

Philadelphia Board of Ethics
Meeting Minutes
October 20, 2010
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

Richard Glazer, Esq., Chair
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

I. Call to Order

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

II. Approval of Minutes

The Board approved the meeting minutes, as printed and corrected, for the public meeting that was held on September 15, 2010.

III. Message from the Chair

Chair Glazer announced that on Monday he received Nolan N. Atkinson, Jr.'s resignation from the Board. He read Mr. Atkinson's resignation letter which is attached to these minutes. (See Attachment #1)

Chair Glazer read his email response that he sent to Mr. Atkinson on Tuesday:

Last night I received a copy of your hand-delivered letter of resignation from the Board of Ethics addressed to Mayor Nutter which I am taking the liberty of sharing with the Board and staff.

On behalf of the Board, its staff and the citizens of the City of Philadelphia, I want to acknowledge your exemplary service. While your membership on the Board has been relatively brief your impact has been great. Your wisdom, judgment and commitment to the principles of transparency and integrity, the bedrocks of our existence, have made an extraordinary impression on your colleagues on the Board who have demonstrated their respect and admiration by electing you Vice-Chair.

On a personal note, I am grateful for your wise counsel, generously given throughout the deliberations on the complex and significant issues that have faced us during your tenure. I will miss your thoughtful and deliberate consideration of not only the substance of the issues but also the real-life implications of our decisions.

Please accept our wishes for your continued professional success and the hope that the City again will be the beneficiary of your energy, experience and talents.

IV. Executive Director's Report

A. Litigation Update

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

Mr. Creamer explained that as reported at last month's Board meeting, oral argument was held on September 15th on Cozen O'Connor's appeal from the Commonwealth Court decision that the law firm lacked standing to challenge the Board's Advisory Opinion issued to its former client, the Friends of Bob Brady. At the suggestion of the Court at oral argument, we filed a Motion to Dismiss Cozen's appeal after Amended Regulation No. 1 took effect on September 27th because, we maintain, that Appeal has been rendered moot by a June amendment to the law, which expressly codified the Board's interpretation of the law in the Brady opinion and by Amended Reg. No. 1, which contains a provision that would enable Cozen to forgive the Brady Campaign debt at one time and *in toto*, if certain conditions were met. The Board's Motion to Dismiss was filed on September 29th – two days after Amended Regulation No. 1 took effect.

He also explained that before the Board filed their Motion to Dismiss when instructed by the Court, Cozen filed an Application for Post-Submission Communication By Appellant on September 20th, in which Cozen argues that neither the change in the law, nor the new debt forgiveness provision in Reg 1 have any affect on Cozen's Appeal or on its ability to forgive its debt. Cozen's unusual Application essentially enabled the firm to make their argument first. Mr. Creamer reported that he learned hours before the meeting that Cozen filed a Response to the Board's Motion to Dismiss on October 14th.

Mr. Creamer again wished to thank the Board's *pro bono* counsel Gregory P. Miller and Gregg W. Mackuse at Drinker Biddle for their continued support.

2) McCaffery v. Creamer, et. al.

Mr. Creamer informed the Board that oral argument on Mr. McCaffery's appeal to the Commonwealth Court, which had been scheduled for October 12th, has been postponed at the

request of Mr. McCaffery's attorney. The next available date for argument is not until February. However, the Court could issue a decision on the briefs at anytime, notwithstanding that oral argument is pending.

B. Campaign Finance Information

Mr. Creamer said that the 2011 election is fast approaching, and staff has therefore begun to prepare for the election cycle. Staff will discuss the campaign finance training schedule later in this meeting.

C. Hiring Update

Mr. Creamer explained that while Charter Section 3-806 requires that the Board appoint its Executive Director and General Counsel, the Law Department advised the Board in 2008 that it is permitted by the Charter to delegate its authority to the Executive Director to fill other staff positions, such as the Information Specialist. Pursuant to this advice, at the June 16th meeting, the Board voted to delegate its authority to him to fill one vacant Information Specialist staff position.

