

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of Aaron A. Thomas : Complaint Filed: April 14, 2014
: :
: Investigation No. 44

FINAL OPINION AND ORDER

I. PROCEDURAL HISTORY

As set out by the Investigative Officer in her Findings Report issued August 15, 2014, and revised only with respect to definitional terms, the Charter Board of the City of Reading ("Charter Board") adopts the following as the procedural history of this matter:

1. On or about April 14, 2014 a complaint form ("Complaint") was filed by City Council President Francis G. Acosta (hereinafter, "Complainant Acosta") who resides at 326 Saint Nicholas Street, in the City of Reading proper.

2. The Complaint alleges that Aaron A. Thomas with an address of 337 South 13th Street, City of Reading violated Sections 23-605.C.1, 23-605.D.2.a and 23-605.D.2.b of the City of Reading's Charter Board Ordinance, Ord. No. 46-2005, as amended ("Charter Board Ordinance"), which is part of the City of Reading Home Rule Charter ("Charter").

3. The Complaint was received by the Investigative Officer on April 21, 2014 and docketed as Investigation Number 44.

4. By separate letters dated April 23, 2014, the Complainant and the Subject of the Complaint, Aaron A. Thomas (hereinafter, "Subject Thomas"), were informed (a) that the Complaint had been received by the Investigative Officer; (b) of the substance of the allegations against Subject Thomas contained therein; (c) that it was determined by the Investigative Officer that the Charter Board had jurisdiction to investigate the claims alleged in the Complaint and, accordingly, a preliminary investigation would be undertaken by the Investigative Officer; and (d) encouraged informal resolution of the issues set forth in the

Complaint. These letters also outlined Complainant Acosta's and Subject Thomas's respective rights and responsibilities under the formal adjudicative process of the Charter Board.

5. Subject Thomas was interviewed as part of the Preliminary Investigation on May 5, 2014.

6. On May 21, 2014, Complainant Acosta and Subject Thomas were notified via separate letters that the preliminary investigation had concluded and facts existed to warrant a full investigation into the matters raised in the Complaint.

7. Complainant Acosta and Subject Thomas were issued separate correspondence on July 7, 2014 providing them a forty-five (45) day status update of the full investigation in accord with Section 23-605.A.5 entitled "Full Investigation" of the Charter Board Ordinance.

8. Having concluded the full investigation, the Investigative Officer concludes that sufficient facts exist to support a finding that Subject Thomas violated the Charter Board Ordinance as set forth herein.¹

II. FINDINGS OF FACT

In accordance with the Charter Board Ordinance, Section 23-605.A.8.b,² the following are the Findings of Fact as determined by the Investigative Officer and set out in her Findings Report issued August 15, 2014, which the Charter Board adopts verbatim with only minor revisions to definitional terms:

¹ However, the Charter Board concludes that the provisions allegedly violated by Subject Thomas are unconstitutional and unenforceable.

² References to the sections of the Charter Board Ordinance are to Chapter 23 of the Code of the City of Reading (codified and adopted 8-26-2013 by Ord. No. 36-2013).

1. Council for the City of Reading (hereinafter, "City Council") conducted a special meeting on March 19, 2014 pursuant to public notice.

2. City Council entered into an executive session in the course of the meeting.

3. During the executive session, residents protested outside the meeting.

4. Subject Thomas was a resident protesting outside City Council's executive session.

5. Subject Thomas was interviewed by the *Reading Eagle* reporter, Mr. Don Spatz ("Don Spatz") while the protest was ongoing.

6. Subject Thomas told Don Spatz that he had filed a Complaint with the Charter Board alleging that City Council's executive sessions to discuss the sale of City water assets violated the City of Reading Home Rule Charter ("City Charter") and Sunshine Act.

7. Don Spatz reported that Subject Thomas filed a Complaint against City Council for allegedly violating the City Charter and Sunshine Act in an article that ran in the *Reading Eagle* on March 20, 2014.

8. In the course of his interview conducted on May 5, 2014, Subject Thomas admitted that on March 19, 2014 he told Don Spatz that he had filed a Complaint alleging that City Council had violated the Charter in performance of the executive sessions to discuss the sale of City assets.

9. Subject Thomas further stated during his May 5, 2014 interview that he was unaware of the confidentiality provision in the Charter that prohibited him from disclosing that he had filed a Complaint.

