

CITY OF MINNEAPOLIS ETHICAL PRACTICES BOARD 2004 ANNUAL REPORT

Introduction

The Ethical Practices Board ("EPB") was created in 2003 with the passage of the City's Ethics in Government Ordinance ("Ordinance"), codified at M.C.O. Ch. 15. Section 15.210 of the Ordinance establishes the EPB and outlines the powers and the duties of the EPB, which include issuing advisory opinions and investigating complaints from City employees and members of the public that the Ordinance has been violated. The Ordinance sets forth some specific standards below which no City official or employee should violate and, as importantly, sets forth aspirations for ethical conduct that go above and beyond the minimum requirements of the Ordinance.

2004 saw the first full year of activity for the EPB. M.C.O. §15.210(f) states that:

The ethical practices board shall prepare and submit an annual report to the mayor and the city council detailing the ethics activities of the board and the city during the prior year. The format of the report must be designed to maximize public and private understanding of the board and city ethics activities. The report may recommend changes to the text or administration of this Code. The city clerk shall take reasonable steps to ensure wide dissemination and availability of the annual report of the ethical practices board and other ethics information reported by the board.

This annual report is respectfully submitted to the Mayor and to the City Council in response to the requirements of the Ordinance in that regard.

Appointment and Membership.

The current chair of the EPB is Dr. Laura Reich. Dr. Reich is a physician at the University of Minnesota. Dr. Reich was originally appointed to the EPB in May of 2004, and was recently reappointed to a three year term that began on January 3, 2005 and runs through January 2, 2008.

Tom Schumacher, Esq. is an original member of the EPB and was appointed in May of 2004. Mr. Schumacher is the Director of Institutional Compliance at the University of Minnesota. Mr. Schumacher's current term expires on January 2, 2006.

The Hon. Roberta Levy, a retired Hennepin County District Court Judge, was also appointed to serve on the EPB in May of 2004. Unfortunately, Judge Levy resigned from the EPB in February of 2005 and a replacement is currently being sought to fill her position. Judge Levy

served on the EPB with distinction and her wisdom will be greatly missed by the remaining EPB members.

2006 Budget Request

Section 15.210(g) of the Ordinance states that "the ethical practices board shall submit a budget request to the mayor's budget process after they organize and each year thereafter." The 2005 budget for the EPB was set at \$12,000. Because it is unknown how much of the 2005 budget will be spent, the EPB is formally requesting that its 2006 budget be approved at the same level as the 2005 budget.

The following specific items are anticipated relative to the 2006 budget:

Communications \$2,000.00

Production and duplication of informational brochures and annual report; mailing expenses; letterhead stationery; miscellaneous.

Note: Per ordinance, the City Clerk shall take reasonable steps to ensure wide dissemination and availability of the annual report and other ethics information reported by the board. The EPB anticipates that the Clerk's Office will fund the costs of distribution of the annual and other reports, though most dissemination may occur electronically.

Staff Support \$1,200.00

Undergraduate student intern for assistance with communications projects: development of EPB website and informational brochures, assistance with preparation of annual report. This budget request was calculated based on 120 hours at Step 3 (junior/senior) of the undergraduate student intern pay schedule (\$10 per hour).

Note: Per ordinance, the Ethics Officer is staff to the EPB. An assistant city attorney is designated as the Ethics Officer. No additional FTE was authorized for this assignment and the staff expense is carried by the City Attorney's Office.

Investigations \$8,500.00

If a complaint is filed alleging an Ordinance violation by a department head, an elected official, or a local official appointed to a City board or commission, the EPB will need resources to investigate the complaint. It is not possible to predict how many, if any, complaints requiring an investigation by the EPB will be filed in 2006. The costs of an investigation could vary dramatically based on the nature of the particular complaint. This budget request was calculated based on the standard rate for outside counsel (\$125 per hour) for 80 hours. Depending upon the nature of the complaint, hiring an outside attorney to investigate may not be necessary. On the other hand, investigation of a single complaint could consume significantly more than 80 hours of investigative time and the Board's budget would have to be supplemented by funds from another source. Investigations may also require court reporting or transcription services, which

the Clerk's Office may be able to provide. If the funds allocated for investigation are not spent, the allocation could be carried over for 2007. The EPB believes that it is important, as a matter of policy, for the City to ensure a base level of funds for investigation of Ethics Code complaints.

