

**CITY OF BIRMINGHAM
BOARD OF ETHICS
COMPLAINT 2007-05**

DECISION

January 31, 2008

I. ISSUE PRESENTED.

Issue: Is it a violation of the City of Birmingham's Code of Ethics for a city official such as a volunteer member of a city committee to advocate against two candidates for election to the city commission on the following facts:

(1) the advocacy was made through a political action committee duly formed by the city official, to which he contributed time and money;

(2) the advocacy is in the form of postcards mailed by the political action committee to city residents containing material that is critical of decisions, views and opinions of the two candidates in their roles as public officials and urges voters to elect other candidates;

(3) the two candidates being criticized are themselves current elected or volunteer members of a city board or committee;

(4) the postcards were printed and mailed with funds raised from citizens within and outside of Birmingham but not with public funds;

(5) the postcards do not identify the individual city official who formed the political action committee, nor did the official associate the postcards with the position he holds with the city; and

(6) the content of the postcards, although viewed by certain members of the public as negative campaign material, was based on issues, was not personal, scandalous or *ad hominem* attack, and was substantially truthful or based on opinion?

Answer: It is not. A volunteer member of a city board may, consistent with the Birmingham Code of Ethics, advocate for or against a candidate for the city commission by forming a duly registered political action committee, raising funds from private sources, and printing and mailing in the name of that political action committee postcards that are critical of the candidate's record as a public official, even if some city residents object to the tone of the advocacy. To the extent that the code of ethics could be interpreted to prohibit such activity, that prohibition is barred by First Amendment principles.

II. OPINION.

This matter came to the Board of Ethics on a complaint filed by Ms. Dorothy Conrad, a resident of the City of Birmingham, as Complainant, against Mr. Christopher Longe, also a city resident, as Respondent. The complaint alleges that Mr. Longe violated various portions of sections 2-320 to 2-324 of the city's code of ethics.

The Board of Ethics is an advisory body created by the Birmingham City Commission to interpret the code of ethics set forth in a city ordinance. Birmingham Code of Ordinances, § 2-325(a)(1). The Board is required to determine whether Mr. Longe's conduct as alleged in the complaint or demonstrated at the hearing violated the code of ethics. 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 its decision in the form of this written opinion. *Id.*

The Birmingham City Clerk gave appropriate notice to the parties and scheduled a hearing on the complaint for the Board's regular December 13, 2007 meeting. Both parties appeared in person, and Mr. Longe filed his answer to the complaint at that time.

At the beginning of the hearing, Board member Ms. Sophie Fierro-Share sought to recuse herself from consideration of the matter. She made the following statement:

I am recusing myself from participation in Complaint 2007-05 which is to be heard at the scheduled December 13, 2007 meeting. This complaint concerns conduct alleged to have occurred during the course of the recent City Election. I have discussed some of the electoral issues with one of the parties to this complaint. While this is neither a "financial interest" nor a "personal" interest within the definition of the Ethics Ordinance, I believe it may create the appearance that my independence may be impaired. I value the reputation that this Board has justly earned for scrupulous and total independence too much to risk calling that reputation into question by participating in a matter where my impartiality might be questioned.

After discussion, the Board voted to accept Ms. Fierro-Share's recusal. She then left the room and did not participate further in the matter.¹

Ms. Conrad and Mr. Longe made opening statements, offered evidence, and presented closing statements. Documents received into the record included Ms. Conrad's complaint and its several exhibits; a letter dated December 3, 2007 from Ms. Alice

¹ The Board acted on Ms. Fierro-Share's initiative, and it did not determine that she was disqualified from participating in the decision. Because Ms. Fierro-Share's recusal did not deprive the Board of a quorum, the Board also did not address the question of whether a member of the Board may recuse herself or himself when to do so would deprive the Board of its quorum.

Thimm, a city resident; Mr. Longe's written answer; and a compendium of documents that he produced. Ms. Conrad and Ms. Margaret Betts appeared as witnesses in favor of the complaint. Mr. Longe, Mr. Clinton Baller, and Ms. Shelli Weisberg appeared as witnesses in opposition to it. All witnesses are city residents.

After receiving and considering the evidence and argument of the parties, the Board deliberated and voted that Mr. Longe did not violate the ordinance. As a result of that vote, the Board issues this opinion as its final decision in this case. To facilitate understanding the decision, the Board issues this opinion in the form of findings of fact, conclusions of law, and discussion.

