

**Philadelphia Board of Ethics**  
**Meeting Minutes**  
July 20, 2011  
Board of Ethics  
Packard Building  
1441 Sansom Street, 2<sup>nd</sup> Floor  
1:00 pm

**DRAFT**

**Present:**

Board

Richard Glazer, Esq., Chair  
Michael H. Reed, Esq., Vice Chair  
Judge Phyllis Beck (Ret.)  
Sanjuanita González, Esq.

Staff

J. Shane Creamer, Jr., Esq.  
Nedda Massar, Esq.  
Evan Meyer, Esq.  
Michael Cooke, Esq.  
Maya Nayak, Esq.  
Elizabeth Baugh  
Tina Formica

**I. Call to Order**

Chair Glazer recognized that a quorum was present and called the meeting to order at 1:15 pm.

**II. Approval of Minutes**

By a 4-0 vote, the Board approved the meeting minutes, with corrections, for the public meeting that was held on June 15, 2011.

By a 4-0 vote, the Board approved the meeting minutes, as printed and distributed, for the public meeting that was held on July 7, 2011.

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

#### **A. Settlement Agreements**

Mr. Creamer announced two settlement agreements with City candidates for failure to electronically file a 2011 cycle 2 (pre-primary) campaign finance report with the Ethics Board.

The candidates were Lamont Thomas (City Council 9th District) and Humberto Perez (City Council at-large). Both candidates admitted to violating the City's campaign finance law by failing to file a 2011 cycle 2 report. They also agreed to pay a civil penalty for the failure to file.

Mr. Creamer noted that the Board approved the Settlement Agreement for Mr. Thomas in an Executive Session via email yesterday. The Board approved the Settlement Agreement for Mr. Perez in an Executive Session prior to the start of the public session meeting, which Executive Session was started via email on Tuesday.

#### **B. Litigation Update**

##### **i. Philadelphia Bar Association v. City of Philadelphia, et al.**

Mr. Creamer reported that on June 30<sup>th</sup>, the Philadelphia Bar Association filed a Complaint for declaratory judgment and a Motion for a temporary restraining order against the City and the Ethics Board. In its filings, the Bar Association sought special and preliminary injunctions to prevent the City's lobbying ordinance from taking effect until the merits of the Bar's Complaint for declaratory judgment and a permanent injunction was determined. The Bar Association asserted that the lobbying law may be unconstitutional if it is deemed to apply to lawyers engaged in the practice of law, because only the Pennsylvania Supreme Court can regulate the practice of law.

Mr. Creamer explained that the Bar Association withdrew its Complaint and Motion without prejudice on July 8<sup>th</sup>, in response to the Board's Resolution approved in a special meeting on July 7<sup>th</sup>. The Board's Resolution states that the Board will not exercise its authority to enforce the lobbying law until 30 days after Regulation No. 9 becomes effective, and that it would exercise its authority to enforce the lobbying law only with respect to acts and omissions that occur after 30 days after Regulation No. 9 becomes effective. Under the circumstances, no one is required to comply with the law until 30 days after we have clarified who must comply with the law and what activities are covered.

##### **ii. Lodge No. 5 of the Fraternal Order of Police, et al. v. City of Philadelphia, et al.**

Mr. Creamer reported that on July 15<sup>th</sup>, the Law Department filed an Answer to the FOP's federal lawsuit. The suit raises challenges to the contribution ban in section 10-107 of the Charter and Ethics Board Regulation No. 8 under the US and Pennsylvania Constitutions.

Plaintiffs seek declaratory relief and even punitive damages against the Mayor and Mr. Creamer. The case has been assigned to Judge Juan R. Sánchez.

Mr. Creamer explained that this challenge appears to be directed at funding the FOP's PAC, rather than the ability of individual officers to make political contributions. In fact, the individual Plaintiffs allege that they want to make voluntary contributions to COPPAC (see paragraphs 37 & 38), but do not allege that they want to make any other political contributions, although they could if the challenge is successful. Last year, Council passed a law that would permit members of the FOP to sign-up for an automatic payroll deduction for contributions to the FOP's PAC. However, according to the Complaint, the Solicitor refuses to approve the implementation of the payroll deduction, because it would violate the Charter and Reg. 8. The payroll deduction law is discussed in paragraphs 30-35 & 37 in the Complaint.

