political fundraising by high-ranking officials. The Board will address each of these in turn.

A. Use of City Time or City Resources

The questions regarding use of City resources for campaign activities, and the Board's responses, were as follows:

1. *City Schedulers*

The Board received several questions concerning City employees whose official City duties include scheduling for the elected official in whose office they work. The Board first advised that, while such employees plainly may arrange their principals' *official* schedules, Board Rules Sections 1-13(a) and (b) prohibit them from using City resources or City time to arrange *campaign* events. Nevertheless, such City employees *may* use City time and resources simply to exchange scheduling information – *e.g.*, for the campaign to advise the City employee about the time and place of campaign events and for the City employee to advise the campaign about the time and place of official events. Furthermore, City schedulers may record campaign events in the schedules that they maintain for their superiors as part of their City jobs. The entry of a campaign event in the City scheduler's records serves the same purpose as the entry of other personal appointments of the elected official, such as a dentist appointment. In both cases, the City scheduler must have current

information about the official's whereabouts in order to perform his or her City duties. The City employee may not, however, receive or record in the City schedule information material to the political campaign itself, such as the names of individuals to be targeted for campaign solicitations or support.

Elected officials have also asked whether the foregoing necessary coordination of campaign and official schedules may be accomplished by direct access to calendars. In particular, may an elected official provide to his or her campaign direct electronic access to his or her City-maintained schedule? The Board has advised that this would not be permissible, noting that the City schedule might contain confidential City information, the disclosure of which would violate Charter Section 2604(b)(4), and that granting a private entity, such as a campaign, remote access to the City schedule might well violate City information technology security protocols. The Board has, however, advised that, in order to facilitate efficient coordination of public officials' schedules, City and campaign staffs may both have read and write access to an online calendar, to which the campaign would post campaign events and the City staff would post official events, provided that such a calendar may not be made accessible to the public.

A final question was whether City scheduling employees may include campaign speeches in their principal's daily binder, which contains not only the daily schedule, but also the text of remarks,

background papers, and the like. The Board has replied in the negative, because for City staff to maintain a binder containing campaign materials would violate the ban on using City time or resources for campaign or other political activities. Public servants running for office must therefore maintain two separate binders, one for City material and the other for campaign materials, the former prepared and maintained by City staff and the latter by campaign staff.

2. *Campaign Inquiries from the Public and the Press*

Elected officials have asked what, if anything, their City staffs may do when phone calls and e-mail messages come to their City offices regarding campaign matters, such as calls or messages inquiring how to contribute time or money to the official's election campaign. Because giving substantive responses to such inquiries would involve use of City time and resources for political activities, the Board has advised that the City employees who receive such inquiries may respond *only* by providing campaign contact information. Thus, for example, the City employee may not forward an e-mail inquiry to the candidate, the campaign, or anyone else in the City office. Nor may the City employee take a campaign-related telephone message and pass that message on to anyone. The City employee, as noted, may simply give campaign contact information.

Similarly, City press officers, whose responsibilities include arranging for press attendance at their superiors' official events, may not use City time or resources to arrange for press attendance at campaign

events. See Board Rules Sections 1-13(a) and (b). But a City press officer may respond to press inquiries prompted by remarks made at campaign events when the press inquiry concerns matters within the City duties of the press officer's principal. Thus, for example, if a press inquiry concerns the official position of the press officer's principal on a matter that was discussed at a political event, the press officer may explain his superior's official position, in the same way the press officer would respond when there was no election campaign under way. If, in contrast, the press inquiry were simply about a campaign matter, such as the expected level of contributions that the public servant's next public filing would show, the City press officer may not reply beyond referring the reporter to campaign officials.

3. *Body Persons and Advance Persons*

The offices of some elected officials employ public servants (sometimes described as "body persons") whose City duties, as described more fully below, include accompanying the elected official to public events for the purpose of assisting the elected official in discharging his or her official duties while away from the office, and other public servants (sometimes described as "advance persons") whose function, also described more fully below, is to arrive at the sites of public events prior to the elected official to help facilitate the official's arrival and attendance. The Board was asked whether body persons or advance persons may accompany their principals to campaign events on their City time. In

reply, the Board advised that these City employees may attend campaign events on City time only if it can reasonably be anticipated that they would be required to perform *official City* duties at the event and if the only duties they in fact perform at the event are official City duties. Because of the different City duties of body persons and advance persons, however, the Board concluded that there ordinarily would be reason to expect body persons to be called on to perform their City duties at campaign events, but that it would not be likely that an advance person would perform official duties at campaign events.

