



City of Atlanta Board of Ethics Formal Advisory Opinion 2017-1 Appearance of Impropriety

Opinion Summary

The Code of Ethics seeks to protect the integrity of city government by prohibiting city officials and employees from engaging in conflicts of interest. Specifically, the ethical standards prohibit officials and employees from participating in business activities, rendering services, or having contractual, financial, or personal interests that conflict with the individual's official duties or the city's best interest or would create the *appearance of a conflict or impropriety* to the public that would impair the individual's independence or objectivity in the performance of his or her official duties. See Atlanta, Ga. Code § 2-802, 2-813. It is often difficult for an official or employee to see that there may be an appearance issue in regards to his or her actions or conduct even when there is no apparent conflict, and it is important for the Ethics Board and Ethics Officer to provide clear guidance to avoid any improprieties.

Question Presented

Why is it important to review matters which raise an appearance of impropriety and how can these matters be addressed appropriately by the Ethics Board and Ethics Officer to provide guidance to city officials and employees?

Facts

Over the years, the Ethics Board has addressed situations where an official or employee may have an actual or potential conflict of interest. Section 2-813 sets out the procedure for city officials and employees to follow in disclosing a conflict. The Ethics Code does not specifically regulate "appearances of impropriety." However, there are situations where an inherent or potential conflict of interest may not exist yet the mere appearance of impropriety may be sufficient to warrant disqualifying a city official or employee from considering certain matters or taking certain positions.

Whether a particular situation requires disqualification or disclosure depends on the value judgment used. Those values are often determined by the individual, but more importantly, by members of the public. Therefore, the mere threat of the appearance of impropriety may suggest that the public official or employee should be disqualified even though that person may be the best available source for a position or service. See Georgia Municipal Association, *Ethics in Government: Charting the Right Course*, p.3 (July 2010).

Avoiding the appearance of impropriety becomes very difficult at times because impropriety can mean different things to different people. One of the most difficult things for an official or

employee to determine is whether his or her conduct or action may create an appearance of impropriety. See *Ethics in Government: Charting the Right Course*, p.4.

A review of advisory opinions issued by similar jurisdictions, such as the City of Honolulu, Hawaii, and the City of New York, New York, show that these jurisdictions conduct a separate analysis as to whether a given relationship or interest will raise the appearance of a conflict of interest. That said, when reviewing a matter to determine whether there has been a violation of the Code of Ethics, such review should also include a **separate analysis** as to whether the situation raises the appearance of a conflict or impropriety. See City and County of Honolulu Ethics Commission, Advisory Opinions, <https://www.honolulu.gov/ethics/opinions.html> (last visited March 9, 2017); New York City Conflicts of Interest Board, Advisory Opinions & Enforcement Cases, http://www.nyc.gov/html/conflicts/html/law/aos_ed.shtml (last visited March 9, 2017).

To provide guidance to city officials and employees, the Ethics Officer presents examples of situations that may raise an appearance of a conflict or impropriety and effective tools that can be used to avoid any appearances issues.

Discussion

Situations that may raise an appearance of a conflict or impropriety

Friendships and business relationships – The Ethics Code does not regulate friendships. It, however, regulates relationships between officials or employees and prohibited sources. For example, an employee has worked at the Atlanta airport for over 20 years in the Ground Transportation Division and developed a close friendship with an individual that holds a city permit to run his transportation business at the airport. The employee is a senior manager and the individual's permit is issued by his office. In this situation, the employee has authority to suspend or revoke permits or even waive violations. What if any, are the restrictions on their friendship? Could they exchange gifts during the holidays and visit each other's homes? Because of the employee's role in that office, there may be restrictions on the relationship with the prohibited source. To avoid any appearances of impropriety, the employee should strive to keep his professional and personal life **separate** and avoid mixing the professional relationship with the personal relationship, and refrain from the exchange of gifts and visits to each other's homes. There is a potential for charges of favoritism and cronyism because the employee's office regulates this business.

