

Philadelphia Board of Ethics
Meeting Minutes
October 19, 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.)
Sanjuanita González, 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 1:00 pm.

II. Approval of Minutes

By a 4-0 vote, the Board approved the meeting minutes, as revised and corrected, for the public meeting that was held on September 21, 2011.

III. Executive Director's Report

A. Enforcement Update

Mr. Creamer announced that on September 21, 2011 the Ethics Board approved eight settlement agreements involving the following candidates, political committees, and treasurers of political committees:

1. Pennsylvanians for Good Govt, James Rosica, and Christine DiNunzio-Sylvestro resolving violations of 20-1006(4);
2. PA UAW Good Government Committee and Tom Ashton resolving violations of § 20-1006(4);
3. Progressive Agenda PAC resolving violations of §§ 20-1006(4) and 20-1002(2);
4. Friends of Blondell Reynolds Brown, Councilwoman Blondell Reynolds Brown, and Gail Scarborough resolving violations of §§ 20-1006(4) and 20-1002(12);
5. Friends of Stephanie Singer, Stephanie Singer, and Ellen Chapman resolving violations of §§ 20-1006(4) and 20-1003;
6. Tyner for Council, Verna Tyner, and Otis Hightower resolving violations of § 20-1006(4);
7. Taubenberger for Philadelphia, Al Taubenberger, and William St. Clair resolving violations of § 20-1006(4);
8. Friends of Greg Paulmier, Greg Paulmier, and Glendora Byrd resolving violations of § 20-1006(4).

Mr. Creamer also announced that on August 23, 2011, the Ethics Board approved a settlement agreement with Whaumbush for Sheriff, Jacque Whaumbush, and Harris Brooks resolving violations of §§ 20-1006(4) and 20-1003.

Mr. Creamer further announced that on October 18, 2011, the Ethics Board approved a settlement with Friends of Michael Bell and Julius Bell. Mr. Bell is a candidate for City Commissioner and he failed to file the required 24 hour reports.

B. Litigation Update

i. McCaffery v. Creamer, et al.

Mr. Creamer reported that the Board responded to Mr. McCaffery's written discovery requests on October 3rd. His answers to the Board's written discovery requests were also due on October 3rd, but staff has not yet received any responses.

Mr. Creamer explained that staff members and he have spent a significant amount of time in August, September and October working with the Board's attorneys to defend Mr. McCaffery's lawsuit. Now that the matter is in midst of discovery, Mr. Creamer anticipates that more staff time will be spent on this lawsuit.

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

Mr. Creamer reported that discovery in this matter closes in mid December. The Law Department has a meeting scheduled with opposing counsel tomorrow. Interrogatories and Requests for Production of Documents were served by plaintiffs. Staff assisted our counsel in responding to the discovery requests.

Chair Glazer asked how much of staff resources are being expended on this matter.

Mr. Cooke responded that he spent two to three hours on the responses to the interrogatories and Requests for Production of Documents.

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

Mr. Creamer reported that the Board is currently waiting for the Court to rule on our Renewed Preliminary Objections to Cozen's Complaint as well as Cozen's Preliminary Objections to Strike Defendant's Preliminary Objections.

Mr. Creamer explained that in the Board's renewed Preliminary Objections, we argue that Cozen's request for a declaratory judgment on the question of whether or not the City's contribution limits apply to post-election efforts to retire campaign debt was rendered moot by the 2010 amendment to the City's campaign finance law and by subsequently amended Regulation No. 1. Last year, while the case was on appeal, City Council amended the law with an express application of the limits to post-election efforts to retire campaign debt.

He also explained that the Board's Renewed Preliminary Objections also argue that there is no case or controversy because advisory opinions cannot be challenged in Court and that even if the Advisory Opinion is deemed to be a "final adjudication" by the Board, that Cozen's Court challenge should be dismissed because it wasn't filed within 30 days of the Opinion, as required by law.

Mr. Creamer reported that on July 29th, Cozen filed Preliminary Objections to Strike Defendant's Preliminary Objections, asserting that mootness cannot be raised by preliminary objection and that the trial court rejected our alternative preliminary objections when it did not rule on them. Cozen filed an Answer to our Preliminary Objections on August 4th and we filed a response to Cozen's Preliminary Objections to Strike Defendant's Preliminary Objections on August 18th. In our response, we argue that mootness based on a change in the law, as has occurred with Cozen's Complaint, can be raised by preliminary objection, while mootness based on a change in facts cannot be raised by preliminary objection. Both sets of Preliminary Objections have been assigned to Judge Panepinto. According to the dockets, the case has been assigned to Judge Sandra Moss.

