

Philadelphia Board of Ethics
Meeting Minutes
May 13, 2009
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
1:00 pm

Present:

Board

Richard Glazer, Esq., Chair
Rich Negrin, Esq., Vice Chair
Phoebe Haddon, Esq.
Kenya Mann, Esq.

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 15, 2009.

III. Messages from the Chair

Mr. Glazer announced that the Board has been very busy lately with enforcement actions, which resulted in three Executive Session meetings. Two were held over the weekend via conference call, on May 10th and 11th, and one session just before this meeting.

Mr. Glazer acknowledged Ed Kung, who was in the audience. Mr. Kung is Mayor Nutter's designee for the vacancy on the Board. He announced that Mr. Kung's confirmation hearing will be held on Thursday, April 16, 2009 at 9 am before the Committee of the Whole. Mr. Glazer encouraged the Board to attend and thanked Mr. Kung for attending the meeting.

IV. Executive Director's Report

A. Compliance Update

1. PA Good Government Fund: Nonfiler Issue

Mr. Creamer reported that in February, the Board discovered that a PAC called the Pennsylvania Good Government Fund had made contributions to a candidate for City office. The Board became aware of this after reviewing campaign finance reports filed with the Ethics Board and the Pennsylvania Secretary of State. Because the PAC's annual report disclosed contributions to a City candidate, it was required to electronically file its report with the Board. However, the PAC had not filed campaign finance reports with the Board.

He said that on April 17, 2009, the Board sent the PAC a letter informing them of their obligation to file campaign finance reports with the Ethics Board. In the letter, a compliance deadline was set for May 1, 2009.

Mr. Creamer also said that on April 27, the PAC electronically filed a 2008 cycle 7 and a 2009 cycle 1 with the Board. Three days later, on April 30th, the PAC electronically filed its 2009 cycle 2 report with the Board.

Finally, he said that because the PAC complied with the compliance deadline set in our April 17 letter, the Board will not seek a civil penalty.

B. Enforcement Update

1. Philadelphia Board of Ethics v. McCaffery for District Attorney, et al.

Mr. Creamer announced that on Tuesday, the Board filed an enforcement petition against the McCaffery for District Attorney Campaign for violations of the City's campaign finance law. The Petition has been assigned to Common Pleas Court Judge Idee Fox.

Mr. Creamer reported that the Board's Petition alleges that the McCaffery Campaign violated the City's campaign finance law, first by accepting more than the \$100,000 aggregate PAC contribution limit in 2008, and then by misstating the amount of money the McCaffery Campaign actually received from Mr. McCaffery's law firm's PAC, called the Pennsylvania Good Government Fund ("the Fund"), to hide the excess PAC contribution from the public.

He also reported that candidates for District Attorney cannot accept more than \$100,000 in the aggregate from PACs in non-election years pursuant to the contribution limits of the City's campaign finance law. Since 2008 was a non-election year for the office of District Attorney, the \$100,000 aggregate PAC contribution limit applied to candidates who are currently seeking that office, including Mr. McCaffery.

Mr. Creamer stated that by the end of December 2008, the McCaffery Campaign had accepted \$92,600 in the aggregate from various PACs. On December 30, 2009, Mr. McCaffery's law firm's PAC, called the Pennsylvania Good Government Fund ("the Fund"), wrote out a check in

the amount of \$10,500 to the McCaffery Campaign. Because Mr. McCaffery was the treasurer of the Fund, he signed the check himself. When the Fund's \$10,500 contribution is added to the \$92,600 that the McCaffery Campaign already received from other PACs in 2008, the Campaign exceeded the \$100,000 aggregate PAC contribution limit for 2008 by \$3,100, in violation of the City's campaign finance law.

Realizing that acceptance of the Fund's \$10,500 contribution check meant that the McCaffery Campaign would exceed the \$100,000 aggregate PAC contribution limit, the Petition alleges that the McCaffery Campaign misstated the Fund's \$10,500 contribution check as only a \$7,400 contribution in its 2008 cycle 7 annual campaign finance report filed electronically with the Ethics Board on February 2, 2009, and the balance of the check as a \$3,100 contribution on January 29, 2009.

Mr. Creamer stated that the misreporting of the Fund's \$10,500 contribution check as two lesser amounts on different dates in different calendar years as alleged in the Board's Petition constitute material misstatements, and are violations of the City's campaign finance law.

He also stated that the Campaign's misreporting of the \$10,500 contribution is also inconsistent with the Fund's reports, which correctly disclosed the \$10,500 contribution on December 30, 2008 and did not disclose a \$3,100 contribution to the Campaign on January 29th. As treasurer of the Fund at the time, Mr. McCaffery personally certified the accuracy of the Fund's disclosures.

