Philadelphia Board of Ethics
Meeting Minutes
March 29, 2012
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

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

Staff
J. Shane Creamer, Jr., Esq.
Nedda Massar, Esq.
Evan Meyer, Esq.
Michael Cooke, 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 5-0 vote, the Board approved the meeting minutes, as corrected, for the public meeting that was held on February 22, 2012.

III. Executive Director's Report

A. Litigation Update

i. McCaffery v. Creamer, et al.

Mr. Creamer explained that staff is waiting for the Court to rule on the Board's Motion for Summary Judgment, which was filed on December 13th. Mr. McCaffery filed an Answer to the Board's Motion on January 13th, and the Board filed a Reply to his Answer on January 23rd. The dockets reflect that the Motion has been assigned to Judge Mark Bernstein.

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

Mr. Creamer said as he reported at last month's Board meeting, staff obtained an extension of deadlines in this case which will allow both sides additional time to develop the factual record. Dispositive motions are now due on April 16, 2012 and trial is scheduled for the July 16, 2012 trial pool. Staff continues to work with counsel at the Law Department in defending the claims brought by the FOP challenging the constitutionality of the Home Rule Charter's ban on police contributions.

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

Mr. Creamer reported that on March 16th, the Board filed a Reply Memorandum of Law in Further Support of Our Motion for Judgment on the Pleadings. The Memorandum was filed in response to Cozen's Memorandum of Law in Opposition to our Motion for Judgment on the Pleadings, which was filed by Cozen on March 6th. Previously, on January 23rd, Cozen filed a Motion for Judgment on the Pleadings. On February 13th, we filed a Motion for Judgment on the Pleadings and in Opposition to Cozen's Motion for Judgment on the Pleadings. The dockets reflect that both Motions for Judgment on the Pleadings have been assigned to Judge Leon Tucker.

B. Solicitor Opinion Regarding the Employment Status of Certain Officials at the Controller's Office

Mr. Creamer informed the Board that he asked the Solicitor last year for a confidential opinion on the employment status under the Home Rule Charter of certain employees assigned to work for the City Controller, but whose salaries are paid by the School District of Philadelphia. He asked for the opinion to determine whether the Ethics Board has jurisdiction over these employees under the Charter and Code, which generally apply to any "officer or employee of the City."

The Solicitor issued an Opinion dated February 29th, in which she concluded that the employees in question "are City employees, entitled to the rights and subject to the duties of City

employees generally." This means that the employees in question are subject to both the City's Ethics Code and the political activity restrictions in section 10-107 of the Charter.

Mr. Creamer said that prior to this Opinion, it was his understanding that it was generally accepted belief that these employees were not subject to the Ethics Code or Charter restrictions on political activity, although there was never a formal opinion or ruling that made that determination. Staff will reach out to the Controller's Office to offer training for the affected employees in the near future so that they will better understand what the rules are and how they apply to them. In the meantime, it is my position that the rules that the Board has jurisdiction to administer and enforce should be applied to these individuals prospectively only and not retroactively.

C. Lobbying Update

Mr. Creamer reported that staff continues to use the interim paper registration process and to receive lobbying registrations. There are approximately 160 registrants. To make lobbying information available to the public, we updated the lists of lobbyists, firms and principals on our website to include registrations completed by February 29th. Staff will update these lists as time permits until our online system is available.

Online System: Mr. Creamer explained that the online system continues to be an obstacle to implementation of the lobbying project. On March 6th, Richard, Elizabeth and Nedda met with Adel Ebeid, the City's Chief Innovation Officer, & Business Analyst Joe Santomero to demand a firm date when PLIS will be available for testing. Mr. Ebeid said that we would have the software by March 13th or 14th for testing. On March 16th, staff finally received the link to the registration software and began to test.

