

## CONFLICTS OF INTEREST BOARD

### CITY OF NEW YORK CONFLICTS OF INTEREST BOARD

#### Notice of Adoption of Amendments to Procedural Rules for Hearings

NOTICE IS HEREBY GIVEN THAT, pursuant to the authority vested in the Conflicts of Interest Board by Section 2603(a) of the New York City Charter and in accordance with Section 1043 of the New York City Charter, the Conflicts of Interest Board has adopted amendments to its procedural rules for hearings, Sections 2-01 through 2-05 of Title 53 of the Rules of the City of New York. Pursuant to a notice published on November 9, 1995, in The City Record, a public hearing on the proposed amendments was held on December 20, 1995, at 2 Lafayette Street, New York, New York. The Board received comments only from the Office of Administrative Trials and Hearings and adopted the proposed amendments, with one change, as final. The text of the amendments is set out below. Additions to the current rules are underlined; deletions from the current rules are bracketed.

Dated: February 1, 1996

- § 2-01 Initial Determination.
- § 2-02 Commencement of Formal Proceedings and Pleadings.
- § 2-03 Hearing.
- § 2-04 [Concluding Procedures] Decisions and Orders.
- § 2-05 [Confidentiality] General Matters.

#### § 2-01 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 § 2603(h) includes a former public servant) has violated a provision of Chapter 68 of the City Charter [or § 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] fifteen days of [receipt] ~~EXPIRES~~ of the notice. The notice shall also inform the public servant of his or her right to be represented by counsel or any other person, and shall include a copy of the Board's procedural rules. A notice of initial determination shall not be required in a proceeding brought pursuant to Section 12-110 of the Administrative Code.

(b) Request for a Stay. In response to the Board's notice, the public servant may apply to the Board 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 § 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 § 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] the Board 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.)

#### § 2-02 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 § 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

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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. 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 which, if proved, would constitute a violation of Chapter 68 of the City Charter or § 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 charge in the petition, such allegation or charge 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, if the Board is conducting the hearing, or by leave of a Board member or Administrative Law Judge, if the Board member or Administrative Law Judge is conducting the hearing.

#### § 2-03 Hearing.

(a) Conduct of [Hearing] Hearings Generally. [The Board shall conduct hearings or designate] hearings shall be conducted by the Board or, upon designation by the Board, by a member of the Board or 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].

[(1) Pursuant to Charter § 3603(h)(4), hearings shall not be open to the public unless requested by the public servant;

(2) Notwithstanding OATH rule § 1-07(d), an answer in response to a petition is mandatory, not optional;

(3) Notwithstanding OATH's rule § 1-07(a)(5), the public servant's failure to file an answer will not under any circumstances result in dismissal of the case;]

(b) 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 (i) the Administrative Law Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the hearing is conducted by the Board or by a member of the Board, upon application of a party or upon the Administrative Law Judge's or the Board member's own motion. In addition to or in lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an order directing the party or person under the control of a party to attend or produce.

(c) Conduct of Hearings by OATH. If the Board refers a hearing to OATH, a copy of the petition [will] shall 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, as set forth in Title 48 of the Rules of the City of New York, except [that:] as otherwise provided by these rules.

[(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 § 2-03(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 § 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;]

(d) Conduct of Hearings [of] by the Board or by a Board Member.

[(1) Generally. The Board may hear a case or 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 Board for the proposed disposition of the proceeding. When a hearing is conducted by the Board, the hearing shall be presided over by the Board's Chair or by his or her designee. The Board or Board member shall conduct the hearing, including such pre-hearing matters as conferences, discovery, and motion practice, in conformance with the rules and procedures of OATH, as set forth in Title 48 of the Rules of the City of New York, except as otherwise provided by these rules.

[(2) Disposition Conferences and Agreements. If disposition of the proceeding is to be discussed at a conference, the Board shall designate an individual other than a Board member participating in the hearing, to conduct the conference. During disposition discussions, upon notice to the parties, the person conducting the conference may confer with each party and/or representative separately. Board members shall not be called to testify in any proceeding concerning statements made at a disposition conference.

[(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 or Board member[;].

[(5) Ex Parte Communications. In addition to the requirements of OATH rule § 1-09(d), 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 proceeding.

(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.]

5 2-04 [Concluding Procedures] Decisions and Orders

(a) [Decisions and Orders.

(1) Report to the Board. 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 proceeding 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] service of the report and recommendation.

