

Philadelphia Board of Ethics
Meeting Minutes
November 20, 2012
Board of Ethics
One Parkway Building
1515 Arch Street, 18th Floor
1:00 pm

Present:

Board

Richard Glazer, Esq., Chair
Michael Reed, Esq., Vice Chair
Judge Phyllis Beck (Ret.)

Staff

Shane Creamer, Esq.
Nedda Massar, Esq.
Evan Meyer, Esq.
Michael Cooke, Esq.
Elizabeth Baugh
Bryan McHale
Tina Formica

I. Call to Order

Chair Glazer recognized that a quorum was present and called the meeting to order at 1:02 pm.

II. Approval of Minutes

By a 3-0 vote, the Board approved the meeting minutes, as corrected, for the public meeting that was held on October 17, 2012.

IV. Executive Director's Report

A. Litigation Update

i. McCaffery v. Creamer, et al.

Mr. Creamer reported that staff filed a motion for Summary Judgment on November 5th. Judge Mazer Moss will hold a settlement conference on December 10th and will also hear argument on the motion for Summary Judgment motions that have been filed. The case is scheduled to begin trial on March 4, 2013. Staff anticipates that litigation of this case will continue to consume significant amounts of their time.

Mr. Creamer noted that staff was informed that this matter will be reassigned to another judge.

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

Mr. Creamer reported that on July 11th, Judge Sanchez heard oral argument on the parties cross motions for summary judgment. Staff awaits Judge Sanchez's ruling. He thanked Mark Maguire and Eleanor Ewing, the Board's counsel at the Law Department, for their representation in this matter.

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

Mr. Creamer reported that on July 18th, Judge Tucker 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 Court has not yet set a schedule for briefing and oral argument.

iv. Dougherty v. Philadelphia Newspapers LLC, et al.

Mr. Creamer reported that on November 7, 2012, Philadelphia Newspapers LLC served a subpoena on the Board seeking documents related to a defamation action filed by John Dougherty. Dimitri Mavroudis of the Law Department is representing us and is in contact with Philadelphia Newspapers' counsel at Pepper Hamilton.

B. Lobbying Update

Software Project: Mr. Creamer informed the Board that the deadline for proposals to develop the Board's online lobbying filing and disclosure system was extended by two days because City offices were closed for Hurricane Sandy. Nine proposals were received by the new November 7th deadline and are currently conducting the proposal evaluation process with the Office of

Innovation and Technology (OIT). Based on discussions with OIT, staff determined that they cannot finish the evaluation process by the November 26th date listed in the RFP. The proposals are too complex and require longer than we anticipated for review. It will take approximately two weeks longer to complete the evaluation process. Even with the storm delay and the extra time for review, we may still be able to begin the actual design project in early January.

Mr. Creamer said that as staff noted last month, on this schedule, the online system cannot be in place to accept lobbying registrations on January 1, 2013. However, staff will have a better idea about how quickly a registration module will be available once we complete review of the proposals. Once staff has this information, they expect to present alternatives to the Board concerning the 2013 registration process which may include a modified filing schedule so that filers can use the electronic system rather than paper forms. There is also a possibility that the expense report module may be ready in time for filing the 2013 first quarter reports that are due on April 30th.

Filing Update: Mr. Creamer said that third quarter expense reports were due on or before October 30th. Staff is still processing the reports and again will work with OIT to make images of these reports available on the Board's website. Staff continues to provide filing assistance to lobbyists, firms and principals who call the office every day.

C. Training

Ethics Training: Mr. Creamer announced that two more ethics training sessions for new City employees are scheduled this year, and all elected City officials have received ethics training in 2012. However, with the Board's small staff and with the limitations of the new office space, staff has not been able to arrange and conduct ethics training for many City board and commission members. Staff is also disappointed that they haven't made further progress toward implementing online ethics training which will enable them to provide more training with the Board's small staff and to begin to offer refresher training to thousands of City employees.

Chair Glazer asked why staff hasn't offered more training. Ms. Massar responded that time is an issue for staff. Designing the content takes time. Staff has begun to work on the Board and Commission module.

Chair Glazer asked if there are any external factors. Ms. Massar responded that there was a technical issue, but that has been resolved by OIT.

Chair Glazer asked if staff would benefit from hiring an outside consultant. Ms. Massar said that OIT has helped. The content will be prepared by the General Counsel and Associate General Counsel which is internal.

Mr. Creamer said that at the January meeting, staff will present an ethics training plan to the Board for 2013 that will include a training schedule for City board and commission members, a

revised plan to provide refresher ethics training for City employees, and a plan to implement online ethics training.