### **iii. Cozen O'Connor v. Philadelphia Board of Ethics**

Mr. Creamer reported that on July 14<sup>th</sup>, Renewed Preliminary Objections to Cozen O'Connor's Complaint were filed in the Court of Common Pleas on behalf of the Board by our attorneys at the Law Department and Dechert. The case was remanded to the Court of Common Pleas after appeals to the Commonwealth Court and Pennsylvania Supreme Court. A case management conference is scheduled before Judge Gary DiVito on July 29<sup>th</sup>.

Mr. Creamer said that in the Board's renewed Preliminary Objections, we argue that Cozen's request for a declaratory judgment on the question of whether or not the City's contribution limits apply to post-election efforts to retire campaign debt was rendered moot by the 2010 amendment to the City's campaign finance law and by subsequently amended Regulation No. 1. Last year, while the case was on appeal, City Council amended the law with an express application of the limits to post-election efforts to retire campaign debt.

Mr. Creamer explained that previously, in 2007, the Board issued an Advisory Opinion to Cozen's former client, the Friends of Bob Brady, in which the Board stated that it interpreted Section 20-1002 "to prohibit contributions that exceed the limits of Section 20-1002 that are received after an election to retire campaign debt incurred for use in advocating or influencing the election of the candidate." Dissatisfied with the Ethics Board Advisory Opinion, Cozen – as an alleged party-in-interest – filed a Complaint in this Court on or about March 3, 2008, seeking a declaratory judgment that post-election funds contributed to Congressman Brady's failed campaign are not "contributions" as such term is found at Philadelphia Code §20-1001(14).

Mr. Creamer also explained that the Board's Renewed Preliminary Objections also argue that there is no case or controversy because advisory opinions cannot be challenged in Court and that even if the Advisory Opinion is deemed to be a "final adjudication" by the Board, that Cozen's Court challenge should be dismissed because it wasn't filed within 30 days of the Opinion, as required by law.

Mr. Creamer said that Cozen filed its Complaint against the Board just over three years ago, making it the longest running challenge to the City's contribution limits since the law took

effect seven years ago. The firm has argued alternatively that the contribution limit rule impairs the Friends of Bob Brady's ability to raise money to retire the firm's debt or that the firm should be permitted to make a \$448,000 in-kind contribution to Congressman Brady's mayoral campaign by forgiving the debt at one time, notwithstanding the \$10,000 contribution limit. Essentially, the firm argues that the City's rules should not apply to its fees or to its former client. Beyond the City's law, the firm, which is a professional corporation, has not explained how it could forgive the debt without violating the ban on corporate contributions under section 3253 of the State Election Code.

The Friends of Bob Brady has never paid Cozen any money, but it has raised just over \$135,000 and spent approximately \$90,000 since 2008.

**iv. McCaffery v. Creamer, et al.**

Mr. Creamer reported that on July 15<sup>th</sup>, Preliminary Objections to Mr. McCaffery's Complaint were filed in the Court of Common Pleas on behalf of the Board by our attorneys at the Law Department and Dechert. The case was remanded to the Court of Common Pleas after an appeal to the Commonwealth Court.

Mr. Creamer said that in the Board's Preliminary Objections, we argue that Mr. McCaffery's Complaint should be dismissed because the Board and Mr. Creamer have immunity under several doctrines (high public official immunity; quasi-judicial or prosecutorial immunity; and immunity under the Pennsylvania political subdivision tort claims act). Notwithstanding the immunity defenses, we also argue that the Complaint should be dismissed because there is insufficient specificity in the pleading. Finally, we argue that the Complaint should be dismissed because each count is legally insufficient.

Mr. Creamer said that the case is scheduled for a status conference before a civil case manager who reports to Judge Jacqueline Allen on August 1<sup>st</sup> at 9:00 am. The case was originally assigned to Judge Allen in December 2009, and Judge Allen, who is a Team Leader, assigned the case to Judge Gary Glazer.

