

**BEFORE THE
PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD**

In the Matter of the Philadelphia Water Department's Proposed Change in Water, Wastewater and Stormwater Rates and Related Charges	Fiscal Years 2019-2021
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**PHILADELPHIA WATER DEPARTMENT'S MEMORANDUM IN OPPOSITION TO
THE PUBLIC ADVOCATE'S MOTION TO RECUSE THE CITY TREASURER**

This memorandum is submitted on behalf of the Philadelphia Water Department ("Water Department" or "PWD") in response to the Public Advocate's Motion for Recusal of Rasheia Johnson ("Motion") from participation as a member of the Philadelphia Water, Sewer and Storm Water Rate Board ("Rate Board") in the FY 2019-2021 Rate Proceeding.¹ The Public Advocate ("Advocate") asserts three broad arguments in support of its Motion: (i) the City Treasurer's service on the Rate Board creates an appearance of bias due to her financial and fiduciary relationship with the Water Department;² (ii) the City Treasurer's service presents an actual, impermissible conflict of interest due to her contractual authority over Water Department witnesses regarding the subject matter of PWD rates;³ and (iii) the City Treasurer's support of pending legislation (to amend the 1989 General Bond Ordinance) which, if enacted as originally proposed, the Advocate believes would have mandated an increase in customer rates and thereby demonstrate actual bias in favor of rate increases.⁴

¹ The FY 2019-2021 Rate Proceeding was initiated with (i) the filing of the Department's Advance Notice with Philadelphia City Council and the Rate Board on February 12, 2018; and (ii) the subsequent filing of its Formal Notice with the Department of Records and Rate Board on March 14, 2018, both in accordance with Section 13-101(7) of the Philadelphia Code.

² The Advocate asserts that the City's Treasurer's participation in a rate proceeding before the Rate Board would create an appearance of bias and potential of actual bias due to her connection with (i) cash management and debt management services (Motion at ¶11); (ii) management of bond issuances (Motion at ¶13); and (iii) oversight of financial advisors, bond counsel and disclosure counsel with regard to marketing bonds (Motion at ¶12). As discussed below, none of the foregoing functions run afoul of the City's Ethics Code which is the controlling authority in this context.

³ The Public Advocate also contends that the City Treasurer's service on the Rate Board presents an actual, impermissible conflict of interest due to her contractual authority over PWD witnesses (presumably financial professionals) citing the fact that the Office of City Treasurer engages financial advisors and bond counsel in connection with the issuance of PWD bonds who may be proffered as witness in this proceeding (Motion at ¶¶31-39). It should again be noted that none of the above activities disqualify the City Treasurer from serving on the Rate Board under the provisions of the City Ethic's Code.

⁴ The Advocate finally argues that the City Treasurer's support of amendments to the 1989 General Bond Ordinance (including a provision increasing the Capital Account Deposit which is now removed from the proposed legislation) disqualifies her from participating as a Rate Board member in the instant rate case (Motion at ¶¶42-50). In each instance cited above, the Advocate fails to cite a disqualifying conflict of interest under the City's Ethics Code. Such conflicts only arise when a public official has a personal (family or business affiliation) financial interest in the matters being decided. See discussion, *infra*.

As discussed below, although the Motion asserts “conflict of interest” and the appearance of bias, the Advocate’s arguments advance an “incompatibility of positions and duties” claim with respect to the City Treasurer’s dual responsibilities in the City Administration and on the Rate Board. The Advocate argues, in essence, that the City Treasurer should be barred from serving as a Rate Board member who decides the merits of rate proceedings because the Treasurer’s position, as a City official, renders her incapable of making an impartial decision about the reasonableness of the pending rate request. In view of the foregoing, the Advocate contends that the City Treasurer’s recusal is required, applying recusal standards applicable to judicial and adjudicative administrative proceedings. Such contention is plainly wrong. The recusal standards, cited by the Advocate, are not applicable in a regulatory (or quasi-legislative) proceeding. Rather, given the nature of the Advocate’s allegations regarding “conflict of interest” and “incompatible positions and duties,” the City of Philadelphia Ethics Code (“Ethics Code”) is controlling here. Notably, pursuant to the provisions of the Ethics Code, none of the allegations raised by the Advocate disqualify the City Treasurer from serving on the Rate Board. See discussion, *infra*.

I. QUESTIONS PRESENTED

- A. Is the Advocate correct in its central contention that the ratemaking process for fixing and regulating the Water Department’s rates and charges is adjudicatory in nature?

