

# **PHILADELPHIA BOARD OF ETHICS**

## **REGULATION NO. 2**

### **INVESTIGATIONS AND ENFORCEMENT PROCEEDINGS.**

#### **SUBPART A. DEFINITIONS; SCOPE.**

**2.0 Definitions.** As used herein, the following words and phrases shall have the meanings indicated.

**a. Public Integrity Laws.** Chapter 4-1100 of the Philadelphia Home Rule Charter, Chapters 20-600 and 20-1000 of the Philadelphia Code, and such other laws and regulations over which the Board has jurisdiction, as well as other matters assigned to the Board by City Council.

**b. Board.** The Board of Ethics, including, with respect to Subpart C of this Regulation, any Hearing Officer appointed by the Board.

**c. Executive Director.** The Executive Director of the Board (including the interim Executive Director until a permanent Executive Director is appointed), and his or her designee or designees.

**d. General Counsel.** The General Counsel of the Board, or his or her designee, designees, or agents.

**e. Paragraph.** A numbered paragraph contained in this Regulation.

**2.1 Scope.** This Regulation, promulgated by the Board pursuant to its authority under Sections 4-1100 and 8-407 of the Home Rule Charter (“Charter”) and Section 20-606(1) of the City of Philadelphia Ethics Code (“Ethics Code”), sets forth the procedures for the Board’s investigations, the conduct of enforcement proceedings, and related matters.

**2.2 Powers of the Board.** The Board shall have the power to investigate all matters related to its responsibilities under the Public Integrity Laws. Pursuant to Ethics Code § 20-606(1)(g) and Charter §§ 8-409 and 8-412, the Board and its designated agents shall have the power to inspect books and records; receive and investigate complaints; issue subpoenas to require the attendance of witnesses and the production of books, accounts, papers and other evidence; and administer oaths and take the testimony of witnesses. The Board may refer any matter related to, or discovered in, an investigation pursuant to this paragraph to any other governmental or law enforcement agency as the Board deems appropriate. As required by law, the Board shall maintain a separation between functions related to determining whether there is probable cause

to believe that a violation of the Public Integrity Laws has occurred and functions related to adjudicating final determinations. In this regard, the individual members of the Board, any hearing officer in a particular case, and the General Counsel shall be considered to be part of the “adjudicative function,” and the Executive Director and professional staff or consultants directed by the Executive Director shall be considered to be part of the “investigatory” or “prosecutorial” function.

## **SUBPART B. INVESTIGATIONS.**

**2.3 Initiation of Investigations.** An investigation may be commenced on the basis of any of the following three circumstances:

- a. receipt of a complaint that meets the requirements of Paragraph 2.4(b), submitted pursuant to Ethics Code § 20-606(1)(f) and Paragraph 2.4(a);
- b. upon a referral from another government and/or law enforcement agency; or
- c. upon the Executive Director becoming aware of facts or allegations that may indicate a potential violation.

The Executive Director shall have the authority to initiate an investigation in any of the above three circumstances. An investigation initiated by the Executive Director that is not in response to a complaint from any other person shall not be subject to the requirements of Paragraphs 2.4(a), (b), and (c).

**2.3A Preliminary Inquiry.** The Executive Director may, at his or her sole discretion, conduct a preliminary inquiry of any alleged violation of the Public Integrity Laws, whether initiated by complaint, referral, or upon the initiative of the Executive Director as described above in Paragraph 2.3 (a), (b), (c). Information relating to a preliminary inquiry shall be kept confidential and no notices will be provided that such an inquiry has commenced.

## **2.4 Complaints.**

**a. General.** Any person who believes a violation of the Public Integrity Laws has occurred may submit a written complaint to the Board in such form as prescribed by the Board. A complaint shall be mailed to, or personally served on, the Board at: City of Philadelphia Board of Ethics, Packard Building, 2<sup>nd</sup> Floor, 1441 Sansom Street, Philadelphia, PA 19102. For purposes of the foregoing sentence, a complaint shall be considered mailed if sent via electronic mail to the Board via the Board’s Web site or by other electronic means.

