



CITY OF PHILADELPHIA

BOARD OF ETHICS
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**Philadelphia Board of Ethics
Public Board Opinion No. 2018-001**

January 25, 2018

The Honorable James F. Kenney
c/o Ellen Mattleman Kaplan, Chief Integrity Officer
Office of the Mayor
City Hall, Room 225
Philadelphia, PA 19107
ellen.kaplan@phila.gov

**Re: Application of the City Ethics Laws to Members of the Board of
Education and to Members of the Educational Nominating Panel**

Dear Mayor Kenney:

You have requested a public advisory opinion regarding the application of the City ethics laws to members of the Board of Education of the School District of Philadelphia and to members of the Educational Nominating Panel. As discussed below, members of the Board of Education are not subject to the ethics laws over which the Board of Ethics has jurisdiction, while members of the Educational Nominating Panel are subject to these ethics laws.

I. Jurisdiction

The Philadelphia Home Rule Charter (“Charter”) grants the Board of Ethics jurisdiction to administer and enforce all Charter provisions and ordinances pertaining to ethical matters. Charter § 4-1100. The Charter and The Philadelphia Code (“Code”) authorize the Board of Ethics to render advisory opinions explaining the application of

laws under the Board’s jurisdiction. *See* Charter § 4-1100; Code § 20-606(1)(d); Board Reg. 4 ¶ 4.1(a). An appointing authority may request an advisory opinion concerning subordinate officers or employees who are subject to, or who reasonably could be subject to, laws within the Board’s jurisdiction. *See* Board Reg. 4 ¶¶ 4.5, 4.6. Board Regulation 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board of Ethics. Board Reg. 4 ¶¶ 4.0, 4.26.

II. Factual Background

You have informed us that the City will soon convene the Educational Nominating Panel and reconstitute the Board of Education of the School District of Philadelphia (“Board of Education”). You have also informed us that members of the Board of Education and members of the Educational Nominating Panel are not compensated.

The Educational Supplement to the Charter established a separate and independent home rule school district known as The School District of Philadelphia. *See* Charter § 12-100. The Charter Educational Supplement also established a Board of Education to administer, manage, and operate the home rule school district. *See* Charter § 12-200. The Mayor appoints the nine members of the Board of Education.¹ *See* Charter § 12-201.

The Educational Nominating Panel, which is composed of thirteen members appointed by the Mayor, is charged with assisting the Mayor in appointing members of the Board of Education. *See* Charter §§ 12-201, 12-207. The Educational Nominating Panel submits to the Mayor three names of qualified persons for each vacancy on the Board of Education. *See* Charter § 12-207(b). At the Mayor’s request, the Educational Nominating Panel will provide a second list of three additional qualified persons for a vacancy. *See id.* The Mayor then makes appointments to the Board of Education from the names that have been supplied by the Educational Nominating Panel. *See id.*

III. Questions Presented & Brief Answers

1. Are members of the Board of Education subject to the City ethics laws that are under the jurisdiction of the Board of Ethics?

No. Members of the Board of Education are not subject to the ethics laws in the Charter and Code that are under the Board of Ethics’ jurisdiction.

¹ A proposed amendment to the Charter Educational Supplement that alters the selection process for members of the Board of Education is now pending before City Council. *See* Res. No. 170967, Nov. 2, 2017, *as amended* Dec. 12, 2017. If adopted, the proposed amendment as it currently stands would not impact the analysis in this Opinion.

2. Are members of the Educational Nominating Panel subject to the City ethics laws that are under the jurisdiction of the Board of Ethics?

Yes. Members of the Educational Nominating Panel are subject to the ethics laws in the Charter and Code that are under the Board of Ethics' jurisdiction.

IV. Discussion

For the reasons discussed below, members of the Board of Education are not subject to the ethics laws in the Charter and Code over which the Board of Ethics has jurisdiction, whereas members of the Educational Nominating Panel are subject to these ethics laws.

