Philadelphia Board of Ethics
Meeting Minutes
March 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.
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 February 20, 2013.

III. Executive Director's Report

A. Litigation Update

i. McCaffery v. Creamer, *et al.*

Mr. Creamer explained that in December 2009, Dan McCaffery filed a lawsuit against the Board and its Executive Director, bringing claims of defamation, false light, and tortious interference with economic opportunities. On February 28, 2013 on the eve of jury selection and a March 4, 2013 trial start date, the parties' attorneys engaged in settlement discussions. As a result, the Board had to decide on the 28th whether to accept and approve a proposed resolution of the case, which it did. That resolution is that:

- McCaffery will withdraw his lawsuit against the Board and its Executive Director with prejudice.
- Neither the Board nor its Executive Director shall admit to any liability and the defendants will not pay any damages or issue an apology.
- The parties agreed to publish a statement in the *Legal Intelligencer*.
- The statement is consistent with an underlying settlement agreement between the Board and the McCaffery Campaign, which resolved an enforcement petition filed in May 2009 in the Court of Common Pleas, and also acknowledges that the Board filed its papers in May 2009 in good faith.

Mr. Creamer then asked the Board to memorialize its approval of the settlement by taking a vote. The Board voted 4-0 to approve the settlement in *McCaffery v. Creamer, et al*.

On behalf of the Board, Mr. Creamer thanked the legal defense team at Dechert, which defended the Board and its Executive Director on a *pro bono* basis. The Dechert team included Cheryl Krause, Karen Daly, Stephen Brown, Elisa Wiygul and Galia Porat. On behalf of the Board, Mr. Creamer also thanked Mark Maguire and Craig Straw of the City's Law Department, who were on the defense team.

ii. 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. Judge Sanchez held that:

Considering the demonstrated ill effects of police political contributions on the City, the public, and members of the Philadelphia Police Department, the City's compelling interest in

preventing these harms outweighs the somewhat narrow First Amendment interests of current and future PPD employees in making such contributions and of the public in hearing their messages as they are communicated through such contributions.

Judge Sanchez thoroughly reviewed the historical background of the ban and relied heavily on the guidance the Board had provided in Regulation No. 8. The FOP has appealed Judge Sanchez's ruling to the Court of Appeals for the Third Circuit. We are waiting for the Court to issue a briefing schedule.

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 18, 2012 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 we are 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 a Notice of "Intent to Contract" was posted yesterday 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 next step in the process requires Law Department approval of the Acclaim proposal, and if approved, the Law Department will issue a Notice of "Intent to Award" to Acclaim. Staff expects that implementation of the online lobbying system will take four months from issuance of the "Intent to Award."

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

C. Financial Disclosure Preparation

Mr. Creamer reported that it will soon be the time of year when many City officials and employees and the members of City boards and commissions are required to file one or more of three annual financial disclosure forms. The filing deadline is May 1st. 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). Several of the Board's staff

members have begun to focus on the many tasks necessary to implement the financial disclosure process.

Mr. Creamer said that there is an online application for preparing the financial disclosure statements. Last week, staff conducted four small group sessions with Records Department staff and departmental HR managers to review the financial disclosure process and to train HR managers to use the online system.

He further explained that the Office of Human Relations will issue filing reminder emails to City employees in early April, and Ethics Board staff will issue email reminders to the members of City boards and commissions. Once these reminders go out, the telephones start to ring off the hook, and several members of staff answer calls about how and what to file.

D. Budget

Mr. Creamer reminded the Board that in January, Budget Director Rebecca Rhynhart indicated that the Board's proposed operating budget for FY14 would be $912,589. Also at the January meeting, the Board approved a staff recommendation to request an increase in the Board's FY14 appropriation in the amount of $87,411 as part of the Board's budget documents. The Board's FY14 documents therefore included the request for additional funding which was justified by the fact that the Board's responsibilities have increased significantly and funding for an additional staff attorney is needed to meet statutorily mandated training and advice functions. Staff further explained that this one additional staff member would more than double the Board's capacity for in-person ethics and lobbying training.

Chair Reed also submitted a letter to Mayor Nutter requesting that the Administration increase our FY14 budget by $87,411 to $1 million. Chair Reed explained in his letter that this amount would restore the Board's budget to the $1 million amount anticipated in Charter Section 2-300(4)(e) and would permit the Board to do two things: 1) to hire a staff attorney to conduct training and provide advice; and 2) to provide small raises for several long-serving staff members. Also in his letter, Chair Reed said that "[w]e know that many City agencies and departments seek increased funding, but believe that the minimal amount of our request will have a disproportionately large impact on the Board's ability to provide service to the public and to City officials and employees."

