



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics Non-Public Board Opinion No. 2022-002

January 19, 2022

Re: Application of City Ethics Laws to Members of Institutional Review Board

Dear Attorney:

You have requested a non-public opinion on behalf of an employee of a nonprofit entity explaining how the City’s Ethics Laws will apply to that employee if they join the Institutional Review Board of the Philadelphia Department of Public Health (“IRB”). The nonprofit employer (the “Nonprofit”) is an independent entity created by the City to provide various services to City residents.

As discussed in further detail below, members of the IRB are subject to the following ethics laws administered by the Board: Philadelphia Code Chapter 20-600 (the Ethics Code) and Sections 10-105 and 10-107 of the Home Rule Charter.¹ We also believe, and the City’s Law Department agrees, that IRB members are subject to the State Ethics Act.

As described in more detail below, under the City’s law, the Nonprofit employee should recuse themselves from any official action taken as a member of the IRB that would financially benefit the Nonprofit and should file a disclosure and disqualification letter if the opportunity arises to take official action that would affect their compensation by the Nonprofit or the willingness of the Nonprofit to retain them or would have a significant and substantial impact on the Nonprofit.

Pursuant to the State Ethics Act, the Nonprofit employee should recuse themselves from taking any official action that would have a pecuniary benefit for the Nonprofit, unless the State Ethics Commission advises otherwise.

I. Jurisdiction

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter and City Code provisions pertaining to ethical matters, including the City’s Ethics

¹ This Opinion addresses the ethics rules solely on the basis of membership on the IRB. Some members of the IRB may separately be subject to these rules if they serve the City in another capacity.

Code (Philadelphia Code Chapter 20-600). [Home Rule Charter Section 4-1100](#) and [Philadelphia Code Chapter 20-600](#) authorize the Board to render advisory opinions concerning a City officer's proposed future conduct. [Board Regulation No. 4](#) describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board.

Home Rule Charter Section 4-1100 also gives the Board “concurrent authority” with the Law Department to advise on the application of the State Ethics Act. Our advice on the State Ethics Act, however, does not provide protection from possible enforcement by the State Ethics Commission. For guidance on the State Ethics Act that would provide such protection, you should contact either the Law Department or the State Ethics Commission.

II. Background

The Institutional Review Board of the Philadelphia Department of Public Health reviews clinical trials and studies involving human subjects to ensure that the rights and welfare of research participants are respected and that research is conducted in accordance with applicable federal regulations. The IRB, along with similar boards throughout the country, is governed by Federal regulations. Under such regulations, any institution that receives funding from the U.S. Department of Health and Human Services must have a registered institutional review board.

The Philadelphia Health Department's IRB was formed in the 1970s. The City's Health Commissioner appoints the chair and members of the IRB. Under federal law, the IRB must include both members associated with the City and members independent of it. The specific jurisdiction of the IRB includes all human subject research involving City employees or people receiving services from the City's Health Department, the Philadelphia Department of Behavioral Health and Intellectual disAbilities, the Philadelphia Department of Human Services, the Philadelphia Office of Homeless Services, or the Philadelphia Prison System. Other City departments and agencies can request that the IRB review a specific research proposal.

The IRB currently consists of 10 regular members and 3 alternate members, some of whom are City employees. IRB members are not compensated for their services to the City and they provide their services on a part-time basis. The IRB is staffed by an administrator and an administrative assistant, both of whom are employees of the Philadelphia Health Department.

After reviewing a proposed clinical trial or study, the IRB will approve or deny the proposal or direct that certain changes be made in order to obtain approval. If the IRB approves a proposal, the Health Commissioner may overturn the decision. If the IRB denies a proposal, however, the Health Commissioner may not overturn that ruling.

III. Applicability of City and State Ethics Laws

a. The Ethics Code

Philadelphia Code Chapter 20-600 is the City's Ethics Code. It includes a variety of provisions that are designed to ensure that City officers and employees exercise their judgment without being influenced by financial considerations. The Ethics Code includes restrictions on conflicts of interest, gifts to City officers and employees, the activities of officers and employees after leaving City service, and the representation by officers and employees of other people in transactions involving the City. The Ethics Code also requires all officers and employees to attend ethics training and certain officers and employees to file annual statements of financial interests.