A. The Board of Education of the School District of Philadelphia

The City Solicitor has advised that the Board of Education, as the governing body of the School District of Philadelphia, is not a City board or commission within the meaning of the Charter. *See* Dec. 22, 2017 Sol. Op. at 2, attached as Exhibit A (“I have little difficulty concluding that this body, charged with administration and management of the independent School District, is not a City body.”). The Solicitor reasoned that the Board of Education “does not perform a municipal function; its responsibility is entirely related to the management and administration of a public education function, a function expressly *denied* to the City.” *Id.* (emphasis in original).

As the Board of Education is not a City board or commission for Charter purposes, its members are not City officers subject to the Charter ethics restrictions discussed below. Moreover, members of the Board of Education are not otherwise subject to the ethics restrictions in the Charter. *See id.* at 3 (describing longstanding stance of School District and Law Department that Charter §§ 10-102, 10-105, and 10-107 are not applicable to members of the Board of Education or to School District employees). Specifically, members of the Board of Education are not subject to the political activity restrictions in Charter Subsections 10-107(3)-(6) because they are neither City officers nor officers of a governmental agency whose compensation is paid from the City Treasury.² *See* Charter § 10-107; Board Reg. ¶ 8.1(a) (defining “appointed officer” subject to Charter §§ 10-107(3) & (4) as an individual, other than an elected official, appointed to a position in a City department, agency, office, board, or commission). Members of the Board of Education are also not subject to the Charter Section 10-105 prohibition on gratuities because they are neither City officers, nor do

² Charter Subsections 10-107(1) and 10-107(2), which are not addressed in this Opinion, bar any person, not only City officers, from engaging in certain behavior regarding civil service appointments and positions. *See* Charter §§ 10-107(1)-(2); Board Opinion 2007-006 at 19 n.7.

they receive a salary or other compensation. *See* Charter § 10-105 (prohibiting solicitation or acceptance of gratuities by City officer or employee or by officer or employee whose salary or other compensation is paid from the City treasury). Further, the Charter Section 10-102 prohibition on interests in certain City contracts would not apply to Board of Education members, as they are not compensated and therefore do not receive a salary. *See* Charter § 10-102 (prohibiting City and other government officers whose salaries are paid out of the City Treasury from having interests in certain City contracts); Board Reg. 6 ¶ 6.1 (providing that Charter § 10-102 applies only to salaried City board or commission members).

Similarly, members of the Board of Education are not subject to the provisions in the City Ethics Code found at Code Chapter 20-600. Board of Education members do not satisfy the definition of “board or commission members” under the City Ethics Code because the Board of Education is not a board or commission of the City. *See* Code § 20-601(4)³; Ex. A, Sol. Op. at 2 (concluding that the Board of Education is not a City body). Further, Board of Education members are not “officers or employees” under the City Ethics Code because they serve the independent School District and do not hold a position in City government. *See* Code § 20-601(18)⁴; Charter §§ 12-100, 12-200; *see also* Ex. A, Sol. Op. at 2.

While the City ethics laws in the Charter and Code generally do not apply, it appears that the Pennsylvania Public Official and Employee Ethics Act (“State Ethics Act”), 65 Pa. C.S. §§ 1101 *et seq.*, would apply to members of the Board of Education. *See, e.g.*, State Ethics Comm’n Advice of Counsel 02-538 (advising that a member of a local board of education qualifies as a “public official” as defined in the State Ethics Act and is thus subject to provisions of the State Act); State Ethics Comm’n Advice of Counsel 84-536 (advising member of Board of Education of the School District of Philadelphia on the application of the State Ethics Act to the member); *see also* discussion *infra* Section IV.B.3 (describing limited jurisdiction of the Board of Ethics with respect to the State Act). Some notable State Ethics Act requirements include avoiding conflicts of interest and annually filing the State Ethics Commission Statement of Financial Interests. *See* 65 Pa. C.S. §§ 1103, 1105.

³ The City Ethics Code defines “board or commission member” as “[a] member of any City of Philadelphia board or commission established by The Philadelphia Home Rule Charter, The Philadelphia Code, or an Executive Order.” Code § 20-601(4).

