

Philadelphia Board of Ethics
Meeting Minutes
March 16, 2011
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

William H. Brown, III, Esq.
Richard Glazer, Esq., Chair
Pastor Damone Jones

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

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 amended, printed and distributed, for the public meeting that was held on February 23, 2011.

III. Executive Director's Report

A. Compliance Update

Mr. Creamer said that the deadline to submit nominating petitions with the City Commissioners was on March 8th. There are 89 candidates for City elective office who are subject the campaign finance law. Of those 89 candidates, only 42 have complied with the new requirement to provide the Board with identifying and contact information within three days of forming a candidate

committee or becoming a candidate. At some point, we may have to consider enforcement action against recalcitrant candidates.

B. Litigation Update

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

Mr. Creamer reported that on February 23, 2011, the Pennsylvania Supreme Court reversed the Commonwealth Court's decision affirming the trial court's dismissal of Cozen's Complaint and ruled that the firm has standing to bring a declaratory judgment action against the Ethics Board and the City to determine whether the firm may forgive, at one time and *in toto*, the outstanding debt of \$448,469.09 owed to the firm by the Friends of Bob Brady without violating the \$10,000 contribution limit in section 20-1002 of the City's campaign finance law. The Court limited its decision to the narrow question of standing and declined to address the mootness issue we raised at oral argument and by a subsequent motion. The Court remanded the case to the Commonwealth Court for further proceedings.

Mr. Creamer explained 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 rules should not apply to its fees or to its former client.

Mr. Creamer reported that regrettably, our *pro bono* counsel Gregory P. Miller and Gregg W. Mackuse at Drinker Biddle are unable to continue their representation of the Board in this matter now that the Supreme Court has issued its opinion. However, he was pleased to report that Cheryl Krause and Karen Daly from Dechert have agreed to represent the Board on a *pro bono* basis going forward. We again wish to thank Gregory P. Miller and Gregg W. Mackuse at Drinker Biddle for their excellent representation in this matter.

2) McCaffery v. Creamer, et. al.

Mr. Creamer said that as he reported last month, a three-judge panel of the Commonwealth Court heard oral argument on February 7th in the case of Daniel McCaffrey v. Shane Creamer and the Philadelphia Board of Ethics. The Board is currently waiting for the Commonwealth Court to issue its decision on Mr. McCaffery's appeal from the trial court's dismissal of his Complaint.

Mr. Creamer thanked Dechert and specifically Cheryl Krause, Karen Daly, and Albert Suh for their continued excellent work and time spent representing us *pro bono* in this significant matter. Thanks also to Kelly Diffily of the City Solicitor's office who has served as co-counsel.

C. Campaign Finance

Training: Mr. Creamer reported that the deadline for filing nomination papers has just passed and there are 89 candidates for City office. Staff is taking many calls for assistance from

candidates, their treasurers, and the public. Our staff continues to focus on campaign finance training to provide complete information on the requirements of the City's campaign finance law for the 2011 primary election. The training sessions are especially important this year because they include information on the recent significant changes to the law.

Mr. Creamer reported that to date, staff held 6 sessions that were attended by 75 people. There are three more sessions scheduled for March 23rd, April 6th and April 13th. This full schedule gives ample opportunity for everyone to attend.

Campaign Finance Website Search: Mr. Creamer said that as he mentioned last month staff is working with the Department of Records and their vendor to improve the campaign finance search functions so that campaign finance information is more easily accessible to the public. Staff has almost finished with testing two "basic searches." A member of the public will be able to do a quick search of the campaign finance database and to download the results to a spreadsheet. The two searches are:

- A search for all contributions made by a particular contributor in a given year, and
- A search for all contributions to a particular candidate or committee in a given year.

Mr. Creamer said that Chief Integrity Officer Joan Markman has provided important support on this project.

Mr. Creamer said that as he explained last month, this project sounds simple, but it is taking a considerable amount of staff time to "get it right." The two "basic searches" are expected to be available to the public within two weeks.

