

**Philadelphia Board of Ethics**  
**Meeting Minutes**  
March 17, 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  
Sister Mary Scullion

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. Call to Order**

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

**II. Installation of New Board Members**

Mr. Glazer stated that it is his great pleasure and honor to introduce the Honorable Ida K. Chen, who will install our newest board members Sister Mary Scullion and Nolan Atkinson. Judge Chen served as the chair of the Ethics Committee of the 21<sup>st</sup> Century Review Forum at the request of Mayor John Street. Based upon a broad review of ethics in Philadelphia, the Ethics Committee made certain recommendations with the goal of enabling the citizens of Philadelphia to strengthen their faith and confidence in their city government. Among those recommendations was the creation of the independent Ethics Board which has been in existence since November 27, 2006, when Judge Chen graciously installed it at the Constitution Center.

With only three years of existence the Board has not had a chance to create many traditions. Among our most cherished is the honor bestowed upon us by Judge Chen's swearing in of new Board members now for the fifth time.

Judge Chen swore in Sister Mary Scullion and Nolan Atkinson with the following oath:

I, Sister Mary Scullion and Nolan Atkinson, do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and the Philadelphia Home Rule Charter and that I will discharge the duties of member of The Philadelphia Board of Ethics with fidelity.

Mr. Glazer congratulated both newly sworn in board members and asked if they would like to say a few words.

Sister Mary Scullion said that she will try to follow the law with fidelity.

Mr. Glazer explained that Mr. Atkinson will be filling the position of the three year term for Reverend Waller, which expired on November 16, 2009. Reverend Waller resigned in March 2007 and was replaced by Professor Phoebe Haddon. Professor Haddon's term was to finish the three years term, however, she resigned prior to the September 16, 2009 board meeting. Mr. Atkinson's term will expire on November 16, 2014.

He also explained that Sister Mary Scullion was filling the five year term of Rich Negrin, which expires on November 16, 2010.

### **III. Approval of Minutes**

The Board approved the meeting minutes, as corrected, for the public meeting that was held on February 17, 2009.

### **IV. Executive Director's Report**

#### **A. Enforcement Update**

##### **1) Board of Ethics v. Hon. Vivian Miller**

Mr. Creamer reported that on February 16<sup>th</sup>, staff filed a Reply to the preemption and Constitutional arguments Vivian Miller raised in her Answer and New Matter to the Board's Petition. Ms. Miller argues that the single committee rule in §20-1003 is preempted by the State Election Code and that it restricts her right of speech in violation of the First Amendment of the US Constitution.

He also reported that on March 5<sup>th</sup>, the City Law Department filed a Petition to intervene in the case, because Ms. Miller has raised preemption and Constitutional challenges to the single committee rule in the City's campaign finance law.

Mr. Creamer said that the case was recently reassigned from President Judge Dembe to Judge Idee Fox. On Monday, Judge Fox issued an Order, scheduling a prehearing conference on April 13<sup>th</sup> at 2:30 pm and a hearing on the Petition on April 20<sup>th</sup> at 10:00 am.

By way of background, Mr. Creamer explained that the Ethics Board filed a Petition in the Court of Common Pleas on January 10<sup>th</sup> to enforce alleged violations of the City's campaign finance law committed by Clerk of Quarter Sessions, Vivian Miller.

He then 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.

As described in the Petition, Mr. Creamer further explained that Ms. Miller used both her designated candidate committee, the Committee to Re-Elect Vivian Miller, and the 51<sup>st</sup> 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 stated 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.

He also 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.

Mr. Creamer noted 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 reported 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 said that Ms. Miller is represented by Sam Stretton, Esq.

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 February 24<sup>th</sup>, Dan McCaffery filed a Notice of Appeal from Judge Glazer's Order dismissing his defamation lawsuit against me and the Board. The appeal was filed with the Superior Court, however, because the case involves a local government agency and official, the Commonwealth Court has jurisdiction over the appeal.

He also reported that 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 me. McCaffery sued the Board and he 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 told the Board that Judge Glazer said that the Board and he are covered by "quasi-judicial" immunity when they are acting in their 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 stated that the Board and he will continue 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 9<sup>th</sup>, our outside, *pro bono* attorneys at Drinker Biddle filed a Brief on the Board's behalf in opposition to Cozen O'Connor's appeal from the Commonwealth Court ruling that affirmed the trial court's dismissal of Cozen's suit against the Board.

