June 11, 2020 Agenda – Open Meeting Matter
May 18, 2020 – Public Hearing
March 26, 2020 Agenda – Open Meeting Matter
January 9, 2020 Agenda – Open Meeting Matter

To: The Board

From: Christopher M. Hammer cmh

Date: May 22, 2020

Re: Proposed Amendments to Board Rules § 1-13: Use of City Time and City Resources
Proposed Amendments to Board Rules § 1-17: Accomplice Liability

As directed by the Board at its March 2020 meeting (**Exhibit 1**), Staff submitted proposed amendments of Board Rules § 1-13 and § 1-17 to the City Record for a public hearing and opportunity to comment (**Exhibit 2**). The public hearing was held on May 18, 2020; no comments were submitted regarding the proposed amendments.

The rules return to the Board for consideration of the draft Notice of Adoption (**Exhibit 3**) with changes tracked to reflect that the rules would no longer be proposed rules. If adopted, the Notice of Adoption will be published in the City Record pursuant to City Charter § 1043(f), and the rules will take effect 30 days after such publication.

The draft Notice of Adoption reflects one additional housekeeping measure. In 2011, the Board adopted Board Rules § 1-17 to establish procedures for a person to appeal their designation as having to file a financial disclosure report (**Exhibit 4**). Shortly thereafter, District Council 37 filed an improper practice petition against the Board. The New York City Office of Collective Bargaining granted that petition and ordered the Board to cease enforcement of Board Rules § 1-17, finding that it involved a mandatory subject of collective bargaining (**Exhibit 5**). The Board, however, has not formally repealed this dormant rule. After consulting with the Law Department,

Staff proposes to include a formal repeal of former Board Rules § 1-17 as part of the final Notice of Adoption of the proposed amendments to Board Rules § 1-17.

Minutes of the Open Meeting of the New York City Conflicts of Interest Board

Date: March 26, 2020
Present:
Board Members: Chair Richard Briffault and Members Fernando A. Bohorquez, Jr., Anthony Crowell, Jeffrey D. Friedlander, and Erika Thomas

Board Staff: Ethan Carrier, Chad Gholizadeh, Ana Gross, Christopher Hammer, Gavin Kendall, Julia Lee, Carolyn Miller, Katherine Miller, Ari Mulgay, Yasong Niu, Jeffrey Tremblay, Clare Wiseman, and Juliya Ziskina.

Guests: None

The Board and Staff participated by videoconference pursuant to Executive Order No. 202 issued on March 7, 2020. The meeting was called to order by the Chair at approximately 9:35 a.m. The Chair stated that the meeting was being conducted pursuant to the New York State Open Meetings Law and designated the undersigned as the Recording Secretary for purposes of the meeting.

The Chair stated that the meeting was called to discuss proposed amendments to Board Rules § 1-07; § 1-01(h); § 1-01(e)-(g); § 1-18; § 1-13; and §1-17.

Board Rules § 1-07

After a brief introduction, the Chair asked for any comments by the Board or Staff. The following comments constitute the changes as agreed upon by the Board and Staff to the proposed amendments to Board Rules § 1-07:

- In the Statement of Basis and Purpose, p. 4, line 10: change "unpaid or unpaid" to "paid or unpaid"
- § 1-07(d)(2)(i): replace "in role" with "no role"

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules § 1-01(h)

After a brief introduction, the Chair asked for any comments by the Board or Staff. There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules § 1-01(e)-(g)

The Chair asked for any comments by the Board or Staff and upon motion duly made and seconded, the Board unanimously voted to continue discussions at a future open meeting.

Board Rules § 1-18

The Chair asked for any comments by the Board or Staff. The Board and Staff agreed to change the caption from "Endorsements" to "Use of City Title in Promotional Materials."

Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

Board Rules §§ 1-13 and 1-17

After a brief introduction, the Chair asked for any comments by the Board or Staff. There were no comments. Upon motion duly made and seconded, the Board unanimously voted to adopt the proposed amendments incorporating the proposed changes as the final rule.

The open meeting was adjourned at approximately 10:02 a.m.

Respectfully submitted,

Julia H. Lee
Recording Secretary

New York City Conflicts of Interest Board

Notice of Public Hearing and Opportunity to Comment on Proposed Rules Regarding the Use of City Time and City Resources and Accomplice Liability

What are we proposing? The Conflicts of Interest Board proposes to amend its rules regarding a public servant's use of City time and City resources and regarding accomplice liability.

When and where is the Hearing? The Conflicts of Interest Board will hold a public hearing on the proposed rule. The public hearing will take place at 10:30 a.m. on Monday, May 18, 2020. The hearing will be conducted by video conference and is accessible by:

- **Internet Video and Audio.** For access, visit: https://zoom.us/j/367205305?pwd=YVBacDVyUTM1QVhmL01Eb0JIZE5iUT09

- **Phone.** For access, dial (929) 436-2866. When prompted, use the Meeting ID 367-205-305 and the password 471951.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Conflicts of Interest Board through the NYC rules website at http://rules.cityofnewyork.us.

- **Email.** You can email comments to Rules@COIB.nyc.gov.

- **Mail.** You can mail comments to Christopher M. Hammer, Deputy General Counsel, Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.

- **Fax.** You can fax comments to the Conflicts of Interest Board at (212) 437-0705.

- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rules at the public hearing may speak for up to three minutes. Please access the public hearing by Internet Video and Audio or by Telephone using the instructions above.

Is there a deadline to submit comments? Yes, you must submit written comments by Monday, May 18, 2020.

Do you need assistance to participate in the hearing? You must tell the Conflicts of Interest Board if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at (212) 437-0730. You must tell us by Thursday, May 14, 2020.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at http://rules.cityofnewyork.us/. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a

summary of oral comments concerning the proposed rule will be available to the public at the Conflicts of Interest Board, 2 Lafayette Street, Suite #1010, New York, New York 10007.

What authorizes the Conflicts of Interest Board to make this rule? Sections 1043 and 2603(a) of the City Charter and authorize the Conflicts of Interest Board to make these proposed rules. This proposed rule was included in the Conflicts of Interest Board's regulatory agenda for this Fiscal Year.

Where can I find the Conflicts of Interest Board's rules? The Conflicts of Interest Board's rules are in Title 53 of the Rules of the City of New York.

What rules govern the rulemaking process? The Conflicts of Interest Board must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose of the Proposed Rules

The Board adopted Board Rules § 1-13 in 1998 to provide broad guidance regarding City Charter § 2604(b)(2), Chapter 68's "catch-all" provision, which 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." Pursuant to Board Rules § 1-13, City Charter § 2604(b)(2) prohibits the use of City time and City resources for non-City purposes and establishes accomplice liability for Chapter 68 violations by others.

When initially drafted, § 1-13 was the only rule of the Board that interpreted City Charter § 2604(b)(2). Since then, the Board has adopted other rules that construe various aspects of City Charter § 2604(b)(2), including § 1-14 (Official Fundraising) and § 1-15 (Community Board Members). The Board has also adopted two provisions as part of § 1-13 that govern the permissible use of City time and City resources: existing Board Rules § 1-13(c) permits a public servant to use a limited amount of City time and City resources to pursue a personal and private activity, upon the approval of the public servant's agency head and the Board's determination that the activity

furthers the purposes and interests of the City; and Board Rules § 1-13(e) establishes parameters by which public servants may perform work on behalf of not-for-profit organizations as part of their City jobs.

Given these intervening additions and to improve the overall organizational structure of the Board Rules, the Board now proposes (1) to reorganize Board Rules § 1-13 into a rule that focuses exclusively on the use of City time and City resources, and (2) to move the provisions regarding accomplice liability into a new Board Rules § 1-17.

The Board also proposes amendments to Board Rules § 1-13 to codify advice given in two Advisory Opinions that reflect the Board's practice regarding the use of City time and City resources:

- Proposed Board Rules § 1-13(d), a new provision, would clarify that a public servant may use his or her City title in connection with the non-City authorship of print or online published work, teaching, and paid speaking engagements under circumstances where it is clear that the public servant is not speaking on behalf of the City. This proposed amendment would codify, in part, advice given in Advisory Opinion No. 1999-4 permitting a public servant who engages in teaching to list his or her title as part of biographical information about the public servant. See A.O. No. 1999-4 at 7.