Without citing any legal authority, the McCaffery Campaign appears to be standing-by its claim that political donors and candidates can agree to "allocate" portions of a single contribution check to different calendar years for the purpose of circumventing the City's contribution limits. By their logic, both the City's contribution limits and the entire campaign finance disclosure system would be rendered meaningless.

Mr. Creamer said that the Ethics Board is seeking a monetary penalty of \$6,000 and an order from the Court compelling the McCaffery Campaign Committee to return an excess contribution and to file amended campaign finance reports.

2. Settlement Agreement with the Williams Campaign

Mr. Creamer reported that on Tuesday, the Board announced that it entered into a Settlement Agreement with the Committee to Elect Seth Williams, the Committee's treasurer, Vincent DeFino and District Attorney candidate Seth Williams ("the Williams Campaign") that addresses reporting errors in the Committee's and Mr. Williams' 2008 cycle 7 annual campaign finance reports that were electronically filed with the Ethics Board.

He said that as detailed in the Settlement Agreement, ten expenditures in Mr. Williams' report were mistakenly reported twice and one was reported three times. Each of the duplicate entries was below \$100. The duplicate entries were caused by the Williams Campaign's inadequate documentation of certain expenditures by Mr. Williams in 2008. However, the Campaign adopted better record keeping practices in late 2008.

Mr. Creamer also said that in addition to the duplicate expenditures, the Williams Committee misreported expenditures to Sonita Williams (Mr. Williams' wife) that were described with the

word “reimbursement” in the Committee’s campaign report, but should have been reported as: “reimbursement to Seth and Sonita Williams for expenditures incurred by Seth Williams.

Mr. Creamer announced that the Williams Campaign has agreed to pay a total civil fine in the amount of \$3,750 for the reporting errors, including \$250 for each of the eleven duplicate entries and \$1,000 for the misreported expenditures to Sonita Williams. The Williams Campaign has also agreed to file amended campaign finance reports to correct the reporting errors.

Mr. Creamer reported that in exchange for the Williams Campaign’s agreement to pay a civil fine of \$3,750 and to file amended campaign finance reports, the Ethics Board has agreed to waive any further penalties or fines relating to their 2008 cycle 7 reports.

C. Litigation Update

1. Cozen O’Connor v. Philadelphia Board of Ethics

Mr. Creamer reported that on April 28th, the Board’s outside, *pro bono* attorneys at Drinker, Biddle & Reath filed an Answer to Petition for Allowance of Appeal on the Board’s behalf, in response to the Petition for Allowance of Appeal filed by Cozen, O’Connor, from the Commonwealth Court decision that dismissed their appeal from Judge DiVito’s Order dismissing their Complaint filed against the Ethics Board.

D. Financial Disclosure

Mr. Creamer stated that staff activity since the April Board meeting has concentrated heavily on the May 1st financial disclosure reporting deadline. With a major filing project of this sort, many on the Board’s staff are involved. In addition to General Counsel Meyer and Associate General Counsel Nayak, who provide advice on filing requirements, we especially wish to thank Tina Formica and Hortencia Vasquez who took unending phone calls about how and where to file, how to use the online financial disclosure system, and how to create bar-coded forms for filing. Brandon West and Danielle Cheatam also took phone calls and worked at the Records Department for several days and evenings to provide additional support for the filing process.

He acknowledged and thanked Commissioner Joan Decker and the Records Department for the essential role they played in this process. All financial disclosure statements, the City, State, and Mayor’s forms, are required to be filed by City officials and employees with the Records Department. Not only did the Records Department staff receive and process thousands of reports, but they also provided support and training for people who used the online electronic reporting software.

Mr. Creamer also stated that the Records Department coordinated the Filing Support Center that operated at the Marriott Residence Inn from April 20th through the May 1st filing deadline. At the Filing Center, technical staff helped people use the filing software to prepare their financial disclosure statements. Support Center staff also helped filers solve problems over the telephone. He was pleased to note that the number of City employees and officials who used the online system to prepare their financial disclosure reports increased significantly from about 22% last year to 55% this year.

Mr. Creamer reported that according to Records Department information, to date, more than 4,300 financial disclosure reports have been filed. This includes the City, State, and Mayor's forms. Because the Board has jurisdiction over filing of the City Statement of Financial Interests, staff has confirmed that all officeholders and City officials who were required to file the City Form have in fact filed. In the months to come, the Board will review compliance by members of the many City boards and commissions with the City Form filing requirements.