(2) (b) Finding of Violation. 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 § 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] Where the Board finds a violation of Chapter 68 or § 12-110 of the Administrative Code, the Board (should) shall state its final findings of fact and conclusions of law and issue an order imposing any penalties it deems appropriate under either (section) statute. The order shall include notice of the public servant's right to appeal to the New York State Supreme Court. Alternatively, in the case of a violation of Chapter 68, (it) the Board 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 § 2604(b)(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) the Board 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) (c) Consultation by Agency. In instances where the Board does not hold a hearing and instead refers a matter to [another] the public servant's agency, that agency shall consult with the Board prior to issuing its final decision.

(4) (d) Dismissals. 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 § 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.

5 2-05 [Confidentiality] General Matters.

(a) Appearances before the Board.

(1) A party may appear before the Board in person, by an attorney, or by a duly authorized representative. The person appearing for the party shall file a notice of appearance with the Board. The filing of any papers by an attorney or other representative who has not previously appeared shall constitute the filing of a notice of appearance by that person and shall conform to the requirements of paragraphs (2) and (4) of this subdivision.

(2) The appearance of a member in good standing of the bar of a court of general jurisdiction of any state or territory of the United States shall be indicated by the suffix "Esq." and the designation "Attorney for (person represented)." The appearance of any other person shall be indicated by the designation "Representative for (person represented)."

(3) Absent extraordinary circumstances, no application shall be made or argued by any attorney or other representative who has not filed a notice of appearance.

(4) A person may not file a notice of appearance on behalf of a party unless the person has been retained by that party to represent the party before the Board. Filing a notice of appearance constitutes a representation that the person appearing has been so retained.

(b) Withdrawal and Substitution of Counsel.

(1) An attorney who has filed a notice of appearance shall not withdraw from representation without the permission of the Board, upon application. Withdrawals shall not be granted unless upon consent of the client or when other cause exists, as delineated in the applicable provisions of the Code of Professional Responsibility.

(2) Notices of substitution of counsel served and filed more than twenty days prior to a hearing before the Board or before a member of the Board may be filed without leave of the Board or Board member. Notices of substitution of counsel served and filed less than twenty-one days prior to a hearing before the Board or before a member of the Board may be filed only with the permission of the Board or Board member, which permission shall be freely given, absent prejudice or substantial delay of the proceedings.

(c) Service of Petition by Board. A petition shall be served on the public servant (i) in the manner provided in Section 312-A, or subdivisions 1, 2, or 4 of Section 108, of the New York Civil Practice Law and Rules for service of a summons or (ii) by both certified mail, return receipt requested, and first class mail to the public servant's last known residence or actual place of business or (iii) in such manner as the Board directs, if service is impracticable under paragraphs (1) and (ii) of this subdivision, or (iv) in any manner agreed upon by counsel to the Board and the public servant or his or her representative.

(d) Service of Other Documents by Board. Notices, orders, and all other documents, except petitions and subpoenas, originating with the Board shall be served on the public servant (i) by personal delivery to the public servant or (ii) by first class mail to the public servant's last known residence or actual place of business or (iii) by overnight delivery service to the public servant's last known residence or actual place of business or (iv) by telephonic facsimile (FAX) or similar transmission or (v) by leaving the paper at the public servant's last known residence with a person of suitable age and discretion or (vi) in such manner as the Board directs, if service is impracticable under paragraphs (1), (ii), (iii), (iv), or (v) of this subdivision, or (vii) in any manner agreed upon by counsel to the Board and the public servant or his or her representative. Where the public servant has appeared by a representative, all papers served by the Board subsequent to that appearance shall be served upon the representative by one of the methods provided in paragraphs (1)-(vii) of this subdivision.

(e) 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 public holiday, the period shall run until the end of the next following business day. Where a period of time prescribed by the rules set forth in this chapter is measured from the service of a paper and service of that paper is made in the manner provided by paragraph (d) of subdivision (a) or paragraph (d) of subdivision (b) of this section, five days shall be added to the prescribed period.

(f) Confidentiality. All matters relating to complaints submitted to or [investigated] inquired into by the Board, or any action 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 public servant waives confidentiality and the Board determines that confidentiality is not otherwise required. Hearings conducted by the Board or by OATH shall be public if requested by the public servant. [The foregoing shall not apply to the final] Final findings, conclusions, and [order] orders issued upon a violation of Chapter 68, which] shall be made public.

(g) Ex Parte Communications with Board.

(1) After service of the petition in a case, counsel conducting the prosecution of the case on behalf of the Board shall not communicate ex parte with any member of the Board concerning the merits of the case, except as provided in paragraph (2) of this subdivision.

(2) Counsel conducting the prosecution of a case on behalf of the Board may communicate ex parte with the Board, or any member thereof, with respect to ministerial matters involving the case or on consent of the respondent or respondent's counsel or in an emergency.