Ordinarily, our finding that Mr. Longe did not violate the ordinance would end the matter. Mr. Longe, however, raised a defense based upon constitutional law in addition to his defenses based upon application of the code of ethics itself. In court decisions, findings of fact or conclusions of law that are unnecessary to the ultimate disposition of the case are called by their Latin term *dicta*. By law, they are not binding precedent. Courts nevertheless sometimes express *dicta* in written opinions for their instructive value to future cases or for the benefit of the public. One of the express purposes of Birmingham's code of ethics is to "provide public officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants." Birmingham Code of Ordinances, § 2-320. Moreover, "[t]he code of ethics is intended to be preventative and not punitive." *Id.* § 2-323. Because Mr. Longe's constitutional defense is substantial, we think that to address it, even in *dicta*, would be instructive and helpful to Birmingham's citizens.²

A. FINDINGS OF FACT.

The operative facts are not in dispute. The November 6, 2007 Birmingham City Commission election was contested by six candidates for four seats. Among those candidates were Mr. Seth Chafetz, formerly a member of the city commission and presently a member of the city's library board, and Mr. George Dilgard, a member of the city's planning board.

The Respondent, Mr. Longe, is a member of the city's architectural review committee. On March 22, 2007, Mr. Longe duly formed with the State of Michigan an independent political action committee called "Residents for Birmingham." The term "independent" as used here means that the committee is not affiliated with a political party. The purpose of the committee is to advocate for or against candidates for political

² Though the Board of Ethics is an adjudicative body, it is not, of course, a court of law. Nevertheless, section 2-323 of the code of ethics provides that the ordinance "should not be construed to interfere with or abrogate in any way the provisions of any federal or state statutes, the City Charter, the city ordinances, or any rights and/or remedies guaranteed under a collective bargaining agreement." Accordingly, the Board is sometimes called upon to take into account controlling legal principles.

office. Mr. Longe is its treasurer. A number of citizens became associated with Residents for Birmingham. Residents for Birmingham raised private funds and at various times during the fall of 2007 manufactured and mailed to Birmingham residents three post cards opposing the candidacies of Messrs Chafetz and Dilgard. The address sides of the postcards were identical and contained the following language:

Birmingham Deserves Commissioners Who:

- Respect your property rights
- Are committed to lower taxes
- Will develop our downtown properly
- Will act in the public good instead of a narrow political agenda

The reverse sides of the postcards featured portrait-type photographs of Messrs Chafetz and Dilgard at the top, bordering various text. One card said:

Protect Your Property Rights
Don't Let Chafetz and Dilgard
Regulate Your Home

Another card said:

The Taxes Team
Chafetz and Dilgard's Agenda
Will Lead to Higher Taxes

A third card said:

The Politics of the
Personal Agenda
Chafetz and Dilgard's Divisive Tactics

The cards went on to recite various facts and opinions about Messrs Chafetz and Dilgard and urged Birmingham voters to vote for everyone on the city commission ballot except Chafetz and Dilgard.

The postcards clearly identified the sender as Residents for Birmingham at the address registered to that organization. Mr. Longe's name was not on the postcards. Nor did the postcards indicate that Mr. Longe is a member of the city's architectural review committee. Private funds, not city funds, were used to support the activities of Residents for Birmingham, including the manufacture and mailing of the postcards. Mr. Longe did not use his position as a member of the architectural review committee to garner support for Residents for Birmingham.

There was some dispute at the hearing as to whether the assertions in the postcards were true. Ms. Conrad stated her belief that many of the facts on the postcards

were untrue or misleading. She opined that the postcards cast doubt on the integrity of the people serving on city boards and put fear in the minds of the people receiving them. Ms. Conrad stated that the postcards had an effect on the election. One such effect is that they tended to induce citizens to think about the qualifications of not only Messrs Chafetz and Dilgard but the other four candidates as well. Ms. Betts testified that she was “offended” by the postcards. Ms. Thimm, by letter to the Board of Ethics, stated that she was “appalled” with Mr. Longe’s methods of campaigning for the election, which she termed “disrespectful.”

Mr. Longe, on the other hand, offered testimonial and documentary evidence to suggest that the factual statements in the postcards were true. Mr. Clinton Baller, a regular reporter of city government and politics, supported the postcards and testified that he found no inaccuracies in them. Ms. Weisberg went even further in supporting the postcards, and expressed shock and dismay about the complaint and that the Board had not summarily dismissed Ms. Conrad’s complaint without a hearing.

