Philadelphia Board of Ethics
Meeting Minutes
September 19, 2012
Board of Ethics
One Parkway Building
1515 Arch Street, 18th Floor
1:00 pm

Present:

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

Staff
Shane Creamer, Esq.
Nedda Massar, Esq.
Evan Meyer, Esq.
Michael Cooke, Esq.
Maya Nayak, Esq.
Elizabeth Baugh
Bryan McHale
Tina Formica

I. Call to Order

Chair Glazer recognized that a quorum was present and called the meeting to order at 1:06 pm.

II. Message from the Chair

Chair Glazer announced the resignation of Board member, William Brown. Mr. Brown tendered his resignation to the Mayor on July 30, 2012.

Chair Glazer read his letter to Mr. Brown, as follows:

"I received a copy of your July 30, 2012 letter of resignation from the Board of Ethics addressed to Mayor Nutter. I wanted to take the opportunity to tell you how much I valued your service. You combined a finely honed sense of what is right with the experience and common sense that come from your career of public service.

I want to wish you well in the difficult issues facing your family."

Chair Glazer said on behalf of the Board that the minutes should reflect the Board's appreciation for Bill's enthusiastic, thoughtful participation in our deliberations. He was, indeed, a valued colleague whose wisdom and judgment will be missed.

III. Approval of Minutes

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

IV. Executive Director's Report

A. Litigation Update

i. McCaffery v. Creamer, et al.

Mr. Creamer reported that discovery in this matter closed on September 4th. The Board's outside counsel at Dechert took extensive discovery, including numerous depositions. The case is scheduled for the trial pool on March 4, 2013. Staff anticipates that litigation of this case will continue to consume significant amounts of their time.

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

Mr. Creamer reported that on July 11th, Judge Sanchez heard oral argument on the parties cross motions for summary judgment. The Board awaits Judge Sanchez's ruling. On behalf of the Board, Mr. Creamer thanked Mark Maguire and Eleanor Ewing, the Board's counsel at the Law Department, for their representation on this matter.

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

Mr. Creamer informed the Board that on July 18th, Judge Tucker ruled in the Board's favor in resolving the case *Cozen O'Connor v. Board of Ethics*, a case challenging the Board's interpretation of the contribution limits found in the City's campaign finance law. Judge Tucker ruled that post-election forgiveness by Cozen O'Connor of the debt owed to it by the Friends of Bob Brady at one time and *in toto* would be subject to the City's contribution limits. Cozen has appealed Judge Tucker's ruling to Commonwealth Court. The Court has not yet set a schedule for briefing and oral argument.

B. Lobbying Update

Lobbying Information on our Website: Mr. Creamer reported that the second quarter lobbying expense reports have been posted on the Board's website and staff continues to update the lists of registered lobbyists, firms and principals on a monthly basis. Therefore, even though the online searchable lobbying database doesn't yet exist, citizens can review information about lobbying activity in the City.

Chair Glazer asked whether there was public access to first quarter lobbying expense reports on the Board's website. Ms. Massar answered that the first quarter paper reports are now available in our office for public review. Chair Glazer suggested that we should indicate on the website that the public can see the reports in our office or request copies. Ms. Massar said that we would post that information on the website.

Lobbying Software Project: Mr. Creamer said that as staff explained to the Board in July, in a meeting with Adel Ebeid, the City's Chief Innovation and Technology Officer, on June 26th, a decision was made to issue a Request for Proposals (RFP) to select another vendor for the online lobbying software project. The Board staff worked with OIT staff during the summer to prepare the RFP, which contains descriptions of both the technical and substantive needs for the lobbying software. The RFP was then reviewed by the City's Law Department and staff expected that it would be posted on the eContractPhilly website on September 17th.

Mr. Creamer explained the Board's Business Analyst in OIT, Joe Santomero, advised staff on Friday, September 14th, that the RFP was prepared on a template that did not align exactly with the latest Finance Department template, and that even though staff had already received Law's approval on the RFP, the Finance Department will not approve the RFP for posting unless it aligns exactly with the new template. Joe therefore made the changes; staff reviewed them; and the new RFP has again been sent to Law and Finance.