- Proposed Board Rules § 1-13(f) would be revised to codify the advice given in Advisory Opinion No. 2009-5 permitting an elected official, including a District Attorney, to use his or her City title in endorsing a candidate for public office. See A.O. No. 2009-5 at 3 n. 1. The proposed new text in subdivision (f) would clarify that other public servants (that is, not elected officials) may not use their titles in endorsing candidates for public office but it would not otherwise prohibit them from disclosing that they are public servants when engaging in political speech—such as the biography of a candidate for City Council identifying the candidate as a community board member, among the candidate's other qualifications, or a participant at a political rally identifying themselves as a public school teacher.

The Board also proposes the following clarifications consistent with the Board's previous confidential advice and enforcement dispositions:

- Proposed Board Rules § 1-13(b) would clarify that a public servant's City title as well as City technology assets (such as e-mail, official social media accounts, and internet access) are City resources for purposes of City Charter § 2604(b)(2).

- Proposed Board Rules § 1-13(c) would permit the Board to authorize, after a public servant receives approval from their agency head, the use of City time and City resources to perform non-City work on behalf of not-for-profit entities where the Board determines that at least one of the following circumstances exists: the work advances the professional development of the public servant, it furthers the purposes and interests of the City, or it benefits the public at large. As a result of these revisions, this subdivision (c) would be harmonized with the provisions of Board Rules § 1-13(e), and each of its provisions would apply only to activities performed on behalf of not-for-profit entities.

Text of the Proposed Rule

New material is underlined.

[Deleted material is in brackets.]

Section 1. Section 1-13 of Title 53 of the Rules of the City of New York is amended to read as follows:

§ 1-13 [Conduct Prohibited by City Charter § 2604(b)(2)] Use of City Time and City Resources.

(a) Except as provided in subdivision (c) of this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to pursue personal and private activities during times when the public servant is required to perform services for the City.

(b) Except as provided in [subdivision (c) of] this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to use City letterhead, title, personnel, equipment, resources, [or] supplies, or technology assets for any non-City purpose. For purposes of this subdivision "technology assets" includes but is not limited to e-mail accounts, internet access, and official social media accounts.

(c) (1) A public servant may [pursue a personal and private activity during normal business hours] perform volunteer services on behalf of a not-for-profit entity during times when such public servant is required to perform work for the City and may use City personnel, equipment, resources, [personnel, and] supplies, and technology assets, but not City letterhead, [if] their title or City email account(s), provided that

(i) [the type of activity has been previously approved for employees of the public servant's agency by the Conflicts of Interest Board, upon application by the agency head and upon a determination by the Board that the activity furthers the purposes and interests of the City] the public servant's agency head approves in writing the proposed volunteer services; and

(ii) [the public servant shall have received approval to pursue such activity from the head of his or her agency] the Board determines that the proposed volunteer services advance the public servant's professional development, further the purposes and interests of the City, or benefit the public at large.

(2) [In any instance where a particular activity may potentially directly affect another City agency, the employee must obtain approval from his or her agency head to participate in such particular activity. The agency head shall provide written notice to the head of the potentially affected agency at least 10 days prior to approving such activity.] The agency head approval required by paragraph (1) of this subdivision must be by the head of the agency served by the public servant, or by a deputy mayor if the public servant is an agency head. A public servant who is an elected official, including a District Attorney, is the agency head for the public servants employed by the elected official's agency or office. Public servants who are elected officials, including District

Attorneys, may approve their own activities as agency heads pursuant to paragraph (1).

(d) [It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally or knowingly:] A public servant engaging in a personal and private activity may use, or permit the use of, their City title in connection with print or online published work, teaching, or paid speaking engagements, under either of the following circumstances:

(1) [solicit, request, command, importune, aid, induce or cause another public servant to engage in conduct that violates any provision of City Charter § 2604] their City title is one of several biographical details used to identify such public servant; or

(2) [agree with one or more persons to engage in or cause the performance of conduct that violates any provision of City Charter § 2604] their City title is used to demonstrate such public servant's relevant professional qualifications provided that their City title is accompanied by a reasonably prominent disclaimer stating that the views expressed in the work, teaching, or speaking engagement do not necessarily represent the views of the agency or the City.

(e) (1) An agency head may designate a public servant to perform work on behalf of a not-for-profit corporation, association, or other such entity that operates on a not-for-profit basis, including serving as a board member or other position with fiduciary responsibilities provided that:

(i) there is a demonstrated nexus between the proposed activity, the public servant's City job, and the mission of the public servant's agency; and such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit;

(ii) the designated public servant takes no part in the entity's business dealings with the City at the entity or at his or her agency, except that Council Members may sponsor and vote on discretionary funding for the entity; and

(iii) within 30 days the written designation is disclosed to the Conflicts of Interest Board and will be posted on the Board's website.

(2) A public servant designated in accordance with paragraph (1) of this subdivision may take part in such entity's business dealings with the City at the entity and/or at his or her agency if, after written approval of the agency head, the Board determines that there is a demonstrated nexus between the proposed participation, the public servant's City job, and the mission of the public servant's agency; and that such participation furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit entity.

(3) The designation made pursuant to paragraph (1) and approval made pursuant to paragraph (2) of this subdivision must be by the head of the agency served by the public servant, or by a deputy mayor if the public servant is an agency head. A public servant who is an elected official, including a [district attorney] District Attorney, is the agency head for the public servants employed by the official's agency or office. A public servant who is an elected official, including a [district attorney] District Attorney, may provide the designation pursuant to paragraph (1) and the agency head approval pursuant to paragraph (2) for him or herself.

(f) [Nothing contained in this section shall preclude the Conflicts of Interest Board from finding that conduct other than that proscribed by subdivisions (a) through (d) of this section violates City Charter § 2604(b)(2), although the Board may impose a fine for a

violation of City Charter § 2604(b)(2) only if the conduct violates subdivision (a), (b), (c), or (d) of this section. The Board may not impose a fine for violation of subdivision (d) where the public servant induced or caused another public servant to engage in conduct that violates City Charter § 2604(b)(2), unless such other public servant violated subdivision (a), (b), or (c) of this section] An elected official, including a District Attorney, may use or permit the use of their City title in an endorsement of a candidate for elective office. No other public servant may use, or permit others to use, their City title to endorse another person's campaign for elective office.

Section 2. Title 53 of the Rules of the City of New York is amended by adding a new section 1-17, to read as follows:

§ 1-17 Accomplice Liability.

(a) It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally or knowingly:

(1) solicit, request, command, importune, aid, induce, or cause another public servant to engage in conduct that violates any provision of City Charter § 2604; or

(2) agree with one or more persons to engage in or cause conduct that violates any provision of City Charter § 2604.

(b) For the purposes of this section, "any provision of City Charter § 2604" shall not include a violation of City Charter § 2604(b)(2) that does not also violate a rule of the Board.

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400

CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Amendment of Rules Governing Accomplice Liability and Use of City Time and Resources

REFERENCE NUMBER: 2020 RG 004

RULEMAKING AGENCY: NYC Conflicts of Interests Board

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

(i) Is understandable and written in plain language for the discrete regulated community or communities;

(ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and

(iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Kahini Ranade — *February 19, 2020*
Mayor's Office of Operations — Date

NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028

CERTIFICATION PURSUANT TO

CHARTER §1043(d)

RULE TITLE: Amendment of Rules Governing Accomplice Liability and Use of City Time and Resources

REFERENCE NUMBER: 2020 RG 004

RULEMAKING AGENCY: Conflicts of Interest Board

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

(i) is drafted so as to accomplish the purpose of the authorizing provisions of law;

(ii) is not in conflict with other applicable rules;

(iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and

(iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: February 19, 2020

EXHIBIT 2

New York City Conflicts of Interest Board

Notice of Adoption of ~~Proposed~~ Final Rules ~~Regarding the Use of City Time and City Resources and Accomplice Liability~~

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Sections 1043 and 2603(a) of the City Charter, that the Conflicts of Interest Board has adopted Board Rules amending its rules governing the use of City time and City resources and accomplice liability.