⁴ The City Ethics Code defines “officer or employee” as “[a]ny 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.” Code § 20-601(18). An “agency” is defined as “[a]ny office, department, board, commission, or other entity that is part of the government of the City, including City Council.” Code § 20-601(1).

B. The Educational Nominating Panel

Educational Nominating Panel members are subject to the ethics laws in the Charter and Code over which the Board of Ethics has jurisdiction.

1. The Philadelphia Home Rule Charter

The City Solicitor has advised that the Educational Nominating Panel is a City board or commission within the meaning of the Charter. *See* Ex. A, Sol. Op. at 2 (“I have little difficulty concluding that [the Educational Nominating Panel] is a City board or commission.”). The Solicitor reasoned that although the Educational Nominating Panel was established pursuant to the Charter Educational Supplement, the Panel’s functions and responsibilities are purely City functions, not School District functions. *See id.* (“Indeed, the sole responsibility of the Panel is to perform a core City function – to assist *the Mayor* in making critical appointments to the Board of Education.”) (emphasis in original). By virtue of being members of a City board or commission for Charter purposes, Educational Nominating Panel members are City officers subject to applicable Charter ethics restrictions.

a. Charter Section 10-107 (Political Activity)

Charter Section 10-107 imposes certain restrictions on the political activity of City officers, which include members of City boards or commissions. *See* Charter § 10-107; Board Reg. 8 ¶¶ 8.0, 8.1(a); Board Opinion 2007-006 at 2. Political activity is activity that is directed toward the success or failure of a political party, candidate, or partisan political group. *See* Board Reg. 8 ¶ 8.1(n).

More political activity restrictions apply to members of City boards or commissions that exercise significant powers of government as compared to members of City boards or commissions that do not exercise such powers. *Compare* Board Reg. 8 ¶ 8.21 *with* ¶ 8.22; *see also* Board Opinion 2007-006 at 19 (concluding that Charter § 10-107(5)’s resign to run provision applies only to members of City boards or commissions that exercise significant powers of government and not to members of City boards or commissions that do not exercise such powers). Members of City boards or commissions that exercise significant powers of government are fully subject to the provisions of Board Regulation 8, which interprets Charter Subsections 10-107(3) and 10-107(4). *See* Board Reg. 8 ¶¶ 8.0, 8.21. In contrast, members of all other City boards or commissions are subject only to a limited number of restrictions in Board Regulation 8. *See* Board Reg. 8 ¶ 8.22(a) (referencing Subpart B (on duty or while using City resources), Subpart C (use of City position), Subpart L (evasion) and Subpart M (penalties)).

For purposes of determining the application of Charter Subsections 10-107(3)-(5), boards and commissions fall into two categories – those that exercise significant powers of government and those that do not. Examples of the exercise of significant powers of government include a board or commission’s ability to make assessments, determine property rights, decide appeals, impose penalties, or adjudicate matters. *See* Board Reg. 8 Subpart J (listing City boards or commissions that exercise significant powers of government including, for example, the Board of Pensions and Retirement, the Human Relations Commission, and the Zoning Board of Adjustment); Board Opinion 2007-006 at 4-16. In contrast, the sole responsibility of the Educational Nominating Panel is to facilitate the Mayor’s appointment of Board of Education members. *See* Charter § 12-207; Ex. A, Sol. Op. at 2. The Educational Nominating Panel provides a limited list of names from which the Mayor makes a Board of Education appointment. *See* Charter § 12-207. As such, for purposes of the application of Charter Section 10-107, the Educational Nominating Panel does not fall within the category of City boards and commissions that exercise significant powers of government. Accordingly, members of the Educational Nominating Panel are subject only to a limited number of political activity restrictions. *See* Board Reg. 8 ¶ 8.22; *see also supra* note 2.

