

IN RE: NOMINATING PETITION
OF ROBERT A. BRADY AS
CANDIDATE FOR THE
DEMOCRATIC NOMINATION
FOR THE OFFICE OF MAYOR
OF THE CITY OF PHILADELPHIA

OBJECTION AND PETITION TO
SET ASIDE THE NOMINATING
PETITION OF ROBERT A. BRADY
AS CANDIDATE FOR THE
DEMOCRATIC NOMINATION
FOR THE OFFICE OF MAYOR
OF THE CITY OF PHILADELPHIA
AND TO STRIKE HIS NAME
FROM THE BALLOT IN THE
MAY 15, 2007 DEMOCRATIC
PRIMARY FOR THE OFFICE OF
MAYOR OF PHILADELPHIA, OF
OBJECTORS ARTHUR MURPHY,
FLORENCE GARRETT, BETTINA A.
BANNISTER, DIANE E. SMITH,
ESQUIRE, PHILLIP H. BAER,
ESQUIRE, AND ELLEN R. BAER

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
MARCH TERM, 2007
NO. 001046

FILED
PRO PROTHV
MAR 27 2007
K. DALY

CERTIFIED FROM THE RECORD ON 3-27-2007
JOSEPH H. EVERS
PROTHONOTARY OF PHILADELPHIA COUNTY
BY Bernie Okane

ORDER

AND NOW, this 27th day of March, 2007, IT IS ORDERED AND DIRECTED that the Objections and Petitions to Set Aside the Nominating Petition of Robert A. Brady and Strike his Name from the Ballot in the May 15, 2007 Democratic Primary for the Office of Mayor of the City of Philadelphia are **DENIED** and **DISMISSED**.

IT IS FURTHER ORDERED AND DIRECTED that each party shall bear their own costs.

BY THE COURT,

Patrick J. Hall S.J.

all other post hearing motions are denied & dismissed
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CERTIFIED FROM THE RECORD ON 3-27-2007
JOSEPH H. EVERS
PROTHONOTARY OF PHILADELPHIA COUNTY
BY Bonnie Okane

OPINION

The above-named Objectors, all residents and Democratic electors of the City of Philadelphia, seek to set aside the nominating petitions of Robert A. Brady (Brady)¹ as a candidate for the Democratic nomination of the office of mayor of the City of Philadelphia and to strike his name from the ballot in the scheduled May 15, 2007, primary election.

This Court scheduled and held a hearing, received and reviewed briefs, heard oral argument, and the matter is now ripe for resolution.

¹ Brady is presently a member of the United States Congress and has been serving in that capacity since 1998.

Brady filed a nomination petition to have his name placed on the May 15, 2007 primary ballot as a Democratic candidate for the office of mayor of the City of Philadelphia. Brady also filed a Statement of Financial Interests (FIS) with the Philadelphia Election Bureau and attached a copy of that Statement to his nomination papers in accordance with Sec. 1104(b)(2) of the Public Officials and Employees Ethics Act².

The subject objections were filed on or about March 14, 2007³, and prompted the issuance of a Rule upon Brady to show cause why his name should not be stricken as a mayoral candidate in the scheduled primary election. Thereafter, the President Judge of the Judicial District, C. Darnell Jones II, requested the Supreme Court to assign a Judge to sit in Philadelphia to hear and determine the objections to Brady's mayoral candidacy. On the same date the Chief Justice of the Commonwealth of Pennsylvania, Ralph J. Cappy, appointed the undersigned Senior Judge from Luzerne County to

² 65 Pa. C.S.A. Sec. 1104(b)(2) provides: "Any candidate for county-level or local office shall file a Statement of Financial Interests for the preceding calendar year with the governing authority of the political subdivision in which he is a candidate on or before the last day for filing a petition to appear on the ballot for election. A copy of the Statement of Financial Interests shall also be appended to such petition."

³ On March 13, 2007, three individuals, T. Milton Street, Larry Smith and Ra Zahir, acting pro se, filed objections claiming Brady's failure to disclose his city pension on his Financial Interests Statement was a "fatal error" requiring the setting aside of the nomination petitions and the striking of Brady's candidacy from the primary ballot. These objections were consolidated with the above-captioned case for purposes of hearing and disposition. At the inception of the scheduled hearing on March 20, 2007, the three pro se Objectors advised the Court of their desire to withdraw their objections. There were no objections, and the request to withdraw was granted.

preside over and determine the matter. Upon agreement of counsel and the Court, a hearing was scheduled for Tuesday, March 20, 2007.