The proposed Rules were published in the City Record on April 17, 2020, and a public hearing was held on May 18, 2020. No comments were received. The Conflicts of Interest Board now adopts the following Rules.

Statement of Basis and Purpose ~~of the Proposed Rules~~

The Board adopted Board Rules § 1-13 in 1998 to provide broad guidance regarding City Charter § 2604(b)(2), Chapter 68's "catch-all" provision, which 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." Pursuant to Board Rules § 1-13, City Charter § 2604(b)(2) prohibits the use of City time and City resources for non-City purposes and establishes accomplice liability for Chapter 68 violations by others.

When initially drafted, § 1-13 was the only rule of the Board that interpreted City Charter § 2604(b)(2). Since then, the Board has adopted other rules that construe various aspects of City Charter § 2604(b)(2), including § 1-14 (Official Fundraising) and § 1-15 (Community Board Members). The Board has also adopted two provisions as part of § 1-13 that govern the permissible use of City time and City resources: existing Board Rules § 1-13(c) permits a public servant to use a limited amount of City time and City resources to pursue a personal and private activity, upon the approval of the public servant's agency head and the Board's determination that the activity furthers the purposes and interests of the City; and Board Rules § 1-13(e) establishes parameters

EXHIBIT 3

by which public servants may perform work on behalf of not-for-profit organizations as part of their City jobs.

Given these intervening additions and to improve the overall organizational structure of the Board Rules, the Board now ~~proposes~~ (1) ~~to~~ reorganizes Board Rules § 1-13 into a rule that focuses exclusively on the use of City time and City resources and (2) ~~to~~ moves the provisions regarding accomplice liability into a new Board Rules § 1-17.

The Board also ~~proposes~~ amend~~ment~~s ~~to~~ Board Rules § 1-13 to codify advice given in two Advisory Opinions that reflect the Board's practice regarding the use of City time and City resources:

- ~~Proposed~~ Board Rules § 1-13(d), a new provision, ~~would~~ clarifies~~y~~ that a public servant may use his or her City title in connection with the non-City authorship of print or online published work, teaching, and paid speaking engagements under circumstances where it is clear that the public servant is not speaking on behalf of the City. This ~~proposed~~ amendment ~~would~~ codifies~~y~~, in part, advice given in Advisory Opinion No. 1999-4 permitting a public servant who engages in teaching to list his or her title as part of biographical information about the public servant. See A.O. No. 1999-4 at 7.

- ~~Proposed~~ Board Rules § 1-13(f) ~~would be revised to~~ codifies~~y~~ the advice given in Advisory Opinion No. 2009-5 permitting an elected official, including a District Attorney, to use his or her City title in endorsing a candidate for public office. See A.O. No. 2009-5 at 3 n. 1. The ~~proposed~~ new text in subdivision (f) ~~would~~ clarifies~~y~~ that other public servants (that is, not elected officials) may not use their titles in endorsing candidates for public office but it does ~~would~~ not otherwise prohibit them from disclosing that they are public servants when engaging in political speech—such as the biography of a candidate for City Council identifying the candidate as a community board member, among the candidate's other qualifications, or a participant at a political rally identifying themselves as a public school teacher.

The Board also adopts ~~proposes~~ the following clarifications consistent with the Board's previous confidential advice and enforcement dispositions:

- ~~Proposed~~ Board Rules § 1-13(b) ~~would~~ clarifies~~y~~ that a public servant's City title as well as City technology assets (such as e-mail, official social media

accounts, and internet access) are City resources for purposes of City Charter § 2604(b)(2).

- ~~Proposed~~ Board Rules § 1-13(c) ~~would~~ permits the Board to authorize, after a public servant receives approval from their agency head, the use of City time and City resources to perform non-City work on behalf of not-for-profit entities where the Board determines that at least one of the following circumstances exists: the work advances the professional development of the public servant, it furthers the purposes and interests of the City, or it benefits the public at large. As a result of these revisions, this subdivision (c) is ~~would be~~ harmonized with the provisions of Board Rules § 1-13(e), and each of its provisions ~~would~~ applies~~y~~ only to activities performed on behalf of not-for-profit entities.

Text of the ~~Proposed~~ Rule

New material is underlined.

[Deleted material is in brackets.]

Section 1. Section 1-13 of Title 53 of the Rules of the City of New York is amended to read as follows:

§ 1-13 [Conduct Prohibited by City Charter § 2604(b)(2)] Use of City Time and City Resources.

(a) Except as provided in subdivision (c) of this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to pursue personal and private activities during times when the public servant is required to perform services for the City.

(b) Except as provided in [subdivision (c) of] this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to use City letterhead, title, personnel, equipment, resources, [or] supplies, or technology assets for any non-City purpose. For purposes of this subdivision "technology assets" includes but is not limited to e-mail accounts, internet access, and official social media accounts.

(c) (1) A public servant may [pursue a personal and private activity during normal business hours] perform volunteer services on behalf of a not-for-profit entity during times when

such public servant is required to perform work for the City and may use City personnel, equipment, resources, [personnel, and] supplies, and technology assets, but not City letterhead, [if] their title or City email account(s), provided that

(i) [the type of activity has been previously approved for employees of the public servant's agency by the Conflicts of Interest Board, upon application by the agency head and upon a determination by the Board that the activity furthers the purposes and interests of the City] the public servant's agency head approves in writing the proposed volunteer services; and

(ii) [the public servant shall have received approval to pursue such activity from the head of his or her agency] the Board determines that the proposed volunteer services advance the public servant's professional development, further the purposes and interests of the City, or benefit the public at large.

(2) [In any instance where a particular activity may potentially directly affect another City agency, the employee must obtain approval from his or her agency head to participate in such particular activity. The agency head shall provide written notice to the head of the potentially affected agency at least 10 days prior to approving such activity.] The agency head approval required by paragraph (1) of this subdivision must be by the head of the agency served by the public servant, or by a deputy mayor if the public servant is an agency head. A public servant who is an elected official, including a District Attorney, is the agency head for the public servants employed by the elected official's agency or office. Public servants who are elected officials, including District Attorneys, may approve their own activities as agency heads pursuant to paragraph (1).

(d) [It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally or knowingly:] A public servant engaging in a personal and private activity may use, or permit the use of, their City title in connection with print or online published work, teaching, or paid speaking engagements, under either of the following circumstances:

(1) [solicit, request, command, importune, aid, induce or cause another public servant to engage in conduct that violates any provision of City Charter § 2604] their City title is one of several biographical details used to identify such public servant; or

(2) [agree with one or more persons to engage in or cause the performance of conduct that violates any provision of City Charter § 2604] their City title is used to demonstrate such public servant's relevant professional qualifications provided that their City title is accompanied by a reasonably prominent disclaimer stating that the views expressed in the work, teaching, or speaking engagement do not necessarily represent the views of the agency or the City.

(e) (1) An agency head may designate a public servant to perform work on behalf of a not-for-profit corporation, association, or other such entity that operates on a not-for-profit basis, including serving as a board member or other position with fiduciary responsibilities provided that:

(i) there is a demonstrated nexus between the proposed activity, the public servant's City job, and the mission of the public servant's agency; and such work furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit;

(ii) the designated public servant takes no part in the entity's business dealings with the City at the entity or at his or her agency, except that Council Members may sponsor and vote on discretionary funding for the entity; and

(iii) within 30 days the written designation is disclosed to the Conflicts of Interest Board and will be posted on the Board's website.

(2) A public servant designated in accordance with paragraph (1) of this subdivision may take part in such entity's business dealings with the City at the entity and/or at his or her agency if, after written approval of the agency head, the Board determines that there is a demonstrated nexus between the proposed participation, the public servant's City job, and the mission of the public servant's agency; and that such participation furthers the agency's mission and is not undertaken primarily for the benefit or interests of the not-for-profit entity.

