

Report of the Ethics Advisory Group

To Bethlehem Town Board

April 25, 2012

The Ethics Advisory Group was created by the Bethlehem Town Board through resolution passed at its February 8, 2012 meeting. The following members were appointed to the Group:

Kevin Crawford, Co-chair	John Hudacs, co-chair
Michael Fallon	Theresa Schillaci
Peter Lauricella	Mary Tremblay-Glassman
Sandy Powell	

The Ethics Advisory Group is charged with the mission to craft options for the Town Board to consider in improving and updating the current Ethics Code and Board, using the State Comptroller's Model Ethics Policy as a starting point, but adapting to fit Bethlehem's needs. The group was asked to report to the Town Board with its recommendations by April 2012.

The Advisory Group commenced its activities by reviewing the existing Town Ethics Code in comparison to the Model Code of Ethics for Local Governments as proposed by the State Comptroller. The Bethlehem Town Ethics Code is contained in Section 16-4 of the Town Code. It is a brief document offering standards of conduct to which Town employees are subject to abide in eight specified areas and activities. The Code addresses conduct as it relates to: Gifts, confidential information, representation before one's agency, representation before any agency for a contingency fee, disclosure of interest in legislation, investments in conflict with official duties, private employment and future employment. When compared to the State Comptroller's Model Ethics Code it appears evident that the Town's Code can be improved, updated and made more effective in several significant ways. By the nature of its brevity it fails to include several significant activities that merit attention in an effective Code of Ethics. Moreover, those areas that are addressed in the present code could benefit significantly from a more thorough treatment that would offer the residents of Bethlehem assurance of a strong, inclusive and workable Code of Ethics guiding the activities of their Town while also offering those affected directly by the Code a clearer understanding of their responsibilities and the limits of their actions.

Recommendations

The Ethics Advisory Group recommends to the Town Board that the existing Town of Bethlehem Code of Ethics be repealed (eliminating the current 3- member Town Board of Ethics) and that a revised Code of Ethics be adopted (appointing a new 5-member Town Board of Ethics that includes no more than 2 members of any political party).

The new Code of Ethics as recommended will provide clear standards of conduct for Town officers and employees, including prohibiting conflicts of interest; prohibiting the solicitation or

receipt of gifts or favors; prohibiting personal or private use of municipal resources; restricting future employment with entities that do business with the Town; prohibiting political activity on Town time; prohibiting political solicitations by town officers and employees; and addressing the issue of nepotism

The newly appointed Town Ethics Board will provide advice to Town officials/employees upon request; will consider and, where appropriate, investigate sworn complaints; and make recommendations to the Town Board regarding how to address such complaints.

Finally, the revised Code of Ethics will provide for posting, distribution and training to ensure that Town officers and employees are aware of it and understand its contents and application.

Overview on Purpose and Intent of the Ethics Code

The Ethics Advisory group has been guided in its deliberations by a common understanding of the value that a Code of Ethics holds within the community. The citizens of the Town of Bethlehem have the right to expect that governmental activities undertaken on their behalf are done with the highest level of ethical conduct by the Town's officers and employees. A written Code of Ethics provides governmental officials and the citizens they serve with an understanding of the essential elements of conduct that will help ensure that governmental functions and operation are performed ethically with the needs and interests of the public as paramount. An effective code of ethics provides clear statements of the actions that should be undertaken, and the relationships that are limited in order to ensure activities that will establish and maintain integrity in all governmental activities. To be effective the Code needs to be clearly understood and universally known to all parties i.e. Town employees, outside providers and the public at large. The Code needs to be enforceable and violations should be publicized. The Code also needs to be practical. The real world environment in which we live and work consists of relationships, community involvements and activities that form the essential fabric of our daily lives in the relatively small geographic area in which we live. Creating a Code of Ethics that does not recognize this reality will yield an unworkable and unrealistic set of expectations that will ultimately erode the public's confidence in government.

