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August 29, 2018

Via U.S. Mail & Email: linda.kelleher@readingpa.org

Linda A. Kelleher CMC, City Clerk
815 Washington Street
Reading PA 19601

Re: Advisory Opinion No. 41

Dear Ms. Kelleher:

Enclosed is a copy of Advisory Opinion No. 41, rendered by the City of Reading Charter Board last night. The Opinion concerns the jurisdiction of the Board of Ethics. I am requesting on behalf of the Board that the Opinion be circulated among City Council members and posted on the City's website as is customary.

Thank you.

Very truly yours,

Eric B. Smith

EBS/mrh
Enclosure

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THE CHARTER BOARD OF THE CITY OF READING

IN RE	JURISDICTION OF	:	Request Received July 31, 2018
	THE BOARD OF ETHICS	:	
		:	
		:	Advisory Opinion No. 41

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.*

IN RE	JURISDICTION OF	:	Request Received July 31, 2018
	THE BOARD OF ETHICS	:	
		:	
		:	Advisory Opinion No. 41

I. PROCEDURAL HISTORY AND QUESTIONS PRESENTED

“Under Charter Section 1201(c) and Ethics Code Section 6G., does the Ethics Board have jurisdiction to hear and decide cases alleging a violation of Charter Section 706, and does that jurisdiction attach without the Complainant first establishing – by rigorous proof – that the City Administration and Council have failed to enforce this Section? In other words, is a simple allegation by the Complainant that an unremedied 706 violation exists, sufficient to attach jurisdiction to the Ethics Board?”

¹ The Board acknowledges, and discloses, that Slifko, 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.

² The Board will also disregard what appears to be a separate question within Slifko's Request, as stated as "does the Ethics Board have jurisdiction to hear and decide cases alleging a violation of Charter Section 706[?]" The scope of the jurisdiction of the Board of Ethics is not the central issue of the Request, but rather the thrust of the Request concerns whether or not, by mere ordinance, that board's Charter given jurisdiction may be modified or conditioned.

³ Coupled with this question is necessarily the foundational question of whether or not the Board of Ethics' "jurisdiction attach[es] without the Complainant first establishing . . . that the City Administration and Council have failed to enforce this Section?

On that same day, July 31, 2018, the City Clerk transmitted the Request to the Board for its consideration. Pursuant to the Charter Board Ordinance, the Board may issue an advisory opinion no later than thirty (30) days after receipt of the request, but as expeditiously as possible. Ord. No. 46-2005, Charter Board Ordinance, § VI.

II. DISCUSSION

A. Prospective v. Retrospective

As the Board regularly cautions, it is constrained to not answer retrospective questions under the guise of an advisory opinion. The Board will answer as an advisory opinion only those questions that are prospective in application. Also, actual or perceived violations of the Charter or Administrative Code, grounded in actual events that have occurred, are not the proper subject of an advisory opinion. *See* Adv. Ops. No. 11 (September 24, 2008), No. 12 (January 12, 2009), No. 14 (May 12, 2009), No. 30 (November 14, 2012), No. 31 (April 8, 2013) (comparing retrospective and prospective application), No. 32 (April 19, 2013) *and* No. 36 (Feb. 7, 2014).

Here the context of this advisory opinion request is very specific and addresses the *current* and ongoing jurisdictional questions affecting the Board of Ethics and complainants to that board. Slifko does reference matters that have already come to pass and are the current practice of the Board of Ethics, City Council and the Board of Ethics' hearing officer.⁴ But, Slifko's Request does not implicate the Board passing judgment on a past act, which is the proper domain of the Charter Board complaint, investigation and hearing process. Rather, implicit in Slifko's Request is an advisory interpretation of potentially conflicting language

⁴ However, although the Request concerns events and conduct that have already occurred, the circumstances are such that the application of this Administrative Code provision in the manner set out in the Request is capable of repetition or recurrence with every alleged violation of Charter § 706 heard by the Board of Ethics. This further supports the Board's determination that the Request is in fact advisory and not retrospective.

between the Charter and the Administrative Code. The Request summonses the Board's interpretive powers, rather than its enforcement powers.

On the basis of the foregoing, the Board finds that this Request is advisory in nature and will be answered by the Board as a matter of interpretation of the Charter and Administrative Code, and not as a matter of enforcement.

B. Pertinent Administrative Code and Charter Provisions

The Request focuses upon an ordinance, the Administrative Code, Part 10, Code of Ethics, Sec. 5-1006(G), Political Activities. That section provides as follows:

G. Political activities. Sections 605(a) and 706 of the City Charter and § 70-108, Political activity, of Chapter 70, Personnel, are incorporated herein by reference and made a part hereof. City employees or officials are to adhere to the sections restricting involvement in political activities as set forth in §§ 605(a) and 706 of the City Charter and § 70-108 of the City Code. *In the event that the City or City Council has failed to take appropriate action in enforcing the aforementioned provisions, then the Board of Ethics shall have jurisdiction to adjudicate any violation thereof.* (emphasis added)

The Charter provisions that govern the jurisdiction of the Ethics Board are as follows:

Section 1201. Conflict of Interest and Code of Ethics

(c) Board of Ethics. The Mayor, with the approval of City Council, shall establish an independent Board of Ethics consisting of five (5) City residents holding terms of three (3) years, to administer and enforce the conflict of interest provision 1201 of this Charter and the prohibition sections of this Charter. No member of the Board may hold elective or city office under the City or any other government or hold any political party office. Insofar as possible under state law, the Mayor shall authorize the Board to issue binding opinions, conduct investigations on its own initiative and on referral or complaint, refer cases for prosecution, impose administrative fines, and to consult with independent counsel. City Council shall appropriate sufficient funds to the Board of Ethics to enable it to perform the duties assigned to it. Members of the Board of Ethics may be removed by the Mayor with the consent of City Council.

