

**Philadelphia Board of Ethics**  
**Meeting Minutes**  
April 21, 2010  
Board of Ethics  
Packard Building  
1441 Sansom Street, 2<sup>nd</sup> Floor  
1:00 pm

**Present:**

Board

Nolan Atkinson, Esq.  
Richard Glazer, Esq., Chair  
Kenya Mann Faulkner, Esq.  
Pastor Damone Jones

Staff

J. Shane Creamer, Jr., Esq.  
Nedda Massar, Esq.  
Evan Meyer, 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 corrected, for the public meeting that was held on March 17, 2010.

**III. Executive Director's Report**

**A. Litigation Update**

**1) McCaffrey v. Creamer, et. al.**

Mr. Creamer reported that on March 26<sup>th</sup>, the Superior Court granted our request to transfer McCaffrey's Appeal to the Commonwealth Court. The transfer was approved over McCaffery's

objection. The Court's Order explains that the legislature vested exclusive jurisdiction in the Commonwealth Court for all tort actions against a local government party. The Board is currently waiting for a schedule order from the Commonwealth Court.

He also reported that on February 24<sup>th</sup>, Dan McCaffrey filed a Notice of Appeal from Judge Glazer's Order dismissing his defamation lawsuit against Mr. Creamer and the Board. The appeal was filed with the Superior Court, but was transferred to the Commonwealth Court.

On January 27<sup>th</sup>, Common Pleas Court Judge Gary Glazer dismissed the defamation Complaint that was filed by former 2009 primary election District Attorney candidate Daniel McCaffery against the Board and Mr. Creamer. McCaffery sued the Board and Mr. Creamer on December 1, 2009, after his Campaign admitted violations of the City's campaign finance law and agreed to enter into a settlement agreement in October with the Board.

Mr. Creamer stated that Judge Glazer said that the Board and he are covered by "quasi-judicial" immunity when we are acting in our official capacity. The Judge explained that "[t]he public has a right to Board members who can honestly and independently examine and enforce campaign finance rules . . . without fear of harassment or retaliation." Judge Glazer also noted that "[t]he distraction and expense associated with obviously retaliatory lawsuits undermines public confidence in the electoral process and compels the result in this case," and that "precious governmental resources should not be expended on defending frivolous lawsuits."

Mr. Creamer said that the Board continues to be represented by the City Solicitor's Office, and Cheryl Krause, at Dechert, who is representing the Board on a *pro bono* basis.

## **2) Cozen O'Connor v. Philadelphia Board of Ethics**

Mr. Creamer reported that on March 29<sup>th</sup>, Cozen O'Connor filed a Reply Brief to the Brief filed by our outside, pro bono attorneys at Drinker Biddle on March 9<sup>th</sup>. The case has been fully briefed. The Board is waiting for the Supreme Court to schedule argument.

Mr. Creamer explained that previously, on December 29, 2009, the Pennsylvania Supreme Court granted the Petition for Allowance of Appeal, filed by Cozen O'Connor in its lawsuit against the Board. The Cozen suit challenges Board Opinion 2007-003 which advised that the contribution limits of Section 20-1002 of the Code apply to contributions received after an election for the purpose of retiring campaign debt.

He also explained that the Court limited the appeal to whether Cozen had standing to obtain a declaratory judgment "in its complaint that it intended to forgive the outstanding debt of the Friends of Bob Brady Campaign Committee at one time and *in toto*, thereby exposing itself to potential civil penalties and other sanctions . . ." under the Campaign Finance Law.

Mr. Creamer said that just over a year ago, on March 12, 2009, a three-judge panel of the Commonwealth Court of Pennsylvania issued an Opinion by Judge Dan Pellegrini that affirmed the trial court's ruling dismissing the Cozen Complaint against the Ethics Board and concluding that Cozen lacked standing to challenge the Board's Advisory Opinion issued to Cozen's former client, the Friends of Bob Brady.

### **C. Legislative Update**

Mr. Creamer said that as he reported last month, on March 4<sup>th</sup>, a package of 8 bills and two resolutions was introduced in City Council. The measures would amend sections of the Ethics Code, campaign finance law and the Charter section on political activities. They would also create a new lobbying registration and reporting law to be administered by the Board.

Mr. Creamer reported that on March 26<sup>th</sup>, Richard Glazer sent a letter to all members of Council expressing the Board's two concerns with Bill 100121 and Resolution 100139. The Board unanimously approved sending such a letter at the March 17<sup>th</sup> Meeting. The first concern was over the fast-track treatment the measures were receiving. The second concern was the misleading ballot question in Bill 100121. The Board requested that there be an additional public hearing to discuss the implications of such a change and to provide the Board with an opportunity to comment on the measures. To date, the Board has not received a response to their March 26<sup>th</sup> letter.

