

**CITY OF BIRMINGHAM
BOARD OF ETHICS MINUTES
SEPTEMBER 11, 2020
151 MARTIN, BIRMINGHAM
MEETING ID:**

I. CALL TO ORDER

Chairperson Robb called the meeting to order at 9:30 a.m.

II. ROLL CALL

Present: James Robb, Chairperson
John Schrot, Board Member
Sophie Fierro-Share, Board Member

Absent: None

Also Present: Donna M. Klein, Complainant
City Commissioner Clinton Baller, Respondent
Attorney Matt Erard, Counsel for the Respondent

Administration: City Manager Valentine, City Clerk Designee Bingham, City Attorney Kucharek.

III. APPROVAL OF MINUTES

A. Approval of Board of Ethics meeting minutes of September 1, 2020

The following corrections/amendments were noted:

1. Page 1, Roll Call: Include Sheldon Klein, husband and Counsel for the Complainant, as present.
2. Page 1, Section V, 1st Paragraph: Replace respondents with respondent's.
3. Page 1, Section V, 1st Paragraph: "Evidence in Record" should read "Evidence in the Record".
4. Page 2, replace the word "several" with the word "five". Adding, "he emailed these documents labeled Respondent's Exhibits A-E, respectively to Ms. Bingham who forwarded them to the board and Ms. Klein during the hearing.
5. Page 2, add list of exhibits submitted by Counsel for the Respondent during the call for additional documents at the hearing.
6. Page 2, replace Discussion with respect to Jurisdiction with Consideration of Respondent's Motion for Summary Decision with respect to Jurisdiction.
7. Page 3, second to last sentence, replace the word "relevant" with the word "resolved".
8. Page 3, insert "this matter is subject to this board's jurisdiction".
9. Page 3, replace "Discussion with respect to violation of the Code of Ethics" with "Consideration of respondent's motion for Summary Decision as to whether the complaint sufficiently demonstrates a violation".
10. Page 4, Paragraph 1, item 3, asserted the term "official conduct".
11. Page 4, mid page, replace "to" with "as" in reference to Mr. Erard's Exhibit C
12. Page 4, Paragraph 5, line 4, replace "is" with "are" in reference to specific allegations.
13. Page 4, Last sentence, replace "determines" with "has determined".

14. Page 4, "Consideration of Respondent's Motion for Summary Decision for Lack of a Genuine Issue of Material Fact".
15. Page 5, Mid Page, replace "several" with "posts" add "allegedly" to critical.
16. Page 5, Last Paragraph, remove "What party was in favor?"
17. Page 8, remove the phrase "agent of destruction" from the record.
18. Page 9, Seventh Line, replace "nor were there homonyms" with "there was nothing ad hominem".
19. Page 9, Ninth Line, replace "an elected is never okay" with "elected: Is it okay or not?"
20. Page 9, Last Paragraph, Line 2, replace "my" with "her".
21. Page 10, First Paragraph, replace "at" with "given".
22. Page 10, Last Paragraph, replace "ordinances" with "sections of the ordinance".

MOTION: Motion by Member Fierro-Share, seconded by Member Robb:
To approve the minutes of September 1, 2020 as corrected.

ROLL CALL VOTE:	Ayes,	Member Fierro-Share Member Schrot Chairperson Robb
	Nays,	None

MOTION: Motion by Member Schrot, seconded by Member Fierro-Share:
To allow the participants to comment on the proposed minutes.

ROLL CALL VOTE:	Ayes,	Member Schrot Member Fierro-Share Chairperson Robb
	Nays,	None

Commissioner Baller, respondent and Mr. Erard, counsel for the respondent, objected to statements in the minutes as written.

Ms. Klein, complainant, objected to statements in the minutes as written.

Chairman Robb withdrew the prior motion to adopt the minutes.

MOTION: Motion by Member Fierro-Share, seconded by Member Schrot:
To adopt the minutes of the September 1, 2020 meeting as amended.

ROLL CALL VOTE:	Ayes,	Member Fierro-Share Member Schrot Chairperson Robb
	Nays,	None

IV. UNFINISHED BUSINESS

None.

V. NEW BUSINESS

A. ETHICS COMPLAINT HEARING

1. 2020-01 Complaint: City Commissioner Clinton Baller, submitted by Donna M. Klein

Chairman Robb opened by noting that the record was closed at the end of the parties' summation at the September 1, 2020 meeting.

Correspondence from Mr. Bloom, resident, and Ms. Klein, complainant, sent to the City Clerk after that point were not accepted into the record.

MOTION: Motion by Chairman Robb, seconded by Ms. Fierro-Share:
To reopen the record to receive Ms. Klein's email of September 8, 2020, and Mr. Erard's email describing Mr. Baller's correction to the prior edition of his newsletter, and to receive the Attorney General's opinion cited by Mr. Erard.

