

Philadelphia Board of Ethics
Meeting Minutes
May 19, 2010
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

Nolan Atkinson, Esq.
Richard Glazer, Esq., Chair
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 April 21, 2010.

III. Executive Director's Report

A. Enforcement

1) Non-filer Update

Mr. Creamer reported that the following four PACs were sent letters, advising them that they failed to file required electronic campaign finance reports with the Ethics Board. Because all four PACs filed within the extended deadline indicated in the letters, we are not recommending any enforcement action against them.

Steamfitters Local Union 420

Sent letter on March 3, 2010

Filed following reports by deadline of April 2, 2010:

2009 cycles 1, 2, 4, and 5

Local 19 Sheet Metal Workers Union

Sent letter on March 3, 2010

Filed following reports by deadline of April 2, 2010:

2009 cycles 1, 3, 4, and 5

Cozen O'Connor State and Local PAC

Sent letter on March 3, 2010

Filed following reports by deadline of April 2, 2010:

2009 cycles 1 and 5

CWA Local 13000

Sent letter on March 3, 2010

Filed following reports by deadline of April 2, 2010:

2009 cycles 2, 4, and 5

B. Litigation Update

1) Ethics Board v. Hon. Vivian Miller

Mr. Creamer said he was pleased to report that the Ethics Board has entered into a settlement agreement with the Honorable Vivian Miller, the former Clerk of Quarter Sessions. In the Agreement, Ms. Miller admits that she used the 51st Ward Committee PAC in addition to her candidate committee to make expenditures in the 2007 primary general elections to get out the vote for the Democratic ticket. Ms. Miller was on the Democratic ticket as the party's candidate for Clerk of Quarter Sessions. Ms. Miller admits that her use of the 51st Ward Committee in 2007 did not comply with the single committee rule in section 20-1003 of the City's campaign finance law. In exchange for this admission, the Ethics Board has agreed to waive all monetary fines. We will also withdraw the Board's enforcement Petition, which was filed on January 19th of this year.

Mr. Creamer noted that this is the Board's 17th Settlement Agreement.

2) McCaffery v. Creamer, et. al.

Mr. Creamer said that there was nothing new to report on the appeal filed by Mr. McCaffery from Judge Glazer's dismissal of his defamation suit against him and the Board. The appeal was transferred from the Superior Court to Commonwealth Court on the Board's motion, over Mr. McCaffery's objection. The Board is waiting for the Commonwealth Court to issue a scheduling order.

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

Mr. Creamer said that there was nothing new to report in Cozen O'Connor's appeal from the

order dismissing its suit against the Board challenging the Board's Advisory Opinion issued to Cozen's former client, the Friends of Bob Brady. The appeal is pending before the Pennsylvania Supreme Court and has been fully briefed. The Board is waiting for the Court to schedule oral argument.

Mr. Creamer noted that City Council Bill 100122 would codify the Board's interpretation of the law that holds that the contribution limits continue to apply after an election for the purpose of retiring campaign debt. Bill 100122 will be discussed later in the meeting.

C. Legislative Update

Mr. Creamer reported that since the April Board meeting, staff has been heavily involved with review and analysis of pending legislation that included 12 bills, all of which would make significant changes to the laws administered by the Board. The 12 bills were the subject of a hearing before Council's Committee of the Whole on Wednesday, May 12th, and Board member Nolan Atkinson delivered testimony on behalf of the Board. A copy of the testimony is included in your Board books.

- Two of the bills would establish a new lobbying registration and reporting law that the Ethics Board would administer and enforce
- Five of the bills would amend the campaign finance law
- Four of the bills would amend the Ethics Code
- Finally, one bill would supersede and replace the restrictions on partisan political activities that are currently in §10-107 of the Home Rule Charter, if voters approve the ballot question contained in Bill 100121 on November 2nd.