(h) Disposition by Agreement. At any time after the service of a notice of probable cause in a proceeding brought pursuant to Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section 12-110 of the Administrative Code, the public servant and the Board may agree to dispose of the case by agreement. For this purpose, the Board or any Board member designated by the Board may conduct a disposition conference. Provided that, when the Board or a member of the Board conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-01(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be confidential and shall be inadmissible at trial of any case. If a disposition by agreement is reached, it shall be reduced to writing and signed by the public servant or his or her representative and the Board or, in the discretion of the Board, placed on the record. When a disposition by agreement contains an acknowledgment that a public servant's conduct has violated a provision of Chapter 68 of

the City Charter or Section 12-118 of the Administrative Code, that disposition by agreement shall be made public by the Board.

**(1) OATH Rules.** In the event of any inconsistency between these rules and the rules of the Office of Administrative Trials and Hearings, these rules shall govern.

**STATUTORY AUTHORITY:** Section 2603(a) of the New York City Charter.

**STATEMENT OF BASIS AND PURPOSE OF AMENDMENTS:** Although the Conflicts of Interest Board's (the "Board's") procedural rules for hearings have worked well since their adoption in 1991, several problems have arisen with respect to those rules that need to be addressed, particularly in view of the Board's substantially increased enforcement efforts. The amendments address those problems.

The hearing process may be divided into four stages:

- (1) The Board's initial determination of probable cause to believe that the respondent has violated the conflicts of interest law (Chapter 68 of the New York City Charter) or the financial disclosure law (Section 12-118 of the Administrative Code) and the respondent's response;
- (2) Service of a petition, which commences the formal proceedings, and the respondent's answer;
- (3) The hearing; and
- (4) The decision and order of the Board.

The first four sections of the Board's hearing rules address each of these stages. The fifth section of the Board's hearing rules currently addresses only confidentiality but is amended to regulate miscellaneous matters that are relevant throughout the hearing process, such as service of papers.

The amendments effect eight primary changes in the Board's hearing rules:

- (1) Elimination of probable cause notices in financial disclosure litigation;
- (2) Elimination of the requirement for certified mail service, except for petitions (the jurisdiction-obtaining document that commences an enforcement proceeding) when they are served by first class mail, and expansion of the methods for serving Board documents to allow all methods of service permitted by the CPLR;
- (3) Clarification of which rules apply to hearings before OATH and which apply to hearings before the Board or before a Board member;
- (4) Clarification of the requirement that only the hearing officer may issue subpoenas in Chapter 68 or Section 12-118 hearings;
- (5) Clarification of the procedures for disposing of a case by agreement;
- (6) Authorization of ex parte communications between the enforcement attorney and the Board in certain circumstances;
- (7) Reorganization of the rules; and
- (8) Certain technical amendments, such as measuring deadlines from time of service instead of from time of receipt.

Each of these changes is discussed below.

**Probable cause notices.** Through complaints, through referrals from the Department of Investigation and other City agencies, and through the Board's own initiatives, the Board becomes aware of conduct that might violate Chapter 68. If upon examining that conduct the Board makes an initial determination that there is probable cause to believe that the public servant has violated a provision of Chapter 68, the Board must notify the public servant of that determination in writing. The notice must contain a statement of the facts upon which the Board relied for its determination and a statement of the provisions of law allegedly violated. Charter § 2603(h)(1); current Board rules § 2-01(a).

The financial disclosure law contains no such requirement for probable cause notices in financial disclosure litigation. Indeed, such notices have little use in such litigation, where the sole issue is whether the official filed his or her financial disclosure report (or paid his or her late fine). In addition, as a result of the large number of financial disclosure cases, the requirement of a probable cause notice imposes a substantial and unnecessary burden upon the Board's staff. For these reasons, the amendments eliminate the requirement of probable cause notices in cases arising under the financial disclosure law. See amended Board rule § 2-01.

**Certified mail.** The current Board rules require that the Board serve notices, petitions, orders, and other documents both by first class mail and either by personal service or by certified mail, return receipt requested, or by fax. Current Board rules § 2-01(e). Except for petitions, which formally commence the enforcement proceeding, no reason exists for requiring that every Board document be served twice. Such a requirement is wasteful and, particularly in financial disclosure litigation, imposes a significant burden upon the Board's staff, which currently spends substantial time simply filling out forms for certified mail. Furthermore, any method of service permissible under the Civil Practice Law and Rules ("CPLR") in civil litigation should also be permissible in Board proceedings. Accordingly, the amended rule eliminates the dual service requirement, except for petitions served by mail rather than by other methods of service, and expands the methods of service to include those permitted by the CPLR. For these purposes, the amended rule treats petitions like summonses and other Board documents like interlocutory papers. Amended Board rule § 2-05(c), (d).