Decision-making in personnel related matters - The hiring and firing of employees can raise appearance issues. It is logical that most people would tend to favor those closest to them whenever the opportunity presents itself. Officials and employees must make decisions based on their fiduciary duty to be fair and impartial. For example, a councilmember wants to hire his nephew as his chief of staff. What are the restrictions if any on such hiring? The Ethics Code would not prohibit hiring of the nephew; however, avoiding the appearance of impropriety is of the utmost importance because anything that may be construed as "favoritism" should be avoided whenever possible. Further, disciplinary action or termination could be difficult if problems arise with the nephew. See *Ethics in Government: Charting the Right Course*, p.14.

Dual roles - The Code of Ethics prohibits city officials and employees from taking on outside jobs or additional roles when the work to be performed is incompatible with the official or employee's city role. Where an additional role becomes too time consuming or repeatedly precludes an individual from voting or participating on matters before the individual's agency or board, the **appearance** of a conflict of interest can become an issue. For example, a local bar

association appoints to the City Zoning Board an attorney whose firm previously worked on real estate closings for the City. Following the nomination, the firm bids and the City awards the firm additional work handling real estate closings on behalf of the City. As a result, the attorney would spend up to 50 percent of his or her time engaged in business with the City on behalf of the firm. While the attorney may seek recusal on a case-by-case basis and disclose such recusals to avoid violating the Code, there could still be the appearance of a conflict of interest due to the volume of work performed by the firm and the perception of divided loyalties between the City and the firm.

Similarly, a city employee handles safety and other community education matters related to the Atlanta Streetcar. A local business organization represents the interests of businesses primarily located on and around the Streetcar route. The organization seeks to appoint the city employee to its Board of Directors as representative for the City. The Code of Ethics does not prohibit city employees from serving as the City's representative on a public board. However, due to the employee's city role with the Streetcar, there could be an appearance of a conflict of interest due to the employee's potentially divided loyalties, specialized knowledge gained on the job, and the need for repeated recusal from matters pertaining to the Streetcar.

Post-employment activities within a year of separation - Post-employment activities can raise appearance issues even where the activity does not constitute a violation of the Code of Ethics. The Code of Ethics prohibits city officials and employees from appearing before a city agency on behalf of a private interest or from receiving payment to work on a project in which the employees were directly concerned, personally participated, actively considered, or acquired knowledge while with the City in the year after leaving city service or employment. See Atlanta, Ga. Code § 2-810.

For example, a city contractor hires a former city employee who handled permit intake on behalf of the Planning Department. Within a year of leaving City employment, the former employee begins to appear before his former Department on behalf of the contractor as a permit expeditor on a project the former employee did not participate on while at the city. Although the former employee has not violated the Code of Ethics because he did not work on the project while employed at the City, there could still be an appearance of favoritism due to the employee's prior relationship with the City and specifically the employee's former department. Other construction firms could perceive such post-employment activities as constituting a real or perceived competitive disadvantage when seeking to do business with the City.

Effective tools that can be used to provide guidance to city officials and employees

There are tools which may assist the official or employee when faced with ethical dilemmas that do not provide a clear distinction between the right and wrong choice:

Media Test - One measure often applied to determine whether conduct is ethical is the "How will it read in the newspaper?" test. The reality is that the public's potential reaction to an official or employee's conduct if it were reported in the news provides an objective yardstick for the official or employee. Thus, the public perception is critical to achieving the objective of eliminating the appearance of impropriety. The public has increased access to governmental affairs and public officials and employees have come under increased scrutiny. This access has exploded primarily due to the internet and social media. Unfortunately, there is a growing dissatisfaction with how the government operates from the local to federal level. Trust is the key to an effective relationship with the public and that largely depends on the image portrayed in the media. See *Ethics in Government: Charting the Right Course*, p.5.

Golden Rule Test - Another test used is one in which the official or employee asks whether he or she would approve if another official or employee did the same thing under similar circumstances. *Id.*

Kid on Your Shoulder Test - With this test, the official or employee asks whether he or she would feel comfortable with his or her child observing the actions or conduct at question. *Id.*

Conclusion

Although the Code of Ethics does not specifically regulate the “appearance of impropriety,” it is important for city officials and employees to carefully evaluate whether the role, action, conduct or activity in question creates the appearance of a conflict or impropriety or whether such activity may cause the public to question whether the official or employee is acting in his or her own interests or in the best interest of the City.

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