Mr. Creamer reported that staff has been advised by the Finance Department that the Board's proposed operating budget for FY14 will be increased by $87,411 to $1 million, and is looking forward to having an additional staff member to help with the increasing demand for training and other programs.

Mr. Creamer added that typically budget hearings occur in early April. He said that staff will prepare testimony to report on the Board's many accomplishments during the past year and will explain how the additional funds will permit staff to continue to offer a full training schedule, including training on the new Lobbying Law. Further, in the testimony presented on

behalf of the Board, staff will again acknowledge the crucial role played by the Dechert firm in providing *pro bono* representation of the Board in major litigation during the past year.

Ms. Massar informed the Board that staff had just received information that City Council would not be automatically scheduling budget hearings for departments whose budgets do not exceed $5 million, which would include the Board of Ethics. She also acknowledged that this does not preclude Council from scheduling the Board at its own discretion and that staff would continue with preparing budget testimony to be submitted.

IV. General Counsel's Report

Ms. Nayak summarized the General Counsel's Report included in full below, prepared by Evan Meyer as of March 15, 2013. She reported that there had been two Board Opinions, one General Counsel Opinion, and seven informal guidance e-mails since the February report.

Ms. Nayak informed the Board that the recent amendments to the Campaign Finance Regulation 1 became effective on March 8, 2013.

1. <u>Board Opinions.</u> There were two Board Opinions since the February report. Both Opinions were requested by the Pennsylvania Horticultural Society, which puts on the Philadelphia Flower Show, and both involved issues that might be presented if the Society were to provide to certain City officials and employees free tickets or free admission to various events associated with the 2013 Flower Show.

a. Board Opinion 2013-002 (February 11, 2013). This Opinion involved the gift rules of the Ethics Code. The Society originally requested a nonpublic opinion, but later agreed that the opinion could be made public. We were advised that the Society plans to provide to certain City officials and employees, free of charge, invitations and/or tickets to three different events, as follows:

1) General Admission tickets to the Flower Show, $27 face value each.

2) Invitations to a reception and tour of the show on March 8. Invited guests will be charged $20 to attend. City employees invited will not pay.

3) Invitations to the March 1 Preview Party, $400 face value each.

The Board noted that the Philadelphia Flower Show is a major international event. It is the world's oldest and largest indoor flower show and has been held in the City since 1829. The Board concluded that providing an official presence at a cultural and tourism event of this importance is a proper function of City government. Therefore, attendance by City officials and employees at this unique event without paying for admission would be appropriate and would

not raise issues of improper gifts to City officials and employees. The Board further stated that it was deferring a detailed consideration of various interpretation questions under the gift provisions of the Public Integrity Laws, until the promulgation of a regulation on gifts.

b. Board Opinion 2013-003 (February 20, 2013). This Opinion involved lobbying only, specifically the impact of the gift provisions of the Lobbying Chapter of the City Code. The request involved the same facts as the previous Opinion, that is, the plan to provide to certain City officials and employees, free of charge, invitations and/or tickets to the Preview Party, the March 8 reception and tour, and General Admission to the Flower Show itself.

The Board noted that, in general, (i) providing free admission to an event is a gift, and (ii) when a person or entity provides a gift to a City official or employee under circumstances that the donor seeks to thereby advance their interests, the gift constitutes "lobbying" even if there is no communication, or expense related to any communication, with the recipient City official or employee regarding any specific City official action. Thus, if expenses by the Society related to such gifts were to exceed $2500 in any quarter, <u>and if no exception applied</u>, the Society would be required to register with the Ethics Board as a principal and report expenses.

However, the Board also noted that the Lobbying Code, as interpreted in Regulation 9 at Paragraph 9.17(A), contains an exception: where a City official or employee attends a reception in connection with his or her public office or employment at the invitation of and hosted by an organization, the value of that invitation is not a gift to the official or employee for the purposes of the Lobbying Code.

The Board considered the meaning of the term 'reception' and concluded that the Preview Party and the March 8 reception and tour both qualified as receptions. Thus, the Board advised that the Society may provide the invitations proposed for the two receptions, without the value of such expenses being considered "lobbying," such that the Society would qualify as a principal under the Lobbying Chapter of the City Code, and thus be required to register with the Board and report lobbying expenses. However, the General Admission tickets do not meet the "reception" exception. This Opinion does not address other law related to gifts to public officials and employees.

Both the above Board Opinions are available on the Board's website.