First, an Educational Nominating Panel member is prohibited from engaging in political activity while on duty⁵ or while using City-owned or leased resources. This includes prohibitions on engaging in political activity while: (1) using City telephones, vehicles, printers, computers, or other supplies or equipment; (2) in City Hall or in any other City-owned or leased building, property, or office space; or (3) wearing a badge or insignia that identifies the member as a City officer. *See* Board Reg. 8 Subpart B. Second, an Educational Nominating Panel member must not use his or her authority, influence, title, or status as a Panel member for any political purpose⁶ or while participating in political activity. This includes a prohibition on using his or her authority or influence as a Panel member to coerce or request that any individual, including a subordinate, participate in political activity. *See* Board Reg. 8 Subpart C.

b. Charter Section 10-105 (Gratuities)

Members of entities that are City boards or commissions for purposes of the Charter are City officers subject to Charter Section 10-105. Charter Section 10-105 prohibits members of the Educational Nominating Panel from soliciting or accepting any

⁵ An Educational Nominating Panel member is “on duty” when performing duties or acting in an official capacity as a member of the Panel. *See* Board Reg. 8 ¶ 8.1(k).

⁶ A political purpose is a purpose related to a political party, candidate, or partisan political group. *See* Board Reg. 8 ¶ 8.1(m).

compensation or gratuity in the form of money or otherwise for any act or omission in the course of City work. *See* Charter § 10-105.

c. Charter Section 10-102 (Interest in City Contract)

Charter Section 10-102 prohibits a governmental officer whose salary is paid out of the City Treasury from soliciting, benefiting from, or being directly or indirectly interested in certain City contracts, regardless of whether a connection exists between the officer’s duties and the contracts. *See* Charter § 10-102; Board Opinion 2014-001 at 2. Charter Section 10-102 applies only to City board or commission members who earn a salary, defined as compensation for services paid on a regular basis – such as monthly or yearly – but excluding payment on an hourly wage or per-meeting basis. *See* Board Reg. 6 ¶ 6.1. Thus, Charter Section 10-102 does not restrict Educational Nominating Panel members, as they are not compensated and therefore do not receive a salary. *See* Charter §§ 12-206, 12-207; Board Reg. 6 ¶ 6.1.

2. The City Ethics Code

Under the City Ethics Code, Educational Nominating Panel members qualify as board or commission members because the Panel is a board or commission of the City of Philadelphia that is established by the Charter. *See* Code § 20-601(4) (defining “board or commission member” in relevant part as a “member of any City of Philadelphia board or commission established by The Philadelphia Home Rule Charter”); Ex. A, Sol. Op. at 2. As such, Educational Nominating Panel members are also City officers under the City Ethics Code. *See* Code § 20-601(18) (defining “officer or employee” in relevant part as any person appointed to a position in City government, including board or commission members).

Educational Nominating Panel members are thus subject to all provisions in the City Ethics Code that apply to board or commission members or to City officers. For instance, members of the Educational Nominating Panel are required to attend annual ethics training and to file an annual statement of financial interests, commonly referred to as the City financial disclosure form. *See* Code §§ 20-606(1)(b)(iii), 20-610. Other ethics restrictions, such as those regarding gifts, conflicts of interest, and representation, also apply to Educational Nominating Panel members. *See, e.g.,* Code §§ 20-602 (representation), 20-604 (gifts), 20-607 (conflicts of interest). Please refer to Code Chapter 20-600 for all applicable City Ethics Code restrictions and requirements.

3. The State Ethics Act

The State Ethics Act contains restrictions that are separate from and in addition to those imposed by the City ethics laws. The Charter grants the Board of Ethics authority

to render advisory opinions regarding the State Ethics Act, and at the option of the requestor, the Law Department also has concurrent authority to issue opinions on the State Act. *See* Charter § 4-1100. Guidance from the Board of Ethics regarding the State Ethics Act is not binding on any person and does not provide any protection from penalties or sanctions for a violation of the Act. Board Reg. 4 ¶ 4.4. It appears that the State Ethics Commission has not previously issued advisory opinions or rulings that address a board or commission like the Educational Nominating Panel that has a singular function of providing a limited list of names for an elected official to make appointments to a governmental board. For this reason, we recommend that advice be obtained from the State Ethics Commission concerning the application of the State Ethics Act to members of the Educational Nominating Panel. The State Ethics Commission is the administrative agency that enforces the State Ethics Act, and advisory opinions issued by the State Ethics Commission provide the greatest protection, including complete protection from Commission enforcement. *See* 65 Pa. C.S. §§ 1107(10)-(11), 1109(g); *see also* State Ethics Comm'n Order No. 1620, Oct. 8, 2013 at 6.

