

AGENCY RULES

CONFLICT OF INTEREST BOARD

FINAL RULES

The Conflicts of Interest Board adopted the following rule at its meeting on July 25, 1991.

Procedure for Hearings Conducted by the Conflicts of Interest Board

Statement of Basis and Purpose of Rule:

Pursuant to the authority vested in the Conflicts of Interest Board (the "Board") by Section 2603(h) of the New York City Charter, the Board is authorized to promulgate procedural rules for conducting adjudicatory hearings. Such hearings are to be held following the Board's determination that there is probable cause to believe that a public servant has violated a provision of the Conflicts of Interest Law (City Charter Chapter 68) or the financial disclosure law (Administrative Code Section 12-110). The rules proposed herein provide that the hearings shall be conducted by the Board or by the Office of Administrative Trials and Hearings, whenever designated by the Board.

Section. Procedural Rules for Hearings.

I. Initial Determination.

(a) **Notice.** If the Board makes an initial determination, based on a complaint, investigation or other information available to the Board, that there is probable cause to believe that a public servant (which for purposes of Charter Section 2603(h) includes a former public servant) has violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, the Board shall notify the public servant of its determination in writing. The notice shall contain a statement of the facts upon which the Board relied for its determination of probable cause and a statement of the provisions of law allegedly violated. The notice shall afford the public servant an opportunity, either orally or in writing, to respond to, explain, rebut, or provide information concerning the allegations in such notice within twenty days of receipt of the notice. The notice shall also inform the public servant of his right to be represented by counsel or any other person, and shall include a copy of the Board's procedural rules.

(b) **Request for a Stay.** In response to the Board's notice, the public servant may apply for a stay of the proceedings, for good cause shown. The Board may grant or deny such request in its sole discretion.

(c) **Admission of Facts.** If, in response to the Board's notice, the public servant admits to the facts contained therein or to a violation of the provisions of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code and elects to forgo a hearing, the Board may, after consulting with the head of the agency served or formerly served by the public servant, or in the case of an agency head, after consulting with the Mayor, issue an order finding a violation and imposing the penalties it deems appropriate under Chapter 68 of the City Charter, provided, however, that pursuant to Charter Section 2603(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may recommend to the City Council such penalties as it deems appropriate. When a penalty is recommended, the City Council shall report to the Board what action was taken.

(d) **No Probable Cause Finding.** If, after receipt of the public servant's response, the Board determines that there is no probable cause to believe that a violation has occurred, the Board shall dismiss the matter and inform the public servant in writing of its decision.

(e) **Service by the Board.** Notices, petitions, orders and other documents originating with the Board shall be served on the public servant (i) personally or by certified mail, return receipt requested, or (ii) by telephonic (FAX) or similar transmission, and (iii) in either case also by first class mail to the public servant's last known address.

(f) **Computation of Time.** The computation of any time period referred to in these rules shall be calculated in calendar days, except that when the last day of the time period is a Saturday, Sunday or legal holiday, the period shall run until the end of the next following business day. Where these rules prescribe different time periods for taking an action depending upon whether service of papers is personal or by mail, service of papers by telephonic (FAX) or similar transmission shall be deemed to be personal service, solely for purposes of calculating the applicable period of time.

II. Commencement of Formal Proceedings and Pleadings.

(a) Determination of Probable Cause.

If, after consideration of the public servant's response, the Board determines that there remains probable cause to believe that a violation of the provisions of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code has occurred, and the public servant has not elected to forgo the hearing, the Board shall hold or direct a hearing to be held on the record to determine whether such violation has occurred.

If the public servant is subject to the jurisdiction of a state law provision or collective bargaining agreement which provides for the conduct of a disciplinary hearing by another body, the Board shall refer the matter to the appropriate entity. The hearing shall be conducted in accordance with the rules of that entity.

The Board may also refer a matter to the public servant's agency if the Board deems the probable cause violation to be minor or if other disciplinary charges are pending there against the public servant.

(b) Petition.

(1) The Board shall institute formal proceedings by serving a petition on the public servant. The petition shall set forth the facts upon which the Board relied in making its determination that there is probable cause to believe that the public servant has violated Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, as well as the applicable provisions thereof which are alleged to have been violated. The petition shall also advise the public servant of the public servant's rights to file an answer, to a hearing, to be represented at such hearing by counsel or any other person, and to cross-examine witnesses and present evidence.

(c) Answer.

(1) **General Rule.** The public servant shall answer the petition by serving an answer on the Board within eight days after service of the petition if service was personal, or within thirteen days after service of the petition if service was by mail, unless a different time is fixed by the Board. The public servant shall serve the answer personally or by certified or registered mail, return receipt requested.

(2) **Form and Contents of Answer.** The answer shall be in writing and shall contain specific responses, by admission, denial or otherwise, to each allegation of the petition and shall assert all affirmative defenses, if any. The public servant may include in the answer matters in mitigation. The answer shall be signed and shall contain the full name, address and telephone number of the public servant. If the public servant is represented, the representative's name, address and telephone number shall also appear on the answer, which shall be signed by either the public servant or by his or her representative.

(3) **Effect of Failure to Answer.** If the public servant fails to serve an answer, all allegations of the petition shall be deemed admitted and the Board shall proceed to hold a hearing in which prosecuting counsel shall submit for the record an offer of proof establishing the factual basis on which the Board may issue an order. If the public servant fails to respond specifically to any allegation or charges in the petition, such allegation or charges shall be deemed admitted.

(d) **Amendment of Pleadings.** Pleadings shall be amended as promptly as possible upon conditions just to all parties. If a pleading is to be amended less than twenty-five days before the commencement of the hearing, the amendment may be made only on consent of the parties or by leave of the Board.

