

**Philadelphia Board of Ethics**  
**Meeting Minutes**  
December 16, 2009  
Board of Ethics  
Packard Building  
1441 Sansom Street, 2<sup>nd</sup> Floor  
1:00 pm

**Present:**

Board

Richard Glazer, Esq., Chair  
Kenya Mann, Esq.  
Pastor Damone Jones

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 November 18, 2009.

**III. Executive Director's Report**

**A. Appreciation Fund**

Mr. Creamer reported that after the last board meeting he received checks from Ernesto DeNofa and Thomas Nocella. A praecipe was filed to satisfy the judgment.

**B. Non-Filers**

Mr. Creamer reported that the following PACs received non-filer letters, but filed the required reports after they received the letter:

19th Democratic Ward  
Philadelphia AFL-CIO  
Blank Rome PAC  
Bravo PAC

Because these committees filed the required reports before the additional deadline, the Board will not seek any penalties or fines.

**C. 2010 Ethics Board Meeting Calendar**

Mr. Creamer explained that the Board is required by the Pennsylvania Sunshine Act to give public notices of its schedule of regular meetings. Staff has therefore provided a list of meeting dates for 2010, beginning on January 20, 2010, for the Board's approval. All meetings are scheduled for the third Wednesday of each month. Once approved, staff will arrange for the list of dates to be published, as required by law.

Chair Glazer asked for a motion to approve the 2010 Board Meeting calendar. The motion passed with a 3-0 vote. The following calendar will be published and placed on the Board's website:

January 20, 2010  
February 17, 2010  
March 17, 2010  
April 21, 2010  
May 19, 2010  
June 16, 2010  
July 21, 2010  
August 18, 2010  
September 15, 2010  
October 20, 2010  
November 17, 2010  
December 15, 2010

**D. Ethics and Campaign Finance Task Force**

Mr. Creamer announced that the Mayor's Advisory Task Force on Ethics and Campaign Finance Reform issued its Final Report to the Mayor on December 10<sup>th</sup>. The Report describes the process by which the Task Force arrived at its conclusions and includes recommendations in the areas of: lobbying, registration and reporting, campaign finance reform, ethics and conflicts of interest, and restrictions on political activity. He is sure that the Task Force recommendations will serve as a strong foundation for further ethics reform in City government.

**E. Litigation Involving the Board**

Mr. Creamer reported that he and the Board have been named as defendants in a defamation lawsuit filed in the Court of Common Pleas by Daniel D. McCaffery, a 2009 primary election candidate for District Attorney. The Complaint was filed two months ago after the Board

entered into a Settlement Agreement with the McCaffery for DA Campaign Committee for admitted violations of the City's campaign finance law.

Mr. Creamer explained that in the September 30<sup>th</sup> Settlement Agreement, the McCaffery Campaign admitted that it violated §20-1006(4) of the City's campaign finance law (concerning material misstatements and omissions in campaign finance reports), and has paid a \$1,500 penalty for the two admitted violations. The Campaign further agreed to file amended campaign finance reports to correct the two material misstatements.

Mr. Creamer said that he and the Board will vigorously defend their actions in this matter and are confident that this complaint will be found baseless. Their response to the Complaint is due on December 23<sup>rd</sup>.

#### **F. 2009 Training Continues**

Mr. Creamer reported that staff has now conducted 22 ethics training sessions and have 3 sessions remaining on our calendar between now and the end of the year. Two Campaign Finance training sessions were also held and one more session is scheduled this year. Staff expects to offer frequent campaign finance training sessions in 2010 in anticipation of candidates preparing for 2011 City elections.

Mr. Creamer stated that work continues on our online ethics training project, and we hope to launch a pilot project in early 2010. Staff will coordinate with the Department of Technology in the next few months on the technical requirements for an email verification process so both the Board and the user will receive confirmation when a user has completed an online training module.

