

Philadelphia Board of Ethics
Meeting Minutes
November 16, 2011
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

DRAFT

Present:

Board

Richard Glazer, Esq., Chair
Judge Phyllis Beck (Ret.)
Sanjuanita González, Esq.

Staff

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 1:07 pm.

II. Approval of Minutes

By a 3-0 vote, the Board approved the meeting minutes, as printed and distributed, for the public meeting that was held on October 19, 2011.

III. Executive Director's Report

Mr. Creamer was not able to attend the board meeting, so Ms. Massar delivered his report to the Board.

A. Litigation Update

i. McCaffery v. Creamer, et al.

We responded to Mr. McCaffery's written discovery requests on October 3rd. His answers to our written discovery requests were also due on October 3rd, but we have not yet received any responses. On October 27, 2011 our *pro bono* counsel at Dechert filed a motion to compel Mr. McCaffery to respond to our discovery requests. On November 9th, the Court ordered McCaffery to respond by November 23rd.

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

The case is making its way through discovery, which closes on December 12, 2011. Our counsel at the Law Department had a brief telephone conference with opposing counsel and Judge Sanchez regarding scheduling. They also discussed the fact that Plaintiffs would like to take the Executive Director's and Mayor's depositions, but we maintain that they have not met their burden to justify the deposition of high public officials in this case. Judge Sanchez encouraged both sides to come to an agreement on this issue, but is prepared to rule on a motion for protective order if necessary.

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

On October, 18, 2011 the Court sustained Cozen's Preliminary Objections to Strike Defendant's Preliminary Objections and directed the Board to answer Cozen's complaint within 20 days. Accordingly, on November 9, 2011, we filed our Answer to Cozen's complaint.

B. Lobbying Update

We will provide an update on the status of Regulation No. 9, the lobbying software, and funding for additional staff later in today's meeting.

C. Legislative Update

Bill No. 110556 which amended the Lobbying Code, Chapter 20-1200, was passed by City Council on October 13th by a vote of 17 – 0 and signed by Mayor Nutter on October 26th. This legislation will require amendments to Regulation No. 9 in the near future.

As we noted last month, Councilman Bill Green introduced Bill No. 110716 on October 13th that would include life partners in the provisions of Chapter 20-600, the Ethics Code. The bill was

referred to the Committee on Law and Government, but has not yet been scheduled for a hearing. We hope that a similar change will 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).

D. Campaign Finance

Prior to the November 8th general election, we conducted campaign finance training sessions jointly with the City Commissioners on September 27th, October 13th, and October 18th. Each session covered the requirements for candidates and political committees under the Pennsylvania Election Code and Philadelphia’s Campaign Finance Law. We believe these sessions were extremely helpful for candidates and treasurers and plan to conduct similar sessions in advance of future elections.

We handled dozens of telephone calls for campaign finance assistance in the three weeks before the election. The questions often concerned how to report last minute contributions that must be reported within 24 hours and how to use the electronic filing SmartClient software. We wish to thank the Records Department for their continued assistance and help desk support for the electronic filing system.

E. Personnel

Last month the Board authorized staff to begin the hiring process for the vacant Information Specialist position. The vacancy has been posted on the Human Resources website with a closing date of November 30th for all resumes. We expect to conduct interviews in December and will report to the Board at the December meeting on our progress.

F. COGEL Conference

We will report next month on our participation in the December 2011 Conference of the Council on Governmental Ethics Laws (COGEL). 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. This year’s Conference will be held in Nashville, TN from December 5th through 7th.

We are proud that members of our staff have been very involved in COGEL committees during the past year. Evan is a member of the Publications Committee that produces the Guardian, a quarterly electronic newsletter, and also served as an alternate on the Awards Committee. Nedda is a member of the Conference Program Committee, the Nominations Committee, and the Awards Committee. I am currently serving as a member of the COGEL Steering Committee which functions as the organization’s Executive Committee.

G. Art in the Office

We would first like to thank local artists Barbara Rosin, Christine Stoughton, Susan Stefanski, Linda Dubin Garfield and Sandi Neiman Lovitz whose works were on display in our office in an

exhibit entitled "Paper and Paint." Visitors to our office thoroughly enjoyed the 51 items in that exhibit.