More particularly, the Board was advised that the City duties of a body person may include such activities as ensuring that the elected official arrives and leaves on time for official events and meetings, identifying whether official events or meetings on the schedule can or should be pushed to later dates or times, informing the elected official about people at the event with whom the elected official might want to speak for official purposes, tracking the conversations the elected official has to ensure appropriate follow-up by other City staff on official matters, providing contact information of the elected official's office to other guests at the event or meeting, holding and answering the elected official's phone when the official is unavailable to speak, coordinating with any security or advance person about events throughout the day, and communicating with other City staff, on behalf of the elected official, on issues throughout the day. Because it is likely that a body person will be

called on to perform City duties such as handling constituent inquires and communicating with the City office on City business even during the course of a campaign event, the body person should be able to accompany the elected official to campaign events on City time. In contrast, because the advance person's duties, the Board was advised, include such functions as arriving at meetings before the elected official, in order to identify the best route to the meeting, check the official through security, identify the exits and location of bathrooms, inform the official whether the event is running late, and inform the security detail of the best place to sit or stand during the event, it was the view of the Board that campaign staffs should be expected to employ their own advance persons to discharge these responsibilities for campaign events. Thus, since there would be few, if any, City duties for a City advance person to perform at campaign events, it would ordinarily violate Chapter 68 for an advance person to attend campaign events on City time. Finally, the Board advised that all City employees, including but not limited to body persons and advance persons, must use annual leave time should they choose to attend campaign events during their regular City working hours if they are not performing City duties at the event.

4. *Official Photographs*

The offices of some elected officials employ staff whose duties including taking photographs of the elected official performing his or her official duties. These photographs are the property of the City and as such

may be used only for City purposes. The Board was asked whether these photographs may be provided to the campaign of a public servant running for office and, if so, at what price. The Board advised that these photographs may be provided to a campaign only if they are made available to the general public, and then only on the same terms. Furthermore, if such official photographs are in fact provided to the general public, they must be provided to the campaign pursuant to the same process by which a member of the general public would obtain them; for example, the campaign may not jump the queue.

B. Campaign Matters involving Superiors and Subordinates

As noted above, the Board has long recognized that, while a superior may not request a subordinate to engage in political activity,² a subordinate may volunteer to work for a political campaign, including the campaign of his or her City superior. Further, in Advisory Opinion No. 2003-6, the Board determined that it would not violate Chapter 68 for a public servant to volunteer for his or her superior's campaign *and* to be paid by the superior's campaign for such work. But the ban on asking a subordinate to engage in political activity may not be circumvented by the superior's campaign staff, rather than the superior personally, requesting the City subordinate to work for or contribute to the superior's campaign. The Board will view a request by a superior's campaign

² See Charter Sections 2604(b)(9)(b) and 2604(b)(11)(c).

staff to be, for these purposes, the equivalent of a personal request by the superior and to be equally in violation of Chapter 68.

While Charter Section 2604(b)(9)(b) does prohibit a public servant from asking a subordinate to engage in political activity, it also contains a proviso that permits a public servant to request that a subordinate “speak on behalf of a candidate, or provide information or perform other similar acts, if such acts are related to matters within the public servant’s duties or responsibilities.” The Board was asked whether this proviso would permit a public servant running for elective office to direct his or her City subordinates to prepare written summaries of matters on which the office has worked, for the public servant’s use at political events, including campaign speeches. The Board replied that such briefings are permissible, so long as they are, as the Charter provides, “related to matters within the [subordinate] public servant’s official duties.” The Board cautioned, however, that this proviso will not support a direct request from the campaign staff to the candidate’s City staff, seeking the preparation of briefing materials for the campaign. As the Board noted, Charter Section 2604(b)(9)(b) does not permit a public servant running for elective office to assign to a private individual or entity, including campaign officials, the right to direct the work of his or her City subordinates. Nevertheless, the public servant may personally direct his or her City staff to gather information and provide it directly to the campaign. In addition, campaign staff are no less entitled, but also no more entitled, than members of the general public to obtain information from City government. If, for example, a public servant had delivered a speech on a particular topic and if

the public servant's office provided the text of that speech to all who requested it, the public servant's office could likewise provide it to the campaign office in response to its request. The public servant's City office staff must take care in responding to requests of the campaign office not to give the campaign any preferential treatment.

A final question concerned superiors and subordinates who volunteer for the same campaign, possibly (but not necessarily) the campaign of the City official who is the superior of both. The Board was asked whether, *at the campaign organization*, one of these two public servants may supervise the other and, if so, whether in so doing the City superior may request the subordinate to undertake tasks in support of the campaign. Outside the context of political campaigns, if a City superior and subordinate moonlight for the same private employer, one may not supervise the other, because that would violate the prohibition of Charter Section 2604(b)(14) against business or financial relationships between superiors and subordinates. And, as noted above, Charter Section 2604(b)(9)(b) prohibits a superior from asking a subordinate to engage in political activity. The Board nevertheless concluded that, if superior and subordinate public servants permissibly volunteer to work in the same political campaign, whether they are paid or unpaid, it would not violate Chapter 68 for one of them to supervise the other in the campaign organization. In the Board's view, that conclusion is a logical extension of its holding in Advisory Opinion No. 2003-6 that a subordinate may volunteer to work for the campaign of his or her City superior and may accept pay for this service. In that situation, the public

servant who has volunteered to work on the campaign will almost certainly perform campaign tasks at the direction of the candidate who is the City superior or of the superior's agents at the campaign. It logically follows, the Board has concluded, that if two City employees in a superior-subordinate relationship in their City agency both *independently* volunteer for the campaign of their ultimate City superior (or for any other candidate's campaign), the superior may similarly supervise the subordinate (or vice versa) and the superior may assign campaign tasks to this fellow volunteer.