**Applicable rules in hearings.** The current Board rules are vague as to which rules apply to hearings conducted by the Board or a Board member and which apply to hearings conducted by the Office of Administrative Trials and Hearings ("OATH") at the Board's request. For example, the current provisions regulating dispositions by agreement, although set forth in the subdivision dealing with Board hearings, would appear also to apply to hearings held before OATH. See current Board rules § 2-03(b)(3). The amendments clarify these matters and also clarify that hearings may be conducted by an individual Board member designated by the Board. See amended Board rule § 2-03.

**Subpoenas.** The current Board rules provide that, where the Board hears the case, only the Board may issue a subpoena. The amended rules require that subpoenas be issued by a member of the Board, where the Board or a Board member is hearing the case, or by an administrative law judge, where OATH is hearing the case. See amended Board rule § 2-03(b).

**Dispositions by agreement.** The amended rule clarifies a number of matters relating to the disposition of a proceeding by agreement between the respondent and the Board. See amended Board rule § 2-05(h). For example, the current rule suggests that a disposition by agreement must await service of a petition (which formally commences the proceeding), even in a Chapter 68 case, although in many instances the Board may be able favorably to dispose of a case by agreement after service of the probable cause notice. The current rule also suggests that an individual Board member may dispose of a case by agreement with the respondent, when in fact only the Board itself may dispose of a case.

The amended rule also introduces certain safeguards, based on OATH's rules, to prevent the appearance of bias as a result of settlement conferences, where the Board or a Board member is hearing the case. See amended Board rule §§ 2-03(d)(2), 2-05(h). The amended rule adopts the requirements of the OATH rules that offers of disposition are confidential and inadmissible at trial. Finally, the current rule appears to confuse a disposition by agreement and a determination by the Board that a violation of law has occurred. The Board may make such a determination of violation only after a hearing or respondent's default on a hearing or respondent's admission in response to the Board's notice of probable cause. See Charter § 2603(h)(3). After consultation with the respondent's agency head, the Board then issues an order of violation imposing or recommending penalties. A disposition by agreement, on the other hand, is an agreement between the Board and the respondent and does not involve any hearing or any determination by the Board that a violation of law has occurred. These matters have been clarified in the amended rule.

**Ex parte communications.** Current Board rule § 2-03(b)(5) prohibits ex parte communications between the prosecuting attorney and the Board once the Board "has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred." That rule contains at least two defects. First, it is unclear whether "determined" refers to the initial determination of probable cause or the sustaining of probable cause. Second, the rule has proven unnecessarily cumbersome and an impediment to disposition of cases by agreement. The amended rule clarifies that the prohibition against ex parte communications comes into play once the petition is served, that the prohibition only applies to communications concerning the merits of the case, and that ex parte communications are permitted on ministerial matters, in an emergency, or with the consent of the respondent. Amended Board rule § 2-05(g).

**Reorganization of rules.** The current Board hearing rules contain provisions of general application within rules governing specific matters. For example, the provisions on service of documents and computation of time are contained in the rule on the initial determination of probable cause. Current Board rule § 2-01(e).

(f). The provisions on disposition by agreement and ex parte communications are set out in the rule on hearings. Current Board rule § 2-03(b)(3), (b)(5). The amended rule collects these provisions that address matters dealing with Board proceedings generally into Board rule § 2-05, which currently addresses only confidentiality. The rule on hearings is also reorganized. See amended rule § 2-03. Specifically, that amended rule is divided into four subdivisions: conduct of hearings generally, subpoenas, conduct of hearings by OATH, and conduct of hearings by the Board or a Board member. The provisions of the current rule § 2-03 are incorporated into the appropriate subdivision in the amended rule.

**Technical amendments.** The Board's rules are clarified by a number of technical amendments, including:

- Measuring time periods in all cases from the service of a document (amended rule §§ 2-01(a), 2-02(c)(1), 2-04(a));
- Setting out a provision, modelled on CPLR 2103(b)(2), for uniform extensions of time to serve documents in response to documents served by mail (amended Board rule § 2-05(e));
- Clarifying that leave for permission to amend a pleading may be granted by the person or entity conducting the hearing (amended Board rule § 2-02(d)) (this change was proposed by the Board during the commenting period);
- Deleting unnecessary cross-references to the OATH rules (current Board rule §§ 2-03(a)(1)-(3), (b)(1), (5));
- Clarifying that Board consultation with an agency head is not required in financial disclosure cases, only in Chapter 68 cases (amended Board rule § 2-04(b));
- Establishing procedures, based on OATH's rules, for appearances and substitution of counsel (amended Board rule § 2-05(a), (b));
- Changing "legal holiday" to "public holiday" to conform to General Construction Law § 24 and changing the provision on extensions of time where a deadline falls on a non-business day to conform to General Construction Law § 25-a (amended Board rule § 2-05(e)); and
- Specifying that OATH's rules yield to a contrary Board rule (amended Board rule § 2-05(i)).