Mr. Creamer also reported that Cozen filed its Complaint against the Board just over three years ago, making it the longest running challenge to the City's contribution limits since the law

took effect seven years ago. The firm has argued alternatively that the contribution limit rule impairs the Friends of Bob Brady's ability to raise money to retire the firm's debt or that the firm should be permitted to make a \$448,000 in-kind contribution to Congressman Brady's mayoral campaign by forgiving the debt at one time, notwithstanding the \$10,000 contribution limit. Essentially, the firm argues that the City's rules should not apply to its fees or to its former client. Beyond the City's law, the firm, which is a professional corporation, has not explained how it could forgive the debt without violating the ban on corporate contributions under section 3253 of the State Election Code.

C. Lobbying Update

Mr. Creamer stated there are two major tasks to be completed in order to implement the new lobbying law. The first is finalizing Regulation No. 9 and the second is the filing software project.

Regulation No. 9: At the September 21st meeting, the Board approved the Hearing Report on Regulation No. 9 which included significant modifications to the text of the regulation that was first presented to the Board in May. The Report was subsequently transmitted to the Law Department for review. Possibly complicating this review was the consideration of Bill No. 110556, amending the Lobbying Chapter, which received final approval in Council only on October 13th and as of this date has not yet been acted upon by the Mayor. If and when the Law Department approves the Hearing Report, it will be transmitted to the Records Department for filing, and will become effective ten days after that filing.

As a reminder, still in effect are Board Resolutions of June 15 and July 7, delaying any enforcement of reporting and registration until the on-line software is available and delaying any other enforcement of the Lobbying Chapter until 30 days after Regulation 9 becomes effective.

Lobbying Software: Staff expects to resume "smoke testing" of the lobbying electronic filing software within a week. This has been delayed by major changes to the City's technology infrastructure which will have a direct impact on our software. It is more efficient to wait for these changes now than to have to modify the lobbying software again within a short period of time.

While this delay has put us further behind schedule on this project, staff believes the lobbying registration process can be ready in November. Staff will then "smoke test" the remaining two lobbying functions, the quarterly expense reporting system for principals and the system administration operations to be conducted by our staff. Smoke testing is followed by even more rigorous "user acceptance testing."

Regulation 9 and the software design are not the Board's only lobbying-related tasks. The Board staff must complete a user manual, design training materials, train other members of our staff to provide "help desk" support for filers, and design internal office processes to collect

registration fees and to receive and verify the electronic reports. The magnitude of this project is stretching our staff to the limit.

In spite of all of these obstacles, we are really excited about implementing the City's lobbying initiative.

D. Legislative Update

Mr. Creamer reported that Bill No. 110556 was introduced on September 8th to amend Chapter 20-1200, the lobbying chapter, of the Philadelphia Code. A hearing on the bill was conducted on September 28th before City Council's Committee on Law and Government where Mr. Creamer presented testimony supportive of the bill. As he mentioned earlier, Council passed the bill on October 13th by a vote of 17 – 0. Staff will advise the Board when the bill is signed.

Mr. Creamer said that in another legislative development, Councilman Bill Green introduced a bill on October 13th that would include life partners in the provisions of the Ethics Code. As the Board discussed last month when reviewing Regulation No. 9, they hope that a similar change is made to include life partners in the definition of "immediate family" in the Lobbying Code at Section 20-1201(14).

E. Campaign Finance

Mr. Creamer reported that staff is continuing to conduct campaign finance training sessions jointly with the City Commissioners before the November election. One session was held at the Board's office on September 27th and a second session was held at County Board of Elections office on October 13th. There is one more joint training session at the Board's office on October 18th. Each session covers the requirements for candidates and political committees under the Pennsylvania Election Code and Philadelphia's Campaign Finance Law.

Mr. Creamer said that staff expects the volume of telephone calls for campaign finance assistance will spike between now and election day.

F. Ethics Training

As staff advised the Board last month, Mr. Creamer said that staff knows that their heavy workload has had an impact on their ability to offer ethics training sessions, and the Board will have to delay ethics training while staff concentrates in the fall on campaign finance training and lobbying tasks. Staff expects to resume a limited ethics training calendar in November and will prioritize sessions for new City employees, officials and board and commission members who have not already had initial ethics training.

G. FY12 Budget Update

Mr. Creamer said that City revenues for the first quarter of FY12 (July through September) came in below projections and that City agencies have been asked to reduce FY12 spending by

2%. Staff received the request to reduce our Target Budget by 2% on October 12th. A 2% reduction to our **\$810,000** budget is **\$16,200** or a total budget of **\$793,800**. Our FY12 budget as approved by City Council in June was allocated as follows:

Class 100 (Personnel):	\$700,000
Class 200 (Purchase of Services):	\$96,000
Class 300/400 (Equipment and Supplies):	\$14,000.

Mr. Creamer said that as staff understands the 2% reduction, the Board can specify where the cuts are to be made. Staff therefore suggests that no cut be made to our Class 100 funds. If the Board were to reduce Class 100, there would not be sufficient funds to fill our vacant Information Specialist position, which staff will discuss in a few minutes. Staff proposed instead to allocate the \$16,200 reduction as follows:

Class 100 (Personnel):	\$700,000 (no change)
Class 200 (Purchase of Services):	\$84,200 (\$11,800 reduction)
Class 300/400 (Equipment and Supplies):	\$9,600 (\$4,400 reduction).

