

**Philadelphia Board of Ethics**  
**Meeting Minutes**  
September 17, 2008  
Board of Ethics  
Packard Building  
1441 Sansom Street, 2<sup>nd</sup> Floor  
1:00 pm

**Present:**

Board

Richard Glazer, Esq., Chair  
Richard Negrin, Esq., Vice Chair  
Phoebe Haddon, Esq.  
Kenya Mann, Esq.  
Stella Tsai, Esq.

Staff

J. Shane Creamer, Jr., Esq.  
Evan Meyer, Esq.  
Nedda Massar, Esq.  
Michael Cooke, Esq.  
Maya Nayak, Esq.

**I. Call to Order**

Mr. Glazer recognized that a quorum was present and called the meeting to order.

**II. Approval of Minutes**

The Board approved the meeting minutes for the public meeting that was held on July 23, 2008.

**III. Executive Director's Report**

**A. Litigation Update**

1. **Local 98 IBEW:**
  - i. **Voucher Request**

Executive Director Creamer reported that on Monday he was contacted by a representative of Local 98, who invited him to inspect and copy the PAC's 2007 vouchers at Local 98's Headquarters. He and Director of Enforcement Michael Cooke went yesterday to Local 98's Headquarters and inspected the PAC's vouchers for 2007 and had copies made of those that related to 2007 elections for City offices.

Chair Glazer clarified that Local 98 had the benefit of counsel during yesterday's inspection and that union counsel knew that the inspection was occurring.

This inspection came after Local 98 IBEW's PAC filed an appeal on August 8<sup>th</sup> from Judge Bartle's July 9<sup>th</sup> Order dismissing the union's Amended Complaint that had alleged that requirements of state and local law violate Local 98's First Amendment rights.

Executive Director Creamer explained that on August 13<sup>th</sup>, he had written to the Chief of the Campaign Finance Division at the Department of State, asking her to enforce the Ethics Board's voucher request. Local 98's attorney opposed that request in a letter dated August 19<sup>th</sup>. On September 8<sup>th</sup>, the Chief of the Campaign Finance Division sent a letter to Local 98's attorney, advising him that the PAC had until today to comply with the Ethics Board's voucher request.

(Ms. Haddon arrived at this time.)

**ii. Petitions to Enforce Administrative Subpoenas**  
**1. Philadelphia Board of Ethics v. Local 98 IBEW**

The Executive Director reported that on August 29<sup>th</sup>, we filed a Petition to Enforce an Administrative Subpoena against Local 98. The underlying Administrative Subpoena was issued on July 9<sup>th</sup> and requested documents and communications relating to two anonymous political flyers that were distributed on or around primary election day in May 2007. On July 18<sup>th</sup>, Local 98's attorney advised us in writing that the Union objected to the Board's Subpoena and would not comply with it. In his letter, the Union's attorney disputed the Board's authority to issue subpoenas and questioned whether the Board's inquiry was within its jurisdiction.

As set forth in the Petition, Mr. Creamer said that the Board clearly has the authority to issue administrative subpoenas under Section 8-409 of the City Charter. The City Solicitor confirmed this in an Opinion dated August 6<sup>th</sup>. Beyond the clear Charter language, a review of City Council hearing transcripts demonstrates that Council expressly intended the Ethics Board to have the power to issue administrative subpoenas. In addition, the Court of Common Pleas has already enforced four of the Board's Administrative Subpoenas.

The Union has until September 22<sup>nd</sup> to answer the Board's Petition. Once an answer is filed, the Petition will be assigned to a Judge.

We are investigating whether Local 98's PAC made or financed the two anonymous flyers that were ordered by its agents. If its PAC made or financed the two flyers, then it failed to accurately disclose expenditures relating to them, in violation of Section 20-1006(4) of the City's Campaign Finance Law.

