

Philadelphia Board of Ethics
Meeting Minutes
December 21, 2011
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

DRAFT

Present:

Board

Richard Glazer, Esq., Chair
Michael Reed, Esq., Vice Chair
Judge Phyllis Beck (Ret.)
William H. Brown, III, Esq.

Staff

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

I. Call to Order

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

II. Approval of Minutes

By a 4-0 vote, the Board approved deferring the approval of the meeting minutes until later in the meeting.

III. Executive Director's Report

A. Litigation Update

i. McCaffrey v. Creamer, et al.

Mr. Creamer explained that Mr. McCaffery filed a defamation action against the Board and him just over two years ago. The Complaint was filed two months 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 further explained that in his complaint, Mr. McCaffery alleged that the Board and Mr. Creamer defamed him at an unofficial and unprecedented "press conference." The Court of Common Pleas dismissed his Complaint on immunity grounds, but the Commonwealth Court reinstated the Complaint and remanded the case on the ground that there was a question of material fact on which immunity turned – whether or not the alleged "press conference" actually took place, with the suggestion that a press conference might constitute unofficial action outside the scope of quasi-judicial immunity.

Mr. Creamer said that since the Commonwealth Court's remand, the Court of Common Pleas denied the Board's renewed request to dismiss the Complaint and ordered the Board to file an Answer to the Complaint, which was done. Since then, staff has been engaged in discovery.

Mr. Creamer reported that on November 23rd, after the Board obtained a Court Order compelling Mr. McCaffery to answer the Board's discovery requests, Mr. McCaffery submitted his responses. In his response to the first interrogatory – which asked him to identify the date, time and location of any press conference held by Defendants at which he was allegedly defamed – Mr. McCaffery stated that the allegedly defamatory statements were published when Mr. Creamer read the allegations of the Board's publicly-filed Enforcement Petition into the record at the Board's May 2009 Board meeting.

Mr. Creamer said that based on this admission that there was no press conference and that the alleged defamatory statements were made at an official Board meeting, the Board filed a Motion for Summary Judgment on December 13th. In the Motion, the Board argues that they are entitled to judgment as a matter of law for four reasons.

First, the Motion argues that Mr. McCaffery's concession that the allegedly defamatory statements were made at an official Board meeting and not at an extra-judicial press conference resolves the only outstanding factual issue that precluded the Commonwealth Court from affirming dismissal of the complaint on the basis of quasi-judicial immunity.

Second, the Board argues in the Motion that they have a qualified privilege from suit under the Pennsylvania Political Subdivision Tort Claims Act.

Third, the Motion argues that Mr. Creamer is entitled to summary judgment because he is absolutely immune from the suit under doctrine of high public official immunity.

Finally, and alternatively, the Motion argues that the Board is entitled to summary judgment because the undisputed factual record shows that the alleged statements at issue, as reflected in the meeting minutes of the Board, were entirely truthful and thus are not actionable as a matter of law.

Mr. Creamer reported that Mr. McCaffery has until January 13th to answer the Motion for Summary Judgment. As he has reported in recent meetings, staff members and Mr. Creamer have spent a significant amount of time since August working with the Board's attorneys to defend Mr. McCaffery's lawsuit.

ii. Lodge No. 5 of the Fraternal Order of Police, et al v. City of Philadelphia, et al.

Mr. Creamer announced that the FOP filed a motion to compel his deposition on December 1st. The Board's response to the motion is due on December 22nd. Discovery closed on December 12th. The expert witness deadline is January 16th. Dispositive motions are due by January 30th and the trial date is scheduled on April 16th.

iii. Cozen O'Connor v. Philadelphia Board of Ethics

Mr. Creamer said that as was reported at the November meeting, the Board filed an Answer to Cozen's Complaint on November 9th. Since then, there has been no significant activity to report.