Mr. Creamer informed the Board that OIT expects to post the RFP by the end of this week at the latest, which means that conforming to the new template added another week of delay to issuing the RFP. OIT estimates that the bidding process will be complete and the City will issue a Notice of Intent to Contract by the middle of November. On that schedule, the contract start date will be in December.

Mr. Creamer said that with these dates in mind, staff is very concerned and extremely disappointed that the software for lobbying registration will not be available in early 2013 and that the Board will continue to have to rely on the paper registration process. Staff will update the Board on the status of the project next month.

C. Training

Mr. Creamer reported that staff reserved rooms for training here at 1515 Arch Street and has begun to schedule ethics training sessions for new employees and board and commission members. Staff will also present an ethics training session to City Council staff on October 2nd.

D. Staff News

Mr. Creamer was pleased to introduce the Board's new staff member, Bryan McHale. Bryan is the Board's new Public Integrity Compliance Specialist and will be part of all of the Board's programs, including training and lobbying. He will also provide support to our legal staff.

Mr. Creamer explained that Bryan has been a facilitator for the Penn Project for Civic Engagement with experience in managing public meetings and discussions about topics as diverse as the City budget and the School District's Superintendent Search. He has also worked for the IRS and the Census Bureau and brings his research experience and a commitment to good government to the Board.

Mr. Creamer announced that Elizabeth Baugh, who has been a member of the Board's staff since 2010, is now our Public Integrity Compliance Services Supervisor. Elizabeth brought her background as a librarian and learning resource person to the Board and has been crucial to the Board's public outreach and information efforts. Among her many projects, she is working on our online ethics training project and has led our work to implement and test updates to the online financial disclosure software used by City employees and board and commission members. She designed and presented training sessions to departmental Human Resource Managers in use of the online financial disclosure system.

Mr. Creamer explained that Elizabeth has been at the center of the planning and development of the lobbying disclosure program. Not only did she work on the RFP for the online filing project, but she also designed the interim lobbying registration and expense report forms and instructions and coordinates with the OIT staff to post forms and instructions on the Board of Ethics' website and to release lobbying data for public disclosure.

E. Annual Fiscal Report for 2012

Mr. Creamer explained that Section 3-806(k) of the Philadelphia Charter requires that the Board submit an annual fiscal report to the Mayor, City Council, the Chief Clerk of City Council, and the Department of Records no later than September 30th. Staff believes that the Board of Ethics is the only City agency that is required to submit such a fiscal report in addition to the detailed Annual Report of all of our activity that we prepare and submit each spring.

Mr. Creamer said that staff circulated a draft Fiscal Report to the Board which indicates that expenditures totaling $682,572 were made in FY12, as follows:

Class 100 (Salaries): $657,532
Class 200 (Purchase of Services): $17,123
Classes 300/400 (Materials, Equipment, & Supplies): $7,917.

Mr. Creamer stated that in addition to listing the categories and purposes of our expenditures, the Report briefly summarizes the Board's activities in FY12, including the Board's ethics and campaign finance training programs, its efforts to implement the City's new lobbying law, and its advice and enforcement work.

Chair Glazer asked staff to think about combining the requirement of the Annual Report that we prepare each spring with the requirement of the Fiscal Report and to determine whether we would be in compliance with the Charter and Code if we combined the two reports.

Chair Glazer asked if staff had sent letters to entities that had not filed their lobbying reports. Ms. Massar responded that staff had contacted those principals who have registered but not filed expense reports and would follow up with those entities. She pointed out that it is difficult to identify those entities who should have registered and filed lobbying reports and that there is still confusion about which entities are subject to the City's lobbying law.

Chair Glazer asked for an update on the compliance of the lobbying expense reports at the next Board Meeting.

By a 4-0 vote, the Board approved the Annual Fiscal Report.

