

Philadelphia Board of Ethics
Meeting Minutes
March 25, 2009
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

Richard Glazer, Esq., Chair
Rich Negrin, Esq., Vice Chair
Phoebe Haddon, Esq. (via conference call)
Kenya Mann, Esq.

Staff

J. Shane Creamer, Jr., Esq.
Nedda Massar, Esq.
Michael Cooke, Esq.
Maya Nayak, Esq.
Tina Formica

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, as printed and distributed, for the public meeting that was held on February 18, 2009.

III. Executive Director's Report

A. Enforcement Update

1) Settlements

a. Friends of Bob Brady

Mr. Creamer announced that the Board entered into a Settlement Agreement with Congressman Bob Brady, who has admitted that his Mayoral Committee (the Friends of Bob Brady) committed 18 violations of the City's campaign finance law and has agreed to pay the Board \$19,250 in penalties for the violations. The Committee will also file amended campaign finance reports for cycles 2, 3 and 7 in 2007 and return \$53,921.95 in excess contributions.

He reported that twelve of the violations were material omissions in the Brady Committee's 2007 cycle 2, 3 and 7 reports discovered by the Board. Two violations were material misstatements. One material misstatement relates to a May 8, 2007 in-kind contribution from the Finance Committee of the Philadelphia Democratic Executive Committee, which is one of two PACs controlled by the Democratic City Committee. The PAC paid Powell Phones \$23,921.95 for voter ID calls for the Brady campaign. However, the Brady Committee only disclosed a \$20,000 in-kind contribution. The PAC's in-kind contribution constitutes a second violation because it exceeded the \$20,000 contribution limit for political action committees.

He also reported that the Brady Committee received two additional excess contributions in 2007. One was a \$20,000 in-kind contribution from the Bob Brady for Congress political committee in the form of an April 13, 2007 payment to Voterlink and Black Blue Media for work done for the Friends of Bob Brady. This undisclosed in-kind contribution was an excess contribution because Bob Brady for Congress had previously made a maximum \$20,000 contribution to the Friends of Bob Brady in 2007. The expenditure also constitutes a violation of the single committee rule under Section 20-1003 because it was made by a political committee controlled by then-candidate Brady that was not his designated candidate committee.

Mr. Creamer said that the second additional excess contribution was a \$50,000 loan from the Fumo for Senate Committee on August 17, 2007. The entire \$50,000 loan constitutes an excess contribution because the Fumo committee had previously made a maximum \$20,000 contribution to the Friends of Bob Brady in 2007. Loans are included in the definition of "contribution" in Section 20-1001(6) of the City's campaign finance law.

Finally, he said that since retaining new counsel in September 2008, the Brady Committee has provided full cooperation with the Board's investigation and has actively tried to mitigate all violations. Prior to September 2008, the Committee was less cooperative, which delayed the Board's investigation.

Mr. Glazer stated that this was a campaign rife with carelessness, indifference and neglect so pervasive as to suggest a conscious disdain for compliance with the campaign finance laws.

He said that while Congressman Brady should be commended for agreeing to settle, one must wonder, without the tenacious pursuit by Ethics Board staff over the last two years, whether these 18 penalized violations and 92 others would have come to light.

Mr. Glazer commented that, remarkably, almost two years after the last primary election, the Ethics Board is still engaged in investigations related to that election. Regretfully, the scope, complexity and protracted nature of these investigations results, in most cases, with exposure long after the election is over.

Chair Glazer stated that the Board of Ethics can only hope, however, that the message will get out to those now running for DA and other offices in the upcoming primary that our commitment to the citizens of Philadelphia will be to unfailingly pursue enforcement of these campaign finance laws no matter how much time has passed.

b. Green for Philadelphia

Mr. Creamer announced that the Board has also entered into a Settlement Agreement with the Green for Philadelphia committee, which is Councilman Bill Green's candidate committee. The Green Committee has admitted that it inadvertently received an excess \$6,207.20 in-kind contribution from Local 98's COPE PAC, which was payment of a catering bill that the Green Committee intended to pay, but which was originally paid by Local 98. This in-kind contribution was an excess contribution because COPE had previously made a maximum \$10,000 contribution to the Green Committee in 2007.

He said that Local 98's payment of the catering bill became public after the Board's Settlement with COPE was made public on October 15, 2008. The Green Committee was unaware of COPE's payment of the catering bill until then, and took immediate corrective action by reimbursing COPE as soon as it learned about it. The Green Committee also provided its full cooperation with the Board and has provided the Board with a thorough explanation of the details of the in-kind contribution. Under the circumstances, the Board has agreed to waive any penalty.