B. Lobbying Update

Software: Mr. Creamer reported that on November 17th, Richard and Nedda met with Adel Ebeid, the City's new Chief Innovation Officer, and his deputy, Dan Heitzer, to request a firm date for delivery of the lobbying registration software. On November 23rd, staff was told that the registration module would be ready, including testing, by February 15th and that the expense reporting software will be ready by March 15th. The other system features will be delivered by March 30th.

Mr. Creamer said that until the registration software is ready, staff is finalizing a temporary paper registration system to accommodate registrations between early January and February 15th. Separate registration forms for lobbyists, principals and firms will be available on the Board's website with filing instructions. It is the Board's goal to have these ready next week, and staff will send an email announcement to our distribution list as soon as the forms are on the website. Staff will offer in-person or telephone assistance to filers. Staff has also created a voucher and tracking system to collect lobbying registration fees.

Advisory Alert: Mr. Creamer said that following Board approval last month, staff issued the Advisory Alert concerning lobbying which announced that no lobbyist, lobbying firm, or principal registrations will be required prior to January 3, 2012 and that all other requirements of the Lobbying Code, Chapter 20-1200 of The Philadelphia Code, will take effect as of January 3, 2012. The Alert was posted on our website, circulated to our email distribution list and mailed to other individuals. A Press Release was also issued.

Staff continues to receive phone calls every day about lobbying, many of which concern the availability of the software or paper forms and training. Several callers wanted to discuss the differences between the requirements of the State and City lobbying laws. Others were concerned about the registration thresholds. In many cases, the questions were answered by referring the caller to Regulation No. 9 and the examples in the Regulation.

Training: Mr. Creamer explained that in addition to testing the online system, the Board must design lobbying training materials and prepare a training schedule. Staff plans to include the use of the electronic filing system as part of training, and expects to begin classes in mid-February when the online system is ready.

Budget: Mr. Creamer stated that last month the Board approved a request to the Fund for Philadelphia for \$44,000 to be used for two additional staff positions needed to support the lobbying program and other tasks. Staff received the \$44,000 check and deposited it in the City's General Fund. The next step in the process requires approval of a transfer ordinance by City Council to move the \$44,000 into the Board's FY12 appropriation. Richard therefore sent a letter on December 16th to Budget Director Rebecca Rhyhart requesting that she introduce the transfer ordinance as soon as possible.

Mr. Creamer said that in anticipation that the funds will be available soon, staff has begun advertising to fill the two positions approved by the Board last month.

C. Legislative Update

Mr. Creamer said that as he noted last month, Councilman Bill Green introduced Bill No. 110716 on October 13th to include life partners in the provisions of Chapter 20-600, the Ethics Code. The Board submitted written testimony in support of the bill for the December 6th hearing of the Committee on Law and Government. In their written testimony, they recommended that a similar change be proposed in the near future to include life partners in the definition of "immediate family" in the Lobbying Code at Section 20-1201(14).

Mr. Creamer stated that City Council passed the bill by a vote of 17-0 on December 15th. It is now awaiting the Mayor's signature.

D. Compliance Update

Mr. Creamer announced that he has an update on filing compliance for the pre-election (cycle 5) reporting period. All City candidates who were on the ballot for the general election

electronically filed pre-election (cycle 5) reports with the Ethics Board. Staff identified a number of political committees that should have, but did not, electronically file the required pre-election (cycle 5) report with the Ethics Board. The following committees filed their reports after receiving a letter from us notifying them of the failure to file:

APPAC
Apartment Association of PA
BOMA for Good Government PAC
Friends of Joe Scarnati
G G R Inc. PAC
Harleysville Insurance PAC
The Chartwell Law PAC
Williams for Senate
Better Mayfair PAC
Friends Across the Keystone PAC
PNC PAC
Vision Committee
Bricklayers & Allied Craftworkers PAC

E. Campaign Finance Training

Mr. Creamer announced that staff will conduct joint campaign finance training with the City Commissioners Office on January 10, 2012 at Local 98 IBEW headquarters on Spring Garden Street. The training session will begin at 10:00 am and is open to the public. Registration forms are available on the Board's website.

