

Before the
Philadelphia Water, Sewer and Storm Water Rate Board

In The Matter of the of the Philadelphia Water:
: For Fiscal Year 2023
Department's 2022 Special Rate Proceeding

Exception to the Hearing Examiner's Report

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Inadequate Notice

1. The Regulations of the Philadelphia Water, Sewer and Storm Water Board, as amended and adopted on September 8, 2021, reaffirmed October 13, 2021 are clear as to the proceedings for a hearing.
2. A. General Provisions—the Following provisions apply to all rate proceedings: (b) “The Regulations establish and open and transparent process for public input and comment on proposed rates and charges . . .”
3. Public Hearings “A minimum of four (4) Public Hearings shall be held . . .”
4. (d) Notice of Public hearings shall be advertised on the Board’s website, in at least one daily newspaper with substantial circulation in the City, and as feasible, also in newspapers with community circulation at least three (3) days prior to any such hearings
5. The City of Philadelphia requires, Under [Section 8-600 of the Philadelphia Home Rule Charter](#) that all posts must ensure that individuals with “limited English proficiency” are able to access City services.
6. The wording of the notice for this proceeding is: *“On January 21, 2022, the Philadelphia Water Department filed [Advance Notice](#) of the initiation of a Special Rate Proceeding regarding the reconciliation and potential downward adjustment of water, sewer and stormwater rates and charges previously approved to take effect September 1, 2022. This proceeding is pursuant to the [Rate Determination](#) and [Joint Petition for Partial Settlement](#) in the [2021 General Rate Proceeding](#)”*
7. During Cross Examination, the Philadelphia Water Department’s witness stated that despite the language of the notice, that a “potential downward adjustment of water, sewer and storm water rates”, was not a possible outcome of the proceeding.

8. The only issue before the hearing examiner and now before the Water Rate Board is how much more will the current rates, the rate consumers are paying today, will go up. There was and is no possibility of rates being adjusted downward.
9. The language, at best is unclear and at worse is misleading. In either case it fails both to comport with Section 8-600 of the Philadelphia Home Rule Charter that specifies all City posts must ensure that individuals with “limited English proficiency” are able to access City Services; and Pennsylvania Supreme Court decision in Schultz v City of Philadelphia (cited above) which must be interpreted to mean that if an action by the City fails to follow the controlling ordinances, rules and regulations, any decision must be found to be invalid.
10. As stated in Philadelphia Home Rule Charter and in the rules and regulations of the Philadelphia Water and Sewer Rate Board, holding public hearings is a City Service, and if the notice of those hearings does not meet the requirements set forth in the Home Rule Charter, no notice was given.
11. The public advocate, the Philadelphia Water Department and the Philadelphia Water and Sewer Board, individually and collectively failed to provide notice that can/could be understood by those with limited English Proficiency, failed to inform the public of what was being considered and failed to, as required, advertise 3 days before the public hearing, notice of the Public Hearing, as required in the section of Public Hearing (d).

Prejudicial and Corrupt Hiring of the Hearing Examiner and the Hearing Examiner’s prejudicial and corrupt rulings.

12. The hearing examiner, also called the hearing officer is hired by the Philadelphia Water and Sewer Rate Board (Rate Board) for each proceeding.
13. There is no contract with a time limit or a limit on the number of proceedings the hearing examiner can be hired to undertake.
14. The Philadelphia Water Rate and Sewer Rate Board, decides to re hire the hearing examiner after each and every proceeding.
15. A decision by the hearing examiner that fails to please the Rate Board, may lead to a refusal to hire the hearing examiner in the next proceeding.
16. The hearing examiner is aware that her contract has no time limits, no case limits and that she serves at the pleasure of the Rate Board
17. This is by definition a corrupt practice. The Rate Board, rather than hire an objective hearing examiner, who serves for a limited time or limited number of proceedings, hires some one who they can influence by offering continued employment if the board is happy with the manner in which the hearings are conducted and happy with the hearing examiner's report.
18. This goes beyond the appearance of a conflict of interest, where it appears that a ruling that supports the efforts of the rate board may have an impact on future employment. It is a conflict as serving the interest of the rate board is the only way the hearing examiner can increase her likelihood of future compensation.
19. To suggest that future compensation concerns has no bearing on a hearing examiner's behavior is specious.