Mr. Creamer explained that because the Ethics Board has jurisdiction over the laws that the bills would amend and would have jurisdiction over a new lobbying law, the Board has a significant interest in all of the bills. Prior to the hearing, there were several discussions between Council staff and Ethics Board staff. These discussions, including several meetings, which enabled Ethics Board staff to provide comment on the proposals to Council staff in a constructive manner. The Board and staff appreciate having had the opportunity to provide input on the legislation and note that Council welcomed the Board's comments.

Mr. Creamer noted that the bills will be discussed in more detail later in the meeting.

D. Financial Disclosure

Mr. Creamer reported that thousands of City officials and employees and the members of City boards and commissions are required to file one or more of three annual financial disclosure forms: the 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). The deadline for filing financial disclosure reports was May 3rd this year, and our staff has been immersed in tasks relating to the financial disclosure filing deadline. To give the Board an idea of the amount of staff time spent on assisting filers, he explained that staff fielded more than 350 calls and emails in the past few weeks. Staff explained the filing obligation and the contents of the three reports, and helped literally hundreds of filers with problems using the online financial disclosure system.

He also reported that staff responded to calls from current City employees, former employees, officials, and board and commission members. In late April, the Board issued thousands of email reminders to filers about their filing obligation and provided information on how to file. As we reported last month, staff had already issued a first set of reminder emails in early April. Our staff members Tina Formica and Hortencia Vasquez responded to the calls and the Board couldn't accomplish this project without Tina and Hortencia. Several staff members also worked at the Records Department on April 30th and May 3rd to assist with the processing of the thousands of financial disclosure reports.

Mr. Creamer thanked the Records Department which accepts and processes the financial disclosure forms and also responds to phone calls and emails from filers.

He also thanked Ms. Massar on a great job managing this effort.

E. New Art in the Office

Mr. Creamer thanked local artist Nancy Bea Miller whose beautiful paintings were on display in our office from last November until the end of April. Visitors to our office thoroughly enjoyed her work. Ms. Miller was instrumental in arranging for the new exhibit which was installed on April 30th, and which is completely different in many ways.

Mr. Creamer explained that this exhibit includes the fascinating work of three award-winning local artists, Sarah Barr, Stephanie Kirk, and Pam McLean-Parker. They've exhibited their work throughout the Philadelphia area. Many of the pieces on display are based on photographic techniques and their subjects range from cathedrals to breakfast and every-day life with children. He encouraged the guests to find the pieces all around our office and to read about the artists and their work in the binder they've prepared. This new show adds a completely different dimension to our office, and we'd like you to take time to appreciate the artists' work as much as the Board does.

IV. General Counsel's Report

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

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

a. Nonpublic Advice of Counsel GC-2010-505 (May 6, 2010) A City employee asked for advice concerning his outside interests as a part-time employee for a regional newspaper, an occasional free-lance writer for an out-of-state non-profit, and an uncompensated member of the board of directors of a local communications nonprofit. This was a bit complicated, because of involving three different outside entities. Based on the facts that were provided, the requestor was advised that Charter Section 10-102 prohibits his financial interest in advertisements placed by the City in the newspaper, and accordingly, he may not be compensated by the newspaper out of revenue received under such advertising contracts. Also, if the City should consider either the regional newspaper or the out-of-state nonprofit for placement of an advertisement or any other

official action that might involve the requestor's official work for the City and on which he may have a personal financial interest (such as being paid by the outside entity), both the City Code and the State Ethics Act would require that he publicly disclose the financial interest and disqualify himself from taking action for the City in the matter.

If the City should take action (including recommendations and preliminary work, such as designing an RFP) regarding the local communications nonprofit, and involving the requestor's work for the City, it is likely that the State Ethics Commission would interpret the State Ethics Act to require him to abstain fully from any participation in any such City official action and publicly disclose the financial interest, so long as he is on the board of directors of that nonprofit. The conflict of interest provision of the City Code does not consider a nonprofit to be a "business" for this purpose.