We again have the pleasure to announce a new art exhibit, entitled "Scenes of the Schuylkill." The 60 works in the exhibit are all by Priscilla Bohlen, and they include oils, watercolors, and acrylics. Ms. Bohlen is a Moore College of Art graduate, and she shows her paintings extensively throughout the Philadelphia area. The paintings are all about light - at sunrise and sunset, sunlight and reflections on the water. Many of the images are of familiar places like 30th Street Station, the Cira Centre, Bartram Gardens, and Grey's Ferry. We have contact information for the artist and invite you to enjoy Ms. Bohlen's work all through our office.

H. Introduction of Intern

Last month we reported that Professor David Hoffman at Temple School of Law assisted us with the search for interns for the Board and that we were lucky to have two students helping us. We'd like to introduce Anip Patel who is here today. He's currently working with Associate General Counsel Maya Nayak on a research project to prepare for future regulations.

Chairman Glazer asked how many people attended the Campaign Finance training.

Ms. Massar said that close to 60 people attended the training sessions.

IV. General Counsel's Report

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

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

a. **Nonpublic Advice of Counsel GC-2011-510 (September 28, 2011).** A City employee requested nonpublic advice as to how the Public Integrity Laws might restrict her in certain private activity for a nonprofit that she created, in view of her public position as a City employee.

Based on the facts provided, the Advice of Counsel advised the requestor of the standard rules concerning outside financial interests, including the following:

(1) Under Charter Section 10-102, the requestor may not have a personal financial interest in a City contract.

(2) Under Code Section 20-602(1), the requestor may not personally represent the nonprofit as agent in any City transaction whether or not she would be acting in the matter as a City

employee. Note that this is an absolute prohibition, so the requestor may not have such participation, even if she files a “disclosure and disqualification” letter.

(3) Under Code Section 20-602(5), another member of the nonprofit may represent, as agent or attorney, the nonprofit in a transaction involving the City, provided that the requestor publicly discloses the conflict and disqualifies herself as provided in Code Section 20-608.

(4) Under Code Section 20-607(a), the requestor may not take official action in her City position that affects her income from the nonprofit.

(5) Code Section 20-607(b) does not apply, since the entity of which the requestor is an officer is a nonprofit.

(6) Based on the facts that were provided to us, the requestor is an officer of the nonprofit. The Public Integrity Laws do not govern whether she may call herself “executive director” or some other title.

(7) Under Section 1103(a) of the State Ethics Act, the requestor may not take official action, as a City employee, that has an economic impact on herself, or on the nonprofit as a “business with which you are associated.” As to the conflict from a personal financial interest or an interest of her employer, this is essentially the same requirement as under the City Code conflict provisions, as discussed above, and the same public disclosure and disqualification would be required.

(8) Code Section 20-608 provides the requirements for making public disclosure and disqualification under the City Code, and such a filing should also satisfy the filing requirements of the State Ethics Act conflict provision, as well.

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

b. **Nonpublic Advice of Counsel GC-2011-511 (October 7, 2011).** A City employee requested a nonpublic advisory regarding whether certain activity involving exploration of a possible run for public office would require him to resign his City position.

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

(1) Under the Home Rule Charter and the City’s Campaign Finance Law, the requestor will not become a candidate until he either files nominating papers or publicly declares his candidacy for public office.

(2) If the requestor were to meet with a group of fewer than 15 community members and share his thoughts on the community, the community’s needs and his willingness to consider a

run for public office and his qualifications (but not committing to run), that action, in and of itself, would not constitute a “declaration of candidacy” by the requestor and would not require him to resign his City position under Charter Section 10-107(5).

(3) This Advice addresses only questions under the Public Integrity Laws that are within the jurisdiction of the Board of Ethics. Explicitly not addressed are any issues under the Pennsylvania Election Code. This Advice also assumes that the requestor’s question does not involve the solicitation or receipt of any contributions or the formation of any political committee.

Advices of Counsel GC-2011-510 and 511 are available on our website.

3. Informal e-mail guidance. Mr. Meyer reported that through Thursday, October 13, 2011, there were three of these since the September 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 from a City official regarding a presentation at a 3-hour continuing education program for professionals. The official asked whether it would be permissible to accept the offered compensation of \$50 per hour for the presentation. The official was advised that a single 3-hour presentation would not make the program host an employer and thus would not raise any issues of conflict of interest. However, the official was advised that there may be an issue under the State Ethics Act, which prohibits acceptance of an honorarium by a public official.