**C. Compliance Update: Candidate Non-filers – 24 hour reports**

Mr. Creamer reported that in late June, a review of the Ethics Board database and consultation with the City Commissioners office revealed that numerous City candidates should have, but did not, file required 24 hour reports with the Ethics Board.

Mr. Creamer explained that under the State Election Code (25 P.S. 3248), candidates must file a report disclosing contributions of \$500 or more within 24 hours of their receipt between the close of the pre-primary (cycle 2) and pre-general (cycle 5) reporting periods and the primary and general elections (hence the name "24 hour report"). The purpose of the requirement is to require candidates to disclose all contributions over \$500 before the election. The contributions must also be reported in the post-election reports (cycles 3 and 6, respectively).

Mr. Creamer said that accordingly, on June 30<sup>th</sup>, enforcement staff sent an email to the campaigns of all candidates that participated in the 2011 May primary election informing them of the obligation to file 24 hour reports. The email stated that as long as candidate committees filed outstanding 24 hour reports by July 8th, the Board would not seek enforcement or civil penalties for the initial failure to file.

Mr. Creamer reported that since June 30<sup>th</sup>, the following candidate committees filed 24 hour reports:

**Joe for Philly**  
**Friends of Stephanie Singer**  
**Friends of Andy Toy**  
**Frank Rizzo '07 Committee**

Mr. Creamer said that enforcement staff will take appropriate action regarding any candidate committees that have not filed required 24 hour reports with the Ethics Board.

#### **D. Lobbying Update**

Mr. Creamer said that the purpose of the resolution adopted by the Board at its special meeting on July 7<sup>th</sup> was to explain that additional time is necessary to complete the complex process of drafting and adopting new Regulation No. 9 on lobbying. The resolution therefore informed the public that there would be no enforcement of the registration or expense reporting requirements of the lobbying law until at least 30 days after Regulation No. 9 on Lobbying becomes effective. The resolution also reiterated the substance of the Board's earlier resolution, adopted on June 15<sup>th</sup>, that it is not a violation of the lobbying law to fail to register as a lobbyist, lobbying firm or principal if the mandatory lobbying electronic filing system, the Philadelphia Lobbying Information System, is not yet available.

Mr. Creamer explained that staff continues to work on a daily basis with the Division of Technology and its vendor on the lobbying electronic filing software so that it will be ready when Regulation 9 becomes effective. Our staff responds immediately to each request from DOT to review or test different parts of the software, but the project is behind schedule.

Mr. Creamer also explained that in cooperation with DOT, we have begun "smoke testing" of the registration software for lobbyists, firms and principals. This is the first step in the testing process and is intended to identify major software issues. The next testing step will be "user acceptance testing" which is more detailed and rigorous. We are currently waiting for several technical problems to be resolved by DOT and the vendor so that we can resume testing.

Mr. Creamer said that after the registration software is thoroughly tested and accepted, staff will move on to the expense report software. The Board's goal is to have the registration and expense report software available before the effective date of Regulation No. 9 so that we can begin training, as mandated by the lobbying law.

Mr. Creamer also said that all of this points to the fact that the lobbying project is a huge undertaking for our small staff. In addition to Regulation No. 9 and the software project, it will be necessary to do all of the following: design materials and instructions for the software; design and schedule lobbying training; train the rest of our staff to provide “help desk” support; and design internal office processes to collect registration fees and to receive and verify the electronic reports. Staff is trying to conduct all of these tasks at the same time that they are meeting with stakeholders and redrafting Regulation No. 9.

#### **E. Budget**

Mr. Creamer stated that the FY12 budget was signed into law on June 24<sup>th</sup>. In spite of the Board’s significantly increased workload, with responsibility for the completely new lobbying program, no additional funds were appropriated for lobbying staff, and the Board’s total appropriation remains unchanged from FY11, at \$810,000. The Board can report, however, that the internal transfer of funds to Class 100, as requested by the Board, was made. The Board will therefore be able to hire into the vacant information specialist position and will report to the Board in August on plans for filling this position.

