

Philadelphia Board of Ethics
Meeting Minutes
September 15, 2010
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

Nolan N. Atkinson, Jr., Esq., Vice Chair
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 distributed, for the public meeting that was held on July 21, 2010.

III. Executive Director's Report

A. Litigation Update

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

Mr. Creamer reported that he had attended oral argument before the Pennsylvania Supreme Court on Cozen's appeal immediately before the Board's public meeting began on September 15th. At oral argument, he explained, Steve Cozen argued that his firm had standing to challenge the Board's Advisory Opinion issued to his firm's former client, the Friends of Bob

Brady, because it would violate the campaign finance contribution limits under that Opinion if it forgave the \$448,000 Brady Campaign debt at one time and *in toto*. On the other hand, Cozen argued that the Ethics Board might bring an enforcement action at some point in the future if the firm “did nothing” to collect the debt, because the uncollected debt could be perceived to be an in-kind contribution that would also violate the City’s contribution limits.

Mr. Creamer advised the Board that Greg Miller, a partner at Drinker Biddle representing the Board *pro bono*, argued that Cozen’s appeal was 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 pending Amended Reg. 1, which would take effect later in September and contains a provision that would allow Cozen to forgive the Brady Campaign debt at one time and *in toto*, if certain conditions were met.

Upon hearing that the appeal may be rendered moot by changes in the law, the Supreme Court instructed Mr. Miller to submit an appropriate Motion to the Court after Reg. 1 takes effect in approximately ten days.

2) McCaffery v. Creamer, et. al.

Mr. Creamer reported that the Commonwealth Court has tentatively scheduled oral argument on Mr. McCaffery’s Appeal for October 12th at 9:00 am. However, the Court could issue a decision on the briefs at anytime, notwithstanding the tentatively scheduled argument.

B. New Campaign Finance Information

Mr. Creamer informed the Board that staff believed that it was important to provide information to candidates and the public about the changes to the Campaign Finance Law, approved in June, as soon as possible and before the amendments to Regulation No. 1 become effective. Accordingly, two new items were added to the Board’s website. A new Summary of Recent Changes to the Campaign Finance Law is prominently displayed on the website along with a revised set of Frequently Asked Questions (FAQs). (Copies of the Summary and FAQs are attached to this report.)

C. Annual Fiscal Report for 2010

Mr. Creamer explained that Section 3-806(k) of the Philadelphia Charter requires that the Board submit an annual fiscal report to the Mayor, City Council, the Chief Clerk of City Council, and the Department of Records no later than September 30th. Staff has circulated a draft Fiscal Report to the Board which indicates that expenditures totaling \$700,086 were made in FY10, as follows:

Class 100 (Salaries): \$677,779
Class 200 (Purchase of Services): \$19,683
Classes 300/400 (Materials, Equipment, & Supplies): \$2624.

Mr. Creamer said that the Report summarizes the Board’s activities in FY10, including our ethics training program, our work to increase compliance with financial disclosure requirements for City officials, employees, and board and commission members, the advice that we provide

throughout the year, and our enforcement efforts. The report also notes work on the online ethics training pilot project and mentions the technical support and suggestions we made on a number of bills that were introduced and eventually approved by City Council in late FY10.

Mr. Creamer also explained that the Annual Fiscal Report includes detailed FY10 expenditure information. It also discusses our FY11 financial challenges, including the concern that our reduced staff size will have a direct impact on our ability to accomplish the Board's new mandates to implement the changes to the Campaign Finance Law and the brand new Lobbying Law.

D. Lobbying Update

Mr. Creamer reported that Nedda and he met with representatives of the Department of State in Harrisburg on August 31st to review their lobbying electronic filing system. Their staff was extremely helpful with information about the State's software and internal processes. This is especially important because the new Philadelphia Lobbying Law is based largely upon the Pennsylvania law.

He also reported that staff has had several meetings with the Division of Technology to discuss the basic features of mandatory electronic filing for lobbyists and principals as required by the Philadelphia law. Chief Integrity Officer Joan Markman has been extremely helpful in these discussions, and staff is hopeful that the Division of Technology will undertake this project because there is no funding in the Board's FY11 budget to pay a vendor to develop the electronic filing system. The new Lobbying Law mandates that lobbying registration begins on July 1, 2011, which seems a long way off. However, it is a complex project to design and test a completely new online filing application and searchable database of lobbying information for the public.