III. Hearing.

(a) **Conduct of Hearing.** The Board shall conduct hearings or designate the Chief Administrative Law Judge of the Office of Administrative Trials and Hearings (OATH), or such administrative law judge (ALJ) as the Chief Administrative Law Judge shall assign, to conduct hearings. If the Board refers a hearing to OATH, a copy of the petition will also be sent to OATH at the time the public servant is served with the petition. OATH shall conduct the hearing in accordance with its rules except that:

(1) Pursuant to Charter Section 2603(h)(4), hearings shall not be open to the public unless requested by the public servant;

(2) Notwithstanding OATH's rule 2.4, an answer in response to a petition is mandatory, not optional;

(3) Notwithstanding OATH's rule 2.13(e), the public servant's failure to file an answer will not under any circumstances result in dismissal of the case;

(b) **Hearings of the Board.** The Board shall conduct its hearings, including such pre-hearing matters as conferences, discovery and motion practice, in conformance with the rules and procedures of OATH except for the following modifications:

(1) **Closure of Hearings.** Hearings of the Board shall not be public unless requested by the public servant;

(2) **Subpoenas.** Subpoenas requiring the attendance of a witness and subpoenas duces tecum requiring the production of books, papers, and other things may be issued only by the Board upon application of a party or upon the Board's own motion. In addition to or in lieu of these subpoenas, the Board may also issue an order directing the party or person under the control of a party to attend or produce;

(3) **Disposition by Agreement.** At any time after the commencement of formal proceedings, the public servant and the Board (or the member of the Board designated pursuant to Rule III, (c)(1) hereof to hear the case) may agree to dispose of the case. For this purpose, the Board or such member may conduct a conference. If terms of disposition are reached, they shall be reduced to writing and signed by the public servant or his or her representative and the Board or placed on the record. When a disposition is based on a determination by the Board that a public servant has violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, that disposition shall be made public by the Board. Prior to the disposition of a case, the Board shall consult with the head of the agency involved, or in the case where the public servant is an agency head or former agency head, with the Mayor;

(4) **Order of Proceedings.** Prosecuting counsel shall have the burden of proof by the preponderance of the evidence, shall initiate the presentation of evidence, and may present rebuttal evidence. The public servant may introduce evidence after prosecuting counsel has completed his or her case. Opening statements, if any, shall be made first by prosecuting counsel. Closing statements, if any, shall be made first by the public servant. This order of proceedings may be modified at the discretion of the Board;

(5) **Ex Parte Communications.** In addition to the requirements of OATH rule 4.4, if staff counsel for the Board is to prosecute a case, the individual designated as staff counsel shall not communicate ex parte with the Board concerning the case once the Board has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred.

(c) Assignment of Hearing, Quorum and Presiding Member.

(1) The Board may designate a member of the Board to hear a case, make findings of fact and conclusions of law, preside over pre-hearing matters and adjournments, and make recommendations to the full Board for the proposed disposition of the proceedings.

(2) Two members of the Board shall constitute a quorum for the purposes of issuing a final order or any other final determination.

(3) When a hearing is conducted by the full Board, the hearing shall be presided over by the Board's Chair or his or her designee.

IV. Concluding Procedures.

(a) Decisions and Orders.

(1) When a hearing has been conducted by either OATH or a member of the Board designated to hear the case, a report of recommended findings of fact and conclusions of law, and recommendations for the disposition of the proceeding shall be issued and forwarded, along with the original transcript of the proceedings and all documents introduced into the record to the Board for review and final action. The report shall not be made public. A copy of the report and recommendation shall be sent to all parties and their counsel or other representative in order to afford them the opportunity to comment before final action is taken by the Board. If prosecuting counsel or the public servant wishes to comment, he or she shall do so within ten days of receipt of the report and recommendation.

(2) If after the hearing and upon a consideration of all the evidence in the record of hearing, including comments, the Board finds that a public servant has engaged in conduct prohibited by Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, the Board shall, in the case of a violation of Chapter 68, consult with the head of the agency served or formerly served by the public servant, or in the case of an agency head, consult with the Mayor. Whether it is a violation of Chapter 68 or Section 12-110, the Board should state its final findings of fact and conclusions of law and issue an order imposing any penalties it deems appropriate under either section. The order shall include notice of the public servant's right to appeal to the New York State Supreme Court. Alternatively, it may state its findings and conclusions and recommend a penalty. If any, to the head of the agency served by the public servant or former public servant or, in the case of an agency head or former agency head, to the Mayor. Pursuant to Charter Section 2604(h)(3), the Board shall not impose penalties against members of the City Council, or public servants employed by the City Council or by members of the City Council, but may state its findings and conclusions and recommend to the City Council such penalties as it deems appropriate. When a penalty is recommended, the head of the agency, Mayor or City Council shall report to the Board what action was taken.

(3) In instances where the Board does not hold a hearing and instead refers a matter to another agency, that agency shall consult with the Board prior to issuing its final decision.

(4) If, after the hearing and upon consideration of the record, the Board finds that a public servant has not engaged in acts prohibited by Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, the Board shall state its findings of facts and conclusions of law and shall issue an order dismissing the petition. The order shall not be made public.

V. Confidentiality.

All matters relating to complaints submitted to or investigated by the Board, or any actions taken by the Board in connection therewith or hearings conducted by the Board or OATH, shall be kept confidential unless waived by the public servant who may request a public hearing. The foregoing shall not apply to the final findings, conclusions and order issued upon a violation of Chapter 68, which shall be made public.