Mr. Creamer said that as the May 1st filing deadline approached, the Board continued their extensive program of email reminders to City employees, officials, and board and commission members. The Board also mailed filing reminders to board and commission members who did not have email addresses. The reminders not only stressed the May 1st filing deadline, but also explained that all three disclosure forms could be prepared using the Online Financial Disclosure System.

He also said that the Board will soon begin to examine this year's filing cycle so that it can make any necessary improvements. Part of this process will include review of the many questions we received, and the Board will use this information to expand the Frequently Asked Questions on our website.

E. Ethics Training

Mr. Creamer reported that staff is planning a new schedule of ethics training sessions for new City employees and board and commission members.

F. Campaign Finance Education

Mr. Creamer announced that an alert was issued to all District Attorney and Controller candidates concerning the State law requirement to file 24-hour reports of all "late contributions." A late contribution is a contribution or pledge of \$500 or more that is received after the Second Friday Pre-Primary (Cycle 2) Report has been completed (May 4, 2009). The 24-hour reporting requirement therefore applies to any contribution or pledge of \$500 or more that is received on or after May 5th.

He also announced that candidates were advised of the Electronic Filing Requirement for late contributions. Section 20-1006 of the Philadelphia Code requires that at the same time the 24-Hour Contribution Report is filed by a Philadelphia candidate with the City Commissioners, the same contribution information must be filed electronically with the Board of Ethics by filing electronically with the City Records Department.

G. Office Update

Mr. Creamer asked the audience to take note of the wonderful art work that has transformed our office since the last Board meeting. Ed Bronstein, a local artist and architect, has loaned many pieces of his work for display in our office. His collection is entitled "Home and Away" because it depicts many sites at home in Philadelphia, as well as sites away in Vermont, the New Jersey shore, Spain, and Ireland.

Mr. Creamer stated that Mr. Bronstein, an architect here in Philadelphia, started painting in 1989 and closed his architectural practice in 2001 to devote his time to painting. The Board is the beneficiaries of his exceptional talent. As an architect, he is well-known for his restaurant designs, and his paintings have been shown in Philadelphia, New Jersey, Delaware, Vermont, and in Dublin, Ireland. The Board invited the audience to take time to appreciate Mr. Bronstein's work, and thanked him for making our office so visually exciting.

H. Doubling Provision

Mr. Creamer announced that he will issue an Advisory Alert later today invoking the Philadelphia Code §20-1002(6) for the 2009 District Attorney race. It was triggered by Dan McCaffrey who donated over \$250,000 to his campaign. Therefore, individuals may not contribute more than \$5,200 and Political Committees may not contribute more than \$21,200 to District Attorney candidates.

V. General Counsel's Report

1. Advices of Counsel. Mr. Meyer reported that there were three new Advices of Counsel issued since the last report:

a. Advice of Counsel No. GC-2009-502 (April 16, 2009). A former City employee requested nonpublic advice as to the effect of post-employment restrictions of the ethics laws. The requestor, an attorney, was employed by the City of Philadelphia in several capacities in multiple departments over the course of several years. The requestor sought advice as to three factual scenarios, two of which involve companies that have approached the requestor to advise them as a consultant and the third concerned whether the requestor could provide legal advice to the City. The Advice of Counsel addresses several uncommon issues: when post-employment "cooling off" periods start, in the case of multiple separation dates; what the former employee's "former governmental body" is in the case of multiple former departments; and how the rules may differ for attorneys. Otherwise, the Advice is a standard summary of the post-employment rules.

b. Advice of Counsel No. GC-2009-504 (April 17, 2009)¹. John Cluver, a member of the Historical Commission's Architectural Committee, requested public advice on whether the ethics laws allow him to present a project, in which he is involved as a member of his architectural firm, before the Historical Commission or before the Commission's Committee on Financial Hardship. We advised as follows. The Code's "representation" provision generally applies to preclude board and commission members only from representing others before their own boards. However, in the unique situation where the Historical Commission has committees that report to it, we advised: "The committees of the Historical Commission are so closely connected to the Commission that the representations you propose present a significant risk of perceived or actual advantage due to a City official's position, which is the harm addressed by Code Section 20-602(2)." Accordingly, Mr. Cluver is prohibited from representing any other person before the

¹ Advices are numbered in the order by which the original is issued to the requestor. Public versions may be issued later and in different order, for a variety of reasons.

