

Ethics Laws for Municipal Officials Within New York City

By Jennifer K. Siegel

New York City's ethics law is contained in chapter 68 of the New York City Charter and is enforced by the New York City Conflicts of Interest Board (the "Board"), successor to the New York City Board of Ethics, established in 1959. The Board is one of the oldest, if not the oldest, ethics boards in the country.



Chapter 68 contains virtually all of the provisions necessary for a good ethics law. This article will review the most significant of those, including: (1) Moonlighting, (2) Ownership Interests, (3) Political Activities, (4) Gifts, (5) Post-Employment, (6) Volunteer Activities, (7) Financial Disclosure and (8) Enforcement.

Keep in Mind: Some Charter Sections Always Apply

Some Charter sections always apply to a public servant's conduct, whether the specific issue is moonlighting, volunteer positions, political activities, or any other topic. These universal prohibitions, which the Board calls the "(b)(2), (b)(3), and (b)(4) warnings," will be referred to throughout this article. Charter §§ 2604(b)(2), (b)(3), and (b)(4) provide that any non-city activity performed by a public servant must be performed on the public servant's own time, without the use of city resources, including personnel and letterhead (unless otherwise authorized), and must be performed without divulging confidential city information. The Charter's waiver provision, discussed in detail below, does not apply to (b)(2), (b)(3), or (b)(4).

Making Ends Meet: Moonlighting

A full-time foster care worker at the Administration for Children's Services (ACS) wants to work part-time for a foster care agency with contracts with ACS. Is this allowed? Opportunities for part-time work by New York City public servants abound, and who doesn't need extra money from time to time? Although moonlighting by New York City public servants is generally permitted, there are a few restrictions.

Full-time and part-time public servants may moonlight part-time with a person or firm which has *no* business dealings with the city,¹ provided that they comply with (b)(2), (b)(3), and (b)(4). *Full-time* public servants are prohibited from moonlighting for a firm which the public servant knows is engaged in business dealings with the city.² The rule for *part-time* public servants is less restrictive, prohibiting moonlighting only when the firm is engaged in business dealings with the public servant's own agency.³ Since many firms in New York City are engaged in business with the city, without a waiver provision, many public servants might be prohibited from moonlighting at all.

Waivers. Waivers allow public servants to hold an otherwise prohibited position if written approval is granted by the public servant's agency head *and* the Board determines that the position would not conflict with the purposes and interests of the city. To determine whether to grant a waiver, the Board considers the hours of the part-time work and whether there is any relationship between the public servant's city and non-city jobs.

In the above example, the ACS employee would require a waiver to work part-time for the foster care agency. If the ACS Commissioner gives his approval, and if the ACS employee has nothing to do with the contract agency in his or her city job and nothing to do with ACS in his or her work for the contract agency, the Board would probably grant the waiver.

Common Requests and Special Rules. The most common waiver requests come from public servants who want to teach at local universities and colleges, almost all of which engage in business dealings with the city. Such waivers are generally granted, provided that the public servant does not teach his or her job or the confidential inner workings of the city. Special rules exist for public servants who work through a temporary agency,⁴ for public servants who have a private law practice,⁵ for those who seek to give compensated expert testimony⁶ and for those who seek to work part-time for another city agency.⁷

Having Your Own Business: Ownership Interests

Public servants are a diverse group of people with many different interests. Many public servants have their own businesses or have an interest in a family

business. Chapter 68 refers to ownership in a business as an "ownership interest." Public servants are prohibited from having ownership interests in firms that do business with the city.⁸ Also, ownership interests are imputed to a public servant if they are held by the public servant's spouse, domestic partner or unemancipated child. There are, of course, some exceptions to this prohibition. Excluded from the rule are firms whose shares are publicly traded and any interests held in a pension plan, deferred compensation plan, or mutual fund, if those investments are not controlled by the public servants. Moreover, in certain circumstances, the Board may grant an order under Charter §§ 2604(a)(3) and (a)(4), which allows a public servant to retain an otherwise prohibited ownership interest.

Determinations. In determining whether to grant an order, the Board considers the nature of the public servant's official duties, the manner in which the interest may be affected by any action of the city, and the appearance of conflict to the public, as well as the financial burden on the public servant which would be caused by the Board's decision. Generally, when issuing an order, the Board requires the public servant to recuse himself or herself from acting on matters involving the private firm's business dealings with the city. Public servants are generally allowed to retain their ownership interests in and sit on the board of directors of cooperative or condominium apartments where they reside.⁹

To Run or Not to Run: Political Activities

Chapter 68 does not for the most part prohibit voluntary political involvement by public servants, provided that the general provisions of (b)(2), (b)(3), and (b)(4) are adhered to.

Political Fundraising. Public servants are prohibited from coercing other public servants to engage in political activities, from requesting any subordinate public servant to participate in any political campaign and from compelling or requesting any person to make political contributions under threat of prejudice or promise of advantage.¹⁰ High-level public servants and those with "substantial policy discretion," other than elected officials, are prohibited from requesting any person to make a political contribution for any candidate for an elected office of the city or for an elected official of the city who is a candidate for another elective office.