#### **G. COGEL Conference**

Mr. Creamer said he is proud to report on the role that Board staff played in the recent annual conference of the Council on Governmental Ethics Laws (COGEL). COGEL is a voluntary international professional organization comprised primarily of local, state, and national government officials who regulate ethics, campaign finance, lobbying, freedom of information, and election administration laws.

Mr. Creamer explained that as a new agency, staff frequently turns to our colleagues in COGEL for advice and guidance. For example, during the past year as staff explored various possibilities for online ethics training, they spoke with many COGEL member agencies about their development of online training programs. The Annual conference provides yet another opportunity to share our experiences with and learn from more than 250 of our colleagues.

Mr. Creamer said he was a member of the Program Committee for this year's conference, and it was the Committee's responsibility to develop a schedule of approximately 40 topics for conference panels and programs. Individual COGEL members then were asked to plan and recruit panelists for each of the sessions. Almost every session was followed by an extremely helpful question and answer period. In addition to attending as many sessions as possible, or staff was involved in preparing and presenting five programs.

Mr. Creamer reported that Mr. Meyer served as a panelist for a session called “The Gift Minefield” which explored whether gifts can ever serve an appropriate function in the operation of government. The panel also discussed trends in gift laws and regulations in other jurisdictions. The other panelists included an attorney in private practice who provided the perspective of the regulated community.

Mr. Creamer said that he joined a Canadian colleague on a panel entitled “Campaign Finance Regulation: Can the Playing Field Really Be Leveled?” The panel examined methods for trying to level the playing field, including public financing of campaigns, and concluded that you can never make the field level in absolute terms because certain factors that affect the relative pitch of the playing field, including wealthy candidates and third party expenditures, cannot be restricted under First Amendment principles. However, it is possible to make the field relatively level, particularly in a public funding system, where candidates’ expenditures can be regulated.

Mr. Creamer reported that Ms. Massar, who is a former COGEL President, facilitated an informal roundtable discussion for Local Ethics Agencies where participants shared their own problems and solutions. She organized and was the moderator of a panel that discussed how agencies can organize, prioritize, and achieve their legislative goals. During the session, a state legislator, an agency legislative liaison, and a professor who studies the legislative process shared their experiences and strategies for achieving legislative goals.

Mr. Creamer also reported that Nedda arranged a session called “Effectively Navigating Overlapping Jurisdictions,” which explored situations where either state or federal law may preempt local ethics and campaign finance laws. The panel included: a Commissioner of the Federal Election Commission; an attorney from the Campaign Legal Center who has defended local campaign finance laws against state preemption claims, including our own City campaign finance law; and an attorney in private practice. The fourth panelist was John Contino, the Executive Director of the Pennsylvania State Ethics Commission, who discussed how federal, state, and local agencies can and should cooperate in their enforcement efforts.

Finally, Mr. Creamer reported that Chair Glazer and Ms. Nayak attended sessions on many topics. These included the annual Campaign Finance and Ethics Update sessions that examined current trends and litigation in other jurisdictions, and a session on “Education on Shoestring Budget.” Staff plans to follow up on many of the ideas they absorbed in these programs.

Chair Glazer said that as a relatively new agency he is proud to say that in the few short years of our existence we have demonstrated significant presence in this national organization. Both in numbers of staff attending the conference and in impact with staff members this year participating in at least three panels. Due to Nedda’s prior involvement with COGEL her advice is constantly being sought.

#### **IV. General Counsel’s Report**

1. Formal Opinions and Advices of Counsel. Mr. Meyer reported that there were no new advisory opinions issued since the November report.