Mr. Creamer explained that previously, 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.

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.

Mr. Creamer expressed his great appreciation to Gregg Mackuse at Drinker, Biddle who has continued to provide *pro bono* representation to the Board throughout this matter.

### **C. Legislative Update**

Mr. Creamer reported that on March 4<sup>th</sup>, a package of 8 bills and two resolutions were introduced in City Council. The measures would amend sections of the Ethics Code, campaign finance law and the Charter section on political activities.

He also reported that a hearing was held before the Law & Government Committee of Council on two Bills and Two related Resolutions on March 15<sup>th</sup>. Based on testimony submitted in advance of the hearing, the Law & Government Committee held two of the measures that would establish an independent Office of Inspector General and modified another Bill that would have placed a Charter amendment to section 10-107 of the Charter (political activities) on the May 18<sup>th</sup> ballot. The chair of the Committee, Councilman Greenlee, said that the question would be moved to the November ballot and that a companion bill would be changed.

Mr. Creamer explained that Richard Glazer presented testimony on the latter measure, in which he asked Council to continue consideration of the proposed legislation to give the Board – including the two new members confirmed last week- an opportunity to consider its position.

Mr. Creamer said the legislation will be discussed in more detail later in the meeting.

### **D. Budget**

Mr. Creamer announced that staff has been advised that our 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. 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 projected that they would reach a staffing level of 11, but they have not been able to do so and are currently operating with a staff of eight.

Mr. Creamer reported that the Board's budget hearing is March 22<sup>nd</sup> at 3:30. The testimony will report on the Board's accomplishments during the past year, including our ethics and campaign finance training efforts, the advice that has been given to City officials and employees, and the Board's progress toward offering online ethics training. It will also be explained that the Board understands the magnitude of the budget situation, but note that the Board believes the budget cuts have a disproportionate impact on our small agency which relies almost exclusively upon direct person-to-person contacts by our staff with City officials, employees, and the public.

Mr. Creamer explained that the Board's testimony will also acknowledge 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. It is important to note that at the \$810,000 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 FY11, 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.

### **C. Financial Disclosure**

Mr. Creamer said that as we noted last month, 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. 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. 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). Staff has begun to focus its efforts on the many tasks necessary to implement the financial disclosure process.

Mr. Creamer explained that as a first step in this process, staff is reviewing all documents on our website that explain the filing requirements and who must file each of the forms.

He also explained that as the staff did last year, they are working with the staff of the HR Department to review the list of Civil Service titles to develop a list of City employees who are potential State Form filers. Next, because they have specialized knowledge of the civil service exempt employees in their departments, we will ask departmental HR managers to review the civil service exempt titles to determine which of these employees should file the State Form. A series of meetings will also be conducted with the HR managers to provide background and training in the financial disclosure process.

Mr. Creamer thanked the HR Department and the many HR managers for their assistance in this process. Last year, as a result of these efforts, more than 4,800 financial disclosure forms were filed, which is significantly more than the 3,900 forms filed in 2008.

Mr. Creamer said that staff has begun to update our list of all City Board and Commission members because they are required to file one or more of the disclosure forms. Information needs to be compiled about boards and commissions from many sources, including the Mayor's Office, emails to the executive directors of various boards and commissions, and many websites.

He also said that staff is currently reviewing the on-line Financial Disclosure System so that they 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 into the system and the information is populated 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.

Mr. Creamer noted that staff is also preparing reminder notices that will be sent in April to all financial disclosure filers.

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.

#### **D. Annual Report**

Mr. Creamer reported that staff is preparing a draft of the Annual Report for review by the Board and anticipates releasing the report to the Mayor and Council in early April. The 2009 Annual Report will describe the Board's accomplishments during the past year, including training and advice and the development of our online ethics training project. As mandated by Section 20-606(1)(l), the report will also include legislative recommendations and information concerning enforcement activity.

#### **E. Regulation Working Group**

Mr. Creamer stated that as the Board announced in July, three members of our staff, Michael Cooke, Maya Nayak, and Nedda Massar, have been working on proposed campaign finance regulations. The goal of the Regulation Working Group is to have regulations in place to provide guidance to candidates and committees in advance of the 2011 elections. Staff is pleased that they have a draft regulation addressing campaign finance issues for review by the Board later in this meeting.

