Philadelphia Board of Ethics
Meeting Minutes
February 20, 2013
Board of Ethics
One Parkway Building
1515 Arch Street, 18th Floor
1:00 pm

Present:

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

Staff
Shane Creamer, Esq.
Nedda Massar, Esq.
Evan Meyer, Esq.
Maya Nayak, Esq.
Michael Cooke, Esq.
Elizabeth Baugh
Bryan McHale
Nina Bradley

I. Call to Order

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

II. Announcements from the Chair

1. Chair Reed informed the public of two Board executive sessions since the January 23, 2013 meeting. The first executive session was held by telephone on January 28, 2013 regarding a confidential enforcement matter and to receive legal advice. The second executive session was held by email from February 7-11, 2013 regarding a non-public advisory opinion.

2. Chair Reed announced that the Mayor has nominated the Reverend C. Kevin Gillespie, Ph.D, President of St. Joseph's University, to fill the current vacancy on the Board. The Reverend Gillespie's nomination is currently pending before City Council.

III. Approval of Minutes

By a 4-0 vote, the Board approved the meeting minutes, as corrected, for the public meeting that was held on January 23, 2013.

IV. Executive Director's Report

A. Litigation Update

i. McCaffery v. Creamer, et al.

Mr. Creamer explained that on December 24, 2012, Judge Shelley Robins-New denied the Board's summary judgment motion. 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 staff time. On behalf of the Board, Mr. Creamer thanked the Board's counsel at Dechert and the Law Department for their extraordinary representation in this matter.

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. The Board awaits Judge Sanchez's ruling. On behalf of the Board, Mr. Creamer 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 the 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 representation in this matter.

B. Lobbying Update

Software Project: Mr. Creamer said that staff has made progress with the vendor selection process in coordination with the Office of Innovation and Technology (OIT).

Filing Update: Mr. Creamer reported that so far in 2013, staff has received 77 principal registrations, 77 lobbyist registrations, and 18 firm registrations. Staff will soon update the Board's website to include lists of registrations received through January 2013 and images of the 2012 fourth quarter expense reports.

C. Legislation

Mr. Creamer reported that two bills to amend the City's Campaign Finance Code were introduced in City Council on February 7, 2013. The first, Bill No. 130078, was introduced by Councilmember James Kenney and makes contribution limits applicable to incumbents. The second, Bill No. 130082, was introduced by Councilmembers Bill Green and James Kenney and concerns disclosure of information concerning independent expenditures. Mr. Creamer explained that the bills would be discussed later in the meeting.

V. General Counsel's Report

1. <u>Board Opinions.</u> Mr. Meyer reported that there was one Board Opinion since the January report. Board Opinion 2013-001 (January 23, 2013). The Opinion states that Shoshana Bricklin, a legislative aide to Council President Clarke, requested a public advisory opinion regarding the "resign to run" provision of the Charter, Section 10-107(5). She advised that she was considering running for judge in the Court of Common Pleas or Municipal Court in the upcoming May 2013 primary, and understands that as a city employee she must resign once she becomes a candidate, which is either when she makes a public announcement or when nominating petitions are filed. Her question was whether her personally circulating nominating petitions on her own behalf, prior to their being filed, would require her to resign.

The Board reviewed prior advisories on what constitutes a "declaration of candidacy" and the permissible circulation of nominating petitions by others. In a footnote, the Board noted that the degree to which employees of City Council are subject to Charter Section 10-107(4)(political activity) is limited by Subpart K of Board Regulation No. 8. [Otherwise, a City employee not employed by City Council may not be permitted to circulate even his/her own petitions, since that would involve prohibited coordination with a campaign, under Paragraph 8.11(a) of Regulation 8.] The Board then advised Ms. Bricklin as follows:

1. Under the Home Rule Charter and the City's Campaign Finance Law, she would not become a candidate until she either filed nominating papers or publicly declared her candidacy.

2. Until nominating papers are filed, and so long as she makes no public statements that indicate that she has already decided to be a candidate, or that she is doing anything more than "considering a run" or "testing the waters," she may circulate nominating papers on her own behalf without being required by Charter Section 10-107(5) to resign her City employment.

