

**DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY**

Monthly Meeting of the Board

April 4th, 2013, 1:00 p.m.
Suite 830 South – Hearing Room
One Judiciary Square

AGENDA

- I. Call to Order
- II. Ascertainment of Quorum
- III. Adoption of the Agenda
- IV. Formal Adoption of the Minutes of the March 7th monthly meeting.
- V. Report by the Director of Government Ethics
- VI. Update on Status of Office of Government Ethics (OGE) Operations – Recap of previous month’s activities (statistics)
- VII. Publication and Reporting Obligations
- VIII. Staffing and Job Announcements
- IX. Financial Disclosure and Lobbyist Registration Filing System
- X. Ethics Manual Updated
- XI. Trainings
- XII. Campaign Finance Reform
- XIII. Budget Oversight Hearing – April 22, 2013
- XIV. Discussion: Best Practices Report
- XV. Non-Confidential Investigations and Public Dispositions – Vincent Orange Formal Investigation - Update

XVI. Executive Session (non-public) to Discuss Ongoing, Confidential Preliminary Investigations pursuant to D.C. Official Code § 2-574(b)(14) and Personnel matters pursuant to D.C. Official Code § 2-574(b)(10).

XVII. Adjournment

MEETING MINUTES

District of Columbia

Board of Ethics and Government Accountability

Monthly Meeting of the Board

April 4th, 2013 1:00 pm

Suite 830 South – Hearing Room

One Judiciary Square

I. Call to Order

The Monthly Meeting of the Board was called to order at 1:02 pm by Chairman Robert Spagnoletti in the Hearing Room at One Judiciary Square, 441 4th Street NW, 830 South, Washington, DC 20001.

II. Ascertainment of Quorum

Board Members Robert Spagnoletti and Deborah Lathen were present. Because two Board members were present, the board has a quorum.

III. Adoption of the Agenda

The agenda was adopted unanimously.

IV. Formal Adoption of the Minutes of the March 7, 2013, monthly meeting

The minutes of the March 7, 2013, meeting were adopted unanimously.

V. Report by the Director of Government Ethics

The Director of Government Ethics reported that it was an eventful month and that additional staff had been hired.

VI. Update on Status of Office of Government Ethics (OGE) Operations – Recap of previous month's activities (statistics)

The Office of Government Ethics (the Office) conducted Financial Disclosure Statement (FDS) and Hatch Act training for Agency Ethics Counselors on March 25, 2013. The Office is getting ready for FDS filings. In preparation, the office put out two memos and FAQ's. The FDS forms and guidance are available on the BEGA website (<http://bega.dc.gov/>).

There are 16 investigations currently active. The Office has opened five investigations since the last Board meeting. The Office has closed five investigations since the last Board meeting. The Office has received six requests for formal Advisory Opinions since the last Board meeting. The Office has issued three formal Advisory Opinions since the last Board meeting.

VII. Publication and Reporting Obligations

The Office is in substantial compliance with its publication requirements. Advisory letters are being published within 30 days of issuance. The Office is current on its website publication requirements as well, with redacted advisory opinions appearing in most cases less than a week after issuance. The Office is current on Quarterly Reports. The Quarterly Report for January 1, 2013 – March 31, 2013 was posted on Tuesday, April 2, 2013.

Chairman Spagnoletti asked Director Sobin to address the redacted advisory opinions. Chairman Spagnoletti asked Director Sobin if anyone had asked about the nature of the redactions. Director Sobin responded that one person had requested an un-redacted opinion, but because the requestor was not the employee who requested the advisory opinion, he could not provide an un-redacted copy without the consent of the employee who had requested the advisory opinion.

Chairman Spagnoletti asked about *sua sponte* versions of the redacted opinions. Director Sobin said that the Office could include helpful advisory memos or FAQ's with the redacted opinions. Chairman Spagnoletti wants the redacted advisory opinions to be as helpful as possible. Board Member Lathen suggested that, after the situation was addressed in the advisory opinion, a hypothetical could be included to make the redacted version easier to understand.

Director Sobin said that the Board's Senior Level Legal Writer will be tasked with crafting advisory opinions and redacted advisory opinions.

VIII. Staffing and Job Announcements

The Office's Administrative Assistant has started. His name is Eric younger.

The Board decided that the Board and the Director will make a joint decision on the hiring of the Board's Senior Writer. Chairman Spagnoletti said that the Senior Writer would write for the Board, but report to Director Sobin. The Board will see all resumes and joint interviews will be conducted with the Board and the Director.

