



**BRONX BOROUGH PRESIDENT VANESSA L. GIBSON**

July 11, 2024

**Testimony for the 2024 NYC Charter Revision Commission**

Thank you Chair Scissura, Vice Chair Dukes, and the members of the Charter Revision Commission (CRC) for holding this hearing in The Bronx. Thank you also to Fordham University for graciously hosting. I'm heartened by the many Bronxites that have participated in this process and I trust the CRC will give thoughtful consideration to all of their comments.

This submission addresses several issues that I feel are in line with the stated focus and goals of the CRC. I believe that implementing these suggested changes will bring increased fiscal and operating efficiency, along with accountability and predictability of process, especially regarding our community boards and borough boards.

**DCAS's Handling of Community Board EEO Matters**

DCAS should assume the investigation and determination of community board equal employment opportunity (EEO) matters. DCAS has long maintained a policy of mandating borough presidents' offices investigate and determine community board EEO matters. DCAS has never issued any rule or regulation imposing this duty and has not even stated this in the Equal Employment Opportunity Policy document it has issued.<sup>1</sup> DCAS's persistent and widespread practices with community board EEO matters and statements support this conclusion. DCAS's Citywide Equality and Inclusion (CEI) Office imposes on the borough presidents a requirement that they survey, collect data, and report on community boards' EEO compliance. DCAS CEI's reasoning for imposing this mandate is that, because borough presidents' offices appoint community board members, it follows that they must ensure accountability and compliance of community board members in areas ranging from mandated trainings to fulfilling their public mandates. Despite DCAS's apparent policy and the apparent reasoning informing it, borough presidents' offices should not be investigating and determining community board EEO matters for three reasons.

First, borough presidents' offices lack general supervisory powers over community boards. Nothing in Section 82 of the New York City Charter confers this power upon borough presidents. To derive such a power, as DCAS CEI argues, merely from borough presidents' concurrent power of appointment and removal makes no sense by way of simple analogy.<sup>2</sup> Similar power vested in

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<sup>1</sup> See [https://www.nyc.gov/assets/dcas/downloads/pdf/agencies/nyc\\_eeo\\_policy.pdf](https://www.nyc.gov/assets/dcas/downloads/pdf/agencies/nyc_eeo_policy.pdf).

<sup>2</sup> See N.Y. City Charter § 2800[a] and [b].

the Mayor to appoint and remove members of the Health and Hospital Corporation's board<sup>3</sup> has never been considered to destroy that entity's autonomy on personnel matters.<sup>4</sup> Language in Section 82 coming closest to a supervisory power – the provision that borough presidents “provide training and technical assistance to the members of community boards within the borough”<sup>5</sup> – also does not support general superintendence. Another analogy that explains this is that the state law authorizing and directing the director of the New York State Office for the Aging to provide training and technical assistance to family members caring for frail or disabled family members<sup>6</sup> has not been understood to render the State “supervisors” of volunteer caretakers. Nor has the obligation of the Community Affairs Unit within the Office of the Mayor to provide training and technical assistance to community boards<sup>7</sup> created a general duty of supervision there. The fairest reading of what the duty of training and technical assistance imposes must consider the language of Section 1150(2) of the Charter defining community boards, borough presidents' offices, and mayoral agencies like DCAS as coequal agencies and Section 2800(e) requiring *each* agency to provide community boards with assistance necessary for the board's work on request. Taking both into account establishes that borough presidents providing “training and technical assistance” does not mandate them to administer community board EEO functions.

Secondly, nothing in the Charter elaborating EEO obligations supports borough presidents' offices enforcing these against community boards. Section 814.1 of the Charter, mandating the commissioner of DCAS to establish an office of diversity and inclusion, speaks of city agencies' duties, with no distinction among them. Section 815 requires agency heads to ensure EEO compliance and reporting in their agencies. No Charter section defines who the agency head of each community board is. However, neither Section 82 nor any other Charter section appoints borough presidents as such. Furthermore, the New York City Conflict of Interest Board (COIB) has interpreted structurally similar language in Section 2603 of the Charter also imposing compliance duties upon agency heads to establish community board chairpersons as agency heads for board employees.<sup>8</sup> All this points to why DCAS has never issued a formal rule, regulation, or statement providing that borough presidents are responsible for enforcing Charter EEO provisions for community boards. It could not lawfully issue such order because that would be inconsistent with the Charter by creating distinctions among or tiers of agencies where none exist in the law. Textbook administrative law provides that agencies cannot enforce and issue regulations inconsistent with the controlling legislation it is designed to implement. “Administrative agencies

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<sup>3</sup> *Id.* at § 2301[a]; New York City Health and Hospitals Corporation Act § 4[1]

<sup>4</sup> *Haynes v. Giuliani*, 238 AD2d 257, 258 ([1st Dept. 1997] quoting *Vaughn v. City of New York*, 108 Misc.3d 994, 998, *aff'd* 89 AD2d 944 for proposition that the Health and Hospital Corporation is an “entity separate and distinct from the City of New York with ‘complete autonomy respecting its personnel.’”).

