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	SUBJECT	Travel Expense Reporting		

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TO Honorable Bill Henry,
Baltimore City Comptroller

You have asked whether a Baltimore City elected official must have travel, not paid for by the City, approved by the Board of Estimates (BOE).

Brief Answer:

There is nothing in the City Charter or the City Code that would require BOE approval of non-funded travel by an elected official. The Administrative Manual (AM), compiled by the Bureau of Budget and Management Research (BBMR), is unclear about what circumstances would require the BOE's approval of travel by elected officials. Because of a number of inconsistencies in the application of the relevant provisions to elected officials, there is no clear answer to whether they require BOE approval for City elected officials' travel not paid for by the City. Disclosure of and transparency about the activities of elected officials are important goals. The City should craft and promulgate regulations that effectively accomplish those goals.

Analysis:

Neither the City Charter nor the City Code directly address the question posed. Only the AM deals with the subject of travel on city business. The AM has been compiled by BBMR over time. Its purpose is to communicate city policies and procedures to city employees. Typically, BBMR publishes the AM's provisions, additions, and revisions without prior review by or approval of the Law Department. The AM must be interpreted within the City's legal framework. The BBMR does not have the authority through the AM to extend the reach of the BOE beyond what is accorded it in the Charter nor to place responsibilities on elected officials inconsistent with those otherwise imposed by law. In Article VI, § 2 (Powers and Duties), the City Charter provides that the BOE "shall formulate and execute the fiscal policy of the City." A review of the other provisions of Article VI confirms that the BOE's primary responsibility is the management of the City's finances.¹

¹ Charter Article VI, § 12: "Salary and wage scales; work conditions" is consistent with the BOE's focus on finances. Subsection (1) calls for the BOE to establish wage and salary "scales" for various classifications of employees in the several agencies. Compensation of employees is clearly a critical element of the City's fiscal status. Subsection (2) calls for the BOE to insure that employees' working conditions, citing vacation and sick leave as examples, are consistent from agency to agency, thus avoiding compensation inconsistencies that might arise from aspects of employment that can add to or substitute for salaries and wages. The reference of subsection (2) to working conditions in a section dealing with employee compensation does not open a broad new BOE duty to provide for general workplace operational rules.

The "Administrative" portion of the AM includes a section on travel policies. AM 239-1 and 239-1-1 expressly set forth travel policies for elected officials. The provisions cover the Mayor, the Comptroller and members of the City Council. AM 239-1-1 requires that elected officials complete a travel request form "for out of town business travel." It specifically requires that "[a]ll travel requests in excess of \$800 must be filed with the Clerk of the Board of Estimates at least 20 days before the trip departure."

For "Travel under \$800, No Cash Advance," three steps are listed:

- Completion of a Travel Request form
- After return from the trip, submission to BBMR of a Direct Payment Order (DPO) and the required receipts.
- Forwarding of the package to Accounts Payable by BBMR

Thus, for travel costing the city less than \$800, elected officials are not directed to obtain approval from the BOE. By clear implication, this provision does not require them to submit a request for approval if no City funds are requested.

In AM 240 *et seq.*, there are additional provisions dealing with travel. There is no express reference in these sections to elected officials. Instead, the references are to City employees and "representatives."² It is not clear that these sections apply to elected officials, the express subjects of AM 239. Nowhere in the text of AM 240 or in its subsections does the term "elected official" even appear. The first paragraph of the Overview, AM 240-1, requires that travel requests be submitted for approval to either the representative's agency head (which would not be applicable to the Mayor, Comptroller or City Council members) or to the BOE. Whether the request should go to the BOE depends not on the status of the requester (e.g. a person who has no agency head), but on the conditions of the trip, "its cost, length of absence, etc."

The reference to the BOE and conditions of the trip gets to the heart of the ambiguity presented by your question. In AM 240-3 "Board of Estimates Approval," a travel request form from an employee requires BOE action if any of the following conditions exists:

- the representative's absence will exceed five (5) workdays, or one or both weekend days;
- compensatory leave or overtime work will be necessary while in travel status;
- a rented vehicle "is necessary by the employee on arrival to the travel site;" or
- the travel is outside the continental United States.³

² There are no definitions provided. While "employee" has a legal connotation, "representative" does not. It could mean anything from an employee to outside counsel representing the City in litigation or a transaction.

³ With regard to international travel, approval of the BOE is required "regardless of the source of funds ..." This is ambiguous. Throughout the BOE minutes/agenda "source of funds" means the City account from which the relevant funds are to be drawn. The phrase appears repeatedly and consistently has that meaning. No definition clarifies the term "source" in AM 240-3, but it could also mean a non-City account.

It is readily apparent that a number of these conditions cannot easily be applied to an elected official. An elected official does not work on a clock. The meaning of a workday is ambiguous in this context. For a City Councilperson, for example, does a workday mean the time when his or her attendance is required (for a committee hearing, or a council meeting)? Or does it mean the full, seven days a week on-call status that is true for the City's elected officials? The implicit concept that a weekend day is not a workday is also incompatible with an elected official's duties. Similarly, there is no relevance of compensatory leave or overtime work for an elected official.