E. Hiring

Mr. Creamer informed the Board that staff has interviewed several candidates for the Information Specialist position and expect to make an offer by the end of September. By filling this position the Board will have eight staff members and one vacant Information Specialist position. Staff is very concerned about our ability to implement the new lobbying law without filling the remaining vacancy and with no additional staff.

F. Board of Ethics Auditor's Report FY 2009 and 2008

Mr. Creamer announced that the Controller released the Audit of the Ethics Board for FY 2009 and 2008 a couple of hours before the Board's public meeting that day. The Controller is required to audit every City department and agency on an annual basis, but this was the Board's first audit by that office.

Mr. Creamer reported that the audit's first finding was that a lack of resources could imperil the Board's mission. He added that the Controller found that there were no material issues with the Board's fiscal processes or management. Mr. Creamer added that the remaining findings are addressed in the Board's written response, which is attached to the Audit.

Copies of the Auditor's Report were distributed to Board members.

IV. General Counsel's Report

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

2. Advices of Counsel. Mr. Meyer reported that there were four Advices of Counsel since the July report.

a. Nonpublic Advice of Counsel GC-2010-510 (August 17, 2010) A City employee requested nonpublic advice on whether there are any issues under the Public Integrity Laws if she were to accept a scholarship to a series of leadership seminars, where the scholarship is offered by a professional firm that is providing pro bono services to the City on a project on which the employee also working in her capacity as a City employee. Advised as follows:

- i. There is no issue under Charter Section 10-105, since the offer was not for any act or omission in the requestor's official duties.
- ii. This is a gift to the requestor, a City employee. A "gift to the City" exception to Code Section 20-604 does not apply to the facts provided.
- iii. Since this is a gift "of substantial economic value that might reasonably be expected to influence one in [her] position in the discharge of [her] official duties," the requestor is prohibited from accepting it, under Code Section 20-604.
- iv. The gift is not prohibited under Section 1103(b), (c) of the State Ethics Act.
- v. For any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and the requestor may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.
- vi. The requestor should consult with the City's Chief Integrity Officer, regarding application of the executive order relating to gifts, and particularly prior to requesting any amended advice based on any proposal to amend the offer.

b. Advice of Counsel GC-2010-511 (July 22, 2010). The Executive Director of the Philadelphia Youth Commission requested a public advisory as to whether members of the Commission may also serve a political party in the position of ward committeeperson (also known as "committeeman"). Advised as follows:

As a City committeeperson is clearly a "member of a local committee of a political party," no appointed officer of the City who is subject to Section 10-107(4) may be a committeeperson. However, the Youth Commission, as authorized under Charter Sections 3-100(e), 3-807, and 4-1200, clearly fits with those bodies listed in Section F of Opinion No. 2007-006 ("Advisory bodies that do not exercise the power of the City and are thus not subject to Section 10-107"), and thus Charter Section 10-107(4) does not prohibit any member of the Youth Commission from serving as a ward committeeperson.

c. Nonpublic Advice of Counsel GC-2010-512 (September 2, 2010). A City employee requested a nonpublic advisory on the following question as stated in her email message:

I am a City employee, I am also a publisher and children's author. My non public question is: Can I become a contractor with the City for the purpose of selling my children's books to them.

Upon a request for follow-up information, the requestor advised that her reference to “contracting with the City” meant that she would propose to sell books, as publisher and author, not to an operating department or board or commission of the City, but to the Philadelphia School District. Advised that the only issue was under Charter Section 10-102 (interest in contracts). Advised that it was uncertain to what degree Section 10-102 applied to the School District, but that if Section 10-102 applied to the School District it would clearly then prohibit School District employees from having an interest in contracts paid out of the Treasury of the School District. As the requestor is a City employee, any contract for purchase of books by the School District from requestor would not be prohibited by Section 10-102.

d. Advice of Counsel GC-2010-513 (September 3, 2010). A City employee requested a nonpublic advisory as to whether pursuing an employment opportunity with a for-profit firm, or obtaining such employment, would violate any ethics laws. The employee advised that he is planning on leaving City employment and is currently seeking alternate gainful employment in his field and wishes to explore opportunities with a particular company. 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 company before separating from City service.

ii. While the requestor is still a City employee, he may be required to 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, such as the company, reaches the level that he has a “financial interest” in the company, as defined in Confidential Opinion No. 2007-001.

iii. The State Ethics Act 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 office. Please note the broad definition of “represent,” which includes having your name appear on a bid, contract proposal, engineering report, invoice, or other official document submitted to his former governmental body.

iv. 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 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.