Mr. Creamer informed the Board that staff interviewed several candidates for the position, and are very excited that Elizabeth Baugh has accepted our offer. Ms. Baugh brings ideal credentials to our staff. She is currently serving as the Library Director for the Free Library of Northampton Township in Richboro, Pennsylvania. Prior to this position, Ms. Baugh was a reference librarian and branch manager in the Suffolk County Library System in Virginia. She has wide experience in assisting the public with access to information and with training, both of which are key components of the Information Specialist position. Staff expects Ms. Baugh to play an important role in our outreach and training plans. Her start date is December 13, 2010.

D. Political Activity Update

Mr. Creamer reminded the Board that we began to discuss a draft new regulation to clarify the political activity restrictions in the City Charter at the September Board meeting. Staff presented a draft proposed Regulation, but the Board did not take any action on the draft. Instead, the Board stressed that it wanted to hear from as many stakeholders as possible during the early drafting process. In response to this concern, he sent more than 40 letters to individuals and groups to solicit input and to explain the steps in the Board's regulation process. The letters enclosed copies of the draft proposed Regulation, explained the regulatory process and asked for input.

Mr. Creamer reported that staff has already begun to hear from several stakeholders and will carefully consider their feedback in the next few weeks. Our goal is to present a draft regulation to the Board in November to approve for public comment and then to schedule a public hearing in December.

E. Lobbying Update

Mr. Creamer asked Ms. Massar to update the Board regarding lobbying.

Ms. Massar said that as you know, among the bills signed by Mayor Nutter on 6/16/10 was legislation creating a brand new lobbying registration and reporting law for the City. The law mandates that lobbyists and principals file reports electronically and that registration begins on July 1, 2011. It also requires that a searchable database of lobbying information be available to the public on our website.

She also said that as staff noted before, the new law does not contain any appropriation for the design, implementation or maintenance of the complex electronic filing system and also does not contain funding for additional staff.

With all of this in mind, staff determined that our first priority had to be creating the electronic filing system. Staff has therefore met many times with the City's Division of Technology to prepare a document that outlines the requirements of the Philadelphia Lobbying Information System (PLIS). With DOT, staff will continue to look at the State's lobbying system because the City law is based largely on the State law.

Ms. Massar reported that DOT has a tentative estimate that the external costs to design the Lobbying system will be \$270,000 to \$300,000. External costs include licenses, hardware, and outside support, but do not include DOT's time and staff costs. Staff has been advised that the City's Capital Program Budget may be a source for funding the system, but this has not yet been approved.

Ms. Massar said that staff is hopeful that the funding issue will be resolved very soon because it will take several months to design and test this new software.

Sister Mary expressed her concern regarding the cost of the lobbying system. She wants to make sure that as the Ethics Board it makes sense to spend that amount on a system that will only be used by a small amount of users.

Mr. Meyer explained that a searchable lobbying database is required by the lobbying statute and not something that the Board decided. The law states that there must be a searchable database.

Mr. Glazer said that DOT does not have an agenda to spend money. He presumes that in speaking with DOT, staff explained the requirement for the database and this is the way it needs to be done.

Ms. Massar explained that there are two categories of users of the lobbying system. First, there are lobbyists, lobbying firms, and principals who will use the software to file reports. She acknowledged that the number of filers may not be more than 200, but said that the purpose of the lobbying law is to advance government transparency for the citizens of Philadelphia. Citizens are the primary users of the system and will likely number in the thousands. She said that we should therefore focus on the fact that many citizens will have access to the searchable database.

V. General Counsel's Report

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

2. Advices of Counsel. Mr. Meyer reported that there were three Advices of Counsel since the September report.

a. Nonpublic Advice of Counsel GC-2010-514 (September 17, 2010) A City employee requested a nonpublic advisory as to whether pursuing an employment opportunity with a nonprofit that has City contracts, or obtaining such employment, would violate any ethics laws. This request presented a mixed question of conflicts issues prior to separation from the City and post-employment issues after separation. Advised as follows:

i. There will be no issue under Charter Section 10-102 if the requestor is not contractually obligated to the nonprofit before separating from City service.