Ms. Klein withdrew her correspondence of September 8, 2020 to the City Clerk and objected to reopening the record.

MOTION: Motion by Chairman Robb, seconded by Member Schrot:
To deny reopening the record to provide evidence of Mr. Baller's correction to the prior edition of his newsletter.

ROLL CALL VOTE:	Ayes,	Chairperson Robb Member Schrot Member Fierro-Share
	Nays,	None

MOTION: Motion by Member Schrot, seconded by Ms. Fierro-Share:
To reopen the record for Mr. Erard's offering of the Attorney General Opinion, dated some years ago, to support his case.

Ms. Klein objected to reopening record.

Member Schrot reiterated that there is not additional testimony or argument involved in receiving the Attorney General Opinion into the record.

ROLL CALL VOTE:	Ayes,	Member Schrot Member Fierro-Share Chairperson Robb
	Nays,	None

DELIBERATIONS

Member Fierro-Share expressed her thoughts about the Ethics Ordinance relative to the public and private conduct of public officials with respect to the complaint. Concluding that the complaint is a private dispute between the parties and that there was no violation of the Ethics Ordinance.

Member Schrot shared his observations about the task and authority of the Board of Ethics with respect to public trust and ~~confidants~~ confidence¹. He concluded that he does not view Commissioner Baller's communications and conduct to undermine public trust, confidence, or the integrity of City government. He opined that Ms. Klein did not establish the use or appearance of use of public office for private gain or privilege. He cautioned Commissioner Baller to insure that his personal activities do not create a conflict with his public duties; and suggested that the City of Birmingham engage guidelines or policies for appointed and elected officials using social media. Finally, he did not find that there was a violation of the City of Birmingham's Ethics Ordinance.

Chairperson Robb expressed his principal concerns with respect to this complaint:

1. Commissioner Baller's personal newsletter signed with his public title without a disclaimer.
2. Testimony about NextDoor, a private community based social networking platform, and the reposting of confidential posts between the leads of this network. Noting that Commissioner Baller used information that did not belong to him that resulted in the public ridicule of Ms. Klein.
3. Commissioner Baller's refusal to provide the source of the confidential posts, when asked, without valid objection obstructed the work of the Board of Ethics.

Review of the Applicable Sections of the Ethics Ordinance

Section 2-320: Public Policy

Chairperson Robb opined that there is a violation of this section demonstrated by Commissioner Baller's conduct of republishing private information of the votes and comments of the leads as to whether to delete the post and using his public title in private communications. He cited the Wisz decision to support his opinion.

Member Schrot expressed that while he would have liked Commissioner Baller to answer the question regarding the source of the information obtained from NextDoor, there is no evidence that when Commissioner Baller received the information it was still private. With respect to using his title in the signature block, Commissioner Baller is now aware of the confusion that the action caused, should there be such conduct in the future would evidence intent to violate the ordinance. Therefore, Member Schrot does not believe that there was a violation of this section of the ordinance. He went on to recommend that the Ethics Board engage in an ethical training session wherein the board uses the thirty-three prior opinions to annotate acceptable and non-acceptable conduct for newly elected City officials.

Member Fierro-Share agreed that the use of Commissioner Baller's official public title in the signature block without a disclaimer is in violation of the ethics ordinance.

MOTION: Motion by Chairman Robb:

To retain jurisdiction over this matter because Commissioner Baller's failure to answer the questions occurred during the course of the board's consideration of the case and under Rule 319, the board is required to determine whether the respondent's conduct as alleged in the complaint or demonstrated at the hearing is in breach of the Code of

¹ As amended at the November 20, 2020 meeting.

Ethics and to reopen the record under Rule 317, which allows for post hearing briefs and would allow any party to submit a brief to the Clerk within 14 days of today limited to the following questions:

1. In refusing to answer the questions put to him at the hearing about whether he received the information depicted on page 2 and 3 of Exhibit A and whether he solicited or received it unsolicited did he violate any of the following sections of the ordinance:
 - a. Sentence 2, of Section 2-320 Earning and Honoring Public Trust by Integrity and Conduct during the hearing.
 - b. Paragraph 1, of Section 2-321 Complying with the laws of the Nation, State, and City and observing in Official Acts the highest standard of ethical conduct. Discharging their duties of office faithfully regardless to personal consideration and recognizing that their Official Conduct should be above reproach.
 - c. Paragraph 2, of Section 2-231 Safeguarding the public confidence by being honest, fair, and respectful of all persons with whom they have conduct by avoiding official conduct which may tend to undermine respect for City Officials, employees, and the City as an institution.
 - d. Part 5, of Section 2-232.3 Adversely affecting the confidence of the public or the integrity of City government.

