

**CITY OF BIRMINGHAM
BOARD OF ETHICS
COMPLAINT NO. 2007-04**

DECISION

July 26, 2007

I. ISSUE PRESENTED

Is it a violation of the City of Birmingham's Ethics Ordinance for an elected member of the Baldwin Public Library Board of Directors to participate in a Board vote, rather than recuse himself, regarding the approval of a voucher for an expense that was authorized by the Library Director of the Baldwin Public Library which is related to this member?

Answer: It is not. A member or volunteer member of a city board or committee is part of the plan of government for the city, and it is recognized that a member may be placed in the position of participating in a decision that may directly or indirectly effect his or her financial or personal interest. Thus, those members of the various boards and committees may participate in such decisions providing that they act:

- (i) In furtherance of the public good;
- (ii) In compliance with the duties of their respective boards; and
- (iii) In a manner consistent with a member not using, or attempting to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen.

II. OPINION

This matter came to the Board of Ethics on a complaint filed by Ms. Joan Heinicke, a resident of the City of Birmingham and an elected member of the Baldwin Public Library Board of Directors, as Complainant, against Mr. Paul VanderMeer (Respondent), who also purports to be a resident of the city of Birmingham, and who is also an elected member and currently the President of the Baldwin Public Library Board of Directors. The complaint alleges that Mr. VanderMeer has violated various sections of 2-324 of the city's Ethics Ordinance.¹

The Board of Ethics is an advisory body created by the City Commission to interpret the Ethics Ordinance. Birmingham Code of Ordinances, § 2-325(a)(1). The Board is required to determine whether the Respondent's conduct as alleged in the complaint or demonstrated at a hearing is in breach of

¹ Specifically Subsections (b)(1) (second paragraph), (b)(2)a, (b)(2)a 4, and (b)(2)b.

the Ethics Ordinance. Board of Ethics Rule 314. The Board is to make its decision upon a vote of a majority of its members based upon the evidence in the record and controlling law. *Id.* The Board must issue a decision in the form of a written opinion. *Id.*

The City Clerk gave appropriate notice to the parties and scheduled the matter to be heard at the Board's regular June 13, 2007 meeting. The Respondent filed a written answer to the complaint, dated June 8, 2007, with attachments,² prior to the hearing; and, he appeared in person on June 13, 2007 to defend. Also, the Director of the Baldwin Public Library, Martha Custer, provided her letter to the Ethics Board, together with attachments, on or about May 31, 2007.

At the June 13, 2007 hearing, the City Attorney advised the Respondent that all elected officials have a right to closed session under the Open Meetings Act. The Respondent informed the City Attorney and the Ethics Board of his election to proceed in open session.

At its regular meeting on June 13, 2007, the Board convened in open session to consider this matter. The Complainant and the Respondent appeared before the Board, made opening statements, offered evidence, and presented closing statements. Documents presented included the complaint and its exhibits, and Mr. VanderMeer's written response.

The witnesses included Ms. Heinicke and Mr. VanderMeer. The Board also received a letter from Ms. Ann Conigliaro, as well as public comment from Ms. Lenita Barcutian, a city resident.

After receiving the evidence and the arguments of the parties on June 13, 2007, the Ethics Board deliberated and voted on the matter. As a result of the vote, the Ethics Board issues this Opinion as its final decision in this case.

A. FINDINGS OF FACT

It is Complainant's contention that on April 23, 2007, at the scheduled Baldwin Public Library Board meeting, Respondent, as President/Chair of the aforesaid board, voted to approve a voucher for an expense allegedly incurred by him (i.e. an invoice from the law firm of Adkison, Need & Allen, PLLC for \$650.00). Complainant alleges that this invoice was to pay for legal services to ascertain Respondent's residency status as an elected official of the City of

² The attachments included such things as excerpts from the Observer and Eccentric Newspaper, a letter to Library Director Martha Custer from attorney Linda Mayer dated February 8, 2007, letter from Respondent to the Ethics Board dated June 8, 2007, Purchase Guidelines of the Baldwin Public Library, Financial Policy of the Baldwin Public Library, Minutes of the April 19, 2005, October 17, 2005, April 17, 2006, and September 18, 2006 Baldwin Public Library Board meetings, Baldwin Public Library Board Meeting vendor list, invoice to Ms. Custer of the Baldwin Public Library from Robert Harrison & Associates, PLC., and Ms. Custer's letter to the Ethics Board of May 31, 2007.

