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BALTIMORE CITY BOARD OF ETHICS

Baltimore City Board of Ethics
Ethics Opinion 21-002
(March 11, 2021)

The Ethics Board received a request for guidance on the application of the Ethics Law¹ to certain voting abstention policies for members of the Board of Estimates (“BOE”). As explained below, the Ethics Law itself does not require a BOE member to abstain from voting on all matters concerning a unit of City government under the member’s control. However, the BOE is free to adopt additional voting abstention policies to avoid even the appearance of a conflict of interest.

Background

The BOE is a five-member body established in Article VI of the City Charter that is charged with “formulat[ing] and execut[ing] the fiscal policy of the City.” City Charter, Art. VI, § 2. The BOE’s membership comprises the Mayor, President of the City Council, Comptroller, City Solicitor, and Director of Public Works.

The BOE meets nearly every week and votes on numerous agenda items involving City governance, including the expenditure of City funds. According to current BOE staff, the members of the BOE have not in the past operated under a formal written conflict of interest policy concerning matters on which they should abstain from voting. Instead, at least some members have kept an individual “abstention list” with the names of individuals and entities with whom they were affiliated in some way; in theory, the member would abstain from voting on particular agenda items that concerned one of these individuals or entities.² It was left to individual members and their staff to identify potential conflicts by comparing weekly agenda items against the member’s abstention list.

In December 2020, the BOE adopted a resolution requiring BOE members to submit a written memo of proposed abstentions to the Comptroller in advance of a BOE meeting, noting the agenda item and the reason for the abstention. This memo would then be publicized along with the meeting’s agenda. The resolution also encouraged BOE members to consult with Ethics Board staff for guidance on abstentions and other considerations.

¹ The Ethics Law is contained in Article 8 of the City Code. Unless otherwise indicated, all citations are to the Ethics Law.

² It does not appear BOE members routinely consulted Ethics Board staff about the application of the Ethics Law to these lists. Accordingly, the lists may have been overinclusive and/or underinclusive in encompassing the individuals and entities that might have presented an actual or perceived conflict of interest under the Ethics Law.

BOE staff also inform us that it is longstanding practice for at least some BOE members to abstain from voting on BOE agenda items that affect units of City government that are under that member's direction. The Ethics Board was specifically asked whether the Ethics Law applies to this particular abstention practice. We will address that question by way of discussing the Ethics Law's abstention requirements more broadly.

Analysis

The Ethics Law's restrictions on participation in Section 6-6 require a public servant³ to refrain from participating in a matter—by disqualification, recusal, abstention, or otherwise—if the public servant or a “disqualifying relative”⁴ holds any legal or economic interest in the matter. § 6-6(b)(1) and (b)(2). The Ethics Law also requires disqualification from participation if the public servant or a disqualifying relative holds certain affiliations with a “business entity” that is a party to the matter. Among other disqualifying affiliations, a public servant is required to abstain from participation in a matter that involves a business entity if they or a disqualifying relative:

- hold a “financial interest”⁵ in the business entity;
- serve as a partner, officer, director, trustee, or agent of the business entity; or
- are employed by, have applied for, or have prospective employment with the business entity.

§ 6-6(b)(3).⁶

The Ethics Law's general definition of “business entity” is broad, meaning “any person in business or other organized activity, whether for-profit or not-for-profit and regardless of form.”

³ The term “public servant” refers to “any official or employee” of the City. § 2-23. The term “official,” in turn, includes, among others, elected officials and department heads. § 2-21.

⁴ “Disqualifying relative” means a public servant's spouse, parent, child, or sibling. § 6-1(b).

⁵ “Financial interest” means ownership of:

- (1) more than 3% of a business entity;
- (2) securities of any kind that represent or are convertible into ownership of more than 3% of a business entity; or
- (3) any interest as the result of which the owner:
 - (i) received more than \$1,000 in any 1 of the preceding 3 calendar years; or
 - (ii) is entitled to receive more than \$1,000 in the current or any subsequent calendar year.

§ 2-16.

⁶ See § 6-6 for the full list of affiliations with a business entity that would require disqualification from a matter that involves that entity. See §§ 6-7 through 6-9 for exceptions to the Ethics Laws restrictions on participation.

§ 2-4. The definition of “person,” in turn, means an individual and an “entity of any kind,” including “a governmental entity or an instrumentality or unit of a governmental entity.” § 2-22. As such, under the general definition of “business entity,” a BOE member arguably would be required to abstain from voting on a matter if they were an officer or director of an entity that was a party to the matter, including a unit of City government that was under their control. *See* § 6-6(b)(3)(ii)(A).

However, in 2013, the Ethics Law was amended to limit the definition of “business entity” as used in the law’s restrictions on participation in § 6-6. As amended, the term “business entity” in § 6-6 “does not include Baltimore City or any instrumentality, unit, or agency of Baltimore City.” § 6-6(a). This limiting definition is consistent with the State Ethics Law, on which the City’s law is modelled. *See* Md. Code, General Provisions Article, § 5-101(e) and § 1-114 (defining, respectively, “business entity” to mean “a person engaged in business, whether profit or nonprofit, regardless of form,” and “person” to mean an individual, company, firm, etc., “or other *nongovernmental* entity” (emphasis added)).

As such, under the plain language of § 6-6(b)(3), and absent other disqualifying circumstances, a BOE member would not be required to abstain from voting on a matter that concerns a City governmental unit under their control because the governmental unit does not count as a “business entity” that could raise a conflict of interest. Nonetheless, a BOE member should still consider whether they or a disqualifying relative hold any personal legal or economic interest in such a matter. § 6-6(b)(1) and (b)(2). For example, depending on the circumstances, a BOE member might be required to abstain from taking action on a matter that directly involves a disqualifying relative’s City employment. As always, Ethics Board staff are available to provide guidance on such matters on a case-by-case basis.

Finally, although the Ethics Law itself may not prohibit a BOE member from voting on most matters that involve a governmental unit under the member’s control, the BOE is free to adopt a formal resolution that outlines additional abstention policies for its members. City Charter, Art. VI, § 2 (“To exercise its powers and perform its duties, the [BOE] may promulgate rules and regulations.”). In determining whether additional abstention policies are merited, the BOE should consider whether there are categories of BOE matters that are more likely than others to give rise to the appearance of a conflict of interest. Identifying such matters and requiring abstention on them would be consistent with the Ethics Law’s general purpose “[t]o guard against improper influence *or even the appearance of improper influence*, and to ensure public trust in the government.” § 1-2 (emphasis added).

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