ii. While the requestor is still a City employee, she may be required to disclose a conflict of interest and disqualify herself from taking certain official action for the City, if her pursuit of employment with a certain potential employer reaches the level that she has a "financial interest" in the employer, as defined in Confidential Opinion No. 2007-001. However, where the employer is a nonprofit, Code Section 20-607(b) does not apply.

iii. The State Ethics Act applies to the requestor. Under the Act, she would be prohibited for one year after she leaves the employ of the City from representing anyone, including herself and any future employer (or any client of herself or any future employer), before her former City office. Please note the broad definition of "represent," which includes having one's name appear on a bid, contract proposal, engineering report, invoice, or other official document submitted to one's former governmental body.

iv. Please note that this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act.

v. Under the City Code, the requestor may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by the City with her involvement.

vi. Under the City Code, the requestor may not for two years after she leaves the employ of the City acquire a financial interest in any official decision she made while in City employ. This would include being employed by a nonprofit with City contracts if her salary at the nonprofit were to be paid out of proceeds from a City contract the award of which she was officially involved in for the City.

b. Nonpublic Advice of Counsel GC-2010-515 (September 20, 2010). A City employee requested a nonpublic advisory as to whether pursuing a particular employment opportunity, or obtaining such employment, would violate any ethics laws.

The requestor advised that he is employed in a technical position in a City operating department with duties including overseeing operations of a “pilot” technical system. The requestor advised that he would like to be employed by an independent legal entity, either for-profit or non-profit, formed in order to improve upon and commercialize the system. He asked for advice concerning his current activities as a City employee and concerning post-employment activities if he separates from the City to work for such an entity. Advised as follows:

i. There will be no issue under Charter Section 10-102 if the requestor is not an owner, officer or contractually obligated to any outside entity before separating from City service.

ii. While the requestor is still a City employee, he may be required to publicly disclose a conflict of interest and disqualify himself from taking certain official action for the City, if his pursuit of employment with a certain potential employer reaches the level that he has a “financial interest” in the company, as defined in Board of Ethics Confidential Opinion No. 2007-001.

iii. The State Ethics Act likely applies to the requestor. Under the Act, he would be prohibited for one year after he leaves the employ of the City from representing anyone, including himself and any future employer (or any client of himself or any future employer), before his former City department. Please note the broad definition of “represent,” which includes having one’s name appear on a bid, contract proposal, engineering report, invoice, or other official document submitted to one’s former governmental body.

iv. Please note that this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. If the requestor has any questions regarding the advice herein as to the State Ethics Act, he is advised to contact the State Ethics Commission.

v. Under the City Code, the requestor may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by the City with his involvement.

vi. Under the City Code, the requestor may not for two years after he leaves the employ of the City acquire a financial interest in any official decision he made while in City employ.

c. Nonpublic Advice of Counsel GC-2010-516 (October 4, 2010). The recipient of the above Advice provided additional facts and requested clarification of the restrictions. Advised as follows:

i. Under the City Code, the requestor may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by his City department with his involvement. The particular issue includes development of the product referred to in the initial request, but the Code provision would only prohibit assistance with a matter if the City continues to have an interest in the matter.

ii. Under the City Code, the requestor may not for two years after he leaves the employ of the City acquire a financial interest in any official decision he made while in City employ. Thus, if the requestor is employed by Firm X, he may not be paid out of revenues realized from Firm X’s contract with the City.

The public versions of all three Advices are available on the Board's website.

3. Informal e-mail guidance. Mr. Meyer reported that through Friday, October 15, 2010, there were five of these since the September report.

a. Received an inquiry from a member of a City board/commission, who has employment with a nonprofit that receives City funding. The requestor asked about Charter Section 10-102 (Interest in Contracts). Advised as follows:

Generally, City officers and employees may "moonlight" or have outside jobs, so long as there is no connection with their City work, no interest in a City contract, no City resources are being used in the work, and they do not represent their outside entity before the City. You have asked only about Section 10-102 (interest in contracts) of the Home Rule Charter, as a member of the board/commission. Board of Ethics [Regulation No. 6](#) defines which City boards and commissions are subject to Section 10-102: it is only those whose members receive a "salary." In that case, Charter Section 10-102 does not apply to you.

