March 16, 2021, Agenda – Open Meeting Matter

To: The Board

From: Ethan A. Carrier

Date: March 11, 2021

Re: Petition for Amendment of Board Rules § 1-07(b)(1).

By letter dated February 10, 2021 (**Exhibit 1**), City Council Minority Leader Steven Matteo has petitioned the Board, pursuant to City Charter § 1043(g),[1] to amend Board Rules § 1-07(b)(1) defining the date of termination City service. The Board is required by Charter § 1043(g) to respond to Leader Matteo's petition in writing within 60 days either by denying the petition, and stating the reasons for doing so, or by stating that the Board will initiate rulemaking on this subject, and specifying the date by which it will commence rulemaking.

Charter § 2604(d)(2) prohibits a former public servant from communicating for compensation with their former City agency for "one year after termination of such person's service with the city." Thus, knowing exactly when a public servant's City service ends is necessary for knowing when the one-year post-employment communication ban begins and ends.

While the date of termination is it clear for the vast majority of public servants, there is occasionally some ambiguity. The Board issued two advisory opinions addressing the question of when a public servant's City service has ended. First, in Advisory Opinion No. 1998-11 (**Exhibit**

[1] Charter § 1043(g) states: "Petition for rules. Any person may petition an agency to consider the adoption of any rule. Within sixty days after the submission of a petition, the agency shall either deny such petition in writing, stating the reasons for denial, or state the agency's intention to initiate rulemaking, by a specified date, concerning the subject of such petition. Each agency shall prescribe by rule the procedure for submission, consideration and disposition of such petitions. In the case of a board, commission or other body that is not headed by a single person, such rules of procedure may authorize such body to delegate to its chair the authority to reject such petitions. Such decision shall be within the discretion of the agency and shall not be subject to judicial review."

2), the Board primarily addressed the question of a non-managerial public servant who leaves City service but continues to receive payments for unused annual leave, sick leave, and compensatory time in a status called "terminal leave." The Board described the circumstance at issue as follows:

> The former public servant will continue to receive these checks at regular intervals until all leave balances are exhausted. The former public servant is not, however, working for the City, in not entitled to any City benefits (other than those available to former City employees) and does not continue to accrue any leave.[2]

Expressly adopting the approach taken by the New York State Ethics Commission, which stated that "[t]he date of termination is the date on which a former employee was removed from the payroll and ceased employment benefits related to active employment,"[3] the Board concluded: "It is the public servant's removal from the active payroll that triggers the imposition of the one-year appearance ban contained in Charter § 2604(d)(2)."[4] The Board added that a public servant who is on an unpaid leave of absence from their City position remains a public servant subject to the restrictions of Chapter 68 "irrespective of the length of such leave" as "these public servants may return to City service at the end of their leave without reapplying for a job."[5]

In Advisory Opinion No. 2019-1 (**Exhibit 3**), a public servant sought advice from the Board about the date of his termination of City service where he had approximately 15 months of accrued compensatory time, but his employing City agency had a policy of paying only 12 months of compensatory time to departing employees. The public servant and his City agency agreed informally that he would take a three-month compensatory time vacation, during which time his

[2] Advisory Opinion No. 1998-11 at 4.

[3] New York State Ethics Commission Advisory Opinion No. 91-12 at 244.

[4] Advisory Opinion No. 1998-11 at 5.

[5] *Id*. at 5-6.

agency would continue payroll deductions for his pension and commuter benefits, and he would continue to be covered by City health, vision, and dental insurance. After this three-month vacation, the public servant would formally retire, begin terminal leave, and start receiving regular payments for his unused leave, but his benefits conditioned on current employment would cease. Citing Advisory Opinion No. 1998-11, the Board determined that:

> the requesting public servant remained an employee of the City until his resignation was triggered after concluding his three-month leave of absence. Although the former public servant performed no City work during the three months during which he "spent down" his accrued compensatory time, he retained his City position to enable him to receive, pursuant to his agency's policy, payment for both the three months of compensatory time and the remaining twelve-month balance after his resignation was triggered. His status as an employee during the three-month period is further evidenced by his continued access to City healthcare, dental, pension, and commuter benefits during that period.[6]

In 2020, the Board amended Board Rules § 1-07, expanding the prior rule to codify the holdings of a number advisory opinions on post-employment subjects, including Advisory Opinions Nos. 1998-11 and 2019-1 (**Exhibit 4)**. The Board received no comments on the proposed rule from the City Council in response to the rulemaking notice. In promulgating current Board Rules § 1-07(b)(1), the Board sought draw a simple bright line rule and thus established that the last day of City service was the later of either the last day a former public servant performed official City duties or the last day the public servant received benefits conditioned upon current City employment after resigning, retiring, or being terminated. Accordingly, Board Rules § 1-07(b)(1) states:

> For purposes of Charter § 2604(d)(2), the date of termination of a former public servant's City service is the later of the last day a former public servant performed official City duties or the last day they received benefits conditioned upon current City employment.

[6] Advisory Opinion No. 2019-1 at 3.

Leader Matteo advises that, while Board Rules § 1-07(b)(1) may work well for most public servants, it has created an unintended result when combined with the City Council's uncommon, if not unique, policy of routinely continuing to provide pension accrual and health care benefits to councilmanic staff who are on terminal leave. These councilmanic staff do not accrue new leave, do not perform work for the City, surrender their City cellphones and laptops, and cannot unilaterally return to their City jobs, and thus appear indistinguishable from the typical public servant on terminal leave, but for their continued receipt of certain benefits normally conditioned on current City employment. As a result, the one-year post-employment communication ban begins later and therefore ends later for these councilmanic staff, and they remain current public servants during this period, possibly unwittingly subject to the full restrictions of Chapter 68, such as the moonlighting, valuable gifts, and political activity restrictions.

