

Philadelphia Board of Ethics
Meeting Minutes
June 13, 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.
Evan Meyer, Esq.
Nedda Massar, Esq.
Maya Nayak, Esq.
Michael Cooke, Esq.
Elizabeth Baugh

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 5-0 vote, the Board approved the meeting minutes, as corrected, for the public meeting that was held on May 16, 2012.

III. Executive Director's Report

A. Litigation Update

i. McCaffery v. Creamer, et al.

Mr. Creamer reported that on April 3, 2012, Judge Bernstein denied the motion for summary judgment that had been filed on December 13, 2011. He said that we are proceeding with full discovery. Discovery was scheduled to close on June 4th. However, on May 23rd the parties jointly moved for a 90 day extension of the deadline. On June 7th, Judge Allen granted the

motion and set a new discovery deadline of September 4th and scheduled the case for the trial pool on March 4, 2013. Mr. Creamer explained that we anticipate that litigation of this case will continue to consume significant amounts of staff time.

In response to a question from Judge Beck, the Executive Director responded that the Board has volunteer outside counsel in this matter.

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

Mr. Creamer said that on May 16, 2012, the parties filed cross motions for summary judgment. Judge Sanchez has scheduled oral argument on the motions for July 2nd at 3:30 pm. Trial, should it be necessary, is scheduled for the August 13, 2012 trial pool. He noted that we continue 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

According to Mr. Creamer, the parties have filed cross motions for judgment on the pleadings. The motions have been fully briefed and argument is scheduled for June 26th before Judge Leon Tucker. In addition, a settlement conference has been scheduled for July 2nd.

Chair Glazer asked whether a conference had occurred on May 29th in this case. Mr. Creamer explained that the date had been changed.

B. Lobbying Update

Mr. Creamer discussed the 2012 First Quarter Lobbying Expense Report and noted that, as we reported last month, our General Counsel issued an Advisory Alert on April 23rd which announced that the filing deadline for the 2012 first quarter expense report had been extended from April 30th to May 30th. The Alert, which was sent to more than 350 interested individuals, further stated that interim "fillable" expense report forms were available on our website. (A "fillable" form may be accessed on line and information may be entered into the form on line, but the form cannot be filed on line. It must then be printed, signed and filed manually.)

Mr. Creamer reported that as of Friday, June 8th, we have received expense reports from 79 principals. He explained that staff made copies of the expense reports available for inspection by members of the public within three days and that images of the expense reports were posted, with assistance from the Office of Innovation and Technology (OIT), on Monday on our website. Mr. Creamer said that staff believes these efforts, even in the temporary paper-based process, are an important step toward transparency in City government. While the lobbying information is not yet available in a searchable database, the public can see which principals have filed and review the actual report.

Mr. Creamer next discussed the Lobbying Software Project, and said that, as we reported last month, Board staff is working with OIT to determine the best approach to provide the mandatory online lobbying registration, reporting, and search system that is called for in the Lobbying Code. He noted that three alternatives were suggested by Adel Ebeid, the City's Chief of Innovation and Technology. There are: borrow and build on a system from another jurisdiction; issue an RFP to select another vendor; or complete the project "in-house" with OIT resources. The source of funding for this project is also unresolved, and there is no appropriation in the Board's FY13 budget to pay for any portion of the complex lobbying electronic filing software project.

He reported that we participated in a conference call with Mr. Ebeid and OIT staff on Monday, June 11th, and agreed that a decision will be made among the three options by the end of this month.

In order to make the decision, Mr. Creamer said that staff continues to evaluate websites in other jurisdictions which might serve as suitable models to "borrow" for the Philadelphia system. In particular, we are looking for systems built on a platform for which OIT has in-house expertise, because OIT would then be able to modify and maintain such a system with its existing resources. He noted that our staff has also advised OIT of several online filing applications currently being used by the City that are available on phila.gov, including the online Financial Disclosure and Campaign Finance systems and the eContractPhilly website. While these applications collect information that is different from lobbying, each is built on a complex database and permits a filer to enter and save data and to file forms. Two of the three systems also include a public search function. We have suggested that OIT review the three programs and speak to these vendors.