On March 18, 2007, the Objectors filed a "Motion in Limine to Strike from the Answer and Preclude Hearsay Affidavits of Robert McCully, James Sleet and Piotr Tonia." On March 19 the Objectors filed a "Motion to Preclude Defenses". After hearing oral argument on March 20, 2007, this Court denied the Motions in Limine⁴ and the Motion to Preclude⁵.

On the morning of March 20, 2007, Brady's counsel filed a "Motion to Strike or Quash Notice to Attend and Notice to Produce and Subpoenas." After hearing oral argument, we denied the Motion and directed Brady to appear in response to the Notice.⁶

⁴ The Court saw no reason or need to decide evidentiary matters before the hearing. The parties were advised that evidentiary issues could be raised and determined during any evidentiary presentations.

⁵ This Motion was denied because Objectors failed to establish any factual or legal basis warranting or justifying the application of the doctrine of collateral or judicial estoppel.

⁶ Counsel contended that Brady's appearance was not essential to any factual determination in this matter because all the evidence that was required was contained in his Answer and the Affidavits attached thereto. In addition, counsel argued that requiring Brady to appear and testify would interfere with his congressional duties. We denied the Motion because we believed the Objectors had the right to select and subpoena any witness, including Brady. They were certainly not required to blindly accept or rely upon Brady's Answer or the attached Affidavits. The Court also recognized that, while Brady's presence could interfere with his congressional duties, the issues before the Court involved his nomination, his FIS and mayoral candidacy. We therefore denied the Motion and required him to appear as directed.

The Objectors contend that Brady omitted to make all the disclosures required by the Ethics Act and such failures constitute non-waiverable, incurable "fatal defects" under 65 Pa. C.S.A. Sec. 1104(b)(3), requiring Brady's nomination petition to be set aside and his name stricken from the ballot in the May 15, 2007 Democratic Primary for the office of Mayor of Philadelphia. Sec. 1104(b)(3) provides:

"No petition to appear on the ballot for election shall be accepted by the respective State or local election officials unless the person has appended thereto a Statement of Financial Interests as set forth in paragraphs (1) and (2). Failure to file a Statement in accordance with the provisions of this chapter shall, in addition to any other penalties provided, be a fatal defect to the person to appear on the ballot."

Without further comment at this time, we simply note that the objections primarily concern Brady's relationship with (1) the City of Philadelphia, (2) the University of Pennsylvania, (3) the Metropolitan Regional Council United Brotherhood of Carpenters and Joiners of America (Carpenters Union), and (4) the Philadelphia Democratic Campaign Committee (a/ka/ the Philadelphia Democratic City Committee). We will address and decide the validity of the objections as they apply to the four identified entities.

Findings of Fact

After full and complete consideration of the testimony and exhibits presented by the parties as well as the legal arguments provided both in writing and orally, we make the following findings of fact:

1. Brady's Nomination Petition and attached copy of his Financial Interests Statement were timely filed.

2. There is no question concerning the propriety or sufficiency of Brady's Nomination Petition(s).

3. The last day for filing Nomination Petitions was March 6, 2007.

4. The primary election date is May 15, 2007.

5. All of the Objectors are residents of the City of Philadelphia and registered enrolled electors of the Democratic Party.

6. The objections were timely filed.

7. The only direct or indirect sources of income disclosed by Brady in Block 10 of his original Statement of Financial Interests were the United States Government and the Federal Credit Union.

8. In response to Block 4 requesting disclosure of "Public Position or Public Office", Brady, in his original FIS, wrote under paragraph A, "Congressman" and checked the block indicating that he was holding that office.

Under Subsection B, the position of "Mayor" was identified and the block indicating he was seeking that position was marked.

9. In response to Block 5 regarding disclosure of "Political Subdivision/Agency in Which You Are/Were an Official or Employee, or Are a Candidate or a Nominee", Brady, in his original FIS, disclosed (A) First Congressional District, (B) City of Philadelphia.

10. In response to Block 12 regarding "Office Directorship or Employment in any Business", Brady, in his original FIS, answered "None."