Otherwise the Advice provided the standard "conflict of interest" advice. The public version of Nonpublic Advice of Counsel No. GC-2010-505 is available on the Board's website.

b. Nonpublic Advice of Counsel GC-2010-506 (May 6, 2010). A member of a City board or commission ("the requestor's board") requested nonpublic advice on whether she would have a prohibited conflict of interest or the appearance of a conflict resulting from the fact that she volunteers as a member of a committee for a nonprofit organization that is working with the City on a contractual matter, where staff of a City department affiliated with the requestor's board and of other City offices will have a role in negotiating the contract and in related City actions. This was another rather standard "conflict of interest" advisory. The requestor is unpaid by the outside nonprofit, so has no personal conflict. There is no conflict through the nonprofit under the Code, because nonprofits are not covered. And, even though nonprofits are covered under the State Act, the Act would not apply to this person, because her City body is only advisory. On the issue of appearances, we recommended that the requestor not take any actions that would cause it to appear that she is attempting to influence the outcome of the leasing process. For example, by voluntarily disqualifying herself from related actions on her City board, even though not required.

The public version of Nonpublic Advice of Counsel No. GC-2010-506 is available on the Board's website.

3. Informal e-mail guidance. Mr. Meyer reported that through Friday, May 14, 2010, there were four of these since the April report (not included are resolution of several standard financial disclosure questions).

a. Received an inquiry from a citizen about whether a City Councilperson may be recalled "on the grounds of self-interest." Advised that we provide advice only to City officers and employees, but informed the person of the mechanism for reporting any evidence that a City official may be in violation of the ethics laws. Noted that the recall provision of the Charter has been ruled to be unconstitutional.

b. Received an inquiry from a City employee as to whether he would be eligible to serve as majority or minority inspector at a polling place at the primary election. Advised that there may be an issue as to Charter Section 10-107(4) but that we have never needed to address that issue, because the State Election Code provides that city employees may not be election officers.

c. Received an inquiry from a member of a City advisory board generally concerning receipt of gift tickets to events. Gave standard gift advice, including that issues concerning the Executive Order on gifts should be referred to the Chief Integrity Officer. Given the likely value of such gifts and the responsibilities of the advisory board, likely no issues. Advised that for advice on which requestor may rely, and on specific facts, she should request an Advice of Counsel.

d. Received an inquiry from a City employee who owns a property that is used as a polling place, asking about rules concerning his ability to be present on election day. Advised that this is a matter of interpreting the State Election Code, not within the jurisdiction of the Ethics Board, and referred the employee to the City Commissioners.

V. Review of Legislation Concerning Campaign Finance, Political Activity, and Lobbying

Mr. Meyer said that as Shane noted at last month's meeting, twelve bills were originally scheduled for hearing: six 2010 ethics bills, along with 6 older bills introduced originally by Councilman Rizzo in 2007 and reintroduced in 2008. However, as of the April Board meeting, it was our understanding that the only ethics bills scheduled for a public hearing were the six 2010 bills. Therefore, staff did not advise the Board on the Rizzo bills, and there was no discussion of a Board position on those bills, at the April 21 Board meeting.

Mr. Meyer stated that when Board member Nolan Atkinson testified on behalf of the Board at the May 12 hearing, he noted his resulting inability to express the Board's position on the Rizzo bills. Mr. Meyer quoted from his testimony:

“At our last Board meeting on April 21st, the Board discussed the pending legislation that is the subject of today's hearing. Unfortunately, the information we had at that time was that the 2008 bills on ethics and campaign finance reform were not on the agenda for this hearing. Accordingly, the Board did not discuss the 2008 bills, and I cannot express the Board's position on these bills today.”