F. October Board Meeting

Mr. Creamer reminded the Board that the October 17th Board meeting will begin at 11:00. The change in meeting time is necessary because this room is not available for the Board's use after 2:30 on the 17th. The November meeting is on the 14th at the usual 1:00 time, but the December 19th meeting is at the earlier 11:00 time. Staff expects that our 2013 meetings will all be at 1:00.

V. General Counsel's Report

1. <u>Formal Opinions.</u> Mr. Meyer reported that there was one Formal Opinion since the July report. (There was no August report, since the August Board meeting was cancelled.) The Opinion numbered 003 is the first to be published because it is public, and Opinions 001 and 002 are nonpublic and still in process.

a. Nonpublic Formal Opinion 2012-003 (July 18, 2012). Although initially captioned "Nonpublic," the requestor has since approved making the Opinion public. Because of this change, we made minimal edits to the version that was issued to the requestor, and are otherwise making it public.

The Law Department requested an opinion, on behalf of the City Administration and PGW, as to whether the City and PGW would be required to register as "principals" in the Lobbying Registration System if they hired two lobbying firms to lobby City Council and the Gas Commission regarding the merits of a potential sale of PGW. The Board made the following conclusions:

1. The Board finds that the principals here are the Administrative and Executive Branch of City government, and PGW.

2. The Board finds that the agencies to be lobbied are City Council and the Gas Commission.

3. The Board finds that the exemption in Code Section 20-1204(7) (City official or employee, acting in official capacity) does not apply where the government entity hires an outside lobbyist, nor does any other exemption apply, and thus the principals here are not exempt from registering with the Lobbying System.

4. As both principals are registered for calendar year 2012, expense reports are due for each quarter of the year, even if only to note that the threshold amount was not exceeded.

Formal Opinion No. 2012-003 should be available on the Board's website soon.

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

a. Nonpublic Advice of Counsel GC-2012-507 (July 24, 2012). An appointed City employee requested nonpublic advice on three questions, all of which relate to his membership in a Philadelphia-based political organization ("The Group"). The employee advised that he is a plaintiff in a class action lawsuit in which the defendants include several other political organizations and officials of a particular political party. He has asked questions regarding the political activity restrictions of Regulation 8 on his membership in the Group, attendance at its meetings, and testifying in the legal action.

Based on the facts provided, the appointed City employee was advised that he may permissibly be a member of The Group, may attend, purely as a spectator, meetings of that organization, and may testify on its behalf in court. However, any further involvement in the management or affairs of the organization, such as participating in a discussion at a meeting of the organization, would be prohibited by Charter Section 10-107, as interpreted by Regulation No. 8.

b. Nonpublic Advice of Counsel GC-2012-508 (July 24, 2012). A City official requested a nonpublic advisory opinion as to the effect of the ethics laws on her creating a nonprofit organization and serving as an uncompensated board member of that organization while also serving as a City official. The facts presented do not identify a conflict of interest under Code Section 20-607, because the requestor is not compensated by the nonprofit and thus has no financial interest. Because of its treatment of nonprofits, there might be a different interpretation under the conflicts provision of the State Ethics Act, but the State Ethics Commission is the entity with jurisdiction over the Act. Code Section 20-602(1)(a) would prohibit the City official personally from representing the nonprofit as its agent or attorney in a transaction involving the City, but another member of the nonprofit could permissibly provide such representation, without restriction. The Commonwealth's financial disclosure form would require that the City official disclose her directorship with the nonprofit when she files that form next April.

c. Nonpublic Advice of Counsel GC-2012-509 (July 25, 2012). A City employee requested a nonpublic advisory opinion as to the effect of the ethics laws on his volunteer service as a member and soon to be president of the PTA of a local charter school, in light of his official position as a City employee in a unit of the City that interacts with such schools.

The employee was advised that, because the PTA is a nonprofit and the employee would be unpaid, the Charter's restriction on benefitting from City contracts contained in Charter Section 10-102 and the Code's conflict of interest provisions, Code subsections 20-607(a) and 20-607(b), do not restrict the requestor.

Under Code Section 20-602, the requestor may not represent others, including the School or its PTA, as "agent or attorney" in transactions involving the City. Based on the duties described, an argument could be made that the exception for representation "in the course of or incident to his official duties" might apply, but it is not without doubt, especially if he would be representing either entity both in his official capacity and in his private capacity, without explicit authority granted from the entity.