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

3. Informal e-mail guidance. Mr. Meyer reported that through Friday, September 10, 2010, there were eight of these since the July report.

a. Received an inquiry from an out-of-town professional firm with some questions about discussing job opportunities with a government official with whom the firm is working, and on the official asking the firm to relax certain rules to finish a job. It was unclear whether the firm actually does business with the City, or was simply doing generic research. Advised as follows:

The "Ask for Advice" function on our website is for the purpose of advising City of Philadelphia officers and employees as to the application to their personal behavior of the ethics laws that apply to them as public officers or employees. Except in a few instances, the ethics laws do not restrict the behavior of outside entities. (One exception is that the City Code provision on gifts does prohibit an outside entity from offering gifts to City employees under certain conditions.) Accordingly, we do not have jurisdiction to advise you on behavior of employees of an engineering/architect firm in the situations you describe.

We also provided links to two relevant public advisories on our website.

b. Received the following inquiry from a City employee:

Is a city employee allowed to purchase merchandise from a vendor we do business with? We would not be getting the city price. Please advise.

Advised that we would need much more information about the vendor, the employee's dealings with that vendor, what would be purchased, and other circumstances. It was not even clear that the employee was asking about him/herself. Also provided the following examples:

For example, if the Recreation Department has a contract with Modell's Sporting Goods store to provide uniforms to teams at rec. centers, that would not restrict a Recreation Dept. employee from going into a Modell's store during her lunch hour and buying a Phillies hat off the shelf for the usual price.

At the other extreme, if that same Recreation Dept. employee is the person who manages the uniform deal with Modell's and that employee, at the end of a conversation in City offices with the Modell's salesperson about the City deal, arranges to buy a uniform for her personal use at a slight discount, although not as deep a discount as the City price in the Department's contract, that purchase would likely represent a prohibited conflict of interest, depending on the particular facts.

We received no further information from the requesting employee.

c. Received an inquiry from a member of a professional firm concerning one of its members who is on a City board or commission, stating "We are concerned that there is not a conflict between [a pending City matter] and [the other member's position on his City body]. Advised that we could only advise the City official personally involved. Gave this general information:

Generally, if there is a conflict of interest, the remedy is for the City official with the conflict to publicly disclose the outside financial interest, and disqualify himself from taking City action in that particular matter. As to your reference to "any other [contract] that [the company] may pursue," we generally do not issue generic advice to cover all future situations. Ethics matters are particularly fact-specific, and our advice must be based on the specific facts of a particular matter.

We received no further information or inquiry.

d. Received an inquiry from a representative of a City department asking about taking action requested by a former City employee, and inquiring about post-employment restrictions on that former employee. Advised as follows:

First, the Department cannot violate the law in this situation. The one-year rule of the State Ethics Act (as well as the post-employment rules of the City Code) applies only to the former employee, so the only possible violation would be by that former employee, not by the Department. Nevertheless, it is my understanding that the City generally has a policy of trying to avoid situations where the City is participating in an action where it is aware that a party to the action would be violating one of the ethics laws in doing so. We then provided a summary of the post-employment rules.

e. Received an inquiry from a City employee regarding doing work in another county, in the person's free time and not involving the employee's City work. Advised:

Generally, City employees may "moonlight" or have outside jobs, so long as there is no connection with their City work, no interest in a City contract, and no City resources are being used in the work; and they don't represent anyone in a City transaction.

Provided a link to a standard "conflict of interest" advisory. Noted, as always, that for a ruling upon which the employee could rely, he/she should ask for an Advice of Counsel.

f. Received an inquiry from a City employee as to whether he/she may hold a position as a committeeperson. Summarized Advice of Council No. GC-2010-511 (summarized above), and noted that it should be available on our website soon.

g. Received an inquiry from a City elected official concerning the official's PAC hosting a fundraiser at which a group would perform (presumably gratis). Advised as follows:

1. If you are not a declared candidate, the contribution limits and other requirements of Code Chapter 20-1000 do not apply to you;
2. In terms of filings with the Secretary of State or City Commissioners, we do not have jurisdiction, as this is a matter of State law; and
3. A free performance for the benefit of a PAC would not be a prohibited gift to you, under Code Section 20-604.

h. Received an urgent request for "approval" for a City employee to attend a political event to be held the next day. Advised as follows:

The Board of Ethics does not provide, on short notice, "approvals" or "clearance" for a City official or employee to engage in a particular activity. (Although you are not alone. This is a common misconception.) Rather, we provide training, informal general guidance, and-- upon request-- advisory opinions on particular facts. An advisory opinion generally requires research, careful consideration of all the provided facts, and precise drafting, and must take its place among the other on-going work of the Board's small staff, so City employees requiring such advice are well-advised not to wait until the day the advisory is needed to ask for it. See below on requesting an advisory opinion on which you may rely.