In summary an effective Code of Ethics must be clear and understandable, transparent, realistic, well known and publicized and enforceable in a way that gives the public an assurance and an understanding that its Town government is conducting their business in accordance with a defined ethical standard that protects the public interest. It enhances public confidence and respect in the integrity of Town government. It gives guidance and support to the Town's employees and those who provide services and goods to the Town or wish to do so. It protects their integrity as well as the integrity of Town government

It is impossible for any Code of Ethics by its very nature to be all inclusive. It does set the tone and the expectations for ethical behavior. While the Code defines and addresses actions that are conflicts of interest, there are also actions that will give the *appearance* of a conflict of interest. These appearances of conflicts of interest also serve to erode public confidence in government and must be avoided. The sense of ethics and the personal integrity of the individual, guided by the tone and expectations of this Ethics Code, should serve to assist in identifying and avoiding such potential conflicts.

Definitions

Definitions add more than clarity; they add accountability. Without a clear and definitive understanding of whom or what is affected or involved in the application of the Code there is a serious threat to its effective application. The present Code contains only two definitions; one for “interest” and the other for “Municipal Officer and Employee”. The Advisory Group has included the Definition Section of the Comptroller’s Model Code which provides fuller definitions of these subjects and more definitions covering significant subjects addressed by the Code. In considering the Comptroller’s Model’s definitions, the Advisory Group amended the definition for the term “Board” to exclude from the Code any *ad hoc* or temporary board, committee or body which is advisory and has no power to commit the town to any course of action. The Advisory Group in addition to including the Comptroller’s Model definitions has added definitions for “Officer”, “Confidential” and “Employee” with the latter definition to include any person that receives a salary or wage from the Town thereby including part-time employees in the Code’s coverage. The Advisory Group has also added a definition for the terms “discretion” and “discretionary”.

Prohibition of Municipal Position for Personal or Private Gain

The existing Town Code does not address this subject. The Advisory Group has accepted the Comptroller’s language with a modification of inserting the word “knowingly”. The section applies to a benefit not only to the individual but a benefit that would also accrue to a “relative”. The intent of the amendment to the Comptroller’s model Code i.e. inclusion of “knowingly”, was to address the potential circumstance where an individual may not know the involvement of all those who may be covered by the definition of “relative”.

Disclosure of Interest in Legislation and Other Matters

This subject is contained in the existing Town Ethics Code but lacks clarity and direction to on how parties should implement it. The Comptroller’s Model Code language offers clearer direction and reporting lines for the disclosure and is accepted by the Advisory Group

Recusal and Abstention

This subject is absent from the existing Town Code. It is a matter that requires inclusion in an effective Code of Ethics. The State Comptroller’s treatment and wording on this subject are accepted for inclusion in its entirety by the Advisory Group.

Prohibition That is Inapplicable with Disclosure, Recusal and Abstention Not Required

This section of the Comptroller’s Model Code describes those situations that are legitimate events in which recusal or abstention would make it difficult or impossible for government to function. It is not discussed in the present Town Code. The Advisory group accepts the language in its entirety.

Investments in Conflict with Official Duties

The existing Ethics Code contains a broad, sweeping general statement forbidding investments that “conflict with official duty”. It fails to give adequate guidance to those affected by the Code. The Comptroller’s language is specific in its description and clarifies not only what investments are forbidden but also which investments are permitted. It is accepted by the Advisory Group.

Private Employment in Conflict with Official Duties

The Town's existing Ethics Code prohibits any employment or services that conflicts or impairs the discharge of official duties and merely repeats the language contained in sections 805-a (1) (c) and (d) of the General Municipal Law relating to prohibitions on representation before one's own agency or for a contingency fee. The State Comptroller's Model Code in covering this subject provides greater clarity and specificity in this matter offering meaningful guidance to the employee or officer affected. It is the opinion of the Advisory group that it should be included in the Town's Ethics Code.

Future Employment

The existing Code prohibits an individual from appearing before the Town in relation to matters in which he/she personally participated or was under their active consideration. The Comptroller's Model Code essentially includes this provision but also forbids post service employment with any party while there is a matter pending which is subject to his/her discretion and also for 30 days following its disposition. It further prohibits, for a period of two years, representing a party before the department in which he/she served. The Advisory Group agrees with the approach taken by the Comptroller's Model with the exception of the two year exclusion stated above. It is the judgment of the Advisory Group that, while an exclusion period is warranted, the two year period is excessive. One year is sufficient to address the negative appearance created when a public official moves directly to employment with an outside vendor or other party with a prior or present business relationship with the town.

