



CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

2 Lafayette Street, Suite 1010
New York, New York 10007
(212) 442-1400; (212) 437-0705 (Fax)

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City Resources: **Compensation for Overbooked Flights**

Charter Sections: 2601(8), 2604(b)(2), 2604(b)(3), 2604(b)(5),
2604(b)(13)

Board Rules: 1-01(a), 1-01(h), 1-13(a), 1-13(b)

Opinion Cited: 2006-05

Advisory Opinion No. 2018-1

The Conflicts of Interest Board (the “Board”) has been asked by an agency head whether the employees of that agency, when traveling on agency business, can accept compensation from airlines in exchange for the voluntary or involuntary surrender of a seat consistent with Chapter 68 of the City Charter, the City’s conflicts of interest law.

For the reasons set forth below, the Board finds that it would violate Chapter 68 for a public servant to accept compensation for the public servant’s personal use from an airline for the voluntary or involuntary surrender of a seat on a flight paid for with City funds. However, it would not violate Chapter 68 for a public servant to accept such compensation on behalf of the City. Additionally, it would be permissible in most circumstances for a public servant to accept and use vouchers offered by an

airline for food, accommodations, and ground transportation in connection with his or her delayed City travel.

I. Relevant Law

A. Chapter 68

Charter Section 2604(b)(2) states: “No 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.”

Board Rules Sections 1-13(a) and 1-13(b), implementing Charter Section 2604(b)(2), prohibit a public servant from using City time or City resources for a non-City purpose.

Charter Section 2604(b)(3) prohibits a public servant from using or attempting to use his or her City position to obtain any private advantage for the public servant or for any person or firm associated with the public servant.

Charter Section 2604(b)(5) states: “No public servant shall accept any valuable gift, as defined by rule of the board, from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city, except that nothing contained herein shall prohibit a public servant from accepting a gift which is customary on family and social occasions.” Pursuant to the mandate of Charter Section 2604(b)(5), the Board enacted its Valuable Gift Rule, Board Rules Section 1-01(a), which defines “valuable gift” to be “any gift to a public servant which has a value of \$50.00 or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form.”

Charter Section 2604(b)(13) states: “No public servant shall receive compensation except from the city for performing any official duty or accept or receive any gratuity from any person whose interests may be affected by the public servant's official action.”

In Advisory Opinion No. 2006-5, the Board determined that it would not be a violation of Chapter 68 for City employees to accumulate and use for personal travel the frequent flyer miles earned while traveling on official business. The Board reasoned that, because frequent flyer miles programs are widely available from most airlines to all their travelers, “there is no realistic possibility that the offeror is seeking to influence any governmental decision or to reward any employee for any official action.” Advisory Opinion No. 2006-5 at 10. The Board emphasized, however, that nothing in that Opinion should be read to limit the City or individual City agencies from the adoption and enforcement of rules “requiring the use of frequent flyer miles earned on travel purchased by the City only for subsequent City travel.” *Id.* at 11-12.

B. Federal Law

A federal executive branch employee who is denied a confirmed seat on a flight taken for government business must give any compensation received from the airline for the denied boarding to the employee’s agency. See 41 C.F.R. § 301-10.116. However, a federal employee who voluntarily vacates a confirmed seat on a flight taken for government business may keep any compensation received from an airline for the federal employee’s personal use, provided that (a) voluntarily vacating a seat does not interfere with the performance of official duties; (b) any additional travel expenses incurred for voluntarily vacating a seat cannot be reimbursed by the federal government; and (c) any delay in travel during duty hours will be charged to federal employee’s annual leave. See 41 C.F.R. § 301-10.117.

The United States Senate Travel Regulations, amended by the United States Senate Committee on Rules and Administration on May 19, 2017, states that any compensation resulting from denied boarding or voluntarily vacating a seat on a flight taken for government business is “a payment to the Senate, the agency for which and at whose expense the travel” was performed, and not a payment to the “Senate traveler.” See 163 Cong. Rec. S3132 (2017). Thus, any compensation from an airline for the voluntary or involuntary surrender of a seat on flight paid for with Senate funds may only be accepted as a payment to the Senate.

C. State Laws

A number of states have no rules or regulations that address the use of overbooked flight compensation received while on state government travel, including New York,¹ Texas,² and Wisconsin.³

Some states have specific regulations dealing with overbooked flight compensation received while on state government travel. For example, New Jersey requires that “any benefits that are earned as a result of State funding (such as future travel or financial vouchers given to individuals by carriers for flight delays) must be relinquished to the State.” See State of New Jersey, Office of Management and Budget, Circular No. 16-11-OMB, March 1, 2016, Travel Regulation § VIII.5. Oregon has determined that the “use of travel awards obtained while conducting state business for

¹ The New York State Joint Commission on Public Ethics, New York State Office of General Services, and the Office of the New York State Comptroller have no regulations or opinions regarding overbooked flight compensation received by a State employee while traveling on State business.