3. This Advice addresses only questions under the Public Integrity Laws that are within the jurisdiction of the Board of Ethics. Explicitly not addressed are any issues under the Pennsylvania Election Code. This Advice also assumes that Ms. Bricklin's question does not involve the solicitation or receipt of any contributions or the formation of any political committee.

2. General Counsel Opinions. Mr. Meyer said that there were no General Counsel Opinions since the January report.

3. Informal e-mail guidance. Mr. Meyer reported that through Tuesday, February 12, 2013, there were no requests for e-mail guidance since the January report.

VI. Discussion of Draft Hearing Report on Proposed Amendments to Regulation No. 1

Mr. Cooke began by discussing the procedure for approving an amendment to the Board's regulations including the approval of a hearing report responding to the testimony given at the public hearing held on January 23, 2013. He explained that the Board would need to approve the draft hearing report and a final version of the amendment, both of which would be submitted to the Law Department for a final approval. Both documents would then be posted with the Records Department, and ten days after posting the amended regulation would become effective.

Mr. Cooke went through the draft hearing report prepared by staff to address the issues raised by testimony during the public hearing.

Mr. McCormick asked whether there had been any additional comments from the public to come in to the Board after the public hearing and meeting on January 23, 2013. Mr. Cooke replied that no additional comments had been submitted.

Ms. González and Mr. Meyer requested that the spelling of their names be corrected in the hearing transcript. Mr. Cooke said he would have the court reporting agency do that.

Mr. Cooke also requested that, as with previous amendments, when the Board made its motion it would add the provision that staff, in consultation with the Board Chair, could make any non-substantive changes requested by the Law Department.

Judge Beck moved that the Board approve the hearing report and amendment with the provision Mr. Cooke suggested, to be sent to the Law Department for final approval, with the corrections made by the Board. By a 4-0 vote, the Board approved the hearing report and amendments for Regulation No. 1.

VII. Discussion of Board Opinion 2013-003

Mr. Meyer summarized the request for a public advisory received from Jeffery Barg, Senior Manager of Urban Planning and Policy at the Pennsylvania Horticultural Society (PHS). PHS inquired whether its plan to provide tickets to specific events during the Flower Show to certain City officials, including the Mayor and members of City Council, would constitute lobbying under the Lobbying Code.

The draft opinion advised that the "reception exception" in the Lobbying Code applies to the preview party and reception/tour events. PHS providing tickets for these events to City officials for their own official attendance would not be lobbying, and the value of the tickets would not count in calculating whether PHS had passed the $2500 threshold for registration as a lobbying principal. The draft concluded that general admission tickets would not qualify for the "reception exception" and could trigger lobbying registration and reporting requirements.

Mr. McCormick pointed out that there was only a mention of the general admission tickets to be given to the Council members and no mention of the tickets to be given to the other City employees. Mr. Meyer agreed that was an oversight and recommended a change in language at the end of the Opinion.

Judge Beck moved that the Board approve the Opinion, as amended. By a 4-0 vote, the Board approved the Opinion.

VIII. Proposed Amendments to Regulation No. 4, Seeking Advice from the Board of Ethics

Ms. Nayak explained that the Board had recently modified Regulation 4 concerning Advisory Opinions. One modification was the imposition of a 14-day waiting period before the Board could publish an approved opinion. She pointed out that the purpose of the modification was to encourage requestors who were going to seek a reconsideration of an opinion to do so as soon as possible.

Ms. Nayak said that staff now believes that the 14-day provision is not practical. A requestor would still be able to seek reconsideration of an opinion, even outside the 14-day window. More importantly, staff believes it is not in the public interest for the Board to discuss and approve an advisory opinion in public session and then not be able to publish the text for 14 days.

As staff also believes it is best to treat public and non-public opinions in the same manner, Ms. Nayak proposed that removal of the 14-day provision apply to non-public opinions as well.

Judge Beck stepped out of the meeting at 1:57 pm. Chair Reed deferred action on this item until her return and moved on to the discussion of Unpaid Penalties.

Judge Beck returned at 2:07 pm, and Ms. González moved that the proposed amendments to Regulation No. 4 be approved. By a 4-0 vote, the Board approved the proposed amendments to Regulation No. 4.

IX. Discussion of Unpaid Penalties

Mr. Cooke said that staff has been working to collect past due penalty payments from the subjects of enforcement who had entered into Board-approved settlement agreements. He explained that currently there are five individuals in arrears to whom letters were sent by staff in order to resolve their outstanding penalties. Since the letters have gone out, staff has received replies from four of the five individuals:

1) Humberto Perez settled his remaining debt to the Board of $250 on February 19, 2013.