Because administration of the City’s new lobbying law was added to the Board’s already significant statutory responsibilities, Mr. Creamer explained that the Board requested that \$130,000 in funds be added to its FY12 appropriation. These funds would have permitted us to hire staff to support the lobbying program and other activities. Because the Board did not get the additional funding, it is extremely concerned about the ability of its eight-member staff to effectively administer the new lobbying program on top of our existing workload and are therefore considering other ways to obtain additional funds.

#### **F. Ethics Training**

Mr. Creamer reported that staff have several tasks to complete before they resume in-person ethics training sessions in the fall here at the Board. Staff must first revise and update the ethics training Powerpoint to include new information based on recently-adopted Board Regulation No. 8 on political activity. Then they must identify, contact and schedule training sessions for those City employees and officials who have not had initial ethics training.

Mr. Creamer said that he is pleased to report that there has been progress with our online ethics training project. As you may recall, there was a technical problem with receiving confirmation emails to verify that a user has completed the online training module. With DOT’s assistance, staff believes that there is now a solution to this problem, but they must still test the software and design new content before we can launch online training.

Mr. Creamer said that staff will resume the online training project once they’ve finished the lobbying project.

## **G. Art in the Office**

Mr. Creamer said that the Board has the pleasure to announce a new art exhibit in our office, entitled "Paper and Paint," which will be on display until the end of August. This new exhibit consists of 51 items and features works by five local artists: Barbara Rosin, Christine Stoughton, Susan Stefanski, Linda Dubin Garfield and Sandi Neiman Lovitz. Their work includes pieces in mixed media, oil on canvas, paper and glass, and acrylic on plexiglass. We have biographies and contact information for all of the artists and invite you to enjoy their work all through our office.

Mr. Creamer thanked the artists whose works appeared in our last exhibit, "Alchemy and Intent." They are Linda Dubin Garfield, Bobbie Diamond Adams, M. Pia De Girolamo, Rachel Citrino and Tom Hlas.

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

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

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

Advice of Counsel GC-2011-505 (June 17, 2011) Kevin Dow, Chief Operating Officer and Deputy Commerce Director of the Commerce Department, requested a public advisory opinion as to the effect of the ethics laws on his proposed service as an unpaid board member of a nonprofit organization, United Way of Southeastern Pennsylvania, while also working for the Commerce Department. Mr. Dow was advised that the ethics laws do not prohibit his service with the United Way, but there are certain limitations on his activities of which he should be aware, such as:

(1) The State Ethics Act's conflict of interest provision likely applies to him and to the financial interests of a nonprofit on whose board he serves. As a result, Mr. Dow should not, in his position with the City, take any official action which causes United Way to receive a "private pecuniary benefit." Furthermore, should his official duties intersect with the financial interests of United Way, he should disclose this interest and disqualify himself from acting for the City, in the manner required by Code Section 20-608(1)(c);

(2) Under Code Section 20-602, he may not represent others, including United Way, as "agent or attorney" in transactions involving the city; and

(3) Both the Mayor's financial disclosure form and the Commonwealth's financial disclosure form require that Mr. Dow disclose his directorship with United Way, when he files those forms next April.

Advice of Counsel GC-2011-505 should be available on our website soon.

3. Informal e-mail guidance. Mr. Meyer reported that through Thursday, July 14, 2011, there were two of these since the June report. *Note that in every such email we state the following: "This informal general guidance is not a ruling on your particular situation and does not provide you protection from an enforcement action." We add that if the requestor would like a definitive ruling that applies the Public Integrity Laws to his/her specific situation and that protects against a possible enforcement action, then they should ask us for an advisory opinion, providing, in writing, full and specific facts on which the opinion is to rely, including their name and title, specific question, and whether they are requesting a public or nonpublic advisory.*

a. Received an inquiry from a City employee whose work might relate to a company of which a relative of the employee is an officer. The employee stated, "I'm not quite sure if I need to fill out form Section 20-608(c) of the City Ethics Code" and requested assistance with this "form." As there is a letter, but no particular form, mandated in Code Section 20-608, nor has the Board of Ethics developed a form, it was presumed that the employee had been informed about the sample disclosure letter that can be obtained from the City's IntegrityWorks website. We pointed out that the sample letter can be a good way to comply with Section 20-608 and offered a few suggestions about facts the employee might insert into such a letter, and explained the process of public disclosure of a conflict and disqualification from taking City action in the matter.

b. Received an inquiry from a departmental HR manager regarding receipt by employees of free passes to an event. Considering the likely value of such gifts, the only issue would be the Mayor's Executive Order on gifts, which is not within the jurisdiction of the Board of Ethics. Referred the HR manager to the Chief Integrity Officer for interpretation of the Executive Order.