D. Budget

Mr. Creamer reported that the Board has been advised that our proposed operating budget for FY12 will continue at \$810,000. This appropriation includes \$681,100 for personnel; \$110,400 for services; and \$18,500 for materials, supplies, and equipment. The \$810,000 is almost 20% less than the \$1 million operating budget that was guaranteed by the Charter for the Board's first two fiscal years.

Mr. Creamer said that last year, the Controller concluded that a lack of resources could imperil the Board's mission, particularly in the area of enforcement, in his Auditor's Report for fiscal years 2009 and 2008. That conclusion was reached without considering the Board's new mandate to implement, administer and enforce the new lobbying law, which was passed after the audit period.

Mr. Creamer explained that the reduction in the Board's budget has had its greatest impact on our staffing level. The Controller found that the Board has yet to reach full staffing, even under a startup scenario. In light of the increased demands on our staff with the new Lobbying law, we requested that the \$681,100 appropriation for personnel be increased by \$18,900 to \$700,000. This will permit us to fill the vacant Information Specialist position for the year. The Board asked that the \$18,900 be moved from our other budget lines and therefore did not ask for additional money.

The change was not made. However, the Finance Department has said that we'll still be able to hire into the position if we preserve the additional \$18,900 by not spending that amount from the rest of our budget. This is not a solution to our problem. If we face unexpected costs in FY12, we may not be able to preserve the \$18,900 cushion.

Mr. Creamer announced that the Board's budget hearing has been scheduled for April 5th at 11:30. The Board will report on our many accomplishments during the past year. The need for additional funding to hire staff to support the demands of the new Lobbying Law will also be explained. The Board's existing staff is stretched to breaking with their current workload, and the Board doesn't want to shortchange other responsibilities in order to implement the new Lobbying law.

Further, in our testimony we will again acknowledge the crucial role played by the Dechert and Drinker Biddle firms in providing *pro bono* representation of the Board in litigation during the past year. It is important to note that at the \$810,000 funding level, especially if we are faced with unanticipated enforcement or litigation matters, that it might become necessary for the Board to take action in Court during FY11, as authorized in Charter Section 2-300(4)(e), to ensure that sufficient funds are appropriated so that the Board can perform its statutory responsibilities.

E. Financial Disclosure Preparation

It will soon be that time of year when many City officials and employees and the members of City boards and commissions are required to file one or more of three annual financial disclosure forms. The filing deadline, which is usually May 1st, is May 2nd this year because May 1st is on Sunday. The three forms are the City Form (required by the City Ethics Code), the Mayor's Form (required by an executive order), and the State Form (required by the State Ethics Act). Several of our staff members have begun to focus on the many tasks necessary to implement the financial disclosure process.

As you may remember, there is an online application for preparing the financial disclosure statements. In the past, a filer still had to print, sign and deliver the reports to the Records Department. The Records Department is working with its vendors on an enhancement to the system that will accept an electronic signature, so that filing can be completed without paper forms. We do not know if we can obtain approval in time to make this feature available this year. We will assist the Records Department with testing and other financial disclosure tasks.

As we did last year, we are working with the HR Department to review the list of Civil Service titles so that we have a list of City employees who are potential State Form filers. Next, because they have specialized knowledge of the civil service exempt employees in their departments, we will ask departmental HR managers to review the civil service exempt titles to determine which of these employees should file the State Form. We will also conduct a series of meetings with the departmental HR managers to provide background and training in the financial disclosure process, including the new electronic signature option.

We have also begun the annual process to update our list of all City Board and Commission members because they are required to file one or more of the disclosure forms. We must

compile information about boards and commissions from many sources, including the Mayor's Office and emails to the executive directors of various boards and commissions.

We are also preparing to send reminder email notices in April to financial disclosure filers.