* * * * *

Thank you for your concern about compliance with the City ethics laws and for seeking advice regarding the application of these laws to members of the Educational Nominating Panel and to members of the Board of Education. Members of the Educational Nominating Panel and members of the Board of Education are entitled to act in reasonable reliance on this Opinion and not be subject to penalties under the City ethics laws within the Board of Ethics' jurisdiction, unless material facts have been omitted, misstated, or change. *See* Code § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12. Since you requested a public opinion, this original Opinion will be made public. Please let Board of Ethics staff know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS⁷



Michael H. Reed, Esq., Chair
Judge Phyllis W. Beck, (Ret.), Vice-Chair
Sanjuanita González, Esq., Member

⁷ Board Members Brian J. McCormick, Jr., Esq., and JoAnne A. Epps, Esq., did not participate in the approval of this Opinion.

EXHIBIT A



City of Philadelphia

LAW DEPARTMENT
One Parkway
1515 Arch Street
17th Floor
Philadelphia, PA 19102

Privilege Waived
1/16/2018

Michael H. [Signature]

MEMORANDUM

Privileged and Confidential Advice of Counsel

TO: Maya Nayak, General Counsel, Board of Ethics

FROM: Sozi Pedro Tulante, City Solicitor [Signature]

DATE: December 22, 2017

SUBJECT: Charter application to the Educational Nominating Panel and the Board of Education

You have asked for my opinion relating to several questions concerning the Board's consideration of the extent to which members of the Educational Nominating Panel and the Board of Education are subject to the ethics laws of the City of Philadelphia. As you are well aware, the interpretation of those ethics laws is a matter for the Board and not for the Law Department. *See generally* Home Rule Charter §§ 3-806(g), 4-1100; City Solicitor's Opinion No. 2008-13 (Smith to Creamer: Authority of Board of Ethics and Law Department to Issue Ethics Opinions). Nonetheless, you recognize that those laws should not be interpreted in a vacuum, but, rather, that they must be read in context, with an appreciation for how certain terms are construed throughout the City Charter, of which the ethics provisions are but one part, and in light of other laws relating to the City of Philadelphia and public education; and that the interpretation of laws other than the ethics laws remains the responsibility of my Office. *See* Opinion No. 2008-13, *supra*. With that in mind, you have asked for my opinion on certain interpretive questions relating to the Home Rule Charter, with the recognition that that opinion may help inform your interpretation of the ethics laws.

In particular, you have asked:

1. Is the Educational Nominating Panel a City board or commission within the meaning of the Home Rule Charter?

Preliminarily, I note that the Ethics Code (Phila. Code Chapter 20-600) defines a "board or commission member" as "[a] member of any City of Philadelphia board or commission established by The Philadelphia Home Rule Charter, The Philadelphia Code, or an Executive Order," Phila. Code § 20-601(4), and, as discussed above, it is not my role to offer an opinion on the meaning of that definition. Nonetheless, it is within my purview to provide an opinion on whether the Educational Nominating Panel is generally considered a City board or commission under the Home Rule Charter, apart from the ethics provisions of the Charter. The answer is yes.

