

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. Chapters 20-600 and 20-1000 of the Philadelphia Code, relevant provisions of the Philadelphia Home Rule Charter and such other laws and regulations over which the Board has jurisdiction under Charter Section 4-1100, as well as other matters assigned to the Board by City Council.

b. Board. The body of members of the Board of Ethics appointed pursuant to Section 3-806 of the Home Rule Charter.

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, and his or her designee or designees.

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

f. Subject of a complaint or an investigation. Those individuals or entities alleged in a complaint to have violated the Public Integrity Laws or those individuals or entities being investigated to determine whether there is probable cause to believe they have violated the Public Integrity Laws.

g. Respondent. Those individuals or entities against whom the Executive Director has instituted an administrative enforcement proceeding or against whom the Board has instituted a judicial enforcement proceeding.

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 to any other governmental or law enforcement agency as the Board deems appropriate.

2.3 Separation of Functions. As required by law, in the context of administrative enforcement proceedings and related investigations the Board shall maintain a separation between the adjudicative functions and the investigatory or prosecutorial functions. 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.

2.4 Preliminary Inquiry. The Executive Director may, at his or her discretion, conduct a preliminary inquiry to determine if there is reason to believe a potential violation of the Public Integrity Laws has occurred. Board and Board staff shall keep preliminary inquiries confidential as required by Regulation No. 5 Paragraph 5.5. However, a preliminary inquiry is not an investigation and is not subject to the disclosure provisions of Board of Ethics Regulation No. 5, Paragraph 5.3 and the notice provisions of Regulation No. 5, Paragraph 5.4.

2.5 Initiation of Investigations. The Executive Director shall have the authority to initiate an investigation on the basis of any of the following three circumstances:

- a. receipt of a complaint that meets the requirements of Paragraph 2.6(b), submitted pursuant to Ethics Code § 20-606(1)(f) and Paragraph 2.6(a);
- b. upon a referral from another government and/or law enforcement agency, if the referral describes a potential violation of the Public Integrity Laws; or
- c. upon the Executive Director determining, through a preliminary inquiry, that a potential violation of the Public Integrity Laws has occurred.

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 2.6(a), (b), and (c).

2.6 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, 2nd 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 subject 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. 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 of the Board into the circumstances surrounding the drafting and filing of the complaint, including requesting or compelling testimony from the complainant.

2.7 Conduct of an 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 notice to the Board. If the investigation is upon a complaint meeting the requirements of Paragraph 2.6(b), the staff shall mail both the complainant and the subject of the complaint notice of this termination.

f. Confidentiality. All investigations shall be subject to the confidentiality provisions of Code § 20-606(1)(i) as described in Board of Ethics Regulation No. 5.

SUBPART C. ADMINISTRATIVE ENFORCEMENT.

2.8 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, 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 2.3 and 2.11(d).

2.9 Notice of Administrative 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 has been found. The Notice of Administrative Enforcement Proceeding may also be referred to as the Notice.

a. Contents. The Notice shall contain the following: (i) a description of the acts and/or omissions of the respondent 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 2.10. The Notice shall inform the respondent of his or her right to request a hearing. The Notice shall also inform respondent that a request for a hearing must be made in his or her written response to the Notice and that a respondent's failure to request a hearing shall be deemed a waiver of the right to a hearing as set forth in Paragraph 2.10(c).

b. Service. The Executive Director shall serve the Notice of Administrative Enforcement Proceeding on each respondent either by personal service or by first class, certified or overnight mail. The Executive Director shall serve a candidate or treasurer of a campaign for City elective office at 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 of any change in their addresses. The Executive Director may serve a respondent whose address is unknown 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. The Executive Director shall serve a copy of the Notice on the General Counsel.

2.10 Opportunity to Respond. The respondent has the right to respond in writing to the allegations of violation in the Notice of Administrative Enforcement Proceeding. The response shall be deemed timely if it is received by the Board within twenty (20) days from the date of the Notice, unless, for exigent circumstances, the Board shall fix a shorter time. Upon the request of the respondent, the Board, in its discretion, may grant the respondent 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 wishes to appear before the Board to contest the allegations of violation in the Notice, the respondent shall timely request a hearing in his or her response to the Notice. The respondent may be represented by counsel, and may call witnesses and present evidence in his or her defense at such hearing.

b. Representation. If the respondent wishes to be represented by counsel in any matter before the Board, the respondent 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.

c. Waiver. A respondent's failure to request a hearing in his or her written response to the Notice shall be deemed a waiver of the right to a hearing by the respondent. A respondent's failure to respond in writing to the Notice by the deadline set forth in Paragraph 2.10 ("Opportunity to Respond") shall be deemed a waiver of the right to a hearing by the respondent. The Board, in its discretion, may grant an untimely request for a hearing if such request is made before the Board votes to approve its final determination in the matter as provided in Paragraph 2.15.