Mr. Creamer reported that on Monday, March 19th, Shane, Evan, Nedda and Elizabeth reviewed the Lobbyist Registration page with the OIT business analyst. Staff compiled a list of more than 40 issues to be addressed with the software vendor. Because Perficient, the vendor, worked on deployment issues between March 20th & March 23rd, staff again did not have access to the software for testing. Staff has not yet reviewed the Principal and Lobbying Firm registration pages and the Board's administration module for management of the lobbying software and public disclosure functions. Staff also has not tested the system as users outside phila.gov to be sure that registration works on different computers and browsers.

As he reported last month, Mr. Creamer said that staff has made it clear to OIT that they cannot begin to test the complex expense reporting module until the registration piece is complete. Staff concluded that the expense report module cannot be ready for filing the 2012 First Quarter expense reports that are due on or before April 30th. Accordingly, staff issued an email Advisory Alert on March 26th to a list of 346 interested individuals, including lobbyists, firms and principals. The Alert stated that the online system would not be ready for filing the First Quarter report, but that they would provide an interim paper reporting process on our website as soon as possible.

Outreach: Mr. Creamer reported that staff continues to be very active in reaching out to the nonprofit community concerning the new lobbying code. On March 6th, Nedda participated in a panel discussion sponsored by the Philadelphia Public Relations Association. The panelists reviewed the major provisions of the Lobbying Code and Regulation No. 9 and answered questions. Indirect lobbying communications were of great interest to this group of public relations professionals who work with nonprofit entities.

He also reported that another outreach session presented a lobbying overview to members of the Urban Affairs Coalition, which is comprised of many nonprofit agencies that interact on a daily basis with City government. As in our other outreach programs, the organizations were concerned whether their day-to-day interactions with City government were subject to lobbying registration and reporting. Accordingly, the overview focused on a series of questions to help individuals and entities examine whether their activity is covered by the lobbying law. We expect to present the overview to other organizations in the near future.

Mr. Creamer served as a panelist yesterday at a Pennsylvania Bar Institute CLE session on lobbying. All of these sessions are perhaps as important to our staff as they are to the attendees. The questions raised at the sessions help us understand the multitude of ways that organizations conduct business with the City and the various ways that lobbying may occur.

These overviews are different from and not intended as a substitute for the mandatory training for lobbying registrants. Once we have the online system in place, we will design detailed lobbying training materials and offer a regular training schedule.

D. Training

Mr. Creamer said that in addition to our lobbying outreach efforts, staff has been very busy since the last meeting with other training efforts. Staff revised training materials and presented ethics training sessions to 138 City Council staffers and Council members. There will be at least one more session for Council in May.

E. Financial Disclosure Preparation

Mr. Creamer stated that it will soon be that time of year when many City officials and employees and the members of City boards and commissions are required to file one or more of three annual financial disclosure forms. The filing deadline is May 1st. The three forms are the City Form (required by the City Ethics Code), the Mayor's Form (required by an executive order), and the State Form (required by the State Ethics Act). Several staff members have begun to focus on the many tasks necessary to implement the financial disclosure process.

Mr. Creamer said that as you may recall, there is an online application for preparing the financial disclosure statements. Staff again worked with the Records Department and its vendors on enhancements to the system that will make it easier for City employees to know which of the three forms they must file. Staff conducted four small group sessions with the

departmental HR managers to review the financial disclosure process and to train them to use the new features of the system.

Mr. Creamer also said that reminder emails will be sent to approximately 6,000 City employees in early April. The Board's telephones start to ring off the hook once reminders go out. Several staff members answer calls about how and what to file.

Members of the many City boards and commissions are subject to the financial disclosure requirements. Staff is very pleased that they received a list of members of 38 boards and commission from the Mayor's Office. In the past, staff had to compile the lists from many sources, including contacting each separate board and commission. The new list saved us much valuable time. Staff will use the email information in the list to send reminders to board and commissions members in April.

F. Budget

Mr. Creamer informed the Board that staff has been advised that the proposed operating budget for FY12 will continue at $810,000. This appropriation includes $700,000 for personnel; $96,000 for services; and $14,000 for materials, supplies, and equipment.