Nevertheless, Mr. Meyer said that Mr. Atkinson did express the following:

“However, as a general concept, the Board believes that public confidence in government can be enhanced when the rules are strengthened to decrease the potential for government decision-making to be influenced by gifts, family relationships, or personal financial interests. It has been the practice of the Board to support additional controls in these areas that would encourage the impartial administration of government services. Again, I regret that I am not in position to offer more detailed testimony on the 2008 bills today. That said, I believe these topics -- gifts, nepotism, and outside employment -- do deserve the attention of all of us and warrant further consideration. The Board is willing to participate in a continued discussion on how to best improve and enhance the rules in these areas.”

Mr. Meyer concluded his summary. He believed the summaries of the 2010 bills will begin with Maya and Michael.

Bill 100122 (Post-candidacy contributions)

Mr. Cooke reported that the Board testified in support of amended Bill 100122 which imposed contribution limits on post-candidacy contributions.

He explained that as originally introduced, Bill 100122 required former candidates to form transition and inauguration committees to raise and spend money for those purposes. However, the bill had a significant loophole: an elected candidate could raise unlimited amounts in his or her candidate committee and transfer the money to transition/inauguration committees.

Mr. Cooke noted that amended Bill 100122 would regulate transition and inauguration fundraising by requiring elected candidates to raise money for these activities through their single candidate committees and by applying contribution limits. Bill 100122 also provides explicit language supporting the Board's interpretation that the contribution limits apply to contributions solicited or made after an election for the purpose of retiring campaign debt.

Mr. Cooke said that the Board testified that it appreciated the opportunity to work with Council on this bill in order to come up with practical solutions that improved an important extension of the City's campaign finance law.

Bill 100124 (Litigation Funds)

Mr. Cooke reported that the Board testified in support of amended Bill 100124 which allows candidates to establish litigation funds and to raise money for those funds subject to contribution limits.

Mr. Cooke also reported that the Board testified that it thinks it would be preferable if litigation funds could only be established when a candidate has a specific, imminent legal challenge. However, even absent such a provision, the Board supports Bill 100124

Bill 100126 (Sample ballots)

Mr. Cooke reported that the Board testified that it did not oppose Bill 100126 which has two purposes:

- 1) To establish what amount of an expenditure by a political committee can be counted towards the contribution limits for a candidate when the political committee distributes a sample ballot featuring the candidate.
- 2) To provide an exception to the single committee rule so that candidate/ward leaders can use their ward committees to make expenditures for sample ballot distribution; and

Mr. Cooke explained that the Board testified that the provisions related to the first goal are consistent with how the Board has interpreted and enforced the City's campaign finance law.

Mr. Cooke said that as to the second goal, the Board testified that although it has concerns about the fairness of an exception to the single committee rule that benefits some, but not all

candidates, it recognizes that the benefit those candidates will receive from the exception may not be significant, given the advantage they already enjoy as members of party leadership.

Mr. Cooke said that therefore, the Board did not oppose Bill 100126

Bill 100125 (Penalties)

Ms. Nayak reported that the penalties bill changed a great deal since the last Board meeting. This was an instance where we made a great deal of progress in staff to staff meetings with Council staff to improve the bill. The original bill was a fixed schedule of penalties that listed a set fine that had to be imposed for a given type of violation. Board staff worked with Council staff and helped put together a sliding scale of penalties, much like what Board staff had contemplated drafting by regulation.

Ms. Nayak explained that the end result is a bill that sets a \$1,000 base fine for most violations that the Board (or a court) can decrease as low as \$250 or increase as high as \$2,000 depending on whether the Board finds that specific mitigating or aggravating circumstances are present.

Bill 100127 (Lobbying)

Ms. Massar explained that last month staff advised the Board about the proposed lobbying legislation – Bill #100127 – that created a completely new law requiring registration and reporting by lobbyists and principals in Philadelphia. We noted that the Mayor’s Advisory Task Force on Ethics and Campaign Finance Reform had identified the absence of lobbying regulation in Philadelphia as a “significant gap” and called for Board of Ethics oversight of registration and reporting. Last month, the Board concurred that it was vital that Philadelphia have a lobbying law, but stressed that there were major issues with Bill 100127.