In general, the question you raise presents a question under Section 10-107 of the Charter, which applies to you as a City employee. Subsection 10-107(4) prohibits any political activity (except "to exercise his right as a citizen privately to express his opinion and to cast his vote"), including being "a member of any national, state or local committee of a political party," and to "take any part in the management or affairs of any political party or in any political campaign." Subsection 10-107(3) prohibits being "in any matter concerned in" asking for or receiving any political donation or campaign contribution.

Both this Board and the City Solicitor have in the past advised many times that mere attendance at a campaign event is not prohibited to appointed City employees, so long as the employee is not involved in organizing or running the event, and engages in no activity that would constitute campaigning at the event. If the event is a fund-raiser, a City employee may still attend, so long as the employee is not actively involved in any fund-raising aspect, such as making public remarks, assisting in collecting money, etc.

Chair Glazer asked if GC-2010-513 was similar to a previous Advice of Counsel. Mr. Meyer explained that the Advices are very fact specific. Ms. Nayak noted that this employee needed a letter addressed to him because it was required by the potential future employer.

V. Discussion of Amendments to Regulation No. 5, Confidentiality of Enforcement and Investigative Matters and Prohibited Disclosure

Chair Glazer explained that the Board approved amendments at the June Board meeting. A public hearing was held on July 21, 2010.

Chair Glazer stated that the Third Circuit Court of Appeals issued the Stilp opinion which created the need for substantive changes. Therefore, the Law Department advised the Board to repost the Regulation for public comment.

Chair Glazer said that the Board will rescind the prior proposed amendments and re-post the amended Regulation with the Records Department. If a hearing is not requested the amended Regulation will be effective in thirty days from the date it is filed with the Records Department.

Ms. Nayak reviewed the three changes that staff is proposing.

Chair Glazer called for a motion to rescind the prior proposed amendments and to approve the amended Regulation and it was moved by Mr. Atkinson. The rescission and new amendments were unanimously approved with a 4-0 vote.

Ms. Nayak said that staff will re-file the new proposed amendments to Regulation No. 5 with the Records Department. Chair Glazer noted that the amendments will be effective 30 days after they are filed.

VI. Discussion of Regulation No. 1, Campaign Finance

Mr. Cooke explained that Regulation No. 1, Campaign Finance was approved at the July Board meeting. A Public Hearing was held on September 8, 2010. He said that staff is asking the Board for final approval of the Regulation based on the draft hearing report that was circulated to the Board members on Monday via email. A copy of the proposed final version of the Regulation is in the Board books.

Chair Glazer asked staff to send a copy of the hearing report to those who testified at the hearing.

Mr. Cooke summarized the changes that were made to the Regulation as described in the hearing report.

Mr. Atkinson made a motion to approve the final hearing report with the changes discussed by Mr. Cooke and the motion was carried with a 4-0 vote.

Chair Glazer acknowledged those who testified and provided thoughtful comments, some of which were incorporated in the Regulation.

VII. Discussion of Proposed Regulation No. 8, Political Activity

Michael Cooke explained that staff prepared a preliminary draft of a new regulation on political activity, Regulation No. 8. He noted that staff does not expect the Board to vote on the regulation today because more input is required from various groups.

The regulation is intended to provide guidance on Charter Section 10-107(4), concerning the types of behavior an official or employee can undertake as political expression, but the draft does not address Section 10-107(3). According to Mr. Cooke, the Law Department told staff that the new regulation appears to supersede the existing 1952 Solicitor's Opinion and a prior Board opinion regarding boards and commissions on who is covered by the political activity restrictions. Therefore, it will be necessary to revise the draft regulation on this topic.

As examples, Mr. Cooke explained that the draft regulation prohibits political activity when an employee is "on duty" in his or her City job and defines permissible political expression "off the job." It provides examples of permissible activity, such as writing letters to the editor.

The Board discussed an extensive plan for outreach to “stakeholders” who would be affected by a regulation on political activity. The Board agreed, by acclamation, to delegate to the Executive Director preparation of a distribution list and a letter to interested individuals.