10. Subject Thomas did not disclose to the *Reading Eagle* that he had filed a Complaint for any of the following purposes:

- (a) As necessary to effect due process.
- (b) For the purpose of seeking advice of legal counsel.
- (c) For the purpose of filing an appeal from a final order.
- (d) For hearings conducted in public according to Subsection A(7).
- (e) For communicating with the Charter Board or its staff, in the course of an investigation or hearing or before a final determination is made by the Charter Board.
- (f) For consulting with law enforcement officials for the purpose of initiating, participating in, or responding to an investigation or hearing.
- (g) For testifying under oath before a governmental body.
- (h) For information relating to a complaint, investigation, or hearing which is disclosed by the subject of such complaint, investigation, or hearing.
- (i) For the divulgence by individuals who are interviewees to confidential Charter Board proceedings as to information that was already in their possession or as to their own statements.
- (j) For the publication or broadcast of information legally obtained by the news media regarding a confidential Charter Board proceeding.

11. Subject Thomas stated that he opined executive sessions were improper based on the plain language of the Sunshine Act that indicates executive sessions regarding real property are to consider the purchase or lease of real property.

12. There is nothing contained on the Charter Board complaint form advising complainants of the confidentiality provisions of the Charter Board Ordinance.

III. CONCLUSIONS OF LAW³

A. Question Presented

1. Where a complainant files a complaint with the Charter Board and thereafter discloses the fact that the complainant filed a complaint, does such disclosure violate the confidentiality provisions of the Charter Board Ordinance?

2. Where a complainant has a reasonable basis to file a complaint with the Charter Board, is that a sufficient basis to not be an “unfounded, frivolous or false complaint” as defined by Section 23-605.D of the Charter Board Ordinance?

B. Legal Discussion

The factual issues in this matter are straight forward. Subject Thomas admits that he told Don Spatz, reporter for the *Reading Eagle*, that Subject Thomas filed a Charter Board Complaint alleging that City Council violated the Charter by performing executive sessions to discuss the sale of City assets, specifically, assets of the Reading Area Water Authority, including real estate. See Finding of Fact Nos. 5, 6, 8. Likewise, it is perfectly clear that the Charter Board complaint form contains no printed warning or advice to those who might file a complaint that Charter Board records and proceedings are confidential. Finding of Fact No. 12. Subject Thomas stated that he was unaware of the confidentiality provisions in the Charter Board Ordinance, which on their face prohibit the disclosure Subject Thomas made to Don Spatz. Finding of Fact No. 9. See Charter Board Ord., Sec. 23-605.C.1. Finally, the Investigative

³ Although Investigative Officer has provided Conclusions of Law within her Findings Report, the Conclusions of Law are not binding on the Charter Board and are not within the purview of the duties of the Investigative Officer under either Amendment I of the Charter or the Charter Board Ordinance. However, the practice of an Investigative Officer providing conclusions of law in a Findings Report at times is helpful to the Charter Board in understanding how and why the Investigative Officer reached certain outcomes. See Charter Board Ord., Secs. 23-605.A.6 (providing that the Findings Report “shall set forth the pertinent finds of fact as determined by the Officer”) and 23-605.A.8.b (providing that where no evidentiary hearing is requested, the Charter Board will decide whether the Findings Report supports a determination that the subject of the complaint violated the Charter or Administrative Code).

Officer found as a fact that Subject Thomas actually considered the “plain language of the Sunshine Act” and that from the Act’s plain language Subject Thomas opined that the executive sessions were improper because they did not regard the “purchase or lease of real property.”

1. Violation of the Board’s Confidentiality Provisions

Section 23-605.C.1 of the Charter Board Ordinance, relating to confidentiality of Charter Board information, provides:

All Board proceedings and records relating to an investigation shall be confidential until a final determination is made by the Board. The final order shall become a public record once the subject has exhausted all appeal rights or has failed to timely exercise such rights.

All other records and proceedings shall remain confidential except:

- a) as necessary to effect due process;
- b) for the purpose of seeking advice of legal counsel;
- c) for the purpose of filing an appeal from a final order;
- d) for hearings conducted in public according to Subsection (A)(7);
- e) for communicating with the Board or its staff, in the course of an investigation or hearing or before a final determination is made by the Board;
- f) for consulting with law enforcement officials for the purpose of initiating, participating in, or responding to an investigation, or hearing;
- g) for testifying under oath before a governmental body;
- h) for information relating to a complaint, investigation, or hearing which is disclosed by the subject of such complaint, investigation, or hearing;
- i) for the divulgence by individuals who are interviewees to confidential Board proceedings as to information that was already in their possession or as to their own statements;

- j) for the publication or broadcast of information legally obtained by the news media regarding a confidential Board proceeding.