Staff has conducted some preliminary research into the various forms of terminal leave used by public servants and believes that, looking in particular at the other indicators discussed in Advisory Opinion Nos. 1998-11 and 2019-1, Board Rules § 1-07(b)(1) can be amended to avoid the instant problem without diminishing its specificity and utility. Accordingly, Staff recommends that the Board initiate rulemaking and so advise Leader Matteo.

Leader Matteo also requests that Board Rules § 1-07(b)(1) not be applied to putatively former councilmanic staff who left the City Council before the rule was final, suggesting instead the set of factors considered by the Board in Advisory Opinion No. 1998-11 be applied to these staff (**Exhibit 1 at 3**). If the Board chooses to initiate rulemaking on this subject, Staff recommends that the Board adopt this approach for councilmanic staff until the amended rule is final.

☐ DISTRICT OFFICE
900 SOUTH AVENUE, SUITE 403
STATEN ISLAND, NY 10314
(718) 980-1017
FAX (718) 980-1051

☐ CITY HALL OFFICE
NEW YORK, NY 10007
(212) 788-7159

smatteo@council.nyc.gov

THE COUNCIL OF
THE CITY OF NEW YORK

STEVEN MATTEO

MINORITY LEADER

COUNCIL MEMBER • 50TH DISTRICT
STATEN ISLAND

CHAIR

STANDARDS AND ETHICS

COMMITTEES
FINANCE
RULES, PRIVILEGES AND ELECTIONS

SUBCOMMITTEE ON CAPITAL

February 10, 2021

Mr. Jeffrey Friedlander
Chair
NYC Conflicts of Interest Board
2 Lafayette Street, Suite 1010
New York, NY 10007

Dear Chair Friedlander:

I write pursuant to New York City Charter (Charter) § 1043(g), requesting that the Conflicts of Interest Board (COIB) consider amending its recently issued Rule 1-07(b) (the Rule), the final adoption of which was published on October 28, 2020. This Rule was part of a number of rules published on that date dealing with Chapter 68's post-employment restrictions contained in Charter § 2604(d).

Subdivision b of section 1-07 of Chapter 1 of Title 53 of the Rules of the City of New York entitled "Date of Termination of City Service" (the "Rule") states in relevant part that "For purposes of Charter § 2604(d)(2), the date of termination of a former public servant's City service is the later of the last day a former public servant performed official City duties or the last day they received benefits conditioned upon current City employment."

As a Council Member the Rule will not affect me. Council Members do not accrue leave time and, therefore, their last day of service is almost always their last day on which they receive any benefits as a result of being an employee. However, as a former Council staffer and principal to a number of dedicated Council staffers whose jobs generally run for the duration of my time in office, I am concerned that the Rule may leave former staffers worse off than those in the past or force them to choose between certain crucial benefits and potential future employment opportunities.[1]

[1] It is my understanding that at least temporarily because of the Rule, the Council has decided to give employees the option of being paid out in a lump sum or being placed on "terminal leave." However, as we do not know the impact this could have on the budget especially as we near the end of term when the vast majority of Council Members will be out of office, the Council might decide that this is not a good permanent solution. Indeed, the impending end of the term for so many Council Members illustrates the lack of suitability of the Rule's reasoning to situations such as this. Come next January, many lower level Council Staffers could be out of a job with no ability to return to the Council and forced to make a choice: (1) Do they give up employer paid health insurance through "terminal leave" so that they might tell a prospective employer that they may appear before the Council after a year; or (2) do they go on "terminal leave" to continue their employer paid health insurance during their job search and risk having their search made more difficult because the practical effect would be to extend their one-year ban?

EXHIBIT 1

Currently when a Council staffer's employment ends, a number of factors mark the end of their employment. They must turn in their City Council identification card and any City equipment (cell phone, laptop, etc.), their access to the Council offices ceases, their access to Council email, computer systems, and networks terminate, they have no authority to carry out any of the work functions they may have had as an employee, and may no longer hold themselves out as an employee of the council. When separation is voluntary, they submit a resignation letter setting forth an effective date – the last date of actual work. Additionally after the effective date in their resignation letter, they cannot change their mind and come back to work at the Council without actually being rehired via the customary hiring process. I, as a Council Member, no longer have the authority to direct them to perform city functions as their job may have previously required. From the Council's perspective, they are no longer employees.

Commonly, in cases where time is accrued as a result of unspent leave time, the former employee is placed on a status called "terminal leave" in order for the Council to pay out their previously accrued leave balances. While they continue to accrue pension credit while on "terminal leave," they do not accrue additional leave time in this status. During this time, they can continue to be covered by employee health insurance. Relying on entitlements like health benefits or pension accruals as indicia of employment with the City is problematic in that such benefits or pension membership are optional. It is entirely possible that an employee, while eligible, may not ever receive the very benefits that this rationale uses to determine their status.

By making the date of termination "the later of" the last day of work "or" the last day they received work-related benefits, the Rule elevates benefits that an agency may seek to provide to former employees for their welfare or convenience, over actual indicia of employment in determining whether an employee's service has ended. I do not think that providing employees with health insurance while they are being paid out for time they earned while employed and/or allowing them to continue to accrue pension credit should be the determinative factors when employment ends for purposes of calculating the one-year ban.