The Board of Ethics finds that the statements in the postcards either were substantially true or were statements of opinion. The board further finds that the statements were based upon issues and were focused upon the views of Messrs Chafetz and Dilgard by referring to formal actions or positions they had taken while in public office in the past. Nothing in the postcards touched on their personal lives. There was nothing *ad hominem* or scandalous about the postcards. Neither did the postcards cast doubt about the integrity of city government or of Messrs Chafetz and Dilgard in the performance of their current or former city-related duties. The postcards were limited to policy issues. Nothing in them was materially untrue.

In drafting and reviewing this opinion, it has occurred to the Board that Mr. Longe might not be a proper Respondent because the postcards were prepared and sent by a political action committee, Residents for Birmingham, and not by Mr. Longe personally. In that sense, Mr. Longe contributed time, money and effort to Residents for Birmingham, but he did not send the postcards. Mr. Longe did not defend on this basis, and we need not address it to decide in his favor. In any event, we do note that Ms. Conrad raised the following question at the end of her Complaint: “Should a member of a city board be raising money to support selected candidates for city commission?” On page 9 of this opinion, we restate the question from “should” to “may” and answer it in the affirmative.

B. CONCLUSIONS OF LAW AND DISCUSSION.

1. Jurisdiction.

The first question is jurisdictional: whether the code of ethics applies to Mr. Longe. The code of ethics defines "city official or employee" to include "persons who serve on advisory boards and commissions." Birmingham Code of Ordinances, § 2-322. Mr. Longe serves on the city’s architectural review committee. He is a city official for

purposes of the code of ethics 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. Longe's Actions Violated the Code of Ethics.

The complaint alleges that Mr. Longe violated sections 2-320, 2-321, 2-323, and 2-324 of the city's code of ethics. The Board of Ethics finds that Mr. Longe's conduct as alleged in the complaint and as demonstrated at the hearing has not violated the ordinance in any way.

a. No Violation of Section 2-320.

The code of ethics declares that public office is a public trust. Birmingham Code of Ordinances, § 2-320. The code of ethics proscribes actions that are incompatible with the public interest. *Id.* It requires city officials or employees to avoid conflicts between their private interests and the public interest. *Id.* City officials or employees hold their positions in public trust, which they are required to honor by integrity and conduct. *Id.* This section of the ordinance specifically requires city officials and employees to be independent, impartial, and responsible to the people; to make governmental decisions and policy in proper governmental channels; and not to use public office for personal gain. *Id.*

Ms. Conrad alleges that the postcards cast doubt on the trust, integrity, and conduct of Messrs Chafetz and Dilgard. These allegations do not fall within the ambit of section 2-320. There is nothing to suggest that Mr. Longe was using his official office for personal gain or that he was not independent, impartial, or responsible in his official acts. In fact, it is evident that Mr. Longe was acting through a duly established political action committee. The Board of Ethics holds that Mr. Longe did not violate section 2-320.

b. No Violation of Section 2-321.

Section 2-321 of the code of ethics requires city officials or employees to avoid conduct that may tend to undermine respect for city officials and employees and for the city as an institution. Section 2-321 also requires city officials and employees to be honest, fair, and respectful of all persons and property with whom they have contact.

Ms. Conrad alleges that the postcards undermined respect for city officials. The Board of Ethics holds otherwise.

First, the Board notes that nothing that Mr. Longe did with respect to Citizens for Birmingham was done in his official city capacity. To the extent that section 2-321 governs only the conduct of city officials acting in their official capacity, that provision is inapplicable.

However, to the extent that the code of ethics applies to Mr. Longe's activities as a private citizen, the Board of Ethics finds no violation of the ordinance. The postcards were negative political advertisements to be sure. They urged voters not to elect Messrs Chafetz and Dilgard but instead to vote for the other candidates. Ms. Conrad and Ms. Thimm termed the postcards "disrespectful." But the postcards contained issue-based content. In opposing the Chafetz and Dilgard candidacies, the postcards referenced decisions Chafetz and Dilgard had made in their official governmental roles and argued that positions they had taken on important political issues made them unacceptable candidates for city commission. There were no personal attacks. There were no statements that called into question the integrity or the good faith of the decisions they previously had made in their official capacities with the city. Although the postcards disagreed with decisions or actions Messrs Chafetz and Dilgard had taken, they contained no statements that tended to undermine respect for them within the meaning of the ordinance.