Proposed Answer: No

- B. Is the Advocate correct in its contention that recusal standards for judicial and adjudicative administrative proceedings are applicable to the current ratemaking process?

Proposed Answer: No

- C. Is the Advocate’s motion, in essence, an “incompatible positions and duties” claim which is best addressed under the City’s Ethics Code?

Proposed Answer: Yes

II. ARGUMENT

A. The PWD Ratemaking Process is Regulatory Not Adjudicatory in Nature.

The Public Advocate’s motion relies upon standards for recusal applicable in judicial and adjudicative administrative proceedings. Its central contention is that, under the new ratemaking framework governing the Water Department (implemented in December 2014), the Rate Board is vested

with authority to “adjudicate” a final rate order, subject to due process and appeal rights set forth in the Administrative Agency Law, 42 Pa. C.S. §763. Contrary to the Advocate’s position, however, the ratemaking process is “regulatory” rather than “adjudicatory” in nature; and the recusal standards cited by the Advocate are inapplicable here.

A discussion of the nature of the rate process regulating the Water Department’s rates and charges is informed by the Commonwealth Court’s decision in *Public Advocate v. Brunwasser*, 22 A. 3d 261 (2011) (“*Brunwasser*”).⁵ There, the Court held that the Department’s rate process was regulatory, rather than adjudicatory in nature. *Id.* at 270. As a part of its reasoning, the Court stated that not every action of an administrative agency is an adjudication.⁶ *Fricchione v. Department of Education*, 287 A.2d 442, 443 (Pa. Cmwlth. 1972). The Court also observed that an agency decision that does not affect the rights of parties, but only affects the interest of the public in general will not be deemed an adjudication. In light of the above and a detailed examination of prior case law applicable to PWD, the Court held:

...the Court is satisfied that PWD’s ratemaking process, as set forth in the Charter and PWDs regulations, is quasi-legislative and not quasi-judicial...The challenged actions of the Commissioner and PWD are not particular to the parties that chose to participate in the rate process. The resulting Rate Determination and Final Regulations therefore are not adjudications...

Brunwasser, 22 A.3d at 270. The holding in *Brunwasser* should guide the analysis regarding whether judicial recusal standards and procedures apply here, as this proceeding is still regulatory (or quasi-legislative), not adjudicatory in nature.

The Advocate argues that the rate process is significantly changed (under Section 13-101 of the Philadelphia Code) to support its argument that a recusal standard should apply here. However, although there have been recent changes to the Philadelphia Home Rule Charter and Philadelphia Code, substituting the Rate Board for the Water Commissioner – the major difference between the historic and

⁵ The *Brunwasser* case concerned the rate determination of former Water Commissioner, Bernard Brunwasser, which established PWD rates and charges for Fiscal Years 2009-2012. An equity challenge was filed by the Public Advocate to overturn the above mentioned rate determination, asserting that the Department’s rate process was regulatory in nature. As discussed above, the Commonwealth Court agreed. Following the remand by Commonwealth Court, the case was settled in November 2012.

⁶ As noted by the Court in *Brunwasser* (citing the Local Agency Law) an “adjudication” is defined as “[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all parties to the proceeding in which the adjudication is made.” See, *Brunwasser*, 22 A.3d at 270; 2 Pa. C.S. §101.

current rate processes is the decision-maker. Little has changed otherwise. The Rate Board's regulations mirror the Department's historic rate setting process and provide for an independent hearing officer and public advocate, both of whom provide substantially similar functions as in the historic rate process. The regulations also provide substantially similar requirements to hold public input and technical hearings, compilation of a hearing record and recommended decision – all of which were a part of the historic rate process. Most notably, as was the case when the rate determination was rendered by the Water Commissioner, the Board's rate determination will authorize new rates and charges for all PWD customers and will not be particular to the parties that choose to participate in the rate process. Simply put, the rate determination, in the instant context, is not an adjudication. See, PWD Response to the Public Advocate's Due Process Memorandum, Appendix A.

B. Recusal Standards for Judicial and Adjudicative Administrative Proceedings Are Inapplicable to the PWD Rate Process.

The Public Advocate is wrong in its contention that recusal standards for judicial and adjudicative administrative proceedings are applicable to the current rate process. In the first instance, this is not an adjudicatory proceeding. The recusal standards relied upon by the Advocate emanate from the common-law rule that recusal is required when a judge has “a direct, personal, substantial, pecuniary interest in the case” before him/her. At its most basic level, the Fourteenth Amendment of the U.S. Constitution (as interpreted) incorporates the above common-law rule. The Fourteenth Amendment specifically provides that:

[no] state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law.