(3) The designation made pursuant to paragraph (1) and approval made pursuant to paragraph (2) of this subdivision must be by the head of the agency served by the public servant, or by a deputy mayor if the public servant is an agency head. A public servant who is an elected official, including a [district attorney] District Attorney, is the agency head for the public servants employed by the official's agency or office. A public servant who is an elected official, including a [district attorney] District Attorney, may provide the designation pursuant to paragraph (1) and the agency head approval pursuant to paragraph (2) for him or herself.

(f) [Nothing contained in this section shall preclude the Conflicts of Interest Board from finding that conduct other than that proscribed by subdivisions (a) through (d) of this section violates City Charter § 2604(b)(2), although the Board may impose a fine for a

violation of City Charter § 2604(b)(2) only if the conduct violates subdivision (a), (b), (c), or (d) of this section. The Board may not impose a fine for violation of subdivision (d) where the public servant induced or caused another public servant to engage in conduct that violates City Charter § 2604(b)(2), unless such other public servant violated subdivision (a), (b), or (c) of this section] An elected official, including a District Attorney, may use or permit the use of their City title in an endorsement of a candidate for elective office. No other public servant may use, or permit others to use, their City title to endorse another person's campaign for elective office.

Section 2. Section 1-17 of Title 53 of the Rules of the City of New York is REPEALED and a new Section 1-17 is added~~amended by adding a new section 1-17,~~ to read as follows:

§ 1-17 Accomplice Liability.

(a) It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally or knowingly:

(1) solicit, request, command, importune, aid, induce, or cause another public servant to engage in conduct that violates any provision of City Charter § 2604; or

(2) agree with one or more persons to engage in or cause conduct that violates any provision of City Charter § 2604.

(b) For the purposes of this section, "any provision of City Charter § 2604" shall not include a violation of City Charter § 2604(b)(2) that does not also violate a rule of the Board.

CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD

Notice of Adoption of Rule Establishing Procedures to Appeal a Designation as a Required Filer of a Financial Disclosure Report

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Conflicts of Interest Board by Section 2603(a) of the New York City Charter and Section 12-110(c)(2) of the New York City Administrative Code that the Conflicts of Interest Board ("the Board") has adopted a rule, Section 1-17 of Title 53 of the Rules of the City of New York, establishing procedures to appeal a designation as a required filer of a financial disclosure report pursuant to Section 12-110(b) of the Administrative Code. Pursuant to a notice published on December 2, 2010, in the City Record and on the Board's website, a public hearing was held on January 3, 2011, at 2 Lafayette Street, Suite 1010, New York, New York. The Board received no comments on the proposed amendment except for a letter dated December 27, 2010 from District Council 37 ("DC 37"), objecting to the Board's authority to promulgate the rule and asserting that the procedure for appeals for DC 37 members is a mandatory subject of bargaining. The text of the amendment is set forth below.

Title 53 of the Rules of the City of New York is amended by adding a new Section 1-17, to read as follows:

[New matter is underscored]

EXHIBIT 4

§1-17 Procedures to Appeal a Designation as a Required Filer of a Financial Disclosure Report

(a) Applicability.

Any employee designated as a required filer by his or her agency may appeal the determination that he or she is required to file a financial disclosure report with the Conflicts of Interest Board ("the Board") pursuant to New York City Administrative Code § 12-110, first to his or her agency head and then to the Board.

(b) Appeal to the Agency Head.

(1) Any employee seeking to appeal the determination that he or she is required to file a financial disclosure report shall complete a "Notice of Appeal to Agency Head," on such form as the Board shall adopt and make available on the Board's website. The completed form shall include the employee's name, employee identification number ("EIN") or agency identifier, agency name, agency code, civil service title, office title, and a brief statement of the grounds for the appeal.

(2) An employee seeking to appeal such agency determination shall file, in the manner designated by the agency, the completed Notice of Appeal form with his or her agency financial disclosure liaison prior to the deadline for filing his or her financial disclosure report but in any event the employee shall have no fewer than twenty-one days within which to file such Notice of Appeal after receiving the notification by the agency that he or she must file a financial disclosure report. Failure to file the Notice of Appeal by the later of twenty-one days after such notification or the deadline for filing, as the case may be, shall constitute a waiver of the right to appeal and the employee will be required to file a financial disclosure report.

(3) Upon receipt of the completed Notice of Appeal, the agency financial disclosure liaison shall:

(i) Time and date stamp the Notice of Appeal form;

(ii) Provide the employee with a copy of such time and date-stamped form as a receipt;

(iii) Transmit the Notice of Appeal form forthwith to the agency head or his or her designee; and

(iv) Within five days of the receipt of the Notice of Appeal, notify the Board by e-mail of the pendency of the appeal and the date that the appeal was received by the agency. Such notice to the Board shall contain the employee's name, agency, EIN (or agency identifier), and the date that the appeal was filed.

(4) No later than fourteen days after filing the Notice of Appeal, the employee shall submit to his or her agency head or such agency head's designee a written statement and any documentation in support thereof setting forth the reasons that such employee believes he or she should not be designated as a required filer of a financial disclosure report. Failure to submit such written statement within such fourteen-day period shall constitute a waiver of the right to appeal.

(5) Within fourteen days of the agency's receipt of the employee's written statement, the agency head or his or her designee shall advise in writing or by email the employee, his or her employee's collective bargaining representative, attorney or other representative, if any, and the Board of the agency's decision as to whether or not the employee is required to file. If the agency head or the agency head's designee fails to meet such fourteen-day deadline, the appeal shall be deemed granted upon default.

(6) A decision of the agency head or his or her designee that denies an appeal shall set forth the reasons for and evidence relied upon in reaching such decision. Such denial shall be predicated on a showing that the employee meets the requirements of at least one of the filing categories set forth in New York City Administrative Code § 12-110(b)(3)(a)(3)-(4) and §§ 1-02, 1-14, and 1-15 of the Board's rules. If the agency denies the appeal, the notice to the Board shall state the manner by which the employee was notified and the date of such notification.

(7) The agency head or his or her designee may consult with the Board prior to rendering its decision.

(c) Procedure Upon Agency's Grant of Appeal.

If the agency grants the employee's appeal, the employee's name shall be removed from the Board's list of required filers and the employee will not be required to file a financial disclosure report for that filing year or in future years until or unless the employee's title, position, duties, or responsibilities change in such a way that he or she would be required to file pursuant to the criteria set forth in New York City Administrative Code § 12-110(b).

(d) Procedure Upon Agency's Denial of Appeal.

(1) An employee whose appeal is denied by his or her agency shall, within thirty days after service of the agency's notice of denial, either:

(i) file a completed financial disclosure report with the Board, or

(ii) file with the Board and with the employee's agency head or his or her designee a completed "Notice of Appeal to Board," on such form as the Board shall prescribe and make available on the Board's website.

Failure to file either a financial disclosure report or an appeal with the Board within the thirty-day period shall constitute a waiver of the right to a further appeal and shall subject the employee to the imposition of the statutory late filing fine pursuant to Ad. Code § 12-110(g).

(2) Within thirty days after filing of a Notice of Appeal to the Board, the employee shall file with the Board and file with the employee's agency head or his or her designee the following materials:

(i) A copy of the statement and any supporting materials previously submitted to the agency head by the employee on the appeal in accordance with paragraph one of subdivision (a) of this section;

(ii) A copy of the agency head's decision on such appeal; and

(iii) Any supplemental documents the employee elects to provide.

(3) Within thirty days after the employee files the materials set forth in paragraph two of this subdivision, the agency shall file with the Board all materials relied upon by the agency in making its determination that the employee is required to file a financial disclosure report, as well as any additional documents in support of the agency's determination.

(4) Within thirty days after the agency has filed the materials set forth in paragraph three of this subdivision, the employee may file with the Board such additional materials as he or she deems necessary to either rebut evidence produced by the agency or otherwise support his or her position.

