

Opinion of the City of Rochester Board of Ethics - 2014-3

December 9, 2014

Overview

On October 26, 2014, City of Rochester Councilmember Jacklyn Ortiz submitted a request by letter (“Letter Request”) for the investigation, review and issuance of an advisory opinion by the Board of Ethics on various issues connected with the Rochester Housing Authority’s (“RHA”) recent change in leadership.

The Board of Ethics reviewed and discussed the letter and its contents at its November 18, 2014 and December 9, 2014 regular meetings. (Mr. Lee recused himself from both proceedings). During the deliberations each Board Member reviewed the following documents:

- Rochester City Council Member Ortiz letter to the Board of Ethics dated October 26, 2014
- City of Rochester Deputy Corporation Counsel memo dated October 29, 2014
- Code of Ethics of the City of Rochester Section 2-18
- City of Rochester Corporation Counsel letter to the President of Rochester City Council dated October 24, 2014
- Rochester Housing Authority letter to the Board of Ethics dated December 9, 2014
- Applicable sections of the New York State Public Housing Law

The authority of the Board of Ethics is defined in the City Charter, Section 2-18 F as follows:

(3) The Board of Ethics shall render written advisory opinions to City officers and employees with respect to the Code of Ethics and Article 18 of the General Municipal Law or amendments to either. Any relevant matter may be brought before the Board for an opinion upon the written request of any City officer or employee or upon the initiative of the Board...

The RHA is a public authority created under New York State Public Housing Law (“NYSPHL”). RHA is a separate public corporation and not a part of City government. Pursuant to the NYSPHL, a Board of Commissioners consisting of seven commissioners governs RHA. The NYSPHL provides that RHA tenants elect two commissioners and five commissioners are to be appointed by the Mayor of the City of Rochester. The City Council has no role in the appointment or removal of these appointments.

RHA employees and Commissioners are not City employees and thus the City’s Code of Ethics is not applicable to them in the performance of their RHA duties. The Board of Ethics has no authority to rule on allegations of wrongdoing or potential conflicts of interest involving RHA employees or commissioners who are not City employees or officials.

The sole focus of the Board of Ethics under the current Code of Ethics can only be to review those RHA issues which involve City employees and officers and evaluate potential conflicts of interest which relate to transactions with City government. It is expressly limited to the powers and responsibilities conferred on it by the Code of Ethics as currently in effect. The Board of Ethics cannot and is not rendering an opinion on whether ethical violations or conflict of interest issues exist for RHA employees or officials and whether actions were properly taken in accordance with RHA policies and procedures.

Opinion

The Board of Ethics can take no position on whether a matter is “appropriate” or “illegal” as requested in the Letter Request nor interpret or advise regarding state or federal law. Seven issues referenced in the letter are not within the Board’s scope of authority to render an opinion on. Only the following portions of four issues contained in the Letter Request are within the scope of the Board of Ethics authority to review and issue an advisory opinion on:

Is there a conflict of interest in having a member of the City’s Law Department sit on the RHA board?

In and of itself, there is no conflict of interest in having an employee of the City’s Law Department serving as a director of an outside boards, including serving as a director of the RHA. It is common and historical practice for City employees and officials to serve on public and non-profit boards.

A City employee or officer must recuse themselves from any matters that might arise from time to time which would involve both the City and the organization on whose Board they are a member of. (See recusal discussion in more detail below).

Is it a conflict of interest for an elected City of Rochester public official to lead a public entity with federal funds?

Involvement with any organization that receives federal funds raises no additional issues under the Code of Ethics unless further specific facts are present. The recommendations and findings as set forth concerning the other issues considered in this opinion would be applicable to this issue.

(Steinbrenner, Antonevich, Lindley, Scott, Maneiro, Weir)

Is it a conflict of interest for the wife of John Borek (Councilman McFadden's Legislative Aid) to serve as an RHA board member?

A City employee's spouse is not an employee or official of the City and is not subject to the City's Code of Ethics. Thus, no ethical issue or conflict of interest would be present under the Code of Ethics.

((Steinbrenner, Antonevich, Lindley, Scott, Weir)

Is it a conflict of interest for a sitting council member to serve as the executive director of the RHA?

Section 2-18(C)(1) of the Code of Ethics provides:

No City officer or employee shall have any employment, or engage in any business or commercial transaction, or engage in any professional activity, or incur any obligation, as a result of which, directly or indirectly, he or she would have an interest that would impair his or her independence of judgment or action in the performance of his or her official duties or that would be in conflict with the performance of his or her official duties.

A part-time City Council member would not be prohibited from other employment as long as their judgment would not be so impaired or compromised so as to interfere with their ability to perform Councilmember duties.

A review of City Council proceedings over recent years identified only a few matters coming before the Council involving RHA. These primarily concerned simple contracts between the City and RHA (trash collection, fueling agreement, and summer youth jobs). The periodic approval of any changes in the salary schedule for RHA employees also is acted upon by City Council as required by NYSPHL.

It is the opinion of the Board that there are no material ethical impediments under the Code of Ethics or inherent incompatibility in a City Council member also serving as Executive Director of RHA. On the infrequent occasions when RHA matters come before City Council, a Councilmember holding both positions simultaneously must recuse himself or herself from discussions or vote on the matter. It is also recommended the Councilmember refrain from participation in any fashion regarding any proposal or legislation that specifically and disproportionately relates to, affects or benefits RHA. The City Council procedures concerning disclosure of interests and abstention from voting must also be strictly complied with.

(Steinbrenner, Lindley, Scott, Weir)

DISSENTING OPINION

Section 2-18(C)(2)(b) of the Code of Ethics also provides:

No City officer or employee shall have or enter into any contract with any person who has or enters into a contract with the City unless the contract between the person and the City is one with respect to which the City officer or employee:

- 1. Has no interest;*
- 2. Has no duties or responsibilities, or, if the contract with the person is one which the City officer or employee entered into prior to becoming a City officer or employee, he or she abstains from any performance of duties or responsibilities; and*
- 3. Exercises or attempts to exercise no influence.*

Looking at each of the three exceptions above, in turn:

- 1.) As the approval of wage and salary increases for RHA employees is acted upon by City Council, there exists an undisputable conflict of interest. Whether or not it is manageable was not the question placed before the Board.
- 2.) The executive director of the RHA has duties and responsibilities; arguably the most duties and responsibilities. The only true exception accounted for in the Code would be if the City officer were already in the position prior to becoming a City officer, in which case abstention is warranted. I am of the opinion that this clause reflects the original intent of the Code of Ethics insofar as City officers and employees may find themselves in a conflict of interest through unforeseen circumstance, marriage, merger, etc.. It was not meant to serve as a tool to manage an officer or employee who knowingly accepts a prohibited contract.
- 3.) As has been recently witnessed in the media, the position of the executive director of RHA is one where the exercise of influence plays a significant role. Advocacy for funding or policy on behalf of the RHA that may eventually require City Council approval presents a clear conflict between the two positions. If a City Council member advocates for funding or policy for the betterment of a sub-population, not from within City Council chambers but from the private sector, they would, as required by the Code of Ethics, need to abstain from any vote related to the funding or policies, thereby not only disenfranchising their constituents but also the very sub-population they are attempting to assist.

I am of the opinion that there is a significant conflict of interest for a sitting Council member to serve as the executive director of the RHA.

(Antonevich)