11. In response to Block 14 requiring disclosure of "Financial Interests in Any Legal Entity in Business for Profit", Brady, in his original FIS, answered "None."

12. In response to Block 15 directing disclosure of "Business Interests Transferred to Immediate Family Member", Brady, in his original FIS, answered "None."

13. The original FIS did not disclose that Brady was receiving a pension for prior service or as an employee in the City of Philadelphia.

14. Brady has, in accordance with the financial disclosure requirements of the United States House of Representatives, filed annual Financial Disclosure Statements.

15. In Schedule 3 of the Federal Financial Disclosure form for 2005 entitled "Assets and Unearned Income" Brady identified under Block A (Asset and/or Income Source), City of Philadelphia; in Block B, (Year-end Value of Asset), \$50,001-\$100,000; and in Block C (Type of Income), Pension; and in Block G (Amount of Income), \$5,001-\$150,000.

16. In Schedule 3 of the Federal Financial Disclosure Form for 2005 regarding assets and "Unearned Income", Brady reported in Block A (Asset and/or Income Source) the Metro Regional Council (Carpenters Union); and in Block B (Year-end Value of Asset) reported \$100,001-\$250,000; and in Block C (Type of Income) disclosed pension and profit sharing; and in Block D (Amount of Income) reported None.

17. In Schedule 9 of the Federal Financial Disclosure Statement for the calendar year 2005 relating to AGREEMENTS, Brady was directed to "identify

the date, parties to, and general terms of any agreement or arrangement with respect to future employment; a leave of absence during the period of government service; continuation or deferral of payments by a former or current employer other than the U.S. Government; or continuing participation in an employee welfare or benefit plan maintained by a former employer.”

18. In response to the instructions on Schedule 9 of the Federal Financial Disclosure Statement concerning AGREEMENTS, Brady disclosed an agreement or arrangement dated 2/19/99 with the Metropolitan Regional Council and provided and disclosed in the block provided that the terms of the agreement were “Part-time Administrative Assistant. Received no salary. MRC continues the funding and vesting of the members’ pension and annuity. 2005 total was \$13,544.30.

19. On Friday, March 9, 2007, Brady filed an Amended Statement of Financial Interests with the State Ethics Commission.

20. The last day for filing FIS’s without Court approval was March 6, 2007.

21. The amended Financial Interests Statement related only to Block 10 of the Financial Interests Form and disclosed a single additional source of income: "City of Philadelphia Municipal Pension Fund Pension Plan."

22. The amended FIS contains no reference, identification or disclosure concerning the University of Pennsylvania, the Philadelphia Democratic Campaign Committee or the Carpenters Union.

23. The amended Financial Interests Statement filed March 9, 2007, did not change or amend any answers made in any other block on the original FIS form.

24. Brady is and has been receiving a pension from the City of Philadelphia and for the year 2006 received approximately \$8,726.

25. Brady holds a position as an unsalaried administrative assistant with the Metropolitan Regional Council United Brotherhood of Carpenters and Joiners (Carpenters Union).

26. Brady, a long-time member of the Carpenters Union, continues to participate in the Carpenters Pension and Annuity Plan and for each month of

2006 and some time prior thereto the Union made remittances each month to the Fund in Brady's name totaling for the year 2006 approximately \$14,025.

27. Brady did not in 2006 or at any time prior thereto request or receive any payments from that Fund.

28. Brady is a part-time employee with the University of Pennsylvania and receives a salary of \$1.00 per semester for a total of \$2.00 per year.

29. The University of Pennsylvania is a non-profit organization.

30. Brady is the Chairperson of the Democratic Executive Committee of the Democratic City Committee.

31. Brady receives no remuneration for his services as Chairperson.

32. The Democratic City Committee is not organized for profit.

33. The Political Action Committee of the Democratic City Committee has made political contributions to political committees and candidates.

34. Brady has at all times acted ethically, and his FIS was completed to the best of his knowledge, information and belief and filed after seeking, securing and accepting the advice of his attorneys and accountant.

35. The Objectors do not attribute any claimed omission to an improper motive, do not suggest that any omissions were part of any scheme or intentional conduct and admit that the statements were innocent omissions (see par. 3 of the Objections.)

36. That Brady acted reasonably and did as much as possible to assure that his FIS was accurate and compliant with the requirement of the Ethics Act.