20. The reason our Federal and State Constitutions require an independent judicial branch of government is to eliminate the influence an interested party would have on the continual employment of a judge/adjudicator.
21. The hearing examiner's prejudicial behavior, her attempt to help the Water Rate Board and the Water Department can be seen in her rulings throughout the proceedings.
22. The hearing examiner has stopped inquires by those opposed to the partial settlement, without an objection raised by any party.
23. The hearing examiner has allowed the lawyers for the parties to help their witnesses answer cross examination questions, despite the objections of other parties.
24. The hearing examiner has allowed the Water Department and Public Advocate to introduce exhibits, after the close of discovery, after the close of the evidentiary hearings, so that other parties were prohibited from examining the veracity of the exhibits; the limits of the exhibits or even who prepared the exhibits and when.
25. The hearing examiner, without any party requesting has pre ruled on what exceptions can be raised by party Haver, who has challenged the legitimacy of the proceedings writing in her opinion : "During the technical hearing, Mr. Haver several times told me that he is entitled to interrogate other participants' witnesses freely to "put on his case in his way." I allowed him considerable latitude to do so, but at some point, he needs to inform me and the other participants what his case actually is. It is unreasonable to expect the other participants to somehow intuit what his substantive positions are so that they can respond appropriately.²⁹ By failing either to provide a statement of his position, or to file a timely brief, Mr. Haver has frustrated the intent of the Rate Board that its hearing process be open and transparent. It would be unfair to the

other participants to allow Mr. Haver to take a position that they've had no opportunity to examine.”

26. No Party raised an objection to participant Haver's filing of Exception to the Hearing Examiner's report.
27. The hearing examiner, without a motion to limit or any other motion, has put forward her own motion to protect the parties in the case, without an iota of evidence.
28. By definition, the hearing examiner's ruling to limit the scope of participant Haver's exceptions, before reading them or even as she herself that states, without knowing what is in the exceptions, is pre judging and prejudicial
29. The hearing examiner has refused to file a conflict-of-interest statement or a financial disclosure form, leaving the public without knowledge if she or family members have financial interests in the businesses that do business with the Philadelphia Water Department.

Ineffective Assistance of Counsel

30. The Issue is not does the Public have a right to be represented in administrative law hearings. The decision to have the Public represented was made by the Philadelphia Water Rate Board to appoint a public advocate during this proceeding.
31. The issue is once a public advocate is appointed, does the public have a legal right to adequate representation?
32. In *Strickland Vs Washington*, (466 U.S. 668 (1984)) the United States Supreme Court ruled that all that is necessary for petitioner to succeed on the merit of an inadequate representation petition is “**A Reasonable Probability**” that the “the result of the proceeding would have been different”.
33. The awardee of the no bid contract, failed to create a client committee to advise the public advocate, failed to enforce Section 8-600 of the Philadelphia Home Rule

Charter, which mandates that public notices be accessible to those with limited English Proficiency, and failed to make a meaningful attempt to engage the public as proven by the lack of public participation at the hearing.

33. Despite the Hearing Officer's help, the public advocate's record shows how little work it did to engage the public. No emails to register community organizations, a handful of emails, without knowing if they were opened, no follow up phone calls, no attempt to understand the best way to engage the public. The record shows, no meetings virtual or otherwise with community, civic or religious groups were made. No phone calls to community, civic or religious groups were made. Not a single member of the public, not a party to the case, attended any of the Public Hearings.

34. Only a late, filed exhibit that the hearing examiner asked be filed after participant Haver challenged the adequacy of the public's representation was presented.

35. The outreach was so poor that PennFuture, an environmental advocacy organization with five offices across Pennsylvania, which opposed the rate increase and wrote in an Inquirer Published editorial "Our water problems won't be solved by continuing to raise rates on hardworking residents . . ."

36. Had the public advocate sought counsel from PennFuture the public advocate may not have agreed to two consecutive rate hikes.

37. Had the public advocate sought public input and guidance from its client, the public, it would have discovered there was no support for the public advocate's position.

38. Had the public advocate sought public input before it decided to accept the inducements of a no bid contract for agreeing to two consecutive rate increases, it would have found no support for its accepting the contract as one of the inducements to agree to the rate hikes.

39. The record shows that the entity awarded the no bid contract to represent the public did

not speak to any member of the public regarding the position the public advocate took.

40. The record shows that the entity awarded the no bid contract to represent the public did not speak to any neighborhood group, civic group, environmental group or religious organization before deciding it was in the public interest for the public advocate to agree to two consecutive rate hikes and accept an inducement, a no bid contract.

