

Philadelphia Board of Ethics
Meeting Minutes
April 15, 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
Phoebe Haddon, Esq.
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 printed and distributed, for the public meeting that was held on March 25, 2009.

III. Executive Director's Report

A. Enforcement Update

1) Settlement

a. Pennsylvanians for Better Leadership

Mr. Creamer reported that on February 23, 2009, a Petition was filed in the Court of Common Pleas to enforce the City's campaign finance laws against Pennsylvanians for Better Leadership

and its Treasurer, Kevin Watson. The Petition alleges sixteen omissions and four misstatements in the PAC's 2007 cycle 2 and 3 campaign finance reports.

He also reported that in March 2009, representatives from the Ethics Board and the PAC met to discuss the PAC's violations of Philadelphia's campaign finance laws. As a result of some conversations, the Ethics Board and the PAC have reached a settlement agreement. The PAC admits to each of the 20 violations alleged in the agreement and agrees to pay a total civil penalty of \$15,750. The PAC will file amended campaign finance reports to correct its omissions and misstatements.

Mr. Creamer stated that since the Board filed the Petition, Charles Breslin has replaced Kevin Watson as treasurer of the PAC.

2) Litigation Update

a. Appreciation Fund

Mr. Creamer announced that on March 11th, the Board's outside counsel filed a Petition for Contempt against Ernesto DeNofa and Thomas Nocella, Esq. alleging that they had engaged in a deliberate and fraudulent scheme to drain the assets of 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. The Ethics Board is seeking to hold DeNofa and Nocella personally responsible for the Judgment against the PAC.

Mr. Creamer stated that the Petition for Contempt arises from an Order, issued by the Honorable Gary DiVito on June 1, 2007, directing the PAC known as the Appreciation Fund 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.

He also stated that the petition alleges that between December 2007 and March 2008, with full knowledge of the Court's Orders and the Ethics Board's efforts to execute on those Orders, DeNofa and Nocella deliberately and systematically depleted the PAC's bank account through a pattern of illegitimate payments. While they did so, according to the Board's filing, they also repeatedly delayed and obstructed the Ethics 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.

Mr. Creamer said that the petition further alleges that the payments contrived by DeNofa and Nocella were fraudulent, because the PAC did not owe any money to the recipients, and were made when the PAC owed money to the Ethics Board under the Court Orders. The Board's filing asserts that less than \$400 remained in the PAC's bank account after the fraudulent payments that were devised and carried out by DeNofa and Nocella.

Mr. Creamer noted that Sam Stretton, Esq. is representing Judge Nocella and Daniel Rendine, Esq. is representing Mr. DeNofa. Cheryl Krause, Esq., of the Dechert firm, represents the Board in this matter on a *pro bono* basis.

He also said that in their Answers to the Board's Petition, DeNofa and Nocella have alleged as New Matter that (1) the Court's underlying Orders were unlawful; (2) even if valid, the Court's underlying Orders do not apply to them; (3) the failure to file with the Ethics Board was not a "true violation" since the Appreciation Fund filed reports with the Commonwealth; and (4) a penalty of \$39,000 would be overly punitive.

Mr. Creamer reported that on April 13th, Ms. Krause filed the Board's replies to the DeNofa and Nocella Answers. The replies assert that the Respondents are not permitted to challenge the validity of the orders against them in the context of a contempt proceeding, that the Court's underlying orders are unambiguous, that the Court's September 21 Order is not technically deficient, and that the Court's Orders squarely apply to DeNofa and Nocella.

B. Budget

Mr. Creamer reported that Chair Glazer presented the Board's testimony at the April 6th Budget Hearing. He noted that recent newspaper editorials have recognized the Board as an ethics watchdog and attested to the Board's work in changing the political culture in Philadelphia. He reported to Council that the Board's staff has increased from four to nine in the last year and that the Board was therefore able to increase and improve our in-person ethics training. He also noted that with our expanded staff, the Board was able to provide advice and guidance more quickly to City employees and officials, and we continued our vigorous investigative and enforcement activity.

Mr. Creamer also reported that the Board's FY10 budget total is \$810,000, which is a 10% cut from our already-reduced FY09 budget of \$900,000. Chair Glazer explained in the testimony that this additional 10% reduction will have a disproportionate impact on an agency as small as the Board because the cut would:

- Delay new public outreach efforts, including business outreach mandated by Section 20-606(1)(c) of the City Code;
- Cause us to reduce, suspend, or eliminate investigative activity; and
- Eliminate Board's ability to hire legal counsel if subject to an outside legal challenge.