With a few exceptions, these Code-based provisions only apply to City officers and employees. The term "officer and employee" is defined at Code Section 20-601(18) as:

Any 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.

As such, if a member of the IRB fits within this definition, they would be subject to the City's Ethics Code.

We note initially that, despite its name, members of the IRB are not members of a City board or commission as described in Code Section 20-601(18) because, as per Section 20-601(4), an individual is only considered a "board or commission member" if the board or commission in question was "established by The Philadelphia Home Rule Charter, The Philadelphia Code, or an Executive Order." As the IRB was not established by either the Home Rule Charter, City Code, or Executive Order, it is not a "board or commission" for the purposes of the Ethics Code.

While the Ethics Code does not consider the IRB to be a City board or commission, we must still consider the broader terms of Section 20-601(18), which cover, as an officer or employee, "any person...appointed to a position in any branch of the government of the City... including, but not limited to...persons serving full-time or intermittently; persons serving with or without compensation." As discussed above, IRB members are appointed by the Health Commissioner. While the Ethics Code does not define the term "position," IRB members serve in a defined role in a capacity that is governed by well-established laws, policies, and practices. The IRB resides in, and provides essential services to, the City's Health Department.

As such, we find that members of the IRB meet the Code’s definition of “officer or employee.” Since IRB members are not paid for their work for the City, they are not “employees;” they are appointed officers of the City subject to the City’s Ethics Code. We note that this holding should not be read to suggest that anyone who volunteers their time at the request of the City is subject to the Ethics Code. As commonly understood, the term “officer” implies a heightened level of responsibility and authority. *See e.g.*, Black’s Law Dictionary (11th ed. 2019 (“Officer” – “Someone who holds an office of trust, authority, or command.”); 63C Am. Jur. 2d Public Officers and Employees § 9 (2021) (“Characteristics of a public officer include . . . the delegation to and exercise of some portion of governmental sovereign power, either legislative, executive, or judicial, with supervisory and discretionary authority.”)). Given the mission and duties of the IRB, in particular the fact that no human subject research project involving the City can proceed without the IRB’s approval, we have no difficulty in finding that IRB members exercise, on behalf of the City, significant powers of government. As such, finding them to be offices of the City is consistent with both the Code’s definition of “officer” and the common understanding of the term.

IV. Philadelphia Home Rule Charter

Unlike the Ethics Code, neither the Home Rule Charter generally nor the provisions over which the Board has jurisdiction include a definition of the term “officer.” That said, we see no reason to apply a different standard from what we have articulated above with regard to the Ethics Code. This is consistent with the Board’s approach to the Charter’s political activity restrictions, which it has found only apply, in full, to those board and commission members whose board or commission exercises significant powers of government. *Board Regulation No. 8*, ¶ 8.16; *see also* Bd. Op. 2007-004 (limiting the full application of the Charter’s political activity rules to boards and commissions that exercise significant powers of government). Accordingly, we hereby hold that members of the IRB are appointed officers subject to the Home Rule Charter provisions within the Board’s jurisdiction, specifically, Charter Sections 10-105 (Gratuities) and 10-107 (Political Activities).²

V. The State Ethics Act

Generally speaking, the State Ethics Act applies to “public employees” and “public officials.” The relevant category for this opinion, “public official,” is defined at Section 1102 of the State Ethics Act as:

Any person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to

² Charter Section 10-102 (City Contracts) only applies to City officers “whose salary is paid out of the City Treasury.” Because members are not paid for their service on the IRB, Charter Section 10-102 is inapplicable to them, unless they hold a paid City position separate from their IRB membership.

expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof.