The Request also cites to Charter § 706, concerning prohibited political activity.⁵ That section provides as follows:

Section 706. Political Activity.

All employees are prohibited from engaging in any form of political activity during regular work hours and are prohibited from using city facilities or property for any political activity. Violation of this section will warrant discharge or other discipline under the provisions of the Personnel Code.

The Board turns again to the central premise of the Charter, that is, that the Charter is the form of government of the City, and can not be altered in any way except as provided by the Charter itself and the Laws of the Commonwealth of Pennsylvania. Charter, Amendment I, Section 1(a), Governing law of the City, provides as follows:

This Charter is the governing law of the City of Reading. No action or inaction by City Council, the Administration, or any other body created by this Charter shall be taken contrary to it, whether individually or collectively, by ordinance, resolution, practice, executive order or decision, or any other means.

C. Analysis

1. *Supremacy of the Charter*

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

⁵ The Board will not address the issue seemingly raised of whether or not enforcement of Charter § 706 falls within the jurisdiction of the Board of Ethics. *See* footnote 2.

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 Charter's jurisdictional provisions for the Board of Ethics are straight forward: "to administer and enforce the conflict of interest provision of § 1201 of this Charter and the prohibitions sections of this Charter." Charter § 1201(c). Charter § 706 is not entitled "prohibitions," but does contain, in summary, political activity prohibitions as to all City employees. For purposes of this Advisory Opinion only, the Board will presume that Section 706 is a "prohibition section" under Charter § 1201(c) and within the exclusive and original jurisdiction of the Board of Ethics to "administer and enforce."⁶

Within the Administrative Code's Code of Ethics, § 5-1006(G), City Council incorporated therein Charter Sections 605(a) and 706, and § 70-108 of the Personnel Code. In the cited paragraph "G," further language is inserted which seemingly is intended to limit the original and exclusive jurisdiction of the Board of Ethics set out in Charter § 1201(c).

The offending language of § 5-1006(G) provides that:

"In the event that the City or City Council has failed to take appropriate action in enforcing the aforementioned provisions, then the Board of Ethics shall have jurisdiction to adjudicate any violation thereof."

The Charter provides no jurisdiction to the City or to City Council that is concurrent with or which supersedes the jurisdiction of the Board of Ethics. Section 5-1006(G) appears to place a pre-condition upon the jurisdiction granted by the Charter to the Board of Ethics. This jurisdictional limitation is wholly the creation of the Administrative Code. Just as the Administrative Code could not expand the jurisdiction of the Board of Ethics, likewise, it cannot diminish the jurisdiction of that board either.

⁶ See footnotes 2 and 5.

2. *Impermissible burden on Charter § 1101(c)*

The analysis does not end there, Charter § 1101(c) ensures a citizens' right to participate in the government of the City by "attending and being heard at public meetings of the Council and other boards, commissions, authorities and agencies of the City government." The Board of Ethics is such a board before which a citizen of the City has the right to participate and be heard as that board's procedures allow. Under the Charter, the Board of Ethics is one of the bodies to which, among others, ordinary citizens may lodge a complaint against a City official, or employee so long as it falls within Section 1201 of the Charter and its prohibition sections.

The offending conditional language of Administrative Code § 5-1006(G), burdens a citizens' right to participate in as much as it impermissibly attempts to alter the Board of Ethics' jurisdiction and to, at least initially, "flip" the burden of proof onto the complainant. As written, the Board of Ethics is without any jurisdiction at all until the complainant demonstrates that the "City or City Council has failed to take appropriate [enforcement] action" as it relates to Charter Sections 605(a) and 706, and § 70-108 of the Personnel Code. This provision divests the Board of Ethics of its exclusive and original jurisdiction provided by the Charter and burdens a citizen's participation rights granted by the Charter.

III. OPINION OF THE BOARD

The Board is of the opinion that:

A. The Request is not retrospective, but is prospective in nature and seeks the utilization of the Board's interpretive powers, not its enforcement powers, and is therefore proper;

B. However, the Board advises Slifko that the remedy for an actual or perceived violation of the Charter or Administrative Code is the filing of a Charter Board complaint, not a request for an advisory opinion. Consequently, any further future, or past, application of the offending language of Administrative Code § 5-1006(G)⁷ is the proper subject of a Charter

⁷ "In the event that the City or City Council has failed to take appropriate action in enforcing the aforementioned provisions, then the Board of Ethics shall have jurisdiction to adjudicate any violation thereof."

Board complaint, or a preliminary investigation commenced by the Board, or other appropriate Board action;

C. The offending language⁸ of Administrative Code § 5-1006(G) is incompatible with, and an impermissible condition upon, Charter § 1201(c), relating to jurisdiction of the Board of Ethics;

D. The offending language⁹ of Administrative Code § 5-1006(G) impermissibly burdens a citizens' participation rights as granted by Charter § 1101(c);

E. Although the Request is focused on application of Administrative Code § 5-1006(G) to Charter § 706, the Board's Advisory Opinion is equally applicable to Charter §§ 605(a) and 706, and § 70-108 of the Personnel Code.

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair

Date: 8/28/18

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⁸ See footnote 7.

⁹ Id.