Comments: Chair Glazer asked why the training is being held at Local 98 headquarters. Mr. Creamer said that Local 98 requested the training.

F. Personnel

Mr. Creamer said that in addition to advertising for the two positions he mentioned earlier, staff has begun interviews to fill the vacant Information Specialist position. Staff received almost 60 resumes for the position and would like to have the position filled in January.

G. 2012 Board Meeting Calendar

Mr. Creamer informed the Board that they are required by the Pennsylvania Sunshine Act to give public notice of their schedule of regular meetings. Staff has therefore provided a list of proposed 2012 meeting dates, beginning on January 18, 2012, for the Board's approval (Tab 3). Once approved, staff will arrange for the list of dates to be published, as required by law.

Comments: Chair Glazer said that the Board meetings are usually held the third Wednesday of the month. Previously the Board cancelled the August meeting, but the Board will schedule the August meeting in the event there is a need for a meeting.

Chair Glazer noted that the November meeting is the day before Thanksgiving and suggested scheduling the November meeting the second Wednesday of November, which would be November 14th.

By a 4-0 vote, the Board approved the 2012 Board meeting schedule, as corrected.

H. Quadrennial Adjustment of Contributions Limits

Mr. Creamer explained that Section 20-1002(11) of the City Code requires quadrennial adjustment of the limits in the Campaign Finance Law on contributions to candidates for City elective office and to political committees. The annual limits are currently \$2,600 to candidates and \$10,600 to committees. The next adjustment is to become effective for contributions received on or after January 1, 2012.

Mr. Creamer said that on December 1st, he sent a letter to Rob Dubow, the City Finance Director, requesting that he calculate the amount of the adjustment, as described in Section 20-1002(11), and certify the new contribution limits in writing to the Mayor, the City Council President and Chief Clerk of Council. Mr. Creamer will update the Board concerning the adjustment next month.

I. COGEL Conference

Mr. Creamer informed the Board that Richard, Evan, Maya, Nedda and he attended the December 2011 Conference of the Council on Governmental Ethics Laws (COGEL) in Nashville from December 4th through 7th. Each of them selected from among 35 sessions, including extremely helpful updates on trends, legislation and litigation in the areas of Campaign Finance, Ethics and Lobbying.

Mr. Creamer explained that several staff members are involved in COGEL and were responsible for events at the Conference. Evan moderated a “breakfast table” discussion for agency general counsels about responding to requests for “Quick Advice.” Nedda was on the Conference Program Committee and moderated a Local Agency Roundtable discussion. Mr. Creamer attended two Steering Committee meetings where they not only made plans for COGEL 2012, but also discussed strategic planning for the organization’s future.

Mr. Creamer also explained that during the past year, Evan served on the Publications Committee that produces the Guardian, a quarterly electronic newsletter, and also served as an alternate on the Awards Committee. Nedda served on the Nominations and Awards Committees, and Mr. Creamer is a member of the COGEL Steering Committee which functions as the organization’s Executive Committee.

Mr. Creamer said that next year’s conference is in Columbus, Ohio. COGEL is a voluntary international organization comprised primarily of local, state, and national government officials

who regulate ethics, campaign finance, lobbying, freedom of information, and election administration laws.

Comments: Judge Beck asked staff to circulate an electronic copy of the Guardian to the Board members.

Chair Glazer said there aren't any other government agencies that have made more of an impact on COGEL as much as Philadelphia. In the past four years the Board of Ethics has made their presence known. He congratulated staff and thanked them for their additional work.

Chair Glazer noted that the Board held executive sessions on confidential enforcement matters since the November Board meeting. The Board conducted one such executive session by email in late November, spanning November 21st to November 26th. The Board also held an executive session by teleconference and email on December 8th and 9th.