Because the members of the IRB are appointed by an appointed official (the Health Commissioner) in the executive branch (the Department of Public Health) of a political subdivision (the City of Philadelphia) and because the IRB does exercise the power of the City, as explained above, we believe that IRB members would be subject to the State Ethics Act. While we cannot provide definitive guidance regarding application of the State Ethics Act, we have conferred with the Law Department and they agree that members of IRB should be considered “public officers” subject to the State Ethics Act.

VI. Application of City and State Conflict of Interest Rules

You have specifically asked how the relevant conflict of interest rules would apply to the Nonprofit employee when serving as a member of the IRB. Both the City’s Ethics Code and the State Ethics Act include conflict of interest provisions.

a. City Conflict of Interest Rule

Philadelphia Code Section 20-607 prohibits a City officer or employee from taking action in an official capacity when either (a) they (or a close family member) have a personal financial interest in that action; or (b) a for-profit business of which they are a member or a fellow member of such business has a financial interest in that action. If such a conflict of interest arises, Code Section 20-608 requires them to submit a letter disclosing the conflict and disqualifying themselves from any official action related to it.

The Board recently addressed the extent to which a conflict will arise with regard to a nonprofit employer (such as the Nonprofit in this current matter). As explained in more detail in Board Opinion 2022-001, a City officer or employee has a conflict of interest under City law if they can take official action that would, or could reasonably be anticipated to affect a nonprofit employer’s ability to pay the City officer or employee, the financial value of the compensation or benefits provided, or the willingness to hire or retain the City official. This threshold can also be met – without the need to delve into the nonprofit’s finances or decision making – if the official action would have a significant and substantial impact on the employer.

As such, if the Nonprofit employee who is serving on the IRB ever has the opportunity in their role as an IRB member to take official action that would affect their compensation by the Nonprofit or the willingness of the Nonprofit to retain them or if the official action would have a significant and substantial impact on the Nonprofit, they would have a conflict of interest and would need to file a disclosure and disqualification letter as described in Code Section 20-608. Based on what we know about the IRB and the Nonprofit, however, it seems unlikely that an opportunity to take such action would arise.

b. State Conflict of Interest Rule

Section 1103(a) of the State Ethics Act prohibits a public employee such as a member of the IRB from taking official action that would have a private pecuniary benefit for: (1) themselves; (2) their immediate family; or (3) a business, whether for-profit or nonprofit, with which they or a member of their immediate family is associated. As such, the IRB member would have to recuse themselves from any official action that would have a private pecuniary benefit for the Nonprofit.³

VII. Conclusion

Members of the IRB are subject to the City Ethics Code, Sections 10-105 and 10-107 of the Home Rule Charter, and the State Ethics Act. As such, as a member of the IRB, the Nonprofit employee would be prohibited from taking any official action that affects their salary or employment at the Nonprofit or that would have a significant and substantial impact on the Nonprofit. In such situations, the Nonprofit employee should recuse themselves from taking any official action and file a disclosure and disqualification letter.

Pursuant to the State Ethics Act, unless you receive definitive guidance regarding the Nonprofit’s status as a “government body” (*see* Footnote 3), the Nonprofit employee should recuse themselves from taking any official action as an IRB member that would have a pecuniary benefit for the Nonprofit.

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Thank you for your concern about compliance with the City’s Ethics Code and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board’s jurisdiction, unless they have omitted or misstated material facts in their requests. § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

³ In some instances, the State Ethics Commission has found that a nonprofit created by a municipality should be considered a “government body” for the purposes of the State Ethics Act. *See* Advice of Counsel 06-511, State Ethics Comm’n (Feb. 3, 2006) at p. 6. An association with a government body does not give rise to a conflict of interest under the State Ethics Act. *Id.* at 5. It is possible that the State Ethics Commission would consider the Non-Profit to be a government body. In the absence of such a determination, however, we recommend that the Non-Profit employee assume that a conflict does exist with regard to the Non-Profit and recuse from official action as described above.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the Ethics Code, a version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. If you have any questions, please contact General Counsel staff.

BY THE PHILADELPHIA BOARD OF ETHICS

/s/

Michael H. Reed, Esq., Chair
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Sanjuanita González, Esq., Member
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