2) Jacque Whaumbush called the Board on February 19, 2013 and said he would make a $300 payment by March 2, 2013. He also said he would request an adjustment to his payment schedule.

3) Al Taubenberger called on February 20, 2013 and said he would make a payment within the next week. He also said he would request an adjustment to his payment schedule.

4) Lamont Thomas contacted staff by e-mail but did not give a date by which he would resume payment.

5) Neither Kacy Nickens nor her lawyer had responded by the time of the Board meeting.

Mr. Cooke pointed out that any adjustment to a payment schedule would have to be an amendment to the settlement agreement and approved by the Board.

Chair Reed said that the Board was not a collection agency and asked if there could be an assessment of interest on past due payments. He said that the Board's credibility would be undercut if those in arrears do not pay. Ms. González agreed and added that it was detrimental to the credibility of the Board if staff sent out repeated communications and never moved to enforcement. She suggested that it should be a short process before moving on to a next step of compelling payment. She asked if a confession of judgment could be attached to settlement agreements.

Chair Reed pointed out that there could be constitutional issues with confessions of judgment on individual defendants. Mr. Cooke said that he would speak with the Law Department about that issue as well as the possibility of assessing interest on past due penalties.

The Board asked staff to recommend a policy for how to deal with delinquencies in the future and to continue to pursue payment collection from the four individuals who have not yet paid.

X. Discussion of Recent Legislation

Mr. Cooke described two bills concerning campaign finance recently introduced before City Council. He informed the Board there were numerous details which staff felt could be improved and requested approval from the Board for staff to discuss those issues with members of City Council and their staffs. Board members expressed their approval for staff to work with City Council on the bills.

Bill 130078, introduced by Councilman Kenney, would apply contribution limits to incumbents. Mr. Cooke noted that it would place incumbents at a disadvantage against non-incumbent challengers or in running for state-wide office against candidates not subject to such fundraising limits. Mr. Cooke suggested that it might be possible to address some of those issues via regulation.

Bill 130082, introduced by Councilmen Green and Kenney, would provide for enhanced disclosure of independent expenditures. Staff flagged multiple issues but noted that all of them could be addressed by modifications to the bill. Board members expressed their approval for staff to work with Councilmen Green and Kenney on the bill.

XI. Mayor's Letter Concerning Lobbying Law & Grants

Mr. Creamer explained that the Board had received a letter from Mayor Nutter asking the Board to clarify that the registration & reporting requirements of the Lobbying Code are not triggered when the City seeks funding from grant-making entities for City initiatives.

Mr. Creamer presented a draft response for the Board to discuss. The response concluded that under the circumstances described in the Mayor's letter, the lobbying ordinance would not apply to the grant-making entity because it was not making a direct or indirect communication in order to influence City action to advance its interests.

Judge Beck said the response was on target and appropriate. A few minor changes in language were suggested. By a 4-0 vote, the Board approved the draft letter, with the language changes suggested by Board members.

XII. Questions/Comments

Cathy Roccia-Meier of Parents United thanked the Board for its clarification of the lobbying ordinance but suggested that the issue had little to do with their complaint against the William Penn Foundation. She said that she hoped the decision today would not deter a fair and impartial review of the complaint before the Board.

Craig Schelter of the Development Workshop said that he was present to see what happened at Ethics Board meetings and ask about a situation he described involving a City-related non-profit. Mr. Creamer replied that the Board would not get into trying to rule on particular situations right then, but that the Board will always accept a complaint or a request for an Advisory Opinion. He suggested that if Mr. Schelter had a compliance issue he wanted to raise, those would be the best avenues to do so.

Adam Bonin asked when the vendor for the new lobbying software would be selected and for how many more cycles lobbying filers would have to continue using the current paper forms. Mr. Creamer said that we should have an answer on the vendor in the next week or so, and Ms. Massar added that an answer for how much longer the paper forms would be used would be forthcoming in the next month.

The public session of the Board's meeting was adjourned at 2:54 pm. Following adjournment of the public meeting, the Board met in executive session to address confidential enforcement matters and to consult with attorneys regarding ongoing litigation.