Personal Representation and Claims Permitted

This subject is addressed by both Codes but the Comptroller's Model offers language that clearer and more inclusive than the existing Code. The Advisory Group concurs with this approach and includes it in the proposed Town Ethics Code.

Use of Municipal Resources

The present Town Code of Ethics does not address this subject. Although the subject appears to be addressed through Town policy and personnel procedures the Advisory Group shares the State Comptroller's approach and believes that it should also be addressed in the Code of Ethics. The Comptroller's Model Code not only offers a descriptive understanding of the resources involved but also provides an understanding of those activities which are not to be construed as prohibited. The Advisory Group concurs with the language contained in the Comptroller's Model Code of Ethics.

Interests in Contracts

This section of the Model Code requires adherence to Sections 801 and 803 of the General Municipal Law relating to prohibiting of an interest in certain contracts and the disclosure of interests in others and is accepted by the Advisory Group. The existing Town Code in its description of the Standards of Conduct for officers and employees makes no specific reference to contracts or to the General Municipal Law in this respect.

Financial Disclosure

New York State's General Municipal Law requires counties, cities, towns, and villages with a population of 50,000 or more, to establish an annual financial disclosure system. Municipalities with a lesser population, such as Bethlehem, may adopt such a system but are not required to do

so. The Ethics Advisory Board is not recommending that the Town impose a financial disclosure requirement on its employees provided the Ethics Board is empowered to secure such financial disclosure from employees as it deems relevant in specific matters while exercising its responsibilities.

Nepotism

The existing Town Ethics Code does not address the topic of nepotism. The Comptroller's Model Code, however, is specific in its treatment of the subject. The Model Code prohibits officials and employees from participating in any decision to appoint, hire, promote or discharge a relative for any position within the municipality or its boards. It further prohibits them from supervising a relative in the performance of their official duties or powers. The Advisory Group believes that this is a subject that needs to be addressed in the Town's Code of Ethics. The Group agrees with the essential elements of the Model Code but believes that the practical treatment of this subject requires some modification to the Model Code's offering. First, the supervision needs to be direct supervision and the individual involved should be a family member rather than a "relative", a term that has a more far reaching application and difficulty in enforcement. Secondly, as a matter of fairness and to prevent workforce disruptions and potential breach of existing personnel rights, an accommodation needs to be made for existing situations through a grandfathering provision. The provision would allow individuals to stay in their existing positions but prohibits them from seeking additional or different positions in violation of the provision. Thirdly, the unique nature of the role of elected officials should preclude the employment of their children in town government in order to avoid even the perception of nepotism.

To ensure compliance with the intent and spirit of the nepotism provisions the human resources capabilities of the Town must be employed. In this regard the performance review, job duties or assignments and awards of overtime for grandfathered individuals, shall be subject to annual review by the Director of Human Resources, and in the event problems are identified they may be referred to the Town Board. Additionally, the significant hiring of part-time and seasonal employees requires monitoring by the Human Resources Department. Town Department Heads need to verify all known relatives of potential seasonal employees based on the Town's Hiring Guidelines for Part-Time/Seasonal Employees. Once the seasonal employee's application has been approved by the department head, it should be forwarded to the Human Resources Department for final review of hiring guidelines.

Political Solicitations

The existing Town code has no provision addressing the matter of political solicitation. The Comptroller's Model Code provides language that protects subordinates from being compelled or induced by an officer or other employee to make political contributions or from being adversely impacted due to their actions regarding political contributions. The Advisory Group believes that this is a subject that needs to be included in a Code of Ethics and concurs with the Comptroller's language. The Group also supplements that language to include a prohibition of engaging in campaign activities during the official work day and prohibiting the use of town resources for political campaigns and political activities.