While mayoral agencies may adhere to a policy that managers are paid out in a lump sum, I believe that the Rule (and prior COIB opinions that can be read to support this interpretation) cannot be fairly applied to the "terminal leave" situation. Council staffers, especially those who work for members, may tend to work for a member for shorter periods, in some cases (at least historically) for lower salaries. Currently, the vast majority are considered managerial employees regardless of level, but are not subject to the Mayoral executive order requiring them to be paid for accrued leave in a lump sum.

In a notable number of cases, a Council Member may leave office before the end of their term and staffers can be out of a job overnight. It is not illegitimate for the Council to decide that paying people out for their leave balances while providing health insurance and pension credit is an equitable way to compensate an employee for time that they earned and perhaps were unable to take before the end of their employment. This practice should not have the practical effect of "extending" the one year ban on appearing before the Council contained in Charter §2604(d).

There is even language in some of the COIB opinions supporting this position. Advisory Opinion 98-11 contrasts an employee who has resigned and is still being paid out for accrued sick and vacation time (albeit without continuing benefits) with one who is on leave and "who may return to City service at the end of their leave without reapplying for a job." From reading this opinion alone, it might be reasonable to conclude that the case of "terminal leave" in which a Council employee resigns and the terminal leave begins after that resignation date, is closer to the employee who is being paid out for accrued sick and vacation time rather than the employee who may return to City service when their leave is over. In both the "terminal leave" case and the case of an employee who has left but is being paid out for past service, the employee has resigned, cannot simply return to work, and is only being paid out for "previously rendered service." (COIB A.O. 98-11). Because we believe this was a reasonable reading of the Advisory Opinion and the status of the situation prior to the issuance of the Rule, I would also ask COIB not to apply the Rule to any Council staffer who left prior to the date the Rule became effective.

It is for the reasons set forth in this letter that I would ask the Conflicts of Interest Board to reconsider the Rule, especially as it applies to the Council "terminal leave" status. I believe that other non-mayoral City entities may have this status as well, but at least at the Council, employees who are on "terminal leave" or similar status lack the critical indicia of employment for purposes of the Rule's determination of the date of termination of a former public servant's City service.

Thank you for your attention to this important matter.

Very truly yours,

Steven Matteo
Minority Leader, 50th District
Chair, Committee on Standards & Ethics

cc: Carolyn Miller, Executive Director
Ethan Carrier, General Counsel

EXHIBIT 1

CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD
2 Lafayette Street, Suite 1010
New York, New York, 10007
(212) 442-1400
Fax: (212) 442-1407 TDD: (212) 442-1443

Post-Employment Restrictions
Separation from City Service

Charter Sections: 2604(d)(2)
2604(d)(3)

Advisory Opinion 98-11

The Conflicts of Interest Board has received requests from several public servants asking when the one-year post-employment appearance ban contained in Charter Sections 2604(d)(2) and (d)(3) begins to run for public servants leaving City service. For the reasons discussed below, the Board has determined that, for the purposes of the application of Charter Sections 2604(d)(2) and (d)(3), the date of termination from City service (and thus, the date on which the one-year appearance ban begins to run) is the date on which a public servant effectively resigns and stops working for the City; it is not the date on which the public servant receives all payment by the City for unused leave balances or payment for lagged paychecks.

Discussion

Chapter 68 contains a number of restrictions governing the conduct of City employees after they have left City service. These restrictions, contained in

Charter Section 2604(d), are called the "post-employment restrictions." The primary purpose of these restrictions is to protect and preserve the integrity of government decision-making.

One of the post-employment restrictions, contained in Charter Section 2604(d)(2),[1] is often referred to as the "one-year ban." This Charter provision prohibits former public servants from appearing[2] before their former City agency within one year of separation from City service. Thus, for one year after leaving City service, former public servants may not write letters, attend meetings, make telephone calls or otherwise be in contact with their former agencies on non-ministerial matters.[3] Certain former high-level public servants may not have contact with their branch of City government for one year after

---

[1] Charter Section 2604(d)(2) provides that "[n]o former public servant shall, within a period of one year after the termination of such person's service with the city, appear before the city agency served by such public servant."

[2] "'Appear' means to make any communication, for compensation, other than those involving ministerial matters." Charter Section 2601(4).

[3] Charter Section 2501(15) defines a "ministerial matter" as "an administrative act, including the issuance of a license, permit or other permission by the city, which is carried out in a prescribed manner and which does not involve substantial personal discretion."

leaving City service.[4]

After a public servant leaves City service, he or she receives a lagged paycheck representing salary payments for service rendered prior to leaving City service. In addition, departing public servants are entitled, subject to the time and leave regulations of the City, to payment for unused annual leave, compensatory time and sick leave. The manner in which managerial and non-managerial employees receive such payment varies.

Managerial employees are paid a lump sum. After an audit by the Comptroller's Office, managerial employees who have left City service receive payment for unused leave time in accordance with the City's time and leave regulations.