The foregoing amendments to the Board hearing rules should streamline and substantially aid the Board in its enforcement efforts.

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- § 2-05 *[Confidentiality] General Matters.*

### § 2-01 *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 § 2603(h) includes a former public servant) has violated a provision of Chapter 68 of the City Charter [or § 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] fifteen days of [receipt] service of the notice. The notice shall also inform the public servant of his or her right to be represented by counsel or any other person, and shall include a copy of the Board's procedural rules. A notice of initial determination shall not be required in a proceeding brought pursuant to Section 12-110 of the Administrative Code.

(b) *Request for a Stay.* In response to the Board's notice, the

public servant may apply to the Board 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 § 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 § 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] the Board 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.]

#### § 2-02 *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 § 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.* 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] which, if proved, would constitute a violation of 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 charge in the petition, such allegation or charge 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, if the Board is conducting the hearing, or by leave of a Board member or Administrative Law Judge, if the Board member or Administrative Law Judge is conducting the hearing.

§ 2-03 *Hearing.*

(a) *Conduct of [Hearing] Hearings Generally.* [The Board shall conduct hearings or designate] Hearings shall be conducted by the Board or, upon designation by the Board, by a member of the Board or 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].

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

(2) Notwithstanding OATH rule § 1-07(d), an answer in response to a petition is mandatory, not optional;

(3) Notwithstanding OATH's rule § 1-07(m)(5), the public servant's failure to file an answer will not under any circumstances result in dismissal of the case;]

(b) *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 (i) the Administrative Law Judge, where the hearing has been referred to OATH, or (ii) a member of the Board, where the hearing is conducted by the Board or by a member of the Board, upon application of a party or upon the Administrative Law Judge's or the Board member's own motion. In addition to or in lieu of these subpoenas, the Administrative Law Judge or the Board member may also issue an order directing the party or person under the control of a party to attend or produce.

(c) *Conduct of Hearings by OATH.* If the Board refers a hearing to OATH, a copy of the petition [will] shall 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, as set forth in Title 48 of the Rules of the City of New York, except

[that:] as otherwise provided by these rules.

[(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 § 2-03(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 § 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;]

(d) Conduct of Hearings [of] by the Board or by a Board Member.

(1) Generally. The Board may hear a case or 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 Board for the proposed disposition of the proceeding. When a hearing is conducted by the Board, the hearing shall be presided over by the Board's Chair or by his or her designee. The Board or Board member shall conduct the hearing, including such pre-hearing matters as conferences, discovery, and motion practice, in conformance with the rules and procedures of OATH, as set forth in Title 48 of the Rules of the City of New York, except as otherwise provided by these rules.

(2) Disposition Conferences and Agreements. If disposition of the proceeding is to be discussed at a conference, the Board shall designate an individual, other than a Board member participating in the hearing, to conduct the conference. During disposition discussions, upon notice to the parties, the person conducting the conference may confer with each party and/or representative separately. Board members shall not be called to testify in any proceeding concerning statements made at a

disposition conference.

[(4)](3) *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 or Board member[;].

[(5) *Ex Parte Communications.* In addition to the requirements of OATH rule § 1-09(d), 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 proceeding.

(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.]

§ 2-04 [Concluding Procedures] Decisions and Orders

(a) [Decisions and Orders.

(1)] Report to the Board. 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 proceeding 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] service of the report and recommendation.

[(2)](b) Finding of Violation. 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 § 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] Where the Board finds a violation of Chapter 68 or [§] Section 12-110 of the Administrative Code, the Board [should] shall state its final findings of fact and conclusions of law and issue an order imposing any penalties it deems appropriate under either [section] statute. The order shall include notice of the public servant's right to appeal to the New York State Supreme Court. Alternatively, in the case of a violation of Chapter 68, [it] the Board 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 § 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] the Board 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)](c) Consultation by Agency. In instances where the Board does not hold a hearing and instead refers a matter to [another] the public servant's agency, that agency shall consult with the Board prior to issuing its final decision.

[(4)](d) Dismissals. 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.

#### § 2-05 [Confidentiality] General Matters.

##### (a) Appearances before the Board.

(1) A party may appear before the Board in person, by an attorney, or by a duly authorized representative. The person appearing for the party shall file a notice of appearance with the Board. The filing of any papers by an attorney or other representative who has not previously appeared shall constitute the filing of a notice of appearance by that person and shall conform to the requirements of paragraphs (2) and (4) of this subdivision.