Mr. Creamer said that staff learned on Monday that Council listed Bill 100121 and Resolution 100139 on its calendar for tomorrow. The Bill and Resolution are among the bills listed for "second reading and final passage." It is our understanding that bills on this list can be called-up by any member of Council for final vote at any time.

Meanwhile, on April 6<sup>th</sup>, Council scheduled a hearing on April 29<sup>th</sup> before the Committee of the Whole for the six other bills that were introduced on March 4<sup>th</sup> (three campaign finance bills, the fixed penalty schedule bill, the lobbying bill and the political activity companion bill). Six older bills introduced by Councilman Rizzo (three ethics bills, one lobbying bill and two campaign finance bills) were also scheduled for the hearing, however, on April 15<sup>th</sup>, a revised hearing notice was issued that removed the six Rizzo bills from the list of bills that will be heard by the Committee of the Whole on April 28<sup>th</sup>.

Mr. Creamer said that the Board will discuss the six bills that are scheduled for a hearing on the 28<sup>th</sup> in more detail later in the meeting.

### **D. Budget**

Mr. Creamer reported that Richard Glazer testified at our March 22<sup>nd</sup> budget hearing. He noted our accomplishments during the past year, including our ethics and campaign finance training efforts, the advice the Board has given to City officials and employees, our progress toward offering online ethics training, and our significant new regulations. He also explained that the Board understands the difficult budget situation, but noted that budget cuts have a disproportionate impact on our small agency.

He also reported that the Board's proposed operating budget for FY11 will continue at \$810,000. This appropriation includes \$681,100 for personnel; \$110,400 for services; and \$18,500 for materials, supplies and equipment. Chair Glazer testified that this amount is almost 20% less than the \$1 million operating budget that was guaranteed by the Charter for the Board's first two fiscal years. The reduction has had its greatest impact on our staffing level. In 2008, the Board had projected that they would reach a staffing level of 11, but have never been able to reach that level due to budget constraints.

Mr. Creamer reported that Chair Glazer explained that if the Board's budget is cut below the \$810,000 funding level, it would have a drastic impact on the Board's ability to meet even its core statutory responsibilities.

Mr. Creamer said that the Board's testimony acknowledged the crucial role played by the Dechert and Drinker Biddle firms in providing pro bono representation of the Board in litigation during the past year. Chair Glazer concluded his testimony by expressing the Board's continued commitment to its work administering and promoting the City's public integrity laws and our belief that our efforts in just a few short years have enhanced public confidence in the integrity of City government.

## **E. Financial Disclosure**

Mr. Creamer reported that staff is immersed in tasks relating to the May 3<sup>rd</sup> financial disclosure filing deadline. The filing deadline, which is usually May 1<sup>st</sup>, is May 3<sup>rd</sup> this year because May 1<sup>st</sup> is on Saturday. Thousands of 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. The three forms 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).

Mr. Creamer explained that in order to prepare for the May 3<sup>rd</sup> deadline, during the past month staff finished reviewing and updating online materials to help filers and expanded the Frequently Asked Questions that appear on the Board's website. Staff worked closely with the HR Department to review the list of civil service titles to develop a list of City employees who are potential State Form filers.

He also reported that staff conducted three meetings for departmental Human Resources managers to review the financial disclosure process and the managers' role in assisting employees in their departments to comply. Because they have specialized knowledge of the civil service exempt employees in their departments, staff also asked the HR managers to review civil service exempt titles to determine which of these employees should file the State Form. City board and commission members are also subject to the financial disclosure requirements, and staff contacted dozens of City officials to obtain updated lists of the members of 46 City boards and commissions.

Mr. Creamer explained that using all of this information, beginning in early April, staff issued thousands of email reminders to City officials, and board and commission members to alert them to their filing obligation and to provide information on how to file. Almost 600 letters were sent to former City employees who must file financial disclosure reports in the year following their separation from the City. As a result of the reminder emails and letters, staff has been receiving a heavy and steady stream of phone calls from employees and board and commission members who need help with filing. Our staff members Tina Formica and Hortencia Vasquez respond to almost all of the calls and patiently help filers with problems when they use the online financial disclosure system and general questions. The Board couldn't manage this project without Tina and Hortencia.

Mr. Creamer noted that the Records Department, which accepts and processes the thousands of financial disclosure forms, is also a crucial part of the financial disclosure process. Records

Commissioner Joan Decker and her staff provide constant support and assistance. They also respond to phone calls and emails from filers. We again wish to remind all filers, including our Board members 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 3<sup>rd</sup> to be timely filed.

Chair Glazer asked the Board members to provide him with a copy of their Financial Disclosure Statements.