---

[4] Charter Section 2604(d)(3) contains a broader appearance ban for certain designated high-level public servants: "No elected official, nor the holder of the position of deputy mayor, director of the office of management and budget, personnel director, commissioner of general services, corporation counsel, commissioner of finance, commissioner of investigation or chair of the city planning commission shall, within a period of one year after termination of such person's employment with the city, appear before any agency in the branch of city government served by such person." Charter Section 2604(d)(3). Charter Section 2604(d)(3) delineates two branches of City government: the legislative branch, consisting of the City Council and office of the City Council; and the executive branch, consisting of all other agencies of the City.

In contrast, non-managerial employees continue to receive periodic checks, ordinarily in an amount and at intervals equivalent to their previous paychecks, in payment for unused annual leave, sick leave and compensatory time. The former public servant will continue to receive these checks at regular intervals until all leave balances are exhausted. The former public servant is not, however, working for the City, is not entitled to any City benefits (other than those available to former City employees) and does not continue to accrue any leave.

Because employees continue to receive lump sum payments or regular checks from the City for unused leave time, the question arises whether these public servants have terminated their City service for purposes of Chapter 68.

The New York State Ethics Commission in its Advisory Opinion No. 91-12 considered this very issue. In that Opinion, the State Ethics Commission stated: "[T]he date of termination is the date on which a former employee was removed from the payroll and ceased employment benefits related to active employment." State Ethics Commission Advisory Opinion No. 91-12 at 244. That Opinion also states:

> Removal from the payroll means that the

> individual is not reflected in the payroll records of the appointing authority as being eligible to receive payment for services to be rendered prospectively. The receipt of "lagged" paychecks with payment for unused leave accruals does not extend the period "on the payroll" because it involves payment for previously rendered services or accrued benefits.

State Ethics Commission Advisory Opinion No. 91-12, n. 3.

Conclusion

The Board adopts the approach taken by the State Ethics Commission. Therefore, for purposes of the post-employment restrictions in Chapter 68, the date of termination from City service is the date a public servant effectively resigns and stops working for the City. It is the public servant's removal from the active payroll that triggers the imposition of the one-year appearance ban contained in Charter Section 2604(d)(2). The fact that the former public servant is receiving lagged paychecks or payment for unused leave does not alter or extend the date of termination from City service.

Accordingly, when a public servant resigns and is removed from the payroll, the then former public servant is subject to the one-year appearance ban contained in Charter Sections 2604(d)(2) and (d)(3).

The Board specifically notes, however, that public servants who are "on leave" from their positions for personal reasons, such as child care, are still considered public servants for purposes of Chapter 68, irrespective of the length of such leave. Even if public servants "on leave" from their City positions are not be getting paid by the City, they are nevertheless employees of their respective agencies; these public servants may return to City service at the end of their leave without reapplying for a job. All employees who are "on leave" are public servants, subject to all of the restrictions contained in Chapter 68.

Bruce A. Green
Acting Chair

Jane W. Parver
Benito Romano

Dated: December 7, 1998

98-147.ao/jf

EXHIBIT 2

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)
www.nyc.gov/ethics
@NYCCOIB
www.instagram.com/nyccoib

Advisory Opinion No. 2019-1

The Conflicts of Interest Board (the "Board") received a request for advice from a former public servant concerning the application of the post-employment restrictions of Chapter 68 of the New York City Charter. The former public servant asked, for purposes of calculating the end of the one-year appearance ban of Charter Section 2604(d)(2), whether his service with the City terminated on the day on which he began a three-month leave of absence and stopped performing work for his City agency or when he formally resigned from the City agency at the end of that leave.[1] Charter Section 2604(d)(2) states in relevant part: "No former public servant shall, within a period of one year after the termination of such person's service with the City, appear before the City agency served by the public servant." For the reasons stated below, the Board advised the former public servant that his service with the City terminated when he formally resigned from the City agency at the end of his three-month leave of absence.

When the public servant began planning to resign from City service he sought to be compensated for approximately 15 months of

[1] The advice contained in this Advisory Opinion applies only to the requesting public servant. See Charter Section 2604(c)(4).

accrued compensatory time. However, the public servant's employing City agency maintained a policy of paying only 12 months of compensatory time to departing employees. The public servant and the City agency reached an unmemorialized agreement to enable the public servant to receive payment for all 15 months of compensatory time in which the City agency agreed that on the public servant's last physical day in the office an exit interview would be conducted and the public servant would provide a letter of resignation. For three months, the public servant did no work for the City but he remained an employee as he "spent down" his accrued compensatory time; payroll deductions continued for his pension and commuter benefits; and he continued to be covered by City health, vision, and dental insurance. At the end of three months, his resignation was formally triggered. At this time, he stopped receiving the benefits afforded to employees but continued to receive payments for the remaining 12 months of accrued compensatory time.

In Advisory Opinion No. 1998-11, the Board addressed the question of when Chapter 68's post-employment restrictions begin for a former public servant receiving lagged paychecks for periodic payment for unused leave after ceasing City service.[2] The Board noted that a former public servant receiving periodic payments for unused leave "is not, however, working for the City, is not entitled to any City benefits (other than those available to former City employees) and does not continue to accrue any leave." The Board therefore advised that "the date of termination from City service is the date a public servant effectively resigns and stops working for the City. It is the public servant's removal from the active payroll that triggers the imposition of the one-year appearance ban." Advisory Opinion No. 1998-11 at 5. The Board distinguished

[2] Advisory Opinion No. 1998-11 applies only to the public servants who requested it. See Charter Section 2604(c)(4).

the former public servant at issue from a public servant who is "on leave" from his or her position, as a public servant on leave remains on the active payroll. Id. at 4.