VIII. Ethics Training Plans for 2010 and 2011

Ms. Massar explained that one of the Board’s major responsibilities is to provide ethics training, and since 2007, Board staff has conducted more than 70 in-person ethics classes for hundreds of City employees, officials, and board and commission members. Training sessions have also been conducted through the Personnel Department.

She discussed proposed plans for ethics training in 2010 and 2011 to implement the Code requirements and the provisions of Regulation No. 7, Annual and Routine Ethics Training, which became effective on November 25, 2009.

Regulation No. 7 clarified the three types of training: “**Initial training**” is required of ALL City officers and employees, regardless of position, duties, or responsibilities. Certain specific officials are required to attend “**Annual training** based on staff position.” And the third type of training is “**Routine training**” and is required on a recurring basis for all other officers and employees after receiving “initial training.” The specific interval for “routine training” is determined by the Board by Resolution, as provided in Regulation No. 7.

It is important to note that Regulation No. 7 also authorizes the use of online training programs that are developed by Board staff.

Training Plans

Ms. Massar noted that staff has been working steadily on implementation of online ethics training, but that our progress was delayed in 2010 by our reduced staffing level. She said that staff considers development of online training to be a priority, and that, with the assistance of the Division of Technology, staff plans to test and complete the first online training module in the next few months.

The Board currently has a total of seven staff members, which is fewer than our complement of nine staff members on July 1, 2009. Recognizing our limited staff and that we will also begin campaign finance training in the fall and lobbying training sessions in early 2011, Ms. Massar recommended that the Board concentrate its scarce resources in 2010 on ethics training for new employees and that we:

- Provide 2010 **initial** in-person training during October through December for any **new** cabinet members, department heads, their designated staff members, and board and commission members. Further, new employees who were hired in 2010 by City Departments be permitted to satisfy their **initial** ethics training requirement by attending in-person training in 2010 and 2011.
- Require any returning elected officials, cabinet members, department heads, their designated staff members, and board and commission members who have already attended

in-person ethics training in 2007 through 2009, to take **annual** training, either in-person or online (when available), in 2011 that will satisfy both the 2010 and 2011 annual training obligation.

- For the purpose of providing **routine** ethics training to those employees who are not required to attend annual training, Ms. Massar said that staff recommends that the departments in City government be divided into three groups, and that, beginning in 2012, **refresher routine ethics training should be required on a three-year interval for each group**. She noted that staff expects to conduct refresher training as an online module.

Ms. Massar asked the Board to approve the draft training resolution to establish the intervals for routine ethics training.

Vice Chair Atkinson said that, if necessary, the Board should be able to modify the training interval in the draft resolution. He therefore suggested that the resolution be amended to include a provision that the Board “may determine by a subsequent Board Resolution” to change the routine training interval. On a motion by Damone Jones, seconded by Sister Mary Scullion, the Board unanimously approved the resolution as amended. The resolution as approved is attached to the minutes. (See attachment #1)

IX. New Business

There was no new business to discuss.

X. Questions/Comments

Ellen Kaplan from the Committee of Seventy urged the Board to include in its Campaign Finance training and information recent law including SEC rules that have an impact on Philadelphia campaigns. She also urged the Board to deal with the issue of volunteer labor as applied to candidates and campaigns.

Mr. Meyer said that campaigns can ask for advice if we have jurisdiction, but the Board does not have jurisdiction over SEC rules.

Mr. Creamer said that the Board does not interpret SEC rules just like we don't give advice on IRS laws.

Chair Glazer said that the Board can't give safe harbor on those laws.

Mr. Meyer noted that Regulation No. 4 limits our advice to officers and employees.

Mr. Creamer added that Regulation No. 4 covers candidates.

Mr. Cooke said that the Board has the ability to explain the Campaign Finance law. The Board can provide guidance on volunteer labor as part of Regulation No. 1 that is consistent with State law.

Ellen Kaplan asked about the timing of Regulation No. 8.

Chair Glazer responded that it will be available as soon as possible.

Bob Warner from the Daily News asked if it was fair to characterize Regulation No. 8 as a staff recommendation. He also asked if the Law Department is cautioning on who it applies to and does the Board decides who it applies to.

Mr. Creamer said that the document was drafted to address what you can and cannot do.

Mr. Cooke said that the Law Department informally advised that as drafted Regulation No. 8 would supersede previous interpretations of who 10-107(4) applies to. Staff recommends that the Board decide who it applies to.

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.