The official was advised that we interpret the Act’s definition of “honorarium” to mean two things: (1) public officials/employees may not receive payment when they are invited to appear and talk about subjects related to their work because of their official identities; and (2) public officials/employees may not receive payment for other services that is out of proportion to the market value of such services. The presumption is that when public employees are paid to talk about their work or are paid an excessive amount for doing something, the payment may represent a “corrupt bargain” to purchase the employee’s influence. Since it appeared from the facts provided that the official’s presentation would be based, at least in part, on the official’s work for the City, the State Ethics Commission could conclude that payment for such a presentation would constitute a prohibited honorarium. Accordingly, the official was advised to decline payment for the presentation. It was emphasized that the State Ethics Commission has final administrative jurisdiction over interpretation of the State Ethics Act, and it was suggested that the official may wish to seek guidance from the Commission.

b. Received an inquiry from a former City official who had separated within the past year. The former official inquired about the permissibility of responding to an RFP by a City-related public entity. We provided a general summary of the post-employment rules, one from the State Ethics Act and two from the City Code, as follows:

(1) State Ethics Act one year rule. The Act prohibits a public official/employee from representing any person (including their firm and any client) before their "former governmental body" for one year from separation from the City. For certain former officers/employees, their "former governmental body," may be their particular City department, but could be several departments or the entire City. Published rulings from the State Ethics Commission do not leave the question free from doubt. See the discussion from Board of Ethics Advice of Counsel GC-2011-509 at page 4.

(2) City Code two-year rule. Code Section 20-607(c) would prohibit the requestor, for two years from separation, from becoming financially interested in any official action she took while a City employee. Thus, if, for example, she had assisted the entity with preparing the RFP or designing the specifications for the RFP to which her firm would now respond, she would be prohibited from having a financial interest in the award of that contract.

(3) City Code permanent rule. Code Section 20-603(1) would prohibit the requestor from "at any time" assisting another person, such as her firm or a client, in any particular transaction involving the City in which she at any time participated during her City service.

c. A City official on behalf of his City office noted that employees of the office have been invited to an "open house" at a firm that has been a vendor with the office. The requestor asked whether employees attend this "open house" and partake in finger food and drinks.

We receive some variation on this question (gift of free attendance at an event for which there is either an admission charge or free food is provided, or both) approximately once a month. We provided the standard gift advice.

4. Additional Matters

Mr. Meyer informed the Board that he had two additional points that were not in the Report sent in advance, because they were in process.

First, as announced at the October meeting, Mr. Meyer explained that General Counsel staff has now begun making regular announcements, at public Board meetings, of certain events related to enforcement matters: the filing of a Notice of Administrative Enforcement Proceeding; the receipt by the Board of a Response to Notice of Administrative Enforcement Proceeding; and the scheduling of a Public Hearing.

Mr. Meyer said that at the October meeting, staff announced that on October 5, 2011, Michael Quintero Moore was served with a Notice of Administrative Enforcement Proceeding in Matter No. 1110MU13. The "MU" designation denotes multiple categories of alleged violations.

Today, we are announcing two additional events. On October 25, 2011, Mr. Moore filed a Response in this proceeding and requested a hearing. The second announcement is that a public hearing is scheduled in this matter for December 13, 2011 at 10 am in the offices of the Board.

Mr. Meyer explained that charges brought by Enforcement Staff are merely allegations and no violation has been established unless and until the Enforcement Staff satisfies its burden of proof in an administrative enforcement proceeding before the Board, pursuant to Board Regulation No. 2, Subpart C.

The Second additional point relates to lobbying.

Mr. Meyer said that since the ordinance adding the Lobbying Code to The Philadelphia Code was signed on June 16, 2010, a number of events have occurred, including two Board of Ethics Resolutions, consideration and adoption of Board of Ethics Regulation No. 9, passage and approval of Council Bill No. 110556 amending the Lobbying Code, and on-going work by the Board of Ethics and the Office of Innovation & Technology to develop and implement an on-line filing system for registrations and reporting, which is still incomplete.