IV. General Counsel's Report

1. Formal Opinions. Mr. Meyer reported that there were no Formal Opinions since the November report.

2. Advices of Counsel. Mr. Meyer reported that there were two Advices of Counsel since the November report.

a. Nonpublic Advice of Counsel GC-2011-512 (November 30, 2011). A City employee in an operating department asked for a nonpublic advisory as to the effect of the ethics laws on her in owning a local business while also working for a City department that may regulate that business. The employee advised that she is considering purchasing, along with a partner, an existing business located in the city.

The requestor further advised that, in her City position, she is responsible for the staff that takes City action in regulating such businesses. She advised that she understands that she would be required to "disclose and disqualify" herself from any City action affecting the business, but stated that she would like to better understand the full scope of such disclosure and disqualification.

Based on the facts provided, the Advice of Counsel advised the requestor of the following:

(1) The Board of Ethics can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past.

(2) Charter Section 10-102 prohibits the requestor from having a direct or indirect financial interest in a City contract.

(3) The requestor may not take official action as a City employee on any matter in which she or her business has a financial interest. In any such City matter, the requestor must disclose her financial interest and disqualify herself from working on that matter for the City, as provided in Code Section 20-608.

(4) The requestor may not represent any person as agent or attorney in any transaction involving the City, including her business and her partner. Her partner may represent the business, if the requestor follows the “disclose and disqualify” procedure.

(5) The requestor was advised that the State Ethics Act has a similar “disclose and disqualify” requirement, which is similar to the City’s in procedure.

(6) Remember that for any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and the requestor may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.

(7) Under Code Section 20-609, the requestor must not disclose confidential City information she acquired in her service with the City to any other person for the purpose of advancing her financial interest or that of her business or partner.

(8) The Commonwealth's financial disclosure form will require that the requestor disclose her financial interest in this business when she files that form by May 1 of the year following the calendar year in which she acquires the business.

b. Advice of Counsel GC-2011-513 (December 8, 2011). Richard W. Hayden, Esq., in his capacity as Counsel to the political committee Nutter for Mayor, requested a public advisory on questions related to the solicitation and receipt of contributions to defray the expenses of an “inaugural celebration event” to be held on the evening of January 2, 2012. Based on the facts provided, the Advice of Counsel advised the requestor of the following:

(1) From now through December 31, 2011, Mayor Nutter may accept post-candidacy contributions of up to \$2,600 from individuals and \$10,600 from political committees, partnerships, sole-proprietorships, or other forms of business organization even if such donors previously gave maximum contributions to the Nutter campaign in 2011 prior to the general election.

(2) In each calendar year following 2011, Mayor Nutter may accept post-candidacy contributions of up to \$2,600 from individuals and \$10,600 from political committees, partnerships, sole-proprietorships, or other forms of business organization.¹

¹ It should be noted that Section 20-1002(11) of the Campaign Finance Law requires the Finance Director to adjust the contribution limitations on January 1, 2008 and on January 1 of every four years thereafter. Accordingly, the limits will increase as of January 1, 2012. However, as of this date, we have not been informed whether the Finance Director has yet certified the amount of the adjustments.

(3) All post-candidacy contributions to the Mayor must be deposited into the checking account of the Nutter for Mayor political committee. Any expenditures for inauguration (or other post-candidacy expenditures) must be made out of the checking account of the Nutter for Mayor political committee.

Advices of Counsel GC-2011-512 and 513 are available on our website.