41. Without speaking with a client, it is impossible for a lawyer to represent a client.

42 . Agreeing to a settlement, without informing the client, without getting the client's consent to the agreement is inadequate representation and mal practice.

43. Accepting a no bid contract as a term of a settlement the public advocate entered into without seeking guidance from its client, is inadequate representation and mal practice.

44. No settlement created without the client's knowledge or approval should be accept by any adjudicatory body.

45. To claim that the public advocate doesn't have to represent the public, has no responsibility to engage the public makes, is to suggest that it is acceptable to mislead the public into believing it is represented.

46 . If the Philadelphia Water Rate Board did not expect the public advocate to engage and represent the public, if the public advocate answers to no one, other that itself, it is disingenuous to continue to refer to it as the public advocate.

IV. Public Advocate's Conflicts of Interest

47. The public advocate's law firm has a financial conflict of interest receiving over 67% of its annual income from the owners of the Philadelphia Water Department:

FINANCIALS

JULY 01, 2020 - JUNE 31, 2021

REVENUE & OTHER SUPPORT		EXPENSES	
Contracts & Grants	\$13,311,701	Program Services	\$15,835,105
Contributions	\$4,862,747	Management & General	\$1,297,193
Attorney Fees	\$227,059	Fundraising	\$397,190
Interest Income	\$4,943	Total Expenses	\$17,529,488
Other Income	\$1,412,700		
Subtotal Revenue	\$19,819,150		

48. The public advocate’s law firm failed to disclose its financial reliance upon the good will of the owners of the Philadelphia Water Department.

49. The public advocate’s law firm failed to seek a release of the conflict.

50. On the record the person serving as the public advocate never disclosed the conflict.

51. The Philadelphia Water Rate Board failed to disclose the conflict.

52. Rule 1.7 – Conflict of Interest: Current Clients:

Conflict of Interest: Current Clients**(a)** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: **(1)** the representation of one client will be directly adverse to another client; or **(2)** there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

“Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the

lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.” -- General Principles of Rule 1.7

53. If the public advocate were to take a position that angered the owner of the Philadelphia Water Department, the law firm’s largest funder, it creates the possibility that the law firm would lose revenue, sufficient enough to force the law firm into bankruptcy—a clear violation of Rule 1.7.

54. Rule 1.7 can be overcome by “**(4)** each affected client gives informed consent”. As the public advocate failed to disclose the fact that the owner of the Philadelphia Water Department was its largest financial contributor, no client consent could have been given.

55. Two members of the Law Firms executive committee have financial interests in US Bank, an out of city bank that has no retail branches in Philadelphia, which has both served as bond agent for the Water Department and holds 10’s of millions of dollars in the Water Department’s “stabilization fund”. The hiring of US Bank deprives Philadelphians of resources that would recirculate in the City of Philadelphia leading to mis opportunity costs. While we will never know why the public advocate has refused to challenge, question or even ask about why the money isn’t kept in a bank that creates jobs in Philadelphia, it is within reason to think it may have something to do with the financial interests of the executive committee of the public advocate’s law firm.

56. The acting public advocate has refused to file a financial disclosure form, a conflict-of-interest form or any disclosure of his and/or his law firms financial relationship with the owner of PWD and/or any of the contractors PWD uses.

57. The conflicts, more than just the appearance of a conflict, but actual conflicts make the

public advocate representation, the refusal to disclose financial interests, the refusal to establish a client group, the refusal to engage community groups, makes the public advocate's representation of the public is ineffective. In no civil case would a lawyer be allowed to enter into a settlement without his client's agreement, and it should not be allowed in this case.

Failure of the Philadelphia Water Department to Make Good Faith Effort to Gain Stimulus Funding Within the Terms of the Partial Settlement Agreement

58. "The [Joint Settlement Petition](#) provided that the FY 2023 Base Rate Incremental Increase (increasing rates on September 1, 2022 to produce \$34.11 million in incremental revenue in FY 2023) would be reduced on a dollar-for-dollar basis (subject to the combined maximum reduction of \$34.11 million) if during the Receipt Period (July 1, 2021, through December 31, 2021) PWD directly received more than \$2 million of specified federal stimulus funding that could be applied to operating expenses. PWD's position is that no adjustment is warranted, as it did not receive in excess of \$2 million of stimulus funding during the Receipt Period. [PWD St. 1](#) at 8-13, the direct testimony of Ms. La Buda; [PWD Brief](#) at 8. The Public Advocate agreed that no adjustment was warranted as the conditions had not been satisfied. [PA St. 1](#) at 19. No other participant submitted written direct or rebuttal testimony on this potential adjustment. I agree that the conditions warranting this potential adjustment were not satisfied and therefore no adjustment should be made on the basis of federal stimulus funding."