F. Lobbying Update

By far the biggest new project facing the Board right now is implementation and administration of the City's completely new Lobbying Law. Our goal is to have a proposed regulation for Board review next month. We believe that the regulation should address many complex issues including who is covered in the definition of the term "lobbyist" and what is meant by the term "administrative action."

As you know, registration under the new Lobbying Law begins July 1st. Our small staff is struggling to get everything ready while we continue with our existing responsibilities. The law mandates two key technology elements: electronic registration and expense reporting for lobbyists and their principals and public access to lobbying information via an online database. We are therefore working with the City's Division of Technology to develop a completely new software application to create an electronic filing system and the searchable online database. We expect to meet the July 1st start date for registration, but we acknowledge that time is growing short and that staff will be spending an inordinate amount of time between now and July 1st on the design and testing of the software and other lobbying-related tasks.

We have also begun to develop a plan for outreach to businesses and individuals who may be affected by the new lobbying law and are therefore planning for lobbying training sessions in late spring.

All of this work will occur during the same few months that our 8 staff members are involved with the campaign finance law and the primary election, with the financial disclosure process for approximately 6,000 City officials and employees, and with ethics training for new employees and board and commission members.

G. 2010 Annual Report

We have prepared a draft of the Board's 2010 Annual Report for review by the Board and plan to release the report to the Mayor and Council prior to our April 5th budget hearing. We ask that Board members review the draft in the next week and contact staff if they have any changes.

H. Recent Legislation

We reported last month that two bills were introduced in City Council that would amend Sections 20-606 and 20-1000 of the Philadelphia Code.

Bill 110072 amends Section 20-606 of the Code to permit the Board to enforce potential violations of Charter Sections 10-102, 10-105, and 10-107 by administrative adjudications, as well as through the courts.

Bill 110073 amends two sections of the Campaign Finance law. First, the amendment proposed to the contribution limits section of the Code (Section 20-1002) clarifies that the \$10,600 contribution limit applicable to a political committee includes contributions made to or through other political committees. The second amendment deletes the requirement to publish a “plain language” summary of the Campaign Finance Law twice a year in three newspapers. Instead, the amendment directs the Board to place the “plain language” summary on its website, which the Board already does. The result of this change would save approximately \$10,000 per year.

The two bills will be on the March 22nd agenda of City Council’s Committee of the Whole.

I. Outreach

Chief Integrity Officer Joan Markman and I spoke at the March 9th meeting of the Greater Philadelphia Chamber of Commerce’s Local Legislation Committee. My topics were the City’s campaign finance and lobbying laws. By far, the greatest interest was in the lobbying law. There were excellent questions concerning application of the law to various types of business groups, and they asked me to come back to speak to the Committee again once we draft lobbying regulations. After the meeting, David Glancey, from the University of Pennsylvania’s Office of Government and Community Affairs, invited me to speak about the lobbying law at the University Government Relations Officers meeting on April 15th at the Philadelphia Community College.

IV. General Counsel’s Report

1. Formal Opinions. There was one Formal Opinion since the February report.

a. Nonpublic Formal Opinion No. 2011-001 (February 23, 2011). The treasurer of a political committee requested a nonpublic advisory providing guidance as to the committee’s expenditure of excess pre-candidacy contributions, prior to the subject individual becoming a candidate for City elective office.

Based on the facts that were provided, the requestor was advised as follows:

(1) Generally, we do not address past conduct, so the Opinion was addressed to future proposed conduct only.

(2) The Board of Ethics has no jurisdiction to interpret or enforce the State Election Code, and accordingly, nothing in the Opinion is official advice on application of that State law.

(3) The committee may make expenditures of excess pre-candidacy contributions in support of non-campaign activity.

(4) The committee may not “frontload” campaign expenses in a committee that is not, at the time, subject to the campaign finance limits.

(5) Under the facts provided, the committee may use excess pre-candidacy contributions to make the following expenditures prior to the subject individual becoming a candidate: overhead utilities and rent, conference fees, condolence expressions, transportation, staff salaries, and advertising that does not advocate the support of a candidate for elective office.