Mr. Creamer said that staff continues to respond on a daily basis to lobbying questions. We provided an overview of the Lobbying Code to members of the Pennsylvania Council of Children, Youth and Family Services on May 24th. These overview sessions are different from and not intended as a substitute for the mandatory training for lobbying registrants. In light of the delay in the software project and our move to new office space, we will reevaluate our plans for mandatory lobbying training, as required by the Lobbying Code.

C. Office Move

Executive Director Creamer said that a tremendous amount of our time in the past month has been consumed by the many arrangements for our move to the 18th floor of 1515 Arch Street, One Parkway Building. The details are endless. Public Property has advised us that the move will happen on Saturday, June 23rd. We will suspend most of our services and operations beginning at the end of business on June 19th because we must pack all our files and materials and dismantle our computers and other equipment. It will also take us several days after the actual move to be fully back in operation. We'll post a prominent notice on our website about our reduced operations schedule and the move to our new location.

Mr. Creamer explained that we will review our website to update any references to our address. He urged Board members to remember to use the new address in any correspondence or other materials. As far as we know, our phone numbers will remain the same, but we may not have phone service from June 22nd through June 26th.

D. Training

Mr. Creamer said that we have suspended ethics training sessions until we are settled in our new space. Then we'll determine which space on the 18th floor is most suitable for training sessions and also available to us. We hope to resume regular ethics training sessions in the fall.

E. Annual Report

Mr. Creamer reported that the 2011 Annual Report has been distributed electronically to the Mayor and City Council. We will post it on our website by the end of the week. He explained that all of our staff members contributed to the 2011 Report, and gave special thanks to General Counsel Meyer for supervising, guiding and coordinating the project.

F. William R. Kane, Esq.

Executive Director Creamer informed the Board that Bill Kane, who was with the law firm Cafferty Faucher and represented the Board on a pro bono basis in 2007, passed away on May 29th. Bill filed the first enforcement petition on the Board's behalf in April 2007 and obtained court orders enforcing the Board's earliest subpoenas that same month. Mr. Kane leaves behind a wife, two children and two grandchildren. He was 51 years old.

Mr. Creamer also noted that, at the request of Mark Davies, the Executive Director of the New York City Conflicts of Interest Board, he participated as a panelist on May 22nd in a program at New York Law School.

Comments

Chair Glazer stressed the significant impact of the software delay on Board staff. He recognized the amount of work and time necessary to produce and monitor the interim paper filing process and the drain on staff time to continue to educate OIT about the lobbying requirements.

Chair Glazer also reported to the Board on further outreach efforts to City Council. He said that Vice Chair Reed, Nedda Massar and he met at Councilman O'Brien's office, but Mr. Reed had to leave before Chair Glazer and Ms. Massar met with the Councilman. On the following day, he, said that no other Councilmembers responded to our outreach efforts.

Mr. Creamer reiterated that the paper lobbying process added a level of manual labor for three staff members that would not be necessary if the electronic system were available. He noted

that he didn't believe the online system would be ready before 2013 and that this additional work was pushing our staff to the breaking point.

The Board members discussed the extent of the Board's responsibility to provide and finance the online lobbying filing system. Chair Glazer said that he assumes that it is an OIT responsibility because the online system is mandated by the Lobbying Code. He also said that he thinks it is a distraction to continue the exercise of trying to cannibalize software from another jurisdiction. He explained that we have pushed hard with OIT to have finality about the solution by then end of June.

IV. General Counsel's Report

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

2. Advices of Counsel. Mr. Meyer reported that there were no Advices of Counsel since the May report.

3. Informal e-mail guidance. Mr. Meyer explained that through Thursday, June 6, 2012, there were four of these since the May report, issued either by himself or by Associate General Counsel Maya Nayak. *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. General Counsel Meyer reported that he received an inquiry from the Integrity Officer for a City office who had forwarded a long string of emails from multiple persons and asked if the Board could "provide clarification." It appeared from review of the email string that the question involved the application of the political activities restrictions of Charter Section 10-107 to a person employed by an entity that contracts with the City.