Birmingham. Complainant alleges that Respondent should have properly recused himself from the vote which would have the Library pay the aforesaid \$650.00 invoice, directed to it.

Both the Complainant and Respondent are elected members of the Library Board of Directors. The Baldwin Public Library enacted, as of July 21, 2003, an internal Code of Ethics and Conflict of Interest under which all library officials (inclusive of elected members of the Board of Directors), employees and consultants are to act under.³

The Baldwin Public Library also has financial policies, which include for example Section IV.J. which provides that the Board is the ultimate spending authority for the Library, and that the Director will serve as the purchasing agent.⁴ Then, pursuant to the Purchasing Guidelines of the Baldwin Public Library, Section III.E., pertaining to the limitations with respect to purchases, the Director has authority to authorize in conformance with the approved budget and without further board approval, any order not exceeding \$6,000.⁵ While the Director is authorized to spend up to \$6,000 without board approval, individual board members are unable to incur any expenses on behalf of the Library.

The Library Director has been charged with ensuring that the overall operations of the Library are carried out efficiently, effectively and legally. The Library Director operates pursuant to policies and takes direction from the Board as a whole. The liaison between the director and the board was and is the Respondent President. When the Respondent's residency issue was first addressed, after some initial investigation the Director concluded that there was no need for a formal legal opinion at that time. However, the need for a formal legal opinion changed based on discussion at the January, 2007 Library Board meeting, as well as an article appearing on the front page of the Eccentric Newspaper on January 28, 2007, which questioned the legality of the Library Board and the Library's ability to expend funds to operate the Library. Because, the Director needed a definitive answer to the question of residency for the benefit of the board members, the Library vendors, and the members of the public, the director engaged the law firm to obtain a legal opinion. The Director correctly concluded that such expense was incurred as a legitimate expense of the Library in accordance with the Library's purchasing and financial policies. Moreover, the Director represented that in her position, on numerous occasions in the past, she has pursued legal opinions.⁶ The board members involved with past disputes (specifically regarding the matter for which the Director sought

³ Section 5.2 pertains to the responsibility for implementation and enforcement of this Code, and it provides in part that the Library Board will retain ultimate responsibility for the implementation and enforcement of said Code; and, Section 5.5 relates to the determination of conflict of interest, and provides in part that any question involving the application of this Code to a Library official or consultant will be resolved by the Library Board provided that a Library Board member who is the subject of the question will not participate in that decision, and the Library Board may engage counsel to assist in any determination under said Code.

⁴ This Section received final approval by the Board of Directors on February 20, 2006.

⁵ This Section received final approval by the Board of Directors on February 20, 2006.

⁶ See e.g. Baldwin Public Library April 17, 2006 meeting minutes.

legal opinion) have voted on and approved the issue of payment of legal fees for such opinion at the Library Board meetings.⁷

Contrary to the Complainant's allegation, Respondent did not request a legal opinion through the Library Director regarding his residency status. Respondent stated that the Library Director contacted legal counsel on her own behest, and that the voucher was properly presented and he had no vested interest in the outcome. Respondent acknowledged that he had a discussion with the Library Director about whether it was necessary to seek a legal opinion. In fact, Respondent issued a "President's Report" dated February 19, 2007, wherein he states in part that he asked the Library Director to check informally with the Library's legal counsel to see if there was an issue with his staying at his friend's house in Royal Oak until he either purchased a home in Birmingham or moved back to Wallace Street full time. He then stated that the Library Director related to him the next day that the Library's attorney had indicated to her that residency was a matter of intention and that a formal written opinion was not warranted at that point. The Respondent then reported that due to one board member exploiting the issue, including debate to the level of invalidating Board decisions, Respondent felt that the integrity of the Board was an issue, and he requested the Library Director to ask for formal written opinion from the Library attorney.

At the Board meeting during which this subject voucher was considered for approval, no one commented to the Library Director about her having requested the legal opinion.

There is no evidence that the taxpayers of Birmingham are paying, or did pay, for a personal legal opinion for the Respondent. The Respondent's request to the Director for a formal legal opinion was within his authority to make, and within the Library Director's authority and discretion to decide. She was acting in the best interests of the Library Board, as a whole, and not for the Respondent, individually. Therefore, at the time of the Library Board's vote relative to the law firm's voucher, the issue was no longer whether the law firm should be paid by the Library, but rather whether the amount sought was reasonable.⁸

⁷ See e.g. Baldwin Public Library Board September 18, 2006 meeting minutes, as well as those of October 17, 2005.