4. Board Procedure for Administrative Adjudications. Mr. Meyer reported that under the Code and Charter, and under our Regulation No. 2, the Board has the option of adjudicating enforcement matters "in-house" through an administrative adjudication. Maya Nayak, with the help of Tina Formica, has proposed and devised a numbering system for administrative adjudication matters. The goal was to have a unique number for each matter that is distinct from our advice numbering system and that also provides useful information. Time since initiation and subject matter seemed to be particularly useful items to know at a glance.

When Enforcement Staff serves a Notice of Enforcement upon a respondent and also serves the General Counsel staff, the General Counsel staff will at that point assign a number to the matter. The numbering system consists of a 4-digit number for the month and year that the adjudication is initiated by the service of a Notice, a 2-letter code for subject matter, and a sequential number beginning with 1 and continuing indefinitely, as follows:

Numbering system:

|                              |   |                               |   |                               |   |   |
|------------------------------|---|-------------------------------|---|-------------------------------|---|---|
| year initiated<br>(2 digits) | - | month initiated<br>(2 digits) | - | subject matter<br>(2 letters) | - | number in sequence of matters ever initiated<br>(as many digits as necessary) |
|------------------------------|---|-------------------------------|---|-------------------------------|---|---|

The Subject Matter Codes are as follows:

CF – Code Ch. 20-1000 (campaign finance)

ET – Code Ch. 20-600 (ethics code)

LB – Code Ch. 20-1200 (lobbying)

NC – Code Ch. 17-1400 (contract reform disclosures)

CH – Home Rule Charter (political activity, interest in City contract, gratuities, etc.)

MU – Multiple combinations of any of the above laws

For example, if in April of 2013 Enforcement Staff serves the first Notice they have served that year, but it's our 12<sup>th</sup> Notice ever initiated, and they allege the campaign finance law has been violated, then the number that General Counsel staff will assign would be Administrative Adjudication Matter # 1304CF12. Once assigned, the matter number should be used by everyone involved in all communications, filings, and rulings.

5. Update on Amendment of Civil Service Regulation 29. Board of Ethics Regulation 8 on political activity became effective in March and superseded Civil Service Regulation 29, which had previously been the main reference for the meaning of the Charter's political activity restrictions. Since March the City's Office of Human Resources and the Civil Service Commission have been considering how to amend Civil Service Regulation 29. Human Resources and the Civil Service Commission have allowed Board staff to be very involved in the discussions of how to amend Regulation 29. It appears that Regulation 29 will likely be amended to simply inform civil service employees that they are subject to the political activity restrictions as set forth in Charter Section 10-107 and as interpreted by the Board of Ethics, and that they must comply with Board of Ethics Regulation 8. The amended Regulation 29 will probably note that Board determinations of a violation and penalties cannot be appealed to the Civil Service Commission, but that appointing authorities can impose employment discipline for violations and such discipline can be appealed to the Civil Service Commission. Regulation 29 will likely be amended in the next month or two.

Chair Glazer emphasized the deepening concern he has about staff being strangled in work. It appears that neither the Board nor the Committee of Seventy have been persuasive enough to provide adequate funding needed for the Board's survival.

The Board has been involved in four lawsuits in which staff has been more than an active party. The Board only has two staff members engaged in enforcement and neither does it full-time. Enforcement is only effective if it is timely undertaken and therefore there is a legitimate expectation that the Board is proceeding expeditiously. The lack of adequate funding for additional staff makes this objective unattainable at this time.

There have been changes in Ordinances and Regulations which means that staff has to update the training module. The Board is working on developing on-line ethics training, but that is an additional responsibility and a burden for staff to get going.