Mr. Creamer announced that the Board's budget hearing is scheduled for April 10th at 11:30. The Testimony will include the Board's many accomplishments during the past year. It will also explain the need for additional funding to hire staff to support the demands of the new Lobbying Law. The Board's existing staff is stretched to the breaking point with their current workload, and they don't want to shortchange their other responsibilities in order to implement the new Lobbying Law.

Mr. Creamer said that our testimony will again acknowledge the crucial role played by the Dechert firm in providing *pro bono* representation of the Board in litigation during the past year.

IV. General Counsel's Report

1. <u>Formal Opinions.</u> Mr. Meyer reported that there were no Formal Opinions since the February report.

2. <u>Advices of Counsel.</u> Mr. Meyer reported that there were two Advices of Counsel since the February report.

a. Nonpublic Advice of Counsel GC-2012-501 (March 7, 2012). The chairman of a candidate's political committee for a City elected official requested a nonpublic advisory regarding the application of the City's new Lobbying Code to any potential lobbying activity by him in light of his position with a political committee. Code Section 20-1205(2) prohibits a lobbyist from serving as an officer of a political committee if the candidate is seeking City elected office. For

purposes of identifying whether an individual is a "candidate seeking City elected office" we apply the definition of "candidate" as it is used in the Campaign Finance Chapter of the City Code:

(a) An individual who files nomination papers or petitions for City elective office;

(b) An individual who publicly announces his or her candidacy for City elective office.

Code Section 20-1001(2). Additionally, the same criteria would apply as to whether a candidate "is seeking" City elected office at any particular time. Therefore, if the requestor were to register as a lobbyist under the Lobbying Code, those provisions would not prohibit him from also serving as the Chair or Treasurer of the political committee, at least until such time as the City elected official takes action that does meet the criteria for definition as a "candidate" as described above.

b. Nonpublic Advice of Counsel GC-2012-502 (March 9, 2012). A City employee requested a nonpublic advisory opinion as to the effect of the ethics laws on her proposed service as a board member of a nonprofit organization while also working for the City. Based on the facts that were provided, we concluded that the ethics laws do not prohibit the requestor's service with the nonprofit, but there are certain limitations on her activities of which she should be aware. In particular:

(1) The Charter's restriction on benefitting from City contracts contained in Charter Section 10-102 does not restrict the requestor.

(2) The Code's conflict of interest provisions, Code subsections 20-607(a) and 20-607(b), do not restrict the requestor.

(3) However, the State Ethics Act's conflict of interest provision likely applies to the requestor and to the financial interests of a nonprofit on whose board she serves. As a result, the requestor should not, in her position with the City, take any official action which causes the nonprofit to receive a "private pecuniary benefit." Furthermore, should the requestor's official duties intersect with the financial interests of the nonprofit, she should disclose this interest and disqualify herself from acting for the City, in the manner required by Code Section 20-608(1)(c).

(4) However, this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. The requestor has the option to seek an opinion from the Commission, or a nonconfidential opinion from the City Solicitor, which may shelter her from certain penalties for violating the State Ethics Act's conflict of interest provision.

(5) Under Code Section 20-609, the requestor must not disclose confidential City information that she acquired in her service with the City to the nonprofit for the purpose of advancing financial interest of the nonprofit.

(6) Under Code Section 20-602, the requestor may not represent others, including the nonprofit, as "agent or attorney" in transactions involving the City.

(7) Any financial disclosure form that the requestor files in April 2013 will require that she disclose the directorship with the nonprofit, if she joins the board in calendar year 2012.

Advice of Counsel Nos. GC-2012-501 and GC-2012-502 are currently available on the website of the Board of Ethics.