## **F. Annual Report**

Mr. Creamer reported that staff continues to work on a draft of the Annual Report which they hope to present to the Board for review in May.

## **G. Personnel**

Mr. Creamer announced that Danielle Cheatam, our Information Specialist, resigned in early April to move back home to Missouri. Danielle was an enthusiastic member of our staff who was an important part of our ethics training program. She was also a key member of our online training team with excellent computer design skills. Danielle and her talents are already missed. Staff expects to begin the search process for her replacement in the next two months.

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

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

2. Advices of Counsel. Mr. Meyer reported that there were two Advices of Counsel since the March report.

a. Nonpublic Advice of Counsel GC-2009-501, originally issued January 28, 2009, was amended March 2, 2010. The amended Advice announced a change in the law concerning the State Ethics Act's conflict of interest provision. Both the City Code and State Act conflict provisions prohibit taking official action in either of two ways: (1) where the City employee/official has a personal financial interest; or (2) where the City employee/official works for a business that has a financial interest. The City Code excludes nonprofit entities from "business," so a City employee (as the requestor in this case) who is also an uncompensated member of the board of directors of a nonprofit would not have a conflict in a City matter affecting that nonprofit.

Until recently, the rule was the same for the State Act. However, on November 30, 2009 the Pennsylvania Supreme Court held that a nonprofit does fit the Act's definition of a "business." Accordingly, the two conflict of interest rules are no longer identical in how they apply to a member of a nonprofit organization. Therefore, the amended Advice stated that it is likely that the State Ethics Commission would interpret the State Ethics Act to require the requestor to abstain fully from any participation in any City official action that would have a

financial impact on the nonprofit, and publicly disclose the financial interest, so long as the requestor is on its board of directors.

The amended public version of Nonpublic Advice of Counsel No. GC-2009-501 should be available on the Board's website soon.

b. Nonpublic Advice of Counsel GC-2010-504 (April 5, 2010). This was standard post-employment advice to a City employee leaving City employment. The one wrinkle was that the employee is an attorney, going to work for a law firm. Attorneys are not covered by post-employment laws, under a decision of the Pennsylvania Supreme Court, as explained in a previous advisory, Nonpublic Advice of Counsel GC-2009-502 (April 16, 2009).

3. Informal e-mail guidance. Mr. Meyer reported that through Friday, April 16, 2010, there were six of these since the March report (not included are resolution of several standard financial disclosure questions).

a. Received an inquiry from a City department about an outside for profit firm that wanted to use the department's conference during lunch hour to do a presentation. Advised that this was not an ethics matter, but that the department may wish to check with the Managing Director's Office as to any City policy on solicitation in City offices.

b. Received an inquiry from a City officer as to whether a certain City board qualifies as "an advisory board" or "as a board that exercises the power of the [City]." Advised that this depends on the reason for the question. Boards that are merely advisory are not subject to the political activity restrictions of Charter Section 10-107 and need not file the State Financial Disclosure Form, but their members are "City officers" for other purposes.

c. Received an inquiry from a City employee about serving on an advisory board for a conference, in planning next year's conference. We were advised that such service would involve no free travel or anything provided *gratis*, so there was no issue of a gift or conflict of interest.

d. Advised an HR manager concerning "correcting the list" by setting the flags in the Oracle computer system to indicate which employees should file which financial disclosure forms. Many departments managing the filing by asking employees to provide their forms to the HR manager, who then transmits the forms to Records, but this is not legally required. There is an Executive Order requiring employees in the Administrative and Executive Branch to provide a copy of their forms to their supervisor, but enforcement of this requirement is not in the jurisdiction of the Ethics Board.

e. Received a request from a City official concerning the propriety of using City letterhead to send a letter to federal officials concerning a recommendation of a federal appointment. Advised that this would not appear to be partisan political activity; there was no suggestion of a financial interest that would lead to a conflict of interest; there is no implication of City government favoritism, so no appearance issue, and no issue in general on use of City letterhead, where there is no implication that the letter is official City action.

f. Received a question about a department holding a fund-raiser and selling products donated by a department employee who has interest in the company that provides the products. Advised that there may be a question of a conflict of interest, if the employee has a financial interest in the promotion of the product. Suggested the requestor contact the Law Department concerning the legality of a City department conducting a fund-raiser to raise funds in addition to its budget appropriation.

## **V. Review of Recently Introduced Legislation Concerning Campaign Finance, Political Activity and Lobbying.**

Chair Glazer stated that at the March 15<sup>th</sup> hearing Councilman Green and Councilman Goode questioned the Board's authority to testify at the hearing or make recommendations. Section 3-606(1)(l)(ii) authorizes the Board to make recommendations to the Mayor and to City Council regarding ethics standards, including legislative changes, at any time, therefore the Board is confident of our role in the process.

