



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics Board Opinion No. 2022-008

June 15, 2022

Sent via email

Daniel W. Cantú-Hertzler
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**Re: Application of City Ethics Laws to Contractors of the Philadelphia Water,
Sewer and Storm Water Rate Board**

Dear Mr. Cantú-Hertzler:

You have requested an Opinion on behalf of the Philadelphia Water, Sewer and Storm Water Rate Board as to whether the Water Rate Board's Hearing Officer, Public Advocate, and Technical Expert are subject to the City's ethics rules.

As discussed in further detail below, we find that the Hearing Officer is a City officer, as that term is used in the Ethics Code, and is therefore subject to Philadelphia Code Chapter 20-600 (the Ethics Code) and Sections 10-105 and 10-107 of the Home Rule Charter. We also believe, and the City's Law Department agrees, that the Hearing Officer is subject to the State Ethics Act. We find that the Water Rate Board's Public Advocate and Technical Expert are not City officers, as that term is used in the Ethics Code and are therefore not subject to the City's Ethics Laws. We believe, and the City's Law Department agrees, that the Public Advocate and Technical Expert are not subject to the State Ethics Act.

I. Jurisdiction

The Board of Ethics (“The Board”) has jurisdiction to administer and enforce all Philadelphia Home Rule Charter and City Code provisions pertaining to ethical matters, including the City’s Ethics Code (Philadelphia Code Chapter 20-600) and certain provisions in Article X of the Home Rule Charter. [Home Rule Charter Section 4-1100](#) and [Philadelphia Code Chapter 20-600](#) authorize the Board to render advisory opinions concerning a City officer’s proposed future conduct. [Board Regulation No. 4](#) describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board.

Home Rule Charter Section 4-1100 also gives the Board “concurrent authority” with the Law Department to advise on the application of the State Ethics Act. Our advice on the State Ethics Act, however, does not provide protection from possible enforcement by the State Ethics Commission. For guidance on the State Ethics Act that would provide such protection, you should contact either the City Solicitor or the State Ethics Commission.

II. Background

In 2012, pursuant to authority granted by an amendment to the Home Rule Charter, City Council established the Water Rate Board. The Water Rate Board is charged with fixing and regulating rates and charges for water and sewer services and with establishing open and transparent processes and procedures for doing so. The Water Rate Board has promulgated [regulations](#) setting the procedures for its rate setting proceedings. These regulations require the appointment of a Hearing Officer and a Public Advocate and permit the Water Rate Board to retain the services of a Technical Expert.

a. Hearing Officer

The Hearing Officer presides over Water Rate proceedings on the Water Rate Board’s behalf. The Hearing Officer’s primary duties are scheduling public hearings and technical review hearings, making procedural rulings, issuing discovery schedules, making rulings with regard to all objections to information requests, and submitting a report on the proceedings to the Water Rate Board and participants. *See* Regulations of the Philadelphia Water, Sewer, and Storm Water Rate Board, Section II(B)(1).

In October of 2019, the Water Rate Board issued a Request for Proposals to serve as the Hearing Officer. *See* philawx.phila.gov/econtract/, New Opportunity No. 21191003134541. Marlane R. Chestnut submitted a response to the RFP and was awarded a contract to serve as Hearing Officer following a competitive process. The contract provides that the Hearing Officer is paid \$275 per hour.

b. Public Advocate

Rate Board Regulation I.(n) defines “Public Advocate” as a “qualified firm, organization or individual(s) appointed to represent the interests of Small User Customers pursuant to a formal City contract.” Along with the Water Department, any Public Advocate is automatically a participant in all rate proceedings. *See* Regulations of the Philadelphia Water, Sewer, and Storm Water Rate Board, Section II(B)(2).

The Public Advocate has the same rights as any other participant and is generally the most active participant (other than the Water Department itself) in propounding information requests, preparing and presenting expert testimony and exhibits, and making arguments to the Hearing Officer and the Water Rate Board. The Public Advocate also conducts discovery and examines witnesses.