Director Sobin suggested publishing the Senior Writer job posting in “Washington Lawyer.” The Board agreed that it should be published in “Washington Lawyer.”

IX. Financial Disclosure and Lobbyist Registration Filing System

The Datanet system will be capable of producing 26 separate reports. There will be three forms, two of which will be filed electronically through Datanet (Public Disclosure and Confidential ANC Disclosure). All other FDS forms will be printable from the BEGA website and are to be filed with the appropriate agency head. The Datanet system will be operational next week, well before May 15, 2013, the filing deadline. Lobbyist information will be manually entered from the previous filing period.

X. Ethics Manual Updated – Hatch Act and FDS portions added – Posted on April 2nd

Chairman Spagnoletti asked Director Sobin if any conforming rules needed to be changed. Director Sobin responded that the Office would take a look and find out.

XI. Trainings

The Office has Ethics trainings scheduled for the following dates this month:

- DSLBD – April 10, 2013
- DCRA – April 17, 2013, and 18, 2013
- ANC – April 13, 2013, (Saturday), April 22, 2013, and April 25, 2013

The Office’s two Investigators will attend a two-day investigator training on April 22, 2013, and April 23, 2013. The Office is paying for the investigator training, but it is a well-regarded training program.

The Office’s Director and General Counsel took an advanced level legal writing review for managers class on March 26, 2013.

The Office’s Attorneys will be attending an Appellate Advocacy seminar in early May hosted by the National Association of Attorneys General.

The Office’s Office Manager will be attending training in Baltimore on May 16, 2013, and May 17, 2013, for Executive Assistants.

The entire Office has participated in multiple ProLaw training sessions with more to come over the ensuing weeks.

Board Member Lathen asked if the Office was conducting Ethics Training for Councilmembers. Chairman Spagnoletti responded that while he was at an Open Government Coalition event, Chairman Mendelson asked him if BEGA would lead an ethics training at the Council’s retreat.

Chairman Spagnoletti put Chairman Mendelson in touch with Bernadette Sargeant, who attended the Council retreat and conducted a one-hour ethics training.

Board Member Lathen thinks the office should offer the Council an ethics training once a year, on issues they may never think of. Chairman Spagnoletti confirmed that most of the questions Bernadette Sargeant received at the retreat dealt with issues that the Councilmembers had never thought of. Board Member Lathen stated that providing yearly ethics training to the Council would not conflict with ongoing investigations.

Board Member Laura Richards joined the meeting at 1:21 p.m.

XII. Campaign Finance Reform

Director Sobin testified at three of the four hearings on the subject (contributions from LLCs, limits on money orders, constituent service funds, mandatory training for candidates). He generally supported efforts by the Attorney General and other similar bills. The Council Committee is now drafting and has asked BEGA to remain available for consultation. Director Sobin has agreed to do so.

XIII. Budget Oversight Hearing – April 22, 2013

The Mayor's budget gives the Office an increase from \$1,000,039 to \$1,218,883. This is an increase of \$173,000 or 17%. This increase is meant to cover the new Hatch Act attorney only. The Mayor rejected Director Sobin's request for an additional attorney and staff person to handle an expected increase in volume next year.

Currently, the Office of Government Ethics (OGE) is authorized for 8 FTEs. With the Hatch Act attorney, it will be 9 FTEs next year. The Office of Open Government (OOG) has only 1 FTE, the Director.

Director Sobin suggests that BEGA ask the Council for additional funds at the April 22, 2013, budget oversight hearing to provide OGE with two additional FTEs and OOG with at least one FTE, a staff person for the Director. Board Member Lathen asked Director Sobin why the Office needed 2 additional FTEs.

Director Sobin used the D.C. Bar's Office of Bar Counsel and Board on Professional Responsibility as examples. Director Sobin offered some comparison numbers – the D.C. Bar has an \$8 million budget. The Bar's Office of Bar Counsel, which handles only prosecutions, has a staff of 35, including 17 attorneys, 12 Administrative Staff, 3 Investigators, a Staff Attorney and 2 Law Clerks. Bar membership of those considered active is 72,998, but only 51,000 practice in the District. BEGA covers 34,000 D.C. government employees with a fraction of the staff and additional responsibilities. The Bar's Board on Professional Responsibility has 9 members and 9 staffers, including attorneys and an Executive Director.