C. Political Fundraising by High-Ranking Appointed Officials

As noted above, Charter Section 2604(b)(12) prohibits certain specified high-ranking appointed officials, including those charged with substantial policy discretion, from soliciting campaign contributions in support of any candidate for City elective office or for any City elected official running for any elective office. The Board was asked whether it still adhered to its determination regarding that prohibition in its Advisory Opinion No. 95-13. The Board advised in that Opinion that it would not violate Chapter 68 for the spouse of an appointed public servant charged with substantial policy discretion to host a fundraiser at the couple's home for a candidate for City elective office or for a current City elected official seeking any elective office, even if the public servant spouse were present at the event, where the invitations for the event did not include the name of the City public servant, where the inviting spouse had a history of political activity, and where the invitations were not targeted at the public servant's subordinates or

at persons who did business with or had matters before the public servant's agency.

In response, the Board has reaffirmed the holding of Opinion No. 95-13, noting that, as a general matter, the prohibitions of Chapter 68 limit conduct of public servants, not conduct of their spouses. Thus, so long as it is clear, as it was in that Opinion, that the public servant is not a true host of the fundraising event and is not otherwise impermissibly soliciting contributions – *i.e.*, that the solicitations being made in that official's home are in fact and appearance made only by the public servant's spouse – then the public servant will not violate Section 2604(b)(12) of the Charter. To make that determination the Board will, as it did in the prior opinion, look to the totality of the circumstances, including those identified in that opinion.

Conclusion

Summarizing the foregoing, the Board has advised as follows:

1. City employees whose duties include scheduling for the official in whose office they work may not use City time or resources to arrange campaign events for that official.
2. It will be permissible for City employees to communicate with the campaign of their principal for the purpose of exchanging scheduling information such as the time and place of campaign and official events.
3. Public servants seeking elective office may not provide their campaigns with direct electronic access to their City-maintained schedules, but it would not

violate the conflicts of interest law for the City and campaign staffs both to have read and write access to an online calendar to which the campaign would post campaign events and the City staff would post official events, provided that this calendar is not accessible to the public.

4. A City official's daily binder, which contains the daily schedule, the text of remarks, background papers, and the like, may not include the text of a campaign speech or other materials prepared by the campaign. Rather, separate official and campaign binders must be kept by the official's City and campaign staffs.
5. If the City office of a candidate for elective office receives communications about campaign matters, such as inquiries about how to contribute time or money to the official's campaign, the City employees who receive these inquiries may respond *only* by providing campaign contact information to the caller or writer; the City employees may not forward the inquiry to the candidate, the campaign, or anyone else in the City office.
6. City press officers, whose City responsibilities include arranging for press attendance at their superiors' official events, may not use City time or resources to arrange for press attendance at campaign events. But a City press officer may respond to press inquiries prompted by remarks made at campaign events when the press inquiry concerns matters within the City portfolio of the press officer's principal.
7. City employees whose duties typically require them to attend official events with the elected official who is their superior, including employees sometimes described as advance persons and body persons, may attend campaign events on

City time only if it can reasonably be anticipated that the City employee will be required to perform *official City* duties at the event and further provided that the only duties they in fact perform at the event are official duties. Because of the different City duties of body persons and advance persons, it ordinarily will not violate the conflicts of interest law for a body person to accompany the elected official to campaign events on City time, while it normally would violate the law for the advance person to attend campaign events on City time.

8. Official City photographs may be provided to a campaign, if at all, only on the same terms as such photos are made available to the general public. Furthermore, if official photographs are in fact provided to the general public, they must be provided to the campaign pursuant to the same process by which a member of the general public would obtain them.
9. Just as a City superior may not request his or her subordinates to work for or contribute to a political campaign, including the superior's own campaign, the superior's campaign staff may not request the candidate's City subordinates to work for or contribute to the campaign.
10. While a City official may request his or her subordinates to gather information for use in that official's political campaign where the work requested is related to the subordinate's City duties or responsibilities, campaign staff may not make such a request directly to City staff. The City official may, however, direct his or her City staff to gather information and provide it directly to campaign staff.
11. If a superior and subordinate public servant independently volunteer for a political campaign, including the campaign of the City official who is the superior of both,

the City superior may supervise and assign campaign tasks to the City subordinate (and vice versa), whether they are paid or unpaid campaign workers.

12. While an appointed official charged with substantial policy discretion may not solicit funds for a candidate for City elective office or for a current City elected official seeking any elective office, it would not violate the conflicts of interest law for the spouse of such an official to host a fundraiser at the couple's home for such a candidate, even if the public servant were present at the event, where under the totality of the circumstances it is clear that the public servant is not a true host of the event and that the solicitations being made in the official's home are in fact and appearance made only by the public servant's spouse.



Steven B. Rosenfeld
Chair

Monica Blum
Andrew Irving
Burton Lehman
Erika Thomas-Yuille

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