After the briefing deadline, the board would reconvene to make determinations on whether Commissioner Baller's conduct as alleged in the complaint or demonstrated in the hearing is in breach of the Code of Ethics.

Member Schrot expressed that he does not believe that the public's trust was adversely affected by Commissioner Baller's conduct because there were so few public comments on this matter; and asked how the proposed briefs would add to the proceedings.

Chairperson Robb explained that the motion is with respect to the process of appearing before the Ethics Board.

Member Schrot argued that Rules of Procedure 209 and Rule 212 both state that the parties "may" not "shall". Rule 314 states that the respondent "may" present evidence to support defense and not "shall".

Chairperson Robb pointed out that Commissioner Baller appeared at the hearing and questions were put before him on an Exhibit that he submitted, and his counsel introduced to the board.

Member Fierro-Share recommended that the board resolve the case in front of them and not complicate the proceedings.

Chairperson Robb withdrew the motion.

MOTION: Motion by Chairman Robb:

That Commissioner Baller did violate the Ethics Ordinance by using his official title in the signature block of his personal newsletter, using the Wisz case as a precedent.

Member Schrot expressed that in the context of Ms. Klein's complaint; she did not state any confusion by the signature block or thought that Commissioner Baller was attacking her as an official of the City. In the context of whether it was a misuse of position or a

conflict of using official position to secure,² request,³ or provide⁴ preferential treatment, then it is a legitimate inquiry. He fails to find that there was intent to use his official position to secure special consideration.

Chairperson Robb agreed that there was no evidence of intent to use his official position to secure special consideration; however, he believes that there was a technical violation.

Member Fierro-Share ~~again, agreed~~ stated⁵ that there was a violation of Section 2-324.2 for using his title in the signature block of his personal newsletter without a disclaimer.

Member Robb, expressed that using an official title in personal communications is not a violation of the Ethics Ordinance.

It was determined by the majority⁶ that there was no violation of Ethics Ordinance, Section 2-320.

Section 2-321, Paragraph 2 – Safeguarding the Public Confidence by being honest, fair, and respectful of all persons and property with whom they have contact.

Member Schrot expressed that the proofs have shown that the conduct of Commissioner Baller has ~~effected the confidence of the City and other individuals but does not believe it has~~ not⁷ adversely affected public confidence. He offered that Commissioner Baller must recognize that as a City Official he has to be careful in his conduct with others. While there is was⁸ a better way to handle this situation, his conduct did not rise to the level of being dishonest, unfair, or disrespectful; and thus did not find a violation of the Ethics Ordinance.

Member Fierro-Share concurred with Member Schrot.

Chairperson Robb disagreed with Member Schrot and Member Fierro-Share.

Section 2-323 (1)⁹ – Commissioner Baller using Official Title on Personal Newsletter

Member Schrot, no violation.

Member Fierro-Share concurred, no violation.

Chairperson Robb agreed, no violation.

² As amended at the November 20, 2020 meeting.

³ As amended at the November 20, 2020 meeting.

⁴ As amended at the November 20, 2020 meeting.

⁵ As amended at the November 20, 2020 meeting.

⁶ As amended at the November 20, 2020 meeting.

⁷ As amended at the November 20, 2020 meeting.

⁸ As amended at the November 20, 2020 meeting.

⁹ Parentheses added after the November 20, 2020 meeting.

Section 2-323 (5)¹⁰ – Adversely Affecting the Confidence of the Public or Integrity of the City Government

Member Fierro-Share did not find evidence of Commissioner Baller’s private conduct effecting affecting¹¹ public confidence in this instance. Private disputes does not undermine the City as an Institution or Government.

Chairperson Robb disagrees based on previous commentary.

Section 2-324 (a)(2)¹² – Representing Personal Opinion of that of the City.

Member Fierro-Share expressed that there was a violation because Commissioner Baller did not include a disclaimer in his communications that used his official title.

Member Schrot disagrees that there is a violation because he does not have evidence that he was stating that his opinion was that of the City against Ms. Klein.

Chairperson Robb concurred with Member Schrot, and noted that there could be risks of people interpreting his use of title in his personal opinions as that of the City.

Section 2-324, (a)(8)¹³ – Use of Official Position to Secure Special Consideration.

Member Schrot expressed that the reference to ~~him~~ Commissioner Baller¹⁴ being a City Commissioner was not the essence of the complaint. It was a complaint about Commissioner Baller’s conduct in publishing gossip. While not wise to reference his title or position in the communication, it ~~was~~ did not appear¹⁵ intended to gain an advantage.

Member Fierro-Share expressed that it is not a violation.

Chairperson Robb concurred with Member Fierro-Share, but pointed out that because the board does not know from whom Mr. Baller received the screenshots or whether he solicited them because he refused to answer those questions, further leaves the board not knowing if he may have attempted to use his position to secure a privilege.