2.11 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. A quorum of Board members need not be present for a hearing to proceed. One or more Board members 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. The Board may, however, appoint a Hearing Officer to oversee pre-hearing disclosures, preside over a hearing, and 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 as set forth below.

a. Notice of Hearing. The Board shall notify the parties of the date and time of the hearing in advance of the hearing. All hearings shall be held at the offices of the Board of Ethics, unless otherwise specified by the Board.

b. 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.

c. Subpoenas. The Board and its designees 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. Upon issuing subpoenas for administrative adjudication hearings, the Board will grant the Executive Director and respondents authority to apply for enforcement of the subpoenas in the appropriate Court of Common Pleas if any person refuses to comply with any such subpoena, or while appearing pursuant to it, refuses to answer any question or produce any records or materials.

d. *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). Communicating with the General Counsel regarding non-substantive issues, such as scheduling, is not an inappropriate *ex parte* communication.

e. Resolution of Pre-hearing Matters. The Board may designate a single Board member or a Hearing Officer to resolve matters related to pre-hearing disclosures and submissions.

f. Maintenance of Order. The Board, or its designated Hearing Officer, may exclude an individual from a hearing or limit the number of persons attending a hearing as necessary to limit disruption and maintain an orderly and efficient hearing.

g. Additional Procedures. The Board may approve additional procedures for the conduct and management of administrative enforcement proceedings. Any additional procedures approved by the Board will be provided to the parties in advance of a hearing.

2.12 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 fourteen (14) 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, or its designated Hearing Officer, 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 or its designated Hearing Officer 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.

2.13 Examination and Cross-Examination. Witnesses shall testify under oath or affirmation, and shall be subject to reasonable examination and cross-examination. Witnesses 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, or its designated Hearing Officer, 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, or the Board's designated Hearing Officer, may ask questions of witnesses at any time.

c. Limitation of Witnesses and Examination. The Board, or its designated Hearing Officer, may limit the testimony of witnesses whose testimony is cumulative or similar. The Board, or its designated Hearing Officer, may limit the time to be spent on the direct or cross examination of a witness or of a party's overall examination and cross examination of witnesses.

2.14 Evidence. As provided in the Pennsylvania Local Agency Law, the Board, or its designated Hearing Officer, 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, or its designated Hearing Officer, 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, or its designated Hearing Officer, 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.

2.15 Final Board Determinations. After providing the respondent with an opportunity to respond to the Notice of Administrative Enforcement Proceeding and to contest any alleged violations at a hearing conducted pursuant to Ethics Code § 20-606(1)(h) and this Regulation, 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. A quorum of Board members must participate in the vote on a final determination. The decision of the Board shall be the final agency action.

a. Basis of Final Determination When Hearing Not Requested. If the respondent does not request a hearing, the Board may make its final determination based on:

- i. Undisputed allegations in the Executive Director's Notice of Administrative Enforcement Proceeding; or
- ii. Evidence submitted by the Executive Director in support of the Notice of Administrative Enforcement Proceeding, including but not limited to deposition transcripts, documents, and affidavits or declarations.

b. Notice of Final Determinations. The Board shall serve notice of the final determination on the respondent in the manner described in Paragraph 2.9(b).

SUBPART D. JUDICIAL ENFORCEMENT

2.16 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.

2.17 Request for Authorization of Judicial Enforcement. 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 judicial enforcement, then the Executive Director shall present the Board with the allegations and an explanation of his or her finding of probable cause and request authorization from the Board to initiate judicial enforcement.

2.18 Opportunity to Address the Board. The Executive Director shall notify the potential respondent to the judicial enforcement of the finding of probable cause by the Executive Director and shall provide him or her with the allegations submitted to the Board pursuant to Paragraph 2.17. The Executive Director shall inform the potential respondent that he or she may appear at the next public meeting of the Board to address the Board and respond to the allegations submitted to the Board pursuant to Paragraph 2.17.

The provisions of Paragraph 2.18 shall not apply to actions to enforce a subpoena issued by the Board or to actions seeking emergency relief.

2.19 Board Action on Request for Authorization of Judicial Enforcement. After reviewing the allegations submitted by the Executive Director and considering the information, if any, provided by the potential respondent to the judicial enforcement proceeding, the Board may do one of the following:

- a.** Reject the Executive Director's finding of probable cause and direct that the matter be dismissed;
- b.** Direct the Executive Director to initiate judicial enforcement; or

c. Determine that the matter is appropriate for administrative enforcement and direct the Executive Director to proceed under Subpart C of this Regulation, but only if the respondent consents, in writing, to the matter being so resolved and agrees to waive any due process challenge based on the commingling of adjudicatory and prosecutorial functions arising from prior consideration of or exposure to the relevant facts, allegations, or legal theories by any member of the Board or its staff.

The Board shall notify the respondent of its decision regarding the Executive Director's request for authorization of judicial enforcement.

SUBPART E. SETTLEMENT AND CONCILIATION

2.20 Settlement negotiations. At any time, the Executive Director may seek to settle a matter that is the subject of an investigation or enforcement proceeding.

2.21 Stipulation of settlement. The Board and a subject of an investigation or a respondent to administrative or judicial enforcement may agree to enter into a written settlement agreement resolving violations of the Public Integrity Laws. The Executive Director shall submit a proposed settlement agreement to the Board in writing with a copy provided to the subject of the investigation or the respondent to the administrative or judicial enforcement. A proposed settlement agreement must be signed by both the Executive Director and the subject or respondent before being submitted to the Board for approval. 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 subject or respondent 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.

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