We also provided a link to a relevant public advisory on our website, concerning outside employment.

b. Received an inquiry from the HR manager for a City office concerning the possible creation of an Employee Recognition Program with the possibility of rewarding employees with gift certificates of nominal value, for such uses as restaurant meals, book stores, department stores, etc., and asking particularly about the effect of Executive Order No. 002-04. Advised as follows:

First, as to Executive Order No. 002-04, this is not under our jurisdiction. Executive Orders are not law. They are more in the nature of management directives by the Mayor to those under his authority. Accordingly, interpretation of his orders is up to the Mayor, not the Board of Ethics. I suggest you contact the Chief Integrity Officer, Joan Markman, for a ruling on the Executive Order.

Second, assuming that you are talking about gift certificates in the area of \$20-\$30 in value, they would not raise an issue under the gift provision of the City Code, Code Section 20-604. [In a follow-up email, we advised that even a gift certificate in the amount of \$50 would not be of substantial economic value.]

Third, it is unclear whether a City office may pay, out of its budget, for additional compensation for its employees. You may wish to consult with Labor Relations about the labor and civil service implications. Also, there may be an issue under Home Rule Charter Sec. 8-107 ("Compensation for Extra Services") if additional compensation is not formally put into the pay plan. Section 8-107 is not within our jurisdiction, and you may wish to consult with the Law Department.

Finally, advised that there could be an issue under Charter Section 10-105 ("Gratuities"), depending on the details of any such program. Advised that if, after consideration of the first three points, it is determined that this Program presents no issues, the requestor may wish to

provide the details of the Program and seek a written advisory opinion from us on Section 10-105.

c. Received an inquiry from a departmental integrity officer who had just attended one of our trainings. Their department had received an offer from a contract vendor of a \$3000 gift card to a local store to purchase certain items for use in the department. Advised as follows:

There is a fundamental question here as to whether a City department may permissibly accept a gift of property or cash (which is closer to what a gift certificate is). It has always been my understanding that all fees, donations, and other payments to any office, department, or board or commission of the City must be payable only to the City of Philadelphia and go into the City's General Fund, not simply be added to the budget of the agency collecting the payment. However, this question is outside the jurisdiction of the Board of Ethics. You may wish to seek the advice of the Law Department.

Assuming that Law advises that there is not a problem, the general issue is whether a \$3000.00 gift card donated by a department contracted vendor to the represents a prohibited gifts from the vendor to any City officer or employee. There are a number of ethics provisions that relate to gifts to City employees that may apply.

The gifts provision of the State Ethics Act, 65 Pa.C.S.A. Sect. 1103(b) and (c) basically prohibits bribes. That is, there must be an understanding that the official receiving the gift would be influenced by the gift. This does not appear to be an issue from the facts you provide.

The Home Rule Charter, in Section 10-105 prohibits gratuities, "in the form of money or otherwise for any act or omission in the course of [the employee's] public work." In other words, a reward or tip in gratitude for something that employee did as part of his/her City job, for which their salary should have been the only compensation. The facts you presented do not appear to raise any issue under this provision.

The Philadelphia Code, in Section 20-604, prohibits gifts "of substantial economic value" from certain sources to employees who are in a position to be influenced by the gift. The City vendor is clearly an applicable source. A gift valued at \$3000 is clearly of "substantial economic value." However, based on the facts that you have provided, it does not appear that the gift is "to any City officer or employee." Rather, it is a gift to the Department. As such, the gift is not prohibited by Code Section 20-604.