## **2. Philadelphia Board of Ethics v. Tommie St. Hill**

Mr. Creamer stated that on July 29<sup>th</sup>, the Board's attorneys at Dechert were forced to file a third Petition against the Union's agent, Tommie St. Hill, in the Board's continuing effort to obtain more information from him about the "Stop and frisk" flyer that he admittedly ordered. Mr. St. Hill is refusing to comply with an Administrative Subpoena issued on July 11<sup>th</sup>. He has also failed to comply with two prior orders issued by Judge Greenspan dated April 15<sup>th</sup> & 21<sup>st</sup>, which directed him to produce the laptop and any other digital equipment used to create the flyer. At the second hearing before Judge Greenspan, Mr. St. Hill's lawyer claimed that the laptop used to create the flyer was owned by someone else and was briefly in his client's office, but he refuses to identify the owner of the laptop.

On September 5<sup>th</sup>, the Board's Petition against St. Hill was assigned to President Judge Darnell Jones.

## **2. Appreciation Fund**

### **i. Petition to Enforce Administrative Subpoena**

Executive Director Creamer reported that the Board is engaged in discovery in aid of execution on a \$39,000 Judgment it obtained on June 20, 2007 against the Appreciation Fund. Discovery has revealed that Respondent's only assets (cash) were deliberately depleted after the June 20, 2007 Judgment was entered against Respondent, while the Board was engaged in discovery in aid of execution. Mr. Creamer noted that, in fact, on December 7, 2007, Respondent's attorney in this matter, Thomas Nocella, Esq. personally delivered a check for \$13,550 drawn on Respondent's only bank account to a catering business as payment of an outstanding bill incurred by a former Mayoral candidate committee in May 2007. Because Respondent did not owe any money to the catering business, this payment constitutes a fraudulent conveyance. This and other expenditures all occurred while the Respondent was ignoring the Court's Order to pay the civil penalty and have resulted in a current bank account balance of \$378.77.

Mr. Creamer explained that because Mr. Nocella personally hand-delivered the check to a vendor that substantially depleted his client's assets, while the Board was engaged in discovery in aid of execution on the Court's \$39,000 judgment, he has knowledge of

relevant, non-privileged facts that the Board may rightfully inquire into pursuant to Rule 3117 of the Pennsylvania Rules of Civil Procedure. Accordingly, the Board issued a Subpoena to Mr. Nocella on July 2, 2008, scheduling his deposition on the mutually-agreed date of July 23, 2008. However, on July 21, 2008, Mr. Nocella notified counsel for the Board that he would not appear for the deposition because of ethical considerations and confidentiality issues. Mr. Creamer stated that Mr. Nocella's blanket assertion of privilege is baseless. Moreover, the crime-fraud exception defeats his claim of privilege for communications he had with his client about the depletion of the Appreciation Fund's assets after the Court's September 21, 2007 Order.

Mr. Negrin asked Mr. Creamer why the payment is a fraudulent conveyance. Mr. Creamer explained that it was a fraudulent conveyance because the Appreciation Fund did not owe any money to the catering business and became insolvent as a result of the transfer.

### **3. Philadelphia Board of Ethics v. The Friends of Curtis Jones, et al.**

According to Mr. Creamer, the Board's Petition filed against Councilman Jones and his committee is pending before Judge Gary DiVito. This matter arises out of a Petition, filed by the Board on May 8, 2008, in the Court of Common Pleas against the Friends of Curtis Jones, Karen Lewis (as treasurer) and the Honorable Curtis Jones Jr., for failing to electronically file a required 2007 cycle 3 report with the Ethics Board, via the Records Department. Mr. Creamer noted that the Committee electronically filed its 2007 Cycle 3 report on May 9, 2008 – nine days after we filed the Petition. He stated that we are waiting for the case to be scheduled for oral argument.

### **4. Cozen O'Connor Suit Against the Board in the Court of Common Pleas**

Executive Director Creamer reported that we have not yet received a briefing schedule from the Commonwealth Court in Cozen O'Connor's appeal from Judge DiVito's June 10<sup>th</sup> Order, which dismissed the law firm's Complaint against the Ethics Board. Cozen filed a Notice of Appeal on July 21<sup>st</sup>.

#### **B. Personnel**

Mr. Creamer said that we are very pleased that Hortencia Vasquez started as our Clerical Assistant on August 11<sup>th</sup>. She had experience with the Police Advisory Commission before joining the Board and is assisting Administrative Assistant Tina Formica with all office tasks.