Officers in Political Organizations

The exclusion of individuals holding office in political parties and/or organizations from town employment is a subject that is not addressed in the existing Code. The State Comptroller's Model Ethics Code is silent on the subject. It limits its attention to prohibiting political solicitations in the work place and influencing personnel matters through political contributions. The subject is addressed at the State government level and is handled in widely differing ways in codes of ethics developed by municipalities. While some municipalities chose not to address the topic at all, others include a ban on holding office in a political party and political organizations. Some municipalities extend the prohibition to serving as a committeeperson of any political party or political organization. The application of the ban, wherever it exists, can be applied to individuals serving at differing levels of responsibility i.e. some apply the ban to policy makers while others apply it to town officers only and yet others to officers and town employees.

A primary goal in prohibiting the holding of a political office while in public employment is to address the potential that political loyalties can influence the employee and the decisions made and actions taken. By prohibiting political officers from public employment it helps to reduce conflicts and potential conflicts of interest grounded in partisan politics. It does not prevent an employee or official from being active as a member in a political party or organization but only that they may not be an officer in the party or organization. The position of officer is one that contains powers and responsibilities likely to place an individual in situations where a conflict of loyalties influences their decisions. It can also place an individual in a position of power to unfairly influence the political fate of another elected official whose vote is needed to pass a measure desired by the party official. Public officials are elected and employees appointed with the anticipation that the interests of the general public are the sole focus of their attention and that there should be no partisanship considerations or conflicts involved. Prohibiting office holding in political parties and organizations removes the most visible and obvious challenge of conflict in this area.

Questions are raised, however, by those concerned that it might go too far in restricting important constitutionally recognized rights such as freedom of association, speech and assembly. There were also concerns raised that this specific exclusion is based on a presumption that holding office in a political organizations is a de facto character flaw making individuals vulnerable to misdeeds. It is argued that the nature of government and the nature of politics have been intertwined to such a degree that it is unrealistic and unfair to assume that they are antithetical and need to be so drastically segregated. It is further argued that the overall restrictions contained in the Code of Ethics are sufficient to address potential conflicts of interest that might be of concern and this would be an unnecessary overreach.

This subject engendered considerable discussion and debate among the members of the Advisory Group and a consensus recommendation was not reached. There were three options that were debated and each is offered for the consideration of the Town Board as it deliberates on this matter. One option would be to prohibit all town officers and employees from serving as political party officers. A second option, which is less restrictive in its application, would prohibit only Town officers as defined by Section 25 of the General Municipal law from serving as political party officers. The third option essentially maintains the status quo and does nothing to prohibit serving as a political party officer.

Confidential Information

The Comptroller's Model Code language is more precise and descriptive than then the language contained in the existing Town Code on this subject which reflects section 805-a (1) (b) of the General Municipal Law. The Advisory Group accepts the Comptroller's language.

Gifts

The present Town Ethics Code provides that an officer or employee may not solicit, accept, or receive any gift greater than \$25 when it could reasonably be inferred or could reasonably be expected to influence him/her in their duties or was intended as a reward for action on his/ her part. The Comptrollers Model Code provides language that mirrors the Town's Code, in part, with the exception that it prohibits any solicitation and sets a \$75 annual aggregate limit on gifts. The Comptroller's Model Code further defines "gift", describes circumstances where presumption of influence would exist, and presents a methodology for determining the aggregate value of gifts. The Model Code also describes specific circumstances wherein gifts are not prohibited.

The Ethics Advisory Group believes that no gifts regardless of value should be solicited, accepted or received with the sole exception of those circumstances which are specified as not prohibited by the Comptrollers Model Code. That list represents a fair presentation of circumstances that reasonably would not be construed as a potential for influence or reward. It includes gifts to the municipality; gifts from family or a personal friend with a clear understanding that the relationship, not the public position, is the motivating factor; unsolicited advertising or promotional material; awards and plaques of no re-sale value recognizing service; meals and refreshments offered at appropriate conferences, meetings programs related to the job and available to all participants and; contributions to political parties or candidates.