Campaign Finance Training: Mr. Creamer reported that the offices of City Controller and District Attorney are up for election in May 2013. Staff began offering campaign finance training sessions well in advance of the 2009 and 2011 election dates and believe that these sessions were extremely successful and beneficial to the candidates and their treasurers. Therefore, on December 12th staff will offer the first campaign finance training session for the 2013 elections. Staff will send emails to announce this session and future sessions to the hundreds of candidates and committees that have registered to electronically file campaign finance reports.

Judge Beck suggested that staff reach out to the Philadelphia Bar Association's Committee on Judicial Selection and Retention and offer campaign finance training through that group.

Mr. Creamer explained that the December 12th session will be presented jointly with the Office of the City Commissioners. Michael Cooke and Tim Dowling, a member of the City Commissioners' staff, presented the 2011 election sessions. Staff found that the joint sessions were especially effective because they were able to address questions concerning both the City and state campaign finance laws.

D. Board Appointments

Mr. Creamer announced that Mayor Nutter has nominated Judge Phyllis W. Beck for re-appointment to serve a full term on the Board ending November 16, 2017. The Mayor has also nominated Brian J. McCormick, Jr., managing partner at Sheller, P.C. to serve on the Board for a term ending November 16, 2016.

E. COGEL

Mr. Creamer said that staff will report next month on their participation in the December 2012 Conference of the Council on Governmental Ethics Laws (COGEL). COGEL is a voluntary international organization composed primarily of local, state, and national government officials who regulate ethics, campaign finance, lobbying, freedom of information, and election administration laws. This year's Conference will be held in Columbus, Ohio from December 2nd through 5th.

Mr. Creamer stated that he is proud that members of the Board's staff continue to be involved in COGEL activities. He is currently serving as a member of the COGEL Steering Committee which functions as the organization's Executive Committee. Evan is a member of the Publications Committee that produces the Guardian, a quarterly electronic newsletter. Maya will host a Breakfast Table Topic at the Conference. Nedda, who is a COGEL Past President, currently serves on the Awards Committee and will moderate a Conference session called the Local Agency Roundtable.

Mr. Creamer reminded Board members that the December meeting will begin at 11 am.

Chair Glazer asked staff about the status of the Board confirmations.

Mr. Creamer explained that a City Council Resolution was introduced to reappoint Judge Beck to a full term. As of Friday staff had not heard anything regarding Brian McCormick. He said that the process starts with a Resolution which is then referred to the Committee of the Whole. At this point staff is not aware of a hearing date.

V. General Counsel's Report

Mr. Meyer noted that he confirmed with the Records Department and the amended Regulation No. 4, will be effective November 20, 2012.

Note: This will be the last General Counsel Report to refer to written advisories of this office as either "Formal Opinions" or "Advices of Counsel." Amendments to Board Regulation No. 4 that took effect as of 12:01 a.m. today refer to both types of advisories as "Advisory Opinion." Going forward, we will caption formal advisories as either "Board Opinion" or "General Counsel Opinion."

1. Formal Opinions. Mr. Meyer reported that there was one Formal Opinion since the October report.

Formal Opinion 2012-004 (October 17, 2012). Stephanie Singer, then Chair of the City Commissioners, requested a public advisory opinion as to whether there are any issues under the Public Integrity Laws if she were to accept reimbursement from the Pew Foundation for transportation to a meeting of Election Directors of major US jurisdictions that was held in Washington, D.C. on September 21, 2012.

Given the fact that the Office of City Commissioners provides no oversight over, contracts with, or other official action affecting the Washington DC office of the Pew Foundation, the Board found that the proposed reimbursement is not a gratuity "for an act or omission in the course of [Commissioner Singer's] public work," and there is no issue under Charter Section 10-105. For the same reason, the reimbursement cannot "reasonably be expected to influence" Commissioner Singer, and thus there is no issue under the City Code's gift provision. Accordingly, Commissioner Singer was advised that she may accept the proposed reimbursement.

Formal Opinion No. 2012-004 is currently available on the Board's website.

2. Advices of Counsel. Mr. Meyer reported that there was one Advice of Counsel since the October report.

Advice of Counsel GC-2012-513 (October 17, 2012). Assistant City Solicitor Allyson Davis requested a public advisory opinion as to the effect of the ethics laws on her current service as an uncompensated member, and vice president of the board of directors of a charter school, a nonprofit corporation, while also working for the City's Law Department. We advised Ms. Davis as follows:

(1) The Charter's restriction on benefitting from City contracts contained in Charter Section 10-102 does not restrict her, since she is uncompensated.

