

THE CHARTER BOARD OF THE CITY OF READING

IN RE	Limitations on City Council's	:	Request Received October 5, 2018
	General Grant of Powers Under	:	
	Charter Secs. 103 and 208	:	
		:	Advisory Opinion No. 44

NOTICE

THE "OPINION OF THE BOARD" SECTION OF AN ADVISORY OPINION MAY BE USED ONLY BY THE REQUESTOR OF THE ADVISORY OPINION AS A DEFENSE IN ANY SUBSEQUENT INVESTIGATION OR PROSECUTION ONLY TO THE EXENT THAT THE QUESTIONS PRESENTED TO THE BOARD ARE IDENTICAL TO THE FACTUAL ISSUES FACED IN THE UNDERLYING MATTER IN WHICH THE DEFENSE IS RAISED. FURTHER, NO OTHER PORTION OF AN ADVISORY OPINION MAY BE USED IN ANY WAY AS A DEFENSE AND SHALL NOT BE A DEFENSE. *See Bill No. 46-2005, as amended, Charter Board Ordinance and Charter Board Resolution 2-2015.*

THE CHARTER BOARD OF THE CITY OF READING

IN RE	Limitations on City Council's	:	Request Received October 5, 2018
	General Grant of Powers Under	:	
	Charter Secs. 103 and 208	:	
		:	Advisory Opinion No. 44

ADVISORY OPINION

I. PROCEDURAL HISTORY AND QUESTIONS PRESENTED

By letter dated October 5, 2018 City Councilor John Slifko¹ (“Slifko”) requested an advisory opinion (“Request”) from the City of Reading Charter Board (“Board”) on the following two questions, as stated below, verbatim:

- (1) Does City Council have the power, by amendment to the Administrative Code, to require the Mayor to appoint the City Solicitor as the Interim Managing Director for the time from when a vacancy occurs in the Office of the Managing Director and extending for a period not to exceed 90 days? and
- (2) Does City Council have the power, by amendment to the Administrative Code, to require the Managing Director to appoint an Acting Department Director within 10 days of a vacancy occurring in the Office of a Department Director?

In the Request, Slifko directs the Board's attention to Charter Sections 103 and 208 as authority for the determination that the Charter afforded these powers to City Council.

Pursuant to the Charter Board Ordinance, if the Board issues an advisory opinion, it must do so no later than thirty (30) days after receipt of the request, but as expeditiously as possible.

Ord. No. 46-2005, Charter Board Ordinance, § VI.

¹ The Board acknowledges, and discloses, that Slifko, now Councilor of the City's District 6, among many other roles of public service, has served with distinction as a founding member of this Board and as its Vice-Chair for many years, as well as having served upon the Charter Review Commission.

II. ANALYSIS AND DISCUSSION

Slifko is correct that the Charter grants to City Council broad powers under Sections 103 and 208 and follows:

§ 103. Exercise of powers.

All powers of the City shall be exercised as provided by this Charter, or if the Charter makes no provision, as provided by ordinances or resolutions of the City Council.

§ 208. General powers and duties.

All powers of the City not otherwise provided for in this Charter shall be exercised in a manner to be determined by Council. Council shall provide for the exercise and performance of any such other powers and duties in a manner consistent with the terms of this Charter.

Section 103 arises out of Article I of the Charter, relating to powers of the City. Section 208 arises out of Article II, relating to City Council.

A. When a vacancy occurs in the Office of the Managing Director, does City Council have the power, by amendment to the Administrative Code, to require the Mayor to appoint the City Solicitor as the Interim Managing Director for a period not to exceed 90 days from the date of the vacancy?

The Board is of the opinion that City Council does not possess the power, by amendment to the Administrative Code, to require the Mayor to appoint the City Solicitor as the Interim Managing Director² for a maximum period of 90 days beginning on the date of the vacancy in the Office of Managing Director. The Charter fully addresses the appointment of a Managing

² The Board sees no difference between the role of the proposed Interim Managing Director and the Charter created Temporary Managing Director. The Board also understands the need to fill a potential 90 day management void at the City's highest management level, however, the Charter provides the framework and the filling of the Office of Managing Director, or a vacancy of that Office, during the first 90 days are in the hands of the Mayor.

Director, and the filling of a vacancy in that office. The Charter covers this problem of City administration, imperfectly, and perhaps confusingly, but it is covered. *See* Charter Secs. 401, 403.

The purpose of Section 401 and the appointment process is for the Mayor to move forward and appoint a Managing Director, either at the beginning of his or her term, or, through Section 403, upon a vacancy in the Office of Managing Director. If “the position of Managing Director cannot be filled by the Mayor” only then may a Temporary Managing Director be appointed. This is true at the beginning of a Mayor’s term, or upon the happening of a vacancy in the Office of Managing Director. The appointment of a Temporary Managing Director may occur within the first 90 days of a vacancy in the Office of Managing Director, so long as Mayor “cannot fill” the position of Managing Director. The Board has previously addressed the interplay between Section 401, 403 and the 90 day limitation. *In re Charter Art. IV, Relating to the Timing of the Appointment of a Temporary Managing Director* (Adv. Op. 38, Feb. 17, 2016); *In re Charter Art. IV, Relating to the Managing Director* (Adv. Op. 22, Nov. 18, 2010).