Parking \$300.00

City policy allows for payment of parking expenses for members of City boards. Parking is provided in the Haaf ramp. The EPB has 12 regular meetings per year which are anticipated to generally last 2 hours.

Total 2006 Budget Request \$12,000.00

2004 Ethical Practices Board Activities

The primary activities and accomplishments achieved by the EPB in 2004 included:

- A review of Ordinance provisions and comparable state provisions
- Development and adoption rules and bylaws for the EPB
- Development and launch of the EPB website
- Issuance of first formal advisory opinion
- Reviewed and recommended approval proposed amendment to nepotism provision brought to Board by Ethics Officer

The activities of the Ethics Officer included:

- Staff to the EPB, preparation of agendas and meeting materials, prepare minutes, keep EPB records
- Coordination of the appointment process for EPB members
- Drafted EPB's budget request and submitted it to Mayor
- Researched and drafted rules and bylaws
- Informally advised 27 City employees and officials regarding ethics inquiries
- Assisted HR in ethics training activities
- Worked with HR and City Clerk's Office to develop list of non-elected employees subject to SEI filing requirement; advised on implementation of new requirement
- Drafted formal advisory opinion
- Summary of informal advice provided
- Advised supervisors and department heads regarding investigation of complaints of violation of Ethics Code by City employees
- Participated in 3 training programs for City employees about Ethics Code
- Assisted the Human Resources in developing and distributing the Ethics video for the training of all City employees and officials
- Assisted Human Resources in developing a new Ethics component for supervisor and manager training program that incorporates both education about Ethics Code provisions and training on communication and problem solving tools.

Recommendations for Amendments to the Ethics in Government Ordinance

The EPB recommends the following amendments to the Ordinance:

1. Clarification of Applicability of the Ordinance to Certain City Commission/Board Appointees.

Problem: Ambiguity as to whether Ethics Code applies to individuals appointed by the Mayor or the City Council to the following commissions or boards:

Metropolitan Airports Commission
Capital Long Range Improvements Committee
Empowerment Zone Governance Board
Minneapolis Public Library Board of Trustees

Background: When the Ordinance was adopted, Council Member Goodman moved to amend the proposed Ordinance to delete reference to the above commissions/boards from §15.80 regarding statements of economic interest. The amendment was adopted. The effect of that amendment is clear: individuals appointed or designated by the Mayor or City Council to those four commissions are NOT required to file a statement of economic interest with the City pursuant to the City's Ethics Code. Note, however, that the statutory provision regarding filing of SEI's, Minn. Stat. §10A.09, may apply directly to the members of one or more of these commissions or boards.

Council Member Goodman made a related motion to amend the definition of a local official that was also adopted. The definition of "local official" in §15.280 (m) was amended as follows:

(m) *Local official* means a person holding the following elected or appointed positions:

- (1) The following elected officials: city council members; the mayor; and elected members of the board of estimate and taxation; and
- (2) Persons employed by the city in appointed positions, or holding the title of an appointed position. A list of the city's appointed positions shall be maintained by the department of human resources.
- (3) Individuals appointed or designated by the mayor or appointed by the city council to agencies, authorities, or instrumentalities including, but not limited to, the following:

~~Airports Commission, Metropolitan (MAC)~~
Arts Commission, Minneapolis
Bassett Creek Watershed Management Commission
~~Capital Long Range Improvements Committee~~
Central Avenue Special Service District Advisory Board
Citizen Environmental Advisory Committee (CEAC)

Civil Rights Commission, Minneapolis
Civil Service Commission, Minneapolis
Civilian Review Authority, Minneapolis
Community Development Agency, Minneapolis
Dinkytown Special Service District Advisory Board
Disabilities, Minneapolis Advisory Committee on People With
Downtown Skyway Advisory Committee
~~Empowerment Zone (EZ) Governance Board~~
Family Housing Fund, Minneapolis/St. Paul
Forty Third Street West and Upton Avenue South Special Service District
Franklin Avenue East Special Service District Advisory Board
Hennepin Theatre District Special Services District
Heritage Preservation Commission, Minneapolis
Hiawatha Corridor Light Rail Transit Community Advisory Committee
Housing Board of Appeals
Latino Community Advisory Committee to the Mayor and City Council
~~Library Board of Trustees, Minneapolis Public~~
Nicollet Avenue South Special Services District

