

Philadelphia Board of Ethics
Meeting Minutes
February 17, 2010
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

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

Guest

Martha Johnston, Esq., Law Department

I. Public Hearing on Regulation No. 2

A public hearing concerning proposed amendments to Regulation No. 2, Investigations and Enforcement Proceedings, was conducted before the Board meeting. A court reporter was present to record the hearing.

II. Call to Order

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

III. Approval of Minutes

The Board approved the meeting minutes, as corrected, for the public meeting that was held on January 20, 2009.

IV. Executive Director's Report

A. Enforcement Update

1) Board of Ethics v. Hon. Vivian Miller

Mr. Creamer announced that on January 19, 2010, the Ethics Board filed a Petition in the Court of Common Pleas to enforce alleged violations of the City's campaign finance law committed by Clerk of Quarter Sessions, Vivian Miller.

Mr. Creamer explained that the Petition alleges that Ms. Miller violated the City's "single committee rule" when she used a second political committee in addition to her designated candidate committee to make expenditures to influence her re-election to office in 2007. The City's campaign finance law requires candidates for local office to use only one political committee to receive contributions and make expenditures while running for office. By using two political committees to make expenditures to influence her re-election in both the primary and general elections in 2007, Ms. Miller violated the City's single committee rule, according to the Petition.

He also explained that, as described in the Petition, Ms. Miller used both her designated candidate committee, the Committee to Re-Elect Vivian Miller, and the 51st Democratic Ward Committee (a political action committee registered and operating under state law) to make expenditures to influence her re-election. The Petition also notes that Ms. Miller used the second political committee to influence her re-election less than two months after Board staff explained the single committee rule to her in a letter.

Mr. Creamer further explained that the Petition alleges that Ms. Miller distributed cash from the second political committee to pay election workers to "get out the vote" for her re-election. The Petition describes how she used the second political committee to make more than 30% of expenditures to influence her 2007 primary election and almost all of her expenditures to influence her re-election in the general election that year. In so doing, the Petition alleges that she violated the single committee rule in both the primary and general elections in 2007.

Mr. Creamer stated that, as detailed in the Petition, the Board first presented the alleged violations to Ms. Miller on April 22, 2009. Over the next several months, the Board engaged in extensive settlement negotiations with Ms. Miller through her attorney. However, the parties were unable to reach a settlement agreement.

He also stated that when candidates for City office use multiple political committees to influence their election, they violate the single committee rule. In addition to violating the law, candidates' use of multiple political committees to influence their election makes it more difficult for the public and the Ethics Board to track the flow of money used by the candidates to influence their election and gives candidates an unfair advantage over those who "play by the rules."

Mr. Creamer said that the Board's Petition seeks \$3,000 in civil penalties from Ms. Miller for two violations of the single committee rule in 2007.

Mr. Creamer reported that Ms. Miller filed an Answer with New Matter to the Board's Petition on February 2, 2010. In her New Matter, Ms. Miller argues that the single committee rule in §20-1003 is preempted by the State Election Code and restricts her right of speech in violation of the 1st Amendment of the US Constitution.

He also reported that Ms. Miller is represented by Sam Stretton, Esq. The case has been assigned to President Judge Pamela Pryor Dembe.

Mr. Creamer stated that charges brought by the Board are merely allegations and no violation has been established unless and until the Board satisfies its burden of proof in a judicial or administrative enforcement proceeding, pursuant to Board Regulation No. 2, Subpart C and D.

B. Litigation Update

1) McCaffery v. Creamer, et. al.

Mr. Creamer reported that on January 27th, 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 him. Mr. Creamer also explained that McCaffery sued the Board and him 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.

He also reported that Judge Glazer said that the Board and he are covered by "quasi-judicial" immunity when we are acting in our official capacity. He 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 and the Board thanked Gerald E. Wallerstein, in the City Solicitor's Office, and Cheryl Krause, at Dechert, for their vigorous representation in this matter.

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

Mr. Creamer reported that on February 8, 2010, Cozen O'Connor filed its Brief in support of its appeal from the Commonwealth Court ruling that affirmed the trial court's dismissal of Cozen's suit against the Board.

He also reported that on December 29, 2009, the Pennsylvania Supreme Court granted the Petition for Allowance of Appeal, in part, 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.

Mr. Creamer 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 further reported that 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.

Mr. Creamer stated that the Board wishes to express its great appreciation to Gregg Mackuse at Drinker, Biddle who has continued to provide *pro bono* representation to the Board throughout this matter.