⁸ The Board of Ethics, having reviewed the voucher and opinion letter, finds that the amount sought by the law firm is reasonable, and therefore does not believe that the Library Board's approval of this expense in any way relates directly to the outcome of the legal decision. Moreover, it should be noted that in Respondent discussing with the Library Director a formal legal opinion that same was not necessarily for his personal benefit, as at that time his residency issue had not been brought before the Library Board pursuant to the Code of Ethics and Conflict of Interest, as it may have been (and pursuant to Section 5.5 thereof the Respondent would not participate in that decision), and the result may very well have been adverse to him. The Complainant herself testified that she did not dispute the amount of the invoice.

B. CONCLUSIONS OF LAW AND DISCUSSION

1. Jurisdiction.

As a threshold matter, the Board notes that pursuant to the Ethics Ordinance, Section 2-322, the Respondent, and all members of the Library Board of Directors, are respectively a "City Official."⁹ The Ethics Ordinance defines "City Official" to include "a person elected, appointed or otherwise serving in any capacity with the City in any position established by the City Charter or by City Ordinance which involves the exercise of a public power, trust or duty." The City Charter served to enact a separate elected Library Board (even though the Library Board is not fully within the purview of the City).¹⁰ Thus, Mr. VanderMeer is a City Official for purposes of the Ethics Ordinance and is subject to and bound by its provisions. Accordingly, the Board of Ethics has jurisdiction to determine the matter.

2. Analysis of Whether Mr. VanderMeer's Failure to Recuse Himself From the Subject Vote Violates the Ethics Ordinance.

Complainant herself admitted that neither she nor anyone else raised the issue of Respondent's recusal at the Library Board meeting of April 23, 2007. The vote to approve the payment of the subject legal fee also took place at this meeting. Again, should she have perceived a conflict between Respondent's Library responsibilities and his private interests, then she could have invoked the Library Board's Code of Ethics, Conflict of Interest, or the city's Ethics Ordinance. §3-324(b)(2)b. See also Chapter 4 of the Board of Ethics Procedural Rules. After all, the stated purpose of the ordinance is to maintain the public's confidence in the integrity and impartiality of Library Officials. Having not raised this issue, she waived any such objection; however waiver does not obviate the responsibility of a City Official to himself or herself otherwise act in accordance with the public trust. The complaint alleges that Mr. VanderMeer owes a fiduciary duty to the City, which he breached as he did not recuse himself; however, the Board does not so conclude. Through materials filed with the Ethics Board, and the subsequent hearing which took place on June 13, 2007, the Ethics Board concludes that Mr. VanderMeer's activity in participating in the subject vote does not constitute a violation of the Ethics Ordinance, for several reasons presented below.

A. Section 2-324(b)(1).

The Complainant cites and relies upon this section (second paragraph) which provides in part that no official of the city shall participate in voting or otherwise acting upon any matter which he has a direct or indirect personal interest, but rather the official shall recuse himself from the matter. The Ethics Ordinance proscribes actions that are incompatible with the public interest. § 2-320. It requires city officials or employees to

⁹ The Ethics section of the City Code (Article IX) became effective July 21, 2003.

¹⁰ See Chapter XVI of the City Code of Ordinances, as well as Chapter 46 thereof pertaining to Library Board elections.

avoid conflicts between their private interests and the public interests. *Id.* City officials or employees hold their positions in public trust, and are required to honor these positions with integrity and proper conduct. *Id.*

The Board holds that Mr. VanderMeer did not violate § 2-324(b)(1) of the Ethics Ordinance. He did not have a direct or indirect personal or financial interest in the outcome of the Library Board vote relative to the payment of the law firm's invoice.¹¹ Under no circumstance would same be considered his personal expense. There is no irreconcilable conflict between his public interest and private interest.

B. Section 2-324(b)(2)a

Section 2-324(b)(2)a of the Ethics Ordinance refers to a city official who has a conflict of interest under said Ordinance, and requires disclosure, and mandates refraining from participating in any discussion, vote or action thereon.