2) Settlement Updates

a. The Friends of Curtis Jones. Jr.

Mr. Creamer reported that the Friends of Curtis Jones has made its first payment toward the \$22,500 agreed-to penalty. On February 28th, we received a payment in the amount of \$2,813.80.

b. Citizens to Elect Vincent Hughes

Mr. Creamer also reported that Senator Hughes' committee has now made two out of three payments towards the \$7,500 penalty. On March 12th, we received the second \$2,500 payment from his committee. The first \$2,500 payment was received on February 12th.

3) Litigation Update

a. Appreciation Fund

Mr. Creamer stated that on March 11th, the Board's outside counsel filed a Petition for Contempt against Ernesto DeNofa and Thomas Nocella, Esq. alleging that they had engaged in a deliberate and fraudulent scheme to drain the assets of a political action committee that was under Court Order to pay the Ethics Board a \$39,000 Judgment for violating the City's campaign finance law. The Ethics Board is seeking to hold DeNofa and Nocella personally responsible for the Judgment against the PAC.

He said that according to the petition, the Honorable Gary DiVito issued an Order on June 1, 2007 directing the PAC known as the Appreciation Fund to pay a statutory penalty of \$39,000 to the Ethics Board for failing to file a required campaign finance report even after it was given additional time to do so by the Board. On September 21, 2007, Judge DiVito issued a second Order holding the PAC in contempt of Court for failing to pay the fine levied under the Court's June 1st Order.

He also said that the petition alleges that between December 2007 and March 2008, with full knowledge of the Court's Orders and the Ethics Board's efforts to execute on those Orders, DeNofa and Nocella deliberately and systematically depleted the PAC's bank account through a pattern of illegitimate payments. While they did so, according to the Board's filing, they also repeatedly delayed and obstructed the Ethics Board's efforts to execute on the Court's Orders so that their fraudulent scheme would not be detected until they had drained the PAC's bank account.

Mr. Creamer stated that the petition asserts that while stalling the Ethics Board's efforts to execute on the Court's Orders, DeNofa and Nocella used most of the Appreciation Fund's money to pay a catering company bill that was owed by a different PAC, "Bob Brady for Mayor". Specifically, according to the petition, DeNofa signed and Nocella personally delivered a \$13,550 check to the caterer, and when that check failed to clear, Nocella arranged to take care of the problem with a cashier's check issued by the bank. The petition alleges that Nocella next arranged for the delivery of a \$390 check, signed by DeNofa, to a different vendor owed money by "Congressman Robert A. Brady." Finally, the petition asserts, knowing that a couple thousand dollars remained in the PAC's account and that nothing had been paid towards the Court Order, Nocella helped himself to \$2,500 from the PAC's bank account at DeNofa's suggestion on the pretext of "legal services" – even though he was representing the PAC for free and was not owed any money by it.

He also stated that the petition also alleges that immediately after DeNofa issued the \$2,500 check from the PAC's bank account to Nocella, but before Nocella actually deposited the check, Nocella told the Ethics Board's attorney that the PAC was "dormant" and that it had "no assets." The petition asserts that these statements were flat misrepresentations by Nocella.

Finally, Mr. Creamer stated that the payments contrived by DeNofa and Nocella were fraudulent, according to the petition, because the PAC did not owe any money to the recipients, and were made when the PAC owed money to the Ethics Board under the Court Orders. The Board's filing asserts that less than \$400 remained in the PAC's bank account after the fraudulent payments that were devised and carried out by DeNofa and Nocella.

Mr. Creamer reported that Sam Stretton, Esq. is representing Judge Nocella.

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

Mr. Creamer reported that Cozen O'Connor filed its Brief in support of its Appeal to the Commonwealth Court on December 29, 2008. The Board's Brief was filed on January 28, 2009. Since the last Board meeting, oral argument was heard on February 24th.

He said that in an opinion by Judge Dan Pellegrini, filed on March 12, 2009, a three-judge panel of the Commonwealth Court of Pennsylvania affirmed the lower court ruling dismissing the Cozen Complaint and concluding that Cozen lacked standing in the matter.

