

Philadelphia Board of Ethics
Meeting Minutes
April 17, 2013 - 1:00 pm
One Parkway Building
1515 Arch Street, 18th Floor

Board Present

Michael H. Reed, Esq., Chair
Judge Phyllis Beck (Ret.), Vice-Chair
Sanjuanita González, Esq.
Brian J. McCormick, Jr., Esq.

Staff Present

Shane Creamer, Esq.
Nedda Massar, Esq.
Maya Nayak, Esq.
Michael Cooke, Esq.
Elizabeth Baugh
Bryan McHale

I. Call to Order

Chair Reed recognized the presence of a quorum and called the meeting to order at 1:05 pm.

II. Approval of Minutes

By a 4-0 vote, the Board approved the meeting minutes, as corrected, for the public meeting that was held on March 20, 2013.

III. Announcements from the Chair

Chair Reed announced that Father C. Kevin Gillespie has been confirmed as the Board's new member, filling the seat vacated by William Brown III. Father Gillespie will be sworn in before the public Board meeting on May 15, 2013.

IV. Executive Director's Report

A. Litigation Update

i. Lodge No. 5 of the Fraternal Order of Police, *et al.* v. City of Philadelphia, *et al.*

Mr. Creamer explained that the FOP had brought suit against the City and the Board of Ethics seeking to strike down the Home Rule Charter's ban on members of the police department making political contributions. He reported that, on February 21, 2013 Judge Sanchez of the Federal District Court granted the City's motion for summary judgment and dismissed the FOP's

case, thereby upholding the ban. The FOP has appealed Judge Sanchez's ruling. The FOP's brief in support of their appeal is due in late May and a brief from the Board in response will be due in late June.

ii. Cozen O'Connor v. Philadelphia Board of Ethics

Mr. Creamer explained that, on July 18, 2012 Judge Tucker of the Philadelphia Court of Common Pleas ruled in the Board's favor in resolving the case *Cozen O'Connor v. Board of Ethics*, a case challenging the Board's interpretation of the contribution limits found in the City's Campaign Finance Law. Judge Tucker ruled that post-election forgiveness by Cozen O'Connor of the debt owed to it by the Friends of Bob Brady at one time and *in toto* would be subject to the City's contribution limits. Cozen has appealed Judge Tucker's ruling to Commonwealth Court. The parties have filed briefs in the appeal and the Board is waiting to hear if the Court will schedule oral argument. On behalf of the Board, Mr. Creamer thanked the Board's counsel at Dechert for their pro bono representation in this matter.

B. Lobbying Update

Software Project: Mr. Creamer said that a Notice of "Intent to Contract" was posted on March 16, 2013 on the eContractPhilly website indicating that the City intends to contract with Acclaim Systems, Inc. to develop the City's online lobbying filing project. The Board is waiting for the final approval of the Law Department and the issuance of an "Intent to Award" the contract to Acclaim. Staff expects that implementation of the online lobbying system will take four months from the date that the "Intent to Award" is issued.

Filing Update: Mr. Creamer reported that the Board's website has been updated to include lists of lobbying registrations received through March 2013 and images of the 2012 fourth quarter expense reports.

C. Financial Disclosure Preparation

Mr. Creamer explained that many of our staff members are now involved in the annual financial disclosure process which requires many City officials and employees and the members of City boards and commissions to file one or more of three annual financial disclosure forms. The filing deadline is May 1, 2013 and the three forms are the City Form (required by the City Ethics Code), the Mayor's Form (required by an Executive Order), and the State Form (required by the State Ethics Act).

Mr. Creamer reported that in order to promote compliance with these requirements, staff makes every effort to reach as many of the filers as possible with email reminders. The reminders describe the various disclosure forms and the online electronic filing system. Also included are instructions for those who choose to file paper forms.

Mr. Creamer pointed out that this year, the Board has been very fortunate to have help from the Office of Human Resources, which issued the first batch of email reminders to more than 6,000 City employees. Staff has issued email reminders to hundreds of members of City boards and commissions, and this week will mail letters to 575 City employees who left City government during the past year, but still have to file one last time.

Now that the reminders have been sent, staff receives a constant stream of phone calls with two consistent themes: callers want to know why they have to file and how to use the online system.

Mr. Creamer said that, in the reminders and phone contacts with filers, staff explains that an in-person Filing Support Center would be available from Monday, April 22 through Friday, April 26, 2013 and Monday, April 29 through Wednesday, May 1, 2013 at the Marriott Residence Inn, across from City Hall, from 8:30 AM until 6 PM each day. Computer workstations are available for those filers who wish to complete their Financial Disclosure forms onsite, and Support Center staff assist filers one-on-one with the online process. The Support Center is provided by the Records Department and is staffed by representatives of the vendor who manages the financial disclosure software.