Furthermore, Ms. Conrad deemed the postcards to be "dishonest" because they were not attributed to Mr. Longe personally, but rather to the political action committee called Residents for Birmingham. She is incorrect. Residents for Birmingham is a duly formed organization, established for the purpose of political advocacy. Citizens other than Mr. Longe participated in that organization. It acted as a separate entity, as it was entitled to do. In identifying Residents for Birmingham as the sender, the postcards were fully accurate. The Board of Ethics holds that Mr. Longe did not violate section 2-321.

c. No Violation of Section 2-323.

Section 2-323(5) requires city officials or employees to avoid any action that might result in or create the appearance of affecting adversely the confidence of the public or the integrity of city government.

Ms. Conrad alleges that the postcards adversely affected the confidence of the public and the integrity of city government. Again, the Board of Ethics holds otherwise, as there is no evidence whatsoever to support the assertion. Ms. Conrad testified that the "tone" of the postcards was "bad" and evidenced a type of campaigning of which the citizens of Birmingham "could not be proud." Ms. Betts testified that she was "offended" by the postcards. Ms. Thimm wrote that she was "appalled" with Mr. Longe's campaign method. But none of those complaints go to the confidence of the public or the integrity of city government. If anything, as Ms. Conrad herself testified, the postcards tended to generate public consideration and debate about the qualifications not only of Messrs Chafetz and Dilgard, who were the subjects of the postcards, but also of the other candidates, some of whom presumably were to benefit from the postcards but might have faced a backlash as a result.³ That being the case, the postcards promoted the electoral process by focusing public attention on the candidates' qualifications to hold public office and by sharpening the public's consideration of the campaign's issues. The Board of Ethics thus holds that Mr. Longe did not violate section 2-323.

³ Despite the postcards, Mr. Dilgard was elected. Mr. Chafetz, however, was defeated.

There is an open question about whether the code of ethics applies at all to this particular case. The last sentence of section 2-323 provides: “[t]his declaration of policy is not intended to apply to contributions to political campaigns, which are governed by state law.” *Id.* § 2-323. It could be argued that Mr. Longe’s activities constituted a contribution to a political campaign, certainly at least to a political action committee. Mr. Longe did not raise this defense, however, and the Board did not consider it fully at the hearing. Nor did Ms. Conrad allege that Mr. Longe violated state law. Accordingly, and because we have found no violation of the ordinance anyway, we choose not to address this question.

d. No Violation of Section 2-324.

Section 2-324(a)(3) requires every city official or employee to use city property in accordance with law and not for personal gain or benefit. Section 2-324(a)(4) forbids a city official or employee to solicit any gift of money for the benefit of any other person or organization, other than the city, which tends to influence the manner in which the official or employee or any other official or employee performs his or her official duties.

Ms. Conrad alleges a breach of these provisions. She offered no evidence to support her allegations. The Board of Ethics thus holds that Mr. Longe did not violate section 2-324.

Ms. Conrad added a question to the portion of her complaint involving section 2-324, which is the conflict of interest portion of the ordinance. She asked: “Should a member of a city board be raising money to support selected candidates for city commission?” At the hearing, however, Ms. Conrad provided no evidence or argument as to how Mr. Longe’s activities created a conflict of interest or violated that section of the ordinance. To the extent Mrs. Conrad intended to argue that Mr. Longe violated section 2-324, her complaint fails for lack of proof.

Moreover, it is not within the province of the Board of Ethics to determine whether a city official or employee “should” do or not do anything. We are charged with determining whether the Mr. Longe’s conduct violated the code of ethics. More correctly, we might reformulate Ms. Conrad’s question from “*should*” to “*may* [consistent with the code of ethics] a member of a city board be raising money to support selected candidates for city commission?” In answering that question, we would point out that the Board of Ethics answered affirmatively a very similar question in 2004. In the decision involving the complaint against Mr. Ralph Seger, Jr., we held that “[a] volunteer member of a city board may advocate on behalf of a person who has brought a lawsuit against the city and certain of its officials and may solicit the donation of funds for the purpose of defraying the expense of that lawsuit.” Decision on Complaint 2004-02, at 1 (June 8, 2004). In supporting that decision, we cited to First Amendment case precedent addressing prohibitions on political campaign activity. Ms. Conrad knows of our decision in the Segar case. She was the Complainant.