<sup>5</sup> Section 82[12] of the N.Y. City Charter.

<sup>6</sup> Elder Law 206.

<sup>7</sup> See *infra*, note 13, at § 2[g].

<sup>8</sup> 53 RCNY § 1-15[f].

can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with [legislation].”<sup>9</sup>

The borough presidents’ offices’ lack of authority points to a third reason. Their offices are not structured to exercise an EEO administration function for community boards. The borough presidents’ offices are small agencies of varying sizes wholly incapable of determining matters for community boards with membership and staff ranging from 159 to 924 individuals per borough. With roughly 220 individuals across all five boroughs, the borough presidents’ offices *together* have fewer combined staff than all but 11 city agencies when that headcount is compared to those of mayoral agencies listed in Appendix A of DCAS’s Agency Guidelines for Incentive Programs. Individually, each borough president’s office has, on average, fewer staff than all but five city agencies. Since each borough president’s office typically has a *single* person handling both internal and community board EEO matters, they are not structured to handle this function appropriately.

Because community boards themselves also have a limited number of employees, typically having no more than three staff members each, they should not be left on their own to ensure legal compliance. Rather, DCAS should assume this function for community boards. Two reasons support this. First, with a headcount of around 2,200 full-time employees, DCAS is adequately staffed to assist community boards with enforcing the EEO Policy. This must be the case if DCAS, in unilaterally and unlawfully assigning the function to borough presidents’ offices, has considered them capable of doing this despite them having only one-tenth of its staff combined. Second, the Charter establishes DCAS as experts on EEO matters. Charter section 814.1 charges DCAS with establishing procedures and standards for EEO matters and overseeing citywide compliance, structuring it to seamlessly assist any city agency in following the law.

With fiscal responsibility and operational efficiency in mind, DCAS should adopt systems similar to those set forth in Executive Order No. 6<sup>10</sup> and 16<sup>11</sup> of 1978 as modified by Executive Order No. 105 of 1986.<sup>12</sup> Through these orders, Mayor Ed Koch established a community board assistance unit (renamed the Community Affairs Unit in 2005) within the Office of the Mayor and assigned the Commissioner of Investigation the general responsibility for investigating and eliminating corrupt or other criminal activity. The CAU Executive Order charged it with coordinating activities of city agencies with respect to the implementation and operation of Charter provisions concerning community boards, including establishing a continuous liaison between them and the Office of Mayor.<sup>13</sup> And the one assigning investigatory responsibilities to the Department of Investigation (DOI) assigned it receive and investigate complaints about corruption, to investigate these through inspector generals for each agency under the aegis of DOI, and to work with agency heads to

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<sup>9</sup> *Seittelman v. Sabol*, 91 NY2d 618, 626 ([1998] quoting *Matter of Jones v Berman*, 37 NY2d 42, 53 [1975] in nullifying regulation inconsistent with federal statute).

<sup>10</sup> [https://www.nyc.gov/assets/records/pdf/executive\\_orders/1978EO006.PDF](https://www.nyc.gov/assets/records/pdf/executive_orders/1978EO006.PDF).

<sup>11</sup> [https://www.nyc.gov/assets/records/pdf/executive\\_orders/1978EO016.PDF](https://www.nyc.gov/assets/records/pdf/executive_orders/1978EO016.PDF).

<sup>12</sup> [https://www.nyc.gov/assets/records/pdf/executive\\_orders/1986EO105.PDF](https://www.nyc.gov/assets/records/pdf/executive_orders/1986EO105.PDF)

<sup>13</sup> Executive Order No. 6 of 1978 §§ 2.

ensure compliance.<sup>14</sup> To date, DOI still exercises this function on behalf of all agencies with 310 permanent staff, seven times fewer than DCAS's permanent headcount.<sup>15</sup>

The Charter should be revised to assign the investigation and determination of community board EEO complaints to DCAS, assign the CAU, if necessary, as a liaison between community boards and DCAS to ensure coordination and the free flow of information, and codify DOI's practice of sending determination notices to the borough presidents' offices so that we can be aware of matters involving members for the purposes of appointment and removal, authority that borough presidents possess under Section 2800(a) and (b) of the Charter.