Mr. Meyer explained that Regulation No. 9 was approved by the Law Department and was filed with the Records Department on November 8. Normally, regulations become effective for the next working day 10 days after filing, which would mean as of November 21. However, in this complicated matter, it is necessary to consider the combined effect of all the various processes that he just referred to. Accordingly, he has prepared an Advisory Alert, which should be self-explanatory. Mr. Meyer read the Advisory Alert which is attached (Attachment 1).

Mr. Meyer said that since this Alert provides for registration as of January 3, 2012, even if the on-line registration system is not ready, he is requesting that the Board rescind its Resolution of June 15 that delays registration until the electronic system is ready, and to partially rescind its Resolution of July 7, to the extent that it relies on the June 15 Resolution.

Judge Beck asked how the Advisory Alerts are issued. Mr. Meyer explained that the Advisory Alert will be posted on the Board's website, mailed and emailed to a list of interested parties that Ms. Massar has established.

Chair Glazer suggested issuing a Press Release.

Accordingly, Mr. Meyer asked for two motions.

[1st motion]: Move to rescind the Resolution of June 15, 2011 completely, and also to rescind the Resolution of July 7, 2011 to the extent that it incorporates the June 15 Resolution, by deleting the following language at the end of Paragraph 3 of the July 7 Resolution: "or, as provided in the Resolution the Board approved on June 15, 2011, if the mandatory lobbying electronic filing system, the Philadelphia Lobbying Information System, is not yet available." The sentence will then end with the word "effective."

Chair Glazer went over the time line of the June 15th Resolution for the Board members. He asked Mr. Meyer to explain the purpose of the first motion.

Mr. Meyer said it makes sense to start the lobbying registration on January 1st. It will benefit the public and provide some sort of system. It might not be the Philadelphia Lobbying Information System (PLIS) but it will be done.

Chair Glazer asked for an update on the software.

Ms. Massar said staff is waiting to smoke test from the Board's offices because the filers will be using the system from remote sites. There are some issues with the access and security of the software. Staff wants the software to work properly.

Ms. Massar informed the Board that training is mandatory and nothing has been scheduled. Staff has created paper copies, which will be available on the website, to use until the software is available.

The Board approved this motion by a 3-0 vote.

[2nd motion]: Move to accept the Advisory Alert and authorize its distribution and posting on the Board's website.

The Board approved this motion by a 3-0 vote.

V. Funding for Additional Staff

Ms. Massar stated that the Fund for Philadelphia, a 501(c)3 charitable organization, was created in 1984 by Mayor Wilson Goode to support City of Philadelphia programs and initiatives. Government ethics programs are among the Fund's priorities, and money was deposited by the City into the Fund by Mayor John Street to support the work of the new Board of Ethics. Staff was recently advised by the Managing Director's Office that \$332,000 is available to the Board through the Fund.

Ms. Massar explained that staff met with Budget Director Rebecca Rhyhart and Deputy Budget Director Kevin O'Hagan to discuss the process for obtaining these funds to hire additional staff to administer the Board's lobbying responsibilities.

Ms. Massar further explained Mr. O'Hagan will arrange to transfer money from the Fund for Philadelphia into the City's General Fund. A transfer ordinance will then be necessary to request that City Council appropriate the funds from the General Fund to the Board's FY12 budget for personnel expenses.

Ms. Massar recommended to the Board to use this funding to hire two new employees, an Information Services Director and an Information Specialist, at a total annual cost of \$84,000.

Ms. Massar recommended that the Board authorize a request for \$44,000 from the Fund for Philadelphia to cover the cost to hire two additional staff members during FY12 and for \$84,000 in each of the next three Fiscal Years (2013, 2014, and 2015) for those positions.

The board members questioned why staff was only requesting \$44,000. Ms. Massar explained that the Board can only make a request for the current year. The Board will have to make the same request for each fiscal year.

A motion was made to request the \$44,000 from the Fund for Philadelphia for the purpose of hiring two additional staff members for FY12. The Board approved this motion by a 3-0 vote.

Ms. Massar also requested a Board motion to delegate the authority to the Executive Director to begin the process to fill the two positions. The Board approved this motion by a 3-0 vote.

VI. New Business

There was no new business to discuss.

VIII. Questions and Comments

Sophie Bryan from Councilman Green's office expressed her concern to the staff with regards to using the paper filing process for lobbying registration.

The public session of the Board's meeting was adjourned at 2:05 pm so that the Board could meet in executive session to discuss enforcement matters and non-public opinions.