Here, the Board determined that the requesting public servant remained an employee of the City until his resignation was triggered after concluding his three-month leave of absence. Although the former public servant performed no City work during the three months during which he "spent down" his accrued compensatory time, he retained his City position to enable him to receive, pursuant to his agency's policy, payment for both the three months of compensatory time and the remaining twelve-month balance after his resignation was triggered. His status as an employee during the three-month period is further evidenced by his continued access to City healthcare, dental, pension, and commuter benefits during that period.

The Board thus advised the former public servant that his service with the City terminated, for the purposes of Charter Section 2604(d)(2), when he resigned from his City agency at the end of the three-month period. At that time he was no longer an employee of the City and became subject to the post-employment restrictions of Chapter 68, specifically the start of his first post-employment year.

Richard Briffault
Chair

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

Dated: October 10, 2019

New York City Conflicts of Interest Board

Notice of Adoption of Final Rules

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Sections 1043, 2603(a), and 2603(c)(4) of the City Charter that the Conflicts of Interest Board has adopted Board Rules amending its rules related to the post-employment restrictions.

The proposed Rules were published in the City Record on August 26, 2020, and a public hearing was held on September 28, 2020. No comments were received, either prior to or during the hearing. The Conflicts of Interest Board now adopts the following Rules.

STATEMENT OF BASIS AND PURPOSE

The post-employment restrictions of Chapter 68 of the City Charter, contained in Charter § 2604(d), seek to balance two competing City interests:

(1) the need to recruit to public service talented individuals who may wish to return to or pursue private sector employment after their City service, and

(2) the need to prevent public servants from trading on connections made in City government service or using confidential City information for the benefit of themselves or future employers.

See Volume I, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 28-29; see also Advisory Opinions ("A.O.") Nos. 1993-11 at 6, 1993-12 at 4, 1994-15 at 11-12, and 1996-1 at 7.

Since it was established in 1989, the Board has issued 31 advisory opinions, totaling 210 pages, providing guidance on the application of the post-employment restrictions set forth in Charter § 2604(d) and on how the Board has considered requests for waivers of those restrictions. Because of the limited scope and duration of the post-employment restrictions, requests for waivers of Charter § 2604(d) are never merely technical, and the Board has engaged in a detailed review of the competing interests at issue in each request. With the benefit of almost 30 years of experience in evaluating requests for post-employment waivers, and in fulfillment of the mandate of Charter § 2603(c)(4) to determine which of its advisory opinions "have interpretative value in construing provisions of this chapter," the Board codifies:

- Definitions of terms within Charter § 2604(d), such as "agency served" and "termination of service."
- A new "totality of the circumstances" standard with a non-exclusive list of four factors, drawn from advisory opinions, that the Board will consider when evaluating requests for waivers of the post-employment restrictions.

EXHIBIT 4

- The standard, also drawn from advisory opinions, for evaluating a unique type of post-employment work: consulting for one's former City agency, known as "consulting back."

The rule addresses the following 22 advisory opinions:

> A.O. No. 1991-8, A.O. No. 1991-19, A.O. No. 1992-13, A.O. No. 1992-17, A.O. No. 1992-37, A.O. No. 1992-38, A.O. No. 1993-11, A.O. No. 1993-12, A.O. No. 1993-18, A.O. No. 1993-30, A.O. No. 1994-15, A.O. No. 1994-19, A.O. No. 1994-22, A.O. No. 1995-1, A.O. No. 1996-1, A.O. No. 1998-11, A.O. No. 2000-2, A.O. No. 2008-1, A.O. No. 2008-4, A.O. No. 2009-5, A.O. No. 2012-2, and A.O. No. 2019-1.

Certain post-employment issues considered by the Board are not the subject of this rulemaking, specifically the advisory opinions interpreting Charter § 2604(d)(6), which the Board reserves for the subject of possible future rulemaking. See A.O. No. 1993-13, A.O. No. 1994-7, A.O. No. 1994-21, A.O. No. 1997-1, and A.O. No. 1999-3. The Board is not adopting A.O. Nos. 1989-1, 1992-2, 1992-32, and 2007-1, which apply only to the public servants who requested those opinions.

1. Definitions

a. Post-Employment Appearances

Board Rules § 1-07(a)(1) codifies the Board's long-standing interpretation that the prohibitions in Charter §§ 2604(d)(2), 2604(d)(3), and 2604(d)(4) against a former public servant appearing before or communicating with a former agency or branch of government served include appearances before or communications with representatives of that agency or branch serving on a City board or commission. For example, an employee of the New York City Department of Housing Preservation & Development ("HPD") would be prohibited by Charter § 2604(d)(2) from appearing at a meeting of the board of the New York City Housing Development Corporation ("HDC") within the former HPD employee's first post-employment year if the HPD representative sitting on the HDC board is participating in that meeting. See A.O. No. 2008-1 (advising that when a public servant simultaneously holds positions at multiple City agencies the post-employment appearance restriction of Charter § 2604(d)(2) applies to each position); see also COIB v. Sirefman, COIB Case No. 2007-847 (2009) (fining the former Interim President of the New York City Economic Development Corporation ("EDC") $1,500 for appearing before the Hudson Yards Development Corporation ("HYDC") within one year of his resignation from EDC because the current EDC President was present at a meeting attended by the former Interim President in the EDC President's capacity as an *ex-officio* Member and Director of HYDC). By contrast, a former HPD employee would not be prohibited from communicating with other employees of HDC, nor would the former employee be prohibited from communicating with or appearing before meetings of the HDC board from which the HPD representative was absent or recused.