The central question is whether or not Subject Thomas's disclosure to Don Spatz violated these confidentiality provisions.⁴

In the context of parties participating in a governmental proceeding, the U.S. Supreme Court has distinguished between information a participant had before joining a proceeding and information the participant gained from the proceeding itself. See *Butterworth v. Smith*, 494 U.S. 624 (1990) (holding that witness before grand jury could speak about his own testimony, but not that of other witnesses). The Third Circuit, in striking down a Pennsylvania ban on speech for the absence of a "clear and present danger," *Stilp v. Contino*, 613 F.3d 405, 410 (citing *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 833 (1978)), and for not being narrowly tailored, *Id.* at 415, invoked a similar distinction. *Stilp* augmented the already existing right of complainants to disclose the contents of their complaint, *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 477 (3d Cir. 1986), by also allowing them to disclose the complaint itself and the fact that it was filed, *Stilp*, 613 F.3d at 405. In doing so, however, it distinguished first-hand knowledge from knowledge "gleaned from the confidential proceeding." *Id.* at 413. Thus, only because the information at issue did not contain "confidential testimony of other witnesses" or "confidential statements by members of the Ethics Commission," was it protected speech. *Id.* at 414.

On the basis of *Stilp*, it appears that there is no basis under which the Charter Board may prohibit complainants from revealing the information in the complaint, or the complaint

⁴ Although the Investigative Officer found that Subject Thomas made the disclosure not knowing of these confidentiality provisions, the Charter Board is not prepared to conclude that ignorance of the Charter or Administrative Code is a defense to a violation of those bodies of law.

itself, or the fact of filing the complaint.⁵ The Board specifically holds that a complainant may disclose to the press (for example, *The Reading Eagle*) and others, what is contained in their complaints, turn over a copy of the complaint itself to the press and others, and state the fact that a complaint was filed. A complainant may not reveal information not already known by them, which is obtained from the Board's confidential proceedings, the testimony of other witnesses, or statements or questions asked by the Board or the Investigative Officer.

The Charter Board concludes that although Subject Thomas did violate the Charter Board's confidentiality provisions, those provisions, as they relate to a complainant that discloses the content of his own complaint, the existence of his own complaint, or the fact of the filing of his own complaint, are unconstitutional and unenforceable.

2. Unfounded, Frivolous or False Complaints

Section 23-605.D of the Charter Board Ordinance, relating to wrongful use of the Charter Board, provides in pertinent part:

1. Complaints directed to the Board must be based on fact and a reasonable belief of a Charter violation. Wrongful use of the Board is prohibited and any person engaged in such conduct may be subject to penalties as set forth in Section V(B).
2. Wrongful use of the Board is defined as either:
 - a. Filing an unfounded, frivolous or false complaint. A complaint is unfounded, frivolous or false if it is filed in a grossly negligent manner without basis in law or fact and was made for a purpose other than reporting a violation of the Charter or Administrative code.

A person has not filed a frivolous complaint if he/she reasonably believes that facts exist to support the claim, and either reasonably believes that under those facts the complaint is valid or acts upon the advice of counsel sought in good faith and given after full disclosure of

⁵The Charter Board's confidentiality provisions are similar to those of the Pennsylvania State Ethics Commission. Compare 65 Pa.C.S. § 1108(k) with Charter Board Ord. Sec. 23-605.C.1.

all relevant facts within his/her knowledge and information; or

- b. Publicly disclosing or causing to be disclosed information regarding the status of proceedings before the Board in violation of Section C, above [regarding confidentiality].

The findings of fact made by the Investigative Officer demonstrate to the Charter Board that Subject Thomas did in fact review the Sunshine Act, considered its plain language, and reasonably believed that the statute as written constituted the applicable law. Section 708(a)(3) of the Sunshine Act, 65 Pa.C.S. §§ 701, *et seq.*, provides that an executive session is permitted

“To consider the purchase or lease of real property up to the time an option to purchase or lease the real property is obtained or up to the time an agreement to purchase or lease such property is obtained if the agreement is obtained directly without an option.”

Subject Thomas is a lay person, is not trained in the law, and the explicit language of the Act limits executive sessions in this context to considering the purchase or lease of real property. The matters allegedly discussed by Complainant Acosta in executive session involved the sale of real property assets. Subject Thomas, relying on the verbatim language of the Sunshine Act, had reasonable grounds to file the Complaint.

