

CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

Notice of Adoption of Rule Identifying Certain Conduct Prohibited by Charter § 2604(b)(2)

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE Conflicts of Interest Board by Sections 2603(a) and 2606(d) of the New York City Charter that the Conflicts of Interest Board has adopted a new rule, Section 1-13 of Title 53 of the Rules of the City of New York, identifying conduct prohibited by Charter § 2604(b)(2). Pursuant to a notice published on December 12, 1997, in the City Record, a public hearing was held on January 23, 1998, at 2 Lafayette Street, Suite 1010, New York, New York. The Board received comments from the City Council and the Comptroller's Office and, after changing the proposed rule in response to those comments, adopted the proposed rule as final. The text of the new rule is set forth below.

SECTION 1-13. CONDUCT PROHIBITED BY CITY CHARTER § 2604(b)(2)

1. Except as provided in subdivision 3 of this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to pursue personal and private activities during times when the public servant is required to perform services for the City.

2. Except as provided in subdivision 3 of this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to use City letterhead, personnel, equipment, resources, or supplies for any non-City purpose.

3. (a) A public servant may pursue a personal and private activity during normal business hours and may use City equipment, resources, personnel, and supplies, but not City letterhead, if, (i) the type of activity has been previously approved for employees of the public servant's agency by the Conflicts of Interest Board, upon application by the agency head and upon a determination by the Board that the activity furthers the purposes and interests of the City; and (ii) the public servant shall have received approval to pursue such activity from the head of his or her agency.

(b) In any instance where a particular activity may potentially directly affect another City agency, the employee must obtain approval from his or her agency head to participate in such particular activity. The agency head shall provide written notice to the head of the potentially affected agency at least 10 days prior to approving such activity.

4. It shall be a violation of City Charter § 2604(b)(2) for any public servant to intentionally or knowingly induce or cause another public servant to engage in conduct that violates any provision of City Charter § 2604.

5. Nothing contained in this section shall preclude the Conflicts of Interest Board from finding that conduct other than that proscribed by subdivisions (1) through (4) of this section violates City Charter § 2604(b)(2), although the Board may impose a fine for a violation of City Charter § 2604(b)(2) only if the conduct violates subdivision (1), (2), (3), or (4) of this section. The Board may not impose a fine for violation of subdivision (4) where the public servant induced or caused another public servant to engage in conduct that violates City Charter § 2604(b)(2), unless such other public servant violated subdivision (1), (2), or (3) of this section.

STATUTORY AUTHORITY: Sections 2603(a) and 2606(d) of the New York City Charter.

STATEMENT OF BASIS AND PURPOSE OF RULE: New York City Charter § 2604(b)(2) provides:

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.

The Charter Revision Commission

retained this "catch-all" prohibition in recognition of the fact that the specific prohibitions set forth in the [Charter] chapter [68] cannot address all conflict of interest situations which may arise in the future and that the [Conflicts of Interest] board must retain the flexibility to handle new situations as they arise. However, fairness to public servants dictates that no punishment be imposed for actions not previously identified as prohibited.

Volume II, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at p. 175.

Accordingly, Charter § 2606(d) precludes the Conflicts of Interest Board (the "Board") from imposing penalties for a violation of Charter § 2604(b)(2), "unless such violation involved conduct identified by rule of the board as prohibited by such paragraph." The purpose of the rule is to identify certain such conduct. As experience reveals additional conduct, the Board may amend the rule to add it.

Since its establishment the Board has received hundreds of requests from public servants for advice as to whether the public servant may engage in various outside activities, such as volunteering for a non-profit organization or working for a private business. Often the Board finds that Chapter 68 permits the

particular activity, provided that the public servant abides by certain restrictions. In that regard, the Board cites, among other provisions, Charter § 2604(b)(2), cautioning the public servant that he or she must pursue the activity at times when he or she is not required to perform services for the City.

So, too, in the enforcement context, the Board has observed on a number of occasions that a public servant has violated Charter § 2604(b)(2) by performing an outside activity, particularly a compensated outside activity, on City time. The Board has also noted that from time to time public servants have, in violation of Charter § 2604(b)(2), encouraged or caused another public servant to violate the provisions of Charter § 2604 by, for example, inducing that second public servant to obtain from the City a financial benefit for a son or daughter, in violation of Charter § 2604(b)(3).

In addition, the Board has received complaints about City employees using City personnel, equipment, letterhead, resources, or supplies for non-City purposes. If such a use is to obtain a private or personal advantage for the employee, for a member of his or her immediate family, for a person with whom the employee has a business or other financial relationship, or for a firm with which the employee has a present or potential position or ownership interest, then the use might be a violation of Charter § 2604(b)(3). However, (b)(3) might not apply, for example, where a City employee writes a letter on City letterhead endorsing a political candidate or uses a City photocopier to make photocopies for a volunteer organization. Adoption of the rule will permit the Board to impose penalties for such violations of Charter § 2604(b)(2), either alone or in combination with the imposition of penalties for violation of other provisions of Chapter 68.