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The intent of the proposed amendments was to exempt members of these four commissions from the jurisdiction of the City's Ethics Code altogether. However, the actual effect of the amendment to 15.280(m)(3) is ambiguous because the preface to the list of affected agencies applies to the agencies "including, but not limited to, the following." 15.280(m)(3) defines as "local officials" those "individuals appointed or designated by the mayor or appointed by the city council to agencies, authorities, or instrumentalities" The list that follows in the Ordinance is intended to be as comprehensive as possible, but ultimately, it is only illustrative. Section 15.280(m)(3) was drafted in this manner in order that City appointees to new (or overlooked) agencies would be subject to the Ethics Code without need for an amendment to the definition of "local official."

Thus, although the names of the four commissions identified in Council Member Goodman's motion were deleted from the list of agencies in 15.280(m)(3), it is my opinion that individuals appointed by the Mayor or Council to those four organizations remain subject to the Ordinance.

Potential clarifying amendment:

- (3) Individuals appointed or designated by the mayor or appointed by the city council to agencies, authorities, or instrumentalities including, but not limited to, the following:

[Retain current list]

The term "local official" shall not include Individuals appointed to the following agencies, authorities or instrumentalities:

Metropolitan Airports Commission

Capital Long Range Improvements Committee

Empowerment Zone Governance Board

Homelessness, County Advisory Board

Minneapolis Public Library Board of Trustees

2. Exclusion of candidates for Board of Estimate and Taxation from SEI filing requirement.

Background: Section 15.40 of the City's old Ethics Ordinance required candidates for the office of Mayor, City Council or the Board of Estimate and Taxation to file a statement of economic interest either: a) within 14 days after filing an affidavit of candidacy or petition to appear on the ballot; or b) if not required to file as a candidate, elected local officials to those bodies were required to file an SEI within 60 days of commencing their term of office.

The current Ordinance at §15.80 only requires candidates for the office of mayor or city council to file an SEI; candidates for the Board of Estimate and Taxation are no longer required by the Ordinance to file the SEI until 60 days after commencing their term of office.

It appears that this change was unintended and may have resulted from changes in how definitions of "local official" and "elected local official" were modified in the new ordinance.

Potential clarifying amendment: (Assuming no substantive change was intended regarding this SEI filing requirement.)

15.80. Statements of economic interest.

(a)(1) A candidate for the office of mayor, ~~or~~ city council member, or board of estimate and taxation member within fourteen (14) days after filing an affidavit of candidacy or petition to appear on the ballot for an elective city office; and

3. Definition of "candidate."

Background: The old Ordinance defined "candidate" as "any individual who files an affidavit of candidacy or petition to appear on the ballot for the offices of mayor, city council member or board of estimate and taxation member."

The current Ordinance at §15.280 (b) defines "candidate" as "any individual who files an affidavit of candidacy or petition to appear on the ballot for any elected office."

In addition to the definition section, the term "candidate" is used in three provisions in the current Ordinance:

1) 15.80(a)(1): "candidate" for mayor and city council member required to file SEI.

- 2) 15.110 (Political activity), paragraph (b): "a candidate for, or holder of, elective office is subject to the campaign finance and public disclosure provisions of Minnesota Statutes, Chapter 10A and Chapter 383B."
- 3) 15.210 (Ethical Practices Board), paragraph (c): "No member of the ethical practices board may be a local official or city employee; the related person of a local official or city employee; *a candidate for elected public office*; a person who, for compensation, represents the private interests of others before the city council or mayor; or a paid campaign worker or political consultant of a current local official."

Pursuant to the definition of "local official" in §15.280(m)(1) of the new Ethics Code, the elected officials subject to the Code are the mayor, city council members, and board of estimate and taxation members. It is consistent, therefore, to define "candidate" as individuals running for those same offices, rather than "any elected office."