Board Rules § 1-07(a)(2) codifies the Board's interpretation that the appearance and communication restrictions of Charter § 2604(d) exclude appearances and communications related to non-City matters. In particular, the Board has advised public servants that the

following communications are not prohibited by Charter § 2604(d): (1) social communications; (2) soliciting a public servant's personal legal business or other types of personal services; and (3) seeking an endorsement for a run for political office. See A.O. No. 2009-5 (advising a former public servant that the post-employment appearance restriction did not prohibit communication with a current public servant in their private capacity, such as reaching out to perform personal legal work, asking them to leave City employment to join the former public servant's new firm, or soliciting a political endorsement).

b. Date of Termination of City Service

To advise a public servant about the applicability of Charter § 2604(d), the Board must determine when the public servant's City service ended. In Board Rules § 1-07(b)(1), the Board incorporates the method of calculating the date of a public servant's termination from City service set forth in A.O. Nos. 1998-11 and 2019-1: that is, the later of either the last day a former public servant performed official City duties or the last day the public servant received benefits conditioned upon current City employment after resigning, retiring, or being terminated. The one-year appearance prohibition of Charter § 2604(d)(2) will run from that date.

In Board Rules § 1-07(b)(2), the Board retains the substance of the former version of Board Rules § 1-07 and codifies A.O. No. 2008-1 for public servants who serve multiple City agencies. See also A.O. No. 1993-30 (providing advice on the tolling dates of the one-year appearance restriction to a public servant who served two agencies in succession before leaving City service). The rule clarifies that a former public servant who has served more than one City agency, concurrently or sequentially, is prohibited from appearing before each such agency for one year after the termination of service, as determined by Board Rules § 1-07(b)(1), with each such agency.

2. Otherwise Prohibited Conduct

a. Waivers of the Post-Employment Restrictions

In contrast to the broad prohibitions against full-time public servants having ownership interests in or positions at firms that do business with any City agency, for the vast majority of public servants, the post-employment appearance restrictions apply only to a former public servant's communications with their former employing City agency or branch of government and only for one year after leaving City service. Similarly, the lifetime post-employment particular matter restriction applies only to a narrow set of matters (as defined in Charter § 2601(17)) on which a former public servant worked personally and substantially while in City service. See, e.g., A.O. No. 1992-38 (advising that a public servant was not prohibited from working on a project where her involvement had been personal but not substantial).

However, because public servants requesting waivers of the post-employment restrictions are seeking to engage in conduct in which the relationships developed in their former City position may influence decision-making by their former City agency, or that may put them in a position to utilize their superior familiarity with, and ability to navigate, the subtle culture of their former agency to achieve preferential treatment for their private employer, or involve the

exact particular matters on which the former public servant personally and substantially worked while in City service, the Board has analyzed requests for waivers of the post-employment restrictions differently from waivers of other provisions of Chapter 68.

In evaluating the many requests for waivers it has received, the Board has sought to balance adhering to the post-employment restrictions of the Charter with the asserted need for a particular former public servant to engage in otherwise prohibited conduct to further an identified City interest. In A.O. No. 1991-8, the Board announced that it would issue waivers of Chapter 68's post-employment restrictions "sparingly, and only in exigent cases." A.O. No. 1991-8 at 2-3; see also A.O. No. 1992-13 (declining to issue a waiver to a public servant seeking to communicate with their former branch of government on behalf of a private employer).

The Board has traditionally considered four factors when evaluating requests for post-employment waivers:

(1) the relationship between the City and the public servant's private employer;

(2) the benefits to the City (as opposed to the public servant) if the waiver were granted;

(3) the likelihood of harm to other organizations similar to, or in competition with, a public servant's prospective employer if the waiver were granted; and

(4) the extent to which the public servant has unique skills or experience suited to the particular position that the prospective employer would be hard-pressed to find in another person (see, e.g., A.O. No. 2012-2).

In applying this long-utilized test, the Board has determined that, when the former public servant's private employer was a not-for-profit organization working in a public-private partnership with the City in which the private employer and the City share an identity of interest, all four factors "need not be satisfied." A.O. No. 2000-2 at 4; see A.O. No. 2008-4. The Board has further explained that, for private employers that devote substantial private resources to support the work of a City agency but which do not meet the standard of a public-private partnership, requests for waivers will "be analyzed in light of [the private employer's] hybrid status." A.O. No. 2008-4 at 10.

Since 1991, the Board has grappled with articulating and applying a standard to requests for waivers of the post-employment restrictions that would fulfill the objectives of the post-employment restrictions while also addressing the needs of City agencies and the City's changing relationship with not-for-profit partners. Over the course of these years, it has become clear that the Board would benefit from the consideration of a more complete set of circumstances. Board Rules §1-07(c)(1) codifies a new "totality of the circumstances" standard for determining whether a waiver of the post-employment restrictions would conflict with the purposes and interests of the City. As part of how the Board would evaluate the totality of the circumstances, Board Rules §1-07(c)(1) includes a non-exhaustive list of four factors drawn from the Board's past deliberations on post-employment waivers.