Cozen has until April 13th to file a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

The Board wishes to express its great appreciation to Greg Miller and Gregg Mackuse at Drinker, Biddle who have continued to provide *pro bono* representation to the Board throughout this matter.

c. Pennsylvanians for Better Leadership

Mr. Creamer stated that on February 23rd, the Board filed an enforcement Petition in the Court of Common Pleas against the Pennsylvanians for Better Leadership PAC for material omissions and misstatements in the committee's 2007 campaign finance reports. The Board is seeking penalties for 20 violations.

He also stated that a Rule to Show Cause was issued by Judge Fox on February 24th. The Rule sets the case management schedule and includes a July 6th hearing date. The PAC is represented by Greg Magarity, Esq., who has filed a motion for an extension of time to file an Answer to the Petition.

Mr. Creamer said that the PAC's treasurer was Kevin Watson, who was a Deputy Sheriff in 2007 when the violations occurred, but who worked for Senator Arlen Specter more recently. He noted that Mr. Magarity has advised him that both Senator Specter and the PAC have fired Mr. Watson.

B. Budget

FY09: Mr. Creamer reported that the Board's request for an internal transfer of FY09 funds was approved as part of a transfer ordinance, Bill No. 090065, which passed in City Council on

March 5th and was signed by the Mayor on March 9th. The Board requested a transfer of \$93,250, originally appropriated for personnel in Class 100, as follows:

- \$78,000 to Class 200 for the Purchase of Services, including costs associated with investigations and litigation; and
- \$15,250 to Class 300/400 for Materials, Supplies, and Equipment, including costs to implement online ethics training

FY10: Mr. Creamer said that the Board was advised that the FY10 budget total is \$810,000. This is a 10% cut from our already-reduced FY09 budget of \$900,000. The original budgeted amount for FY09 was \$1 million. The Board explained in their FY10 budget submission that this additional 10% cut would have a disproportionate impact on an agency as small as the Board because the cut would:

- Delay new public outreach efforts, including business outreach mandated by Section 20-606(1)(c) of the City Code;
- Cause the Board to reduce, suspend, or eliminate investigative activity; and
- Eliminate the Board's ability to hire legal counsel if subject to an outside legal challenge.

Executive Director Creamer also said that it is important to note that at this funding level, especially if we are faced with unanticipated enforcement or litigation matters, it might become necessary for the Board to take action in Court at some point during FY10, as authorized in Charter Section 2-300(4)(e), to ensure that sufficient funds are appropriated so that the Board can perform its statutory responsibilities.

Mr. Creamer announced that the Board's budget hearing is scheduled for April 6th at 3 p.m.

C. Financial Disclosure

Mr. Creamer said that many City officials and employees and the members of City boards and commissions are required to file one or more of three annual financial disclosure forms by May 1st. These are the City Form (required by the City Ethics Code), the Mayor's Form (required by an executive order), and the State Form (required by the State Ethics Act). Staff efforts have been focused during the past month on the many tasks necessary to implement the financial disclosure process.

He also said that as a first step in this process, staff revised a document entitled "Who Must File the State, City and Mayor's Financial Disclosure Forms," that summarizes criteria for determining whether or not a City employee comes within the State Ethics Act filing requirement. The "Who Must File" document, which also lists the individuals who must file the City and Mayor's Forms, is available on the Board's website.

Mr. Creamer stated that in an effort to provide better guidance to City employees to alert them whether they may be required to file a State Form, our staff worked with staff of the HR Department to develop a revised list of potential State Form filers. First, as a result of the review with HR of approximately 1100 civil service job titles, we learned that some job titles should be

added to the list of likely State Form filers, while others should be removed. Next, because they have specialized knowledge of the civil service exempt employees in their departments, we have asked the departmental HR managers to review the almost 760 civil service exempt titles to determine which of these employees should file the State Form. We believe that the result of the detailed analysis of positions this year will be an increased number of filers and better guidance to City employees about who must file the State Form.

Mr. Creamer thanked the HR Department and the many HR managers for their assistance in this process.

Mr. Creamer said that staff has also contacted various sources to develop a list of all City Board and Commission members because they are required to file one or more of the disclosure forms. Staff compiled information about boards and commissions from many sources, including the Mayor's Office, countless emails to deputy mayors, the executive directors of various boards and commissions, and many websites.

He said that as another important step in preparing for May 1st, staff revised the Financial Disclosure section of the Board's website. They also updated the Frequently Asked Questions and forms and instructions on the website, including a link to the on-line Financial Disclosure System that can be used to prepare all three financial disclosure statements.