² A search of the Texas Ethics Commission and Textravel, a site created by the Texas Comptroller of Public Accounts to provide information on state travel laws to state agencies, found no law regarding overbooked flight compensation received by a state government employee while on state government travel.

³ Wisconsin deems credit vouchers received from airlines while on state government travel as belonging to the state, but only when part of an airline’s promotional programs. See State of Wisconsin, Office of State Employment Relations, July 1, 2015, Pocket Travel Guide at 2.

personal travel constitutes personal gain from state employment and violates ORS 244.040 (Prohibited use of official position or office).” See Or. Rev. Stat. § 292.230(2). Oregon’s Statewide Travel Policy has interpreted the definition of “travel award” to include “airline flight segment certificates or dollar bonuses that are offered to a traveler who is voluntarily or involuntarily bumped from an oversold flight.” See State of Oregon, Department of Administrative Services, Oregon Accounting Manual No. 40.10.00, October 2, 2017, Statewide Travel Policy § 141.

Other states require that travel “credits” earned during state government travel must accrue to the employer’s state agency, without specific mention of overbooked flight compensation.⁴ While, at least one state’s ethics commission has issued an advisory opinion allowing the personal use of overbooked flight compensation received for being involuntarily denied boarding while on state government travel, that commission was silent on the issue of overbooked flight compensation received for voluntarily surrendering a seat while on state government travel. See West Virginia Ethics Commission Advisory Opinion No. 2012-34 (September 6, 2012).

II. Background

Public servants travel as part of their official City duties to attend lectures, conferences, meetings, and other City-related events. This travel serves a City purpose, occurs on City time, and is generally paid for with City funds.

Airlines regularly overbook flights to boost financial performance and to offset “no-show” passengers. When overbooking results in more passengers than seats available, airlines solicit volunteers from the flight’s passengers to surrender their seats. If the solicitation of volunteers fails

⁴ See Minn. Stat. § 15.435(a) (2017) (“Whenever public funds are used to pay for airline travel by an elected official or public employee, any credit or other benefits issued by any airline must accrue to the benefit of the public body providing the funding”); Commonwealth of Virginia, Department of Accounts, CAPP Manual, Topic 20335, State Travel Regulations at 22 (“Travel credits, reduced rates, or free services received from public facilities (examples: airline, car rental agencies, motels, etc.) by individuals for whatever reason accrue to the Commonwealth”).

to garner enough open seats, airlines will deny boarding to select passengers. Airlines determine which passengers to deny boarding based on factors including seat assignments, fare classes, itinerary types, check-in times, frequent-flyer status, and whether a passenger has special needs.

In both voluntary and involuntary situations, airlines provide financial compensation in the form of cash, check, or vouchers redeemable for future travel on that airline (“overbooked flight compensation”). Airlines also offer vouchers for food, accommodations, and ground transportation in connection with delayed travel.

For the purposes of this Opinion, any major air carrier is presumed to do business with the City within the meaning of Charter Section 2601(8).

III. Analysis

Public servants are responsible for making decisions on how to spend taxpayer money: they purchase office supplies, invest in City infrastructure, choose which social service providers to utilize. If a public servant accrues a personal windfall from the expenditure of City funds, it casts doubt on the integrity of that decision-making process. The Board considers the acceptance for a public servant’s personal use of overbooked flight compensation for a flight paid for with City funds to be such a windfall.

Accepting overbooked flight compensation in connection with delayed travel on a flight paid for with City funds would not, in and of itself, constitute a misuse of a public servant’s City position in violation of Charter Section 2604(b)(3).⁵ However, the Board concludes that a public servant’s

⁵ A public servant is not using his or her City position by accepting overbooked flight compensation when such compensation is offered to all passengers regardless of the passenger’s status as City public servant. Therefore, the acceptance of overbooked flight compensation by a public servant traveling on City business will not violate Charter Section 2604(b)(3), provided that the public servant does not use his or her status as a City employee to obtain additional compensation or some other personal benefit beyond that which the airline has offered to other similarly situated passengers. See Charter Section 2604(b)(3); Advisory Opinion No. 2006-5 at 11 (“The Board concludes that City

acceptance for *personal use* of overbooked flight compensation whether for the voluntary surrender of a seat or the involuntary denial of boarding on a flight paid for with City funds, *would violate* Chapter 68's prohibition on using City resources for a non-City purpose. See Charter Section 2604(b)(2), pursuant to Board Rules Section 1-13(b). Overbooked flight compensation in connection with a flight paid for with City funds of necessity arises from and, therefore is, a City resource, and so may only be accepted on behalf of the City for use for a City purpose, not by a public servant for personal use.⁶ See Advisory Opinion No. 2006-5 at 11. The undesirability of the travel delay would not entitle the public servant to keep for personal use compensation provided by the airline that belongs to the City.