3. Informal e-mail guidance. Mr. Meyer reported that through Wednesday, December 14, 2011, there were four of these since the November report. *Note that in every such email we state the following: "This informal general guidance is not a ruling on your particular situation and does not provide you protection from an enforcement action." We add that if the requestor would like a definitive ruling that applies the Public Integrity Laws to his/her specific situation and that protects against a possible enforcement action, then they should ask us for an advisory opinion, providing, in writing, full and specific facts on which the opinion is to rely, including their name and title, specific question, and whether they are requesting a public or nonpublic advisory.*

a. Received an inquiry on Election Day stating that a voting machine had malfunctioned. Pointed out that Board of Ethics has no jurisdiction over voting machine malfunctions. Provided the number to call to report such problems and provided a link for more information on how to report election problems.

b. Received an inquiry from a California private firm that would be traveling to Philadelphia to meet with City officials the week of November 21, and inquiring whether they would be required to register as lobbyists. Provided the following response:

Although Section 20-1202 of the Lobbying Code states that registration begins July 1, 2011, in actuality the program of lobbyist registration and reporting in Philadelphia cannot begin until an implementing regulation is effective, details of registration procedures are completed, and delayed deadlines imposed by Board of Ethics Resolutions are passed, none of which has happened or will happen this week.

Accordingly, you are advised that even if any of your activity this week might otherwise constitute lobbying such that it might have required registration and expense reporting if the program were underway, because the program is not underway, no registration or reporting will be required based on any events of this week. You need not even keep records of any of this week's expenses for any future reporting, if you are later required to register, because reporting will not "reach back" to this week.

We will be publicly announcing further developments as they occur. If you would like your name added to our list of interested parties who wish to be included in any notifications, please let me know, and we will add your email address to our list.

c. Received the following inquiry from an official for a local political committee:

Can a Political Cmte accept contribution from PC? Personal Corporation common with Drs &?attys

Advised that whether any corporation may make any political contribution is a question under the State Election Code. The Board of Ethics has no jurisdiction to enforce, interpret, or advise on the State Election Code. Referred the requestor to the City Commissioners or the Pennsylvania Department of State.

d. Received an inquiry from a City employee requesting advice about serving in an unpaid position on the board of directors of a nonprofit organization. Provided links to several prior Advices of Counsel that discussed this issue.

V. Discussion of Internal Guidelines for Public Communications

Ms. Nayak walked the Board through the redline version of the Internal Guidelines for Public Communications policy, which incorporated suggested language she had received from Mr. Reed.

There was a brief discussion among the Board members regarding whether the Board members should be interviewed by or make statements to the media.

Ms. Nayak said she can draft language regarding this issue for the next Board meeting.

Chair Glazer said the Board has not had a policy in place since November so he suggested voting on the redline version that was distributed at the meeting.

By a 4-0 vote, the Board adopted the redline version of the Internal Guidelines for Public Communications policy with further understanding that staff will provide additional amendment language at a future meeting. The redline version is attached to the minutes (Attachment 1)

VI. Discussion of Proposed Amendments to Regulation No. 9, Lobbying

Chair Glazer said that there are proposed amendments to Regulation No. 9, on Lobbying, which incorporate the changes made to the Lobbying Code, Chapter 20-1200, by Bill No. 110556 and a change suggested by the Law Department.

Mr. Meyer walked the Board members through the proposed amendments to the Regulation.

Chair Glazer said that under the Charter process, amendments to a regulation are treated the same as adoption of a regulation. The Board will need to approve language and then the Law

Department will have to sign off. In the past a hearing date was set, but he did not recommend setting a hearing unless requested.

By a 4-0 vote, the Board approved the proposed amendments to Regulation No. 9, Lobbying.

VII. Approval of Minutes

By a 4-0 vote, the Board approved the meeting minutes, as corrected, for the public meeting that was held on November 16, 2011.

VIII. New Business

Judge Beck said that the Legal Services division of the Bar Association is upset about lobbying. Larry Beaser and Ellen Kaplan scheduled a meeting with the Legal Services division. She suggested that staff participate in the meeting.

Ms. Massar said that she met with Larry and Ellen in the past and will reach out to them.

IX. Questions and Comments

The public did not have any questions or comments

The public session of the Board's meeting was adjourned at 2:42 pm so that the Board could meet in executive session to discuss enforcement matters and non-public opinions.