Special Rules. Elected officials, high-level public servants and public servants with substantial policy discretion may not be members of national or state committees of political parties, may not serve as an assembly district leader of a political party or as chair or officer of a county committee or the county executive committee of a political party. Certain exceptions exist for City Council members. Chapter 68 does not prohibit public servants from seeking elective office.

The Golden Goose: Gifts

From time to time public servants get offered items of value from persons or businesses engaged in business dealings with the city. In some cases, gifts may be accepted; in most, however, acceptance of a gift is a conflict of interest. The general prohibitions of (b)(2) and (b)(3), which state that public servants may not use their official positions for personal financial gain and may not engage in activities which are in conflict with the proper discharge of their official duties, are particularly pertinent when discussing gifts.

The General Rule. The Board's Gift Rule allows acceptance of gifts if they are valued at less than \$50.¹¹ The \$50 value is calculated as either one gift or a number of gifts from the same source or related sources within any 12-month period. Any gift over \$50 must be returned, or if that is impracticable must be reported to the agency's inspector general who shall determine the disposition of the gift. A gift is not only cash, but may also be lunch or dinner, entertainment, travel or anything else of value. Even small gifts, however, may have the appearance of a conflict and thus should not be accepted. Indeed, even a \$5 gift might in some circumstances violate the general prohibitions in (b)(2) and (b)(3).

Gifts that May Be Accepted. Gifts given on family or social occasions may be accepted so long as the real reason for the gift is a social relationship and there is no appearance of a conflict.¹² Awards and plaques in recognition of public service may be accepted, provided that their value is less than \$150.¹³ In some cases, meals, refreshments or travel-related expenses may be accepted as well. Certain gifts may be accepted by agencies (as opposed to individuals) as a gift to the city from private entities which are engaged in business dealings with the city.

The Party's Over: Post-Employment Restrictions

Negotiating. Public servants may not negotiate for a position with a private firm with which they are currently dealing in their city job.¹⁴ For example, Linda is a contract manager for a city agency and is currently working with ABC Corp. as part of her city job. ABC Corp. enjoys working with Linda and asks her for a resume. Can Linda give ABC her resume? Linda cannot give ABC her resume until she has finished the project she is working on with them. She may, however, ask her supervisor to remove her from the project and then submit her resume.

The One-Year Ban. Public servants who leave city service may not appear before their former city agencies for one year from the date of their separation from the city.¹⁵ An appearance is a "communication for compen-

sation" and includes making phone calls, attending meetings, writing letters and signing documents.¹⁶

Exceptions to the Ban. One exception to the one-year ban is for an appearance that is ministerial in nature.¹⁷ For example, a former public servant may drop off papers to his or her former agency, but may not have a discussion about what is contained in those papers. In addition, a former public servant may communicate with his or her former agency when that communication is incidental to an otherwise permitted appearance before another agency or body. This exception does not apply, however, if that proceeding was pending in the agency while the former public servant was employed there.¹⁸

Particular Matter. The lifetime bar is a permanent prohibition and covers any matter on which the public servant worked personally and substantially while in city service. Personally and substantially, which is construed very narrowly, means that the public servant had responsibility over the matter through decision, approval, recommendation, investigation, or other similar activities. This ban applies to both paid and unpaid appearances.

Confidential Information. A former public servant may never divulge confidential information they may have learned as a result of their city employment.

Exceptions. The post-employment prohibitions do not apply to those public servants who leave the city to work for another government agency. This is referred to as the "government-to-government" exception. Another exception applies to those public servants who seek to contract with their former agencies to perform identified tasks. Such "consulting back" allows a former public servant to appear before their former agency prior to the expiration of the one-year appearance ban and to work on particular matters.¹⁹

Waivers. Waivers of the post-employment provisions are available, but are granted by the Board very sparingly. Factors used by the Board in determining whether to grant a waiver include: the relationship of the city to the public servant's prospective employer; the benefits of the waiver to the city (as opposed to the public servant); and the likelihood of harm to other organizations or companies in competition with the public servant's prospective employer if the waiver is granted.

For the Greater Good: Volunteer Activities

Public servants become involved in a myriad of volunteer activities for charitable organizations. Generally, volunteer work is ok, but there are a few restrictions. Volunteer work done for not-for-profit organizations that have *no* business with the city is permissible,

provided that the restrictions contained in (b)(2), (b)(3) and (b)(4) are adhered to.

Business Dealings with the City. If the not-for-profit has business with the city or receives funding from the city, a public servant may still volunteer for the organization, but there are four conditions that must be met. First, the public servant may not take part, directly or indirectly, in the organization's business dealings with the city. Second, the organization may not have business dealings with the public servant's own agency, except where it is determined by the public servant's agency head that the volunteer activity is in furtherance of the purposes and interests of the city. Third, the public servant must perform work for the organization on his or her own time; and fourth, the public servant may not receive any compensation for the work. If the public servant wants to be involved in the business dealings with the city, a waiver may be possible.