Mr. Meyer said that we informed the requestor that the Charter Section does not apply to employees of contractors, and the Board of Ethics has no jurisdiction over employees of contractors, so we were unable to provide advice. In addition, because this seemed to be a question of policy for the Administration, he suggested that the Integrity Officer may wish to contact the Chief Integrity Officer, Joan Markman, in the Mayor's Office.

b. Mr. Meyer also received the following lobbying inquiry from an out-of-town attorney:

My question pertains to Phila. Code 20-1205(1), "Indirect Communication Disclosure." The ordinance requires the clean and conspicuous disclosure on indirect communications of "the name of the person who made or financed the expenditure for

the communication.” Please consider a situation in which “Organization A” provides some funding to an affiliate, “Organization B”, which expects to engage in “indirect communications.” Do both Organization A’s and Organization B’s identities need to be disclosed, or just one since the ordinance uses the term “or.”

He advised as follows: The Lobbying Code itself does not further explain Code Subsection 20-1205(1), and the Board’s Regulation No. 9 merely quotes the provision verbatim (See Paragraph 9.25 of the Regulation.) Nor has the Board to date issued any formal published advisory interpreting this provision.

In his response, Mr. Meyer noted that, in general, grammatically, the word “or” does not necessarily mean “one or the other but not both.” For example, if I were to say: “If you or I get on a bus, the trip needs to be paid for” and we both get on the bus, that “or” does not mean that only one of us has to pay a bus fare.

Mr. Meyer noted that the precise facts can make all the difference. For example, the requester used the word “affiliate,” which can apply to any of several kinds of legal organizations. He noted that Section 20-1205(1) requires disclosure of “the name of the person,” and “person” is defined in Regulation 9 as “A business, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons.” Thus, it is possible that, in the requester’s hypo, “Organization A” and “Organization B” might be so affiliated that they are both part of the same corporation. In that case, the two organizations might not be separate “persons,” but we have to analyze the precise facts.

Given the above, it was his recommendation, for any indirect communication subject to the City’s Lobbying Code, all “persons” that are financing an expenditure and those that are making the expenditure for the communication should have their names stated in the communication.

c. In another email, a City employee, staff to a City board/commission, asked: Can members of the board/commission serve on committees that advocate for candidates if they are not raising money for that candidate?

General Counsel Meyer explained that questions concerning what political or campaign activity a City officer or employee may engage in are governed by Section 10-107 of the Home Rule Charter, which is interpreted in Board of Ethics Regulation 8. A careful reading of Regulation 8 should answer almost any question involving political activity (except the “resign to run” rule).

Members of City Boards and Commissions are covered in the Regulation in Subpart J (pages 8-9). Subpart J consists of two Paragraphs which describe different application to different groups of boards and commissions. Paragraph 8.21 describes “boards and commissions that exercise significant powers of government” and lists those bodies that fit in this category, including the body in question. The body of Paragraph 8.21 provides that a member of any of the listed board/commissions “shall be fully subject to the provisions of this Regulation.” (In contrast, board/commissions listed in Paragraph 8.22 are not subject to certain Subparts.)

Thus, members of the body in question are subject to all the Subparts of Regulation 8, including the prohibitions of Subpart B (“Political Activity on Duty or While Using City Resources is Prohibited”); Subpart C (“Use of City Position for Political Purposes is Prohibited”); Subpart D (“Collecting, Receiving, or Soliciting Contributions for a Political Purpose is Prohibited”); and Subpart E (“Other Prohibited Political Activity”).

Mr. Meyer responded that serving on a committee that advocated for a candidate, even if not at all involved in fundraising, would likely violate several provisions of Subpart E, especially Paragraph 8.11.

d. General Counsel Meyer also received an inquiry from a City employee about post-employment restrictions. He explained that he provided the standard post-employment summary that we provide at least once a month to some requestor, including links to several previous published Advices. In a follow-up inquiry, he provided further explanation to the requester.

V. New Business

There were no new business items.

VI. Questions and Comments

There were not questions or comments from the public.

The public session of the Board’s meeting was adjourned at 1:45 pm so that the Board could meet in executive session to discuss confidential enforcement matters, non-public opinions, and advice of counsel.