Although it was established pursuant to the First Class City Public Education Home Rule Act as part of the Educational Supplement to the City's Home Rule Charter, the Nominating Panel's functions and responsibilities are purely City functions. Indeed, the sole responsibility of the Panel is to perform a core City function -- to assist *the Mayor* in making critical appointments to the Board of Education. The Panel is not serving a School District function, and there is no suggestion in the Educational Supplement that the Panel is a part of the School District. Its job is to serve the Mayor and to restrict the Mayor's appointment power, but not to serve the School District. To the extent it needs legal advice, it would seek such advice from the Law Department, as would any City board or commission. To the extent it needs to purchase any supplies or services, it would do so through the Procurement Department, as would any City board or commission. I have little difficulty concluding that it is a City board or commission.¹

2. Is the Board of Education a City board or commission within the meaning of the Home Rule Charter?

The answer is no. The Board of Education is the governing body of the School District of Philadelphia. The School District is established, by Charter and by State law, as an independent political subdivision, entirely separate and independent from the City of Philadelphia. *See* Charter § 12-100 ("A separate and independent home rule school district is hereby established and created to be known as 'The School District of Philadelphia.'"); 53 P.S. § 13218(a)(1) (Home Rule Education Act) (City given the "power to establish and create a separate and independent home rule school district" and the "power to provide for a board of education of such home rule school district"). The Board's responsibility is "to administer, manage, and operate the School District of Philadelphia." Charter § 12-300; *see also* 53 P.S. § 13218(a)(2) (to same effect).

The Board does not perform a municipal function; its responsibility is entirely related to the management and administration of a public education function, a function expressly *denied* to the City. *See* 53 P.S. § 13219(a)(2). I have little difficulty concluding that this body, charged with administration and management of the independent School District, is not a City body.

¹ I recognize that the Panel was established as part of the adoption of the School District's Charter, and that the purpose of the Panel is to facilitate appointment of School District board members. Nonetheless, because the Panel's entire responsibilities relate to a core City function -- appointments made by the Mayor -- I find that its essence is far more "City" than "District."

3. Are there any other issues under the Charter that the Board of Ethics should consider when determining the applicability of Charter Sections 10-102, 10-105, and 10-107 to members of the Educational Nominating Panel and to members of the Board of Education? For example, how does Charter Section 12-502(c) apply to the question of whether members of the Board of Education are subject to the foregoing provisions?

Section 12-502(c) of the Charter provides as follows:

(c) The following Sections of the Philadelphia Home Rule Charter shall not apply to the Board of Education or to The School District of Philadelphia:

Sections 2-308, 3-306, 4-300, 4-400, Chapter 1 of Article 6, 6-500, 6-600, 6-601, 7-100, 7-102, 7-201, 7-300, 7-301, 7-302, 7-400, 7-401, 8-101, 8-103, Chapter 2 of Article 8, 8-406, 8-407 and 8-410. In all other respects the Philadelphia Home Rule Charter so far as pertinent shall apply to the Board and to the District.

Given that sections 10-102, 10-105 and 10-107 are not expressly listed as inapplicable to the District, it is clear that they were intended by the framers of the Educational Supplement to apply to the Board of Education (and to the District itself) *so far as pertinent*. As Solicitor Franklin-Suber explained in Opinion No. 97-13, however, “The Law Department has not, to my knowledge, had occasion to formally opine on either the reach of the emphasized phrase in general or the degree to which Section 10-102 in particular applies to the School District and the Board,” and, to my knowledge, that remains the case today, with respect to all three particular sections at issue. It is my understanding, however, that longstanding School District policy and interpretation has been that these Charter provisions, to the extent they are directed at City officers and employees, are not applicable to the Board or to the School District, for the reason that Members of the Board of Education and employees of the School District are not City officers or employees. Moreover, that has been the assumption of the Law Department, albeit without careful analysis of Section 12-502(c). *See, e.g.*, Opinion No. 95-20 (Section 10-107 not applicable to the School District).

There is much to be said for this historical practice and interpretation; indeed, the referenced Charter provisions apply almost exclusively to City officers and employees, which the members of the Board and the employees of the District most certainly are not. To “apply” these provisions to the Board and the District would require some difficult analogizing, as the plain language alone simply does not fit.

In light of the foregoing, absent compelling circumstances, and subject to review of this issue by the Board of Ethics, I am loath to upset the settled expectations of literally thousands of School District employees and officials by rejecting this long-entrenched understanding.