

Philadelphia Board of Ethics
Meeting Minutes
October 21, 2009
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

Richard Glazer, Esq., Chair
Rich Negrin, Esq., Vice Chair
Pastor Damone Jones
Kenya Mann, Esq. (via Conference Call)

Staff

J. Shane Creamer, Jr., Esq.
Nedda Massar, Esq.
Evan Meyer, Esq.
Michael Cooke, Esq.
Maya Nayak, Esq.
Tina Formica

I. Call to Order

Mr. Glazer recognized that a quorum was present and called the meeting to order.

II. Approval of Minutes

The Board approved the meeting minutes, as corrected, for the public meeting that was held on September 16, 2009.

III. Executive Director's Report

A. Enforcement Update

1) McCaffery for DA

Mr. Creamer announced that the Ethics Board has entered into a Settlement Agreement with the McCaffery for DA Campaign Committee. In the Agreement, the McCaffery Committee admitted to two violations of §20-1006(4) of the Philadelphia Code and agreed to pay a \$1,500 penalty, which represents a \$750 fine for each violation.

He explained that the McCaffery Committee disclosed a \$7,400 contribution from the Pennsylvania Good Government Fund on December 31, 2008 in its 2008 cycle 7 report and a \$3,100 contribution from the Fund on January 29, 2009 in its 2009 cycle 2 report, when in fact, the Committee received a single contribution of \$10,500 on January 27, 2009 from the Fund.

Mr. Creamer also explained that in addition to the \$1,500 fine, the McCaffery Committee has agreed to file amended campaign finance reports to correct the misstatements. In exchange, the Board has agreed to discontinue the enforcement Petition filed against the McCaffery Campaign.

The Board filed an enforcement petition in the Court of Common Pleas in May 2009. In its petition, the Board alleged three violations of the City's campaign finance law arising from a contribution made to McCaffery for DA by the Pennsylvania Good Government Fund. The petition alleged that the Good Government Fund gave the McCaffery Campaign a check for \$10,500 on December 31, 2008. However, rather than disclosing a contribution in that amount in its 2008 cycle 7 campaign finance report, the McCaffery Campaign disclosed a December 31, 2008 contribution of \$7,400 in its 2008 cycle 7 report and a January 29, 2009 contribution of \$3,100 in its 2009 cycle 2 report. In addition, because the McCaffery Campaign had received a total of \$92,600 from PACs by the end of 2008, the petition alleged that the Campaign's acceptance of the \$10,500 Good Government Fund contribution violated the City's prohibition on acceptance by DA candidates of more than \$100,000 in PAC contributions in non-election years.

Mr. Creamer said that in the course of litigation, the Board learned that the McCaffery Campaign did not actually receive the Good Government Fund check until January 27, 2009. Therefore, because contributions are made when received under Pennsylvania law, the contribution did not count toward the 2008 contribution limits and the amount of PAC contributions the McCaffery Campaign accepted in 2008 complied with the limit imposed by the City's campaign finance law. The McCaffery Campaign has admitted that the disclosures in its 2008 cycle 7 and 2009 cycle 2 campaign finance reports violated Section 20-1006(4).

2) Appreciation Fund

Mr. Creamer reported that Judge DiVito granted the Board's Petition for Contempt against DeNofa and Nocella on September 9, 2009. The Court's Order, docketed on October 6th, directs them to pay the Board a civil penalty in the amount of \$39,000 and enjoins them from transferring or otherwise disposing of any real or personal property subject to execution of the Order. DeNofa and Nocella were also ordered to pay reasonable attorney's fees and costs, upon application to the Court by the Ethics Board.

In March of this year, the Philadelphia Board of Ethics filed a Petition for Contempt and to Enter Judgment Against Ernesto DeNofa and Judge Thomas Nocella after discovering that they had engaged in what the Petition alleged was a deliberate and fraudulent scheme to drain the assets of the Appreciation Fund, a political action committee, that was under Court Order to pay the Ethics Board a \$39,000 Judgment for violating the City's campaign finance law.