(2) The appearance of a member in good standing of the bar of

a court of general jurisdiction of any state or territory of the United States shall be indicated by the suffix "Esq." and the designation "Attorney for (person represented)." The appearance of any other person shall be indicated by the designation "Representative for (person represented)."

(3) Absent extraordinary circumstances, no application shall be made or argued by any attorney or other representative who has not filed a notice of appearance.

(4) A person may not file a notice of appearance on behalf of a party unless the person has been retained by that party to represent the party before the Board. Filing a notice of appearance constitutes a representation that the person appearing has been so retained.

(b) *Withdrawal and Substitution of Counsel.*

(1) An attorney who has filed a notice of appearance shall not withdraw from representation without the permission of the Board, upon application. Withdrawals shall not be granted unless upon consent of the client or when other cause exists, as delineated in the applicable provisions of the Code of Professional Responsibility.

(2) Notices of substitution of counsel served and filed more than twenty days prior to a hearing before the Board or before a member of the Board may be filed without leave of the Board or Board member. Notices of substitution of counsel served and filed less than twenty-one days prior to a hearing before the Board or before a member of the Board may be filed only with the permission of the Board or Board member, which permission shall be freely given, absent prejudice or substantial delay of the proceedings.

(c) *Service of Petition by Board.* A petition shall be served on the public servant (i) in the manner provided in Section 312-a, or subdivisions 1, 2, or 4 of Section 308, of the New York Civil Practice Law and Rules for service of a summons or (ii) by both certified mail, return receipt requested, and first class mail to the public servant's last known residence or actual place of business or (iii) in such manner as the Board directs, if service is impracticable under paragraphs (i) and (ii) of this subdivision, or (iv) in any manner agreed upon by counsel to the Board and the public servant or his or her representative.

(d) *Service of Other Documents by Board.* Notices, orders, and all other documents, except petitions and subpoenas, originating with the Board shall be served on the public servant (i) by personal delivery to the public servant or (ii) by first class mail to the public servant's last known residence or actual place of business or (iii) by overnight delivery service to the public servant's last known residence or actual place of business or (iv) by telephonic

facsimile (FAX) or similar transmission or (v) by leaving the paper at the public servant's last known residence with a person of suitable age and discretion or (vi) in such manner as the Board directs, if service is impracticable under paragraphs (i), (ii), (iii), (iv), or (v) of this subdivision, or (vii) in any manner agreed upon by counsel to the Board and the public servant or his or her representative. Where the public servant has appeared by a representative, all papers served by the Board subsequent to that appearance shall be served upon the representative by one of the methods provided in paragraphs (i)-(vii) of this subdivision.

(e) 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 public holiday, the period shall run until the end of the next following business day. Where a period of time prescribed by the rules set forth in this chapter is measured from the service of a paper and service of that paper is made in the manner provided by paragraph (ii) of subdivision (a) or paragraph (ii) of subdivision (b) of this section, five days shall be added to the prescribed period.

(f) Confidentiality. All matters relating to complaints submitted to or [investigated] inquired into by the Board, or any action 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 public servant waives confidentiality and the Board determines that confidentiality is not otherwise required. Hearings conducted by the Board or by OATH shall be public if requested by the public servant. [The foregoing shall not apply to the final] Final findings, conclusions, and [order] orders issued upon a violation of Chapter 68[, which] shall be made public.

(g) Ex Parte Communications with Board.

(1) After service of the petition in a case, counsel conducting the prosecution of the case on behalf of the Board shall not communicate ex parte with any member of the Board concerning the merits of the case, except as provided in paragraph (2) of this subdivision.

(2) Counsel conducting the prosecution of a case on behalf of the Board may communicate ex parte with the Board, or any member thereof, with respect to ministerial matters involving the case or on consent of the respondent or respondent's counsel or in an emergency.

(h) Disposition by Agreement. At any time after the service of a notice of probable cause in a proceeding brought pursuant to Chapter 68 or at any time after service of a petition in a proceeding brought pursuant to Section 12-110 of the Administrative

Code, the public servant and the Board may agree to dispose of the case by agreement. For this purpose, the Board or any Board member designated by the Board may conduct a disposition conference, provided that, when the Board or a member of the Board conducts or is to conduct the hearing, the Board shall comply with the requirements of section 2-03(d)(2). All offers of disposition, whether made at a conference, hearing, or otherwise, shall be confidential and shall be inadmissible at trial of any case. If a disposition by agreement is reached, it shall be reduced to writing and signed by the public servant or his or her representative and the Board or, in the discretion of the Board, placed on the record. When a disposition by agreement contains an acknowledgment that a public servant's conduct has violated a provision of Chapter 68 of the City Charter or Section 12-110 of the Administrative Code, that disposition by agreement shall be made public by the Board.