(5) The Board's Director of Financial Disclosure shall review the agency's determination and the documents submitted by the employee and the agency and shall make a recommendation to the Board, or to the Executive Director upon delegation by the Board, as to whether the agency's determination should be upheld or reversed. The agency and employee shall each be

served with a copy of the recommendation of the Director of Financial Disclosure and, within thirty days of service of the recommendation, may submit written comments to the Board or Executive Director, as the case may be, upon the proposed recommendation.

(6) In the event that the Board, in its sole discretion, determines that issues are presented by the written materials filed on the appeal that require an evidentiary hearing, the Board may order such a hearing before the full Board, or, in the discretion of the Chair, before a member or members of the Board or before the Executive Director, designated for that purpose, at which the employee and agency may call witnesses to testify under oath to determine any such issue. If the Board requests additional information, both the employee and the agency shall provide to the Board whatever additional information it requests, within fourteen days after service of such a request in writing or by email by the Board. Failure of either party to timely provide any of the requested information may result in a summary finding adverse to that party.

(7) The Board or the Executive Director, as the case may be, shall review the recommendation and any comments submitted in response thereto and issue a decision and order either upholding or reversing the agency's decision.

(8) If the Board grants the appeal, the employee's name shall be removed from the Board's list of required filers and the employee will not be required to file a financial disclosure report for that filing year or in future years until or unless the employee's title, position, duties, or responsibilities change such that he or she would be required to file pursuant to the criteria set forth in New York City Administrative Code § 12-110(b).

(9) If the appeal is denied, the employee shall either:

(i) file a financial disclosure report for that filing year within thirty days after service of the denial of the appeal by the Board, and shall file for future years

until or unless the employee's title, position, duties, or responsibilities change such that he or she would not be required to file pursuant to the criteria set forth in Administrative Code § 12-110(b); or

(ii) commence, within the time provided by law, an Article 78 proceeding to review the Board's decision.

(e) General Provisions

(1) At all stages of the financial disclosure appeals process, the employee may be represented by a union representative, an attorney or other representative.

(2) Once an employee files an appeal with the Board, neither the employee nor the agency or their respective representatives may communicate *ex parte* with any member of the Board staff or Board with respect to the matter, except on consent of the opposing party or in an emergency.

(3) During the pendency of the appeal and any court proceeding timely brought by the employee to review a denial of the appeal by the Board, the employee need not file a financial disclosure report, and no late filing fines will be assessed for that period.

(4) Whenever a deadline in the process set forth in this section is measured from the filing or service of notice and notice is filed or served by United States Postal Service mail, five days shall be added to the deadline.

(5) The Board may, in its discretion and for good cause shown, extend any deadline set forth in this rule. An application for such extension must be made in writing and prior to the expiration of the deadline.

(6) In the case of any appeal that is decided upon default, whether in favor of the employee or the agency, that decision shall apply to that filing year only and shall not be a determination on the merits.

(7) Unless otherwise stated, any reference to a number of days specified as a period within which an act is required to be done means such number of calendar days.

(8) Nothing in this rule shall prevent the Board from determining, pursuant to New York City Administrative Code § 12-110(b)(3)(a)(2)-(3), that any public servant, regardless of an agency's determination, is required to file a financial disclosure report.

STATEMENT OF BASIS OF PURPOSE OF THE RULE

As mandated by New York City's Financial Disclosure Law (Administrative Code § 12-110), the Conflicts of Interest Board (the "Board") must adopt a rule addressing appeals by public servants who contest their designation as required filers based on their policymaking or contracting responsibilities. See Ad. Code § 12-110(c)(2), as amended by Local Law 43 of 2003. See also Ad. Code § 12-110(b)(3)(a)(3)-(4). Determination of such appeals by employees was initially the responsibility of the Department of Investigation and in 2004 was transferred to the Board. See Ad. Code § 12-110(c)(2), as amended by Local Law 43 of 2003.

Subsequent to the transfer of the determination of appeals to the Board, the City and DC37 entered into a pilot program entitled "Financial Disclosure Appeals Process," which created a procedure for appeals for filers of financial disclosure reports. This rule is based on that process and contains procedures for any employee to appeal a designation as a required filer based on policymaking or contracting responsibilities and for agencies to respond to those

appeals. The rule provides the employee with notice and the opportunity to be heard at each stage of the appeal, and the opportunity to comment on the Board's decision before it is final.

In light of the foregoing, the Board's purpose in promulgating the rule is threefold: (1) to provide all City employees with a comprehensive procedure for appealing their designation as a required filer based on policymaking or contracting responsibilities; (2) to ensure the uniform and prompt resolution of financial disclosure appeals; and (3) to provide guidance, through decisions on these appeals, to agencies as to which categories of employees are required filers as policymakers or contract filers.

The rule was not included in the regulatory agenda because enactment of a financial disclosure appeals rule was not anticipated at the time of publication of agency regulatory agendas.

DC 37, 5 OCB2d 8 (BCB 2012)

(IP) (Docket No. BCB-2959-11)

Summary of Decision: The Union claimed that the City violated its duty to bargain in good faith by unilaterally changing the COIB financial disclosure appeals procedure. The Union argued that the COIB financial disclosure appeals procedure is a mandatory subject of bargaining and that the statute at issue did not expressly or implicitly remove the appeals procedure from the scope of mandatory bargaining. The City argued that the duty to bargain was preempted by statute, or, alternatively, that the changes that it made to the financial disclosure appeals procedure were *de minimis*. The Board found that the changes were not *de minimis*, that bargaining was not preempted by statute, and that the City violated its duty to bargain over the financial disclosure appeals procedure. Accordingly the Union's improper practice petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY CONFLICTS OF INTEREST BOARD,

Respondents.

DECISION AND ORDER

On May 17, 2011, District Council 37, AFSCME, AFL-CIO ("DC 37" or "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Conflicts of Interest Board ("COIB"). The Union claims that the City violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (City of New York

Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally changing the COIB financial disclosure appeals procedure. The Union argues that the COIB financial disclosure appeals procedure is a mandatory subject of bargaining and that the statute at issue did not expressly or implicitly remove the appeals procedure from the bargaining obligation. The City argues that the duty to bargain was preempted by statute, or, alternatively, that the changes that it made to the financial disclosure appeals procedure are *de minimis*. This Board finds that the changes were not *de minimis*, that bargaining was not preempted by statute, and that the City violated its duty to bargain over the financial disclosure appeals procedure. Accordingly, the Union's improper practice petition is granted.

BACKGROUND

The COIB is an independent, non-mayoral agency that, among other responsibilities, is charged with interpreting and enforcing the City's financial disclosure law set forth in § 12-110 of the New York City Administrative Code ("Administrative Code § 12-110"). Administrative Code § 12-110 provides the COIB with the authority to promulgate rules concerning the financial disclosure law and requires certain public employees to file an annual financial disclosure report with the COIB.[1] *See also* N.Y. City Charter § 2603(d) (stating that the COIB "shall issue rules concerning the filing of financial disclosure statements"). The Union serves as the Citywide collective bargaining representative and is an amalgam of 55 local unions representing approximately 120,000 City employees. Some of the Union's members are required to file an annual financial disclosure report with the COIB because their duties relate to the

[1] Financial disclosure reports concerning a particular calendar year are filed in the next calendar year. For example, reports pertaining to calendar year 2006 are filed in 2007.

negotiation or approval of contracts.[2] Such employees are known as "contract filers." Initial determinations concerning whether an employee must file a financial disclosure report are made by the employing agency.

Prior to the events that gave rise to the petition, and dating back to at least 1990, the City and the Union negotiated a financial disclosure appeals procedure, which allowed employees to challenge an agency designation requiring them to file financial disclosure reports. This procedure was memorialized in letter agreements dated March 14, 1990 ("1990 Agreement"), March 1, 2000 ("2000 Agreement"), and March 24, 2002 ("2002 Agreement"). Under each of these agreements, employees who requested a review of the requirement to file a financial disclosure report could appeal their agency's determination to a neutral referee provided by the New York City Office of Collective Bargaining ("OCB"). For example, the 2002 Agreement provides:

> If the employee is dissatisfied with [the Agency Head or the Agency Head's designee's] determination, the employee's collective bargaining representative shall have five (5) days from the receipt of the notification from the Agency Head or the Agency Head's designee to file a written appeal of that determination with the Deputy Chair for Dispute Resolution (Deputy Chair) of the Office of Collective Bargaining (OCB).

