

**CITY OF BIRMINGHAM
BOARD OF ETHICS
COMPLAINT 2020-01
November 20, 2020**

I. Introduction

Donna Klein, a resident of Birmingham, filed a Complaint against Clinton Baller a City Commissioner, alleging he violated the Ethics Ordinance.

This Complaint presents difficult and serious issues. Difficult because the Complaint involves social media usage, the particular rules governing one social media site, free expression, the communal desire for good—sometimes called “ethical”—government and the text of the Birmingham Ethics Ordinance. Serious because the incident which forms the basis of the Complaint has inflamed the passions of the parties to this Complaint and caused emotional distress for both and it may not be the last time a City official’s activities on social media cause controversy.

The Board of Ethics held two meetings on this matter, each lasted approximately 4 hours. At the first, we considered several motions of the parties and listened to testimony and argument from the parties. At the second we discussed the testimony and documents and debated how to rule on the Complaint. This matter is unusual both because of the length of time we have devoted to it and because it is the first time we have had three different opinions on whether there has been a violation of the Ethics Ordinance.

II. Statement of Facts

The Complainant is active in the local administration of NextDoor, a social media site. Clinton Baller, a City Commissioner since November 2019, has been active on NextDoor since before his election. Mr. Baller also maintains a Facebook page. Earlier this year a NextDoor user made a commercial post that attracted considerable attention within the NextDoor community, not all of it positive. As a result of negative comments, the poster took his post down. Mr. Baller thought this was unfortunate and said so in a post on NextDoor. This resulted in his permanent removal from NextDoor.

Mr. Baller wanted to explain his sudden absence from a forum he had been active on. He explained his side of the story on his personal Facebook page and in an email newsletter that he periodically circulates with his personal views about various items of local and national significance. Both the Facebook page and the newsletter expressed the view that his banishment was unjustified and stated that the Complainant had outsize influence in his banishment, serving as a “lead” with both policing and judging powers. This prompted a few others to post comments on Mr. Baller’s Facebook page, some extremely uncomplimentary about the Complainant, as well as Mr. Baller. Mr. Baller’s posts contained screen shots of a conversation among certain Nextdoor leads that is supposed to be confidential. The testimony

does not establish how Mr. Baller obtained the screen shots and whether they were in fact still confidential when he posted them.

Complainant did not establish that any communications were private or confidential once NextDoor released same. Ms. Klein never established that the disclosure of screen shots and/or other information to Mr. Baller was unauthorized. There was no evidence Mr. Baller received any communications because he was a City official. NextDoor is a privately-owned business based in California, operating in our community. Community individuals, including Ms. Klein, volunteered to accept certain responsibilities on behalf of and at the service of this private enterprise. NextDoor has its own internal arrangements with its agents regarding the release of information. Unlike Ms. Klein, Mr. Baller was not an agent or in service to NextDoor. Mr. Baller was not in a position to be bound by NextDoor's rules and/or policies, as to confidentiality or otherwise. Commentary from NextDoor members appears to, in other matters, include negative comments and/or argument as routine. Ms. Klein never testified as to any concerns she had with NextDoor regarding this matter, as she had a right to do if she had a concern with respect to the dissemination of allegedly "confidential" information.

The Complainant learned of Mr. Baller's references to her and was extremely distressed as she believed Mr. Baller's explanation of her role in his banishment was inaccurate in several important respects, singled her out for public shaming for something she did not do, and the resulting commentary caused her private conduct to become a public issue in a way that was most hurtful. During the hearing, Mr. Baller acknowledged at least one of his statements was untrue, though he believed it to be true at the time he made it. He further stated that his purpose was to educate followers and express concern about NextDoor. Mr. Baller's communications listed his name and the fact that he is a Birmingham City Commissioner, along therewith his personal residential address.

Ms. Klein filed this Complaint against Mr. Baller alleging violations of the Birmingham Ethics Ordinance. She believes his conduct was dishonest, disrespectful and has destroyed public confidence in the integrity of City officials.