Mr. Creamer said that on June 1, 2007, the Honorable Gary DiVito had issued an Order directing the Appreciation Fund PAC to pay a statutory penalty of \$39,000 to the Ethics Board for failing to file a required campaign finance report even after it was given additional time to do so by the

Board. On September 21, 2007, Judge DiVito issued a second Order holding the PAC in contempt of Court for failing to pay the fine levied under the Court's June 1st Order.

Mr. Creamer also said that the Board's Petition alleged that between December 2007 and March 2008, with full knowledge of the Court's prior Order and the Ethics Board's efforts to execute on those Orders, DeNofa and Nocella deliberately and systematically depleted the PAC's bank account and delayed and obstructed the Board's efforts to execute on the Court's Orders so that their fraudulent scheme would not be detected until they had drained the PAC's bank account. The Petition alleged that they did this by using most of the PAC's remaining funds (\$13,940) to pay two vendors to whom the Appreciation Fund did not owe money.

Instead, in a Court-Ordered deposition, according to the Petition, Nocella admitted that he personally delivered the checks to vendors that were owed money by a different committee, the Friends of Bob Brady, a mayoral candidate committee. Nocella also paid himself \$2,500 from the PAC's bank account at DeNofa's suggestion – even though he was representing the PAC for free and wasn't owed any money by it.

The Board's Petition describes how Nocella told the Ethics Board's attorney that the PAC was "dormant" and that it had "no assets," while this activity was occurring. The Petition further alleged that the payments contrived by DeNofa and Nocella were fraudulent because the PAC didn't owe any money to the recipients, and were made when the PAC owed money to the Ethics Board under the Court Orders.

Chair Glazer stated that the Board owes thanks to Cheryl Krause and her colleagues at Deckert for their vigorous pursuit in this matter.

B. FY2010 Budget

Mr. Creamer reported that since Plan C did not go into effect, our budget for FY2010 is currently \$810,000, which is 19% below our FY08 \$1 million budget, and 15% below our \$950,000 adjusted budget for FY09. The \$810,000 consists of: \$681,000 for personnel (Class 100), \$110,400 for the purchase of services (Class 200), and \$18,500 for supplies and equipment (Class 300 and 400). Staff submitted our Target Budget Plan to the Finance Department on October 9th to provide our spending plan for the \$810,000 for the entire fiscal year. Staff must now submit Quarterly Budget Updates to show that the Board is spending within the amounts budgeted for each spending class.

C. 2009 Training Plans

Mr. Creamer reported that staff has now conducted 13 ethics training sessions and have 12 sessions remaining on our calendar between now and December. These sessions are for officeholders, City officials, Integrity Officers, members of City boards and commissions, and new City employees. The Board's first Campaign Finance training session will be conducted on Friday, October 23rd.

He also reported that staff continues to work on our ethics training project. Several different modules are expected to be developed to meet the needs of the various groups who attend ethics training, including elected officials, employees and board and commission members. Maya

Nayak, Danielle Cheatam, and Nedda Massar are reviewing online ethics training programs offered by other ethics agencies and are working on the content for our programs. Our goal is to launch a pilot project in early 2010. We are working with the Department of Technology on the technical requirements for an email verification process so both the Board and the user will receive confirmation when a user has completed the training.

D. Conferences

1) **COGEL Conference:** Mr. Creamer said that as a member of the Program Committee for the December 2009 Conference of the Council on Governmental Ethics Laws (COGEL), he is working on three different parts of the Conference program. The first is a panel called “The Gift Minefield” that will explore the current thinking on law regulating gifts to government officials. Evan has agreed to serve as a panelist for this discussion. Nedda will serve as the facilitator of a roundtable discussion for local ethics agency officials and as the moderator of a panel called “Achieving Your Legislative Agenda.” Mr. Creamer also agreed to speak on a panel called “Campaign Finance Regulation: Can the Playing Field Really be Leveled?” Mr. Creamer is also working on a third panel called “Navigating Overlapping Jurisdiction” that will examine situations where local, state, and even federal laws regulate the same ethics or campaign finance behavior.

2) **PBI Session:** Mr. Creamer informed the Board that he has also agreed to be a panelist in a CLE program called “Pennsylvania Election Law and Campaign Finance.” His segment of the program is called “The Broad Impact of the City of Philadelphia’s Campaign Finance Law.” The program will be held on November 17th at the Wanamaker Building.