The Charter Board concludes that where reasonable grounds exist to file a Charter Board complaint, such a complaint cannot be considered “unfounded, frivolous or false” and a “wrongful use” of the Charter Board as defined in the Charter Board Ordinance, Sec. 23-605.D.2.a. This is in accord with generally accepted legal principles applicable to pleadings in the Court of Common Pleas. An action is frivolous if, on its face, it does not set forth a valid cause of action. A frivolous action is one that lacks an arguable basis in either law or fact. *Credico v. Attorney General of Pennsylvania*, 2014 WL 546684, * 2 (internal citations omitted). The State Ethics Commission, the commission upon which the Charter Board is patterned,

considers a complaint to be frivolous where it is filed in a grossly negligent manner without basis in law or fact. 65 Pa.C.S. § 1102. Gross negligence has been defined as using less care than a careless person. *Keystone Freight Corp. v. Stricker*, 2011 PA Super. 216, 31 A.3d 967, 973 (2011).

The Charter Board further concludes, for the same reasons as set forth above in Section III.B.1, that a complainant's public disclosure of the content of his own complaint, the existence of his own complaint, or the fact of the filing of his own complaint, is a violation of the confidentiality provisions of the Charter Board Ordinance, however, those provisions are unconstitutional and unenforceable and therefore such conduct is not a wrongful use of the Charter Board, as defined in Charter Board Ordinance, Sec. 23-605.D.2.b.

C. Conclusions of Law

1. The confidentiality provisions of Section 23-605.C.1 are unconstitutional and unenforceable, as they relate to a complainant disclosing the content of his own complaint, the existence of his own complaint, or the fact of the filing of his own complaint.
2. A complainant may disclose the content of his or her own complaint and may disclose the filing of such a complaint, and its existence.
3. A Charter Board complaint filed upon reasonable grounds cannot be considered "unfounded, frivolous or false" and a wrongful use of the board as defined in the Charter Board Ordinance, Sec. 23-605.D.2.a.
4. Reasonable grounds exist, sufficient to permit the filing of a Charter Board complaint, where the legal issue remains undecided, or a reasonable, non-frivolous argument exists to extend, modify or change existing law.

IV. DETERMINATION OF THE CHARTER BOARD

A. The Charter Board concludes that although Subject Thomas did violate the Charter Board's confidentiality provisions, those provisions, as they relate to a complainant disclosing the content of his own complaint, the existence of his own complaint, or the fact of the filing of his own complaint, are unconstitutional and unenforceable.

B. The Charter Board concludes that where reasonable grounds exist to file a Charter Board complaint, such a complaint cannot be considered “unfounded, frivolous or false” and a wrongful use of the Charter Board as defined in the Charter Board Ordinance, Sec. 23-605.D.2.a.

V. **ORDER**

The Charter Board enters the Order attached hereto as Exhibit “A.”

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair

Date: October 14, 2014

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of Aaron A. Thomas : Complaint Filed: April 14, 2014
: :
: Investigation No. 44

ORDER

AND NOW, this day of October, 2014, upon consideration of the Findings Report issued August 15, 2014, and there being no request for an evidentiary hearing by the subject, Aaron A. Thomas (“Thomas”), the Board determines that the Findings Report establishes that Thomas did violate the Charter Board Ordinance, Sections 23-605.C.1, relating to confidentiality of board information, did not violate 23-605.D.2(a), relating to wrongful use of Board proceedings by filing an unfounded, frivolous or false complaint, and did not violate 23-605.D.2(b), relating to wrongful use of Board proceedings by public disclosure of Board proceedings.

Further, the Board determines that to the extent the Charter Board Ordinance, Ord. No. 46-2005, as amended, imposes confidentiality upon a complainant thereby preventing the complainant from disclosing the content of his or her complaint, the existence of the complaint itself or the fact of its filing, said provisions of the Charter Board Ordinance are unconstitutional and unenforceable. *See Stilp v. Contino*, 613 F.3d 405 (3d Cir. 2010).

The Charter Board hereby enters an adjudication in favor of Thomas on the Complaint filed April 14, 2014.

EXHIBIT “A”

In accordance with Sections 23-605.A.8(c) of the Charter Board Ordinance, the Final Opinion and Order shall be transmitted to Thomas and the complainant, City Council President Francis Acosta, by certified US Mail, return receipt requested.

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair

Date: October 14, 2014