59. During her Testimony before Philadelphia City Counsel, Ms. LaBuda acknowledge that the Water Department had not accepted the help City Council offered in receiving stimulus dollars

60. During cross examination Ms. LaBuda acknowledge the Water Department had hired a consultant to help it obtain stimulus dollars, outside of the time frame in the settlement.

61. During cross examination, Ms. LaBuda acknowledged that the Water Department had not asked for Philadelphia City Council's help in obtaining stimulus dollars during the time frame in the settlement agreement

62. During cross examination, Ms. LaBuda acknowledge that the Philadelphia Water Department declined to hire a consultant to help it obtain stimulus dollars during the time frame in the settlement agreement

Argument

63. The failure of the Water Department, public advocate and Philadelphia Water and Sewer Rate Board to post notices that could be understood by those “with limited English proficiency”; and the misleading language of the notice itself suggesting that the hearing was for a rate reduction, when the record makes clear that lowering the rates was never a possibility, means the public was not informed of the hearing.

64. The Pennsylvania Supreme Court in striking down legislation that failed to comply with rules and regulations controlling the hearing process, stated that “[t]here can be no question that an ordinance is invalid if it fails to comply with legal requirements of this nature.” *Schultz v. City of Philadelphia*, [385 Pa. 79](#), 82, 122 A.2d 279, 281 (1956).

65. The lack of adequate notice, the failure to advertise three days before the public hearing, the failure of the Public Advocate to represent the public, constitutes a violation of the ordinances controlling the Philadelphia Water Rate Board and as such the hearing examiner’s report must be rejected.

66. The corrupt hiring practice and the prejudice of the hearing examiner as proven on the record in her ruling before facts are/were introduced means that the hearings were in violation of the rules and regulations of the Water Rate Board, Philadelphia’s Home Rule Charter and the Pennsylvania Constitution.

67. Once the Philadelphia Water and Sewer Rate Board announced that the public was going to be represented, the public had the right to adequate representation.

68. The failure of the awardee of the no bid contract to engage the public in any meaningful way, to fail to seek guidance from the public, means that despite the Philadelphia Water Rate Board’s requirement that the Public be represented, the Public was not, making the hearing invalid.

69. The inducement accepted by the awardee of the no bid contract to agree to a settlement that granted the Philadelphia Water Department two consecutive rate hikes, creates at least, the

appearance, if not an actual conflict of interest, in violation of rule 1.7 of rules of professional conduct.

70. The shocking failure of the Public Advocate to release, inform and state on the record that his law firm receives over 67% of its funding from the owner of the Philadelphia Water Department is a fatal conflict of interest that renders the public advocates representation inadequate.

71. The failure of the public advocate to release financial disclosure forms and conflicts of interests and hide that member of his firm's management team have financial interests in the businesses that the Philadelphia Water Department does business with, makes the representation of the public by the public advocate ineffective.

72. For the reasons listed above, the public was not adequately represented, and while it is true the public advocate was given a no bid contract, by the Philadelphia Water and Sewer Rate Board, with the mission to represent the public, that does not guarantee the public is represented.

73. The failure of the Philadelphia Water Department to seek Philadelphia City Council's help in obtaining stimulus dollars, the decision to hire a consultant to help the Water Department obtain Stimulus dollars outside of the time frame in the settlement; the decision by the Philadelphia Water Department not to hire a consultant to help obtain stimulus funding inside of the time frame in the settlement proves the Philadelphia Water Department failed to make a best effort to obtain stimulus funding that would have made a rate increase unnecessary.

74. For the reasons listed, failure of adequate notice, failure of an impartial hearing examiner, inadequate counsel and the failure of the Water Department to make its best efforts to obviate the need for a rate increase the hearing examiner's report should be rejected, the settlement agreement should be set aside, a new hearing should be instituted with a mandate that the public advocate meet with and represent the public by establishing an advisory committee, a hearing examiner who is given a term of service so as not to be beholden to the Philadelphia Water and Sewer Rate Board should be appointed and participants allowed to put on the case as they deem gives them the best possibility of success.

Verification

I, Lance Haver, do hereby affirm that the information in the above filing is, to the best of my knowledge true and correct.

Lance Haver, Pro Se