The Objections

As noted, the Objectors contend that Brady's FIS failed to disclose the information required by 65 Pa. C.S.A. Sec. 1105 of the Ethics Act and the instructions provided for completion of the FIS form by the Ethics Commission.

Sec. 1105 of the Ethics Act directs that the FIS shall include the following information for the prior calendar year with regard to the person required to file the Statement:

"(1) Name, address and public position.

"(2) Occupation or profession.

"(3) Any direct or indirect interest in any real estate which was sold or leased to the Commonwealth, any of its agencies or political subdivisions, or purchased or leased from the Commonwealth, any of its agencies or political subdivisions, or which was the subject of any

condemnation proceedings by the Commonwealth, any of its agencies or political subdivisions.

(4) The name and address of each creditor to whom is owed in excess of \$6,500 and the interest rate thereon. However, loans or credit extended between members of the immediate family and mortgages securing real property which is the principal or secondary residence of the person filing shall not be included.

(5) The name and address of any direct or indirect source of income totaling in the aggregate \$1,300 or more. However, this provision shall not be construed to require the divulgence of confidential information protected by statute or existing professional codes of ethics or common law privileges.

(6) The name and address of the source and the amount of any gift or gifts valued in the aggregate at \$250 or more and the circumstances of each gift. This paragraph shall not apply to a gift or gifts received from a spouse, parent, parent by marriage, sibling, child, grandchild, other family member or friend when the circumstances make it clear that the motivation for the action was a personal or family relationship. However, for the purposes of this paragraph, the term "friend" shall not include a registered lobbyist or an employee of a registered lobbyist.

(7) The name and address of the source and the amount of any payment for or reimbursement of actual expenses for transportation and lodging or hospitality received in connection with the public office or employment where such actual expenses for transportation and lodging or hospitality exceed \$650 in the course of a single occurrence. This paragraph shall not apply to expenses reimbursed by a governmental body or to expenses reimbursed by an organization or association of public officials or employees of political subdivisions which the public official or employee served in an official capacity.

(8) Any office, directorship or employment of any nature whatsoever in any business entity.

(9) Any financial interest in any legal entity engaged in business for profit.

(10) The identity of any financial interest in a business with which the reporting person is or has been associated in the preceding calendar year which has been transferred to a member of the reporting person's immediate family.

The approved FIS form prepared and published by the Ethics Commission contains 15 blocks which must be completed by the person required to file the Statement. The instructions as to those blocks provide:

Block 1 Please fill in your last name, first name, middle initial and suffix (if applicable) in the boxes provided. Public office candidate should use the exact name used on official nomination petition or papers.

Block 2 List your work or residence address, daytime phone number and **county** of residence in the space provided.

Block 3 Please check the block or blocks to indicate your status. See definitions on page 1. If you are correcting a prior filing, please check the block designating an amended form.

Block 4 Please check the appropriate block (seeking, hold, held) for each position you list in the blocks below. List all of the public position(s) which you are seeking, currently hold or have held in the **prior** calendar year. Please be sure to include job titles and official titles such as "member" or "commissioner" (even if serving as alternate/designee).

Block 5 Please fill in the political subdivision of the position(s) you are seeking, hold or have held. Please complete this block with the name of the township, borough, board, commission, agency, authority, etc. in which you are seeking, currently hold or have held a public position(s) in the **prior** calendar year. Please be sure to list **all** applicable political subdivision(s) for public position(s) listed above.

Block 6 Please list your current occupation or profession. This information may have already been stated in block 4.

Block 7 List the prior calendar year for which you are filing this form. All information provided in blocks 08 through 15 pertain to the calendar year designated in block 07.

Block 8 **REAL ESTATE INTERESTS:** This block contains the address of any property which was involved in transactions (leasing, purchasing, or condemnation proceedings of real estate interests) with the Commonwealth or any other governmental body. If you have no properties which have been involved in transactions with the Commonwealth or any other governmental body, then check "NONE".

Block 9 CREDITORS: This block contains the name and address of any creditor and the interest rate of any debt over \$6,500. **Do not report** a mortgage or equity loan on your home (or secondary home), or loans or credit between you and your spouse, child, parent or sibling. Car loans, credit cards, personal loans and lines of credit must be listed on the form if the balance owed was in excess of \$6500 at anytime during the calendar year. If you do not have any reportable debt, then check "NONE".