The Chair is concerned that the Board won't have the ability to carry out the responsibilities that the Administration and City Council have given to the Board.

## **VI. Discussion of Draft Hearing Report for Amendments to Board Regulation No. 1, Campaign Finance**

Chair Glazer reported that on May 11, 2011 the Board approved the proposed amendments to Regulation No. 1 for public comment. Without waiting for a request, the Board chose to hold a public hearing on the amendments and scheduled a hearing for June 15, 2011. The Law Department reviewed the proposed amendments to Regulation No. 1 and on May 16, 2011 approved them. The public hearing on amendments to Regulation No. 1 was held on June 15, 2011.

Chair Glazer said it is important to understand that the Board will be approving all amendments to Regulation No. 1 today.

Chair Glazer asked Ms. Nayak to walk the Board through the Hearing Report.

Ms. Nayak said that staff did not propose modifications to amendments filed with the Records Department. The draft Hearing Report notes that 1.4(a)(ii) was the subject of testimony by three witnesses at the hearing.

Ms. Nayak said that the Hearing Report notes that paragraph 1.4(a)(ii) is a reasonable and appropriate implementation of the political committee pass-through prohibition in the City's campaign finance law, which provides at Code Section 20-1002(2) that "no person, other than individuals who are covered under §20-1002(1), and no political committee shall make total contributions per calendar year, including contributions made to or through one or more political committees, of more than ten thousand dollars (\$10,000) to a candidate for City elective office." The phrase "including contributions made to or through one or more political committees" was recently added in an April 2011 amendment to the campaign finance law in order to close the pass-through loophole for political committees and persons. The statutory language "through one or more political committees" is a broad and general description of prohibited behavior that requires the Board to exercise its discretion and rely on its expertise in

crafting a regulation that achieves the goal of the ordinance, which is to prohibit pass-through contributions.

Chair Glazer called for a motion to approve the Hearing Report. A motion was made to approve the proposed Hearing Report with delegation to the Chair to approve non-substantive amendments after consultation with the Law Department. The motion was unanimously approved with a 4-0 vote.

Ms. Nayak noted that there will be a delay in the Law Department approval due to vacation schedules.

Mr. Creamer noted that the Regulation may not be effective until mid-August.

## **VII. Appointment of Hearing Officer**

Ms. Nayak provided the Board with background information regarding the role of an administrative adjudication hearing officer. Regulation 2 governs investigations and enforcement proceedings, including administrative enforcement. Reg. 2 provides that the Board can appoint a Hearing Officer to resolve pre-hearing matters and to conduct hearings.

Ms. Nayak identified some reasons it would be helpful to appoint a Hearing Officer. Under the current procedures, General Counsel Staff is not authorized to do much more than grant an initial extension. Therefore, it would be helpful for General Counsel staff to work with someone who has more authority. Having a Hearing Officer will give us flexibility to deal with circumstances that are not specifically provided for in the Board's procedures.

Ms. Nayak explained what a hearing officer's authority would include. Examples of pre-hearing issues that a hearing officer would be authorized to resolve include, but are not limited to:

- extension requests under circumstances not already provided for
- complaints about a party's failure to follow procedures
- issues related to subpoenas, witnesses, evidence or exhibits
- issues related to pre-hearing disclosures and submissions

A hearing officer would have the authority to resolve and rule on issues that arise at all stages of the administrative adjudication process. Ms. Nayak noted that Staff understands that a Hearing Officer may resolve an issue by directing General Counsel Staff to implement the Hearing Officer's decisions.

Chair Glazer volunteered to serve as the Hearing Officer.

A motion was made to delegate the responsibility of being a Hearing Officer to Chair Glazer until a successor is appointed. The motion passed with a 4-0 vote.

## **VIII. New Business**

There was no new business to discuss.

## **IX. Questions/Comments**

Sophie Bryan from Councilman Green's office made a comment, in response to the Hearing Report summary, regarding the Councilman's view on intent as it relates to contributions.

The public session of the Board's meeting was adjourned so that the Board could meet in executive session to discuss enforcement matters and non-public opinions.