### Introduction

Mr. Creamer said that as he explained in his report, on April 6<sup>th</sup>, Council scheduled a hearing on April 28<sup>th</sup> for six of the recently introduced Bills (three campaign finance bills, the fixed penalty schedule bill, the lobbying bill and the political activity companion bill), and six older bills introduced by Councilman Rizzo (three ethics bills, one lobbying bill and two campaign finance bills). On April 15<sup>th</sup>, a revised hearing notice was issued that removed the six Rizzo bills from the list of bills that will be heard by the Committee of the Whole on April 28<sup>th</sup>.

Mr. Creamer said that the six bills scheduled for hearing on April 28<sup>th</sup> and the two measures that already had a "fast track" hearing on March 15<sup>th</sup> raise process, policy and implementation issues that will be explained in the following paragraphs.

### Process

Mr. Creamer stated that the requirements for enacting legislation by Council are set forth in section 2-201 of the Charter. The purpose of the ordinance process is explained in the Annotation:

"One of the main purposes sought to be accomplished is to prevent the hasty consideration and enactment of ordinances before citizens and the members of Council themselves have had an opportunity to be heard on the subject matter and to consider the wisdom of the proposed legislation."

He said that as explained below, the Board believes that the process that Council is employing to make significant and complicated changes to the City's campaign finance, ethics and political activity laws, and the proposed new lobbying law – while technically sufficient - defeats the purpose of the legislative process, which is to prevent the hasty consideration and enactment of ordinances.

## 1) The March 15<sup>th</sup> Hearing on Bill 100121 & Resolution 100139

Mr. Creamer reported that Council only provided six business days' notice for the March 15<sup>th</sup> hearing on Bill 100121 and Resolution 100139. Again, Bill 100121 contains the ballot question for the amendment to section 10-107 of the Charter and resolution 100139 contains the related Charter amendment (enabling Council to “supersede” the provisions of 10-107(3), (4) & (5), and 10-109 by ordinance).

Mr. Creamer explained that during those six business days between the notice and the hearing, two new Ethics Board members were confirmed, but would not be sworn-in until two days after March 15<sup>th</sup>. Also, the Chair of the Board was out of the country that week. As a result, the Board was unable to discuss its position on the legislation before the hearing. At the hearing, the Board explained this and asked for more time to provide comments. Both Councilman Green and Councilman Goode questioned whether the Board had the authority to provide comments at all.

Mr. Creamer said that notwithstanding the Board's request, the measures were voted out of Committee with favorable recommendations. Three days later, Council approved a motion to suspend the rules, which means that the legislation will be placed on the second reading and final passage calendar and could be passed without further public comment whenever Council decides to consider it again.

Mr. Creamer also explained that eight days after Council approved the motion to suspend the rules, on March 26<sup>th</sup>, the Board sent a letter to all members of Council that raised two concerns with Bill 100121 and Resolution 100139. The first concern is over the fast-track treatment that the legislation was receiving. The Board requested an additional public hearing be scheduled, to provide more opportunity for informed public comment from the Ethics Board and others.

Mr. Creamer said that the Board's second concern was over the language of the proposed ballot question. The question asks voters to “authorize the creation” of standards of conduct regarding political activities and to provide for penalties, which incorrectly suggests that such standards and penalties do not yet exist in Philadelphia. The Board noted that an additional public hearing on the proposed legislation would also provide an opportunity for public discussion of alternative language for the proposed ballot question.

He also said that to date, no one from Council has responded to the Board's March 26<sup>th</sup> letter. Instead, on April 6<sup>th</sup>, Council scheduled the April 28<sup>th</sup> hearing for the remaining bills that were introduced on March 4<sup>th</sup>, including companion Bill 100128, which contains the proposed Code provision that would supersede sections 10-107(3) & (4) of the Charter.

## 2) The April 28<sup>th</sup> Hearing

Mr. Creamer reported that the hearing scheduled for the six bills April 28<sup>th</sup> at 11:30 am will be exceptionally broad on a number of significant public policies: campaign finance, political activities, lobbying and ethics. Any one of these topics could easily consume an entire hearing under normal circumstances. Beyond that, we have been advised that Council intends to both amend *all* six bills from the floor *and* to pass them on April 28<sup>th</sup>. This morning, Council staff forwarded amendments to five of the six bills (all but the lobbying bill) to Michael and Maya, who provided some technical feedback to Council staff on Friday. Mr. Creamer stated he had

not had an opportunity to see or discuss them yet, however Michael and Maya might be able to provide some highlights on the amendments when they present some of the details. Under the circumstances, it may be impossible for anyone to provide meaningful testimony, or for Council to seriously consider any testimony presented on April 28<sup>th</sup>.

