

DELAWARE CITY BOARD OF ETHICS

IN RE: BETTY BARRETT, :
NATALIE GREEN, and : **Case No. 2016-001**
PAUL D. FITZWATER, III, in their official :
Capacities. :

DECISION OF THE DELAWARE CITY BOARD OF ETHICS

I. NATURE OF THE PROCEEDINGS

The matter before the Delaware City Ethics Board (“Board”) is a complaint filed by Megan Titus (“Councilwoman Titus”) that her fellow City Council Members Betty Barrett, Natalie Green, and Paul D. Fitzwater, III (“Respondents”) violated various provisions of the City Code of Delaware City under Article IV, Ethics for Officials and Employees (“Code of Conduct”). The Code of Conduct violations are alleged to have occurred in conjunction with the City Council’s vote on August 15, 2016 to lease an undeveloped portion of Jefferson Street to PSC Properties, LLC (“PSC”). Council Member Megan Titus submitted a complaint to the Board via email on September 13, 2016 (“Original Complaint”), and she subsequently submitted an amended complaint on September 22, 2016 (“Amended Complaint”) (collectively the “Complaints”). Respondents, through their counsel Max Walton and Lauren DeLuca, filed Respondents’ Motion to Dismiss Amended Ethics Complaint on September 30, 2016 (“Respondents’ Motion to Dismiss”).

A hearing before the Delaware City Ethics Board was called to order on October 5, 2016 at 7:00 pm. Chairman Tim Konkus and Board Members Tim Dilliplane and Ray Fruytier were present, along with Barrett Edwards, Esq. representing the Board. Max Walton, Esq. appeared on behalf of the Respondents, and Megan Titus represented herself at the hearing.

II. BACKGROUND

The Complaints involve the lease of a portion of an undeveloped street known as Jefferson Street (“Jefferson Street Property”) to PSC. After several rounds of negotiations, the City Council for Delaware City was scheduled to vote on the Jefferson Street Property lease to PSC at a council meeting held August 15, 2016. Respondents’ Motion to Dismiss, p. 2-3. Councilwoman Titus stated before the Board at the October 5, 2016 hearing that on August 12, 2016, she submitted a competing proposal to the City Council to lease the Jefferson Street Property. This proposal was read to the public at the August 15, 2016 council meeting. *Id.* The City Council ultimately voted to approve the lease with PSC (with Councilwoman Titus recusing herself), and the Councilwoman Titus filed the Complaints in response to the City Council’s vote on the lease. *Id.*

III. MOTION TO DISMISS

The initial matter before the Board was Respondents’ Motion to Dismiss Amended Ethics Complaint. Respondents moved to dismiss the Amended Complaint based on a lack of

jurisdiction and for failure to state a claim. The Board is authorized by sections 1-29(E)(4)(f) & (g) of the Code of Conduct to dismiss any complaints due to a lack of jurisdiction or for failure to state a claim. The Delaware Supreme Court has stated that a motion to dismiss may be granted when it can be determined “with ‘reasonable certainty’ that a plaintiff could prevail on no set of facts that can be inferred from the pleadings.” *Solomon v. Pathe Communications Corp.*, 672 A.2d 35, 38 (1996) (internal citations omitted). After hearing arguments from both Councilwoman Titus and Respondents, and for the reasons outlined herein, the Board voted 2 to 1 to grant Respondents’ Motion to Dismiss.

1. Jurisdiction

The Board may dismiss any complaints it receives due to a lack of jurisdiction. Section 1-29(E)(4)(f) of the Code of Conduct states that “[t]he Board shall satisfy itself that it has jurisdiction over . . . the subject matter of the complaint before proceeding with the remainder of the hearing.” Respondents have argued that the Board does not have jurisdiction over violations of the Delaware Freedom of Information Act (“FOIA”). Motion to Dismiss, ¶ 17. The Delaware Code authorizes specific avenues that Delaware citizens may pursue when seeking to challenge an action under FOIA, but municipal ethics boards are not identified in the Delaware Code as an entity authorized to hear FOIA complaints. 29 *Del. C.* § 10005. Because the Board is not authorized to hear FOIA complaints, any allegations by Councilwoman Titus pertaining to FOIA violations are hereby dismissed due to a lack of jurisdiction.

2. Failure to State a Claim

The Board may dismiss any allegations in the Complaints that fail to state a claim. Section 1-29(E)(4)(g) of the Code of Conduct states that “[t]he Board shall have the authority to dismiss any complaint which . . . fails to state a claim.” A complaint fails to state a claim when it can be determined “with ‘reasonable certainty’ that a plaintiff could prevail on no set of facts that can be inferred from the pleadings.” *Solomon*, 672 A.2d at 38. The Complaints do not articulate sufficient facts upon which any violations of the Code of Conduct can be inferred and thus are dismissed by the Board for failure to state a claim.

In the Original Complaint, Councilwoman Titus made broad factual allegations against the Respondents, but the Original Complaint only alleged a violation of one section of the Code of Conduct (Section 1-27 Fair and Equal Treatment). In the Amendment Complaint, Councilwoman Titus identified a variety of Code of Conduct sections that were allegedly violated by Respondents, but Councilwoman Titus did not identify sufficient facts to adequately state a claim that the Code of Conduct had been violated.

A. Fair and Equal Treatment

The Complaints fail to state a claim that the Respondents have violated section 1-27 of the Code of Conduct, Fair and Equal Treatment. Under Fair and Equal Treatment, the Code of Conduct prohibits behavior based on impartiality, the use of public property, and the use of public time. Code of Conduct, § 1-27. The Complaints only specifically allege a violation of the

use of public property, so the other two categories are presumably not be at issue. *See* Amended Complaint.

