

Philadelphia Board of Ethics
Meeting Minutes
February 22, 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.

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 1:05 pm.

II. Approval of Minutes

By a 4-0 vote, the Board approved the meeting minutes, as corrected, for the public meeting that was held on January 18, 2012.

Chair Glazer noted that the Board met in Executive Session on February 13th via conference call, and prior to today's public meeting to discuss enforcement matters and non-public opinions.

III. Executive Director's Report

A. Litigation Update

i. McCaffery v. Creamer, et al.

Mr. Creamer said that, as he reported at the last Board meeting, the Board filed a Motion for Summary Judgment 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.

Mr. Creamer reported that separately, on January 25th, Judge Allen denied McCaffery's discovery motion, which was to compel production of any confidential complaints that were filed with the Board against him and to compel production of attendee lists for all public Board meetings from January through May in 2009.

Mr. Creamer said that as he has reported in Board meetings over the past six months, staff members continue to spend a significant amount of time 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 reported that an extension of deadlines has been obtained 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 our 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 January 23rd, Cozen filed a Motion for Judgment on the Pleadings. On February 13th, the Board filed a Motion for Judgment on the Pleadings and in Opposition to Cozen's Motion for Judgment on the Pleadings.

B. Lobbying Update

Mr. Creamer stated that staff continues to use the interim paper registration process and to receive lobbying registrations. There are approximately 120 registrants. To make lobbying information available to the public, staff manually created lists of lobbyists, firms and principals who had completed registration by January 27th and posted the lists on the Board's website. Staff hopes to update these lists at the end of each month, until the online system is available.

Online System: Mr. Creamer reported that in November, staff was advised by the Office of Innovation and Technology (OIT) that the completed lobbying registration software would be

delivered by February 15th. Staff is still waiting to begin User Acceptance Testing (UAT) of the registration portion of the online lobbying system. Once staff receives the registration module, they will work as quickly as possible to test the registration module from three critical perspectives: the filer's experience, the Board's administration function, and the public's access to information. It is also imperative that staff test the system as users outside phila.gov to be sure that registration works on different computers and browsers. Staff has already identified several issues that must be addressed before they can accept the software for use on the Board's website. Staff has made it clear to OIT that they cannot begin the next phase of testing on the complex expense report module until the registration piece is complete.

Chair Glazer said that he and Nedda met with Adel Ebeid. He said we have significant concerns about being able to move forward because OIT did not deliver the software by February 15th.

Mr. Creamer added that Perficient, the outside vendor, is rebuilding the software from scratch. They did not provide any dates for testing.

Outreach: Mr. Creamer informed the Board that staff has been very active in reaching out to the nonprofit community concerning the new lobbying code. On February 8th, they presented an overview of lobbying to approximately 20 members of the Philadelphia Association of Community Development Corporations. On the 9th, they presented the overview at the United Way to representatives of more than 80 nonprofits at a lobbying briefing sponsored by the Committee of 70.

Mr. Creamer said that in each case, 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 four questions to help individuals and entities examine whether their activity is covered by the lobbying law. Staff relied heavily on the exemptions from registration and reporting examples that are spelled out in Regulation 9 to describe the reach of the new lobbying law. Staff expects to present the overview to other organizations in the near future. Mr. Creamer will also be a panelist at a Pennsylvania Bar Institute CLE session scheduled for March 28th.

Mr. Creamer explained that the overview is different from and not intended as a substitute for the mandatory training for lobbying registrants. Once staff has the details of the online system in place, they will design detailed lobbying training materials and offer a regular training schedule. Staff plans to include use of the electronic filing system as a major part of each training session.

C. Training

Mr. Creamer said that, in addition to staff's lobbying outreach efforts, they have been very busy since the last meeting with other training efforts. Staff conducted three ethics training sessions for the City Commissioners and their staff (85 people). Two ethics training sessions have been scheduled for City Council and staff on February 28th and March 6th. Before presenting these sessions, staff reviewed and updated the training materials. In addition to ethics training

classes offered by the Board's staff, there are currently five ethics training sessions for new City employees that will be conducted by HR trainers, using material prepared by staff. Approximately 50 people are registered for each of the sessions.

Mr. Creamer informed the Board that staff also assisted the Community College of Philadelphia with arrangements for ethics training that was presented on February 2nd by John Contino, Executive Director of the State Ethics Commission, to the CCP Board and administrative staff.