The Board holds that Mr. VanderMeer did not violate Section 2-324(b)(2)a of the Ethics Ordinance. He did not have a conflict of interest as defined under the Ordinance, and therefore was not precluded from voting.

In addition, there was disclosure as the matter was discussed publicly at the meeting of the Library Board.

C. Section 2-324(b)(2)a.4

Section 2-324(b)(2)a.4 of the Ethics Ordinance also pertains to disclosure of conflict of interest and disqualification. This particular subsection pertains to an exception. The subsection provides in part that any city official shall address such a disclosure to the supervisor or head of his department, and any elected city official shall address such disclosure to the general public.

The Board holds that Mr. VanderMeer did not violate Section 2-324(b)(2)a.4 of the Ethics Ordinance. Respondent did not have a conflict of interest to disclose. Nevertheless, the Respondent did issue his President's Report dated February 19, 2007, which is found to have otherwise been adequate disclosure to the general public under this Section.

D. Section 2-324(b)(2)b

Section 2-324(b)(2)b of the Ethics Ordinance requires when a member of a city board or commission refuses to refrain from voting on a matter about which that person has disclosed a conflict of interest, the board or commission shall immediately refer to the board of ethics for a final determination the question of whether that person must refrain.

¹¹ See City of Birmingham, Ethics Board Advisory Opinion No. 2003-03, dated November 4, 2003, for a discussion of conflict of interest, disclosure, and voting.

The Board finds that Respondent did not have a conflict of interest under the Ethics Ordinance, and therefore he had nothing to disclose or otherwise have determined for him. Accordingly, it was within his discretion and authority to participate in the subject vote pursuant to this subsection of the Ordinance. Also, pursuant to this subsection, if the Library Board felt at the time of this vote that there was a conflict of interest, the Board had an obligation to refer the matter to the Board of Ethics. This was not done.

E. Section 2-323 and 2-324(a)

Section 2-323 addresses the intention of the Ordinance, specifically Section 2-324. Therein, city officials are to avoid any action which might result and/or create the appearance of: using public employment or office for private gain; giving or accepting preferential treatment, including the use of City property or information, to or from any organization or a person; and making a City decision outside official channels.

Section 2-324(a) pertains to conflict of interest. As with Section 2-323, Section 2-324(a) may also relate to Complainant's allegations (especially Subsections (3), (8) and (9)). The Board, however, concludes that Mr. VanderMeer did not violate these or any other section of the Ethics Ordinance relative thereto.

Section 2-324(a)(9) is particularly relevant to the subject matter hereof, and it provides as follows:

"It is recognized that various boards and committees are part of the plan of government for the city. As such, it is further recognized that by virtue of the various requirements for membership of the board, a member may be placed in the position of participating in a decision that may directly or indirectly affect his or her financial or personal interests. Therefore, those members of the various boards and committees in the city, as they may be established from time to time, may participate in such decisions provided that they act:

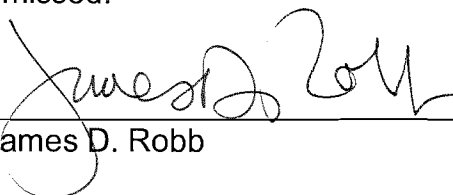
- a. In furtherance of the public good;
- b. In compliance with the duties of their respective boards; and,
- c. In a manner consistent with subsection (8) of this section."¹²

¹² Subsection 8 provides that "no official or employee of the city shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any special consideration, privilege, exemption, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen."

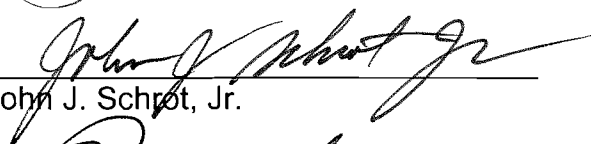
III. CONCLUSION

Complainant had the burden of proving, by a preponderance of the evidence, that the alleged unethical conduct had occurred, or is occurring. Rule 314. The Board considered all of the documents submitted, the testimony of the parties, and the testimony of any witnesses presented by the parties. In light of the evidence presented, the Board finds no violation of the Ethics Ordinance. Accordingly, Complaint No. 2007-04 is dismissed.


Dated: August 28, 2007


James D. Robb

Dated: 8-28-07


John J. Schrot, Jr.

Dated: 8-28-07


Sophie Fierro-Share