3. Constitutional Analysis of the Code of Ethics as Applied to Mr. Longe's Activities.

As mentioned on page 3 of this opinion, our holdings that Mr. Longe has not violated the code of ethics ordinarily would end the matter. It is often sound practice to decide legal matters on the narrowest grounds possible. In this instance, however, Mr. Longe raised a substantial constitutional defense that merits public discussion.

As noted, this is not the first time the Board of Ethics has been called upon to determine whether political activities of city officials violate provisions of the code of ethics. The first matter indeed involved the previously mentioned complaint brought by Ms. Conrad against Mr. Ralph Seger, Jr. That complaint arose out of Mr. Seger's activities to support another public official who had commenced litigation against the city. Decision on Complaint 2004-02, at 1, 7-8 (June 8, 2004). One of our holdings in that case was that Mr. Seger's political speech activities were protected by First Amendment principles. In our opinion, we noted:

the freedom of speech embodied in the First Amendments to the U.S. Constitution and the Michigan Constitution enjoys important stature in American society. It is "the indispensable condition of nearly every form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937) (Cardozo, J.).

Id. at 7. We also held in *Seger* that, even to the extent that governmental employees may sometimes be validly prohibited from participating in political campaigns, Birmingham's code of ethics is not sufficiently clear and narrow so as to withstand constitutional scrutiny, even if that were the intent of the city. *Id.* at 8. Furthermore, it does not appear to us that the city intends the code of ethics to prohibit political activity.

A recent decision of the Michigan Supreme Court further guides our review of Mr. Longe's constitutional defense:

[T]he political parties are given access to certain information gathered at public expense in order to support or oppose candidates and ballot proposals. The debate engendered as the result of that access is integral to the operation of our democracy, our electoral process, and our political campaigns and thus serves a public purpose by "enlighten[ing] the public and encourag[ing] an informed decision making process." *Advisory Opinion [on Constitutionality of 1975 PA 227, Questions 2-10]*, 396 Mich 465, 494; 242 N.W.2d 3(1976)] "Discussion of public issues and debate in the qualification of candidates are integral to the operation of the system of government established by our constitution." *Buckley v Valeo*, 424 US 1, 14; 96 S. Ct. 612; 46 L. Ed. 2d 659 (1976).

Grebner v State of Michigan, ___ Mich ___; ___ N.W.2d ___; No. 135274 (Nov. 21, 2007); 2007 Mich. LEXIS 2894.

Mr. Longe's actions in forming a political action committee and through it taking a position against the candidacies of Messrs Chafetz and Dilgard for city commission amounts to nearly pure political speech. The Board of Ethics thus finds that, under the facts presented to it, Mr. Longe had every right to take the actions he did and that those actions are protected under the First Amendments to the U.S. and Michigan Constitutions.

Ms. Conrad argued that the postcards set a "tone" that was "bad." She urged that a campaign should be "for" someone, not "against" someone. She complained that "this type of campaigning was not what the city could be proud of." Ms. Betts testified that she was "offended" by the mailings. Ms. Thimm wrote that such behavior by Mr. Longe "does not speak well for Birmingham" and that she was "appalled with [his] methods of campaigning." All three of these residents are entitled to their opinions. But the Board of Ethics is not the forum to advance those opinions.

The danger of adopting their opinions as the standard for deciding a question under the code of ethics is self evident. It is not hard to imagine that their opinions are thought by other citizens to be equally "bad," "offensive," or "appalling." As noted above, Mr. Baller and Ms. Weisberg both testified in favor of the postcards, and Ms. Weisberg expressed shock about Ms. Conrad's complaint, calling it frivolous. All of this bespeaks the rhetorical-sounding question, "Who is to say whether one side is 'right' and the other is 'wrong'?"

The answer to that question, fortunately, is patently clear: *the electorate*. Absent highly unusual circumstances not present here, the Board of Ethics will not prescribe the tone, style, or content of a political campaign. To do so would be repugnant to the Constitution. Ms. Conrad's remedy in this case does not rest with the Board. Rather, her remedy is found in the ballot box. She is free to vote for or against candidates based on the tone of their campaigns, their positions on issues, or any other reason.


III. CONCLUSION.

Mr. Longe complied with the code of ethics. The complaint is dismissed.

Mr. Longe suggested that the complaint may have been politically or personally motivated or raised out of animus or in bad faith. The Board of Ethics finds that there is insufficient evidence to draw this conclusion in this case.



James D. Robb



John J. Schrot, Jr.

Sophie Fierro-Share took no part in the consideration or decision of this matter.