C. New Board Nominees

Mr. Creamer reported that on January 28th, Mayor Nutter nominated two individuals to fill vacancies on the Board created by the resignation of Board members Phoebe Haddon and Rich Negrin. Sister Mary Scullion, an advocate for the homeless and co-founder of Project H.O.M.E. in Philadelphia, has been nominated to fill the vacancy left by Mr. Negrin. Nolan Atkinson, a member of the Trial Practice Group at Duane Morris, LLP, and the firm’s first Chief Diversity Officer, has been nominated to fill the position vacated by Professor Haddon. Mr. Atkinson was a member of the Mayor’s Advisory Task Force on Ethics and Campaign Finance Reform.

Mr. Creamer said that our current Board member, Kenya Mann Faulkner, has been nominated for another term. Ms. Faulkner, who is a former Assistant United States Attorney, is now a partner at Ballard Spahr.

Mr. Creamer explained that the Charter requires that the nominations be confirmed by City Council. We expect all three nominees to appear at a confirmation hearing before Council on March 9th.

Mr. Creamer stated that the Board looks forward to having these talented individuals as members of the Board of Ethics.

D. Financial Disclosure:

Mr. Creamer explained that there are three different financial disclosure forms that must be filed by different groups of City employees and officials: the City Form, the Mayor’s Form, and the State Form. Staff is therefore working closely with the Human Resources Department and the Records Department on the many component tasks to prepare for the financial disclosure filing deadline which is normally May 1st for all three forms. Because the May 1st filing deadline falls on Saturday this year, all reports must be filed by Monday, May 3rd.

Mr. Creamer stated that the major tasks include:

- Developing accurate lists of the individuals, including the members of all City boards and commissions, who must file one or more of the three forms;
- Reviewing all materials, including those on our website, to provide guidance for filers; and
- Planning a series of email reminders to filers to be issued during April

V. General Counsel's Report

1. Formal Opinions. Mr. Meyer reported that there was one Formal Opinion since the January report.

a. Nonpublic Formal Opinion No. 2009-005 (January 22, 2010). We received a request from the representative for the campaign of a candidate for City elective office, which requested nonpublic advice on the following question: “[W]hether and to what extent, a group of volunteers to the campaign . . . can engage in pre-transition planning.” The concern was that, if the volunteers contacted City officers or employees to gain their impressions about the current work of the office being sought and good ideas about improvements going forward, the political activity restrictions of Charter Section 10-107 might be at issue. We advised that the volunteers themselves would not be subject to the Charter provision, nor would the candidate. As to any City officials contacted, so long as the contact was solely for the purpose of this pre-transition planning and not for the purpose of the formation of campaign policies, speeches or positions, and was not made public prior to the election, the Board concluded that there would likely not be an issue that the official was engaging in prohibited campaign activity, although any such official could only rely on an opinion issued directly to themselves.

The issuance of the public version of Formal Opinion No. 2009-005 was delayed due to a number of procedural complications. The public version should be available on the Board's website soon.

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

a. Advice of Counsel No. GC-2010-501 (January 22, 2010). Dr. Arthur Evans, Director of the City's Department of Behavioral Health and Mental Retardation Services, asked whether any ethics issues would arise if he agreed to participate in a foreign exchange program funded by a local foundation, and accept travel expenses to travel to Israel on his own time, to learn about their programs. The Advice analyzed the various gift provisions of the Public Integrity Laws and concluded that even if this exchange could be considered a “gift,” due to the lack of a connection between Dr. Evans' work and the funding organization, such a gift would not be prohibited by any of the provisions.

b. Advice of Counsel No. GC-2010-502 (January 26, 2010). Carl Coin, Executive Director of the Sinking Fund Commission, asked to be advised on procedures that must be taken at a meeting of the Sinking Fund Commission to ensure compliance with the ethics laws, because one of the members is concerned about a possible conflict of interest. The Advice advised that if the Controller were to participate as a member of the Sinking Fund Commission in selecting as an investment manager, or contracting with, Weaver C. Barksdale & Associates, in light of the fact that an employee and officer of Barksdale, Robert O'Donnell, also is a consultant for the Controller's Office, there would be no issue under the Public Integrity Laws.

Both Advices of Counsel are public and should be available on the Board's website soon.

3. Informal e-mail guidance. Mr. Meyer reported that through Monday, February 16, 2010, there were three of these since the January report.

a. Received an inquiry from a City official concerning the possibility of sending an email update to a distribution list of individuals, companies, and organizations that would mention upcoming RFP opportunities. Advised that the facts provided did not indicate any conflict of interest, and any question under City contracting procedures was not under our jurisdiction.

b. Received an inquiry from a City board/commission member as to whether he/she is permitted to run or serve as a party committeeman. Advised that the person could technically run, since the “resign to run” provision does not apply to party offices. But if elected, the person would be prohibited from serving, as that would violate Charter Section 10-107(4).

c. Received an inquiry from a City official asking whether he/she could permissibly attend, free, an educational workshop hosted by a City vendor. Given the sparse facts provided and the extremely short notice, we advised that the better course was to decline the invitation. Analyzed the applicable gift rules in the Public Integrity Laws.