D. 2011 Annual Report

Mr. Creamer explained that as a result of staff's significantly increased workload, they advised the Board that they are behind schedule in preparing the draft of the 2011 Annual Report. With the exception of the 2009 Annual Report, every year staff has presented a draft report to the Board in March, with circulation of the final report in April. Staff will not be able to meet that goal this year. Staff will try to have an outline of the report ready for the Board's review next month.

E. Art in the Office

Mr. Creamer announced the ninth in the Board's series of Art in the Office exhibits. The shows began in 2009, and staff never expected that they would continue and grow as they have. While there are art installations in City Hall and other City buildings, it is most likely that these exhibits are the only ones arranged by a small City agency. The Board has been exceptionally lucky that so many local artists are willing to share their work. The artists deliver and arrange their work, and the Board and public are the beneficiaries of their time and generosity.

The current exhibit is entitled "Likeness" and is comprised of exceptional portraits by ten Philadelphia-area artists: Rachel Constantine, Amy Kann, Lea Colie Wight, Stephen Early, Carlo Russo, Katherine Fraser, Diane Feissel, Jon Laidacker, Alexandra Tyng and Kerry Dunn.

Mr. Creamer stated that, as explained by Brooke Hine, who is the guest curator of the exhibit "[f]or thousands of years, portraitists have served the steady demand of men and women who desired to have their likenesses preserved on canvas. Throughout history, the face has been an enduring, ambivalent subject manipulated by artists to explore a range of human emotion." This exhibit explores the variety of portraits and styles.

Mr. Creamer said that this exhibit will be on display until March 28th and encouraged the audience to take time to enjoy these portraits. You will not be disappointed. Staff has contact information for all of the artists.

F. Enforcement Update

Mr. Creamer announced that the Board entered into the following four Settlement Agreements earlier today:

- 1) Friends of Stephanie Singer, Commissioner Stephanie Singer, Ellen Chapman:
Resolving violations of the campaign finance law for accepting excess contributions and for making material misstatements and omissions in campaign finance reports filed with the Board
(accepted 5 excess contributions, omissions from 2 reports, misstatements in 1 report)
- 2) Committee to Elect Anthony Clark, Commissioner Anthony Clark, John Raimondi
Resolving violations of the campaign finance law for accepting excess contributions and for making material misstatements in campaign finance reports filed with the Board
(accepted 1 excess contribution, misstatements in 2 reports)
- 3) Laborer's District Council PAC
Resolving violations of the campaign finance law for making excess contributions to City candidates
(made 2 excess contributions)
- 4) Bobby 11, Councilman Bobby Henon
Resolving violations of the campaign finance law for accepting excess contributions
(accepted 2 excess contributions)

Mr. Creamer said that copies of these agreements are available and will also be posted to the Board's website.

IV. General Counsel's Report

1. Formal Opinions. Mr. Meyer reported that there were no Formal Opinions since the January report.
2. Advices of Counsel. Mr. Meyer reported that there were no Advices of Counsel since the January report.
3. Informal e-mail guidance. Mr. Meyer reported that through Wednesday, February 15, 2012, there were fourteen of these since the January 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 former member of a City board/commission who requested advice on generally what restrictions there might be on any consulting or other paid work he

might take on related to the subject matter of his former board/commission. 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.

b. Received a similar inquiry from a City employee, an attorney, about to separate from employment, regarding post-employment rules, including lobbying. Provided similar advice to the above, but added that, as to the State Ethics Act one-year prohibition on any representation with the City, the courts have ruled that the State Ethics Commission may not apply the restriction to attorneys, to the degree that their activities are "the practice of law." For example, if an employee left the City to become a salesman for a vendor of a product purchased by the City, her contacts with the City within the first year to get a sales contract would not be the practice of law and would be prohibited by the Act. On the other hand, the Commission has ruled that lobbying, as an attorney, is the practice of law for this purpose. We reminded the requestor that guidance as to the State Ethics Act is a prediction only, as only the State Ethics Commission can give definitive advice interpreting the Act.