(2) Similarly, the Code's conflict of interest provisions, Code subsections 20-607(a) and 20-607(b), do not restrict her.

(3) However, the State Ethics Act's conflict of interest provision may apply to her and to the financial interests of a nonprofit on whose board she serves, so she may wish to consult with the State Ethics Commission.

(4) Under Code Section 20-609, she must not disclose confidential City information she acquires in her service with the City to the Charter School for the purpose of advancing the financial interests of the School.

(5) Under Code Section 20-602, she may not represent others, including the Charter School, as "agent or attorney" in transactions involving the City.

(6) The Commonwealth's financial disclosure form requires that Ms. Davis disclose her directorship with the Charter School, when she files that form next April.

Advice of Counsel GC-2012-513 is currently available on the website of the Board of Ethics.

3. Informal e-mail guidance. Mr. Meyer reported that through Wednesday, November 14, 2012, there were five of these since the October report, issued either by him or Associate General Counsel Maya Nayak. *Note that in every such email we state the following: "This informal general guidance is not a ruling on your particular situation and does not provide you protection from an enforcement action." We add that if the requestor would like a definitive ruling that applies the Public Integrity Laws to his/her specific situation and that protects against a possible enforcement action, then they should ask us for an advisory opinion, providing, in writing, full and specific facts on which the opinion is to rely, including their name and title, specific question, and whether they are requesting a public or nonpublic advisory.*

a. Prior to Election Day, a requestor, presumably a City employee, posted this inquiry: "My wife is not a city employee. We occupy the same house. Can she house volunteers in a presidential campaign?"

We advised that the political activity restrictions of Section 10-107 of the Home Rule Charter, as interpreted by Board of Ethics [Regulation No. 8](#), apply to any political campaign, not just those in Philadelphia or Pennsylvania. Over the years, we have been asked from time to time whether there is a problem if a non-City employee who is married to a City employee hosts a political fund-raiser in a house jointly owned by the couple. We always advise that husbands and wives are separate (especially in Pennsylvania, which has an Equal Rights Amendment), and that therefore, if the husband/City employee has nothing to do with the fund-raiser, there is no issue under Section 10-107 if the wife (who does not work for the City) is the sole host of the event. However, we caution, this cannot be a sham, and the spouse who is not the City employee must be genuinely the one hosting the event and not simply a stand-in for the City employee (the real host), as a dodge around the Charter restriction.

Applying the above principles to the request, we advised that the essential requirement is that an employee may not take part in "any political activity that is performed in concert or coordination with a political party, candidate, or partisan political group." Assuming that the employee jointly owns or rents the house with his wife, such a decision is necessarily not solely that of one spouse. Further, assuming that these volunteers are coordinated by a political party, candidate, or partisan political group (and it's hard to imagine that they are not), then the question is whether housing campaign volunteers is itself "political activity" as defined in Paragraph 8.1(n) of Regulation 8. No published advisory opinion of this Board has addressed that question. It could certainly be argued that providing housing, so that volunteers are able to come to Philadelphia to campaign for a candidate is "activity directed toward the success . . . of a political party [or] candidate." However, for a definitive ruling, we advised the requestor that he would have to request a formal advisory, and it is not certain what the view of the Board would be on this question.

b. We received a common question about the post-employment laws (sometimes called "revolving door" restrictions). As usual, we provided a short summary, with links to published advisories from our website.

c. We received a common question from a member of a City board/commission concerning potential conflicts due to being a member of an outside group that occasionally appears before that body.

We provided links to several advisories on our website: GC-2010-503 (a general summary of all the rules that apply to a City board, GC-2010-506 (which has a good discussion on appearance of impropriety), and Formal Opinion No. 2009-003 (which has a good discussion on pages 9-10 about the exact procedure for disclosing and disqualifying yourself from Board actions in cases of conflicts).

d. We received a long and complicated request for informal advice from a lobbying firm on behalf of a client, as to whether the client qualified as a principal required to register with the Lobbying System. There were a number of issues. First, the requestor advised that the client

pays a monthly retainer for a number of services, but did not specify the amount of the retainer or how it is allocated among different services. The requestor advised that among the services it provides are pursuing contract opportunities with business entities and also with government entities; advising the client on procurement procedures, protocol, etc. ; and “strategizing services” on how best to pursue a specific contract offering. After emphasizing that our advice is only informal and based on the facts provided, we first advised as to the general issue of retainers by addressing some hypotheticals:

If you have a client who pays you \$1000 a month (\$3000/quarter) solely for monitoring private contract opportunities and advising you on procedures, but your contract with the client is for you to do no lobbying ever and you do nothing related to lobbying for that client, and you get a \$3000 retainer from that client for 1Q13, the client would not have to register and report for 1Q13.