Unlike frequent flyer miles which the Board found were not easily transferable to the City, overbooked flight compensation is generally offered in a form that is easily transferable to the City, such as payments by cash or check.⁷ Accordingly, while traveling on City business, a public servant must accept overbooked flight compensation in a form that is transferable to the City and must transfer the compensation.⁸ See Charter Section 2604(b)(2), pursuant to Board Rules Section 1-

employees will not violate Chapter 68 if they retain for personal use frequent flyer miles accrued on City travel, provided that employees do not use their City positions to choose travel arrangements to accrue their own frequent flyer benefits at additional expense to the City.”).

⁶ This rule applies whether the City pays for the travel-related expenses directly or whether the travel-related expenses are offered by a private entity and accepted by the City for a public servant's official travel pursuant to Board Rules Section 1-01(h).

⁷ “[R]etention and use of these miles by employees for their personal travel might arguably violate the prohibition of Board Rules Section 1-13(b) against using City resources for personal purposes. However, because frequent flyer miles typically accrue to the individual traveler... [i]t would be impractical for the City to attempt to ‘harvest’ these miles, or to require City employees to segregate miles earned from City travel from those earned on personal travel and to use these segregated miles for future City travel.” Advisory Opinion No. 2006-5 at 11.

⁸ Because a public servant's first duty is to the City, a public servant may not volunteer to surrender his or her seat on a flight taken for City business if doing so would have a detrimental impact on the public servant's proper discharge of his or her official duties, such as when the travel delay would cause the public servant to miss the event for which he or she is traveling on City business. See Charter Section 2604(b)(2). In circumstances when volunteering would not be detrimental to the performance of a public servant's City duties, the public servant should attempt, where practical, to

13(b); Advisory Opinion No. 2006-5 at 11. In the unusual circumstance that an airline cannot or will not offer overbooked flight compensation in a form that is transferable to the City, each City agency shall determine the appropriate disposition of such non-transferable compensation.

On the other hand, in most circumstances a public servant may use the vouchers offered by airlines for food, accommodations, and ground transportation in connection with delayed City travel. To be sure, such benefits are also City resources, as they arise from the City resources used to acquire the airline travel, see Advisory Opinion No. 2006-5 at 11. But such vouchers are generally not transferable and are limited in use to the date of the delayed travel. A public servant may use such City resources in connection with his or her delayed official City travel provided that he or she does not use his or her City position to obtain greater benefits from the airline. See Charter Section 2604(b)(2), pursuant to Board Rules Section 1-13(b), and Charter Section 2604(b)(3).

In reaching this conclusion, the Board concluded that, under normal circumstances, overbooked flight compensation is neither a “valuable gift” within the meaning of Charter Section 2604(b)(5) nor compensation for performing official duties under Charter Section 2604(b)(13). Overbooked flight compensation is not a gift because a gift is given without consideration, whereas the cash, check, vouchers or other benefit provided by an airline to passengers who voluntarily surrender a seat or are involuntarily denied boarding is provided in exchange for the inconvenience of the passenger’s delayed travel and, therefore, is compensation rather than a prohibited valuable gift. Nor can overbooked flight compensation be considered compensation for performing an official duty or a gratuity for an official action from a person whose interest the public servant can affect as prohibited by Charter Section 2604(b)(13). A public servant’s surrendering a seat or being involuntarily denied boarding is not part of the performance of his or her official duties during City

contact his or her supervisor for approval prior to the voluntary surrender of his or her seat. City agencies may establish policies governing whether a City employee may voluntarily surrender his or her seat when traveling on City business.

travel. Moreover, the vast majority of public servants are not in a position to take official action that could affect the interest of an airline. Thus, overbooked flight compensation does not fall under Charter Section 2604 (b)(13).

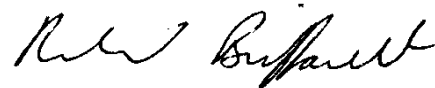
IV. Conclusion

A public servant may not accept compensation from an airline for the voluntary or involuntary surrender of a seat on a flight paid for with City funds for the public servant's personal use.

Regardless of whether a public servant has voluntarily surrendered a seat or been involuntarily denied boarding on a flight taken for City travel, the public servant must (1) request the overbooked flight compensation offered be issued in a form transferable to the City and (2) transfer such compensation to the City. See Charter Section 2604(b)(2); Board Rules Section 1-13(b); Advisory Opinion No. 2006-5 at 11.

In the unusual circumstance that overbooked flight compensation arising from City travel is not easily transferable to the City, the Board leaves to the discretion of individual City agencies to determine how best to dispose of such non-transferable compensation.

Finally, in the case of either voluntary surrender or involuntary denial of boarding, a public servant may accept and use vouchers offered by an airline for food, accommodations, and ground transportation in connection with his or her delayed City travel, provided that the public servant does not use his or her City position to obtain greater compensation from the airline. See Charter Section 2604(b)(3); Advisory Opinion No. 2006-5 at 11.



Richard Briffault
Chair

Fernando A. Bohorquez, Jr.
Anthony Crowell
Jeffrey D. Friedlander
Erika Thomas

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