

ENFORCEMENT: AN INDISPENSIBLE COMPONENT IN THE SUCCESS OF MUNICIPAL ETHICS BOARDS

By Marie Louise Victor

What are Ethics Laws, as Opposed to Anti-Corruption Laws?

A search for the word “ethics” in the Oxford English Dictionary yields “science of or treatise on morals; moral principles.” A search for the word “corruption” leads to “depraved”; and a further search for “depraved” leads to “wickedness, morally corrupt.” So, why have ethics laws in addition to anti-corruption laws? The underlying assumption of ethics laws is that public servants are good, honest citizens who will make the right choice when their public duties and their private interests diverge, if only they know, or are told, what the right choice is. Therefore, unlike anti-corruption laws, which are geared toward the depraved, wicked, and morally corrupt and therefore focus on punishment, ethics laws and the boards that administer them are created to teach public servants what the right choice is when public duties come into conflict with private interests. Moreover, making that right choice promotes public confidence in government, protects the integrity of government decision-making, limits financial waste, and promotes efficiency.

To that end, ethics boards usually have a training function to instruct public servants on the requirements of the ethics law, a legal advice function to give personal advice to public servants based on their particular circumstances, and a financial disclosure function to help create the reality of open government. To be truly effective however, an ethics board *must* have enforcement power, that is, the power to prosecute public servants for violating the municipality’s ethics law.

Components Of An Effective Ethics Enforcement Program

Government ethics laws govern conflicts between a public servant's duties to his or her governmental employer and the public servant's private (usually financial) interests. Enforcement provides the incentive for public servants to make the right choice again and again; it deters public servants who, though honest most of the time, may be tempted to stray every now and then. An enforcement program can also be used as an educational tool to show public servants the real life scenarios that often lead to a violation of the municipality's ethics laws. Also, an enforcement program shows public servants that the government is serious about compliance with those laws. The following are key components of an effective ethics enforcement program: (1) a range of appropriate penalties, including civil fines, disciplinary action, nullification of improper contracts, damages, disgorgement of ill-gotten gains, debarment from future government contracts, and, in particularly egregious cases, criminal penalties; (2) fairness; (3) an independent body to determine the facts and the law and to impose penalties for a violation; (4) appellate review; (5) a means of publishing cases after the independent body has issued a finding of a violation; and (6) confidentiality throughout the process.

Enforcement Procedure

A review of government ethics in the United States shows that the laws are similar and that they tackle, among other issues, the following:

1. Use of position to obtain personal benefits, for example hiring a relative or one's own company to do work for one's government agency;

2. Acceptance of gifts, money, and the like from those doing business with the government or compensation from anyone other than the government for doing one's government job (tips);
3. Use of confidential government information for private gain;
4. Post-governmental employment (revolving door) or dual employment (moonlighting);
5. Representation of private clients before a government agency, while employed by the government;
6. Financial conflicts, such as ownership interest in private companies that do business with one's government employer;
7. Political solicitations of subordinates or government vendors;
8. Business or financial relationships with superiors or subordinates.

The enforcement process starts with a complaint, either oral or written; however, a newspaper article with the heading "Public servant hires entire family to run agency unit!" might trigger the process. Ethics boards must have the power to initiate enforcement without waiting for a complaint. Once an ethics board receives, or perceives, an allegation of wrongdoing, the board may either dismiss it for failure to state a claim and close the case, or may proceed with an investigation, an investigation that the ethics board must have the power to control. If the investigation does not garner sufficient evidence to support a claim, the case should be closed without further action. If, on the other hand, the investigation does produce evidence of a violation, then a notice of initial determination of probable cause should be sent to the respondent. The initial determination of probable cause should state the allegations against the respondent and

should inform the respondent of his or her due process rights, such as (1) his or her right to respond in writing; (2) the deadline for the response; (3) the effect of not responding; (4) the right to have representation; (5) and the right to a hearing, should the case proceed further.