H. Personnel

Mr. Creamer said that based upon the FY12 Target Budget numbers that he just reviewed and assuming no reduction to Class 100, the Board will have sufficient funds in Class 100 to fill the Information Specialist position that has been vacant for more than a year. The Board currently has one Information Specialist, Elizabeth Baugh, who has taken on a tremendous amount of work, including much responsibility for our lobbying program. An additional staff member is really necessary to assist with our on-going responsibilities.

Mr. Creamer requested Board authority to fill this vacancy, which has a salary of \$34,000. While Charter Section 3-806 requires that the Board appoint the Executive Director and General Counsel, the Law Department advised the Board in 2008 that the Board is permitted by the Charter to delegate its authority to the Executive Director to fill other staff positions, such as the Information Specialist. Accordingly, Mr. Creamer requested a Board motion to delegate this authority to him so that staff can begin the process to fill the Information Specialist position.

The motion was approved with a 4-0 vote.

I. Interns

Mr. Creamer expressed the Board's appreciation to Professor David Hoffman at Temple School of Law for his assistance in recruiting two very qualified interns for the Board. Professor Hoffman reached out to Temple students and collected resumes from seven students who are interested in the Board's work. The Board is pleased that Rahul Gogineni and Anip Patel have already started to work with staff on two key projects. The first involves research to prepare for future regulations, and the second is to provide support on enforcement matters.

Mr. Reed suggested staff to call or send a letter to Professor Hoffman to express the Board's appreciation.

J. International Visitors

Mr. Creamer reported that on September 26th, staff hosted eight officials from the Republic of Moldova which was, until August 1991, part of the USSR. These officials were invited to the United States under the auspices of the Department of State's International Visitor Leadership Program. Their Philadelphia visit was coordinated by International Visitors Council of Philadelphia, and they were interested in visiting agencies with jurisdiction over ethics laws.

Mr. Creamer explained that staff provided them with an overview of the Board's history and responsibilities with special attention to the Code of Ethics and campaign finance law. He thanked Evan and Michael who made presentations to the visitors.

Chair Glazer said he is not criticizing staff. The Board knows staff is overextended. He is concerned that the Board may be in violation of its own Regulation No. 7, Annual and Routine Ethics Training.

Mr. Meyer said he is not sure the Board can violate its own Regulation. He will think about Chair Glazer's concern and consult with Ms. Massar before the next Board meeting.

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. Creamer 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. Public Communications Policy. Mr. Meyer reported that staff continues to work on preparing a revised public communications policy. In the interim we do have Regulation No. 5, which provides guidance concerning what may or may not be disclosed publicly.

5. Announcements. Mr. Meyer informed the Board that he has an additional procedure to draw to the Board's attention, which is not in the Report sent to you, as it was still in development. General Counsel staff intends to begin regular announcements, at public Board meetings, of certain events related to enforcement matters. Under Board Regulation No. 2, hearings in administrative adjudication proceedings by the Board are public. Accordingly, pleadings in such matters are also public, and the hearings must be announced publicly, so the scheduling of a hearing is a public matter. As a result, General Counsel staff has determined that, in order to be as fair as possible, and treat all respondents as equally as possible with respect to disclosure of these public matters, it is appropriate to adopt a regular practice of public announcements of three events: 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.

The documents themselves will be public, so the announcements will be as objective and summary as possible. The documents announced will then be available upon request.

We gave extensive consideration to how much advance notice to respondents was fair. For example, we would likely not announce at a Board meeting a Notice that had just been filed the day before, in case there were errors, or a problem with service of process. We determined that the general goal would be to announce any of the three events that occurred ten days or more before the Board meeting, with discretion on the General Counsel staff to adjust that period in a particular matter, if circumstances warranted it.

Questions received after the Board meeting should be directed to General Counsel Evan Meyer, or – in my absence – Associate General Counsel Maya Nayak. Questions on the substance of allegations will be answered by referring the requestor to the associated document. Questions on procedure will be answered by referring to either Regulation No. 2 or the document entitled "Procedures for Administrative Enforcement Proceedings" – both of which are provided to every respondent.

This is not an action item requiring a Board vote, but I will be happy to receive any questions or comments by members of the Board.

[There was no discussion.]

Mr. Meyer said that in light of the practice just announced, staff has their first enforcement event to announce. 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. In this matter, Mr. Moore is charged with ten counts of violations of Charter Section 10-107(4), one count of a violation of Charter Section 10-107(3), and five counts of violations of Code Section 20-606(2).

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.

VI. New Business

Chair Glazer took a moment to acknowledge and thank John Contino, Executive Director of the State Ethics Commission for meeting with staff for an hour prior to the Board meeting regarding the work of the State Ethics Commission.

VIII. Questions and Comments

The public did not have any questions or comments.

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