[2] Administrative Code § 12-110(b)(3)(a)(4) provides that persons who are required to file a financial disclosure report include:

> Each employee whose duties at any time during the preceding calendar year involved the negotiation, authorization or approval of contracts, leases, franchises, revocable consents, concessions and applications for zoning changes, variances and special permits, as defined by rule of the conflicts of interest board and as annually determined by his or her agency head or employer, subject to review by the conflicts of interest board.

See § 1-15 of the Rules of the Conflicts of Interest Board (Rules of the City of New York, Title 53, Chapter 1) (clarifying which employees with the responsibilities set forth above are required to file financial disclosure reports).

* * *

> Upon receipt of an appeal, the Deputy Chair shall appoint one of its referees from a list jointly agreed to by the parties to render a recommendation as to whether an employee should be recertified or decertified.

(Ans., Ex. 5) Under the 2002 Agreement, the City and the Union had the ability to file a written objection to the OCB neutral's advisory recommendation with the City's Department of Investigations ("DOI"). The DOI Commissioner would then make the final determination regarding whether the employee would have to file a financial disclosure report.

Effective January 1, 2004, Local Law 43 amended portions of the Administrative Code relating to the annual disclosure of financial interests by certain officers and employees of the City. Among other things, Local Law 43 transferred the authority to determine who was required to file financial disclosure reports from DOI to the COIB.[3] The COIB also was given rulemaking responsibility to establish a financial disclosure appeals procedure. In pertinent part, Local Law 43 states:

> c. Procedures involving the filing of financial disclosure reports.
>
> * * *
>
> 2. Each agency head shall determine, subject to review by the conflicts of interest board, which persons within the agency occupy positions that are described in clauses three and four of subparagraph (a) of paragraph three of subdivision b of this section, and shall, prior to the date on which the filing of the report is required, inform such employees of their obligation to report. *The conflicts of interest board shall promulgate rules establishing procedures whereby any employee may seek review of the agency's*

[3] Local Law 43 also changed the universe of employees who could be required to file annual financial disclosure reports based on duties related to the negotiation or approval of contracts because it eliminated the word "directly" from the requirement that contract filers be "*directly* involve[d] the negotiation, authorization or approval of contracts . . . ." (Ans., Ex. 2) (emphasis added)

determination that he or she is required to report.

Administrative Code § 12-110(c)(2) (emphasis added).

During the legislative process, the New York City Council Committee on Standards & Ethics issued a report, which explained that the "proposed amendments would require the COIB to adopt rules establishing procedures for employees to seek review of their agency's determination that they fall within this filing category." (Ans., Ex. 7) The COIB's rulemaking responsibility to establish a financial disclosure appeals procedure was not prescribed by prior versions of the Administrative Code.

On March 15, 2007, the City and the Union agreed to a financial disclosure appeals procedure effective for a one year pilot period covering the 2006 calendar year filing period ("Pilot Program").[4] Under the Pilot Program, an employee was required to file a notice of appeal form with the agency's financial disclosure liaison and then submit a written statement to the agency head or request a meeting with the agency head. The agency would then review the employee's appeal and notify the employee and the COIB of its decision. If the agency approved the appeal, the COIB would remove the employee from its list of required filers. If, however, the agency denied the appeal, the employee could elect to file a further written appeal

[4] Pursuant to the Pilot Program, the parties "reserve[d] all their respective rights, including by statute, rule, regulation and/or under a collective bargaining agreement." (Pet., Ex. B) No such language was contained in the 1990 Agreement, the 2000 Agreement, or the 2002 Agreement. The parties further agreed that:

> If any of the provisions of this letter agreement are found to be in conflict with the New York City Administrative Code § 12-110 and/or Rules of the City of New York, Title 53, §§ 1-02, 1-14, and 1-15, or any other applicable rules and regulations, it is understood by the parties that such law, or the applicable rules and regulations, shall govern. Such conflict shall not impair the validity and enforceability of the remaining provisions of this letter agreement.

(*Id*.)

with the COIB, which would either reverse the agency's determination or refer the matter for a hearing before an OCB neutral. After holding a hearing, the OCB neutral would issue "a report[] and recommendation to the COIB as to whether the appeal should be granted or denied." (Pet., Ex. B) Upon receipt of the OCB neutral's report and recommendation, the COIB would make the final determination regarding whether to grant or deny the employee's appeal.

The Pilot Program provided that, after the one year pilot period, "the parties would meet to discuss the experience and to recommend modifications, if any, based on the application of this appeals process." (Pet., Ex. B) By e-mail dated July 16, 2008, the parties agreed to extend the Pilot Program until June 2009.[5] The Union alleges that, sometime after the expiration of the Pilot Program in June 2009, it learned that the COIB intended to unilaterally implement a new financial disclosure appeals procedure upon its members.

In the fall of 2010, the COIB commenced its rulemaking process pursuant to the City Administrative Procedure Act, § 2603(a) of Chapter 68 of the City Charter, and Administrative Code § 12-110(c)(2). Three public meetings and a public hearing were held concerning the proposed financial disclosure appeals rule. Notice of each meeting and the hearing as well as notice of an opportunity to comment on the proposed rule was published in the City Record and on the COIB's website. According to the City, no member of the public attended any of the meetings or the hearing. It is undisputed that the COIB informed the Union of its intent to

[5] According to the City, 83 employees filed 220 appeals with the COIB under the Pilot Program. Only one case, however, was heard by an OCB neutral. The case concerned seven employees at the New York City Office of Comptroller, and the OCB neutral recommended that they were not required to file financial disclosure reports for the 2006 calendar year. The COIB ultimately rejected the OCB neutral's Report and Recommendation, ordering the employees to file the financial disclosure reports in question. Upon review under Article 78 of the Civil Practice Law and Rules, the COIB's determination was upheld by the Supreme Court of the State of New York, New York County. *Matter of Tirado v. N.Y. City Conflicts of Interest Board*, Index No. 112955/2009 (Sup. Ct. N.Y. Co. July 1, 2010).

implement a new financial disclosure appeals procedure and sought to elicit the Union's input in the rulemaking process.

On December 27, 2010, the Union sent a letter to the City objecting to "the proposed rule change by the [COIB] regarding appeals of the requirement for financial disclosure." (Pet., Ex. C) The Union wrote that the City and the Union had "negotiated a process for members to appeal their requirement for financial disclosure to a neutral labor relations professional" and that the procedure had been in place since 2007. (*Id*.) The Union further wrote that the financial disclosure appeals procedure is a mandatory subject of bargaining and demanded that the City cease and desist from making any changes that apply to its members unless and until an agreement was reached at the bargaining table.

On January 18, 2011, the City replied to the Union's letter, declining the Union's demand for bargaining over changes to the financial disclosure appeals procedure because, according to the City, "current New York State and New York City law preempts collective bargaining in this area." (Pet., Ex. D) In the letter, the City explained that implementing legislation expressly requires the COIB to adopt an appeals rule and that, as early as October 2010, the COIB solicited the Union's input regarding the rulemaking.

On February 4, 2011, the COIB published a notice of adoption of the new appeals rule in the City Record and on its website. Thirty days following publication, the rule became effective. Similar to the 2002 Agreement and the Pilot Program, the new rule provides that any employee seeking to appeal an agency's determination of the requirement to file a financial disclosure report must first file a notice of appeal form with his or her agency's financial disclosure liaison. The employee then is required to submit a written statement and any supporting documentation to his or her agency head or agency head's designee, who determines whether or not the

employee is required to file. If the agency grants the employee's appeal, the employee will not be required to file a financial disclosure report. If the agency denies the employee's appeal, the employee may further appeal to the COIB and supplement the filing with additional requested materials. Unlike the 2002 Agreement and the Pilot Program, there is no process that permits an appeal hearing before an OCB neutral. Instead, the new appeal rules provide that the COIB Director of Financial Disclosure will review the matter and recommend to the COIB whether the agency's determination should be upheld or reversed. The agency and the employee may submit written comments to the COIB regarding the COIB Director's recommendation. The COIB has the sole discretion to request additional information or to order an evidentiary hearing before the full COIB, or, in the discretion of the Chair of the COIB, before a member or members of the COIB or before the Executive Director. The COIB will then issue its decision.