### **DCAS's Handling of Mandatory City Trainings for Community Boards**

With a similar reasoning to DCAS's management of community board EEO matters above, the Charter should clarify DCAS as the responsible agency to manage mandatory community board member trainings. Community board members, while not city employees, are officers of the City of New York and are required to complete many of these trainings, including those about sexual harassment prevention and equal employment opportunity.

For city employees, this process is efficiently managed via DCAS's web-based training system. However, because they are not city employees, volunteer community board members do not have access to this convenient training system because they do not have city-provided email addresses or access to the city server on which these trainings must be completed. This has resulted in numerous difficulties and delays for community board members to complete required trainings.

These trainings are important for community board members to complete, just as they are important for city employees. They impart knowledge that helps the community boards run more smoothly, fairly, and in compliance with the law.

While our office has pursued alternative options in the past such as larger in-person trainings instead of online ones, requiring all members to visit our office or their board offices to complete the training on a City computer is inefficient and impractical. A Charter clarification would clearly state DCAS's responsibilities and encourage them to find a solution for community board members to have the same training access as City employees, tapping into existing infrastructure and making the process more fiscally responsible and operationally efficient.

I believe that DCAS taking over oversight of these trainings for community board members makes sense for many of the same reasons they should take over EEO investigations. Board members are volunteers, and trainings should be made available in an efficient way. DCAS is better equipped to provide alternatives to ensure that all board members fulfill the requirements. I urge you to

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<sup>14</sup> Executive Order No. 105 of 1986, §§3[a], [b], and [d] and 5[a].

<sup>15</sup> See Appendix A of DCAS's Agency Guidelines for Incentive Programs

include in your proposals a revision to the Charter to require DCAS to oversee and administer these trainings for community board members.

### **Borough Board Notifications**

Borough boards provide an important function in overseeing the delivery of services in the borough, reporting borough needs to the Mayor, Council, and city agencies, holding public hearings on important issues affecting the whole borough, submitting a statement on budget priorities for the borough, and reviewing applications and proposals for development and rezoning that go through public review, when it affects multiple community districts.

One of the issues that affects multiple community districts in every borough is the city's waterfront. The City is required to maintain a Comprehensive Waterfront Plan, established in Section 205 of the Charter. The City is required to file this plan with the city's elected officials as well as all of the community boards, but the borough board is not included in this requirement.

I urge you to include a revision to Section 205 of the Charter to include borough boards as part of the notification process for the City's Comprehensive Waterfront Plan.

### **Borough Board Voting**

Section 85(d) of the Charter currently states, "Whenever any act is authorized to be done or any determination or decision made by any borough board, the act, determination or decision of the majority of the members present entitled to vote during the presence of a quorum, shall be held to be the act, determination of such board." This paragraph has resulted in borough boards employing a flawed voting system. Because a vote at the board can only pass when a "majority of the members present" vote in the affirmative, an abstention is functionally no different than a negative vote. Consequently, this makes it more difficult for the borough board to pass *any* motion, even when a majority of those expressing an opinion are in agreement.

Borough boards are made up of the borough president, the chairs of each community board, and each council member in the borough. Community board chairs are bound to vote how their boards have directed but, by treating an abstention the same as a negative vote, it takes away the ability of a board to meaningfully decline to weigh in. Furthermore, council members often withhold judgment on a proposal when it is at the borough board stage, waiting until it receives more examination by the Council itself – this often results in numerous abstentions and borough board votes often require far more votes in favor than against in order to carry.

Two examples from the past year at the Bronx Borough Board illustrate this problem. First, in August 2023, the Bronx Borough Board passed the City of Yes: Zoning for Carbon Neutrality text amendment by a vote of seven in favor to none against. However, because there were six abstentions, the vote nearly failed and was only deemed to have passed by a single vote, despite

no one being against it. Second, in January, the Bronx Borough Board rejected the City of Yes: Zoning for Economic Opportunity text amendment with the vote being nine in favor to five against, with eight abstentions. Because it only got nine of the 22 votes, the vote was deemed to have failed, despite a majority of those who cast a vote being in favor.

This situation should be rectified through a Charter amendment. By altering the text of Section 85(d) to read “majority of the members present entitled to vote *and voting affirmative or negative*,” we can remove this unnecessary difficulty and make borough boards more reflective of what members believe should occur on the proposals that come before them.

Thank you again to the CRC for considering these revisions and for hearing all of the suggestions that Bronxites have thoughtfully expressed. I urge you to include these changes as part of a ballot measure to improve the way community boards and borough boards operate in our city. I look forward to examining the final proposals that emerge from the CRC’s process for the consideration of the voters this fall.