#### **C. Training**

Mr. Creamer noted that staff has been very busy with many ethics training sessions in the past few weeks. Between July 1<sup>st</sup> and the end of September, he said that with our growing staff, we will have conducted 14 ethics sessions. As a comparison, during the entire 2008 fiscal year, we conducted 19 such sessions.

The next major phase of training is for the more than 300 members of the City's "advisory" boards and commissions who are required to attend training before the end of the year. In the next two weeks, we will send notices to these members announcing training sessions that will be scheduled in October and November. Mr. Creamer noted further that with cooperation and support from the Human Resources Department, we are also training over 150 departmental trainers who will, in turn, provide ethics training to thousands of City employees.

In addition to training for board and commission members and City employees, upcoming ethics training sessions are also scheduled for City Council members and staff and new administration officials.

Ms. Tsai asked whether our current resources are sufficient with the expanded training offerings. Ms. Massar responded that they are stretched.

#### **D. Financial Disclosure**

Executive Director Creamer stated that, as described at our last meeting, staff identified members of the City's major boards and commissions who had not filed financial disclosure statements that were required to be filed by May 1<sup>st</sup>. Letters were sent advising these individuals of their "non-filer" status. Staff is currently verifying their filing status. We expect to report to the Board further on this project in the future. Mr. Creamer also reported that staff has undertaken a review of the City financial disclosure statements filed by key City officials. We are examining the statements for missing information and other possible reporting issues and, if necessary, will contact these individuals to ask that they amend their reports.

Chair Glazer noted that we believe this is the first time that financial disclosure compliance has ever been reviewed for City board and commission members. He similarly commented that he believes this is the first time that there has been a review of the contents of City financial disclosure statements.

Executive Director Creamer noted that he had participated on a CLE panel entitled "Show Me the Money" with Joan Markman and Mike Schwartz. The session concerned campaign financing issues.

#### **E. Budget**

Mr. Creamer advised the Board that in August, he sent a letter to Budget Director Stephen Agostini, on behalf of the Board, requesting an internal transfer for this fiscal year of \$100,000 from Personal Services (Class 100) to Class 200 for the Purchase of Services. He reminded the Board that during the FY09 budget process, the Board requested, but did not receive, an additional \$100,000 beyond its \$1 million budgeted amount to meet anticipated litigation-related costs. These funds are needed because, unlike other City departments or agencies, the Board of Ethics is not represented by the City Solicitor, and the Law Department does not pay for outside counsel to represent the Board of Ethics.

The letter to Budget Director Agostini explained the Board will either not hire into or delay hiring into two budgeted staff positions to support the \$100,000 internal transfer. This will ensure that there are funds available for FY09 litigation costs.

#### **IV. General Counsel's Report**

General Counsel Meyer reported that there were three Advices of Counsel issued since his July report; all three were nonpublic, as requested by the requestor, and all were from a member of a City board or commission:

- a. Nonpublic Advice of Counsel of August 4, 2008. He advised a member of a City board/commission, who is also an employee of a local business that may have an interest in transactions involving purchases of real property from the City, concerning application of the Public Integrity Laws to the member's public service. He advised that Charter Section 10-102 (interest in City contracts) applied to members of that board/commission.
- b. Nonpublic Advice of Counsel of September 4, 2008. He advised a member of a City board/commission, who is also an employee of a local business that may have an interest in transactions involving purchases of real property from the City, concerning application of the Public Integrity Laws to the member's public service. He advised that Charter Section 10-102 (interest in City contracts) applied to members of that board/commission, but that Section 10-102 did not apply to purchases from the City.
- c. Nonpublic Advice of Counsel of September 5, 2008. This Advisory was nearly identical to the above-mentioned document, except that it involved a different requestor and a different board/commission. He advised a member of a City board/commission, who is also an employee of a local business that may have an interest in transactions involving purchases of real property from the City, or possibly City-related entities, concerning application of the Public Integrity Laws to the member's public service. He advised that Charter Section 10-102 (interest in City contracts) applied to members of that board/commission, but that Section 10-102 did not apply to purchases from the City.