(6) As to maintaining documentation of expenditures, the Board of Ethics has no additional requirements beyond those in the State Election Code.

Formal Opinion No. 2011-001 should be posted on our website soon.

2. Advices of Counsel. There was one Advice of Counsel since the February report.

a. Non-Public Advice of Counsel GC-2011-502 (March 3, 2011). A City employee advised that she was considering leaving City employment and applying for a position with a particular firm that has a City contract (“the firm”) and with which the employee has contact in her City work. The employee requested a nonpublic advisory as to whether the post-employment ethics laws would restrict her in her future employment as an employee of the firm.

Based on the facts that were provided, the requestor was advised as follows:

(1) The State Ethics Act likely does not apply to the requestor. Thus, the one-year restriction on “representing” an employer before her former governmental body would not apply.

(2) 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, she is advised to contact the State Ethics Commission.

(3) 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 her City department with her involvement.

(4) Under the City Code, she may not for two years after she leaves the employ of the City acquire a financial interest in any official decision that she made while in City employ.

Advice of Counsel GC-2011-502 is available on our website.

3. Informal e-mail guidance. Through Thursday, March 10, 2011, there were six of these since the February report.

a. Received an inquiry from a member of a City board/commission concerning either being a “co-sponsor” or attending a candidate fund-raiser, stating several general questions about permissible campaign activity. Advised that fundraising is restricted under Charter subsection 10-107(3), which prohibits any City officer to “be in any manner concerned in demanding,

soliciting, collecting or receiving, any assessment, subscription or contribution, whether voluntary or involuntary, intended for any political purpose whatever." Under existing interpretations, and also under the proposed Regulation 8 (which at that point had not received its Feb. 23 hearing), mere attendance by a City officer at a fundraising event is not a violation of Section 10-107(3). Where an officer does more than merely attend, and participates in the planning of, publicity for, or management of the event, or participates in the event in a way that supports the campaign (such as being a "co-sponsor"), rather than merely as a spectator, that raises issues under Section 10-107(3). In particular, the requestor must avoid any activity that in any way participates in any appeal for funds, the sale of tickets, or the collection or receipt of political contributions.

b. Received an inquiry from a member of a City board/commission concerning the member's participation in political activities, and raising several questions regarding Formal Opinion No. 2007-006. We noted that since December 2007, when Opinion No. 2007-006 was issued, some new boards have been created, some renamed, and some further interpretation of Charter Section 10-107 has occurred. Pointed out the status of Regulation 8 (see above summary), and advised that if the Regulation is adopted as presented at the hearing, members of boards and commissions such as those listed in Section F of Opinion 2007-006 would still be permitted to engage in political activity, but not while "on duty" or while using City resources or in City-owned buildings.

c. Received an inquiry from a City employee regarding restrictions on objecting to a zoning matter in the employee's neighborhood. Gave standard advice on avoiding a conflict of interest by not taking official action in such a matter. Also advised on the "representation" provision of Code Section 20-602. There is an exception for representing oneself, such as by signing a petition or writing a letter to the editor. But employee must not represent others, such as by circulating petitions. And the employee should not use his/her City title in such communications.

d. Received the following inquiry from a citizen: "Is there any restriction for anonymous contributions to an individual running for office?" Advised as follows:

Any restriction would be in the State Election Code, which is not in our jurisdiction. However, Section 3254(a) and (b) of the State Election Code provides:

(a) It shall be unlawful for any person to make any contribution with funds designated or given to him for the purpose by any other person, firm or corporation. Each person making a contribution shall do so only in his own name.

(b) It shall be unlawful for any candidate or political committee to disburse money received from an anonymous source. All such money shall be handed over to the State Treasurer within twenty (20) days of its receipt.