III. Question Presented

Do the social media comments of a City Commissioner about events on his personal social media site and personal newsletter involving himself, but not pertinent to City business, and that (i) contain at least one factual inaccuracy, (ii) name a private Birmingham citizen and (iii) result in embarrassment to that citizen, violate the Birmingham Ethics Ordinance?

IV. Answer and Analysis

People often confuse ethics and law. When people think about “ethics”, they often think of standards of morals or virtue. People understand law to regulate conduct rather than morality. Ethics set out minimum standards for public or professional behavior. Unlike religious systems of belief, ethics for governmental officials don’t judge morality. When we call a law an Ethics Ordinance, it can create confusion. Are we regulating specific conduct or morality? This is not the first time a complainant has come to the Ethics Board seeking a judgment that a public official has behaved unfairly, dishonestly or disrespectfully.

Elements of virtue and law are both present in the Ethics Ordinance. This can cause difficulties in applying the Ordinance. We all hope for a virtuous government run by virtuous public officials. We think this is a worthwhile civic statement. The Ethics Ordinance was not intended to, nor can it, effectively regulate whether a public official’s conduct is in all respects virtuous. Sections 2-320, 2-321, 2-323 and 2-324 challenge public officials to behave with fairness, honesty and respect—a sort of shorthand for virtue. But we as a community haven’t agreed on what exactly virtue consists of. Our numerous religious traditions and secular institutions show this, as does the disagreement of the parties in this case. There is no agency that we all would willingly agree to judge whether we are virtuous or not. Certainly, judging virtue is beyond this Board’s capability.

The Birmingham Ethics Ordinance in its simplest terms aims to assure the citizens of Birmingham that they can have confidence in their government by prohibiting the use of public office for private gain; requiring public officials to disclose conflicts of interest and avoid taking official action where a conflict of interest exists; making decisions only through official channels; and by not making the public believe their personal opinion is City policy unless the City has formally adopted a policy approving that opinion. The Ethics Ordinance resides within the framework of existing state, local and federal law. It is not an overriding mandate that supersedes all other rights.

The Ethics Ordinance generally does not regulate the actions of City officials in purely private disputes. Therefore it is not necessary to analyze Mr. Baller’s conduct under the broad, aspirational standards of Sections 2- 320, 2-321 or 2-323 or to determine what NextDoor’s policies are or whether Mr. Baller’s statements about his banishment from NextDoor are accurate or inaccurate. Nonetheless, this Board will examine the particular sections of the Ethics Ordinance that could be triggered by this Complaint.

The Board of Ethics has identified six specific sections of the Ethics Ordinance that might apply to the allegations of this Complaint. All or a majority of the Board have concluded that Mr. Baller’s conduct does not violate the Ethics Ordinance, thus the Board’s formal judgment is that the Complaint must be dismissed in its entirety, though at least one of us would find a violation of four of the six Ordinance sections. This Opinion sets out the majority opinion, though it also identifies the one instance where Ms. Fierro-Share diverges from the majority.

Section 2-320

Section 2-320 is the very first section of the Ethics Ordinance. It announces that public

office is a public trust and states that each public official “must earn and honor the public trust by integrity and conduct.” It notes that the Ethics Ordinance “proscribes actions incompatible with the public interest...” These are lofty sentiments, not easily translated into neat behavioral categories that everybody would agree on. What exactly is the “public trust”? How do we measure it? What level of agreement within the community establishes whether and when any particular elected official has it or loses it? The evidence established that Mr. Baller’s communications were not so clearly outside the bounds of private behavior as to be clearly incompatible with the public interest and/or public trust.

Notably, Section 2-320 obligates the City to “provide its officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants.” As to social media, no evidence was presented that any specific guidelines exist or, if they do, that Mr. Baller violated them. Given the increasing importance of social media, the City Commission may wish to adopt guidelines for public officials’ use of social media.

The Board finds that Mr. Baller’s conduct does not violate Section 2-320.