General Counsel Meyer reported that, through Friday, September 12, informal e-mail guidance was provided in response to 14 requests since his July report. This included three from Associate General Counsel Maya Nayak, who also helps the General Counsel with some of the responses he provides. He noted that in every such e-mail, we provide a link to Regulation No. 4 and explain that the requestor may obtain a written advisory opinion, if they wish.

a. Advised a City official on the propriety of accepting air fare, hotel expenses and a per diem for appearing on an out-of-town panel at a conference hosted by another government entity. The official was invited to participate on the panel, based on his/her work with the City. Advised generally that the cash per diem would be an honorarium, prohibited under the State Ethics Act. As to air fare and other travel expenses, advised that, under certain circumstances these expenses may be viewed as a "gift to the City." Since the Executive Order on gifts is generally the issue (since there is no minimum value of prohibited gift), we suggested the requestor consult the City's Chief Integrity Officer, Joan Markman, to determine whether the free conference attendance may be a "gift to the City."

b. Received a query from a City employee who had suffered a severe family trauma, and who advised that his/her co-workers wished to conduct fund-raising for the family. Advised that no issues are raised under ethics laws on the facts as presented, provided that care must be taken to separate your official duties and connection to the City from any fund-raising. No City employee should be using City time, equipment, or materials in any fund-raising. Fund-raising should not be done from City phones, or listing City phone numbers as call-back numbers. Mailings should not be sent using City mail service or listing any City office as a return address. And fund-raising activities should not occur on City time.

c. Received a query from a City employee regarding whether employees in that office may avail themselves of an offer from a firm with a City contract to provide a free seminar related to that service. The offer was apparently made to City employees in general. We advised that it was possible that the free seminar was a negotiated term of the company's contract with the City. However, even if it was not a negotiated benefit, we concluded that the free seminar was more in the nature of a "loss leader" or "sale" or similar common marketing tool, rather than a gift to selected City officials. Accordingly, none of the ethics laws that restrict the receipt of gifts would prohibit acceptance of the free seminar.

d. A City employee asked, whether forming an exploratory committee for a candidacy would represent a declaration of candidacy and therefore implicate the "resign to run" provision of the Charter. We advised as follows:

It would be important to know what public statements are made by the exploratory committee, and in particular by the person who is considering a run for office. In general, however, it is my understanding that the usual purpose of an exploratory committee is to explore the possibility of a person becoming a candidate for a particular office, with an aim of determining whether sufficient support exists for that person to announce candidacy. In that case, it would appear that merely forming an exploratory committee would be more akin to "indicating availability to run" and would not constitute, by itself, an announcement of candidacy, and thus the individual involved would not become a candidate at that point.

e. An official who works with certain boards/commissions asked, "Does the Ethics training have to be attended annually?"

We examined Code Sections 20-606(1)(b)(i) and 20-606(1)(b)(iii) and advised that annually all board and commission members must attend the mandatory ethics program.

f. As a follow-up to the above question, a City employee who also sits on two City boards and who had attended training in 2008 in one capacity asked whether attendance in the same year was required because of the other position(s). We advised that only one attendance per calendar year was required.

g. A City official asked about City policy regarding nepotism. We advised that, although there is no provision in any of the ethics laws explicitly labeled "nepotism," it is still his conviction that the substance of nepotism (a City official taking employment action affecting a close relative) fits the definition of prohibited conflict of interest under both Section 20-607 of the City Code and Section 1103(a) of the State Ethics Act.

h. Received a question from a recently retired City employee who has been approached by City vendors to work for them as a subcontractor on their City contracts. We provided the requestor with a copy of the newsletter on post-employment restrictions, from our website. We pointed out that the "cooling-off period" from the State Ethics Act is one year, not six months. And we pointed out that the Act's definition of the kind of "representation" that is prohibited is much broader than "contract or performance negotiations." We asked the requestor for additional information, so we could provide a formal advisory, but received no response.