(i) OATH Rules. In the event of any inconsistency between these rules and the rules of the Office of Administrative Trials and Hearings, these rules shall govern.

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

STATEMENT OF BASIS AND PURPOSE OF AMENDMENTS: Although the Conflicts of Interest Board's (the "Board's") procedural rules for hearings have worked well since their adoption in 1991, several problems have arisen with respect to those rules that need to be addressed, particularly in view of the Board's substantially increased enforcement efforts. The amendments address those problems.

The hearing process may be divided into four stages:

(1) The Board's initial determination of probable cause to believe that the respondent has violated the conflicts of interest law (Chapter 68 of the New York City Charter) or the financial disclosure law (Section 12-110 of the Administrative Code) and the respondent's response;

(2) Service of a petition, which commences the formal proceedings, and the respondent's answer;

(3) The hearing; and

(4) The decision and order of the Board.

The first four sections of the Board's hearing rules address each of these stages. The fifth section of the Board's hearing rules currently addresses only confidentiality but is amended to regulate miscellaneous matters that are relevant throughout the hearing process, such as service of papers.

The amendments effect eight primary changes in the Board's

hearing rules:

(1) Elimination of probable cause notices in financial disclosure litigation;

(2) Elimination of the requirement for certified mail service, except for petitions (the jurisdiction-obtaining document that commences an enforcement proceeding) when they are served by first class mail, and expansion of the methods for serving Board documents to allow all methods of service permitted by the CPLR;

(3) Clarification of which rules apply to hearings before OATH and which apply to hearings before the Board or before a Board member;

(4) Clarification of the requirement that only the hearing officer may issue subpoenas in Chapter 68 or Section 12-110 hearings;

(5) Clarification of the procedures for disposing of a case by agreement;

(6) Authorization of ex parte communications between the enforcement attorney and the Board in certain circumstances;

(7) Reorganization of the rules; and

(8) Certain technical amendments, such as measuring deadlines from time of service instead of from time of receipt.

Each of these changes is discussed below.

Probable cause notices. Through complaints, through referrals from the Department of Investigation and other City agencies, and through the Board's own initiatives, the Board becomes aware of conduct that might violate Chapter 68. If upon examining that conduct the Board makes an initial determination that there is probable cause to believe that the public servant has violated a provision of Chapter 68, the Board must notify the public servant of that determination in writing. The notice must contain a statement of the facts upon which the Board relied for its determination and a statement of the provisions of law allegedly violated. Charter § 2603(h)(1); current Board rules § 2-01(a).

The financial disclosure law contains no such requirement for probable cause notices in financial disclosure litigation. Indeed, such notices have little use in such litigation, where the sole issue is whether the official filed his or her financial disclosure report (or paid his or her late fine). In addition, as a result of the large number of financial disclosure cases, the requirement of a probable cause notice imposes a substantial and unnecessary burden upon the Board's staff. For these reasons, the amendments



eliminate the requirement of probable cause notices in cases arising under the financial disclosure law. See amended Board rule § 2-01.

Certified mail. The current Board rules require that the Board serve notices, petitions, orders, and other documents both by first class mail and either by personal service or by certified mail, return receipt requested, or by fax. Current Board rules § 2-01(e). Except for petitions, which formally commence the enforcement proceeding, no reason exists for requiring that every Board document be served twice. Such a requirement is wasteful and, particularly in financial disclosure litigation, imposes a significant burden upon the Board's staff, which currently spends substantial time simply filling out forms for certified mail. Furthermore, any method of service permissible under the Civil Practice Law and Rules ("CPLR") in civil litigation should also be permissible in Board proceedings. Accordingly, the amended rule eliminates the dual service requirement, except for petitions served by mail rather than by other methods of service, and expands the methods of service to include those permitted by the CPLR. For these purposes, the amended rule treats petitions like summonses and other Board documents like interlocutory papers. Amended Board rule § 2-05(c), (d).

Applicable rules in hearings. The current Board rules are vague as to which rules apply to hearings conducted by the Board or a Board member and which apply to hearings conducted by the Office of Administrative Trials and Hearings ("OATH") at the Board's request. For example, the current provisions regulating dispositions by agreement, although set forth in the subdivision dealing with Board hearings, would appear also to apply to hearings held before OATH. See current Board rules § 2-03(b)(3). The amendments clarify these matters and also clarify that hearings may be conducted by an individual Board member designated by the Board. See amended Board rule § 2-03.