On May 17, 2011, the Union filed the instant petition, alleging that the City violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain over the new financial disclosure appeals procedure. As relief for the alleged statutory violations, the Union requests that the Board order the City and the COIB to cease and desist from unilaterally changing the financial disclosure appeals procedure for DC 37 members, order the City and the COIB to bargain over any change and/or the practical impact of any change to the financial disclosure appeals procedure, and order any other relief that may be just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City failed to bargain in good faith in violation of NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the procedures for employees to appeal a

designation requiring the filing of an annual financial disclosure statement.[6] The new appeal procedure does not provide for a hearing before a neutral, and an employee's appeal now may be denied without a hearing of any kind because the COIB has the sole discretion regarding whether to order a hearing. As a consequence, the Union contends that due process and employee participation, including the ability to testify at a hearing, has been "materially, substantially[,] and significantly reduced." (Rep. ¶ 61) The Union asserts that the Board has consistently held that there is an obligation to bargain over procedures requiring employee participation in the disclosure of personal information, even where the procedures are necessary to achieve legitimate managerial concerns. Accordingly, the Union maintains that the appeals procedure is a mandatory subject of bargaining over which the City failed to bargain. The Union admits that the COIB sought to elicit the Union's input in the rulemaking process; however, the Union argues that the act of seeking the Union's input does not fulfill the City's bargaining obligation. The Union contends that the City's bargaining obligation is "compelling" because the parties had previously negotiated multiple appeals procedures. (Pet. Memo at 4)

The Union argues that the City's bargaining obligation was not preempted by statutory mandate because there is no language in the Administrative Code that evinces a plain and clear intent to remove this mandatory subject from the collective bargaining process. Instead, the

[6] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees[.]

Administrative Code left room for negotiation over the appeals procedure, which is evidenced by the fact that the City bargained over the appeals procedure in 2006 and 2007, after the COIB was directed by statute to promulgate such rules. The Union argues that the cases cited by the City are distinguishable because they involved the content of statutes that clearly preempted the duty to bargain. Although the Administrative Code authorizes the COIB to promulgate rules establishing an appeals procedure, it does not expressly or implicitly remove the subject from collective bargaining.

Further, the Union contends that the Pilot Program did not waive or alter the Union's rights under the NYCCBL to bargain over the financial disclosure appeals procedure. Rather, upon its expiration, the Pilot Program expressly reserved to the parties all their respective rights, including by statute, rule, regulation, and/or collective bargaining agreement. Therefore, the Union argues that, when the Pilot Program expired, the COIB remained bound by the parties' last recorded agreement regarding the financial disclosure appeal process and had an obligation to bargain over any changes to the procedure.

City's Position

The City argues that it did not violate NYCCBL § 12-306(a)(1) and (4) because the financial disclosure appeals rule adopted by the COIB was implemented pursuant to a statutory mandate. The City explains that the obligation to bargain over terms and conditions of employment may be preempted where an employer's actions are subject to a statutory mandate. According to the City, Local Law 43 clearly and unequivocally required the COIB to promulgate a rule establishing procedures for financial disclosure appeals. The City contends that the plain language of Local Law 43 and the New York City Council Committee of Standards & Ethics report evidence a clear intent to preclude bargaining over the matter. Thus, under Local Law 43,

the financial disclosure appeals procedure is a non-mandatory subject of bargaining, and the City had no obligation to bargain.

Further, assuming that a duty to bargain existed, the City and the COIB did not violate NYCCBL § 12-306(a)(1) and (4) based on the fact that the parties previously negotiated the Pilot Program. The one year Pilot Program covered the 2006 calendar year filing period and had an explicit expiration date. Thereafter, the parties expressly agreed to extend the expiration date of the Pilot Program until June 2009. The Pilot Program did not create any post-expiration obligations, and, additionally, the *status quo* provisions of the NYCCBL do not apply because the Pilot Program contained a valid sunset provision. Furthermore, even if there was no sunset provision, the COIB could implement a new financial disclosure appeals procedure because it is not a mandatory subject of bargaining. Accordingly, following the expiration of the Pilot Program, the COIB had the authority to promulgate a financial disclosure appeals procedure pursuant to the statutory directive of Local Law 43, and any allegation of a refusal to bargain is unfounded.

Moreover, the City argues that any change that the COIB made to the financial disclosure appeals procedure is *de minimis* because the new rule has little or no effect on the final determination of an appeal. According to the City, the rule promulgated by the COIB made only minor adjustments and continues to allow for multiple levels of review by individual agencies and the COIB. The fact that the process no longer includes review by an OCB neutral is not determinative because the OCB neutral only acted as a fact-finder, providing non-binding recommendations to the COIB, which made the final determination. Thus, the substance of the right to appeal has not been abolished or altered, but, rather, one step in the appeals procedure

has been minimally changed, and, therefore, employees' participation in the appeals process has not changed substantially.

DISCUSSION

It is undisputed that the COIB made a unilateral change when it adopted a new financial disclosure appeals procedure in early 2011. We find that the unilateral change to the financial disclosure appeals procedure was not *de minimis* because the decision to no longer provide employees with a hearing before an OCB neutral materially impacts employees' due process and participation in the appeal procedure. *See DC 37*, 4 OCB2d 43, at 8-9 (BCB 2011). Therefore, in order to assess whether the City committed an improper practice, the sole question for this Board to decide is whether the City had a duty to bargain over the changes that it made to the financial disclosure appeals procedure. For the following reasons, we find that the City had a duty to bargain over the financial disclosure appeals procedure.

NYCCBL § 12-307(a) requires public employers and employee organizations to bargain in good faith over wages, hours, and working conditions, as well as "any subject with a significant or material relationship to a condition of employment." *Municipal Highway Inspectors L. Union 1042*, 2 OCB2d 12, at 7 (BCB 2009); *see also DC 37*, 79 OCB 20, at 9 (BCB 2007); *NYSNA*, 51 OCB 37, at 8 (BCB 1993). The duty to bargain in good faith includes the duty to negotiate until an agreement is reached or the statutory impasse procedures are exhausted. *DC 37*, 4 OCB2d 19, at 22 (BCB 2011). Pursuant to NYCCBL § 12-306(a)(4), a public employer commits an improper practice if it fails or refuses to bargain over matters within the scope of mandatory bargaining. *See DC 37, L. 1457*, 1 OCB2d 32, at 26 (BCB 2008). A

unilateral change to a mandatory subject of bargaining amounts to a refusal to bargain in good faith. *See DC 37, L. 1457*, 77 OCB 26, at 12 (BCB 2006).

The New York State Court of Appeals has long recognized the "strong and sweeping" public policy in favor of collective bargaining and the "presumption . . . that all terms and conditions of employment are subject to mandatory bargaining." *Matter of City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 79 (2000); *see also Matter of City of N.Y. v. Patrolmen's Benevolent Assoc.*, 14 N.Y.3d 46, 58 (2009). Indeed, even where substantive decisions are entrusted by statute to a public employer, the procedures appurtenant to the decisions may nonetheless constitute mandatory subjects of bargaining. *See Matter of City of Watertown*, 95 N.Y.2d at 79-81; *DC 37*, 79 OCB 37, at 11 (BCB 2007). Thus, "[w]hile the City has the right to make and implement decisions concerning its management prerogatives without bargaining, the procedures for implementing decisions that affect terms and conditions of employment are mandatorily negotiable." *DC 37*, 75 OCB 13, at 11 (BCB 2005).