i. Received, via the "Ask for Advice" feature on our website, a complaint that the person had been threatened by an attorney and asking "Please get back to me to help me figure out who I should be contacting . . . ." We advised that this matter was not in our jurisdiction as it did not appear to involve any question of application of the

ethics laws to a City official or employee. Suggested that the person may wish to contact the Disciplinary Board of the Penna. Supreme Court, and provided a link to their website.

j. Received a query from a City employee regarding two potential types of outside volunteer work: for his/her church and for a nonprofit fundraiser to fight disease. Provided a copy of the 2002 City Solicitor newsletter on service with nonprofits, and pointed out the necessity of avoiding a conflict with the individual's official duties, and not using City resources to aid either nonprofit entity.

k. Received a query from a representative for a City department, regarding a former City employee of another department, who is now working for an entity receiving City funds through the requestor's department. The department was concerned that they may be violating the law by dealing with an entity that employs a former City employee within one year of separation from the City. We advised the department as follows: First, the "one year rule" is from the State Ethics Act. We concluded that we do not have jurisdiction to advise a City department as to the effect of the Act on a former employee of a different City department. Interpretation of the State Act is ultimately up to the State Ethics Commission. Moreover, in this case, there may be an issue as to whether the former employee in question had duties that qualified him/her as a "public employee" subject to the Act. In any event, only the former employee can violate the Act by representing a person before the City; the City cannot itself violate the Act. As informal general guidance, we also provided a general summary of the post-employment ethics laws.

l. Fielded an inquiry via the "Ask for Advice" feature on our website from a former City employee regarding the post-employment restrictions, who upon follow-up indicated he/she wanted an advisory opinion. We asked the requestor some questions to elicit the facts necessary to write an opinion, but to date we have not received a response.

m. Received a request from a City employee asking to be directed to the laws that prohibit representations involving City transactions and that prohibit conflicts of interest. We directed the requestor to the relevant provisions of the City Code and also to the State Ethics Act. The employee requested an advisory opinion. We asked the requestor follow-up questions to elicit the facts necessary to write an opinion. After a month we received responses to our questions, and we will be drafting a non-public Advice of Counsel.

n. Received, via the "Ask for Advice" feature on our website, a question asking what ethics laws are relevant to City employees being involved in non-profit organizations. We advised that generally speaking the ethics laws do not prohibit City employees from volunteering their time to non-profit organizations, but City employees must

abide by the ethics laws in connection with their work for a non-profit organization and must avoid conflicts of interest, prohibited representations, and prohibited interests in City contracts. We provided more detailed guidance about these areas of concern. We flagged the relevant Civil Service regulation and potential financial disclosure implications. In addition, we gave the requestor a 2002 Law Department newsletter that discusses the ethics laws as they apply to service with non-profits.

## **V. Annual Fiscal Report**

Deputy Executive Director Massar reported that Section 3-806(k) of the Philadelphia Charter requires the Board of Ethics to submit an annual fiscal report to the Mayor, City Council, the Chief Clerk of City Council, and the Department of Records no later than three months after the end of each fiscal year.

The Board had a \$1 million budget for FY08 that was guaranteed by Section 2-300(4)(e) of the Philadelphia Charter. Ms. Massar stated that this was the first fiscal year when the Board of Ethics administered its own budget and was independent of the Law Department. The Board spent almost \$520,000, which was more than the \$291,000 spent in FY07. Overall, more was spent in salary in FY08 with less spent on equipment and other start-up costs associated with a new agency. The expansion of staff has already resulted in many more ethics training sessions.

In the cover letter to accompany the report, Ms. Massar suggested that the Board bring to the Mayor's attention that we did not receive an additional \$100,000 as requested during the budget process and that we cannot assume that we will continue to receive *pro bono* legal representation which had an estimated value of \$250,000 in FY08. She indicated that was the basis for the request for an internal transfer of \$100,000 reported earlier by the Executive Director.

Ms. Tsai asked how long it would take to process the request for an internal transfer. Ms. Massar said that she expected it might occur in the next few months.

Executive Director Creamer explained that the Board's request would be included in a larger transfer ordinance presented to Council.

Chair Glazer clarified that the Board's actual total budget request was \$1.1 million, which included the additional \$100,000 for litigation expenses. The Board did not receive the additional funds.