With respect to which persons should be ineligible for the ethical practices board, it seems that the premise is that ineligible persons should be those who would have a conflict of interest or bias because they are either subject to the Code or closely associated with a person subject to the Code. Barring a person who is a candidate for any elected public offices other than the three listed in the definition of "local official" may be unnecessarily broad.

Potential clarifying amendments:

15.280. Definitions.

(b) Candidate means any individual who files an affidavit of candidacy or petition to appear on the ballot for ~~any elected office~~ the offices of mayor, city council member or board of estimate and taxation member.

15.210. Ethical Practices Board.

(c) No member of the ethical practices board may be a local official or city employee; the related person of a local official or city employee; a candidate ~~for elected public offices~~ as defined in section 15.280; a person who, for compensation, represents the private interests of others before the city council or mayor; or a paid campaign worker or political consultant of a current local official.

4. Ethical Practices Board

The provision regarding the selection of the chair is misplaced. It wouldn't be required at all – the provision in 15.210(e)(1) gives the Board the power to establish rules and procedures governing its own internal organization. If it is to be retained, I suggest moving it to the end of (b).

Suggested amendment:

15.210. Ethical practices board. (a) The ethical practices board will be composed of three (3) members appointed by an appointing committee. The members of the appointing committee shall be the Chief Judge of Hennepin County District Court, the Dean of the University of Minnesota Law School, and the Dean of the University of St. Thomas School of Law. In making the appointments, the committee shall follow the city's open appointments process, supplemented by the following:

- (1) The city clerk shall notify non-partisan civic and community groups, colleges and universities of any openings on the board.
- (2) At least thirty (30) days prior to making an appointment, the committee shall submit the names of the finalists for the position to the mayor and the city council for comment.
- (3) Within five (5) days of receiving the names, the city council shall schedule a public hearing to solicit public input on the finalists. ~~The chair of the board shall be elected by the membership from among its members.~~

(b) One (1) member of the ethical practices board will be appointed for an initial term to expire on January 2, 2005; two (2) members will be appointed for an initial term to expire on January 2, 2006. All subsequent appointments will be made for three (3) year terms. All members shall serve until their successors have been appointed and qualified. The appointing

committee may remove a board member for cause at any time during the board member's term of office. The chair of the board shall be elected by the membership from among its members.

Other changes to 15.210. Given our recent experience developing rules for the Board and thinking about the respective roles of the Board and the City Council, you may have thoughts about how other aspects of 15.210 could be clarified or modified.

5. Department Head List.

Proposed housekeeping amendment:

15.280. Definitions.

(e) Department head means:

City assessor

City attorney

City coordinator

Commissioner of health

Chief of fire

Chief of police

Director, civil rights

City engineer

City clerk

~~Director, planning~~

Director, community planning and economic development

Executive director, MCDA

Director, human resources

Director, communications

Assistant city coordinator, operations/regulatory services

Chief information officer

Finance officer

Director, government relations

Director, emergency communications center.

6. Post employment restrictions contained §15.90.

Problem: The post-employment restrictions found in §15.90 of the current Ordinance are similar, but not identical, to those found in the old code. The old and current provisions are set out side-by-side below for comparison. Questions remain about the interpretation of “represent or lobby” and about scope of the exception when “acting on behalf of the city.”

Background:

Old Code, §15.35	New Code, §15.90
<p>15.35. Prohibited conduct after leaving city. (a) No former local official, as defined in sections 15.10(c) or 15.10(d), or employee shall disclose or use any confidential, privileged or proprietary information gained by reason of their city employment unless the information is a matter of public knowledge or is available to the public on request;</p> <p>(b) No former local official, as defined in sections 15.10(c) or 15.10(d), or employee shall, during the period of one (1) year after leaving city office or employment:</p> <p>(1) Assist any person in proceedings involving the agency of the city with which they were previously employed, or on a matter in which they were officially involved, participated or acted in the course of duty.</p> <p>(2) Represent any person as an advocate in any matter, including any pending or existing contract in which the former local official or employee was involved in their capacity as a local official or employee.</p> <p>(3) Participate as a competitor in any competitive selection process for a city contract, nor shall any city contract be awarded to such former local official or employee in which they assisted the city in recommending or approving the project or work to be done or recommending or approving the process to be used.</p>	<p>15.90. Post employment restrictions. (a) A former local official or employee shall not disclose or use any confidential, private, nonpublic, privileged or proprietary information gained by reason of his or her city employment.</p> <p>(b) During the period of one (1) year after leaving city office or employment:</p> <p>(1) A local official, as defined in section 15.280(m)(1) of this ordinance, shall not represent or lobby on behalf of any person or organization on any matter before the city.</p> <p>(2) A local official, as defined in section 15.280(m)(2) of this ordinance, or an employee shall not represent or lobby on behalf of any person or organization on any matter before the city in which the former local official or employee participated. A local official, as defined in section 15.280(m)(3) of this ordinance, may only represent or lobby on behalf of a person or organization on a matter before the city in which the former local official participated when that participation was only advisory in nature.</p> <p>(3) A local official or employee shall not participate as a competitor in any competitive selection process for a city contract, nor shall any city contract be awarded to such a former local official or employee, in which they assisted the city in recommending or approving the project or work to be done or recommending or approving the process to be used.</p>

(c) A local official, as defined in sections 15.10(c) or 15.10(d), or employee who contracts with a former local official, as defined in sections 15.10(c) or 15.10(d) or employee for expert or consultant services within one (1) year of the latter's leaving city office or employment, shall promptly inform the city attorney about the agreement.

(d) The prohibitions of sections 15.35(b)(1) and 15.35(b)(2) shall not apply to former local officials or employees acting on behalf of a governmental agency unless such assistance or representation is adverse to the interest of the city.

(c) The prohibitions of this section shall not apply to a former local official or employee acting on behalf of the city, its departments, independent boards and commissions, or another governmental agency unless such assistance or representation is adverse to an adopted policy or position of the city.

Meaning of "represent or lobby."

Sections 15.35(b) (1) and (b)(2) of the old ordinance made a distinction between "assisting" a person on city matters and "representing" a person. In comparison, sections 15.90(b)(1) and (b)(2) of the new Ordinance uses the terms "represent or lobby." The definition of "lobby" in 15.280 is: "Lobby means to attempt to influence any city council or mayoral action, city administrative action, or city proceeding by communicating or urging others to communicate with local officials or employees." It may be that the drafters felt that the definition of "lobby" encompassed the old code's prohibition on "assisting" or "advising" on certain matters. The question remains whether "lobby" incorporates some of all forms of "assistance" or "advice." For example, should former elected officials be prohibited from giving any information and advice on all city matters? Or just from being a spokesperson?

Exception for work on behalf of the City

The exemption provision in the old Ordinance, §15.35(d), was limited in scope – it applied only to modify the general prohibitions in (b)(1) and (b)(2) in order to allow former officials and employees to assist, represent or lobby on behalf of a governmental agency unless such assistance or representation is adverse to the interest of the city. It did not exempt former officials and employees from the contracting prohibitions.

The exemption provision in the new Ordinance, §15.90(c) is broader because it exempts former officials and employees from all of the provisions in the section, not just those related to representation and lobbying. Thus, it seems to anticipate that there will be some circumstances where a former official or employee could be awarded a city contract in which they were involved before leaving the City, because they would now be acting "on behalf of the City." But, in the broadest sense, all City contractors are "acting on behalf of the City", in that they are providing goods or services to the City. The new ordinance provides no guidance for what types of contractual activity is performed "on behalf of the City;" thus, the exception becomes the rule with respect to contracts.

One could argue that the exemption should not apply at all to contracts because there is a significant potential for perceptions of self-dealing, conflict of interest and unfair competition if officials or employees are allowed to accept contracts for work projects they helped plan before leaving the City. On the other hand, it would not be in the best interests of the City to deprive it of the opportunity to enter personal services contracts with recently departed officials and employees when those may be the very people most qualified to help on a particular matter (e.g. contract with a retired assistant city attorney to continue to represent the City on a matter she handled prior to retirement).

Perhaps a greater distinction should be made between "competitive" contracts that require a bid or solicit requests for proposals and non-competitive personal or professional services contracts.