VI. Discussion of Draft Formal Opinion 2010-001

Mr. Meyer thanked Councilman Rizzo for requesting a public opinion because it enables there to be more facts in the opinion which makes it clearer.

Mr. Meyer reported that he received a request from Councilman Rizzo through his chief of staff as to whether the Councilman would become a “candidate” under the Philadelphia Home Rule Charter by the act of others circulating nominating petitions for him for a different publicly-elected position. The Councilman is clearly a City employee and subject to political activity restrictions. In order for him to become a candidate he must make a public announcement. The draft opinion before the Board on the narrow facts states that other people circulating petitions would not make a city official a candidate.

Ms. Mann Faulkner stated that she appreciated the Councilman requested a public opinion. It will be very helpful to other people even if it is a narrow issue.

There was a motion to approve the opinion which passed unanimously with a 3-0 vote.

VII. Discussion of Draft Hearing Report for Proposed Amendments to Regulation No. 2, Investigations and Enforcement Proceedings

Mr. Glazer stated that testimony is generally in favor of our response. A few items addressed by Sophie Bryan were not fully incorporated.

Mr. Meyer summarized the Report of the public hearings regarding proposed amendments to Regulation No. 2, “Investigations and Enforcement Proceedings” that were held on January 20th and continued on February 17th. Section A addresses the Board’s legal authority to bring

enforcement actions. Section B recaps the hearing process. The board will attach a copy of the amended Regulation, file with Records and it will become effective in 10 days. Section C gives the background of the regulation. The Law Department has already approved the proposed amendments. Section D summarizes the hearing process including the testimony from January 20th. The Board will have to adjust draft report based on testimony received on February 17th. Mr. Meyer proposed adding a paragraph to include testimony from Councilwoman Tasco, Councilman Green, Joseph Fernandez and Sophie Bryan.

General Counsel Meyer asked whether the Board agreed with draft report as prepared or are revisions needed.

The Board agreed to add the phrase “by the Executive Director” to paragraph 2.18.

Chair Glazer asked if the Board can vote even though the report is not formally written.

Martha Johnston from the Law Department responded that there has been a summary and an analysis, so the Board can decide on whether to vote.

Mr. Meyer suggested adding language to the motion that would authorize the Executive Director to review additions to the final report.

A motion was made to approve the amendments as prepared in the draft report with the Executive Director to review the final draft. The motion was unanimously approved with a 3-0 vote.

VIII. New Business

Mr. Glazer stated that the Board has previously met in Executive Session before today to discuss the rehiring of our General Counsel, Evan Meyer after he retires as a result of enrolling in the Deferred Retirement Option Plan (DROP). His separation from the City must take place before March 12, 2010.

Charter Section 3-806(g) – states that Board shall appoint by a vote of 3 members, a counsel.

The official action relating to this appointment must be done in an open meeting. Thus, at this time, we will vote on the rehiring of Evan Meyer as General Counsel.

The Board voted unanimously by a 3-0 vote to rehire Evan Meyer as General Counsel.

Mr. Glazer said that the Board is aware that there has been some public debate attendant to the rehiring of employees who have participated in the referenced Deferred Retirement Option Plan (DROP). Most of the controversy has been related to elected officials whom, it is argued, were not the intended beneficiaries of the DROP.

It is not our intent to enter into a debate on the merits of DROP except to point out our research has disclosed that it is not unique to Philadelphia.

A number of states and municipalities have similar type plans presumably believing as the Administration and City Council did in 1999 that there were good and sufficient reasons to have such a program. Some of these other plans allow rehiring of employees who have availed themselves of DROP-like plans.

While we are sensitive to the criticism leveled at City departments that have rehired employees who have entered DROP, on balance we believe that there is greater value in retaining a critical employee, with approximately 23 years of public service spent in the Law Department and since August 2007 with the Board of Ethics, than in not doing so because of the possibility of an adverse reaction.

Evan was absolutely within his rights to enter in DROP in 2006 before he even knew there would be an Ethics Board that he might seek to apply to as General Counsel.

The Section of the Code 22-310 that establishes the Deferred Retirement Option Plan anticipates rehiring.

23-310 5(g) states “A retiree may be rehired by the City.”

We did a national search when we hired Evan in August 2007. Everything he has done since that time has confirmed the wisdom of that choice. His institutional knowledge, expertise and passion for what we do made our decision today an easy one.

Refusing to rehire such an exceptional person for a relatively new and underfunded agency because there is controversy over the efficacy of the program would be wrong, self defeating and not serve the public interest.

IX. Questions/Comments

The public did not have any questions or comments.

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.