Financial disclosure season is therefore a cooperative effort of the Records and Human Resources Departments and the Board of Ethics.

V. Report on Recent Advice Activity

Ms. Nayak summarized her report on recent advice activity, which is described in detail below:

1. Board Opinions

At the March 20, 2013 meeting, the Board issued public Opinion 2013-004 and advised an attorney requestor that the Lobbying Code prohibits him and his client from agreeing that he be paid on a contingent fee basis for lobbying. The Opinion concluded that an exception from the contingent fee prohibition does not exist for attorneys, as the requestor had suggested.

2. General Counsel Opinions

On March 28, 2013, Executive Director Shane Creamer issued a memo directed to Associate General Counsel Nayak, providing that until the Board approves a new General Counsel and that individual is installed, she will serve as the General Counsel's designee for purposes of Regulation No. 4. With this authorization, she has been handling all the advice requests and also issued one non-public General Counsel Opinion. Opinion No. 2013-503 advises a firm that it is not required to register as a lobbyist when it provides services and expertise to the City pursuant to a contract with the Law Department and has not been hired by the City to conduct any lobbying activity. The redaction will be included in next month's report.

3. Informal Email Guidance

- a. Conflict of interest:** Received an inquiry from a supervisor asking about a situation in which a current City employee has an unpaid position on the Board of Directors of a non-profit organization from which she will be resigning and only then will she be taking on new duties in which she will take action as a City employee that likely impacts the financial interests of that non-profit organization. Advised that based on a quick review there did not appear to be an issue under the laws over which the City Ethics Board has jurisdiction or the State Ethics Act. Provided links to two relevant Board advisory

opinions. Included caveats regarding the Board's inability to give binding advice on the State Ethics Act, appearances of impropriety, and the fact that informal email guidance is not a ruling that can be relied upon.

- b. Campaign finance:** Received several questions from one person about the recent amendments to Regulation 1 on campaign finance. Advised as follows:
- PACs are required to file with the Board any report filed with the PA Department of State that discloses contributions to candidates for City elective office. The recent Reg 1 amendment restates the requirement in plainer language.
 - If a PAC has no expenditures made to influence the outcome of a covered City election in a reporting period, then no report or annual report is required to be filed with the City Board of Ethics.
 - A contribution to a non-candidate committee (such as a Philadelphia political party committee or PAC) would not on its own trigger the filing requirement. If, however, the contribution to the committee was a pass through contribution to one or more City candidates, that would trigger the filing requirement.
 - The signed sworn statement that must be submitted with campaign finance reports is due on the same day the report is due. However, as long as we receive it within a couple of days, there would not be a problem.
- c. Political activity restrictions:** Received an inquiry about whether an elected City official may serve as the chair of a political committee. Provided the 1993 Solicitor's Opinion No. 93-6 issued to District Attorney Lynne Abraham, which is the latest written word on the application of Charter Section 10-107(3) to elected officials. Advised that the Board has not addressed the application of 10-107(3) to service as chair of a political committee or to elected officials.

4. Regulation 4 Amendments Effective

Recent amendments to Regulation 4, which addresses the Board's advisory opinion process, became effective on March 28, 2013. The amendments eliminated a 14-day waiting period for the Board to publish an approved opinion.

5. Outline of Future Work on Board Regulations

Ms. Nayak informed the Board that she and Mr. Cooke had recently met and outlined a work plan for Board regulations. They identified high, medium and low priority regulation needs. This includes new regulations, such as for gifts and conflicts of interest, as well as amendments to existing regulations. Ms. Nayak said staff will be working on regulations, but it may be some time before drafts are ready for Board review. She noted that additional staff would be very helpful for making progress on the regulation work plan.

The regulation work plan that Ms. Nayak described is as follows:

High Priority

- New Regulation on gifts
- Regulations 2 (Investigations and Enforcement Proceedings) and 5 (Confidentiality) amendments
- Regulation 1 (Campaign Finance) amendments
- New Regulation on conflicts of interest

Medium Priority

- Regulation 9 (Lobbying) amendments
- Regulation 6 expansion to cover all of Charter Section 10-102

Low Priority

- Regulation 7 (Annual and Routine Training) amendment (after online training is active)
- New regulation on financial disclosure (mandated by Code)
- New regulation on Code Section 20-602's representation restriction
- New regulation on post-employment restrictions

VI. Selection of General Counsel

A. General Counsel

Chair Reed noted that at the Board's January 23, 2013 meeting, he announced that the Board's General Counsel, Evan Meyer, would retire in March, and that the process to hire a new General Counsel would begin. Section 3-806(g) of the Home Rule Charter requires that the Board shall, by a vote of three members, appoint its General Counsel to serve at its pleasure subject to the availability of appropriations. Therefore, at the January 23 meeting, the Board approved a job description, and staff recommended that the description be posted on the Board's website, the City's Human Resources website, the website of COGEL (Council on Government Ethics Laws), and as an online advertisement at lawjobs.com.