Member Fierro-Share agreed to write the opinion.

MOTION: Motion by Member Schrot, seconded by Member Fierro-Share: The board determines on this record that Commissioner Baller has not violated the Ethics Ordinance for the reasons set forth in the various opinions to be written. Ms. Fierro-Share volunteered to write the majority opinion; Mr. Schrot has volunteered to write the opinion with respect to Section 2-234 or any section indicating Mr. Baller using his title in his newsletter, and Chairperson Robb will offer dissent.

¹⁰ Changed from 2-323.4 to 2-323 (5) after the November 20, 2020 meeting.

¹¹ As amended at the November 20, 2020 meeting.

¹² As amended at the November 20, 2020 meeting.

¹³ As amended at the November 20, 2020 meeting.

¹⁴ As amended at the November 20, 2020 meeting.

¹⁵ As amended at the November 20, 2020 meeting.

Chairman Robb withdrew the motion to restate it, by consensus.

MOTION: Motion by Chairperson Robb, seconded by Member Schrot:
The Board of Ethics determines that Commissioner Baller did not violate the Ethics Ordinance raised and discussed during the case.

MOTION: Motion by Chairperson Robb, seconded by Member Schrot:
To amend the motion by adding by majority vote.

MOTION: Motion by Chairperson Robb, seconded by Member Schrot:
The Board of Ethics by majority vote determines that Commissioner Baller has not violated the Ethics Ordinance.

ROLL CALL VOTE: Ayes, Member Schrot
Member Fierro-Share
Nays, Chairperson Robb

MOTION: Motion by Chairperson Robb, seconded by Member Schrot
The board determines that Ms. Fierro-Share would write the majority opinion on the issues, except with respect to Commissioner Baller's use of his title on his personal newsletter; Mr. Schrot would write the majority opinion on that, and Chairperson Robb will offer a written dissent.

ROLL CALL VOTE: Ayes, Chairman Robb
Member Schrot
Member Fierro-Share
Nays, None

MOTION: Motion by Chairperson Robb,
That the board retain jurisdiction over this matter because Commissioner Baller's failure to answer the questions that occurred during the consideration of the case. Under Rule 319, the board may determine whether the respondent's conduct as alleged in the complaint or demonstrated at the hearing is in breach of the code of ethics. That the board reopen the record under Rule 317, which allows post-hearing briefs and the parties be permitted to submit post-hearing briefs if they wish. Either party would submit the brief to the City Clerk by the close of business on Friday, September 25, 2020, 5:00 p.m. with the brief being limited to the following questions:

1. In refusing to answer the questions put to him about whether he received the information depicted on pages 2 and 3 of respondent's Exhibit A and whether he solicited the information or received it unsolicited, did Commissioner Baller violate any of the following sections of the ordinance:
 - a. Section, 2-320.2 Earning and honoring public trust by integrity and conduct.
 - b. Paragraph 1, Section 2-321 – Complying with the laws of the Nation, State, and the City. Observing in their Official Acts the highest standard of ethical conduct in discharging the duties of their offices faithfully regardless of personal consideration and recognizing that their official conduct should be above reproach.
 - c. Paragraph 2, Section 2-321 – Safeguarding Public Confidence by being honest, fair, and respectful of all persons and property with whom they

have contact and by avoiding official conduct which may tend to undermine respect for City Officials, employees, and for the City as an institution.

- d. Section 2-323.5 – Adversely Affecting the Confidence of the Public or the Integrity of the City Government.

After briefing, if the motion is granted, the board will reconvene to make the determination of whether Commissioner Baller’s conduct in refusing to answer those questions is a breach of the code of ethics.

Motion failed for lack of a second to the motion.

VI. PUBLIC COMMENT

- Mr. Erard, counsel for the respondent, commented on the discussion in reference to the Wisz case.
- Christie Barrett, resident, commented on the proceedings and commended Commissioner Baller for his transparent public communications.
- David Bloom, Resident, commented on the prior hearing and based on the recent campaign literature that he received, he does not see how Commissioner Baller putting his title on his newsletter is a violation of anything.
- Ms. Klein expressed that the previous two comments are an example of what Commissioner Baller has unleashed into the community by addressing her in his newsletter. She further noted that now others are calling her a bully and harassing her and she is shocked at the board’s decision.

Chairman Robb thanked all of the participants.

VII. ADJOURN

MOTION: Motion by Chairperson Robb, seconded by Mr. Schrot:
To adjourn the meeting.

ROLL CALL VOTE: Ayes, Member Schrot
Chairperson Robb
Member Fierro-Share

Nays, None

The meeting was adjourned at 1:53 p.m.



Alexandria Bingham, City Clerk Designee/vc