If, on the other hand you have a client who pays you \$1000 a month (\$3000/quarter) solely for lobbying the City, and you get a \$3000 retainer from that client for 1Q13, even if you do no lobbying for that client in 1Q13, if your deal with the client means that you keep the \$3000, then you were a lobbyist for that client in 1Q13, and the client would have to register and report for 1Q13.

Closer to the facts presented by you, if you have a client who pays you \$1000 a month (\$3000/quarter) for a combination of nonlobbying monitoring of private business contract opportunities and advising you on procedures; and lobbying the City, and you do no work at all for that client in 1Q13, if your deal with the client means that you keep the \$3000, then it would probably be advisable for you to have some provision for this circumstance in your contract with the client, and you should present the exact facts to us for advice. (You did not advise us as to the amount of the retainer you receive from the client that you are asking about, but since there is apparently an issue as to whether lobbying exceeded \$2500, I will assume that the retainer is for at least \$2500 each quarter.)

Then, as to the requestor’s suggestion that much of the described activities would not be reportable lobbying, we advised as follows:

Even though it might seem obvious that assisting a client with "pursuing contract opportunities" with existing private clients or other business (not governmental) entities would never be lobbying, I should point out, again, that it depends on the facts. For example, "incurring office expenses" is included in lobbying. This can include preparing to contact City officials, such as drafting proposed legislation, conducting related research, and meetings between principal and lobbyist to plan strategy. Such expenses might include pro-rated salaries, rent, utilities, and the like while doing such lobbying-related work. For example, if your client is pursuing a private business opportunity, but the business deal would require a zoning variance on a property, as to which lobbying would eventually occur, conducting the research now about the requirements for a variance might be a lobbying office expense. See the following Paragraphs of Regulation 9: 9.1(X)(2); 9.1(BB); 9.1(DD);

9.16(C); 9.16(D); 9.16(E); and 9.16(G). However, generally, if there is no connection at all with actual or potential contact with City government, there is probably not lobbying.

Second, to the extent that your firm is responding to City RFPs or the like in the appropriate way (i.e., merely submitting proposals to the official specified in the RFP), that response is likely exempt under Reg. 9, Para. 9.24(L).

Third, however, to the extent that your firm is generally "pursuing contract opportunities" with the City by contacting City officials outside the RFP/bidding process, it's only lobbying **IF** you are contacting the official whom you know or should know is not the appropriate official (e.g., trying to influence the decision by going over that person's head), as stated in identical language 3 places in Reg. 9 -- last sentence of Paras. 9.1(X), 9.24(J), and 9.24(O).

As to the requestor's question concerning line 10 ("Lobbyist or Lobbying Firm Affirmation") of the expense report, we advised:

if, after reviewing the above advice, along with the actual expenses incurred by your client, you conclude that no part of your retainer was for lobbying expenses and you engaged in no lobbying (including office and personnel expenses) during the reporting quarter, you may check the third box (no lobbying). The middle box (the so-called "limited knowledge" statement) contemplates situations where the lobbyist actually lacks knowledge related to items that the principal is reporting on the form. For example, a principal may employ more than one lobbying firm. In such a case, your firm may well lack knowledge as to lobbying expenses incurred by the other lobbying firm. Similarly, if the principal itself incurred in-house lobbying expenses, your firm may not have actual knowledge as to those expenses. The middle box is not intended to be used in circumstances where lobbying expenses merely did not exceed \$2500 for the quarter.

e. A requestor who is on the board of a municipal authority requested advice about serving as an expert witness in a matter involving the City. We advised that, as organized under State law (the Municipal Authorities Act), the Authority would be an agency of the Commonwealth of Pennsylvania, and not an agency of the City of Philadelphia. Accordingly, the provisions of the City Code and Charter relating to ethics would not apply to the requestor as a board member of the authority. We advised that it is possible that the State Ethics Act would apply to him. Whether he is a "public official" as defined in the Act, and whether the ethics provisions of the Act would then restrict him, are matters subject to the interpretation of the State Ethics Commission, and the requestor may wish to consult the Commission for a ruling.

VI. New Business

There was no new business to discuss.

VII. Questions and Comments

There were no questions or comments from the public.

The public session of the Board's meeting was adjourned at 1:43 pm.