

**Opinion of the City of Rochester Board of Ethics - 2017-1
August 8, 2017**

Overview

On June 1, 2017, Rachel Barnhart ("Barnhart") submitted a request ("Request") for an advisory opinion from the Board of Ethics ("Board") of the City of Rochester ("City") concerning a May 31, 2017 job fair held at City Hall in conjunction with and on behalf of Uber Technologies, Inc. ("Uber").

Barnhart was neither an officer nor employee of the City of Rochester, but in her Request asked that the Board review possible violations of City Charter, Code of Ethics, Sections 2-18 C. (4), (5), and (12) by City officers or employees, particularly by the Mayor of the City.

At its regularly scheduled meeting on June 13, 2017, the Board unanimously agreed on its own initiative to have the matter brought before the Board and to render a written opinion thereon; the matter to be considered at its next scheduled meeting of July 11, 2017.

On June 15, 2017, Barnhart further made a number of procedural requests relating to the matter, including postponement of its consideration. Preliminary to taking up the matter at its July 11 meeting, the Board reviewed the additional requests. The requests were unanimously deemed by the Board to be moot or inappropriate as infringing on the authority and prerogatives of the Board and valid only if supported by and requested by a member of the Board.

Records and Information

Corporate Counsel advised the Board that no formal rules or procedures had been adopted or existed regarding the hosting or supporting job fairs or the promotion of private business in the City. Corporate Counsel could also find no record of any City business ever being denied requested non-financial economic development assistance by the City.

Barnhart, and Alex Yudelson and Baye Muhammed from the City attended the meeting and were given the opportunity to address the Board and answer questions from individual Board members.

A "Ridesharing Timeline" was presented outlining the communications regarding and evolution of the trade fair event with Uber.

Opinion

The authority of the Board is defined in the City Charter, Code of Ethics, Section 2-18 F. (3) as follows:

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 Board has no authority to rule on allegations of wrongdoing or potential conflicts of interest involving City officers or employees beyond those standards and provisions as expressly set out in the currently existing Code of Ethics ("Code"). It is expressly limited to the powers and responsibilities conferred on it by the Code as currently in effect. The Board cannot and is not rendering an opinion on whether ethical considerations or conflict of interest issues exist other than as precisely established in the current Code.

Notwithstanding this, the Board believes a reasonable inference may be applied to Code provisions, and that it may take into consideration interpretations that can reasonably be drawn from a particular Code provision. The Board feels reasonable inferences may be applied, especially where necessary to avoid an overly technical application of or obvious inconsistency in the Code or where its provisions are in conflict.

I. City Charter, Code of Ethics, Section 2-18 C. (4)

No City officer or employee, acting in the performance of his or her official duties, shall treat, whether by action or omission to act, any person more favorably than it is the custom and practice to treat the general public.

No evidence or facts were presented indicating any favoritism of Uber or that it received more enhanced City support of resources than other City employers. To the contrary, the record indicates its primary competitor, Lyft, Inc. held a similar job fair in conjunction with the City immediately thereafter and also specifically requested that it and Uber be permitted to conduct separate job fairs.

II. City Charter, Code of Ethics, Section 2-18 C. (5)

No City officer or employee shall use or permit the use of city-owned vehicles, equipment, materials or property for the convenience or profit of himself or herself or any other person.

This provision, if read literally, would not permit the use of any City resources for the benefit of any third party, even City residents whose well-being City government was established to protect and foster. An "other than in the public interest" exception and carve-out must be inferred and read into this prohibition. To otherwise do so would be to completely eradicate the third prong of Lincoln's "government of the people, by the people, for the people" notion and forever banish

City attendance at City business grand openings and constrain if not eliminate City officers and employees from engaging in City economic development and job creation activities and programs. The Board particularly takes notice that one of the City's greatest challenges currently is lifting an ever-increasing number of City residents out of poverty through developing work and job opportunities in the City's private business sector.

III. City Charter, Code of Ethics, Section 2-18 C. (12)

No former City officer or employee shall at any time after he or she leaves the agency he or she served represent a person before any agency on a matter with which he or she was directly involved or of which he or she has special knowledge, if the representation would be adverse to the position of the City on the matter.

This potential violation of the Code centers around the involvement of Jeremy Cooney, a former City officer and Chief of Staff of the Mayor, in assisting Uber with the job fair. Mr. Cooney was an employee of a marketing firm hired by Uber to coordinate the job fair with the City and was directly involved in negotiations with the City. Even if it is assumed arguendo that Mr. Cooney possessed special knowledge valuable to the endeavor, it was clearly not adverse to the City. This prerequisite is plainly not present.

IV. Conclusion

It is the opinion of a majority of the Board that the activities of City employees and officers relating to the job fair did not violate those sections of the Code cited by Barnhart and therefore no ethical violations were involved with creating and holding the Uber job fair.

In reviewing the matter, however, the Board as a whole strongly recommends that the City adopt formal policies and procedures regarding use of its resources for economic development purposes and objective standards and criteria be put in place for the allotment of City assistance and publicity to aid business growth and job creation.

Putting in place written standards and qualifying conditions for assisting private businesses would minimize the risk of the inadvertent disproportionate assistance to a third party and also reduce the likelihood of allegations that a non-level playing field exists in connection with the allocation of City equipment, materials or property.

The Board further unanimously recommends that a complete updating of the Code be effected which is clearly outdated and overly technical and narrow. The Board continues to labor with the patchwork of imprecise provisions contained in the current Code when a much more flexible and modern approach to ethical issues involving City officers and employees is clearly needed.

(Steinbrenner, Lee, Scott, Weir with Antonevich and Maneiro concurring except as to Section II)

Dissenting Opinion

(As to City Charter, Code of Ethics, Section 2-18 C. (5))

Section 2-18(C)(5) of the Code of Ethics provides:

No City officer or employee shall use or permit the use of city-owned vehicles, equipment, materials or property for the convenience or profit of himself or herself or any other person.

To insert an “other than in in the public interest” carve-out in order to justify nullifying this provision is unwarranted. There were a myriad of alternative options to serve the public interest that did not require the use of city-owned property for the convenience of a single company. While the administration’s goal of lifting city residents out of poverty is a noble cause, taking an “ends justifies the means” view is a slippery slope and is the very reason a Code exists.

In the absence of a codified exception to the rule, it is clear Uber was permitted the use of city property for its convenience and profit in violation of this section of the Code.

(Antonevich, Maneiro)