2. <u>General Counsel Opinions.</u> There was one General Counsel Opinion since the February report.

General Counsel Opinion GC-2013-502 (February 25, 2013). Donna E.M. Bailey, currently employed as Director of Special Projects for the City's Office of Health & Opportunity, requested public post-employment advice. She advised that she was interested in pursuing an employment opportunity with Community Behavioral Health (CBH), a City-established nonprofit

501(c)(3) corporation with which the City contracts to provide mental health and substance abuse services for Philadelphia County Medicaid recipients. The position she would seek is as Special Assistant to the CEO. The question requires essentially the same advice on the post-employment rules that we have provided in at least eleven advisories over the past two years (see the citation in footnote 1 of the Advisory Opinion):

(1) Under the State Ethics Act, you may not for one year after the date you separate from City employment represent anyone—yourself, any firm that employs you, or any of its clients—before your "former governmental body," which may or may not be limited to the City's Office of Health & Opportunity. Moreover, it is unclear whether the Act applies to you. You may wish to seek the advice of the State Ethics Commission.

(2) You are a City employee. Therefore, upon separating from the City (for example, to take a position with CBH), the post-employment rules of the City Code would apply.

(3) Under City Code Section 20-603, after separating from the City, you may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a <u>particular</u> issue or issues on which decisions were made by the City's Office of Health & Opportunity, or in connection with that office, with your involvement.

(4) Under City Code Section 20-607(c), you may not for two years after you leave the employ of the City acquire a financial interest in any official decision you made while in City employ. As to working for a City contractor (like CBH), "official decision" involves matters affecting the award, significant terms, or financial details of the contract.

General Counsel Opinion GC-2013-502 is available on the Board's website.

3. <u>Informal e-mail guidance.</u> Through Tuesday, March 12, 2013, there were seven of these (2 combined at 'c' below) since the February report.

a. A departmental HR manager sent the following inquiry:

> I recently conducted ethics training and there were a couple of questions:
>
> 1. If an Executive Order, by the Mayor, conflicts with or is in contradiction of a Home Rule Charter which one supersedes?
>
> 2. If an employee is not working due to a furlough, can they work another job? Like their second job that they are already approved to have.

It was not clear from the email whether these were questions from attendees about their own behavior and that the trainer had promised those attendees that she would seek answers and get back to them; or whether these were just questions that came up during the training, and

the trainer was simply curious herself as to the answers in case they ever came up in a future training, so she might be better able to answer.

The trainer was advised as follows:

If it is the former (the attendees are waiting for an answer), you should tell them to contact the Board of Ethics (they can use the "Ask for Advice" feature on our website), provide more factual detail and the precise question and how it relates to them personally, and we will advise them directly. (In fact, this is a good approach in general for almost any question that comes up in training where you don't know the answer.)

In particular, as to question #1, I would want to know the person's job title and department, the executive order they are concerned about, the Charter provision that they think it conflicts with, and the particular action that they would like to take that they think would be restricted by the executive order or Charter provision.

Question #2 was puzzling. If a person is furloughed, then they are no longer a City employee, and they wouldn't be at ethics training. They may have re-employment rights under the Civil Service regulations, but as I understand it (and interpreting the employment rules are not in our jurisdiction), it is otherwise the same as if they had quit or been fired. Also, I don't know what is meant by "the second job they are already approved to have". Approved by whom? Is the question whether, if any employee has received a ruling from the Board of Ethics that there's no conflict of interest in a particular second job, and the employee is then laid off by the City, whether working for the second job now violates the post-employment restrictions? If so the employee (or former employee) should ask us for written advice, after providing full facts (including details of both jobs) and the exact question.

b. A City employee sent the following to us via the "Ask for Advice" feature on our website:

> I am retiring from City service soon and I have a question related to employment post-retirement. I am leaving the State of Pennsylvania and wish to work for one of the providers with whom we contract who also has programs around the country. My work would not be in the City of Philadelphia or in the State of PA but rather in another State, and my work would be paid for from another State's budget that has nothing to do with either the State of PA or the City of Philadelphia. I would not be representing the program in any meeting in the City or the State, or applying for or creating any RFP or other document that may lead to funding of any service in PA or Philadelphia.
>
> Please provide me with some advise [sic]. If you require more information, kindly let me know.

The requestor was advised as follows: there are few, if any, situations where a City employee would be absolutely prohibited from leaving City employment to work for a particular employer. Rather, there are restrictions on what a former City employee may do for certain future employers. The below rulings should be read carefully to understand these restrictions.