Section 2-321

When originally adopted in 2003, Section 2-321, entitled “Responsibilities of Public Office”, contained language that the official and private conduct of City officials “should be above reproach.” In 2016, on the recommendation of this Board, the City Commission amended Section 2-321 to remove the reference to “morality”. It was this Board’s belief that the requirement that moral conduct be “above reproach” was too vague to apply and inappropriate for an ordinance regulating an official’s conduct. “Ethical Conduct” of a City official is the measure.

The last paragraph of Section 2-321 states that “All city officials and employees shall safeguard public confidence by being honest, fair and respectful of all persons and property with whom they have contact, *“by maintaining non-partisanship in all official acts, and by avoiding official conduct which may tend to undermine respect for city officials and employees and for the city as an institution.”*

The Complainant says that while some of the Ethics Ordinance’s broad language is limited to official action, the quoted language is not and Mr. Baller’s statements were neither accurate (because some were untrue) or fair (because they misleadingly suggested that it was her fault that Mr. Baller was banished from NextDoor), nor respectful (because he gratuitously named her for the purpose of shaming or bullying her). We cannot agree that this sentence of the Ordinance applies to the subject private conduct for two reasons. The first is that the quoted language is a single sentence that has a primary and a dependent clause. The primary clause taken alone may not be limited to official action, but the dependent clause (italicized to identify it) is strictly limited to official actions. The Ordinance states that public officials have to be honest, fair and respectful by maintaining non-partisanship in official acts and by avoiding certain official conduct. The conduct we have heard and read about is entirely private. The Ethics Ordinance does not generally seek to regulate city officials in their private dealings.

There is wisdom in this. The Ethics Board is ill-equipped to be a forum to settle private disputes by declaring one of the contestants ethical or unethical. Beyond that, even if the words of the primary clause are not limited to official action, the conduct complained of here--which the Board does not necessarily condone--does not violate that standard. Honesty does not and cannot mean accuracy in all things. By becoming a public official a person does not become subject to being judged unethical if they make a factual mistake. Similarly, respect does not mean that a public official can't disagree with a constituent, even vehemently, or that the public official's opinions can't offend. Respect means the public official must listen, endeavor to understand the point of view of the other person and respond. But the official can disagree and should do so if that is their honest belief. Public officials can't treat citizens as if they don't exist or that their views don't matter or ridicule them for personal characteristics unrelated to the substance of the dispute. Mr. Baller's comments were not disrespectful. There was no evidence he was responsible for the speech of others.

The Board finds that Mr. Baller's conduct does not violate Section 2-321.

Section 2-323 (1)

Section 2-323 (1) prohibits the use of public office for private gain. "Private gain" means "any interest or any benefit, in any form, received by a city...official." (2-322). Mr. Baller did not use his public office to gain any benefit in this private dispute. While he listed his City Commissioner title in his communication, that did not gain Mr. Baller any advantage. The evidence before us shows Mr. Baller wanted to justify himself, but he used persuasion and his view of the facts, not his office, to try to achieve that goal.

The Board finds, unanimously, that Mr. Baller's conduct does not violate Section 2-323(1)

Section 2-323(5)

Section 2-323(5) states that it is the intention of the Ethics Ordinance that city officials avoid any action, "whether or not specifically prohibited in Section 2-324" which might create the "appearance ofaffecting adversely the confidence of the public or the integrity of city government." For the reasons already mentioned, we do not believe the Ethics Ordinance regulates Mr. Baller's communications about purely private matters.