Fundraising. Fundraising for a not-for-profit is generally allowed, but there are restrictions for some elected officials and high-level appointed public servants.²⁰ Elected officials may not take an "active role" in fundraising on behalf of charitable organizations. "Active" means making telephone calls, signing letters or otherwise directly soliciting for a charitable group. They may, however, serve as the chair or a member of an honorary committee for a fundraising event or be honored at a fundraising event. This is referred to as "passive" fundraising.

The New (b)(2) Rule. This rule allows public servants to perform certain volunteer work on city time, using city resources, and city personnel but not city letterhead. Such activities must be pre-approved by the public servant's agency head and by the Board.

Let it All Hang Out: Financial Disclosure

Approximately 12,000 city employees file financial disclosure reports with the Board each year. The Board retains the reports, which are available for public viewing, for six years. City employees may submit a request to the Board to have some or all of their financial disclosure reports withheld from public inspection. Failure to file a timely report may lead to monetary fines of up to \$10,000.

Who Files. City employees who are agency heads, deputy agency heads, assistant agency heads, paid members of a board or commission, and each city employee who is a member of the management pay plan or whose salary exceeds \$68,100 must file a financial disclosure report with the Board. In addition, any employee whose duties involve contracts, even if they are not one of the above types of employees, must file with the Board.

Required Information. The financial disclosure form requires a myriad of information. Those filing must include, for example, any non-city positions held, even if they are honorary and uncompensated; any earned and unearned income in excess of \$1,000 from any non-city source; any reimbursements for travel-related expenses; any gifts over \$1,000; and securities, real estate and business investments over \$1,000. Also to be disclosed is certain information about the public servant's spouse and unemancipated children.

The Power of the Badge: Enforcement

A public servant or former public servant who violates any of the prohibitions discussed above is subject to an enforcement action by the Board.

Procedure. Ordinarily, an enforcement action begins with the receipt of a complaint. The Board may (1) dismiss the complaint if it fails to state allegations of a charter violation; (2) refer it to the Department of Investigation (DOI) for investigation if the complaint states a possible charter violation; (3) issue an "initial determination of probable cause," or, in the case of a minor violation or if related disciplinary charges are pending, refer the alleged violation to the head of the agency employing the public servant accused of a charter violation; or (4) issue a private warning letter. If the complaint has been referred to DOI, DOI makes a formal, confidential report to the Board. The Board then determines whether to proceed with a probable cause notice or to dismiss. If the Board decides to proceed with an action, the target of the investigation is afforded full due process. If the matter is not resolved at this stage, the Board may decide to go forward with a hearing. Most hearings are conducted at the Office of Administrative Trials and Hearings (OATH). After a hearing, OATH issues a non-binding, written report and recommendation, at which time both parties may submit comments to the Board. The Board considers OATH's recommendation and all the evidence as well as any comments submitted by the parties in making its own final findings of fact, conclusions of law and order. The Board's findings, conclusions, and order are made public only if a violation is found to have occurred. Once there is a final Board action, an appeal may be made to state court.

Penalties. Penalties include civil monetary fines of up to \$10,000 per violation, recommendation of suspen-

sion or removal from office, or voiding of a contract. A District Attorney may separately prosecute a Chapter 68 violation as a misdemeanor in a criminal case.

Most public servants want to do the right thing. A comprehensive ethics law such as Chapter 68 provides a roadmap to guide them down the right path.

Endnotes

1. "Business dealings with the City means any transaction involving the sale, purchase, rental, or disposition of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but does not include a transaction involving a public servant's residence or a ministerial matter." Charter § 2601(8).
2. Charter § 2601(12).
3. See Charter § 2604(a)(1)(a).
4. Any public servant who works during any 12-month period for more than 30 days for any individual firm which is a client of a temporary agency, whether consecutive or in seriatim, is deemed to have a position with the firm and therefore must obtain a waiver if the firm engages in business dealings with the city. Advisory Opinion No. 98-5.
5. See Advisory Opinion No. 91-7 and Charter §§ 2604(b)(6) and (b)(7).
6. See Charter §§ 2604(b)(6) and (b)(8).
7. See Advisory Opinion No. 95-26.
8. See Charter § 2601(16), as amended by Board Rules § 1-11 (definition of ownership interest).
9. See Advisory Opinion No. 92-7. See also Advisory Opinions Nos. 94-27, 95-11, and 95-25.
10. See Charter §§ 2604(b)(9), (b)(11), (b)(12).
11. See Charter § 2602(b)(5) and Board Rules § 1-01.
12. See Board Rules § 1-01(c).
13. See Board Rules § 1-01(d).
14. See Charter § 2604(d)(1).
15. See Charter §§ 2604(d)(2), (d)(3).
16. See Charter § 2601(4).
17. See Charter § 2601(15). See also Charter § 2604(d)(7).
18. See Charter § 2604(d)(2) and Advisory Opinion No. 96-6.
19. See Advisory Opinion Nos. 93-12, 95-1.
20. See Advisory Opinion No. 91-10. See also Advisory Opinion Nos. 93-15, 93-26, 95-2, 95-7, 98-14.

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