Subpoenas. The current Board rules provide that, where the Board hears the case, only the Board may issue a subpoena. The amended rules require that subpoenas be issued by a member of the Board, where the Board or a Board member is hearing the case, or by an administrative law judge, where OATH is hearing the case. See amended Board rule § 2-03(b).

Dispositions by agreement. The amended rule clarifies a number of matters relating to the disposition of a proceeding by agreement between the respondent and the Board. See amended Board rule § 2-05(h). For example, the current rule suggests that a disposition by agreement must await service of a petition (which formally commences the proceeding), even in a Chapter 68 case, although in many instances the Board may be able favorably to dispose of a case by agreement after service of the probable cause notice. The current rule also suggests that an individual Board member may

dispose of a case by agreement with the respondent, when in fact only the Board itself may dispose of a case.

The amended rule also introduces certain safeguards, based on OATH's rules, to prevent the appearance of bias as a result of settlement conferences, where the Board or a Board member is hearing the case. See amended Board rule §§ 2-03(d)(2), 2-05(h). The amended rule adopts the requirements of the OATH rules that offers of disposition are confidential and inadmissible at trial. Finally, the current rule appears to confuse a disposition by agreement and a determination by the Board that a violation of law has occurred. The Board may make such a determination of violation only after a hearing or respondent's default on a hearing or respondent's admission in response to the Board's notice of probable cause. See Charter § 2603(h)(3). After consultation with the respondent's agency head, the Board then issues an order of violation imposing or recommending penalties. A disposition by agreement, on the other hand, is an agreement between the Board and the respondent and does not involve any hearing or any determination by the Board that a violation of law has occurred. These matters have been clarified in the amended rule.

Ex parte communications. Current Board rule § 2-03(b)(5) prohibits ex parte communications between the prosecuting attorney and the Board once the Board "has determined that there is probable cause to believe that a violation of the provisions of Chapter 68 has occurred." That rule contains at least two defects. First, it is unclear whether "determined" refers to the initial determination of probable cause or the sustaining of probable cause. Second, the rule has proven unnecessarily cumbersome and an impediment to disposition of cases by agreement. The amended rule clarifies that the prohibition against ex parte communications comes into play once the petition is served, that the prohibition only applies to communications concerning the merits of the case, and that ex parte communications are permitted on ministerial matters, in an emergency, or with the consent of the respondent. Amended Board rule § 2-05(g).

Reorganization of rules. The current Board hearing rules contain provisions of general application within rules governing specific matters. For example, the provisions on service of documents and computation of time are contained in the rule on the initial determination of probable cause. Current Board rule § 2-01(e), (f). The provisions on disposition by agreement and ex parte communications are set out in the rule on hearings. Current Board rule § 2-03(b)(3), (b)(5). The amended rule collects these provisions that address matters dealing with Board proceedings generally into Board rule § 2-05, which currently addresses only confidentiality. The rule on hearings is also reorganized. See amended rule § 2-03. Specifically, that amended rule is divided into four subdivisions: conduct of hearings generally, subpoenas, conduct of hearings by OATH, and conduct of hearings by the Board

or a Board member. The provisions of the current rule § 2-03 are incorporated into the appropriate subdivision in the amended rule.

Technical amendments. The Board's rules are clarified by a number of technical amendments, including:

- Measuring time periods in all cases from the service of a document (amended rule §§ 2-01(a), 2-02(c)(1), 2-04(a));
- Setting out a provision, modelled on CPLR 2103(b)(2), for uniform extensions of time to serve documents in response to documents served by mail (amended Board rule § 2-05(e));
- Clarifying that leave for permission to amend a pleading may be granted by the person or entity conducting the hearing (amended Board rule § 2-02(d)) (this change was proposed by the Board during the commenting period);
- Deleting unnecessary cross-references to the OATH rules (current Board rule §§ 2-03(a)(1)-(3), (b)(1), (5));
- Clarifying that Board consultation with an agency head is not required in financial disclosure cases, only in Chapter 68 cases (amended Board rule § 2-04(b));
- Establishing procedures, based on OATH's rules, for appearances and substitution of counsel (amended Board rule § 2-05(a), (b));
- Changing "legal holiday" to "public holiday" to conform to General Construction Law § 24 and changing the provision on extensions of time where a deadline falls on a non-business day to conform to General Construction Law § 25-a (amended Board rule § 2-05(e)); and
- Specifying that OATH's rules yield to a contrary Board rule (amended Board rule § 2-05(i)).

The foregoing amendments to the Board hearing rules should streamline and substantially aid the Board in its enforcement efforts.

[COIB13: 2-01.fin]