Mr. Glazer noted that in the three years of the Ethics Board’s existence the evidence of their accomplishments is COGEL’s request for staff to participate in the conference. Staff is to be commended.

IV. General Counsel’s Report

1. **Formal Opinions.** Mr. Meyer reported that one Nonpublic Formal Opinion was issued since the last report.

Nonpublic Formal Opinion No. 2009-003 (September 16, 2009).

As noted in the June report, Nonpublic Advice of Counsel No. GC-2009-506 (June 11, 2009) addressed a City Employee who serves as another official’s alternate on a City non-advisory board, where the board was about to consider a matter in which the applicant is represented by the law firm of which a relative of the employee is a partner, although the relative was not involved in the representation. The only issue presented was whether a law firm partner in such a matter would have a “financial interest” in the board alternate’s official action, under Code Section 20-607 (“Conflict of Interest”). In that Advice of Counsel, the requestor was advised that, in light of the lack of prior rulings on similar facts construing the term “financial interest,” the requestor was not required to file a public disclosure under Code Section 20-608. However, the requestor was advised that he/she should not participate in this matter before the board.

Subsequently, the requestor asked for general advice as to any similar matters to come before that board in the future. In Nonpublic Formal Opinion No. 2009-003, the Board addressed that question, and the general issue of what constitutes a “financial interest.” The Board of Ethics advised that in any matter in which an applicant before the board is to be represented by the law firm, the requestor must at a minimum request the advice of this Board as to whether there is a conflict that requires disclosure and disqualification under Code Sections 20-607 and 20-608.

In further defining “financial interest,” the Board offered two example hypothetical scenarios:

- a. A major party in an action before a City board/commission, the result of which will have significant financial effect on the party, with the possibility of an appeal or additional legal work, is represented by the law firm. It is clear that success in the matter means that the party will hire the law firm for future work. **This would be a conflict and require disclosure and disqualification.**
- b. An interested, but minor, party in an action before a City board/commission, the result of which will have small financial effect on that party, had hired an associate in the law firm to represent them for the associate’s hourly fee. The party is not financially well off, nor an entity that requires frequent legal work. **This would not be a conflict and would not require disclosure and disqualification.**

Nonpublic Formal Opinion No. 2009-003 should be available on the Board’s website soon.

2. Advices of Counsel. Mr. Meyer reported that two Advices of Counsel were issued since the last report:

- a. Nonpublic Advice of Counsel No. GC-2009-510 (September 17, 2009).

A professional/technical employee in a City operating department requested nonpublic advice on whether the ethics laws would permit her to serve and be compensated as a workshop trainer in her area of professional/technical expertise while not on work time for the City. Based on the facts presented, including no financial interest in a City contract, no conflict with her City duties, and no representation of the outside employer before the City, her proposed outside work as a trainer would not present an issue under the ethics provisions of the City Code or Home Rule Charter. We recommended, however, that the requestor seek an opinion from the State Ethics Commission regarding the honorarium restriction of the State Ethics Act.

Nonpublic Advice of Counsel No. GC-2009-510 is available on the Board’s website.

- b. Nonpublic Advice of Counsel No. GC-2009-511 (September 18, 2009).

A City employee requested nonpublic advice on whether any issue under the ethics laws, such as a conflict of interest, would result from his unpaid participation as a board member of a non-profit agency that has contracts with the City. Based on the facts presented, the employee was advised that he would not have a conflict of interest nor a prohibited interest in a City contract in this situation since is not paid by the nonprofit, and that for him to serve as an unpaid member of the board of this nonprofit agency

would not present a problem provided that he does not represent the nonprofit in a transaction with the City.

Nonpublic Advice of Counsel No.GC-2009-511 is available on the Board's website.