The pertinent language above (“Due Process Clause”) provides substantive and procedural protections to individuals. The Due Process Clause operates in three primary ways (i) it incorporates many provisions of the Bill of Rights; (ii) it bars certain governmental action affecting substantive rights; and (iii) it

guarantees fair procedures. Applicable case law associated with recusal standards and procedures is dominated by judicial and other adjudicatory proceedings.⁷

The “fair procedures” guaranty embodied in the Due Process Clause is implicated when a protected interest is affected⁸ in judicial and other administrative actions. Regardless of context, the Court has applied a two-step analysis to identify procedural due process violations. The first step is to determine whether the state has, in fact, denied a protected interest to an individual – i.e., life, liberty or property. Once the Court has found such a deprivation, the second step is to determine whether the individual was deprived of the protected interest without due process of law. See, *Zinermon v. Burch*, 494 U.S. 113 (1990). In the instant context, there is no constitutional deprivation, as a rate proceeding does not affect the rights of parties. Instead, it affects the interest of the public in general; and is not an adjudication. See, *Insurance Department v. Pennsylvania Coal Mining Association*, 25 Pa. Cmwlth. 3, 358 A.2d 745 (1976). The Rate Board’s inquiry with regard to adjudicative recusal standards should appropriately end here.⁹

C. The City Ethics Code Addresses the “Incompatible Duties” Claim Advanced by the Advocate.

The Advocate’s arguments really turn on whether the City Treasurer’s role in City government is incompatible with her function as a Rate Board Member. Stated differently, the argument seems to be that a person holding the office of City Treasurer should be prohibited from being a Board member who

⁷ There are four distinct situations where the U.S. Supreme Court has applied the Due Process Clause to reverse lower court judgments for reasons of recusal (i) when the judge was paid a salary from the fines he collected from defendants appearing before him (*Tumey v. Ohio*, *infra.*); (ii) when a judge presided over a contempt proceeding against defendants who had allegedly committed contempt toward the judge in a separate proceeding (In re *Murchison*, *infra.*); (iii) when the judge participated in a decision that had a direct effect on a different but substantially related lawsuit to which that judge was a party (*Aetna v. LaVoie*, *infra.*); and (iv) when a judge participated in a case in which one of the parties substantially supported the judge’s campaign for office (*Caperton v. A.T. Massey*, *infra.*). It bears emphasis that the Court has noted that the Due Process Clause demarks only the outer boundaries of judicial disqualifications. See, *Aetna v. LaVoie*, 475 U.S. 813, 828 (1986). Within those boundaries, it can be difficult to identify the specific circumstances when a judge is not sufficiently impartial. However, in a judicial proceeding, unlike the common-law rule (examining a judge’s pecuniary interest in case only), all surrounding circumstances and relationships are to be considered.

⁸ Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause. See, *Matthews v. Eldridge*, 424 U.S. 319, 322 (1976).

⁹ The Public Advocate relies upon the Pennsylvania Supreme Court decision in *Reilly v. SEPTA*, 507 Pa. 204, 489 A.2d 1291 (1985) as supportive of its position. *Reilly* identifies key considerations in the context of judicial recusal with regard to (i) a litigant’s right to raise the question of a judge’s bias; (ii) the onus of proof borne by the litigant raising a recusal claim; (iii) fact-finding by others (as opposed to judge) as mitigating any claim of bias; and (iv) waiver of recusal rights in certain circumstances. See, *Reilly*, 489 A.2d at 1299-1302. While interesting, none of the above considerations for judicial recusal are applicable here (as the PWD rate process is not adjudicatory in nature). See, *Brunwasser*, 22 A.3d at 270.

decides the merits of rate proceedings because holding such office renders her/him incapable of making an impartial decision. The Advocate relies on case law related to judicial proceedings – indicating the PWD rate process is adjudicatory in nature. His arguments are misplaced, however, given the regulatory nature of the rate process and the direct applicability of the City’s Ethics Code. Members of the Rate Board are subject to the Ethics Code. Determination of a disqualifying conflict is treated as a matter to be decided by the individual member concerned. If in doubt, a Board member can seek detailed advice from the City’s Ethics Board before he or she acts.