**b. Requirements.** A complaint shall conform to the following requirements:

i. It shall provide the full name and address of the complainant, and identify as the respondent of the complaint those individuals or entities who are alleged to have committed violations of the Public Integrity Laws, including their names and addresses to the extent known.

ii. It shall contain clear allegations of fact, including times, places, and names of witnesses to the extent known, which describe a violation of the Public Integrity Laws.

**c. Initial Review.** Upon receipt of a complaint, the Executive Director shall review the complaint for substantial compliance with the requirements of subparagraph (b). If the complaint is in compliance, the staff shall mail the complainant notice that the complaint has been accepted. If a complaint is not in compliance, the Executive Director shall dismiss the complaint and shall mail notice thereof to the complainant.

**d. Notice and Opportunity to Respond.** Upon conclusion of any preliminary inquiry and if the Executive Director concludes that an investigation should proceed, or after a full investigation has been initiated, and the Executive Director, in his discretion, determines that there is reason to believe that a violation of the Public Integrity Laws has occurred, but no later than ten days prior to any hearing or final adjudication, the Executive Director shall mail to each respondent notification that the complaint has been filed or an investigation initiated. If based on a complaint, the Executive Director shall enclose a summary of the factual basis for the violations of the Public Integrity Laws alleged in the complaint. If the investigation is not based on a complaint, the Executive Director shall enclose a summary of the factual basis for any violations of the Public Integrity Laws that are being investigated. The notice shall further inform each respondent of his or her opportunity to respond to the allegations in the complaint within ten (10) days of the date of the notice, or in such time as the notice specifies.

**e. De Minimis Complaints; Frivolous Complaints.**

i. The Executive Director may dismiss or suspend further processing of a complaint or other investigation if, in his or her judgment, the alleged violation is trivial, typographical or clerical, or in other respects a *de minimis* violation; provided, however, that the Executive Director shall report regularly to the Board on the number and nature of complaints dismissed or suspended under this subsection.

ii. If the Executive Director receives information that a complaint is false or frivolous, or reasonably finds after review that a complaint is false or frivolous, the Executive Director, pursuant to Ethics Code § 20-606(1)(k), may initiate an investigation on behalf the Board into the circumstances surrounding the drafting and filing of the complaint, including requesting or compelling testimony from the complainant.

## **2.5 Conduct of Investigation.**

**a. Purpose.** The purpose of an investigation is to determine whether there is probable cause to believe that a violation of the Public Integrity Laws has occurred.

**b. General.** An investigation may include, but is not limited to, field investigations and inspections, the issuance of subpoenas, the taking of sworn testimony, requests for the production of documents, interrogatories, requests for admissions, the review of public filings, and other methods of information gathering.

**c. Subpoenas and Subpoenas Duces Tecum.** The Executive Director shall have the authority to issue subpoenas and subpoenas duces tecum on behalf of the Board in connection to any investigation conducted pursuant to Ethics Code § 20-606(1)(g) and Subpart B of this Regulation. If any person refuses to comply with any subpoena issued under this paragraph, or while appearing pursuant to it, refuses to answer any question or produce any records or materials, the Board, by majority vote, may direct the Executive Director to apply for the enforcement of the subpoena in the appropriate Court of Common Pleas.

**d. Testimony.** The Executive Director shall have the authority to administer oaths and affirmations on behalf of the Board, and to take testimony from any person, in connection to any investigation conducted pursuant to Ethics Code § 20-606(1)(g) and Paragraph Subpart B of this Regulation.

**e. Termination.** The Executive Director shall have discretion to terminate an investigation upon reasonable written notice to the Board. If the investigation is upon a complaint meeting the requirements of Paragraph 2.4(b), the staff shall mail both the complainant and the respondent notice of this termination.

**f. Confidentiality.** All investigations shall be subject to the confidentiality provisions of Code §20-606(1)(i).

## **SUBPART C. ADMINISTRATIVE ENFORCEMENT.**

**2.6 Initiation of an Administrative Enforcement Proceeding.** If the Executive Director finds there is probable cause to believe that a violation of the Public Integrity Laws has occurred, and that the matter is appropriate for an administrative adjudication by the Board, then, except as provided in Subpart D, the Executive Director shall direct the initiation of an enforcement proceeding pursuant to Code § 20-606(1)(h). In accordance with Code § 20-605, the Executive Director shall not engage in any *ex parte* communications with the Board, its General Counsel, or any Hearing Officer appointed by the Board, with respect to any such matter. See Paragraphs 2.2 and 2.10(c).