Board member John Schrot agrees that Mr. Baller has not violated Section 2-323(5), but for a different reason. He believes that Mr. Baller's conduct has not, in fact, affected adversely public confidence. Mr. Schrot noted that the evidence showed Mr. Baller's communications may have been exposed to 13,000 Birmingham residents, yet only a very few people commented on Ms. Klein, and not all of those were negative. Mr. Schrot concluded that there was no reason to believe that the confidence of the public at large in the city government was adversely affected by Mr. Baller's conduct. While I do not think it is necessary to engage with

this issue, I concur in his opinion. I have no doubt that the Complainant has lost confidence in Mr. Baller and perhaps in the government for failing to curb or punish his conduct. But I see no basis for concluding that Mr. Baller's private conduct in this instance affects public confidence in the city as an institution. Commissioners come and go. Not all citizens agree with every Commissioner in all respects. Private disputes of this nature between individuals—even when one is an elected official-- are not the kind of thing that tends to undermine public confidence in the city as an institution or its government unless there is a separate and distinct violation of Section 2-324 of the Ethics Ordinance.

The Board finds that Mr. Baller's conduct does not violate Section 2-323(5)

Section 2-324(a)(8)

Section 2-324(a)(8) prohibits any city official from using his or her official position to obtain or seek to obtain any special consideration, advantage or preferential treatment beyond that which is available to every other citizen. No evidence was presented that Mr. Baller tried to get preferential treatment or advantage due to his status as a City official. He acted as did any other citizen in posting on Facebook and sending out a newsletter. Those avenues are available to anybody who chooses to belong to Facebook or has an email account.

The Board finds, unanimously, that Mr. Baller's conduct does not violate Section 2-324(a)(8).

Section 2-324(a)(2)

Section 2-324(a)(2) says that "no official or employee of the city shall represent his or her personal opinion as that of the city." Mr. Baller noted he is a City Commissioner on both his personal Facebook page and the email newsletter, and also provided his personal residential address. These were intentional acts. He changed the Facebook page after his election to include this designation and he included it in the newsletter he wrote. That is not a problem. He could have been criticized had he not identified himself as a City Commissioner. The question is whether the designation could create confusion as to whether he represented his personal opinion as that of the city. My two colleagues do not believe Mr. Baller's use in this case of his title in his personal Facebook page or his newsletter violates Section 2- 324 (a)(2). They believe that the communications did not create confusion because they are obviously Mr. Baller's personal thoughts. He nowhere says his views are City policy. He does not represent his personal opinion as that of the City. Ms. Klein did not allege any confusion or that Mr. Baller was attacking her as an official of the City. Ms. Klein's Complaint did not allege it was his "official" opinion or "City opinion/policy." Thus, the Board has determined that there is no

violation here.

Board member Ms. Fierro-Share does not agree. Her judgment is that the use of his City title in a private communication does create a significant risk of confusing personal and official opinion. Our Advisory Opinion 2009-02 is relevant to this discussion, even though it is not exactly like this case. In that Opinion we concluded that an appointed city board member could advocate on certain public issues and use his title “if he states that it is his personal opinion and not that of the [City Board]”. P.2

Mr. Baller is allowed to speak on private matters like this. He is allowed, but not compelled, to use his title as a City Commissioner. If he chooses to identify himself as a City Commissioner he must avoid giving the impression that his personal opinions are those of the City by including a disclaimer to the effect that the opinions expressed are his personal opinions and are not the opinions of the City, the City Commission or any other City official. While not agreeing with Ms. Fierro-Share’s opinion that a violation exists, the entire Ethics Board concurs in the wisdom of City Commissioners using a disclaimer any time they use their City title in private communications that are disseminated publicly.

In board member Fierro-Share’s opinion, this is a technical violation that must be understood in the context that newly elected City Commissioners are probably not required to read all 33 of the Opinions this Board has issued or given a summary of all those that directly affect Commissioners. The Ethics Ordinance recognizes the difficulty a situation like this presents when, in Section 2-320, it mandates giving City officials “adequate guidelines for separating their roles as private citizens from their roles as public servants.” The City Commission or Administration may wish to consider including in any orientation they give newly elected Commissioners guidance concerning when to use a disclaimer.

The Board finds that Mr. Baller did not violate Section 2-324(a)(2).

V. Conclusion

Mr. Baller complied with the Code of Ethics. The Complaint is dismissed.



Sophie Fierro-Share



John J. Schrot