Chair Reed said that the position was posted on the four websites and that the Board received many responses to the posting by the February 28 deadline or shortly thereafter. He noted that there were applications from candidates in New York, New Jersey, and the Washington, D.C. area, as well as from the Philadelphia area.

Chair Reed said that the Board subsequently conducted interviews with several highly qualified candidates. He believed that the Board was in a position to take action on the appointment of a candidate to fill the General Counsel position. Staff advised the Board that there are three further steps in the City's hiring process that must be taken once a candidate is selected: a City-mandated background check; a City tax compliance check; and receipt of Finance Department approval that there is adequate funding for the \$117,260 annual General Counsel salary. Therefore, any vote to appoint a candidate to the General Counsel position must be conditioned on the receipt of those three clearances.

Judge Beck moved to appoint Maya Nayak to the General Counsel position, pending receipt of the necessary clearances noted by Chair Reed. Ms. González seconded the motion. By a 4-0 vote, the Board approved the appointment of Maya Nayak to the position of General Counsel, pending the necessary clearances.

Chair Reed congratulated Ms. Nayak and voiced his belief that she would effectively and diligently discharge her new duties.

Ms. Nayak thanked the Board for having the trust and the confidence in her to appoint her as General Counsel. She said she was delighted to serve the Board and the People of the City of Philadelphia and that she looked forward to expanding on the good work that has already been done by the Board.

B. Associate General Counsel Vacancy

Chair Reed pointed out the importance of beginning the process of filling the Associate General Counsel position to be vacated by Ms. Nayak as soon as possible. Staff advised that, in addition to empowering the Board to appoint its Executive Director and General Counsel, Charter Section 3-806(g) also empowers the Board to appoint and fix the compensation of such other staff as may be required to meet its obligations. This appointment authority is subject to the availability of adequate funding.

Chair Reed reported that the Board sought advice from the Law Department in 2008 to determine whether it is permitted by Charter Section 3-806(g) to delegate its authority to fill other staff positions. The Law Department responded that the Board could make this delegation to the Executive Director, and the Board has done so on several occasions to hire other staff members.

Subsequently, anticipating that there might be a need to fill the Associate General Counsel position, staff recently asked the Law Department whether or not the Board could delegate its authority to the General Counsel to hire counsel-related staff, including an Associate General Counsel. The Law Department responded that the Board could delegate hiring for counsel-related positions to the General Counsel.

Mr. McCormick moved that Ms. Nayak be delegated the authority to begin the recruitment process for an Associate General Counsel. By a 4-0 vote, the Board approved the delegation of authority to Ms. Nayak to recruit an Associate General Counsel.

Judge Beck asked how the process for selecting an Associate General Counsel would be different from the one used to select the General Counsel.

Ms. Nayak described the anticipated search process for an Associate General Counsel. She explained that a job description would be posted at all the places a posting had been made for the General Counsel position. This includes the COGEL and City websites, and perhaps a posting would also be made with the City Law Department. Then Ms. Nayak and Ms. Massar would review the applications that were submitted and select candidates for them to interview. They would identify a final candidate or final candidates whom the Board Chair and other members would be welcome to interview prior to an employment offer being made.

Chair Reed added that it was expected that Ms. Nayak would also solicit the interest of those who applied for the General Counsel position.

Both Chair Reed and Ms. Nayak affirmed that the Board would be able to have as much involvement in the process as they wished to have and that Ms. Nayak would consult with them.

Chair Reed explained to the Board that it would help facilitate the process if Ms. Nayak could not only recruit but also be able to hire the candidate who was ultimately selected. He suggested that it would therefore be appropriate for the Board to authorize Ms. Nayak to recruit and hire the Associate General Counsel while consulting with the Board during the process.

Ms. González moved that Ms. Nayak be delegated the authority to begin the recruitment process for an Associate General Counsel. By a 4-0 vote, the Board approved the delegation of authority to Ms. Nayak to recruit an Associate General Counsel.

Ms. González then moved that once Ms. Nayak has received the three approvals discussed earlier and is the Board's General Counsel, she be delegated the authority to appoint and fix the compensation of an Associate General Counsel, subject both to consultation with the Board and the allocated budget amount.

By a 4-0 vote, the Board also approved the delegation of authority to Ms. Nayak to appoint an Associate General Counsel, subject to her being the General Counsel, to her consultation with the Board, and to the allocated budget amount.

VII. New Business

No new business was discussed.

VIII. Questions/Comments

There were no questions or comments from the public.

The public session of the Board's meeting was adjourned at 1:40 pm. Chair Reed announced the Board would meet in executive session following adjournment of the public meeting to address confidential enforcement matters and non-public advice.