1. Conflict of Interest Prohibition.

The Ethic Code’s conflict of interest restriction prohibits a City official from taking action in an official capacity when either (a) the official has a personal financial interest in that action; or (b) a family member¹⁰ or business of which the official is a member, or a fellow member of such business, has a financial interest in the official’s action.¹¹ The term “financial interest” means an “interest involving money or its equivalent or an interest involving any right, power or privilege that has economic value.”¹²

In the past, the Ethics Board has advised that a person or entity has a financial interest in matters that have a potential impact on the person or entity’s income, compensation, value of assets, wealth, employment prospects, or business prospects.¹³ The Board has opined that a financial interest may also arise from an on-going, present financial relationship and that it is possible for a financial interest to be too remote in some cases to give rise to a conflict of interest.¹⁴

The Ethics Board has explained that the Ethics Code is focused only on financial interests. In fact, the Ethics Board has repeatedly stated that the Ethics Code does not prohibit “appearances of impropriety,” and an enforcement action could not be brought based on an appearance of impropriety.¹⁵ Noting that situations in which there is not a conflict under the Ethics Code can still create “appearances

¹⁰ For conflict of interest purposes, under the Philadelphia Code, a family member includes a parent, spouse, life partner, child, brother, sister or like relative-in-law. Philadelphia Code § 20-601(8).

¹¹ See Philadelphia Code § 20-607(a)-(b).

¹² Philadelphia Code § 20-601(9).

¹³ Philadelphia Ethics Board, General Counsel Opinion No. 2015-501 (dated January 28, 2015), at 4. (citations omitted).

¹⁴ *Id.*

¹⁵ Philadelphia Ethics Board Non-Public Board Opinion No. 2015-001 at p. 5 (citation omitted). A copy of this Opinion is available at: <http://www.phila.gov/ethicsboard/Opinions/Nonpublic%20Board%20Opinion%202015-001.pdf>.

of impropriety,” the Ethics Board has frequently offered non-binding guidance¹⁶ about *perceived* (as opposed to actual) conflicts of interest.¹⁷ Such guidance is intended to mitigate against the public’s perception of bias, prejudice and/or impropriety — which can be damaging to public confidence in government.¹⁸ **Here, under the circumstances presented, there is no basis to assert that an appearance of impropriety exists.** The fact that a single individual holds two positions in the same government does not — in any of itself — show a conflict¹⁹ as to that specific individual’s interests. The City Solicitor has opined that the City Treasurer can properly serve as a member of the Rate Board.²⁰ As noted, City Council created the Rate Board and confirms the members, appointed by the Mayor, to the Rate Board. In this context, the appointment and confirmation of the City Treasurer (Ms. Johnson) to the Rate Board, it is clear that the City Council does not view it as improper for her to hold both positions at the same time. Moreover, none of the duties identified by the Advocate in its Motion suggest that the individual holding such offices at the same time would perforce be subject to improper influence. See, Motion at ¶¶11-20. Most importantly, the fact that Ms. Johnson holds said positions at the same time does nothing to show that her personal interest in any matter is so substantial that it would be difficult for her to resist acting in favor or her interests to the detriment of the proper execution of her official duties.

To be clear, there is no valid reason to apply (by analogy or otherwise) other non-City Ethics Code standards that would disqualify an individual from acting as a Rate Board member if there is the appearance of bias, prejudice and/or impropriety.²¹ If the City desired to hold Rate Board members to

¹⁶ See, e.g., *Advice of Counsel No. GC-2009-503*.

¹⁷ *Id.* See also *Philadelphia Ethics Board Opinion Nos. 2009-001 and 2009-006*, which are available at: <http://www.phila.gov/ethicsboard/advisory/Pages/BoardOpinions.aspx>; *Ethics Board General Counsel Opinion Nos. GC-2011-501, GC-2010-506*, which are available at: <http://www.phila.gov/ethicsboard/advisory/Pages/GeneralOpinions.aspx>.

¹⁸ The City expects members to be constantly on guard against conflicts of interest and has stated that members should act with honesty and fairness, without bias resulting from a relationship, a financial interest, or political affiliation.

¹⁹ The Ethics Board has explained that the “general purpose of laws against a ‘conflict of interest’ is to prevent a City officer having a conflict between his duty in acting honestly and capably on behalf of the public on the one hand and a personal interest in obtaining or preserving a financial benefit to himself (perhaps indirectly through an employer or relative) on the other hand. It is desirable to prevent such situations because the officer may be tempted to act in a way that benefits that personal interest to the detriment of the proper execution of his official duties. Even if the officer does not actually yield to the temptation of incurring a private benefit to himself, public confidence in the officer’s decisions and in the impartiality of government is undermined by the mere existence of such competing interests.” See *Advice of Council No. GC-2009-509* at 2.