EXHIBIT 4

Board Rule § 1-07(c)(1)(i): When a former public servant's work for a private employer involves furthering an interest identical to that of the City, there are diminished concerns about such former public servant using their special access or knowledge to the detriment of the City's interests. Therefore, the Board has historically been more likely to grant requests for waivers for former public servants who work for entities that the City controls or effectively controls. See A.O. 2008-4 (observing that the Board would look favorably upon requests to work for City-affiliated not-for-profits when those entities were created by City agencies and had a governing structure that involved public officials as officers or board members). Additionally, in the past the Board has granted waivers in situations where the former public servant's private employer operates as a public-private partnership with the City and devotes substantial private resources to support the work of a City agency. See A.O. No. 2008-4 (stating that, "[w]hen the City and [a private employer] share an 'identity of interest,' the City benefits from encouraging former City employees to effectively remain in public service" by working for that private employer); A.O. No. 1994-22 (granting a waiver for a public servant to take a position at a bio-medical facility which operated as a joint venture between the City, the State, and a university).

Board Rule § 1-07(c)(1)(ii): When a former public servant is uniquely suited to perform work that would benefit the City, rather than their private employer, the proposed post-employment activities do not conflict with the purposes and interest of the City. See A.O. No. 2012-2 (stating that, in evaluating a request for a waiver of the post-employment restrictions, "the Board looks for a demonstration of the benefit *to the City*, not to the new employer") (emphasis in original). The potential benefit to the City has been articulated in two ways: either by virtue of the former public servant's unique technical or professional expertise or because at a small not-for-profit, there is no other employee able to do the prohibited work. See A.O. No. 1992-17 (granting a public servant a waiver of the post-employment restrictions to work for an entity when his expertise would help remedy contractual disputes between the entity and the agency); A.O. No. 1994-19 (granting a waiver of Charter § 2604(d)(3) when a public servant's proposed communications on behalf of a not-for-profit entity would primarily benefit the City).

Board Rule § 1-07(c)(1)(iii): Because public servants who have worked for the City for brief periods of time are less likely than those who served for extended periods of time in City government to have developed the type of connections that could afford them undue influence or unfair access, the Board has issued post-employment waivers for these public servants more readily. See COIB Case No. 2019-463 (40 days); COIB Case No. 2017-790 (36 days); COIB Case No. 2017-214 (38 days); COIB Case No. 2015-646 (40 days); COIB Case No. 2013-381 (granting a waiver for a former paid summer intern). Additionally, public servants whose City service was part-time on a consultative body have been granted post-employment waivers more frequently in light of the limited role they played in City government.

Board Rule § 1-07(c)(1)(iv): A former public servant communicating with their former agency on behalf of a private employer shortly after departing may pose a risk of harm to firms similar to or in competition with that private employer, given the former public servant's familiarity with, and ability to navigate, the processes of their former agency. To mitigate this risk, the Board will continue to disfavor requests in which the former public servant proposes to communicate with units or divisions at the former agency with which he or she worked regularly. See A.O. No. 1993-8 (stating that one of the purposes of the post-employment restrictions was to

prevent the exertion of special influence on government decision-making by, among other things, preventing contact with former City colleagues on behalf of a new employer); A.O. No. 1994-15 (granting a waiver of the one-year appearance restriction for a public servant working for a unique not-for-profit created by New York State to communicate with a unit of his former City agency other than the one for which he worked). Additionally, the Board will continue to disfavor requests for waivers for former public servants who wish to communicate with their former agencies to seek new business for their private employers in the forms of licenses, permits, grants, or contracts. Compare A.O. No. 1992-17 (granting a waiver of the post-employment restrictions to a public servant when her work at a private employer "would help remedy pending contractual disputes between the entity and the agency") with A.O. No. 1993-18 (declining to grant a waiver to a public servant whose work at his private employer would focus, in part, on encouraging the participation of his private employer's clients in programs run by his former City agency); see also A.O. No. 1991-19 (prohibiting a public servant making an otherwise ministerial FOIL request from bypassing normal procedures to contact individuals directly).

Additionally, in Board Rules § 1-07(c)(2), the Board establishes two procedural requirements for waivers of the post-employment restrictions. First, the Board will decline to issue waivers when the request is made after undue delay. In considering such requests, the Board's decision-making is hindered by a lack of time to evaluate the specific circumstances of the request as well as the complications that, in the Board's experience, often accompany such requests, most commonly the former public servant having already accepted (or started) a job that requires otherwise prohibited communications. The Board has emphasized this factor to ensure that self-created exigencies do not take precedence over other relevant factors. See A.O. No. 2012-2 (advising that request for waivers of the post-employment restrictions should be submitted in advance of departure from City service); A.O. No. 1992-37 (noting with disapproval that a former public servant did not request a waiver prior to having accepted the position with a private employer).

Second, the Board will decline to issue waivers when a former public servant has, in the course of soliciting employment, violated Charter § 2604(d)(1), which requires recusal from any particular matters involving a private employer while soliciting or negotiating for a position with that employer. See A.O. No. 1992-37 (observing that a former public servant's solicitation and negotiation for a position with a private employer that had business dealings with her own agency raised the possibility that a violation of Charter Section 2604(d)(1) had occurred).