Mr. Creamer reported that staff reviewed and tested the on-line Financial Disclosure System so that our staff can act as "help desk" staff to assist filers when they call with questions about using the system. If a filer is required to file more than one of the reports, he or she only has to enter financial information once and it is filled in on the appropriate forms. By using the on-line system a filer can prepare one or more of the three financial disclosure reports and each will contain a bar code to expedite the filing process at the Records Department.

He also reported that staff is preparing reminder notices that will be sent, with the assistance of the Records Department, to all financial disclosure filers.

Finally, Mr. Creamer stated that all financial disclosure forms, even if prepared using the on-line system, must be printed, signed, and delivered to the Records Department by 5:00 p.m. on May 1st to be timely filed.

D. Training

Mr. Creamer reported that staff conducted their third campaign finance training session on February 19th. The Records Department conducted a special training session last Wednesday on the SmartClient electronic filing software that permits candidates to comply with the City's electronic filing requirement.

He said staff expects to continue to offer more training sessions prior to the Friday, May 8th filing deadline for the Second Friday Pre-Primary Cycle 2 Report. The 2009 municipal primary election is on May 19th. The Cycle 2 report will include contribution and expenditure information through Monday, May 4th.

E. COGEL

Mr. Creamer reported that he attended the Planning Committee meeting for the 2009 COGEL Conference on February 27th & 28th in Scottsdale, Arizona, at his own expense. It was a really exciting and stimulating experience to work for two intense days with other Canadian and American ethics officials to plan more than 30 conference sessions on ethics, campaign finance, lobbying, freedom of information, and election administration topics.

IV. General Counsel's Report

Mr. Glazer informed the audience that Mr. Meyer was out of the office and asked Associate General Counsel Maya Nayak to present his report to the Board.

1. Board Regulation No. 5 (annual and routine training). Ms. Nayak reported that the Board is investigating the possibility of drafting the regulation so that the standard for which City employees must have annual training is similar to the standard that the State sets for which employees must file the State financial disclosure form. Consideration of a standard and drafting of language involves substantial interaction with the Office of Human Resources, which has been very helpful. Also, as we refine the financial disclosure process, it will be helpful to review this year's experience with the filing process, which is complete with the May 1 filing deadline.

2. Informal e-mail guidance. Ms. Nayak stated that through Friday, March 20, 2009, there were seven of these since the January report. (These include advice provided by Associate General Counsel Maya Nayak.) In every such e-mail (except for some of the routine financial disclosure messages), we provide a link to Regulation No. 4 and explain that the requestor may obtain a written advisory opinion, if they wish to have a formal ruling on which they may rely.

a. Responded to City employee's question about charging fees for notary services provided by the City employee. Advised there was not an ethics law violation where the employee did so not while performing City job duties, not while using City equipment, and did not use his/her City position to suggest to people that they use the employee's notary services.

b. Received an inquiry from a campaign on two questions:

1. Is there any issue under the Campaign Finance Chapter of the Philadelphia Code (Code Ch. 20-1000) concerning campaign contributions or expenditures or the reporting thereof, where a campaign website links to an official website; and

2. Is there any issue under the Political Activities Section of the Home Rule Charter (Charter Sect. 10-107) concerning involving City appointed employees in political campaign activity in such a linking of websites.

Based on the facts provided to us, we advised that it appears that no expenditure of funds or in-kind contribution of anything of value would be made by the simple act of the campaign linking to a pre-existing official website. Nor is any action by the the City office required for such a link

to be accomplished, so there need not be any even arguable campaign activity by any City employee.

c. Received an inquiry about the Campaign Finance FAQs posted on our website, specifically the Q & A regarding the \$2600 limit on contributions by individuals. The requestor wondered whether a donor could give \$2600 to multiple candidates. We advised as follows The FAQ is a summary of Code subsection 20-1002(1)--with amounts modified as per subsection 20-1002(8). I interpret "contributions . . . to a candidate for City elective office" to mean that the limit applies to each candidate. In other words, just to give an example, in 2007, an individual would not have violated the provision if he/she had donated \$2500 to each of the 17 candidates running for City Council, for a total of \$42,500.

d. Clarified for a departmental HR manager filing requirements for various departmental boards. (It is now financial disclosure season. We are starting to receive the annual flood of emails and phone calls concerning who must file which form. Generally, these involve routine reference to Code Section 20-610 (for the City Form) and Mayor's Executive Order No. 11-84 (for the Mayor's Form). We will not note such routine advices in the General Counsel report, unless there is some interpretation of the law involved, or novel question.)

e. We were asked if any issues would be presented in a matter where someone from the staff of an interested nonprofit would give comment or what amounts to testimony to a City board/commission for a proposed action by that board/commission, at which one member of the board/commission who is also a member of the interested nonprofit would participate. We advised that the conflict of interest rules are generally concerned with **financial** conflicts and that there appeared to be no financial interest by the nonprofit in this matter.