Otherwise, the advice was the same as the above advisory. Additionally, as to lobbying, we referred the requestor to the Lobbying Code and Regulation 9.

c. Received a general inquiry from a City employee about becoming a candidate for elected office. As the request was devoid of facts, including whether the requestor was personally considering running for office, we provided links to several advices on our website that discuss when one is a candidate.

d. Received a request from a representative for an out-of-state entity regarding an apparent contract with the City (the facts were rather garbled and uncertain), and whether lobbyist registration would be required by certain local colleagues who would deal with the City on the contract. Advised as follows:

Your colleagues would not have to register if less than 10 days had elapsed since the beginning of 2012 lobbying activity, or the applicable thresholds had not been exceeded (e.g., more than \$2500 in lobbying expenses incurred or in-house employee worked at least 20 hours in the quarter). Registration is only required upon beginning of lobbying activity and all exemption being removed (the thresholds are expressed as exemptions until met).

Otherwise, the question is what activity is lobbying. Here we rely, as we do in all matters (ethics, campaign finance, etc.), on facts provided by the requestor. In the case of a simple City-issued RFP, where an entity (that had not otherwise sought the business) is responding to the RFP in the normal course of business, merely submitting a proposal is not lobbying. Nor would negotiating and executing the contract, and performing the contract, unless there is an attempt to influence officials other than those who normally do such functions.

e. Received an inquiry from a City employee, who advised that he was a member of the board of directors of an out-of-state nonprofit that had no transactions with the City. Provided a link to Advice of Counsel No GC-2011-505, with reference to its discussion of conflicts and representation restrictions.

f. Received the following email from a City employee, quoted in its entirety:

Rabbi just dropped off 5 Challahs for the office. Can we keep (eat) them? Please advise.

Advised that the only possible issue might be under the Mayor's Executive Order on gifts, which has limited application. Referred the requestor to the Chief Integrity Officer.

g. Received an inquiry from a City employee regarding a possible conflict by a City contractor. Advised as follows:

The Public Integrity Laws apply to City officials and employees. Only an official or employee of the City can have a conflict of interest that is restricted by the ethics laws.

However, the ethics laws do not address City contractors, and in particular do not restrict or prohibit a City contractor from having multiple financial interests with the City. We are sometimes asked if this kind of situation should be restricted, and we always respond that, if the City wishes to limit contractors' ability to have multiple financial arrangements (or contracts) with the City, the City could simply make such a restriction a term in its contracts. However, whether the City should do this is not within the jurisdiction of the Board of Ethics.

h. Received an inquiry from an out-of-state attorney concerning the gift laws, and in particular the meaning of "substantial economic value" under Code Section 20-604. Assuming that the attorney represents a client who may either give or receive such a gift, giving advice was appropriate. Provided link to GC-2010-510, which discusses the issue and states that \$700 is substantial. Noted that \$700 is the smallest amount that has been identified as "substantial economic value" in a published advisory.

i. Received an inquiry from a representative of a local entity as to whether certain contacts with certain City officials would constitute lobbying. The contacts would urge the officials to engage in certain outreach to the public. Advised that the only apparent issue is whether this would constitute "administrative action" under Code Section 20-1201(1)(a), and that it would likely only possibly qualify as "an agency's development or modification of a written statement of policy." 20-1201(1)(a)(ii).

Reminded requestor that, even if the activity is "lobbying," registration and reporting is only required if the applicable thresholds of expenses or time for the quarter are met.

j. Received an inquiry from an out-of-state attorney representing a principal registered under the Lobbying Code. The attorney inquired whether several employees of the principal would be required to register as lobbyists, even if paid less than \$2500 in the quarter, if they worked in excess of 20 hours for the principal during the quarter.

Advised as follows:

Your request refers to two exemptions from the list of those exempt from registration and reporting in the Lobbying Code and regulation.

In general, the question as you pose it refers to the exemption for employees acting on behalf of their employer, which exemption is stated at Code Section 20-1204(5) and Paragraph 9.24(E) of Regulation 9:

An individual who engages in lobbying on behalf of the individual's employer if the lobbying represents less than 20 hours during any reporting period.

Whether the 20-hour exemption applies may be a difficult question under the facts you present. However, I do not know that we need to get that far. I interpret the exemptions to be independent of each other. Thus, if a person or entity meets any one exemption, that person or entity is exempt from registration and reporting, and no reference to any other exemption is necessary.

On the facts you present, none of the individuals would be compensated over \$2,500 in a quarter. Thus, the individuals would be subject to exemption under the exemption stated at Code Section 20-1204(4) and Paragraph 9.24(D) of Regulation 9:

An individual whose economic consideration for lobbying, from all principals represented, does not exceed \$2,500 in the aggregate during any reporting period.