2. Informal e-mail guidance. Mr. Meyer reported that through Monday, December 14, 2009, there were four of these since the November report.

a. Received an inquiry from a City employee about non-profit work and fundraising. Advised that City employees are not prohibited from volunteering for charitable nonprofit organizations in their free time, including doing fund-raising; however, any such activities may be restricted by the ethics laws, depending on any connection with City government. Outlined the relevant ethics provisions and provided a copy of Advice of Counsel GC-2009-501.

b. Received three separate gift-related questions: (1) a City vendor asked whether it is acceptable to send City employees Christmas cards; (2) the leader of an association asked whether public officials could attend the association's holiday party; and (3) a City employee asked whether a City agency may issue "nominal internal monetary unisex gifts" for an employee of the month. In response to each of these three questions, we outlined the various gift provisions of the ethics laws, advising there likely would not be an issue under the Code's "substantial economic value" gift restriction or the Charter's gratuity restriction. We suggested that each requestor contact the Chief Integrity Officer with respect to the Mayor's Executive Order on gifts.

3. Regulations: Mr. Meyer reported that Regulation No. 7 on Annual and Routine Ethics Training, which was adopted by the Board at the October Board meeting, became effective on November 25, 2009.

## **V. Discussion of Proposed Amendments to Regulation No. 2, Investigations and Enforcement Proceedings, and Regulation No. 3, Referrals to and Cooperation with Other Governmental Enforcement Agencies**

Chair Glazer explained that in the summer of 2007, when it was only a few months old, the Board developed Regulation 2 on investigations and enforcement. The Board looked at other cities as a template, and now we are taking a closer look at Regulation 2 and staff has made recommendations to the Board for amendments.

Mr. Glazer called on Associate General Counsel Maya Nayak to explain the proposed amendments.

Ms. Nayak explained that staff has concluded that Regulation 2 should be amended to clarify the Board's procedures for its administrative enforcement proceedings. Ms. Nayak noted that these are only recommendations, and the Board can choose to accept, reject or revise any of them.

She explained that staff had three guiding principles in reviewing Regulation 2: (1) making sure the Board's procedures are well within the requirements for due process; (2) maintaining the Board's flexibility so that it can respond to unpredictable circumstances; and (3) clarifying things in the Regulation that might have been ambiguous or implicit.

Ms. Nayak explained further that the proposed amendments to Regulation 2 that are now before the Board generally fall into three categories: (1) clarifications of original Regulation 2 by eliminating language that was unclear; (2) revisions or adjustments of the substance of

Regulation 2 (a subset of this is changes made to conform to the requirements and terminology of Regulation 5 on confidentiality which did not exist when the original Regulation 2 was passed); and (3) additions of content that was not in the original Regulation 2.

Ms. Nayak then highlighted the amendments proposed by staff.

- In Section 2.0b, the definition of “Board” is clarified, removing the reference to “hearing officer.”
- The term “preliminary inquiry” in Section 2.4 has been clarified to indicate that a Preliminary Inquiry is not an investigation, which would trigger Regulation 5 confidentiality requirements. Ms. Mann asked where does a preliminary inquiry end?

Michael Cooke, Director of Enforcement, responded that a preliminary inquiry determines whether there is sufficient evidence of a violation to proceed to an investigation.

Chair Glazer asked whether the term “Executive Director” includes other individuals. Ms. Nayak said that the term includes designees at Section 2.0c.

- Regarding old Section 2.4(d), the proposed amendments clarify the notice requirement for judicial enforcement and move addressing that topic to new Section 2.19. She stated that staff determined that notice to the subject at the initiation of an investigation is not legally required.

Chair Glazer noted that staff has done a more comprehensive job than in the original text of Regulation 2. He explained that Mr. Cooke has checked federal and other applicable laws, and that he is satisfied that notice is not required.

- The proposed amendments include a 20-day response deadline, which mirror Philadelphia Common Pleas Court rules, and which can be shortened for exigent circumstances.
- New Section 2.10c clarifies that the failure to respond in writing to a Notice of Enforcement Action constitutes a waiver of the right to a hearing. Ms. Nayak explained the staff view that this was implicit in the original regulation, but that the proposed text makes this clear.