Slifko’s Request presupposes the creation of what is in essence a new form of Temporary Managing Director (i.e. the City Solicitor appointed as “Interim Managing Director”). This ignores the Charter’s requirement that such a temporary appointment be made only “in the event that the position of Managing Director cannot be filled by the Mayor.” *See* Charter Sec. 401(d). An Ordinance cannot require the Mayor to do something (i.e., appoint the person who fills the office of City Solicitor to the position of temporary managing director) that the Charter

expressly does not allow (i.e. no appointment of a Temporary Managing Director unless the Mayor “cannot fill” the position of Managing Director).

The Charter is supreme. As the Board just recently stated in *In re: Jurisdiction of the Board of Ethics*, (Adv. Op. 41, August 28, 2018) at pp. 4-5:

Charter, Amendment I, Section 1(a) guarantees the supremacy of the Charter, under all circumstances, regardless of the method of circumvention, whether active or passive, express or implied, the Charter is the supreme document of City government. *See In re: Position of Community Development Director* (Adv. Op. 1, April 12, 2006) at 5. A policy created that is not Charter compliant is unenforceable. *In re: Communications Director and Media and Communications Policy* (Adv. Op. 3, Nov. 22, 2006) at 5. The Administrative Code may not waive, supersede or modify provision of the Charter. *In re: Purchasing Policy* (Adv. Op. 30, Nov. 14, 2012) at 2. The Charter has the same force and effect as a statute passed by the General Assembly, *see In re: Addison*, 385 Pa. 48, 57, 122 A.2d 272, 275-76 (1956) and *Gans v. City of Philadelphia*, 403 A.2d 168, 170 (Pa. Cmwlth. 1979), while the Administrative Code is a mere ordinance.

The Board concludes with certainty that a mere ordinance, i.e., an amendment to the Administrative Code, cannot change, conflict with or supersede the Charter in any way whatsoever. Therefore, the Board must also respond in the negative to the first part of the Request.

B. When a vacancy occurs in the Office of a Department Director, does City Council have the power, by amendment to the Administrative Code, to require the Managing Director to appoint an Acting Department Director within 10 days of the happening of the vacancy?

Pertinent to responding to this portion of the Request, the Board notes that Administrative Code Section 401(F) provides that the Managing Director shall have the power to:

Designate himself or some other officer or employee to perform the duties of any office or position in the administrative service

under the supervision of the Managing Director during a vacancy, absence, or disability of an incumbent.

Further, Administrative Code Section 5-803(E), relating to department directors, provides:

Whenever the department director position is vacant due to removal, resignation, retirement, permanent disability or death, the Managing Director shall appoint a qualified employee from the department to the acting director position, as is required in § 5-401F of this chapter, until such time as the Mayor nominates a replacement to City Council and City Council approves the nomination.

The Charter is silent on the timing of an appointment for an Acting Department Director.

The Charter is also silent on any requirement at all for the Managing Director to appoint an Acting Department Director. However, the Charter does provide at Section 406(9) that the Managing Director shall “[p]erform such other duties as are specified in this Charter or may be required by the Mayor or City Council.”

The Board concludes that City Council may issue an amendment to the Administrative Code *requiring the Managing Director³ to appoint an Acting Department Director within 10 days of the occurrence of the vacancy* and such amendment would not violate the Charter or Administrative Code. The Board’s conclusion is limited to the question presented here and the italicized wording above.

III. OPINION OF THE BOARD

It is the Opinion of the Board that:

A. City Council does not possess the power, by amendment to the Administrative Code, to require the Mayor to appoint the City Solicitor as the Interim Managing Director

³ The Board answers the second question of the Request only with respect to the Managing Director, and specifically does not answer the second question of the Request as to the Temporary Managing Director. Slifko’s Request in this regard asks only with regard to the Managing Director and the Board’s opinion is so limited.

for a maximum period of 90 days beginning on the date of the vacancy in the Office of Managing Director.

B. Such a proposed amendment by City Council would conflict with Charter Sections 401 and 403.

C. A mere ordinance, i.e., an amendment to the Administrative Code, cannot change, conflict with or supersede the Charter in any way whatsoever.

D. City Council may issue an amendment to the Administrative Code requiring the Managing Director⁴ to appoint an Acting Department Director within 10 days of the occurrence of the vacancy and such amendment would not violate the Charter or Administrative Code and is within the scope of Charter Section 406(9).

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair

Date: 10-30-18

NOTICE

THE "OPINION OF THE BOARD" SECTION OF AN ADVISORY OPINION MAY BE USED ONLY BY THE REQUESTOR OF THE ADVISORY OPINION AS A DEFENSE IN ANY SUBSEQUENT INVESTIGATION OR PROSECUTION ONLY TO THE EXTENT THAT THE QUESTIONS PRESENTED TO THE BOARD ARE IDENTICAL TO THE FACTUAL ISSUES FACED IN THE UNDERLYING MATTER IN WHICH THE DEFENSE IS RAISED. FURTHER, NO OTHER PORTION OF AN ADVISORY OPINION MAY BE USED IN ANY WAY AS A DEFENSE AND SHALL NOT BE A DEFENSE. *See Bill No. 46-2005, as amended, Charter Board Ordinance and Charter Board Resolution 2-2015.*

⁴ See footnote 3.