Posting, Distribution and Training

The effectiveness of a Code of Ethics is dependent upon the fact that those impacted by the Code not only are aware of its contents and its intent but also understand its practical application in their day to day work life. To achieve these objectives it is important that the Code is widely publicized and distributed to Town officials and employees as well as the general public.

Following the passage of the Code of Ethics by the Town Board all employees should be required to receive a copy of the Ethics Code with relevant attachments and receive a briefing on the Code and its relevance to their work place activities. The employee should then sign a statement that he/she has received the Ethics Code and any attachments, had the opportunity to ask questions regarding its application and has been made aware of the avenues available to him/her to seek information and clarification in the future. All Town employees should be required to be re-briefed on the Code as part of the regular cycle of training provided by Human Resources

The Code of Ethics also needs to be publicized and made available to the general public. Accordingly, the Advisory Group recommends that in addition to the general postings and distributions the Code of Ethics and information on how to get additional information on the Code also be posted on the Town's website and updated as necessary.

Once passed, the Town Board is urged strongly to undertake a concentrated effort to educate employees on the substantive and practical application of the Code of Ethics. To be done effectively it will require a commitment of new, but modest resources. One practical and low cost way to assist in meeting this need would be the creation of a DVD orientation on the Ethics Code that could be used by human resources with copies given to each Department and operating unit and placement on the Town's official website for general public viewing.

Board of Ethics

The present Code of Ethics for the Town creates a three member Board. The Advisory Group believes that a five member Board would offer a better opportunity for greater representation from the community and more potential for diversity and experience. Members would be appointed by the Town Board and serve for specific staggered terms and would only be removable for cause. No member should be an elected official, or an officer in a political organization and no more than 2 members shall be from the same political party. These provisions would assist in creating a Board that is independent while minimizing the potential for outside pressure, either real or perceived. Several members of the Advisory Group had concerns regarding the present Code's requirement (and that contained in the Comptroller's Model) that the membership include a Town official or employee. Concern was also expressed that persons may be apprehensive or reluctant about using the Board for an advisory opinion if Town staff were included as a member due to their perception that an Ethics Board with direct Town involvement would not constitute a totally independent, impartial and neutral body. Contrary arguments are made that the exclusion of the employee as a Board member deprives the Board of the experience, knowledge and perspective of someone directly knowledgeable of the actual functioning of Town operations and practices. The Advisory Group believes that the Code is best served by a Board consisting solely of individuals who have no direct employment relationship with the Town. By requiring that town employees and officers cooperate and assist the Board upon its request, the Advisory Group believes that the expertise and experience of town employees can be secured as necessary.

The Advisory Group believes that a primary responsibility of the Ethics Board is to advise individuals on the application of the Ethics Code. The responsibility to investigate claims and allegations requires expertise and financial resources in order to be done competently and credibly. It is the consensus of the Advisory Group that unless adequate resources are assigned to the Board for this purpose it is unrealistic to expect full investigative activities to be performed by the Ethics Board. Absent dedicated funding the Board would require the assistance and cooperation of town personnel as it deems necessary in its evaluation of complaints, reviewing and defining the issues and based upon the available information make recommendations to the Town Board for its action to further address and resolve the complaint. Transparency and timeliness are important considerations in addressing these matters. In this regard, the Town Board, after its appropriate deliberations, should take final action on the Board's recommendation in open session within sixty days of its receipt. In addressing requests for advice or receipt of complaints the Ethics Board will initiate review in a timely manner. It will require that the complaint or request be placed in writing with information relevant to the matter and the petitioner to be identified to ensure that additional information attained as necessary and response can be made.

There is a delicate balance that needs to be maintained between protecting the confidentiality required to effectively provide advice and investigate complaints while ensuring transparency and openness. Those seeking the services of the Board need to do so with confidence. Advisory opinions would be confidential to the extent provided by law and individuals seeking such should be so advised.

Enforcement

Municipal officers and employees of the Town who are in violation of the ethics code may be censured, fined, suspended or removed from office in the manner provided by law.

Effective Date

The effective date of the code should be set in a timely manner that achieves its full and effective implementation.