The State Ethics Act's conflict of interest provision may apply to the requestor and to the financial interests of a nonprofit that he serves as an officer. However, the State Ethics Commission has authority to interpret the State Ethics Act.

d. Nonpublic Advice of Counsel GC-2012-510 (August 3, 2012). A City employee, who is also an attorney, requested a nonpublic advisory opinion as to the effect of the ethics laws on her volunteer service in a private capacity on Election Day 2012 (November 6, 2012) as a voter protection volunteer through the Committee of Seventy. The political activity restrictions include a prohibition on City employees engaging in political activity while on duty, using City resources or in any City-owned or leased building. *See* Regulation 8, Subpart B. We were advised that the requestor is planning on taking leave on Election Day to participate in the voter protection program, so her participation, even if it could be considered to be "political activity," would not be on duty. Accordingly, we advised that the City ethics laws, including those on political activity, do not restrict this volunteer service in a private capacity in the Committee of Seventy's Voter Protection Program, provided that the requestor does not represent any person as agent or attorney in a transaction involving the City.

e. Nonpublic Advice of Counsel GC-2012-511 (August 16, 2012). An employee of the Office of City Commissioners requested a nonpublic advisory opinion as to the effect of the ethics laws if he were to participate, as part of his duties and representing his City office, in a rally addressing the Pennsylvania Voter ID law. The Advice discussed the meaning of the phrases "political activity" and "on duty" and the difficulty in determining whether a rally will be truly nonpartisan. Based on the facts that were provided, the requestor was advised that Charter Section 10-107(4), as interpreted by Regulation 8, does not prohibit his participation in the Voter ID rally, but he should avoid making, or being associated with, partisan political statements or activity.

Nonpublic Advices of Counsel GC-2012-507, 508, 509, 510, and 511 are available on the website of the Board of Ethics.

3. <u>Informal e-mail guidance.</u> Mr. Meyer reported that through Tuesday, September 11, 2012, there were five of these since the July report, issued either by myself or 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. A member of a City board/commission asked about participating in a matter before that body, where a party had in the past sued the requestor personally over a related matter, but the suit was dismissed. We advised that, if the requestor had a financial interest in the decision, he would have to publicly disclose that interest and disqualify himself from any official action (not just voting, but preliminary analysis, recommendations, etc.) However, since the suit was dismissed, there is no apparent financial interest and thus no issues under the ethics laws, based on the facts presented.

As information only, we noted that there is a common-law concept of "bias" that applies to members of adjudicative bodies that vote on the rights and obligations of parties before them. Determining whether an official may be biased, or advising on how to address such questions, is not in our jurisdiction. Theoretically, a disappointed party could sue, claiming that a decision was made improperly, due to bias of a member. The requestor later advised that he would recuse himself from the matter.

b. An HR manager asked for assistance in advising an employee on outside employment that involves creating art and selling it. We provided links to several advisories on conflicts and outside employment on our website and noted the following: Outside employment is not generally prohibited, but -- depending on the facts -- it does have the potential for creating ethics issues, if there is interaction with the City. Obviously, for example, the artist may not be soliciting buyers for her artwork while she is on the job. Nor would it be permissible for her to execute a contract with the City to provide it with artwork for compensation. We added that there is a Mayor's Executive Order on outside employment (EO 2-11 of 1/25/2011). Executive Orders are not within the jurisdiction of the Board of Ethics but the requestor may wish to consult with Chief Integrity Officer Joan Markman.

c. A City employee asked about restrictions after leaving City employment, and we provided the standard post-employment advice that we provide at least once a month.

d. A City official asked whether the office was required to return a box of chocolates sent to their office from an out-of-town group that had visited. We referred the official to the Chief Integrity Officer for an interpretation of the Executive Order on gifts.

e. A City employee advised that he had been invited to attend the President's speech at the Democratic National Convention, as a private citizen, on a companion ticket offered to the requestor by a City of Charlotte employee, and taking a vacation day for the purpose. We advised that Regulation 8 provides that City employees can attend political events, such as conventions, solely as spectators. Based on the facts provided, the City Code's prohibition on gifts was determined to be inapplicable.