Director Sobin said that the Office needs to expect and anticipate growth. Board Member Lathen, with the preface that she was playing devil's advocate, asked Director Sobin if his current case load necessitated 2 additional FTEs. Director Sobin responded that investigations take 30-40% of the Office's time. The other 60% is everything else. He doesn't want to be hamstrung in FY14 by an increasing case load and not enough FTEs to handle the increase. Director Sobin said that he thinks that we are understaffed and is concerned that our numbers are increasing all the time and if we do not ask for these positions now, we may be hamstrung because we will be one and one-half years away from getting any more positions.

Board Member Richards said that the reluctance to allocate for 2 additional FTE's is based on the current investigation count. She stated that it is a communications issue. The Mayor and the Council need to understand BEGA's mission. They need to see a Strategic Plan. They need to see an integrated plan for cooperation with the Office of the Inspector General (OIG), Contracts Appeals Board, etc. She thinks the Mayor and Council are just looking at the investigations case load.

Chairman Spagnoletti stated that the Council has been more in the weeds, so may be more sympathetic to BEGA's needs.

Director Sobin said that the Best Practices Report will lay out much of the strategic plan.

Board Member Lathen asked what other agencies were competing for the funding. Director Sobin responded: OIG, Board of Elections, and maybe the Office of the Attorney General, given that BEGA now handles some of OAG's former responsibilities.

The Board agreed that BEGA needs to work on its message to the Mayor and the Council.

XIV. Discussion: Best Practices Report (BPR)

Stacie Pittell asked if the Board wants to include short bios of the pro bono attorneys who worked on the BPR. The Board said yes, it should include the bios.

Director Sobin reported that the BPR was ready, with just one substantive issue to raise with the Board. General Counsel Pittell explained that his issue involved disclosing firm clients. BEGA has taken the position that depending on the size of the firm and the person's position in the firm, as a practical matter, a person may not be in a position to disclose the firm's clients or their dealings with the District, and may not be able to realistically find out. In contrast, Bernadette Sargeant feels that firms have a mechanism to determine conflicts and could feasibly do a conflicts check for every client.

Chairman Spagnoletti stated that the problem has many layers. He said that the statute says to identify the clients who have an interest in things pending or that may be brought before the Council. He thinks this is unmanageable and unrealistic, and puts people in a box between

attorney-client privilege and the reporting requirements of the statute. He recommended that the statutory language be rephrased.

Board Member Richards said that it would be difficult to speculate on a client's future business, but that a broad "reasonably foreseeable interest" could be ascertained, although specific pending interests may not be ascertainable.

Chairman Spagnoletti told Director Sobin that the Board would email a vote on the BPR before the April 22, 2013, Budget Oversight hearing.

XV. Schedule of Fines – Proposed

Director Sobin provided the Board with a Schedule of Fines.

Chairman Spagnoletti asked where the fine amounts came from. General Counsel Pittell explained that they primarily are her creation. She explained that research into other jurisdictions reveals that jurisdictions do not seem to have a set schedule of fines and a review of the results did not reveal consistency in the imposition of fines. Therefore, she tried to create a logical schedule of fines, considering the range of conduct for each violation. Chairman Spagnoletti that said the range of the fines provided substantial flexibility.

Board Member Lathen asked where the categories on the Schedule of Fines came from. General Counsel Pittell explained that they came from statutory language. Chairman Spagnoletti said that they would be used for negotiated dispositions. Board Member Lathen asked if the fines could go above the amounts on the Schedule. Director Sobin responded that the Office could not go above the amounts, but that the Board can.

Board Member Richards said that she has concerns regarding the entry on page 4 that addresses serving as a representative, agent, or lawyer for a private party, in any matter, before the District government or a D.C. Court. She said that she wants to make sure that it does not foreclose a person from being a spokesman for their civic association and wanted to ensure that there was clarity. Director Sobin said that the Office will provide clarity through the Ethics Manual and Advisory Opinions. Board Member Lathen pointed out that a person is never barred from representing themselves. It was decided that this entry should be left as is.

XVI. Attorney General Request for Reconsideration of an Advisory Opinion

An Advisory Opinion issued in February has been suspended until it is reviewed by the Board.

Attorney Burns explained that the Advisory Opinion turned on statutory interpretation methods. The statutory language in question is from the Ethics Act, § 1-1162.31(f) – "No public official shall be employed as a lobbyist while acting as a public official except as provided in § 1-1162.28." The Office read this as an outright prohibition on public officials being employed as

lobbyists. The Office focused on “employed” status, but the Advisory Opinion has drawn criticism from those focused on the discretionary term “acting.”