Presumably, this fact situation is the reason for the separate filing requirement for "lobbying firms"—that is, if only lobbyists were required to register, a lobbying firm could assign work to its lobbyists so that no lobbyist exceeded the \$2500 threshold, and avoid the registration requirement altogether.

In support of my conclusion, I note that the State Ethics Commission has addressed the relationship among exemptions in the State Lobbying Law and has held that "each exemption is effective independently of the others." State Ethics Commission Opinion No. 07-1003 at 5. The Opinion is persuasive authority, as the City's Lobbying Chapter is very similar to the State Act on the exemptions. (There are differences in other areas, so State Ethics Commission rulings are not necessarily conclusive guidance on all interpretations of the City Code.)

k. Received a request from an official for a large local nonprofit corporation regarding whether certain entities with which the nonprofit was "affiliated" would be required to register

separately as principals. We asked for more information on the precise legal structure of the entities involved, but no response has been received as of this writing.

l. Received a request from a City employee who works in an office that contracts with certain vendors. She advised that a sibling worked in the same industry as some of these vendors, and asked if she could introduce her sibling to one of the vendors currently under contract. Responded with a request for more information, including what the Chief Integrity Officer thinks of this.

m. Received an inquiry from a City official concerning political activity restrictions on some interns with the City. Noted that, while whether an intern is a "City employee" for this purpose is a difficult question, as a policy matter it may be wise to require interns to comply. Requested more information on the employment status of the interns included in the request, and we are awaiting a response.

n. Received an inquiry from a City employee who volunteers for, but is not an officer of, a nonprofit organization that engages in advocacy. You advised that the organization occasionally makes public comments on State policy, and ask whether there are any issues under the ethics laws for you, as a City employee. The employee advised that the organization had no contact with City government, so there would appear to be no conflict issues. We advised that if the organization should contact City government, the requestor may not represent the organization as its agent in that matter, under Code Sect. 20-602. We advised that it did not appear that the Lobbying Code would apply to the requestor, as an unpaid volunteer. To the extent that the political activities restriction of Charter Sect. 10-107 would apply, we advised that there was no current candidate or election connected with the referenced proposed public advocacy, so it appeared that no political activity would be involved.

4. Update on amendments to Board Regulations.

a. No hearing was requested on the posted proposed amendments to Regulation 9 (Lobbying), which largely incorporated amendments made by Council to the Lobbying Chapter, so the amended Regulation became effective as of February 3, 2012.

b. To date, no hearing has been requested on the posted proposed amendments to Regulation 1 (Campaign Finance), which simply incorporated the Finance Director's quadrennial inflation adjustments to the contribution limits. If no hearing is requested, the amended Regulation itself will become formally effective as of March 2, 2012. However, in this case the Regulation is only restating the law. Under the Code, the Finance Director's determination made the adjustments effective as of January 1, 2012.

V. New Business

Chair Glazer asked the Board's indulgence to change the March meeting from March 21st to March 29th.

By a 4-0 vote, the Board agreed to change the March meeting from Wednesday, March 21st to Thursday, March 29th.

VI. Questions and Comments

Sophie Bryan from Councilman Green's office asked if the lobbying software was always being developed by an outside vendor.

Ms. Massar explained that a vendor has been involved since the inception of the software. They were selected last March.

Mr. Creamer added that there has been a consistent Project Manager and Business Analyst from OIT.

Ms. Bryan asked when the software will be ready.

Ms. Massar said that she will know more information once she talks to OIT after the Board meeting.

Ms. Bryan said that Councilman Green is willing to help to move the project along.

Adam Lang said he filed a complaint with the Board in March 2011 regarding political activity on the part of City employees who are getting paid by the School District. He said that he has been in contact with Michael Cooke regarding the complaint. Mr. Cooke told him the Board requested an opinion from the Law Department. Mr. Lang said it's been almost a year since he filed the complaint. He asked how the Board handles these issues.

Mr. Meyer advised Chair Glazer not to answer any questions regarding a confidential investigation. He referenced the Board's Regulation No. 5.

Chair Glazer said that he will stand on the advice of the Board's General Counsel and therefore will not answer the question.

Mr. Lang asked how does the public hold City agencies accountable.

Chair Glazer said his response was still the same.

The public session of the Board's meeting was adjourned at 1:40 pm.