It is important to note, however, that certain public service activities, such as volunteering one's services for a professional organization, may in some instances further the City's interests. For example, a public servant's uncompensated participation on a bar association committee not only may help the public servant meet his or her obligations to the profession but also may reflect favorably upon the City and the public servant's agency, may assist in the professional development of the public servant, and may provide him or her with new insights into the performance of his or her City job, all to the City's benefit.

For this reason, the rule, in subdivision (3), permits an agency head to apply to the Conflicts Board for permission for the employees of the agency to engage in such activities during normal working hours and to use City equipment, resources, personnel, and supplies - but not City letterhead - in connection with the activity. Thus, for example, the Corporation Counsel could seek approval of the Board for attorneys in the Law Department to attend bar association committee meetings during the day and even to type

and photocopy a bar association report on City computers and photocopiers - but not to use Law Department letterhead. If, however, the work of the bar association committee has a direct impact upon another City agency, then the Corporation Counsel would have to give the head of that other agency at least 10 days written notice before approving the employee's request.

Furthermore, once a type of activity has been approved by the Board for the employees of a particular agency under this provision, other employees of that agency who wish to engage in the same type of activity need obtain approval only from their agency head; additional approval from the Board is not required.

Three additional points should be noted. First, as with any ethics law, the rule must be interpreted in light of reason, experience, and common sense. A brief telephone call to a friend or doctor would not constitute a violation of the rule. Running an outside business from one's City office would, as would spending an afternoon at the beach during City time.

Second, as stated in subdivision (4) of the rule, conduct other than that identified in the rule may constitute a violation of Charter § 2604(b)(2), although, under Charter § 2606(d), the Board may not impose any penalties for such other conduct, unless it violates some other provision of Charter § 2604. As noted by the Charter Revision Commission, "the board may in some situations adjudicate a public servant to be in violation of paragraph two [of section 2604(b)] without imposing any penalties." Volume II, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at pp. 175-176. The Board may in the future amend the rule to identify other conduct prohibited by section 2604(b)(2).

Third, where a charitable or philanthropic activity, such as the annual toy collection drive or the Combined Municipal Campaign, is sanctioned by the Mayor as a City activity, neither Charter § 2604(b)(2) nor this rule comes into play. Accordingly, City employees may use City time, letterhead, and resources in connection with that activity.

In response to the public hearing notice on the proposed rule, the Board received detailed and persuasive comments from the City Council and the Comptroller's Office. In response to those comments, the Board changed the rule in several respects: to delete the requirement that a public servant may engage in an activity permitted under subdivision 3 only at times when the public servant is not required to perform services for the City; to remove the prohibition on using City personnel for an activity permitted under subdivision 3; to require that such an activity further the purposes and interests of the City (the same standard as that set forth in Charter § 2604(c)(6)(b)); to replace with a notice requirement the requirement that permission for such an activity be

obtained from every affected City agency; to add a mental state ("intentionally and knowingly") to subdivision 4; and to make certain technical changes in the rule.

[COIB28: (b)(2).x11]

CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD

Notice of Adoption of Amendment to Rule Defining Conduct Prohibited by City Charter
§ 2604(b)(2)

NOTICE IS HEREBY GIVEN THAT, pursuant to the authority vested in the Conflicts of Interest Board by Sections 2603(a) and 2606(d) of the New York City Charter, the Conflicts of Interest Board has adopted an amendment to its rule on conduct prohibited by City Charter § 2604(b)(2), which rule is found at Section 1-13(d) of Title 53 of the Rules of the City of New York. The text of the amendment is set forth below.

Section 1-13. Conduct Prohibited by City Charter § 2604(b) (2).

[Subdivisions (a)-(c) and (e) remain unchanged.]

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

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

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

STATUTORY AUTHORITY: Section 2603(a) and 2606(d) of the New York City Charter.

STATEMENT OF BASIS OF PURPOSE

New York City Charter § 2604(b) (2) provides:

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.

Rule 1-13(d) currently provides:

It shall be a violation of City Charter § 2604(b) (2) for any public servant to intentionally or knowingly induce or cause another public servant to engage in conduct that violates any provision of City Charter § 2604 (emphasis added).

The language “induce or cause” has proven to be too narrow in scope and does not capture all of the conduct that could be subject to accessorial liability under the Penal Law. Accordingly, the amendment would modify the language of the rule to be parallel with that in section 20.20 of the Penal Law, as specified in the proposed paragraph (1) above. In addition, the current rule does not provide for liability for those persons who engaged in a conspiracy with others to violate the conflicts of interest law. The proposed paragraph (2) would adopt the Penal Law definition of conspiracy in the sixth degree found in Penal Law § 105.00 to specify additional conduct that would form the basis for liability for the acts of another under this provision.

A public hearing on these rules was held on November 28, 2006, pursuant to notice published in the City Record on October 19, 2006, and no one attended to provide testimony or comment, nor were comments received prior thereto.