## **Policy**

Mr. Creamer said that Council is moving forward rapidly on legislation that would make extensive changes to the campaign finance law, Charter restrictions on political activities and even the Ethics Code (new penalty schedule). At the same time, Council is moving forward on a new lobbying law that has received almost no public discussion.

### **1) Campaign Finance Law**

#### **a. The Three Bills**

Mr. Creamer reported that the three proposed amendments to the campaign finance law would do three things:

- Effectively increase the contribution limits by creating two new ways to give money to all candidates
- Create a broad exception to the single committee rule that may give ward leaders a significant advantage over others
- Make a simple, efficient law much more complicated to comply with and administer

He said that a fourth bill that would amend the penalty provision in the Ethics Code would dramatically lower penalties for almost all campaign finance violations (Bill 100125).

Mr. Creamer stated that Bill 100122 amends the campaign finance law by creating inauguration committees, transition committees and a new provision called “post-candidacy contributions,” each of which is allowed a separate full contribution up to the limit (\$2,600 for individuals and \$10,600 for PACs). It also adds a requirement to notify the Ethics Board of candidate committees and accounts. It also fixes the issue with the doubling provision created by *Davis v. FEC*.

Mr. Cooke reported on some additional issues:

- Because elected candidates can raise outside the limits after an election and because they can transfer unlimited amounts from a candidate committee to transition and inauguration committees, elected candidates can still raise and spend unlimited amounts of money on transition and inauguration expenses
- Prohibiting a candidate committee from making expenditures for transition and inauguration activities may be in conflict with state law
- The bill does not provide for disclosure of contributions and expenditures by transition and inauguration committees

The Board agreed that the staff concerns should be addressed.

**Bill 100124** amends the campaign finance law by permitting candidates to have a separate litigation fund for civil, criminal and administrative proceedings. The funds are subject to the contribution limits and the single committee rule, and they cannot be used to pay fines. When formed, candidates must notify the Ethics Board.

- If a candidate establishes such a fund, this would create a third way to contribute to a candidate in the same calendar year.
- Contributions to a litigation fund may be subject to the doubling provision, although this may not have been intended.

Ms. Nayak reported on some additional issues:

- No trigger event is required. Anyone who is a candidate can set up a litigation fund. It would be preferable if a litigation fund could only be formed if the candidate faces an actual legal challenge, especially since candidate committee funds can cover these costs too. The Task Force based its recommendations for a litigation fund on the San Diego law which requires a triggering event.
- Doubling appears to apply. The Bill requires reporting only to be to the Board, whereas state law requires a political committee to report to the City Commissioners or Secretary of State depending on the content
- The bill doesn't require "litigation fund" be in the name of the litigation fund committee.

Ms. Nayak also reported on some amendments that were made to original bill:

- candidate can now contribute unlimited amounts from personal resources or his/her candidate committee

The Board agreed that there was a lack of trigger.

### **Damone Jones arrived to the meeting.**

**Bill 100126** amends the definition of "contribution" to exclude expenditures related to the printing and distribution of sample ballots containing the names of more than one candidate. It also amends the single committee rule by expressly stating that it is not a violation of that rule to have another political committee pay for sample ballot printing and distribution, as long as the ballots list more than one candidate.

Election-day ballot distribution (aka "GOTV") expenditures are arguably the largest category of expenditures by all candidates, with the possible exception of mayoral candidates. This exception would allow unlimited expenditures by "second" committees to promote the election of City candidates, so long as they are related in some way to the printing and distribution of sample ballots with more than one candidate's name. As drafted, the candidates could even control those expenditures directly, or simply know that it's being done, which would otherwise be an in-kind contribution subject to the limits and reporting.

It appears that Council intended to limit the exception to expenditures by ward committees to print and distribute sample ballots (*see Ethics Board v. Hon. Vivian Miller*). It is likely that this exception will be amended under the circumstances.

Mr. Cooke reported on some additional issues:

- Creating a new exception to contribution limits through a change to the definition of contribution rather than in §20-1002 is potentially confusing to candidates and others who are required to disclose contributions in campaign finance reports filed with state
- Language amending §20-1003 does not accurately describe an exception that is limited just to use by candidate/ward leaders of ward committees to make expenditures for sample ballot printing and distribution

Mr. Atkinson stated that he is struggling with taking a public position. He is concerned with taking a position on an issue that the Board is not clear on.

The Board did not come to a consensus on this bill.

## 2) Ethics Code

### a. The Amendment to the General Penalty Provision

**Bill 100125** amends section 20-612 of the Ethics Code (penalties) by establishing a fixed schedule of penalties for ethics, campaign finance and political activity violations. It also eliminates the repeat offender and “forfeiture” provisions. Penalties are reduced from the current \$2,000 amount for most violations (as low as \$300 for some of the most common campaign finance violations). Other requirements of the campaign finance law and Ethics Code are not originally listed on the schedule, such as material misstatements or omissions in campaign finance reports, however, this appears to be an oversight.