It is also worth noting that at the end of each subsection of the AM there is a list of "Related Policies." The lists at the end of AM 239-1 and 239-1-1 have no reference to AM 240-1 through 240-3, but only to AM 240-5.1 (dealing with daily subsistence rates). If the requirements of AM 240-1 and 240-3 were meant to be engrafted on elected officials who are specifically told in AM 239-1 and 239-1-1 that no request for less than \$800 (as a request for no funds at all surely is) requires BOE approval, then presumably the Related Policies addendum would have alerted one to AM 240-3 in particular. This point is corroborated by the fact that the section central to the conundrum, AM 240-3, likewise fails to cross reference AM 239-1 and 239-1-1.⁴

The conditions in AM 240-3 would also be problematic if applied to elected officials in other ways. Travel by a Mayor, Comptroller, or Councilperson often mixes city business with personal and political purposes. For example, if one of these elected officials travels out of state and visits a municipal office or has a meeting with local officials while on vacation, does that mean that the time arguably devoted to city business is what is counted for the five day or the weekend conditions? Does the municipal side visit mean that the trip, predominantly a vacation, is now subject to BOE approval? Of course, if the trip requires more than \$800 of city funding, then there is no question of the need for BOE approval. But the question addressed here assumes no expenditure of city funds at all. Moreover, for travel covered by the conditions in AM 240-3, there is no cost factor (to anyone) that would limit the application of the provision. Any travel, no matter how inexpensive, is covered. Does AM 240-3 therefore require a Mayor to get BOE approval for a Saturday event in Baltimore County with the County Executive promoting City-County cooperation?

If interpreted to require BOE approval for trips that are in significant part personal or political, the AM could encroach on protected activity. The city government cannot prevent an elected official from taking personal travel, even when that travel makes a political statement, such as attending a meeting of a group promoting racial equality in government. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Indeed, the City can only regulate travel of its employees when the government interest in controlling an employee's words and actions outweighs the private, First Amendment rights of the employee. Philips v. City of Dallas, 781 F.3d 772 (5th Cir. 2015); *accord Joyner v. Lancaster*, 815 F2d 20, 23 (4th Cir. 1987). Under Maryland law, local government officials are to enjoy the broadest free association rights possible. Md. Code. Local Gov't § 1-303.

⁴ Confusingly, AM 240-1, "Travel Package Overview," does reference AM 239-1-1 in the "Related Policies" addendum, which does little to alleviate the uncertainty of an elected official trying to understand the directives of the two sections."

Regulations that may infringe First Amendment privileges are subject to being stricken as overbroad. Interpretations of AM 240-1 and 240-3 in a way that constrain an elected official's political, personal and First Amendment rights are disfavored. AM regulations that affect a person's right to free association would have to be very clear and narrowly focused only on city business to be enforceable. This is particularly so where the regulation creates a prior restraint. By requiring BOE approval of non-funded travel, the regulation would impose a prior restraint. An application of AM 240-1 and 240-3 as currently drafted to elected officials taking non-City funded trips would not be clear or focused.

There are other provisions in AM 240-1 and 240-3 that raise additional questions about the applicability of those sections to non-funded travel. The overview provided in AM 240-1 states that "[i]t is the intent of this policy to encourage travel on official City business by the most economical means, i.e. discount airfare, and to maximize City savings on conference expenses, i.e. early bird registration and number of employees permitted to attend the same conference." None of these worthy goals is compromised by travel not funded by the City. This point is reemphasized later in AM 240-1 where it is stated that the Travel Request form "must be approved by the appropriate body if the representative is to have the trip funded by the City."

Finally, AM 240-1 makes it clear that any failure to obtain BOE approval precludes reimbursement but imposes no other consequence. That suggests that the section has no applicability to a situation where no reimbursement at all is sought. If the point of requiring BOE approval for travel not funded by the City is disclosure and transparency, those goals could be satisfied by the ethics rules that require disclosure of gifts, including funding of travel and lodging paid for by others.

A review of BOE minutes/agenda does not provide a clear pattern of custom and usage by elected officials that might have aided in interpreting the provisions in question. In three instances of international travel in 2015 and 2016, Mayor Rawlings Blake sought the approval of trips from the BOE even though payment for the travel was arranged by the US Conference of Mayors. But we know of no other occasions when similar approval was sought for domestic trips longer than five days or including one weekend day that were funded by, for example, the Mayor's Conference or two other organizations that reportedly sponsored travel for Mayor Rawlings Blake, the Democratic National Committee and the American Federation of Teachers.

Since the beginning of 2017, two councilmen, whose travel was fully paid for by third parties, provided information about their trip to the BOE many months after returning, explaining that they were unaware that they were supposed to do so. Their explanation suggests that it was not widely known that BOE approval was needed for non-City funded travel. Other councilmen reported trips partially paid for by the City and partially paid for by third parties. In every instance their reports to the BOE were months after the trips, despite the directive in AM 240-3 that BOE approval be obtained (implying a pre-trip disclosure). In the same time frame, Mayors Pugh and Young each reported a single, partially non-City funded trip that extended over a weekend day.

Each of these elected officials could well have traveled on other occasions in which third parties contributed to the costs of travel. There have also been many other City elected officials who have served during these years. We do not know how many trips lasting more than five days or including a weekend day were taken and not reported to the BOE. It is not unreasonable to assume, however, that there were at least as many instances of non-compliance with the

directives of LM 240-3 by elected officials as there were instances of conformity to those directives.

In sum, what we can glean from the history of the handling of non-City funded travel by elected officials confirms the lack of clarity of the relevant AM provisions.

Conclusion:

If the City desires to regulate travel by elected officials, even when the travel does not require city funding, it can, but in doing so, it acts effectively and lawfully only if it (1) expressly identifies that elected officials are to be covered, (2) deals with the application of the provision to the particulars of the their jobs and (3) narrowly crafts the provision to apply to city business only, without regulating political or personal business at the same time. The Law Department stands ready to assist in developing and drafting such provisions and ensuring their enforceability.