**2.7 Notice of Enforcement Proceeding.** To commence the enforcement proceeding, the Executive Director shall issue written notice to each respondent regarding the violations of the Public Integrity Laws for which probable cause have been found.

**a. Contents.** The notice shall contain the following: (i) a description of the acts and/or omissions of the respondent(s) that form the basis for each alleged violation; (ii) the applicable provisions of law that are alleged to be violated; and (iii) the deadline for the respondent's response required under Paragraph 2.8.

**b. Service.** Service of process upon a respondent whose address is known to the Board shall be made either by personal service or by mailing the notice to respondent(s) by first class, certified or overnight mail. Notice to a candidate or treasurer of a campaign for city elective office shall be mailed to the addresses provided in the campaign's disclosure reports filed with the Board pursuant to Code § 20-1006. The candidate and treasurer are responsible for maintaining a correct address on file with the Board, and for notifying the Board in writing in any change in their addresses. Service of process upon a respondent(s) whose address is unknown shall be made either by personally delivering the notice to such respondent, or his or her attorney or agent; or by any means of substituted or constructive service authorized by Pennsylvania statute or civil rule. A copy of the notice shall be provided to the General Counsel.

**2.8 Opportunity to Respond.** The respondent(s) has the right to respond in writing to the allegations of violation in the notice. The response shall be deemed timely if it is submitted by the date specified by the notice, which shall not be less than fourteen (14) days from the date of the notice, unless, for exigent circumstances, the Board shall fix a shorter time. Upon the request of the respondent(s), the Board, in its discretion, may grant the respondent(s) an extension of time to respond to the notice. No request for an extension shall be granted unless such request is in writing, and alleges good cause for such extension.

**a. Appearance.** If the respondent(s) wishes to appear before the Board to contest the allegations of violation in the notice, the respondent(s) shall timely request a hearing in his or her response to the notice. The respondent shall be notified of the date, time, and place of the requested hearing. The respondent(s) has the right to be represented by counsel, and to call witnesses and present evidence in his or her defense at such hearing.

**b. Representation.** If the respondent(s) wishes to be represented by counsel in any matter before the Board, the respondent(s) shall so advise the Board in his or her response to the notice, or shall provide the Board with a letter of representation, stating the name, address, telephone number, and attorney number of the counsel.

## **2.9 Settlement and Conciliation.**

**a. Settlement negotiations.** At any time, the Executive Director may seek to settle the matter.

**b. Stipulation of settlement.** The Board and the respondent(s) may agree to enter into a written conciliation agreement or stipulation of settlement in any pending enforcement proceeding in lieu of conducting a hearing. The adoption of a stipulation of settlement is entirely within the discretion of the Board. A stipulation of settlement is not binding until it is signed by the respondent(s) and the Executive Director and approved by a majority vote of the Board. All final stipulations of settlement shall be made available to the public.

**2.10 Public Hearings.** The Board is authorized by Ethics Code § 20-606(1)(h) to conduct public hearings to adjudicate alleged violations of the Public Integrity Laws and/or Board regulations. The Board shall preside over all such hearings, and determine the conduct and order of the proceeding, subject to the Pennsylvania Local Agency Law, 2 Pa.C.S. §§551-555, the Charter, the Philadelphia Code, this Regulation, and other applicable law; provided, however, that the Board may appoint a Hearing Officer to prepare Findings of Fact and Conclusions of Law for the Board's consideration. Respondents to an enforcement proceeding will be afforded a full and fair opportunity to be heard before the Board.

**a. Oaths and Affirmations.** The Board and its designated agents shall have the power to administer oaths and take testimony on any matter relevant to the alleged violations that are the subject of the hearing.