Please also note that the "one-year rule" of the State Ethics Act is interpreted by the State Ethics Commission, not the Board of Ethics, and we are limited in giving advice on that rule.

http://www.phila.gov/ethicsboard/pdfs/GC_2013_501_1_11_13.pdf

http://www.phila.gov/ethicsboard/pdfs/GC_2012_516_12_31_12.pdf

http://www.phila.gov/ethicsboard/pdfs/post_employ2.pdf (Please note that this article is 4 years old, and the contact information at the end is inaccurate.)

c. In two separate requests, different members of the same City board/commission that is considering a matter involving the financial interests of an outside entity requested advice as to whether they may participate officially in the deliberations of the board/commission on the matter, where each member had a remote present connection with the outside entity. We advised as to three potential questions:

1. Conflict of interest. There would only be a prohibited conflict if the board/commission member were either an officer or paid employee of an organization with a financial interest in this matter. However, we were not advised that any City board/commission member is a board member, other officer, or paid employee of the applicable outside entity.

2. Representation. No City board/commission member may represent an organization, or any other person, before the City board/commission in a matter, but it doesn't appear that anyone is proposing to do that. Any City board/commission member may, of course, represent his or her own interests.

3. Due Process. This is not a concept under the laws within our jurisdiction, but I include it to provide complete advice. If a City board/commission member personally feels so strongly about any past or present connection with the outside entity that they may not be able to be appropriately objective in acting as a member of the City board/commission, then an opponent of the proposed action might claim that the member is biased and should not be involved in the process. But, again, this is not within our jurisdiction. If you have concerns on this point, you may wish to consult the Law Department.

d. We were asked once more, as happens approximately once a month, whether City employees may accept a gift of attendance at an event with free food. Here is a general summary of the gift rules:

The gifts provision of the State Ethics Act, 65 Pa.C.S.A. Sect. 1103(b) and (c), basically prohibits bribes. That is, there must be an understanding that the official receiving the gift would be influenced by the gift. This does not appear to be an issue, from the facts provided.

[Moreover, note that interpretation of the State Ethics Act is within the jurisdiction of the State Ethics Commission, not the Board of Ethics.]

The Home Rule Charter, in Section 10-105, prohibits gratuities, "in the form of money or otherwise for any act or omission in the course of [the employee's] public work." In other words, a reward or tip in gratitude for something that employee did as part of his/her City job, for which their salary should have been the only compensation. Absent some specific facts to indicate that the invitation you propose is a gratuity for a specific official act or omission by the City or by any City employees invited, individually, this would not be an issue.

The Philadelphia Code, in Section 20-604, prohibits gifts "of substantial economic value" from certain sources to employees who are in a position to be influenced by the gift. A firm that is located in the City is clearly an applicable source. There has never been any ruling or regulation that establishes a fixed amount that is the threshold of "substantial economic value." It is probably more than $200, however. Since there is no admission charge, and I presume the food provided does not approach in value $200 per person, I see no issue under the Code.

Mayor's Executive Order No. 3-11 of 2011 restricts gifts of any amount to City employees from certain sources, with certain exceptions. However, interpretation of executive orders is a matter for the Mayor's Office, and is out of our jurisdiction. I suggest you contact the Chief Integrity Officer, Joan Markman, for any questions on the Executive Order. She can be reached at 215-686-2178 or joan.markman@phila.gov.

City employees who attend may be required to disclose the free attendance at this event as a gift on any financial disclosure form filed by them. However, the form that will be due May 1, 2013 discloses interests for calendar year 2012. Therefore, they would not have to disclose that interest on the financial disclosure form until filing in 2014 for calendar year 2013.

It was noted that the contract reform legislation would require a contractor to disclose any gift to City employees in any future application (within the next 2 years) for a City contract. See Code Section 17-1402(1)(b)(.4). The purpose of the contract reform legislation is to end "pay to play"--whereby in order to get a City contract, a vendor is pressured to provide gifts. This could be an issue if the donor of a gift has, or seeks, any contract with the City. This provision is interpreted by the Finance Director's Office (686-3499).

Also, it is important to note that the new Lobbying Code has provisions relating to gifts to City officials. Under Paras. 9.17 and 9.19 of Reg. 9 (implementing Code Section 20-1203(2)(b)-(f)), lobbyists or principals must report gifts to City officials on expense reports filed under the Lobbying Chapter and also notify the recipient official. There is an exception for officials attending a "reception" in their official capacity, but it is uncertain whether that exception would apply to this event.

e. A City Council employee advised that he may be appointed by the Mayor to serve on the board of a Special Services District. The employee asked:

> Although Special Services District Boards are not listed in Regulation 8.21 as a board or commission that exercises significant powers of government, a special services district board has the authority to assess properties and collect those assessments in order to implement a budget and issue contracts for services.
>
> My question is, if I was appointed, would I be subject to the provisions of Regulation 8 from which I am currently exempt, pursuant to Subpart K?