Mr. Creamer stated that the testimony indicated that at the FY10 spending level, the Board proposes to maintain its current staff level of nine and hopes to preserve its core education, advice, and enforcement mandates. The Board had expected to reach a staffing level of 11 in FY09, but as the budget situation unfolded, the Board did not hire staff for two budgeted investigative positions. The Board is therefore already operating with two fewer staff members than anticipated and expect to continue to do so. The work of our existing staff has been modified and reallocated to adjust to this reduced staff level.

Mr. Creamer also stated that Chair Glazer advised Council that because the Board is not represented by the City Solicitor, in a total \$810,000 appropriation, it will be impossible to hire outside counsel to represent the Board should it be faced with an outside legal challenge. He

noted that the Board has been fortunate to be represented in several matters by *pro bono* counsel, but that the Board is realistically concerned that such generous volunteer legal services may no longer be available, especially in this economic climate. Chair Glazer said that if the Board is forced into court in FY10 without *pro bono* counsel, the Board and its mandates will be disadvantaged because it will be forced to suspend other critical Board activity to permit existing staff to focus only on litigation.

Mr. Creamer said that Chair Glazer noted that in just over two years of existence, the Board has imposed civil penalties on candidate political committees and PACs totaling almost \$100,000. When collected, the amounts are deposited directly into the General Fund.

Mr. Creamer also said that Chair Glazer concluded his testimony by stating that even with the constraints imposed by the reduced FY10 budget, the Board of Ethics is excited to continue its efforts to implement and promote the City's public integrity laws.

Finally, Mr. Creamer said that the Board received questions from several councilpersons concerning its jurisdiction and relationship to the other ethics offices in City government, including the Inspector General and Chief Integrity Officer. Additional questions were asked concerning the City Solicitor's representation of the Board. The Board reiterated that the Solicitor does not provide representation or funding.

C. Financial Disclosure

Mr. Creamer noted that much of our time during the past month has been devoted to arrangements for the May 1st Financial Disclosure filing deadline. 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 by May 1st. These 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 said that as he reported last month, in an effort to provide better guidance to City employees to alert them whether they may be required to file a State Form, our staff worked with staff of the HR Department to develop a revised list of potential State Form filers. This included review with HR of approximately 1100 civil service job titles and review by departmental HR managers of almost 760 civil service exempt titles to determine which of these employees should file the State Form. The result of the detailed analysis of positions this year will be an increased number of filers and better guidance to City employees about who must file the State Form. Staff has also updated a list of all City Board and Commission members because they are required to file one or more of the disclosure forms.

Mr. Creamer reported that in early April, staff began an extensive program of email reminders to City employees, officials, and board and commission members. The reminders explained that all three disclosure forms can be prepared using the Online Financial Disclosure System maintained by the Records Department. Staff also provided detailed contact information if filers have questions about using the online system or about the content of the disclosure reports.

He also reported that people are definitely using the contact information! Staff received more than 100 telephone inquiries and at least another 150 email inquiries in the past 10 days. Steps

have been taken to train the Board's staff to act as "help desk" to respond to all kinds of questions. Where staff cannot help a filer with a technical issue about the online system, they will refer calls to the Records Department and the vendor who developed the system.

Mr. Creamer noted that members of the Board of Ethics staff will be assisting the Records Department during the height of the filing period. They will receive training from the Records Department staff and will work on several days between April 21st and May 4th. The Board spoke with the Records Department about the release of the financial disclosure reports that are due for filing on May 1st. Copies will be made available on Monday, May 4th. It would be helpful to submit a list of requested reports in advance to the Records Department so that requests can be ready on May 4th.

D. Annual Report

Mr. Creamer announced that the Board's 2008 Annual Report was printed and delivered to the Mayor and City Council on April 3rd. We are extremely proud of the progress that we reported during 2008. Copies will be distribute to other agencies and interested individuals in the near future and will make the Report available on our website. Many thanks to all the staff members and Paul Jablow whose work made the 2008 Report possible.

E. Training

Mr. Creamer stated that the Board will begin a new schedule of ethics training sessions in May for new City employees and board and commission members.

IV. General Counsel's Report

1. Advices of Counsel. Mr. Meyer reported that there was one new Advice of Counsel issued since the last report, No. GC-2009-503 (April 9, 2009)¹. A member of a City board/commission requested nonpublic advice on the restrictions the ethics laws place on the member in his or her capacity as an appointee to a City board/commission in light of the member's employment by a university that receives financial support from companies that can be affected by the Board's actions. Purpose of "conflict of interest" provisions explained. As there was no personal financial interest of the requestor, and as the requestor's employer is a nonprofit, the conflict provisions of the Code and State Act are not implicated. Requestor had asked that we address appearance issues, and we advised that should the requestor's board/commission be in the position of taking action that impacts a product where the decision will have a significant financial effect on the manufacturer of the product, and where the same manufacturer is providing or has recently provided the University that employs the requestor, its students, or faculty with substantial funding or in-kind contributions, then—in the interest of enhancing

¹ Advices are numbered in the order by which the original is issued to the requestor. Nonpublic Advice of Counsel No. GC-2009-502 is taking somewhat longer to redact, and so has yet to be issued in public form.

public confidence in government and avoiding any appearance of impropriety—the requestor should consider following the disclosure and disqualification process of Code Section 20-608. Advice of Counsel No. GC-2009-503 is available on the Board’s website.