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

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

2. Advices of Counsel. Mr. Meyer reported that there was one Advice of Counsel since the February report.

a. Advice of Counsel No. GC-2010-503 (March 11, 2010). Dr. Donald Schwarz, Health Commissioner, asked for a public advisory as to the legal requirements that the Public Integrity Laws would impose on members of a proposed Animal Advisory Committee. Dr. Schwarz advised that the purpose for the request was to allow candidates for Committee membership to make an informed decision prior to accepting appointment.

We advised that generally, under the Ethics Code, members of City boards and commissions may not do any of the following:

- (a) act on matters in which they (or certain close relatives) have a personal financial interest;
  - (b) act on matters in which their for-profit employer has a financial interest;
  - (c) act on matters in which a member of their for-profit entity is appearing before their Board as agent or attorney;
  - (d) personally represent, as agent or attorney, any person before their own board;
- and

(e) solicit or receive a gift of substantial economic value from a person or entity that might have an interest in official action by the Committee.

In addition, members of City boards and commissions must do the following:

(i) file the City of Philadelphia financial interest statement, disclosing their finances for the prior calendar year, every year by the first working day in May;

(ii) attend annual ethics training conducted by or authorized by the Ethics Board; and

(iii) if the member has a conflict of interest—that is, their board/commission is about to act on a matter identified in one of the first three prohibitions above: (a), (b), or (c)—the member must publicly disclose the conflict and disqualify himself, under Code Section 20-608.

In addition, we advised that Charter Section 10-107 would not apply to members of the Committee, and that it appears that the State Ethics Act would not apply, as the Committee would be purely advisory.

Advice of Counsel No. GC-2010-503 is public and should be available on the Board's website soon.

3. Informal e-mail guidance. Mr. Meyer reported that through Monday, March 15, 2010, there were seven of these since the February report.

a. Received an inquiry from the Law Department regarding application of the ethics laws to proposed Animal Advisory Committee. Advice is essentially repeated in Advice of Counsel GC-2010-503, summarized above.

b. Received request from Records Department regarding application of records retention schedule to filed financial disclosure forms. Advised that we had no objection to disposing of records filed more than 7 years ago.

c. Received an inquiry from a City official asking a subordinate could permissibly accept, from a City vendor, free accommodations and travel to attend that vendor's roll-out of a new product. Advised that the invitation, rather than service on an educational panel, appears to be simply a way for this City vendor to provide a reward to a City official for the City's past purchase of the company's products and equipment.

We were later advised that the City employee would decline the offer.

d. Received an inquiry involving a City employee's involvement at a polling place, but which was not engaging in partisan politics. Advised that this was a possible issue under the Election Code, but not within our jurisdiction.

e. Received an inquiry involving potential outside employment by a "potential City employee" in the event that the person became a City employee. Advised that the "Ask for Advice" feature

is only for advising City officers and employees as to their conduct under the ethics laws. Provided links to two advisories that may be helpful.

f. A staff person for a City board/commission inquired about possible uses to spend money raised at a fund-raiser for the board/commission. Advised that this was not an issue under the ethics laws, but suggested the staffer may want to consult the Law Department about City agencies raising and spending money through fund-raisers.

g. Received an inquiry from person running for committeeperson who would also like to be appointed to a City board/commission, and asking for guidance as to whether service in both positions would be permissible. Advised that we do not give advice to potential appointees, but that if appointing authority inquired, we could advise that official.

## **VI. Discussion of Proposed Legislation Concerning Political Activity Restrictions in § 10-107 of the City Charter and Other Recently Proposed Legislation**

Mr. Creamer informed the Board that City Council introduced several bills on March 4, 2010 concerning political activity restrictions that now appear in the Home Rule Charter.

Bill #100121 is a ballot question that would ask voters to approve an amendment to permit political activity restrictions by City ordinance.

Bill #100139 would amend §10-107 Charter language to authorize political activity restrictions by City ordinance.

Mr. Creamer said that §10-107 prohibits employees from engaging in political activity. This bill would authorize Council to change certain sections of the charter.

Bill # 100128 would amend Code Chapter 20-600 to address the political activity restrictions.

Mr. Creamer explained that this bill would allow all political activity off the job. If this amendment goes through City Council can change the Charter through an Ordinance.