The sharp reduction in penalties restricts Board discretion because there is less room for compromise and reduces the deterrent effect that the higher amount in the existing general penalty provision serves. All violations are currently subject to a \$2,000 civil penalty. An examination of the Ethics Board’s enforcement record over the past three years demonstrates that the fixed penalty schedule with significant reductions for most violations is unwarranted.

Ms. Nayak reported on some remaining issues:

- This is a fixed list of penalties that leaves less room for the Board to negotiate or exercise discretion. The Task Force had recommended a sliding scale of penalties, with discretion to enforcement officials to choose from a range of penalties
- This is a huge reduction in penalties.
- Many of the fines are so low (\$300) in the campaign finance context that they may well be treated as the cost of doing business.
- There are varying levels of egregiousness of a single committee rule violation, but under this schedule they would all be treated the same (\$300)

Ms. Nayak also reported on some amendments that were made to the original bill:

- In the original bill, several violations were omitted, but the bill now addresses them. For example, the bill now addresses mandatory ethics training, litigation fund, and inaugural/transition committee requirements. The bill still does not address material misstatements and omissions in campaign finance reports, but this would be covered by the catch-all provision.
- Included a catch-all provision that any violation not specified is a \$300 fine.

- Went from an unlimited safe harbor period to a 45 day safe harbor for accepting excess contributions. We are concerned this is too long and may give a candidate the benefit of an excess contribution

### 3) Political Activities

**Bill 100121** contains the ballot question for the Charter amendment to section 10-107 on political activities. The question asks voters to “authorize the creation” of standards of conduct regarding political activities and to provide for penalties, which incorrectly suggests that such standards and penalties do not yet exist in Philadelphia. The proposed ballot question does not give voters clear notice of what they are being asked to approve.

**Resolution 100139** is related to Bill 100121 and contains the actual amendment to section 10-107 of the Charter:

“(7) Notwithstanding anything to the contrary in subsections (3), (4) and (5) of this Section 10-107 or in 10-109, Council may, from time to time, ordain standards of conduct with respect to the political activities of City officers and employees, and provide penalties for violations. Any such legislation enacted by Council shall supersede any contrary provisions of subsections (3), (4) and (5), and of 10-109.”

10-107(3) prohibits employees from engaging in political fundraising (Council staff are *not* exempt from this under the 1952 Solicitor Opinion that exempts them from subsection (4)). Subsection (4) contains the restrictions on political activity, such as being a member of a political party and taking part in the affairs of a political campaign (partisan political activity). Subsection (5) contains the resign-to-run provision, while 10-109 lists the penalties for violations, including immediate dismissal.

- Although there are 16 Charter provisions that permit Council to supplement Charter provisions by ordinance, we are not aware of a similar provision where Council is permitted to “supersede” Charter provisions by ordinance.

**Bill 100128** is the “companion bill” to Resolution 100139 that would amend Code Chapter 20-600 to address the political activity restrictions and supersedes any contrary provisions in the Charter. We were told at the hearing on March 15<sup>th</sup> that Council will replace this bill with another that is based on the current Federal Hatch Act, with classes of “more” and “less” restricted employees. Michael and Maya received substantial amendments to Bill 100128 this morning. We understand that Council will amend Bill 100128 from the floor on April 28<sup>th</sup>. It is unclear whether they will circulate the amendments before the hearing.

For more than 60 years, the US Supreme Court, Federal Courts around the country and Pennsylvania State Courts have consistently upheld restrictions on partisan political activity because the government has a compelling interest in protecting the integrity, efficiency and impartiality of the administration of public service. The courts have consistently held that this compelling government interest can be protected through partisan political activity restrictions without violating the First Amendment rights of public employees.

We must distinguish restrictions on *partisan political activity* from those on *political expression*. Charter §10-107(4) permits the private expression of political opinion, but the Civil Service Commission narrowly interpreted this provision decades ago in Civil Service Regulation 29. The Ethics Board has the authority to reinterpret §10-107(4) by regulation, which would supersede the interpretation in Civil Service Regulation 29.

#### 4) Lobbying

Mr. Creamer said that everyone agrees that Philadelphia should regulate lobbying activities with registering and reporting requirements. Bill 100127 would accomplish this. However, there are many implementation problems with this bill.

Ms. Massar reported that unlike the other legislation discussed today, the proposed lobbying legislation – Bill #100127 – creates a completely new law requiring registration and reporting by lobbyists and principals in Philadelphia.