3. <u>Informal e-mail guidance.</u> Mr. Meyer reported that through Thursday, March 22, 2012, there were eleven of these since the February 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 employee inquiring about representing his neighborhood civic association in a matter before a City board that is on appeal to the courts. Code Section 20-602 prohibits a City employee to represent any person, as agent or attorney, in any "transaction involving the City." A court appeal of a City board ruling would qualify as a "transaction involving the City." Thus, Section 20-602 would prohibit the employee from representing the civic association, or any other person, as its agent in that appeal, or in any subsequent proceeding in which the City would be a party or taking official action. There is an exception in Code Section 20-602(4) that would permit the employee to act on his/her own behalf, however.

b. Received an inquiry from a City employee who is interested in becoming self employed as an independent consultant for city agencies and asked about restrictions on his/her post-employment activities as a vendor. We provided a summary of the post-employment rules, including links to a recent Advice of Counsel on point and to a "plain language" summary in a newsletter, both links from our website.

c. A departmental HR manager asked this question:

> If an employee received a gift do they need to report it to anyone? Is it sufficient to just return it to the sender with a thank you and an explanation why they cannot accept it?

The HR manager advised that a citizen who obtained a favorable result from a departmental action sent the responsible employee a $100 gift card to a restaurant.

We advised as follows. There are a number of provisions in the various ethics laws that apply to gifts. The City Code and State Ethics Act provisions likely do not apply to these facts. Charter Section 10-105 prohibits receipt of any gift that is a "gratuity" or reward, which under these facts, seems to be the case. There is no minimum value of gift that is permitted under this provision, but it is questionable whether the provision is violated if the gift is promptly returned (see below)

There is also a Mayor's Executive Order on gifts. The EO includes a provision for return of gifts. The HR manager was advised to check with Chief Integrity Officer Joan Markman on interpretation and implementation of the EO. Mayor's executive orders are not within the jurisdiction of the Board of Ethics. Advised that the procedure under the EO for returning a gift would likely satisfy any requirement under the Charter, as well.

d. Received a request from a representative for a high City official asking whether the official may permissibly send a solicitation letter seeking donations to a nonprofit charitable organization. We advised, assuming that the official is not paid by the organization as an employee or compensated officer, of the following:

> Conflicts of interest. The City Code and State Ethics Act have conflicts provisions. A City official may have a conflict if he takes official action affecting an entity in which he have a financial interest. For the City Code, this does not include nonprofits, so there appears to be no issue under the City Code.
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> The State Act is different, as nonprofits are considered a "business" under the Act. Even if unpaid, if the official is on the board of directors of the school, it is a "business with which he is associated," and he may not take official action that financially benefits the school. Whether using City letterhead constitutes "official action" is an interpretation question for the State Ethics Commission, which has authority over the State Ethics Act. I am not aware that the Commission has addressed the question.
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> Contract reform provisions (no-bid contracts). Code Section 17-1402(1)(b)(i)(.4) requires this mandatory disclosure in any application to the City for a no-bid contract: " The name and title of each City officer or employee who, within two years prior to the date the application must be filed, asked the Applicant, any officer, director or management employee of the Applicant, or any Person representing the Applicant, to give money . . ." Also, Code Section 17-1402(1)(d)(iii) requires that any City no-bid contract shall include this term: "The Contractor shall, during the term of such contract and for one year thereafter, disclose the name and title of each City officer or employee who, during such time period, asked the Contractor, any officer, director or management employee of the Contractor, or any Person representing the Contractor, to give money . . ."

These contract reform provisions do not require anything of the official, but he should be aware of them because if he plans to solicit funds on behalf of the nonprofit, he should know that if anyone he solicits has, or later applies for, a City contract, they may have to disclose his solicitation. Questions about the contract reform provisions should be addressed to Stephanie Tipton in the Finance Department.

Appearance issues. There's no law that prohibits a City officer from soliciting for his favorite charity. However, This Board, the prior advisory Board of Ethics, and the Law Department have several times recognized that there can be an appearance issue in a high City official soliciting donations from a local entity, where that official has the power to take action that might affect that entity. The more that the solicitation emphasized the official's government position (letterhead, reference to his title, etc.), the more of an appearance issue there could be.