For example, in *Matter of City of Watertown*, the Court of Appeals held that, while a municipality's initial determination of disability status was a non-mandatory subject of bargaining, the procedures for challenging the determination had to be negotiated. 95 N.Y.2d at 79-80. Similarly, we found that a union had the right to request bargaining over the procedures implementing the requirements of Chapter 68, the New York City Conflicts of Interest Law. *Doctors Council*, 69 OCB 31, at 10 (BCB 2002). *See Local 333, United Marine Division, ILA*, 3 OCB2d 11, at 12 (BCB 2010) (ordering the City to bargain "over the implementation of federal drug testing regulations to the extent that compliance with them permits discretion in how to achieve such compliance"); *DC 37*, 77 OCB 34, at 14 (BCB 2006) (finding a duty to bargain over procedures for requesting FMLA leave); *DC 37*, 75 OCB 14, at 15 (BCB 2005) (holding

that a change in residency verification procedures may not be implemented unilaterally even though enforcement of the statutory residency requirement is a management right); *LBA*, 71 BCB 23 (BCB 1999) (finding procedures that implement the verification of overpayment of nonresident tax claims under City Charter § 1127 mandatorily negotiable), *affd., Matter of City of N.Y. v. Lieutenants Benevolent Assn.*, 285 A.D.2d 329 (1st Dept. 2001).

Although procedures affecting terms and conditions of employment, such as the financial disclosure appeals procedure, generally are mandatory subjects of bargaining, the City contends that any obligation to bargain over the financial disclosure appeals procedure that may have existed prior to the enactment of Local Law 43 was preempted by the legislature's amendment to the Administrative Code. We disagree. "[I]t is well established that compliance with statutory mandates other than the NYCCBL does not, of its own weight, discharge distinct statutory obligations arising under the NYCCBL." *DC 37, L. 376*, 1 OCB2d 37, at 10 (BCB 2008), *affd., Matter of City of N.Y. v. N.Y. City Bd. of Collective Bargaining*, Index No. 403010/08 (Sup. Ct. N.Y. Co., Oct. 23, 2009) (Lehner, J.). While we have recognized that bargaining is not permitted when a subject has been preempted by statute, the "strong and sweeping" public policy supporting collective bargaining and the NYCCBL's presumption in favor of it require that we not find preemption and "contravene our own expressed statutory mandate" unless there is "clear evidence that a statute . . . was designed to remove a particular subject from the ambit of mandatory collective bargaining . . . ."[7] *United Marine Division, L. 333, ILA*, 2 OCB2d 44, at 17; *see also UFA*, 43 OCB 4, at 8-9 (BCB 1989), *affd., Matter of*

[7] The Court of Appeals has similarly explained that "in order to overcome the strong State policy favoring the bargaining of terms and conditions of employment, any implied intention that there not be mandatory negotiation must be 'plain and clear', or 'inescapably implicit' in the statute. Anything less threatens to erode and eviscerate the mandate for collective bargaining." *Matter of Webster Cent. Sch. Dist. v. Pub. Empl. Relations Bd. of State of N.Y.*, 75 N.Y.2d 619, 627 (1990) (citations omitted).

Uniformed Firefighters Assn. v. Office of Collective Bargaining, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *affd.*, 163 A.D.3d 251 (1st Dept. 1990). Here, there is no evidence that the City Council intended to remove the financial disclosure appeals procedure from collective bargaining. Neither the statutory language nor the legislative history support an inference that the elimination of collective bargaining over the financial disclosure appeals procedure was contemplated, let alone intended, by the City Council's amendment to the Administrative Code.

Bargaining may be preempted by statute in the limited circumstance where the statutory provision contains "so unequivocal a directive to take certain action that it leaves no room for bargaining." *Matter of Bd. of Educ. of the Cent. Sch. Dist. of the City of N.Y. v. N.Y. State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 668 (1990). Thus, "[t]here is no duty to negotiate where explicit statutory mandates dictate conduct to such an extent that a public employer cannot impose variations of such conduct." *City of Schenectady*, 19 PERB ¶ 3051, at 3108 (1986), *affd.*, *Matter of City of Schenectady v. N.Y. State Pub. Empl. Relations Bd.*, 135 Misc.2d 1088 (Albany Co. Sup. Ct. 1986), *affd.*, 132 A.D.2d 242 (3d Dept. 1987), *app. denied*, 71 N.Y.2d 803 (1988). This Board was presented with such a scenario in *PBA*, 39 OCB 41 (BCB 1987). There, we found that a statute left no room for bargaining over the composition of a civilian complaint review board because the statute explicitly stated that "[t]he [civilian complaint review] board shall consist of twelve members, of whom six shall be members of the public so that one resident from each of the five boroughs of the city and one citywide representative are members." *PBA*, 39 OCB 41, at 7-8.

By contrast, a statutory directive to promulgate rules but which affords unfettered discretion as to the content of those rules does not remove that content from the scope of bargaining. *See Matter of Bd. of Educ.*, 75 N.Y.2d at 668. Here, the City Council did not enact

"so unequivocal a directive to take certain action that it leaves no room for bargaining." *Id.* The statute only prescribes that rules establishing a financial disclosure appeals procedure shall be promulgated; the nature and extent of the procedures applicable to financial disclosure appeals are left to the COIB to determine. *See State of N.Y.*, 37 PERB ¶ 6601, at 6605 (2004) (ALJ) (following *Matter of Board of Education* and finding no basis to conclude that the word "shall" as applied to procedural rule-making authority relieves the state of its duty to negotiate). Similarly, in *Matter of Board of Education*, "the statute [] explicitly [gave] the Board wide discretion concerning the substance of the reporting requirements" that it was directed to prescribe.[8] 75 N.Y.2d at 668. Where a statutory directive grants broad discretion to the employer in promulgating rules, it leaves sufficient room for bargaining to take place. *Cf. Matter of County of Chautauqua v. Civil Serv. Employees Assn.*, 8 N.Y.3d 513, 521-522 (2007) (following *Matter of Board of Education* and finding that a statutory provision limiting bumping rights did not preclude the arbitration of a grievance concerning layoffs, although the remedy available at arbitration may be constrained by the statute).

Further, in finding no explicit statutory prohibition against bargaining, the Court of Appeals in *Matter of Board of Education* noted that "[t]he Board itself viewed its power to act under the statute as discretionary and it refrained for nine years from acting at all." 75 N.Y.2d at 668. In the present matter, it is undisputed that for many years the parties negotiated a financial disclosure appeals procedure. The parties' longstanding practice of bargaining over the financial

[8] In *Matter of Board of Education*, the Court of Appeals considered whether there was a duty to bargain over the substance of employee disclosure requirements in light of two statutory directives mandating the New York City School Board to prescribe regulations and bylaws requiring employees to disclose certain financial interests. The Court of Appeals found that there was a duty to bargain over the substance of the reporting requirements set forth in one of the two statutory provisions because the statute afforded the New York City School Board discretion to determine the content of the financial reports.

disclosure appeals procedure continued after the enactment of Local Law 43. In addition, the COIB waited approximately seven years before unilaterally promulgating a new procedure allegedly in accordance with the statutory directive.

Because Local Law 43 left room for bargaining over the substance of the financial disclosure appeals procedure, the COIB "may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its [promulgation of the new procedures] were in accord with statutory law." *Doctors Council*, 69 OCB 31, at 10; *see also DC 37, L. 376*, 1 OCB2d 37, at 10 (BCB 2008), *affd.*, *Matter of City of N.Y. v. N.Y. City Bd. of Collective Bargaining*, Index No. 403010/08 (Sup. Ct. N.Y. Co., Oct. 23, 2009) (Lehner, J.). For the reasons stated above, we find that the financial disclosure appeals procedure is a mandatory subject of bargaining, and that the City committed an improper practice by unilaterally implementing a new procedure. Therefore, we grant the Union's petition.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO, docketed as BCB-2959-11, is granted; and it is further

ORDERED, that the City of New York and the New York City Conflict of Interests Board cease and desist from enforcing the rule, adopted in 2011, establishing a new financial disclosure appeals procedure; and it is further

ORDERED, that the City of New York and the New York City Conflicts of Interest Board bargain over the financial disclosure appeals procedure to the extent required by the New York City Collective Bargaining Law.

Dated: March 6, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

EXHIBIT 5