²⁰ On November 7, 2017, the City Solicitor opined that the City Treasurer could properly serve as a member of the Rate Board. A copy of this letter was attached to as part of “Exhibit 2” to the Public Advocate’s Motion to Compel dated February 26, 2018.

²¹ Such standards include (a) Pennsylvania Code of Judicial Conduct, which establishes a straightforward mandate: Any judge – including a Justice of the Supreme Court—“shall disqualify himself or herself in any proceeding in which the judge’s impartiality

such an ethical standard, it could do so in the City's Ethics Code. It did not, and such standards should not be imputed when the City has not seen fit to hold them to such a standard.

Definitive rulings on legal questions concerning the City's Ethics Code should be addressed to the Ethics Board.²² 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 Ethics Board's jurisdiction, unless they have omitted or misstated material facts in their requests.²³

2. "Recusal" Procedure²⁴

The Department submits that there is no basis to disqualify the City Treasurer, Ms. Johnson, from acting as a Rate Board member in the 2018 Rate Case. Nevertheless, the recusal procedure under the City's Ethics Code is set forth below for the Board's information.

A City official with a financial interest that gives rise to a conflict of interest with his/her official action must follow the "disclosure and disqualification" requirements of Section 20-608 of the Philadelphia Code.²⁵ Specifically, Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The member should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;

might reasonably be questioned." 207 Pa. Code Judicial Conduct Rule 2.11(A) (emphasis added); (b) The "*Cinderella* rule" disqualifies a decision-maker if a disinterested observer may conclude that he has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. *See Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); or (c) The code of ethics set forth in Section 319 of the Public Utility Code, which requires each PUC Commissioner (and administrative law judges) to, *inter alia*, avoid impropriety and the appearance of impropriety in all activities. 66 Pa.C.S. §319.

To be clear, such standards should not be applicable because the Rate Board members are acting under quasi-legislative (not quasi-judicial) authority in setting rates for the Water Department. And, the federal courts have declared that the *Cinderella* rule was never intended this rule to apply to a rulemaking procedure. *See, e.g., National Advertisers v. FTC*, 627 F.2d 1151, 1168 (D.C. Cir. 1979) (The legitimate functions of a policymaker, unlike an adjudicator, demand interchange and discussion about important issues).

²² The Ethics Board renders advisory opinions concerning proposed future conduct to any person who is subject to, or reasonably could be subject to, a law within the Board of Ethics's jurisdiction. Ethics Board Reg. 4 ¶4.5; *see also* Charter § 4-1100; Code § 20-606(1)(d). Ethics Board Regulation 4 describes the procedures for seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Ethics Board. Ethics Board Reg. 4 ¶¶4.0, 4.26.

²³ Philadelphia Code § 20-606(1)(d)(ii); Ethics Board Regulation 4 ¶4.12.

²⁴ It should be noted that the Ethics Code does not actually use the term "recusal."

²⁵ *See also* Advice of Counsel No. GC-2008-524 was devoted exclusively to an extensive discussion of the disclosure and disqualification requirement. That advice is available at: <http://www.phila.gov/ethicsboard/General%20Counsel/GC-2008-524%20102108.pdf>.

2. The official's public position (member of the City board) and description of duties relevant to the conflict, if not obvious;
3. The official's private position or financial interest (position with the firm) that presents the conflict;
4. A statement of how the official's public duties may intersect with his/her private interest (if not obvious from 2 & 3 above); and
5. The official's intention to disqualify self from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair, Executive Director, or Secretary of the board in which the official would be acting; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

If a single conflict disclosure and disqualification letter filed by a Board member provides that he or she will not take official action in any future Board matters involving an organization that gives rise to a conflict for the Board member, then the Board member is not required to file subsequent disclosure and disqualification letters when new matters involving that organization arise.

Penalties for violations of the City's Ethics Code shall be subject to a fine or civil penalty of \$1,000, subject to the consideration of Mitigating Factors and Aggravating Factors as set forth in Chapter 20-1300.²⁶

²⁶ Philadelphia Code § 20-612(a). *See also* Philadelphia Code §§20-1301, 20-1302.

III. CONCLUSION

Members of the Rate Board are subject to the conflict of interest prohibition in the City's Ethics Code. Generally speaking, a conflict of interest situation involves the conflict between a specific official's interests (personal pecuniary interest) and their special obligations to the public to act in the public interest. As discussed above, the motion proffered by the Public Advocate fails to identify any such conflict. Based upon the foregoing, the Water Department submits that the recusal motion should be denied and dismissed.

Respectfully submitted,

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