3. Informal e-mail guidance. Mr. Meyer reported that through Friday, October 16, 2009, there were three of these since the September report.

a. Responded to a City employee's question regarding a promotional company that wished to drop off free samples of an inexpensive product distribution to anyone using the City office. Advised that there did not appear to be an issue under the gifts provisions of the Charter, the State Ethics Act, or the City Code. Noted that the Mayor's Gift Executive Order is not under our jurisdiction and referred the requestor to Joan Markman, Chief Integrity Office. Suggested that reference to "samples" and "marketing" may indicate that this is not a gift at all, but a marketing strategy, and suggested that the City may have a policy on assisting vendors with marketing.

b. Responded to a City employee's question regarding a subcontractor on a City contract who wished to donate sports tickets to be raffled off at an event in order to defray expenses of the event. Advised that there did not appear to be an issue under the gifts provisions of the Charter or the State Ethics Act. Noted that there was a potential issue under the City Code gifts provision, depending on whether the value of the tickets constituted "substantial economic value," a determination that would need to be decided by a Formal Opinion of the Board. Noted that the Mayor's Gift Executive Order is not under our jurisdiction and referred the requestor to Joan Markman, Chief Integrity Office. Noted that if the subcontractor was solicited to provide the donation by a City official, the contract reform legislation would require the subcontractor to disclose the solicitation and the gift in any future application (within the next 2 years) for a City contract. Also, suggested that the requestor consult with Joan Markman for Administration policy on appearance issues.

c. Received an inquiry from a departmental HR official requesting a "policy" a post-employment restrictions on a former employee doing business with a City contractor. Advised that the only way to get conclusive advice on a particular factual situation is for a person who has standing to ask to request a written advisory from the Ethics Board. Otherwise, on general Administration policy, we suggested the requestor consult with Joan Markman, the Chief Integrity Officer. Advised that there are two publicly available documents on our website that may provide a helpful summary. The first is a newsletter that attempts to describe the post-employment law in layperson's terms. The second document is an Advice of Counsel (No. GC-2008-505) issued to a City employee. It also sets out the three provisions, and provides an idea of how they might apply. Provided the links to these two documents.

V. Discussion of Advisory Opinion Concerning Mailing by City Councilperson to Constituents

Mr. Meyer thanked Councilman Curtis Jones, Jr. for requesting a public opinion because it can provide more guidance. Councilman Jones requested an opinion on whether any issue under the ethics laws would arise if his office were to send out a letter to his constituents in the 4th Councilmanic District, regarding the availability to eligible families to enroll in Pennsylvania's

Children's Health Insurance Program (CHIP), if the "cost for the letter" will be borne by one of the providers in that Program, AmeriChoice. The Board advised that sending the letter would violate no ethics laws, but suggested a number of clarifying changes to the proposed letter.

The Opinion was unanimously approved by the Board, as corrected.

VI. New Business

Mr. Glazer announced that Phoebe Haddon resigned from the Ethics Board in August. Phoebe was filling the three year term of Reverend Allan Waller, which will expire on November 16, 2009. The question would be whether Phoebe's resignation would make the expiration of her term moot. Under the Charter the Mayor is required to make a nomination for her replacement within thirty days. There is no remedy if he doesn't meet that deadline.

Separately, Pauline Abernathy was appointed to a two year term that would expire on November 16, 2008, but she resigned in July 2007. Kenya Mann was appointed in January 2008 to finish Pauline's term. Since the Mayor did not make a nomination 30 days prior to the November 16th expiration date, Kenya's term was extended for one year. The Mayor did not nominate anyone to Kenya's position, so she will continue to serve as a Board member until November 16, 2010.

VII. Discussion of Proposed Regulation No. 7, Annual and Routine Ethics Training

Mr. Meyer explained that when the Ethics Board was created in 2006, City Council amended Section 20-606 of the Ethics Code granting the Board additional duties such as promulgating regulations and providing training.

Training is very important to the Board. There are three basic schedules in the Code: initial, routine and annual. Initial training is for new city employees; routine training is not defined; and annual training does not apply to all employees. Therefore the purpose of this Regulation is to clarify when or how often city employees are required to be trained.

There was a motion to adopt Regulation 7, which passed unanimously with a 4-0 vote. The Regulation will be submitted to the Law Department, and then sent to the Department of Records.

VIII. Questions/Comments

The public did not have any questions or comments.

The public session of the Board's meeting was adjourned after public questions and comments, so that the Board could meet in executive session to discuss enforcement matters and non-public opinions.