2. Informal e-mail guidance. Mr. Meyer said that through Thursday, April 9, 2009, there were eight of these since the March report. (These include advice provided by Associate General Counsel Maya Nayak.) Note that in every such e-mail, we provide a link to Regulation No. 4 and explain that the requestor may obtain a written advisory opinion, if they wish to have a formal ruling on which they may rely. The below summaries do not include the numerous inquiries that we have fielded regarding financial disclosure.

a. Advised a department head that distribution of 50 donated tickets to employees did not raise issues under the City’s ethics laws, but may be an issue under the Mayor’s executive order on gifts. We suggested the person contact the Chief Integrity Officer, Joan Markman.

b. Received a question regarding identification requirements on items paid for by a political action committee where the items contain no political messaging. We advised that the question is outside our jurisdiction because it raises issues only under the State Election Code, not the City’s campaign finance law. We provided contact information for someone at the PA Department of State we thought might be helpful and also provided relevant state law citations that the requestor could reference.

c. Through the Ask for Advice feature of our website, a supervisor asked us about a subordinate considering outside employment at a university. We advised that generally speaking, the ethics laws do not prohibit City employees from being employed outside City government and then we detailed described the restrictions that apply. We also attached Advice of Counsel No. GC-2008-502, which addresses in greater detail the application of the ethics laws to the situation of a City employee taking a paid outside position as an academic instructor.

d. Responded to an inquiry about a potential conflict of interest for a board/commission member by advising that the member follow the disclosure and disqualification requirements of Code section 20-608.

e. Received an inquiry about a Councilmember who has an interest in a local nonprofit that may be affected by legislation. Councilmember is not compensated by the nonprofit, so there is no personal conflict of interest. The official does not have a conflict through the nonprofit’s interests, because neither the City Code nor State Act apply to interests through nonprofits.

f. Received an inquiry from a department regarding certain officials in that department being required to file the Mayor’s Executive Order financial disclosure form (“Mayor’s Form”). Advised as to prior practice, but referred requestor to Chief Integrity Officer for interpretation of Mayor’s Executive Order.

g. Advised a former employee that Mayor’s Form is not required of employees after separation, unlike the City and State Forms.

h. Received an inquiry from a department regarding a small gift given to an employee. Referred requestor to Chief Integrity Officer for application of Mayor's Executive Order on gifts.

V. Memorandum Concerning Public Advice Regarding the Code's Representation Rule

Mr. Meyer stated that he is anticipating issuing an Advice of Counsel and some interesting issues have been raised involving the city structure. He wanted to make the Board aware of the issues.

He also stated that the Historical Commission created a number of committees that advise the Commission, which are the Architectural Committee, the Committee on Historic Designation and the Committee on Financial Hardship.

Mr. Meyer reported that a member of the Architectural Committee of the Historical Commission, John Cluver, works for a firm that is involved in a developer's application before the Historical Commission and before that commission's Committee on Financial Hardship. Mr. Cluver asked if he can present the application before the Historical Commission or before the Committee on Financial Hardship.

(Ms. Haddon arrived.)

There was a discussion among the Board regarding issues of disclosure and disqualification, appearance of impropriety, political activity and conflict of interest.

Mr. Meyer said he will draft the Advice of Counsel with the guidance of the Board in mind.

VI. Report on Meeting with City Council Members

Mr. Glazer reported that the Board is continuing efforts to meet with the Councilmembers.

VII. New Business

There was no new business to discuss.

VIII. Old Business

Mr. Glazer commented on the inability to have the Board at full strength since Stella Tsai's resignation six months ago.

He said the Board is going to lose Ms. Haddon and wished her much success as the Dean of the University of Maryland School of Law.

IX. Questions/Comments

Marcia Gelbart asked when is Phoebe Haddon's last meeting.

Ms. Haddon responded that she will be relocating in July.

Marcia Gelbart asked if the Board contacted the Administration.

Mr. Glazer responded that the Administration is well aware of the Board's concerns. Ms. Markman from the Administration said she has taken steps on this issue.