Lastly, Mayor's Executive Order No. 002-04 restricts gifts of any amount to City employees from certain sources. However, Executive Orders are management directives by the Mayor to those under his authority. Accordingly, interpretation is up to the Mayor, not the Board of Ethics. Whether any of the exceptions in the Executive Order might apply, or whether the gift could be accepted by the City as a "gift to the City," is a matter for the Mayor's Office, and is out of our jurisdiction. I suggest you contact the Chief Integrity Officer, Joan Markman, for a ruling on the Executive Order.

d. I was copied on an email from a departmental HR manager to other officials in her department, noting that she was copying Evan Meyer "in case he'd like to weigh in." The HR manager had been asked about a recently-retired employee of the department representing a

client before the department, and mentioned the one-year post-employment rule of the State Ethics Act. I provided a link to a recent post-employment Advice of Counsel from our website and advised:

You are essentially correct on the "one-year cooling-off period" of the State Ethics Act. However, there are always individual facts to consider in every case. For example, if the retiree happens to also be a lawyer, the rule does not apply (because lawyers are otherwise governed by the professional conduct rules applicable to members of the bar). And the State Ethics Act does not apply to all City employees, although anyone who had a responsible enough job with the City that they know enough to be able to represent anyone else likely was a "public employee" subject to the Act. [Noted that we can provide formal advice on a particular factual situation if requested, and facts provided.]

e. Received an inquiry from a City employee as to whether he could accept a gift from a consultant to his department of free attendance to the Chamber of Commerce annual breakfast meeting and be a guest at the consultant's table. We were advised that tickets for the event are normally \$70 for an individual. Advised, following our standard "gift" principles, as follows:

The gifts provision of the State Ethics Act, 65 Pa.C.S.A. Sect. 1103(b) and (c) basically prohibits bribes. That is, there must be an understanding that the official receiving the gift would be influenced by the gift. This does not appear to be an issue from the facts you provide.

The State Act also prohibits honoraria, in Section 1103(d). I do not believe the facts you present constitute an honorarium to you.

The Home Rule Charter, in Section 10-105 prohibits gratuities, "in the form of money or otherwise for any act or omission in the course of [the employee's] public work." In other words, a reward or tip in gratitude for something that employee did as part of his/her City job, for which their salary should have been the only compensation. There could be an issue as to whether this gift is a reward for your office giving business to this consultant. I would have to be given more facts.

The Philadelphia Code, in Section 20-604, prohibits gifts "of substantial economic value" from certain sources to employees who are in a position to be influenced by the gift. Valuation in the matter of attendance at events is often difficult. (Generally, a gift valued at \$70 would not be considered to be "of substantial economic value," however.) If I were to conclude that there were a significant issue as to whether the Code provision was implicated, I would probably also conclude that this matter was not appropriate for an "Informal General Guidance" and thus advice could not be provided via e-mail, under our Regulation No. 4, but via a written Advice of Counsel. An Advice of Counsel generally takes a week to ten days to research, draft, and finalize.

Lastly, Mayor's Executive Order No. 002-04 restricts gifts of any amount to City employees from certain sources. However, Executive Orders are management directives by the Mayor to those under his authority. Accordingly, interpretation is up to the Mayor, not the Board of Ethics. Whether any of the exceptions in the Executive Order might apply, or whether the gift could be accepted by the City as a "gift to the City," is a matter for the Mayor's Office,

and is out of our jurisdiction. I suggest you contact the Chief Integrity Officer, Joan Markman, for a ruling on the Executive Order.

3. Regulation No. 5 (Confidentiality). Mr. Meyer said that the amendments that were approved for public comment at the September 15 Board meeting, and as of Monday, October 18, will have been on file at the Records Department for the required 30 days. As of this writing, staff has not been advised of any requests for a hearing on the Regulation. The Records Department advised that, since there were no requests for a hearing, the amended regulation became effective at midnight on Monday, October 18, 2010.

VI. Campaign Finance Training Plans

Mr. Cooke informed the Board that staff created a schedule for Campaign Finance training. There will be two sessions in November, December and January, but staff anticipates scheduling additional dates in January and February.

The Board discussed how to best publicize the training sessions in order to assure high attendance.

Mr. Cooke said he would send the training schedule to the Committee of Seventy, City Commissioner's Office and the Records Department. It will also be posted on the Board's website.

Staff will also intend to contact candidates they learn about through the press.

VII. New Business

There was no new business to discuss.

VIII. Questions/Comments

Ellen Kaplan from the Committee of Seventy agreed that they will post the definition of Candidate on their website and in the newspaper.

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.