Ms. Tsai asked about campaign finance training before the 2009 election. Ms. Massar responded that we have already begun planning two sessions that will occur in November and December. Executive Director Creamer noted that campaign finance training was

provided in the past in conjunction with the Records Department. Ms. Massar stated that Records Commissioner Joan Decker has already agreed to assist in the sessions this year.

Mr. Creamer noted that no one is required to file in 2008, but that this illustrated an issue with the campaign finance law. We are losing much contribution and expenditure data because incumbents are not required to file in 2008. He suggested that the Board recommend as a legislative change that incumbents continue to file in non-election years. This would assist the Board in identifying excess precandidacy contribution issues.

Ms. Tsai stated that fundraising goes on all the time.

Ms. Mann moved approval of the Annual Fiscal Report for FY08. Ms. Tsai seconded the motion, which was approved unanimously.

## **VI. Discussion of Annual Ethics Training Requirement**

General Counsel Meyer explained that it is up to the Board to determine which City employees, other than “all elected City officers, all Cabinet members, all City department heads, and all board and commission members,” must continue to receive training each year after receiving an initial training. He described three possible options to use as criteria to determine which other individuals require annual training.

The Board might rely upon: the State Ethics Act definitions of “public employee” or “public official”; a standard applied to all City employees that is based on a combination of Fair Labor Standards Act categories and job duties and/or pay grade; or exempt and civil service pay grades to be determined with assistance from the Department of Human Resources. Counsel Meyer indicated that we need more information and research and then will come back to the Board.

Chair Glazer said that he believed there were several issues to consider. If we had infinite staff, he said we would train all employees every year. Mr. Glazer stated his understanding that the Code does not require that mandatory routine training be “in person” and that the Board could therefore use other alternatives, such as videotaped training or web-based training.

Mr. Glazer stated that although legislative history is not conclusive or binding, it would be helpful to know whether there was any legislative history on this issue. He also requested information on the number of employees who file the State financial disclosure form.

Executive Director Creamer said that the Board could always change any training plan if there were new ethics laws enacted and noted that training could always occur on a predetermined interval.

Ms. Haddon said that City employees and officials need refresher training in the ethics requirements and that such training could occur on a rotating basis.

Chair Glazer cautioned that salary alone should not be the standard for requiring training. Mr. Negrin said that the Board should always reserve the right to conduct annual training when necessary.

## **VII. Discussion of the Disclosure and Disqualification Requirement**

General Counsel Meyer explained that compliance with the disclosure and disqualification requirement in Section 20-608 has become a frequent topic of discussion at several board and commission ethics training sessions. Board and commission members noted that they often did not know sufficiently in advance of a meeting that there might be an item on the agenda that would require disclosure and disqualification. Mr. Meyer suggested that the Board issue an advisory on the website to alert board and commission members about complying with Section 20-608.

Chair Glazer asked whether the Board of Ethics could enforce an ethics advisory. Mr. Meyer said that if disclosure and disqualification requirements were not observed, it would be a direct violation of the Code section.

Executive Director Creamer noted that there would be an evidentiary issue without a recording of a particular board or commission meeting. He suggested that we could recommend that a board or commission member notify the Board of Ethics if he or she is unable to comply with Section 20-608. He also stated that boards and commissions need to change their practices to make compliance with Section 20-608 possible.

Mr. Meyer indicated that he would draft an advice and provide it to the Board for review.

## **VIII. New Business**

Executive Director Creamer announced that Local 98 had just delivered copies of the vouchers that were examined yesterday.

## **IX. Public Comment**

Lauren Vidas asked at what point does an incumbent become a candidate for the purpose of filing campaign finance reports? Executive Director Creamer answered when a person has made a public declaration of candidacy or filed a nominating petition.

Bob Warner asked when an annual campaign finance report is required? Mr. Creamer explained that one is required only if the report contains information concerning a City

candidate. He reiterated that this is a reason to require incumbents to continue to file campaign finance reports.

Chief Integrity Officer Joan Markman asked how new employees would be trained. The Executive Director explained that their training would occur through the Human Resources Department and departmental trainers.