Block 10 DIRECT OR INDIRECT SOURCES OF INCOME: This block contains the name and address of each source of \$1,300 or more of gross income. List the name and address of all employers (including governmental bodies). Also, include the source name and address, not the dollar amount, of any payment, fee, salary, expense, allowance, forbearance, forgiveness, interest income, dividend, royalty, rental income, capital gain, reward, severance payment, prize winning, and tax exempt income. **DO NOT INCLUDE**: gifts; governmentally mandated payments; or retirement, pension or annuity payments funded totally by your own contributions. If you did not receive any reportable income then check "NONE".

Block 11 GIFTS: For each source, provide the name and address of the source and the circumstances and value of any gift(s) received valued at \$250 or more in the aggregate. **Do not report** political contributions otherwise reported as required by law, gift(s) from friends or family members (although the term friend does not include a registered lobbyist or employee of a registered lobbyist) or any commercially reasonable loan made in the ordinary course of business. If you did not receive any reportable gift, then check "NONE".

Block 12 TRANSPORTATION, LODGING, OR HOSPITALITY EXPENSES: **NOTE: Per amendments to the Ethics Act effective 1/1/07, the threshold for disclosure in Block 12 has changed. For forms due to be filed in 2007 or thereafter, the following instructions apply.** List the name and address of each source and the amount of each payment/reimbursement by the source for transportation, lodging or hospitality that you received in connection with your public position if the aggregate amount of such payments/reimbursements by the source exceeds \$650 for the calendar year for which you are reporting. Do not report reimbursements made by a governmental body or by an organization/association of public officials/employees of political subdivisions that you serve in an official capacity. If you do not have any reportable expense payments/reimbursements, then check "NONE".

Block 13 OFFICE, DIRECTORSHIP OR EMPLOYMENT IN ANY BUSINESS ENTITY: List any office that you hold (for example, President, Vice President, Secretary, Treasurer), any directorship that you hold (through service on a governing board such as a board of directors), and any employment that you have in any capacity whatsoever, as to any

business entity. This block focuses solely on your status as an officer, director or employee, regardless of income.

Block 14 FINANCIAL INTERESTS: List the name and address and position held in any business for profit of which you own more than 5% of the equity or more than 5% of the assets of economic interest in indebtedness. If you do not have any such financial interest to report, then check "NONE".

Block 15 TRANSFERRED BUSINESS INTERESTS: List the name and address of any business as to which you transferred a financial interest (as defined in Item 14) to a member of your immediate family (parent, spouse, child, brother or sister), as well as the interest held, relationship to the individual, and date of transfer. If you did not transfer any such business interest, then check "NONE".

The Philadelphia City Pension

There is no question that Brady is and has been receiving a pension from the City of Philadelphia based upon his prior years of service and that for the year 2006 he received payments in the amount of \$8,726. The Objectors insist that the city pension is "income" within the meaning of the Ethics Act, and Brady was required to disclose the "source" of such income in Block 10 of his FIS. Brady, on the other hand, contends that this pension is a "governmentally mandated payment" and is expressly exempted from disclosure by the definition of "income" under the Act and the FIS instructions.

Income is specifically defined in the definition section of the Ethics Act (65 Pa. C.S.A. Sec. 1102) as follows:

"Any money or thing of value received or to be received as a claim on future services or in recognition of services rendered in the past, whether in the form of a payment, fee, salary, expense, allowance, forbearance,

forgiveness, interest, dividend, royalty, rent, capital gain, reward, severance payment, proceeds from the sale of a financial interest in a corporation, professional corporation, partnership or other entity resulting from termination or withdrawal therefrom upon assumption of public office or employment or any other form of recompense or any combination thereof. The term refers to gross income and includes prize winnings and tax exempt income. The term does not include gifts, governmentally mandated payments or benefits, retirement, pension or annuity payments funded totally by contributions of the public official or employee, or miscellaneous, incidental income of minor dependent children." (Emphasis supplied.)

The instructions provided on the second or back page of the approved Statement of Financial Interests form provide as to Block 10:

"DIRECT OR INDIRECT SOURCES OF INCOME: This block contains the name and address of each source of \$1,300 or more of gross income. List the name and address of all employers (including governmental bodies). Also, include the source name and address, not the dollar amount, of any payment, fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rental income, capital gain, reward, severance payment, prize winning, and tax exempt income. **DO NOT INCLUDE:** gifts, governmentally mandated payments⁷; or retirement, pension or annuity payments funded totally by your own contributions. If you did not receive any reportable income, then check 'NONE'." (Emphasis supplied.)