VI. Proposed Formal Opinion 2012-004

Mr. Meyer explained that this request for an opinion was received from Stephanie Singer, Chair of the City Commissioners. Commissioner Singer has been invited by the Pew Foundation to attend a meeting of election officials in Washington, D.C., and the Foundation has offered to reimburse Chair Singer for her travel expenses. She has asked whether she may accept the reimbursement.

Mr. Cooke reviewed the draft response that staff had provided to the Board at the start of the meeting.

Staff discussed whether taking the reimbursement raises the possibility of an impermissible gratuity for an official action.

Judge Beck noted that paying for expenses related to an education meeting is not the same as receiving a ticket to the ballpark.

Vice Chair Reed compared Chair Singer's attendance at the meeting to similar experiences at events held by professional groups like the Bar Association.

Mr. Reed echoed Judge Beck by saying that there is a difference between reimbursing a $250 travel charge and giving someone a $250 gold watch. That $250 may be valued differently and consequently substantial economic value may have to be defined in context.

Chair Glazer expressed his discomfort that the Board was being asked to define "substantial economic value" in such a short period of time. Until now, he said that the Board has not defined a specific amount for "substantial economic value," and he believed the Board should be more deliberative on the issue. He suggested tabling the opinion for future consideration.

Vice Chair Reed wanted to know why this hasn't been addressed in the past four and a half years, to which Mr. Meyer responded that it has been addressed numerous times in informal e-mails and conversations. This however is the first time it will be addressed as a published ruling.
Mr. Creamer reminded the Board that as a public opinion it could only be deliberated by the Board in public session and asked what the Board would like staff to prepare for the next meeting.

Chair Glazer said that the Board needed more time to consider the draft. Judge Beck asked that the “gift to the City” exception be more fully discussed.

By a 4-0 vote the Opinion was tabled until next month.

VII. Proposed Amendments to Regulation No. 4, Seeking Advice from the Board of Ethics

Mr. Cooke explained that the proposed amendments to Regulation 4 were intended to accomplish three goals: to update the Regulation to the current drafting style from a style used by the Board in its earliest regulations; to change nomenclature to use the more formal term “advisory opinion” instead of the term “Advice of Counsel,” which seemed too informal; and to provide a process, as requested by the Board, for reconsideration or appeal of opinions.

Mr. Cooke indicated that although the new draft of the Regulation looks very different, it is substantively similar to the existing Regulation.

The Board and staff had a lengthy discussion about the proposed amendments to Regulation 4, including these issues raised by Board members:

(1) whether the Board should be involved in the General Counsel's reconsideration of an advisory opinion issued by the General Counsel;

(2) whether the step of reconsideration by the General Counsel is necessary;

(3) whether the Board should simply affirm an opinion issued by the General Counsel as opposed to issuing an opinion of the Board that adopts the opinion issued by the General Counsel;

(4) whether a timeframe, such as six months, should be established by which an opinion will be issued to a requestor or by which the Board will respond to a request for reconsideration or appeal; and

(5) whether a deadline should be set for a requestor to seek reconsideration or appeal.

Board members suggested alternative language in Subpart G (Review by General Counsel of Request for Advisory Opinion) so that the verb "addressed" would be replaced by "determined" and "overrules" would be replaced by "supersedes." It was also agreed that the amendment should state that the General Counsel shall respond to requests for reconsideration after consultation with the Chair or Vice Chair.

Mr. Cooke said that staff will make revisions and present a revised draft to the Board.

V. New Business

Chair Glazer announced that the Board held an Executive Session via email on July 13th regarding litigation. Executive Sessions were also held via email July 26th to August 13th, July 30th to August 8th and August 23rd to August 25th regarding Non-Public advice.

VI. Questions and Comments

There were no questions or comments from the public.

The public session of the Board's meeting was adjourned at 3:12 pm.