Ms. Massar said that since staff reported to the Board last month, there have been significant amendments to the Bill, and we’ll discuss those in a few minutes.

She said that as staff noted last month, the largest issue with the lobbying bill concerns funding and this has not changed. There is no appropriation for the costs of implementing a City-wide lobbying registration and reporting program. If Bill 100127 is enacted, the Board will have multiple additional responsibilities, which include creating software for electronic filing and maintaining a lobbying disclosure database for the public. The amended bill now includes a \$500 annual registration fee for lobbyists and principals, but even if these fees are made available for spending by the Board, it is doubtful that they would cover the annual costs to implement Bill 100127.

Sister Mary, speaking on behalf of tax payers, thought the cost to implement lobbying software was too high.

Ms. Massar reported that in the Board’s testimony on May 12th, staff estimated that the cost of the lobbying electronic filing software and database alone could be \$500,000 or more. Council members questioned this amount. Our estimate was based on the cost of recently-designed software applications for similarly complex laws. For example, it cost approximately \$500,000 to design and implement the City’s campaign finance electronic filing software, and we were

advised that the total cost of the Pennsylvania Department of State's lobbying disclosure system was about \$1 million. The registration and quarterly reporting requirements in Bill 100127 are based on that same State law.

Ms. Massar said that Council members suggested that this expense could be covered by an outside funding source, possibly a grant. Even if such a funding source is found to design the software, there are on-going and unanticipated costs in future years to fix, maintain and improve this kind of software. Ms. Massar gave an example from the Board's very recent experience in the 2010 financial disclosure filing season. She explained that as many may know from their own attempts to use the online financial disclosure system, the software has many glitches and problems. The application "freezes" in the middle of a page and users are unable to make necessary changes to their information. But, there are currently no funds in our budget or the Records Department budget to fix these problems. The result is frustrated users and underutilized software. The Board doesn't want to be in that same situation and unable to fix a new lobbying application.

She also said that another Council member expressed concern about the high cost of an electronic filing system for only 50 lobbyists. The reality is that design and implementation of a lobbying software application and database will cost the same amount, regardless of the number of lobbyists and principals who use it. The cost to create and implement our campaign finance electronic filing was the same whether 50 or 150 candidates and committees use it each year. Plus, Ms. Massar said that she believes there will be more than 50 people or entities who will come within the definition of either "lobbyist" or "principal" under the new law.

Ms. Massar explained that lobbying registration and reporting cannot be implemented by the Board without new funding for additional staff. She said that we estimate that it will cost \$250,000 per year to implement and maintain a City-wide lobbying program. Additional staff must be hired to conduct training for filers, provide advice, respond as "help desk" to electronic filing issues, investigate potential violations and conduct enforcement, and continually update lobbying information on the Board's website.

Ms. Massar said that as Mr. Atkinson said in the Board's May 12th testimony, it makes no sense to create a lobbying requirement and then make it impossible for the Board of Ethics to implement and enforce the new law.

Ms. Massar also said that another issue tied to funding is that the Bill calls for registration to begin July 1, 2011, in a little over a year. This is an almost impossible timetable. The effective date of the new law must recognize that funding should be provided well in advance of the start date for lobbying registration and reporting. Ms. Massar said that it will probably take six months to design and test electronic filing software, to hire and train staff, and to train potential users. Therefore, to be ready for a July 1, 2011 start date, we would need to have funding available on January 1, 2011 in FY11. The Board's FY11 budget contains no such funding.

Ms. Massar was pleased to report that, by working with Council staff, amendments have been made to Bill 100127 since the Board's April meeting to address several other major issues that were mentioned last month.

The amendments have:

- Added areas of lobbying, including zoning matters, that are particularly relevant to municipal government.
- Eliminated the separate and distinct enforcement process for lobbying and have granted authority to the Board to enforce the lobbying law within the Board's existing enforcement authority.
- Replaced the very expensive mandatory audit requirement to be conducted by an outside CPA firm with the Board's authority to review and examine registrations and quarterly expense reports for compliance with the law and to conduct enforcement activity where necessary.
- Authorized the Board to report on lobbying as part of its Annual Report and to make annual lists of lobbyists and principals and a biannual directory of lobbyists available on its website, rather than as paper reports.