She said that the Mayor’s Advisory Task Force on Ethics and Campaign Finance Reform identified the absence of lobbying regulation as a “significant gap” and called for Board of Ethics oversight of registration and reporting.

Ms. Massar also reported that Bill No. 100127 tracks almost verbatim the State Lobbying Disclosure Act.

She also said that there are three Major Up-Front Issues:

**COST:** Ms. Massar reported that the Bill has no appropriation to fund the multiple additional responsibilities of lobbying registration and reporting. Section 20-1208 of the Bill allows the Board to impose a \$100 biennial (20-1202(1)) registration fee, but all fees so imposed are payable to the City of Philadelphia and go into the General Fund, not to the Board.

She explained that unlike the State lobbying law, Bill 100127 contains no equivalent to the State Lobbying Disclosure Fund. Even if the Board were permitted to keep the registration fees, it is doubtful that the total of those fees would cover the cost of implementation of the additional responsibilities assigned to the Board AND STAFF necessary for the tasks, including:

- a) Providing **advice and opinions** to any of a variety of requestor regarding the new Code Chapter (§20-1206(1));
- b) **Designing, producing and providing forms** (§20-1206(2));
- c) Providing for public inspection and copying (§20-1206(3));
- d) **Preparing and publishing various reports** - an annual report and several lists of registrants (§20-1206(4));
- e) **Conducting investigations and holding hearings** to prosecute violations (§20-1207);
- f) Conducting **audits** every two years by a professional auditor (§20-1206(6)); and
- g) Maintain all registrations and reports available in a **searchable database** (§20-1206(3)).

She also explained that the Bill appears to contemplate the design and implementation of an **electronic filing system** for lobbying registration and reporting. Based on other lobbying

programs, the software cost would be at least \$300,000, and information from the Pennsylvania Department of State indicates that their lobbying electronic reporting system cost approximately \$1 million.

**EFFECTIVE DATE:** Ms. Massar reported that the Bill calls for registration to begin **July 1, 2010**. This allows less than two months to prepare for lobbying registration and filing. That is insufficient time to design forms, design and test computer software, hire additional staff, and MOST IMPORTANTLY identify and provide training to possible filers. The earliest possible effective date would be January 1, 2011 to start registration, with the first lobbying expense reports due by April 30, 2011, at the end of the first quarter. Even those dates may be overly optimistic.

Ms. Massar stated that there is an **ADDITIONAL MAJOR ISSUE**: Whether or not attorneys can be regulated by a City lobbying law. Attorneys do a lot of lobbying. The Pennsylvania Rules of Professional Conduct permit lawyers to comply with the State Lobbying Act without violating attorney-client privilege IF the law was enacted by the General Assembly. As this would be a law enacted by the City, there is a threshold question as to whether a City lobbying law can be applied to require registration and reporting by Pennsylvania attorneys.

Ms. Massar said that the Bill currently includes “an attorney at law while engaged in lobbying” in the definition of “Lobbyist” in Section 20-1201(20). [Defines “attorney at law” as an attorney admitted to practice in Pennsylvania (20-1201(4))]

Ms. Massar reported that there are other significant issues that can be addressed with changes to the bill:

**Omission of major areas of lobbying relevant to the City:** Bill 100127 does not cover several areas of lobbying that we believe should be included - grants, loans, and zoning as “administrative action” and subject to lobbying. Also does not include procurement of services for “construction.” as in the State Act.

**Enforcement Process:** Section 20-1207 creates a completely separate and distinct enforcement process from the one that already exists for ethics and campaign finance violations. Imposes a separate hearing process and appears to mandate certain enforcement actions. Preferable to grant authority to the Board to enforce the lobbying registration and reporting requirements consistent with its existing enforcement authority.

**Electronic Registration and Filing:** The Bill does not mandate electronic filing. It would be preferable to mandate electronic registration and expense report filing. This is consistent with the electronic filing requirement that already exists in the City’s Campaign Finance Law. As the bill is currently drafted, the Board would have to maintain both paper and electronic filing processes. This will increase staffing costs, and, if paper reports were permitted, we would need additional staff to perform data entry to maintain the searchable database mandated by Section 20-1206(3). [Section 20-1209 (Regulations) of Bill 100127 is unclear because it says the “regulations shall accommodate” electronic registration and reporting for lobbying.]

**Reports and Filer Lists:** Bill 100127 requires that the Board publish an Annual Report on lobbying activities (Section 20-1206(4)(a)) and “annually publish” lists of principals, firms, and

lobbyists (Section 20-1206(4)(b)). It would be more practical, and reduce costs, to include annual reporting on lobbying activity in the Board's Annual Report, that is already mandated by Code Section 20-606(1)(1). We also suggest that electronic versions of each of the lists and the directory on the Board's website would be preferable and less costly. It would always be possible to accommodate a request from a citizen without internet access for a printed copy of any report, list, or directory.