The restrictions on you, as a citizen, in the City Code Campaign Finance Chapter, over which we do have jurisdiction, generally involve only limitations on the dollar amount that may be contributed.

e. Received an inquiry from a City employee regarding an outside firm that provides professional development classes and is offering a discount to City employees. Requestor asked

whether acceptance of the discount would be permissible. Summarized the provisions of the State Ethics Act, Charter, and Code as to gifts and suggested that requestor provide more detail in order to obtain a written Advice of Counsel. Suggested that requestor contact the Chief Integrity Officer regarding application of the Mayor's Executive Order on gifts.

f. Received an inquiry from a City employee regarding signing nominating petitions. Advised as to status of Regulation 8 and noted that employees have always been able to sign nominating petitions, but if current draft of Regulation 8 is adopted, signing petitions will be prohibited while on duty or in City Hall or in any other City-owned or leased building or office space.

V. Discussion of Draft Hearing Report for New Board Regulation No. 8, Political Activity

Mr. Cooke explained that at last month's board meeting the Board held a hearing on Regulation No. 8, Political Activity. A draft of Regulation No. 8 was posted with the Records Department a month earlier.

He said that today staff will review for the Board a draft hearing report, which includes information received from public testimony. Staff will ask the Board to approve the hearing report with possible changes.

Mr. Cooke explained that if the hearing report is approved it will be sent to the Law Department for approval and then posted with the Records Department. The Regulation will then be effective 10 days later.

Mr. Cooke noted that the hearing report includes several attachments including the transcript and the version that was posted with the Records Department in January.

Mr. Meyer raised the issue of attaching drafts that could confuse the public. The Board decided that a cover memo will be included to explain all of the attachments.

Mr. Cooke walked the Board through the changes to the Regulation due to testimony that was received.

A motion was made to approve the hearing report, which was unanimously approved with a 3-0 vote.

Chair Glazer asked staff to provide a copy of the hearing report to anyone that testified at the hearing.

VI. New Business

Chair Glazer noted that at the last Board meeting he raised the issue of the Board's vacant Vice-Chair position. The Administration has nominated two new Board members, so he suggested waiting until they are confirmed.

Ms. Nayak reported that the Civil Service Commission contacted Staff to talk about Regulation 8. Ms. Nayak and Mr. Cooke met with the Commission and Personnel Director Al D'Attilio on March 15th. The Law Department and Civil Service Commission agree that Reg. 8 supersedes Civil Service Reg. 29. It seems the Civil Service Commission plans to amend Reg. 29 and have it conform to the substance of Reg. 8 and would let Staff review a draft of their regulation before it is final. Further discussion is needed about an amended Reg. 29 and also about the Board's enforcement process, so everyone agreed to a follow-up meeting in two weeks.

Ms. Nayak informed the Board that the Commissioners asked Staff to provide political activity training to a few key groups: HR managers, integrity officers, and the Managing Director's executive team. Separately, City Council staff has said that they would like training on Regulation 8. Staff will be developing political activity training over the next two weeks that can be used to train all these groups.

Chair Glazer suggested that staff work on a possible political activity manual for the next election cycle as part of the Board's outreach.

Mr. Cooke responded that the goal in drafting Regulation 8 was to include as much guidance as possible in the regulation itself -- for example by providing numerous specific examples -- so that a separate manual would not be necessary. Mr. Cooke also noted that he has spoken with Joan Markman about issuing an email alert on Regulation 8.

Chair Glazer informed the Board that he will not be able to attend the Board meeting scheduled for April 20, 2011 and asked the Board to reschedule that meeting for April 27, 2011.

Mr. Creamer noted that May 18, 2011 meeting is the day after the primary election and suggested that the Board reschedule the May meeting for May 11, 2011.

A motion was made to reschedule the April meeting to April 27, 2011 and the May meeting to May 11, 2011. The motion passed unanimously with a 3-0 vote.

VII. Questions/Comments

A staff member of the Committee of Seventy asked about the Executive Director's Compliance Update: How will the Board determine which candidate to make an example out of?

Mr. Creamer responded that we would try to narrow the group down so there would be fewer non-filers. Then we would treat all non-filers the same.

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.