In October of 2019, the Water Rate Board issued a Request for Proposals to serve as the Public Advocate. *See* philawx.phila.gov/econtract/, New Opportunity No. 21191003134541. Community Legal Services, Inc. (“CLS”) submitted a response to the RFP and was awarded a contract to serve as Public Advocate following a competitive process. CLS fulfills the obligations of the contract through a senior attorney as lead, assisted as needed by other attorneys on its staff. CLS also retains experts to analyze Water Department submissions, submit testimony, and assist CLS with discovery, cross-examination, and briefing.

c. Technical Expert/Consultant

The Water Rate Board’s regulations permit, but do not require, the Board to hire or contract with a Technical Expert “to advise the Board on the Department’s proposed rates and charges and directly related issues.” *See* Regulations of the Philadelphia Water, Sewer, and Storm Water Rate Board, Section II(B)(3). In practice, the Water Rate Board has called the Technical Expert a “Technical Consultant.” The Technical Consultant is responsible for helping the Water Rate Board, the Hearing Officer, and the participants in Rate Proceedings determine what documentation and calculations the Water Department should make available, especially at the outset of the Rate Proceedings, in order to expedite consideration of the proposed rates.

In October of 2019, the Water Rate Board issued a Request for Proposals to serve as the Technical Consultant. *See* philawx.phila.gov/econtract/, New Opportunity No. 21191002085811. Amawalk Consulting Group LLC submitted a response to the RFP and was awarded a contract to serve as Technical Consultant following a competitive process.

III. Relevant Law and Discussion

a. The City's Ethics Code

Philadelphia Code Chapter 20-600 is the City's Ethics Code. It includes a variety of provisions that are designed to ensure that City officers and employees exercise their judgment without being influenced by financial considerations. The Ethics Code includes restrictions on conflicts of interest, gifts to City officers and employees, the activities of officers and employees after leaving City service, and the representation by officers and employees of other people in transactions involving the City. The Ethics Code also requires all officers and employees to attend ethics training and certain officers and employees to file annual statements of financial interests.

With a few exceptions, these Code-based provisions apply only to City officers and employees. The term "officer and employee" is defined at Code Section 20-601(18) as:

Any person who is elected or appointed to a position in any branch of the government of the City and/or County of Philadelphia or to any elected or appointed position which serves the City and/or County of Philadelphia including, but not limited to, members of agencies, authorities, boards and commissions however elected or appointed; persons serving full-time or intermittently; persons serving with or without compensation.

As such, if any of the Hearing Officer, Public Advocate, or Technical Expert fits within this definition, they would be subject to the City's Ethics Code.

The Board addressed a similar situation in Board Opinion 2022-002. In that case, the question before the Board was whether members of the Institutional Review Board ("IRB") of the Philadelphia Department of Public Health are officers of the City, as that term is used in the Ethics Code. The Board found that members of the IRB meet the Code's definition of "officer or employee" because they "serve in a defined role in a capacity that is governed by well-established laws, policies, and practices" and the IRB "resides in, and provides essential services to, the City's Health Department." The Board further observed:

We note that this holding should not be read to suggest that anyone who volunteers their time at the request of the City is subject to the Ethics Code. As commonly understood, the term "officer" implies a heightened level of responsibility and authority...Given the mission and duties of the IRB, in particular the fact that no human subject research project involving the City can proceed without the IRB's approval, we have no difficulty in finding that IRB members exercise, on behalf of the City, significant powers of government. As such, finding them to be officers of the City is consistent with both the Code's definition of "officer" and the common understanding of the term.

1. Hearing Officer

As with members of the Health Department's Institutional Review Board, the Water Rate Board's Hearing Officer is appointed by a City entity and serves in a defined role in a capacity that is governed by well-established laws, policies, and practices. The Hearing Officer also provides essential services to the Water Rate Board. Moreover, the Hearing Officer exercises, on behalf of the City, significant powers of government. As such, we find that the Water Rate Board's Hearing Officer is a City officer subject to the Ethics Code.

2. Public Advocate

While the Public Advocate is appointed by the Water Rate Board to a defined role that is governed by well-established laws, policies, and practices, it provides services to the Water Rate Board in only the broadest sense of the term. It is, in fact, charged with representing the interests of "small users" rather than the interests of the Water Rate Board or the City. Moreover, the function of the Public Advocate is essentially advisory. It presents information to the Water Rate Board to inform and influence its decision making, but it cannot, on its own, take any action on behalf of the City. As such, the Public Advocate does not seem to exercise significant powers of government.