3. Consulting for a Former City Agency

As part of its experience applying the post-employment restrictions, the Board has also considered how those restrictions impact the City's ability to retain the expertise held by retiring and departing City employees. The Board's approach to this issue has been informed by Charter § 2604(d)(6), the so-called "government-to-government" exception, which provides that the post-employment restrictions "shall not apply to positions with or representation on behalf of any local, state or federal agency." Historically, the Board has determined that a City agency's consulting agreement with a former employee falls within the government-to-government exception when: (1) the former agency has a pressing need for the former employee's services,

(2) the former agency contracts directly with the former employee, not through a firm employing the former public servant, and (3) the contracting compensation is comparable to that of the employee's salary at the time he or she left the agency. See A.O. Nos. 1993-12; 1995-1. Board Rules § 1-07(d)(1) provides a new set of five more specific and detailed conditions which, if met, would permit a former public servant to be retained directly, rather than through an employer, as a consultant by the City agency for which he or she worked with the written approval of the agency head. Such written approval must then be provided to the Board, which will post that information on its website.

The Board has also reviewed matters where, for reasons of administrative convenience, a City agency seeks to employ a former employee as a consultant through an intermediary entity, rather than directly as a consultant. This often arises when a City agency seeks to retain a public servant as a consultant through a temporary staffing agency with which the agency already has a staffing contract. In this case, because the former public servant would be an employee of the temporary staffing agency or other intermediary entity, the "government-to-government" exception of Charter § 2604(d)(6) would not apply. However, because in many circumstances the consulting arrangement is motivated by the same City purpose that motivates direct consulting arrangements, the Board has often issued waivers to public servants whose former City agencies seek to employ them in this manner when it has determined there is no likelihood that the intermediary entity may reap disproportionate benefits from the City agency's need to retain its former employee. See A.O. No. 1995-1 at 6. In Board Rules § 1-07(d)(2) the Board articulates a standard that such waivers must meet, incorporating the requirements of Board Rules § 1-07(d)(1), but also requiring that the intermediary entity is selected by the City rather than by the public servant.

New material is underlined.

Section 1. Section 1-07 of Chapter 1 of Title 53 of the Rules of the City of New York, relating to post-employment limitations on the activities of former public servants, is REPEALED and a new Section 1-07 is added to read as follows:

§1-07 Post-Employment

(a) Post-Employment Appearances

(1) For the purposes of the restrictions set forth in Charter § 2604(d) on appearances by a former public servant before their former City agency, or branch of City government, or the City, such prohibited appearances include compensated communications with representatives of that former agency or branch of City government sitting as members of City boards, commissions, or other governmental entities.

(2) The restrictions set forth in Charter § 2604(d) on appearances by a former public servant do not include appearances related to non-City matters.

(b) Date of Termination of City Service

EXHIBIT 4

(1) For purposes of Charter § 2604(d)(2), the date of termination of a former public servant's City service is the later of the last day a former public servant performed official City duties or the last day they received benefits conditioned upon current City employment.

(2) A former public servant who has served more than one City agency within one year prior to the termination of such public servant's service with the City may not appear before each such City agency for a period of one year after the termination of service from each such agency.

(c) Waivers of the Post-Employment Restrictions

(1) In determining whether to issue a waiver pursuant to Charter § 2604(e) of the post-employment restrictions of Charter § 2604(d) the Board will consider the totality of the circumstances, including, but not limited to:

(i) whether the City shares an identity of interest with, or controls or effectively controls, the former public servant's private employer;

(ii) whether the former public servant is uniquely suited to perform work that would benefit the City because:

1. the private employer has no other employees able to engage in the proposed appearances or work; or

2. the former public servant has rare or unique technical or professional expertise necessary to engage in the proposed appearances or work;

(iii) whether the former public servant is unlikely to exercise undue influence on government decision-making because they were a public servant for only a short period of time; and

(iv) whether the former public servant's proposed appearances or work do not pose a risk of harm to firms similar to, or in competition, with the former public servant's private employer.

(2) The Board will not grant requests for waivers of Charter § 2604(d):

(i) made after undue delay; or

(ii) for former public servants who were not fully and formally recused from all particular matters involving the private employer from the time of soliciting or negotiating for employment with the private employer through the termination of their City service.

(d) Consulting for a Former City Agency

(1) Pursuant to Charter § 2604(d)(6), with the written approval of the agency head, a former public servant may be directly retained by their former City agency as a consultant within one year of the termination of their City service, and may work on particular matters with which they were personally and substantially involved, provided that:

(i) the consulting arrangement is made for the purpose of continuing or completing work left unfinished by the former public servant at the time their City service terminated, or for training their replacement, or for filling a vacancy until a replacement can be hired;

(ii) the duration of the consulting arrangement is no longer than reasonably necessary;

(iii) the former public servant has technical, professional, or other subject-matter expertise or skills not otherwise available among the agency's employees;

(iv) the compensation is comparable to what the former public servant last earned at the agency; and

(v) within 30 days the written approval of the agency head is disclosed to the Conflicts of Interest Board, which approval will be posted on the Board's website.

(2) Where a proposed consulting arrangement between a City agency and a former public servant does not meet all of the requirements set forth in paragraph (1) of this subdivision and is therefore not covered by Charter § 2604(d)(6), a waiver may be sought for such a proposed arrangement pursuant to Board Rules § 1-07(c).

(3) Pursuant to Charter § 2604(e), a consulting arrangement between a former public servant and their former agency that meets the requirements of paragraph (1) of this subdivision but under which the former public servant is retained through a private firm for the administrative convenience of the City may be entered into if:

(i) the former public servant played no role in the recommendation or selection of the private firm in his or her work as a public servant; and

(ii) after receiving written approval of the head of the City agency, the Board determines that the proposed consulting arrangement would provide a benefit to the City distinct from the benefit to the former public servant or to the private firm.

EXHIBIT 4