e. Received an inquiry from a City official as to whether a gift ticket for a seat in a box "suite" to see a 76ers game at the Wells Fargo Center is of "substantial value" and so would be a prohibited gift under the City Code, and what the value would be if the official wished to reimburse the donor for the ticket. We provided the standard analysis of the gift rules under the State Act, the Charter, and the Code and concluded that a single seat in a box is not of "substantial economic value." As to determining the precise value for reimbursement, since reimbursement is not required, that is a matter between the official and the person providing the ticket.

f. We were asked whether a City employee could be a chair of a political committee. Example 3 to Subpart D of Board Regulation 8 provides that an employee may not be a treasurer of a political committee. This is in part in recognition of the fact that the State Election Code requires that every candidate name a sole treasurer "to receive and disburse all funds for [candidate authorized] committees" and that "All money received and disbursed by a political committee must be done through the treasurer of the committee." 25 P.S. Section 3242(a),(b).

Although it is not our jurisdiction to interpret the State Election Code, I am not aware of a similar provision (to a treasurer) assigning similar responsibility for funds to a committee chairperson. A City employee (whether serving as chair or any other capacity) may not "directly or indirectly be in any manner concerned in the collection, receipt, or solicitation of contributions intended for a political purpose." Whether is it possible to serve as a chair of a political committee without ever being in any manner concerned in the collection, receipt, or solicitation of political contributions depends on how the functions of the committee are carried out depends on how functions of the committee are distributed.

In short, we advised that the fact that the Examples to Subpart D explicitly address only a treasurer does not mean that it is in every case permissible for a City employee to serve as a political committee chair.

g. Received an inquiry from a former City employee who retired last fall, asking about post-employment restrictions, writing: "I would just like to verify that there is a two year window

that one must sit out before being employed by contractors working on a city contract." Explained the three different post-employment restrictions (only one of which is for two years).

h. Received an inquiry from an out-of-state vendor inquiring whether coming to Philadelphia to meet with certain City officials to seek City business would require the firm to register under the Lobbying Code. A central determinant as to whether registration is required is whether any contacts with City officials constitute "lobbying" as that term is defined in the Regulation (which reflects the language of the Lobbying Code, Chapter 20-1200 of The Philadelphia Code). In general, vendors seeking business with the City who proceed through the normal course of obtaining such business and who contact the usual officials that have the staff responsibility for receiving applications are not "lobbying." The concern is when a prospective vendor seeks to "grease the wheels" by contacting higher officials in an attempt to exert influence over the normal process.
Based on the facts provided, it appeared that the vendor would meet with the usual staff-level officials who receive such business inquiries, and thus such a meeting would not be lobbying.

i. Received an inquiry from a City employee about certain workplace problems and alleged abuses and misfeasance by superiors. We advised that none of the facts raised any issues under the Public Integrity Laws and referred the requestor to the Inspector General or Chief Integrity Officer, who may or may not have jurisdiction.

j. Received an inquiry from a former employee who had separated within the past year who was working for a local company that may make a proposal to the City and wanted to know if wanted to know if his name could be mentioned in the proposal. As this was an issue under the State Ethics Act, on which there is no clear prior guidance from the State Ethics Commission, we referred the requestor to the Commission.

k. Received an inquiry from a City employee regarding gift travel and provided the standard gift advice that we provide on a regular basis.

4. Update on amendments to Board Regulation.

Mr. Meyer stated the recent amendments to Regulation 1 (Campaign Finance), which incorporated the Finance Director's quadrennial inflation adjustments to the contribution limits, became formally effective as of March 2, 2012. However, in this case the Regulation is only restating the adjustments that became effective as of January 1, 2012 upon the Finance Director's determination in December.

V. 2011 Annual Report

Mr. Meyer explained that the Board is required by Section 20-606(1)(l) of the Code to submit an annual report to the Mayor and City Council. He noted that there is no due date for the report. Staff plans to circulate a draft of the annual report to the Board in April and finalize it in May.

VI. New Business

Chair Glazer said that the Board held Executive Session via email March 21st and March 22nd to discuss Non-Public opinions.

VII. Questions and Comments

The public did not have any questions or comments.

The public session of the Board's meeting was adjourned at 1:37 pm.