The Office of the Attorney General (OAG) drafted a memorandum that read the statute, not as an outright prohibition, but as a prohibition while the public official was “acting” or “on duty.”

When drafting the Advisory Opinion, this Office looked to the plain language of the statute, then, to the legislative intent. The legislative history revealed that in section 127 of the Committee Report (pg. 36), the Council wrote, “public officials are banned from acting as lobbyist while in office.” The language in the statute has been used since 1976. The Ethics Act used this language without change. The Office of Campaign Finance (OCF) had previously interpreted the statute as a prohibition while the public official was “on duty.” The statute provides no distinction between public officials, be they the Mayor, Councilmembers, or members of Boards or Commissions.

Councilmember Spagnoletti explained that OAG thinks that there is a difference between the Mayor, Councilmembers, and Board or Commission members, in that the Mayor and the Council can never take off their Mayor or Council “hat.” Chairman Spagnoletti stated that he is not convinced by OAG’s argument. He has trouble with the “we have always done it this way” argument. Board Member Lathan said that logically this doesn’t make sense. She disagrees with the OAG analysis, and sees the statute as plain language.

Director Sobin stated that BEGA has jurisdiction over the Code of Conduct and that this issue falls under the Code of Conduct. OAG cannot prosecute employees, BEGA can.

Chairman Spagnoletti suggested going back to the Council. He suggested informing them that BEGA disagrees with the historical interpretation and that the Council may want to amend the statute on an emergency basis. He made the point that the Council has approved Board members who they knew were paid lobbyists.

Board Member Richards stated that OAG had never analyzed the issue and that it only affects a handful of people. Chairman Spagnoletti stated that because many people relied on OCF’s interpretation, there is no need to be adversarial. Board Member Lathan responded that BEGA would only alert the Council because the historical interpretation was relied upon. Board Member Richards suggested a “grandfathering” mechanism for the people who had relied on the OCF interpretation. She suggested that current Board and Commission members be grandfathered until the end of their current terms.

Director Sobin said that the Office can write a letter to Council alerting them that:

- the opinion was issued
- the OAG has issued a memo
- we will reissue opinion with a “grandfathering” clause

XVII. Non-Confidential Investigations and Public Dispositions

The formal investigation of Councilmember Vincent Orange commenced on March 7, 2013. Subpoenas have been issued, documents have been received, witnesses have been interviewed, and the investigation continues.

The formal investigation initiated by Michael Sindram's sworn complaint is not clear on its face. Director Sobin recommends dismissing the complaint without prejudice. Chairman Spagnoletti asked if the complaint alone supports further investigation. Director Sobin replied that it did not. Board Member Richards asked if the Office was able to get information from other persons. Director Sobin replied that it is not clear what the violation might be because there is no clear violation of the Code of Conduct. Chairman Spagnoletti agreed that it should be dismissed.

Director Sobin asked the Board about his authority to enter into negotiated dispositions without Board review. The Board said that he did not need Board review for informal admonitions, because they are already appealable to the Board.

General Counsel Pittell asked the Board about negotiated dispositions other than informal admonitions. Chairman Spagnoletti replied that negotiated dispositions are much like pleas, which require Court approval. He feels that it will be helpful for the Board to sign off on negotiated dispositions, particularly in the early days of their use. It will be helpful for the Board when they are before the Council for the review process. He thinks that, down the road, if they are working well, the Board's review can be scaled back. For now, the Board will review negotiated dispositions other than informal admonitions.

Board Member Lathen does not want the Board to hold anything up. Chairman Spagnoletti suggested that the Board perform their review online.

General Counsel Pittell asked, as a practical matter, at what point in the process the Board wants to review negotiated dispositions. The Board agreed that they should review the negotiated disposition when it has been completed, meaning that the Respondent and the Director have signed it. Chairman Spagnoletti said that the negotiated dispositions do not even need a Board signature, just something that signals that the Board has reviewed.

XVIII. Executive Session (non-public) to Discuss Ongoing, Confidential Preliminary Investigations pursuant to D.C. Official Code § 2-574(b)(14) and Personnel matters pursuant to D.C. Official Code § 2-574(b)(10)

XIX. Adjournment

Board Member Richards moved to adjourn the Board Meeting. Board Member Lathen seconded the motion. The Board Meeting adjourned at 2:33 p.m.