There was a lengthy discussion among the Board regarding jurisdiction, expressing the Board's concerns to Council and the ballot question's lack of clear notice to the voters on the issue being voted on.

The Board agreed that they should take a position in connection with the Ordinance that allows Council by Ordinance to change §10-107 in November's election.

Mr. Glazer made a motion to approve the creation of a position of the Board to reflect concerns of timing, notice to the voters, ballot question and asking for an opportunity to discuss in public setting.

The motion was unanimously approved with a 5-0 vote.

## **VII. Discussion of Proposed Regulation No. 8, Campaign Finance**

Ms. Nayak stated that there are copies of the draft of Regulation 8 available for anyone in the audience who would like to follow along.

Ms. Nayak said that staff believes that a campaign finance regulation will provide helpful guidance on the Board's implementation of the City Code's campaign finance law. A regulation will further the Board's ongoing goal of making application of the campaign finance rules as clear as possible.

She also said that today Staff is not asking the Board to vote or approve a draft of Regulation 8 for public comment. Because the draft campaign finance regulation is lengthy, today we would like to just introduce the Board to the current draft by walking through it and explaining some of what is behind the provisions. The version we are going to walk through has not been reviewed or approved by the Law Department and we fully expect that it will change as we revise it further and get input.

Ms. Nayak explained that the Regulation Working Group began initial planning for a campaign finance regulation in the summer of 2009. We began drafting in the fall with a goal of presenting to the Board in January. We missed that goal because we needed to spend a significant amount of time working on two other regulations – Reg. 5 on confidentiality and then the recent amendments to Reg. 2. After the Board's approval of amendments to Reg. 2 in February, we resumed working on what is now an initial draft of proposed Regulation 8 on campaign finance.

She also explained that in writing this initial draft, Staff was informed by questions from candidates and campaigns that we fielded during the last two elections. We have provided answers to key questions in the draft regulation. Some of the sources we have turned to when working on the draft in front of you include the State Election Code, regulations from other jurisdictions such as the Federal Election Commission, relevant case law, the campaign finance-related recommendations of the Task Force on Ethics and Campaign Finance Reform and the Board's advisory opinions. As they walked through the regulation, they identified sources they relied on for some of the regulation's specific provisions.

Ms. Nayak said that regarding the State Election Code in particular, the draft regulation incorporates several terms and concepts from the State Code where we thought it would be particularly helpful for those who will be relying on the regulation. This is because Philadelphia's campaign finance law supplements and complements the State Code. The City campaign finance law supplies additional requirements that address issues of particular concern to Philadelphia. The City's law incorporates the reporting requirements of the Pa. Election Code. It is the State Election Code, not Philadelphia's campaign finance law that determines the content of campaign finance reports.

She also said that the Staff's goal was to have as much information about campaign finance in the Regulation as was workable without being unwieldy given the separate but related requirements of the State Election Code. Also, the current location for the filing requirements of the City's Campaign Finance Law is the Board's Regulation No. 1 on electronic filing of campaign finance reports. Although the Reg. Working Group's long-term plan is to consolidate

all the Board's regulations into a single place, in the short-term we should decide how in Regulation 8 to point to the filing requirements in Regulation No. 1. It may be that we mention Regulation 1 in the Scope section or as a separate subpart, but the current draft of Regulation 8 does not do either.

Ms. Nayak noted that as the Board is aware, two weeks ago legislation related to the City's campaign finance law was proposed in City Council. Our draft regulation is based on the City's law as it now exists. As they walked through the regulation, they identified the few areas that may be affected by the proposed legislation, but generally speaking the draft regulation does not conflict with the proposed legislation. If the proposed legislation or a version of it is enacted, we expect that we would need to make additions to any campaign finance regulation that is in place.

Ms. Nayak informed that Board that if they have any questions as we walk through the regulation, please let them know.

Ms. Nayak and Mr. Cooke proceeded to go through the document paragraph by paragraph explaining the document and sources they relied on. They also informed the Board where there would be interaction with the proposed legislation.

#### **VIII. New Business**

Mr. Glazer stated that Rich Negrin was the Vice Chair for the Board and since his resignation the position is vacant. He asked the Board members to think about their interest in serving. A vote will be taken at the next meeting.

Sister Mary Scullion noted that she will be available to attend the next board meeting.

#### **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.