If after consideration of the public servant's response, the ethics board finds that there remains probable cause to believe that a violation of the ethics laws has occurred, the board may hold a hearing or direct a hearing to be held on the record to determine whether a violation has in fact occurred. The New York City Conflicts of Interest Board ("COIB," New York City's ethics board), for instance, directs its hearings to be held at the New York City Office of Administrative Trials and Hearings ("OATH"). OATH is New York City's central administrative tribunal, which hears cases from a variety of City agencies. Directing hearings to be held by a third party adds a level of fairness and independence to the proceeding, while being cost effective in that it eliminates the need for an ethics board to have its own hearing facilities. At the close of the hearing, after motions and discovery and all the machinations of litigation, if the administrative law judge finds that the respondent has not committed a violation, then the case should be closed. On the other hand, if the administrative law judge issues a report and recommendation stating that the respondent has violated the ethics laws, the ethics board's lawyers and the respondent may submit written comments on the report and recommendation to the ethics board, before the board makes a full review of the record, issues, findings of fact, and conclusions of law.

The administrative law judge may issue a report and recommendation, but the ethics board must have the final word on the outcome of cases prosecuted on the basis of

its laws. The members of an ethics board are chosen for their independence and impartiality and should neither work for nor have any contracts with the municipality. If the ethics board finds that the respondent has not committed a violation, then the case should be closed. On the other hand, if the board does find a violation, then the board issues a public order finding a violation and may impose a fine or require disgorgement of ill-gotten gains. The publication is important because it serves as a powerful educational tool. The thinking behind publication is that public servants who read the facts and resulting order and fine will know what types of activities to avoid – and will feel a greater incentive to comply with the ethics law. Publication serves as an additional deterrent if a public servant cares about his or her reputation or fears disciplinary action, such as suspension or dismissal; these concerns are often a bigger deterrent than any fine. Respondents rarely take the Lord Wellington approach of “publish and be damned” and will go a long way to avoid publication.

That said, one must emphasize that it is very important to keep all aspects of a case confidential until there is, at the very least, a determination by the ethics board that sufficient evidence of a violation exists to warrant a trial. Some ethics laws, such as New York City’s, make an ethics proceeding public only after the ethics board has made a final finding of a violation. Despite this tension between the public’s right to know and the public servant’s interest in protecting himself or herself against unjustified accusations, it is critical to safeguard the reputation of innocent public officials from malicious or unfounded complaints.

Finally, after exhausting their administrative remedies, that is, after receiving a final ruling from an ethics board, respondents have the right to appeal to the state court

system by way of an Article 78 proceeding. Two good examples of such appeals in New York City are: *COIB v. Elizabeth Holtzman*, COIB Case No. 93-121 (1996), *aff'd*, 240 A.D.2d 254, 659 N.Y.S.2d 732 (1st Dep't), *aff'd*, 91 N.Y.2d 488, 673 N.Y.2d 23, 695 N.E.2d 1104 (1998) (where the Court of Appeals upheld the Board's reading of the high standard of care applicable to public officials under the ethics law and rejected as a defense the asserted lack of actual knowledge of business dealings between the respondent's City agency and the affiliate of a company from whom respondent had a campaign loan), and *COIB v. Kerry J. Katsorhis*, COIB Case No. 94-351 (1998), *appeal dismissed*, M1723/M-1904 (1st Dep't 2000), *appeal dismissed*, 95 N.Y.2d 918, 719 N.Y.S.2d 645 (2000) (where the COIB fined a former Sheriff of the City of New York \$84,000 for using City personnel, equipment, letterhead, and resources for his private law practice; the Appellate Division and the Court of Appeals dismissed respondent's appeals as untimely).

Ethics boards without full and effective enforcement power have often been criticized as toothless tigers – and worse. Such boards raise and then dash hopes of prompt and fair adjudication of ethics complaints and thus only increase the public's cynicism about the honesty and integrity of our public servants. Therefore, municipalities that adopt new ethics laws should do so *only* if they are prepared to grant their ethics boards the powers and duties outlined above. Anything less may well reap a whirlwind of censure and derision.

Additional information on enforcement laws and procedures is available on the New York City Conflicts of Interest Board's website: <http://nyc.gov/ethics>

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