Massar said that staff believes that these amendments have made the lobbying bill a much better program and "fit" for Philadelphia.

Bill 100128 (Political activity)

Mr. Cooke stated that from a technical point of view, there are two significant areas of concern in Bill 100128.

The first is section 4(c)(iv) (pg. 3), which reads:

Unless such officer or employee has completed and filed with the Board of Ethics the required registration statement, which shall include the officer or employee's job title, and such other information as the Board of Ethics may require by regulation.

Mr. Cooke said that the Board would have to decide exactly how much information would have to be disclosed and in what format.

He also said that the question of format is significant. Whenever possible, the Board has strongly urged mandatory electronic filing. However, that would cost money and none has been appropriated.

Mr. Cooke explained that paper filing would have less start up costs, but would consume more staff time through handling and filing of submissions.

He said that the second significant issue is the requirement that the Board issue regulations that identify, by job title, which employees are in the further restricted category.

Mr. Cooke also explained that the Bill sets forth a list of the type of job duties that would cause an employee to be placed in the further restricted category. For example...

Whether a specific employee's duties falls within one of the listed criteria will often be a very hard call. For example, who has authority to impose a fee or a fine?

Mr. Cooke said that in addition, the process of promulgating regulations that match specific employees to the duties will be very time consuming.

He also said that a related issue is that the bill, if passed, would become effective upon the approval of the companion ballot measure, which would be early November.

Mr. Cooke explained that it will be challenging to have a registration filing system and related regulations in place by then. It will be impossible to have sorted all of the City's employees and promulgated the relevant regulations by that then.

VI. Memorandum Concerning Procedures for Administrative Enforcement Proceedings

Ms. Nayak explained that an administrative adjudication is an enforcement proceeding in which the Board would act as a judge and the Executive Director acts as the prosecutor. The Board has not yet had an administrative adjudication because all enforcement matters have been pursued in court and have settled.

Mr. Atkinson asked why the Board has not had an administrative adjudication.

Mr. Creamer responded that under the Charter there is a dual enforcement track. Enforcement matters can either go to court or the Board can create a process through administrative adjudication. This process permits a single agency to separate functions and create walls of division.

Mr. Creamer explained that until one year ago the Board was involved in all investigations, therefore the Board was tainted. Last year the Board began to separate investigations. It has taken a tremendous amount of time to build a procedure and figure out procedural details.

Mr. Creamer noted that people want an opportunity to address the Board, which was a major factor in creating this process.

Ms. Nayak reported that in February, the Board amended Regulation 2 on enforcement proceedings with an eye toward conducting administrative adjudications. Paragraph 2.11(g) of Regulation 2, called "Additional Procedures," provides: The Board may approve additional procedures for the conduct and management of administrative enforcement proceedings. Any additional procedures approved by the Board will be provided to the parties in advance of a hearing."

Ms. Nayak said that this memo fills in nuts and bolts procedures that are not specified in Regulation No. 2 and addresses fairly technical details. The memo reminds me of the standing procedures memo that the judge I clerked for had – the purpose is to answer questions we anticipate will be common (such as - how long can my opening statement be? how do I get a

transcript?) and the purpose is also to specify how the parties should do certain things (such as how to format filings and where to send the filings).

Ms. Nayak explained that the respondents will receive the memo, and Board staff will also rely on it. By specifying such technical details in advance, we hope the administrative adjudication process will run more smoothly for everyone involved.

Mr. Glazer said that this has been carefully thought out and fairly straight forward. He called on the Board for a motion to approve the Memorandum. The motion was approved with a 3-0 vote.

VII. New Business

There was no new business to discuss.

VIII. 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.