Lastly, the Water Rate Board has chosen to contract with an organization rather than an individual. While the terms of the contract determine the scope of services, Community Legal Services determines who does the required work and how they will do it. While the Water Rate Board could certainly choose to contract with an individual, rather than an organization, it is notable that the Public Advocate is able to fulfill its function without the direct supervision and control of the Water Rate Board.

Accordingly, we find that the Public Advocate is not a City officer subject to the City's Ethics Code.

3. Technical Expert/Consultant

The Technical Expert/Consultant is appointed by the Water Rate Board to a defined role that is governed by well-established laws, policies, and practices and it provides services to the Water Rate Board (as well as to other participants in rate setting proceedings). That said, the Technical Expert/Consultant is purely advisory. It does not act on behalf of the City and does not seem to exercise significant powers of government. Accordingly, we find that the Public Advocate is not a City officer subject to the City's Ethics Code.

b. Philadelphia Home Rule Charter

Unlike the Ethics Code, neither the Home Rule Charter generally nor the provisions over which the Board has jurisdiction include a definition of the term “officer.” In Board Opinion 2022-002, we found “no reason to apply a different standard from what we have articulated above with regard to the Ethics Code.” The same is true in this case. As such, we find that the Water Rate Board’s Hearing Officer is subject to the Home Rule Charter provisions within the Board’s jurisdiction, but the Public Advocate and Technical Expert/Consultant are not.

More specifically, the Hearing Officer is subject to Charter Sections 10-105 (Gratuities) and 10-107 (Political Activities). Charter Section 10-102 (City Contracts) only applies to City officers “whose salary is paid out of the City Treasury.” Board Regulation No. 6 provides that, as the term is used in Section 10-102, a salary is “compensation for services paid on a regular basis, such as bi-weekly, monthly or yearly. It does not include payment on an hourly wage or per-meeting basis.” Because the Hearing Officer’s contract provides that she is paid on an hourly basis, we conclude that she is not paid a “salary” as the term is used in Section 10-102. As such, we find that the Hearing Officer is not subject to Charter Section 10-102.

c. The State Ethics Act

Generally speaking, the State Ethics Act applies to “public employees” and “public officials.” The relevant category for this opinion, “public official,” is defined at Section 1102 of the State Ethics Act as:

Any person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof.

Because the Hearing Officer is appointed by an appointed official (members of the Water Rate Board) in the administrative branch of a political subdivision (the City of Philadelphia) and because the Hearing Officer exercises the power of the City, as explained above, we believe that the Water Rate Board’s Hearing Officer is subject to the State Ethics Act. While the Public Advocate and Technical Expert/Consultant are also appointed by an appointed official in the administrative branch of a political subdivision, as discussed above, we do not believe that they exercise the power of the City. As such, they would not be subject to the State Ethics Act. While we cannot provide definitive guidance regarding application of the State Ethics Act, we have conferred with senior attorneys at the Law Department and they agree with our analysis. If, however, you would like definitive guidance that would offer protection from enforcement, you should contact the City Solicitor.

We note that the State Ethics Act requires Public Officials to file an annual Statement of Financial Interests. The Hearing Officer may file the required Statement through our website.

IV. Conclusion

The Water Rate Board's Hearing Officer is subject to the City Ethics Code, Sections 10-105 and 10-107 of the Home Rule Charter, and the State Ethics Act. The Water Rate Board's Public Advocate and Technical Expert/Consultant are not subject to the City's Ethics Code or the Home Rule Charter provisions within the Board's jurisdiction, nor do we believe they are subject to the State Ethics Act.

The Board's General Counsel Staff will be happy to answer any questions the Hearing Officer may have about these rules. In addition, the Hearing Officer should attend ethics training as soon as is practicable. General Counsel Staff will follow up with the Hearing Officer in the near future to make the necessary arrangements to attend training.

* * * * *

Thank you for your concern about compliance with the City's Ethics Code and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board's jurisdiction, unless they have omitted or misstated material facts in their requests. § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

Since you requested a public opinion, a copy of this Opinion will be made public on the Board's website and by other means. Please let General Counsel Staff know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

/s/Michael Reed

Michael H. Reed, Esq., Chair
Judge Phyllis W. Beck, (Ret.), Vice-Chair
Sanjuanita González, Esq., Member
Brian J. McCormick, Jr., Esq., Member
JoAnne A. Epps, Esq., Member