The Complaints fail to state a claim that the Respondents have used public property for their personal convenience or private advantage or for the personal convenience or private advantage of someone else. The Original Complaint alleges an ethics violation because the opportunity to lease the Jefferson Street Property was not publically advertised and because the lease was not awarded to the highest bidder. However, the Code of Conduct does not require leasing opportunities to be publically advertised nor does it require leases to be awarded to the highest bidder. As argued by Respondents, it would be illogical to interpret section 1-27(b) as prohibiting individuals or entities from benefiting from a lease for public property because doing so would call into question every lease the City Council approved since all such leases presumably benefit individuals or entities. For these reasons, Councilwoman Titus has failed to state a claim that an “official or employee” has used public property “for the personal convenience or the private advantage of himself or of any other person.” Code of Conduct, § 1-27(b).

B. Conflict of Interest

The Complaints allege the Respondents violated the conflict of interest provisions in the Code of Conduct, but the Complaints include no specific facts to identify a conflict of interest violation. While a conflict of interest can include many things under the Code of Conduct, the only fact loosely alluded to in the Complaints that could involve a conflict of interest was the allegation that Respondents were friends of the owner of PSC. However, this suggestion in the Original Complaint is not sufficient to state a claim for a Code of Conduct violation.

The Code of Conduct prohibits city officials from having a “personal interest in any business or transaction” with Delaware City without disclosing the same. *Id.* at § 1-28(a). A personal interest is defined as “[a]ny interest arising from blood or marriage relationships or from close business or political association” *Id.* at § 1-26(e). Although the Complaints allege the Respondents are friends of the owner of PSC, there is no allegation of a blood or marriage relationship. Nor is there any allegation of a close business or political association. Consequently, Councilwoman Titus has failed to state a claim that Respondents violated the conflict of interest provisions of the Code of Conduct.

C. Conduct of the City Council


The final group of allegations made by Councilwoman Titus is that the Respondents have violated three different areas falling under section 1-29(A) of the Code of Conduct (“City Council Relationships”). The Amended Complaint first alleges a violation of section 1-29(A)(2), council action in public, which section requires council members to treat each other with respect and not represent that he or she is speaking on behalf of the City Council when no authority has been given to do so. The Complaints include no set of facts describing any circumstances in which this provision was allegedly violated. Absent any such facts, the Complaints fail to state a claim that 1-29(A)(2) was violated.

The Amended Complaint alleges a violation of section 1-29(A)(3), council conduct with city staff, and the Original Complaint alleges the Respondents “interfered with the duties of the City Manager by not letting him negotiate the lease for the town.” Original Complaint, ¶ 3. In broad terms, section 1-29(A)(3) requires Council to treat staff members in a professional manner, to use the City Manager as the point of contact for the city staff, and to not attempt to unduly influence the opinions of the city staff. *See* Code of Conduct, § 1-29(A)(3). The Code of Conduct does not, however, prescribe any particular duties that must be fulfilled by the City Manager, such as negotiating a lease. The Complaints fail to state a claim that Respondents violated the Code of Conduct by not allowing the City Manager to negotiate the lease because the Code of Conduct does not identify specific duties of the City Manager that were interfered with by Respondents.

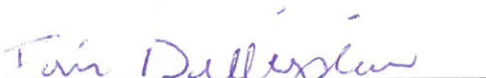
Lastly, the Amended Complaint alleges a violation of section 1-29(A)(4) of the Code of Conduct, council conduct in city council meetings, which requires council members to respectfully listen and respond to comments from members of the public. However, the Complaints include no facts describing any circumstances in which section 1-29(A)(4) was violated and thus Councilwoman Titus has failed to state a claim in this regard.

IV. CONCLUSION

The Board may only hear claims that have been sufficiently stated in the complaint and over which it has jurisdiction to act. Councilwoman Titus has failed to state a claim if the Board has determined with “reasonable certainty that [she] could prevail on no set of facts that can be inferred from the pleadings.” *Solomon*, 672 A.2d at 38. For the reasons outlined herein, the Board has determined that Councilwoman Titus has not articulated any set of facts upon which the Board could find any violations of the Code of Conduct and that the Board does not have jurisdiction over FOIA complaints. The Delaware City Ethics Board hereby grants Respondents’ Motion to Dismiss Amended Complaint by a vote of 2 to 1 and dismisses all claims against Respondents.



Tim Konkus, Chairman



Tim Dilliplane, Board Member



Ray Fruytier, Board Member

Date of filing the Ethics Board’s written decision with the office of Delaware City and mailing the Decision to the Parties: 12-19-16

EXHIBITS PROVIDED TO ETHICS BOARD

Respondents' Motion Exhibits

Exhibit A – Delaware City Council Meeting Minutes, June 20, 2016

Exhibit B – Delaware City Council Meeting Minutes, July 18, 2016

Exhibit C – Delaware City Council Meeting Minutes, August 15, 2016

Exhibit D – Complaint and Amended Complaint from Councilwoman Titus

Respondents' Hearing Exhibits

Exhibit A – Delaware City Council Meeting Agenda, July 18, 2016

Exhibit B – Delaware City Council Meeting Agenda, August 15, 2016

Exhibit C – July 12, 2016 letter from Councilwoman Titus to Mayor and Council (corrected date was August 12, 2016)

Exhibit D – Memorandum of Law as to Zoning

Exhibit E – Lease Agreement between Delaware City and PSC Properties, LLC dated September 30, 2016