Executive Director Creamer asked a question about rendering a final decision. Ms. Nayak said that this is covered by Section 2.16. Mr. Creamer said that it is unclear when the decision is actually rendered.

Chair Glazer suggested that a sentence be added to clarify that the Board’s final decision is rendered at the vote of the Board. Mr. Cooke suggested that the word “renders” be changed to “votes to approve” at 2.10c.

- Ms. Nayak explained the requirement at Section 2.11b that a settlement be presented in writing. Mr. Creamer asked if that meant that the settlement must be signed by the parties? Ms. Nayak said “yes.” Mr. Creamer suggested that the text say that in order to submit a settlement to the Board for approval, the settlement must be signed by the Executive Director and respondents.

General Counsel Meyer said that the settlement must say that it is not binding until approved by the Board.

Chair Glazer noted that the level of approval required at Section 2.11 on settlements is a majority of the Board, but that Section 2.16 on final determinations refers to three Board members. He asked whether there should be a different standard for settlements which are voluntary. Ms. Nayak said that the vote required for the final board determination was unclear in the original Regulation 2.

Chair Glazer noted that with only three Board members right now, it would be possible that two members can decide a matter where a majority vote is required.

Executive Director Creamer said that we want to encourage settlements.

Mr. Cooke agreed that having settlements approved by a majority is acceptable, but that requiring a vote of three in a final determination is a stronger imprimatur of the strength of a case.

Ms. Mann stated that she thought the Board might have only three members for a while and that she believes approval by a majority is acceptable.

Pastor Jones asked whether there could be language that varies the vote requirement by the size of the Board.

Mr. Glazer said that there might be an issue of disparate treatment of respondents if there were a different requirement. Mr. Cooke also noted that a different vote requirement would only matter where there are only three board members, so clarifying whether a majority vote is ok is simplest. Mr. Glazer said he would support a majority vote of the Board in Section 2.16.

Mr. Meyer said we must be clear about what constitutes “the Board” for Section 2.16. He suggested that the term “present and voting” be added for clarification.

- Ms. Nayak explained that Section 2.12c deals with subpoena enforcement and that the authority to enforce a subpoena is granted upon issuance.
- Pre-hearing matters may be resolved by one Board member as provided in Section 2.12e.
- Ms. Nayak explained proposed Section 2.16a which specifies how the Board can make a final determination when no hearing is requested by the respondent.

Counsel Meyer clarified that Charter Section 4-1100 is the source of the Board’s jurisdiction in Section 2.0a and noted that at Section 2.3 on Separation of Functions that the substance is not being changed.

Mr. Cooke explained that the Law Department was currently reviewing the proposed Regulation 2 amendments and expected to complete its review in a few days. He suggested that if the Board concurs in the proposed amendments, they grant authorization to staff to make non-substantive changes that may be recommended by the Law Department.

Chair Glazer suggested Board approval of amendments to Regulation 2 as redrafted with the delegation of authority to staff to make non-substantive changes upon consultation with the

Chair to decide whether or not a change is substantive. Ms. Mann made a motion to that effect which was seconded by Pastor Jones, and approved by a vote of 3 to 0.

Mr. Cooke explained that there were also amendments proposed to Regulation 3 concerning referrals to other government enforcement agencies. These amendments conform Regulation 3 with the amendments to Regulation 2 and delete Section 3.4, concerning confidentiality, because that topic is covered by Regulation 5.

The Board approved the amendments to Regulation 3 by a vote of 3 to 0.

The Board determined to hold a hearing on the Regulation 2 amendments at the January 2010 Board meeting, assuming that Law Department approval of the amendments has been received.

## **VII. New Business**

Chair Glazer noted that the Board has received the Final Report of the Mayor's Task Force. He asked staff to review the recommendations in the Report for the next Board meeting, especially those that invite Board interpretation.

Chair Glazer said that the Board would go into Executive Session to consider enforcement issues and nonpublic advisory opinions.

## **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.