**b. Subpoenas.** The Board and its designated agents shall have the power pursuant to Charter § 8-409 to issue subpoenas to compel the attendance of witnesses and the production of documents and materials relevant to the alleged violations that are the subject of the hearing, and to enforce such subpoenas in the manner set forth in Paragraph 2.5(c).

**c. *Ex parte* communications.** In accordance with Code §20-605, no person shall engage in an inappropriate *ex parte* communication with any member of the Board (including, for purposes of this subparagraph, the General Counsel and any designated Hearing Officer).

## **2.11 Discovery.**

**a. Pre-hearing disclosures.** All parties to an enforcement proceeding shall give notice of the names of the witnesses they plan to call to testify, or whose testimony they plan to submit, at least seven (7) days prior to the hearing at which the witnesses are to testify, unless the Board or its designated Hearing Officer shall, for exigent circumstances, fix a shorter time. The Board may require the Executive Director and Respondent to exchange copies of documents they intend to offer as evidence at the hearing.

**b. Evidence.** Other than witnesses and documents as identified under (a) above, there shall be no evidence admitted at the hearing, provided that the Board may grant exceptions, for good cause shown.

**c. No other discovery.** Except as provided in subparagraphs (a) and (b) of this paragraph, there shall be no other discovery, although the parties in an enforcement proceeding may voluntarily agree between themselves to other forms of discovery.

**2. 12 Examination and Cross-Examination.** Witnesses shall testify under oath or affirmation, and shall be subject to reasonable examination and cross-examination. Witness shall appear on behalf of or at the invitation or subpoena of the Board or on behalf of the parties to the proceeding.

**a. Written Testimony.** The Board, at its discretion, may allow any party or witness to offer testimony in written form. Such written testimony shall be received in evidence with the same force and effect as though it were stated orally at the hearing by the party or witness who has given the evidence, provided that such testimony is sworn under penalty of perjury, and the party or witness is available to appear at the hearing for cross examination as requested by any party to the proceeding.

**b. Examination of Witnesses by the Board.** Board members and Board-appointed Hearing Officers may ask questions of witnesses at any time.

**2.13 Evidence.** As provided in the Pennsylvania Local Agency Law, the Board shall not be bound by technical rules of evidence at Board hearings, and all relevant evidence of reasonably probative value may be received.

**a. Official Notice.** The Board may take official notice of relevant laws, official regulations and transcripts of prior administrative enforcement proceedings; and of judicially cognizable facts, facts of common public knowledge, and physical, technical or scientific facts within the Board's specialized knowledge.

**b. Documentary Evidence.** The Board may accept, at its discretion, copies and excerpts of documents and other records if the original is not in the possession of a party or readily available.

**2.14 Final Board Determinations.** After providing the respondent(s) with an opportunity to respond to the notice and to contest any alleged violations at a hearing conducted pursuant to Ethics Code § 20-606(1)(h) and these Regulations, the Board shall deliberate on the evidence and determine, by a preponderance of the evidence, whether a violation of applicable law has occurred, and whether to assess penalties for any such violations. A determination to find a violation and assess a penalty requires a majority vote of Board members present and voting, but in no case less than three. The decision of the Board shall be the final agency action. Notice of the final determination shall be sent to each respondent in the manner described in Paragraph 2.7(b), and shall be made public upon the conclusion of enforcement proceedings.

## **SUBPART D. JUDICIAL ENFORCEMENT**

**2.15 Scope.** Subpart C shall not apply, and this Subpart D shall apply, to those enforcement actions to be instituted by the Board filing an action in the Court of Common Pleas.

**2.16 Institution of a Judicial Enforcement Proceeding.** If the Executive Director concludes that, based on all the circumstances, the determination of probable cause should be made by the Board, and the ultimate adjudication by the courts, the Executive Director shall institute a judicial enforcement proceeding, in lieu of an administrative enforcement proceeding. In such a case, the Executive Director shall present the Board with the charges and explanation of his or her recommendation of probable cause. The Board may do one of the following:

- a.** Determine that no probable cause exists and direct that the charges be dismissed;
- b.** Determine that the matter is appropriate for an administrative enforcement proceeding and direct that the Executive Director proceed with such a proceeding; or
- c.** Undertake any other appropriate resolution, in the Board's discretion.

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