One non-financial provision is Section 20-602(2) of the Philadelphia Code, relating to representation. That provision would prohibit an board/commission member from representing his/her outside entity (like the interested nonprofit) before his/her board/commission, but this was not in the facts presented.

f. An HR manager asked about a City employee who was not considered a "public employee" in 2008 and not asked to file the State Form, but who was recently promoted into a position that appears to qualify as a "public employee." Advised that, just as a newly hired "public employee" must file the State Form, so must an employee newly promoted into a "public employee" position.

g. A member of a City board/commission asked about running for office and/or campaigning for other candidates for elective office. We advised that this particular board/commission was ruled not to be subject to Charter Section 10-107 in Board Advisory Opinion No. 2007-006 and that therefore there was no prohibition on the requestor's proposed activities.

V. Annual Report

Ms. Massar noted that the draft 2008 Annual Report, which was circulated to the Board, is the work of many staff members, including Evan Meyer, Michael Cooke, Maya Nayak, and Danielle Cheatam. She also noted that we relied heavily on Paul Jablow's work drafting several sections of the report and his editing skills. She explained that Tina Formica will use her special skills to format the report and make it look professional. We expect to deliver the 2008 Annual Report to the Mayor and members of City Council in advance of the Board's April 6th budget hearing.

VII. New Business

There was no new business to discuss.

VIII. Questions/Comments

Marcia Gelbart asked Mr. Glazer to repeat his statement regarding the Brady settlement.

Mr. Glazer said he would send it to her after the meeting.

Marcia Gelbart asked the Board to characterize the material misstatements. Were they intentional?

Mr. Creamer said that the Campaign Finance Laws are strict liability laws. He believes that the errors by the Brady Committee were due to poor book keeping/record keeping and sloppy records kept at different locations with different formats. He said the lesson is to be careful with compliance because the Board is looking at the reports very carefully.

Marcia Gelbart asked if Brady has \$50,000 to reimburse Fumo for Senate.

Mr. Creamer said that he is not sure, but they have one year to repay the excess contribution. He said he was aware of one debt retirement fund raiser that was held.

Marcia Gelbart asked for the name of the prior counsel.

Mr. Creamer said it was an attorney at the Willig firm in 2007.

Bob Warner asked who took over.

Mr. Creamer said the Buchanan Ingersoll firm took over in the beginning of 2008, and then Jim Eishenhower took over in September 2008. He said that on four occasions their forensic accountant spent time in the Board's offices examining the Board's records.

Marcia Gelbart asked about Richard Maccarone.

Mr. Creamer said he was the treasurer in 2007, and he was not involved in the reconstruction process.

Marcia Gelbert asked for an explanation regarding the 1,500 and 1,000 penalties.

Mr. Creamer said this is consistent with other Board penalties to impose the full penalty on the first occurrence with a reduced penalty on the later violations.

Bob Warner asked if the Brady campaign is to blame on the record keeping.

Mr. Creamer said yes. He also said that he gives the committee credit for “doing a 180” to fix their record keeping problem.

Bob Warner asked if anyone from the Ethics Board had a conversation with Congressman Brady.

Mr. Creamer said yes, he did.

Bob Warner asked what role Brady played in not cooperating.

Mr. Creamer said that he didn’t know.

Mr. Negrin said he has been very involved recently.

Bob Warner asked if the limits apply to pay the penalty.

Mr. Creamer said he has not addressed that issue yet, but he thinks they may apply.

Does the millionaire trigger limits still apply to these contribution limits?

Mr. Creamer said yes.

Bob Warner asked if Kevin Watson was fired.

Mr. Creamer said yes – from the PAC and from Senator Spector’s office.

Bob Warner asked who makes the decision on behalf of the PAC.

Mr. Creamer said he’s not sure.

Marcia Gelbart asked for the total amount of fines that have been collected.

Mr. Glazer said he would send that information to her.

Marcia Gelbart asked if the fines are deposited into the General Fund.

Mr. Creamer said yes.