**Audit Requirement:** The bill contains a very expensive mandatory audit requirement (Section 20-1206(6)) that is taken directly from the State law. We estimate that a minimum cost could be \$100,000 for such audits. It would be less costly to require that the Board conduct random reviews of registrations and expense reports and refer any that exceed a certain incidence of errors for further investigation and enforcement.

Preparation of the RFP for accounting services alone is extremely time consuming. The only function in the State law audits that could not be performed by a Board staff member is the rendering of the auditor's "opinion" that the report or statement being audited is "materially correct."

### **Bills 100121, 100139, 100128**

Mr. Meyer said that these bills are different from all other since it will change the Home Rule Charter. It was enacted by the people by ballot question. The restrictions on political activity were designed to remove them from the political process. This legislation removes them from voters and could be changed by City Council. He believes that voters are being asked to write a blank check. It will be more difficult to enhance public confidence in the city government.

Mr. Glazer stated the Board testified at the City Council hearing that was held on March 15<sup>th</sup>. The Board also sent a letter to Council and was not favored with a response. They believe that there are areas in public expression that should be addressed.

Mr. Creamer said he believes that 10-107(4) is overbroad, however, people can private express their political opinion through voting. This Board has never expressed its opinion on Regulation 29, which interprets Political Activity. He agrees that these pose a constitutionality issue but other restrictions on partisan activity are constitutional. The Board plans to deal with political expression by a future Regulation. This also affects 10-107(3) on fundraising. With this change Council could also amend 10-107(5), which is the resign to run provision.

Mr. Creamer explained that voters reject a ballot question on eliminating resign to run a few years ago, therefore this would allow Council to bypass the five year restriction on readdressing this issue.

Mr. Glazer said that this is a difficult topic which deserves careful reflection. He proposed that the Board continue with their position stated in the letter to Council. The Board agreed.

## **VI. Report on the Status of the Draft Regulation No. 8, Campaign Finance**

Mr. Cooke explained that at the last Board meeting staff presented a Draft of Regulation No. 8. Since the last meeting staff received input from the Law Department and met with several members of Council and Council's staff at length. Staff is working on a revised draft hopefully for the next meeting.

## **VII. New Business**

Chair Glazer noted that the Board needs to vote on a Vice Chair, but since the full Board is not present he would like to defer the vote until the next meeting.

## **VIII. Questions/Comments**

Councilman Green stated that Council is not going to rush the bills through to get them on the May ballot. They will be on the November ballot. The Board should not feel they can not have a dialogue regarding the bills. Council wants the Board's input. He agreed with Mr. Atkinson about the difficulty of commenting on things that are not final. The bills are never final until they are passed in Council. He offered to continue to meet with the Board and staff. Council has received valuable comments from the Board.

He said until the Bills pass feel free to continue the dialogue.

Sophie Bryan thanked Michael and Maya for their help with the legislation.

Sophie addressed the Board's concerns with the legislation:

### 100122 – Inaugural & Transition Committees

- Unintended loop hole
  - Council can amend to address
- Doubling provision
  - not intended for three Committees
- Filing
  - Board of Ethics can determine by creating a Regulation

### 100124 – Litigation Fund

- Trigger
  - Council can address but may be too late for underfunded candidate

### 100125 – Penalty Bill

- Philosophical agreement
- Not accurate to say bill reduces penalty via per diem
- Tried to deal with severity

Derek Green said that he has concerns over how some actions have gone forward. He would like the Board to reach out to others on Regulations before the final draft.

Chair Glazer responded that the Charter makes it that the Board's Regulation process is a public process.

#### 100126 – Sample Ballot Bill

- Concern that once a candidate pays for their name to be on a sample ballot that they are not also charged with the distribution costs.

#### 100127 – Lobbying

- Effective date
  - Room for negotiation
- Attorney issue
  - Add language
- Concern with definitions
- Funding
  - Possibly apply for a grant application

#### 100121, 100139, 100128 – Political Activity

- Philosophical disagreement
- Council sees constitutionality issue
- Needs to be balance on compelling interest and political activity
- Guided by federal level
- Apply to DC employees at a less restrictive level

Councilman Green asked the Board to create a list of employees who should be more restrictive and less restrictive categories. He said that there is a strong likelihood that the bill will pass.

Ellen Kaplan asked if the Board has the authority to comment on the application of the Federal Hatch Act to the City. She also asked if the Board would consider promulgating Regulations to address the political expression issue.

Mr. Creamer responded that Council passes the laws. The Board has the ability to interpret them, but can't change the law.

The public session of the Board's meeting was adjourned after public questions and comments, so that the Board could meet in executive session to discuss enforcement matters and non-public opinions.