We advised as follows:

> In general, the legal provision that governs political activity of City officers and employees is Section 10-107 of the Home Rule Charter. Board of Ethics Regulation 8 provides interpretation of Subsections 10-107(3) and (4). Subsection 10-107(4) applies to appointed officers and employees of the City. It is Subsection 10-107(4) from which the Regulation exempts City Council employees in certain ways, with defined conditions. Your question is whether, upon being appointed as a member of the board of directors of a Special Services District, you would become an appointed officer of the City in an additional role, not covered by the exemption afforded by Subpart K of the Regulation.
>
> It is my understanding that Special Services Districts are generally organized under the Municipal Authorities Act, a State statute. Therefore, such Special Services Districts are entities of the Commonwealth (or possibly separate political subdivisions), and not part of the government of the City of Philadelphia as organized under the Home Rule Charter. Accordingly, board members of Special Services Districts are not "appointed officers of the City of Philadelphia" in that role. Since Charter Section 10-107(4), as interpreted by Regulation 8, applies only to any "officer or employee of the City," appointment to the board of a Special Services district would not, in itself, change the application of Section 10-107 and Regulation 8 to that person. (In other words, Charter Section 10-107(4) would not apply to you solely in your capacity as a member of the board of a Special Services District.)

f. A City official asked about participating in a survey, conducted by an out-of-town organization, and advised that there is a $250 payment for participation which the official would donate to a City of Philadelphia charity. We provided a link to a ruling on a similar issue, GC-2011-503, with special reference to the State Ethics Act prohibition against acceptance of honoraria.

V. Discussion of Board Opinion 2013-004

Mr. Creamer summarized the request from Steve Masters, Esq. about whether, as a licensed attorney, he could be paid on a contingent fee basis by a client who is seeking to win a procurement contract from the City. Mr. Masters added that an RFP for the contract has not been issued yet and part of the services he would provide would be to persuade the City to issue the RFP.

The draft public Opinion concludes that there is a prohibition against contingent fees for lobbying under 20-1205(7) of the Lobbying Chapter of the Philadelphia Code and that there is no applicable exemption to that prohibition arising out of one being a member of the bar. Rule 1.19 of the Pennsylvania Rules of Professional Conduct as amended on May 17, 2012 explicitly requires lawyers to comply with lobbying laws, including those adopted by municipal governments.

Mr. Creamer added that there were three paragraphs in the draft Opinion provided to the Board that staff recommended were not necessary and should be deleted.

After the discussion, the Board approved the draft Opinion with the recommended edits by a 4-0 vote.

VI. Executive Session announcements

Chair Reed announced that the Board had conducted four executive sessions since the February 20, 2013 meeting:

- The first session was held by email from February 21 through February 25 and was related to a confidential enforcement matter.

- The second session concerned consultation with attorneys regarding ongoing litigation and strategy and was conducted by email on February 28.

- The third session was conducted by telephone on March 12 and concerned a personnel matter.

- The fourth session was conducted the morning of March 20 and also concerned a personnel matter.

VII. New Business

A. Unpaid penalties

Mr. Cooke reminded the Board of the four individuals who had entered into Board-approved Settlement Agreements and were still in arrears on the penalties they had agreed to pay: Jacque Whaumbush, Al Taubenberger, Lamont Thomas, and Kacy Nickens. He reported that none of the four had made a payment since the February Board meeting.

Mr. Cooke said that, as requested by the Board, staff has had discussions with members of the Law Department about consolidating our collection process with the Law Department or as part of one of the City's contracts with a collection agency. He also said that staff was working with the Law Department to draft additional language for future settlement agreements, adding penalties for non-compliance or confessions of judgment where possible.

VII. Questions/Comments

Bob Warner of the Philadelphia Inquirer suggested that the Board put material it would be considering in public session on the Board's website prior to the public meeting. Chair Reed expressed appreciation for Mr. Warner's comments and said the Board and staff would take them under consideration.

The public session of the Board's meeting was adjourned at 1:45. Chair Reed announced the Board would meet in executive session following the adjournment of the public meeting to address confidential enforcement matters, non-public advice, and personnel matters.