Historical Commission or any of its advisory committees. Any conflict of interest is avoided by the disqualification and disclosure that Mr. Cluver has already filed.

c. Advice of Counsel No. GC-2009-505 (May 7, 2009). A member of an uncompensated advisory board who is also an officer for a local nonprofit requested advice as to the permissibility of certain actions the member might take to pursue a proposal with the City that would benefit his/her nonprofit, including advice on any appearance of impropriety. The advice is similar to that in Advice of Counsel No. GC-2009-504. Charter Section 10-102 does not apply. Code Section 20-602(2) prohibits the official from representing any other person before his/her own board/commission. There is no conflict of interest if the person is not compensated, and if there is compensation, he/she must disclose and disqualify. There is no conflict through the requestor's outside organization, since it is a nonprofit. As to appearance issues, we advised that the appearance of impropriety can be greatly diminished by the official's voluntary disclosure and disqualification.

All three Advices of Counsel are available on the Board's website.

2. Informal e-mail guidance. Mr. Meyer reported that through Friday, May 8, 2009, there were five of these since the March report, in addition to a large number of inquiries regarding financial disclosure, which were not tracked as to substance. (The summaries below include advice provided by Associate General Counsel Maya Nayak.) Note that in every such e-mail, a link was provide to Regulation No. 4 and explain that the requestor may obtain a written advisory opinion, if they wish to have a formal ruling on which they may rely.

a. Advised a local lawyer on the increased campaign limits, as adjusted on January 1, 2008. The new limits are \$2600 (individuals) or \$10,000 (organizations). See "Campaign Donation Limits FAQs" on our website. Individual contributions are not attributed to the entire firm.

b. Received an inquiry from an attorney for a City employees' union concerning the State Ethics Act Financial Disclosure that employees in certain job titles are "being requested to fill out." We advised that we have, with Central HR, provided guidance to City employees as to which job titles appear to be subject to the State Act's requirement, but that we do not have jurisdiction, and any request for further advice, challenge, or discussion should be with the State Ethics Commission, which does have jurisdiction. Employees who choose not to file bear the risk of enforcement action by the State Ethics Commission.

c. Received an inquiry regarding a gift of free attendance at a Phillies game in a corporate box. Referred requestor to Chief Integrity Officer for application of Mayor's Executive Order on gifts.

d. Advised a judicial candidate that judicial candidates are not required to file information with us. Suggested that he or she could contact the City Commissioners' office to see if that office requires the updated information at issue. Provided contact information for the Commissioners' office.

e. Advised a departmental integrity officer concerning a former department employee, now a lawyer, representing a client before the department. Advised that, after two years from separation, the only post-employment restriction that still applies to a former City employee is

the permanent restriction of Code Section 20-603, which prohibits assisting another person in a City transaction that the former employee worked on while with the City. The only way that this would be violated in the matter referred to would be if the same transaction were in the department back when the employee was there, and this person worked on it then, and it is now somehow still alive several years later, and he is representing a client in that same matter.

VI. Resolution on Application of Section 20-606(1)(i)

Mr. Creamer introduced a Resolution that is intended to clarify Section 20-606(1)(i) of the Philadelphia Code which imposes confidentiality restrictions. He explained that our legal research indicates that the extent of the prohibitions in the confidentiality portion of the Code may be vulnerable in a constitutional challenge for overbreadth. Therefore, staff recommends adoption of the resolution to interpret Section 20-606(1)(i) to conform to constitutional requirements.

Mr. Meyer stated that the State Ethics Commission has been faced with similar issues in the Gene Stilp matter. He suggested adding some additional language to clarify the Resolution.

After a brief discussion the Board unanimously approved the Resolution. Mr. Meyer will amend the Resolution and give it to Chair Glazer for signature.

VII. New Business

Mr. Creamer will issue an Advisory Alert, which will be sent to all of the District Attorney candidates about the doubling of the contribution limits for District Attorney candidates. It will also be posted on the Board's website.

VIII. Political Activity Restrictions/Philadelphia Bar Association's Commission on Judicial Selection and Retention

Mr. Meyer stated that City Solicitor Shelley Smith requested a public opinion after she came under criticism for serving on the Philadelphia Bar Association's Committee on Judicial Selection and Retention. The question is whether this participation is prohibited political activity under Section 10-107(4) of the Home Rule Charter. The Bar Association's selection process is very detailed and the appendix to the draft opinion includes the guidelines.

He also stated that the opinion addresses future participation in the Bar Association's process. The concern at issue in Section 10-107(4) of the Charter is that employees should not participate in political campaigns. The opinion finds that the Bar Association Committee is not partisan political activity; therefore, Ms. Smith may participate in the process in the future.

Ms. Nayak noted some formatting errors, which will be corrected.

Mr. Glazer asked for a motion to approve the Opinion. The Board unanimously approved the Opinion.

IX. Questions/Comments

The audience did not have any questions or comments.