While the phrase has been mentioned in some election contest cases, no appellate court has specifically addressed or resolved the issue of "what is a governmentally mandated payment" and/or "whether a city pension which has vested and is being received constitutes such a payment."

⁷ Note the differences in the language and punctuation between Sec. 1102 and the instructions provided by the Ethics Commission.

What is clear is that "governmentally mandated benefits" are not income and need not be reported or disclosed in Block 10. What is not clear and is in question is the meaning of the phrase.

The Commonwealth of Pennsylvania and the City of Philadelphia have enacted well-established legal provisions for the creation and administration of pension plans which mandate payments to vested members who are entitled to receive benefits based on age and years of service. The City of Philadelphia is required to fund a pension system and is mandated to make the required payments to qualified retired employees. We believe and hold that the city pension in this case is mandated by law and, accordingly, falls within the governmentally-mandated payment exclusion outlined in the Ethics Act and its FIS instructions. The cases cited and relied upon by the Objectors do not specifically address or resolve the precise issue presented in this case.

Having determined that the city pension need not be disclosed, there would ordinarily be no need or reason to determine whether an amendment was appropriate. Since, in all likelihood, our decision will be appealed, we believe it would be appropriate

to consider and judicially respond to Brady's claim of entitlement to an amendment under In Re: Benninghoff, 578 Pa. 402, 852 A.2d 1182 (2004).

Benninghoff, a State Representative seeking re-election, filed his FIS but failed to disclose the Commonwealth of Pennsylvania as a source of income in Block 10. The Court held that Benninghoff's salary was not excluded from the definition of income and, accordingly, disclosure was required in Block 10. The Court then reviewed the entire form and observed that while Benninghoff failed to identify the source of his income in Block 10, he did identify his present position as a State Representative in Blocks 4, 5 and 6; the political sub-division as Legislative District 171 in Block 7; his occupation as State Representative in Block 8. Further, the candidate listed a rental property in Harrisburg as an income source in Block 10. Despite the fact that the salary was not properly reported in Block 10, the Court refused to apply the fatality rule and permitted the candidate to cure the non-disclosure by amendment on the basis that the omitted disclosure could "be facially obtained from the information provided on the form as a whole."

In the instant case we cannot facially obtain from any response made by Brady in his Financial Statement that would lead or permit us to conclude that he was ever employed by the City of Philadelphia or that he had earned and was receiving a pension for such service. (See Hearing Record p. 156.) Accordingly, we do not believe Benninghoff supports the allowance of an amendment in the event it should be determined that the pension is not a "governmentally mandated payment."

The phrase "governmentally mandated payment" has not been defined by the Legislature, the Ethics Commission⁸ or by appellate decision. Brady testified that he read and was confused by the FIS form and its instructions, and accordingly, he sought and secured the assistance and advice of his attorneys, accountant and campaign finance director. Based upon and accepting their advice and the completed form which they provided, Brady read, signed and dated the Statement (Hearing Record pp. 147-152). We do not believe it would be fair or just under the facts and circumstances to remove the candidate from the ballot. In an effort to assure compliance with the Act,

⁸ Prior to its review of the issues in In Re: Benninghoff, supra, the Supreme Court transferred the case to the State Ethics Commission and directed that the Commission issue a disposition regarding whether the defect at issue in the case was a fatal or amendable defect. As the Supreme Court noted:

" . . . Interestingly, the Commission concluded that Benninghoff's failure to list the Commonwealth as the direct source of his income as a State Representative did not constitute a defect at all as it concluded such disclosure was not required under the Ethics Act." (Emphasis supplied.)

The Supreme Court specifically rejected the Ethics Commission decisional basis.

Brady consulted with individuals who might better understand the ethics law and the financial reporting requirements. The Objectors do not claim that Brady acted unethically (par. 61 of the Objections), nor do they attribute any claimed omission to an improper motive or suggest that any omissions were part of some improper scheme or intentional misconduct (Par. 3 of the Objections), nor does the Court.

We do not believe that the purposes of the Election Code or the Ethics Act would be served or promoted by finding a material non-disclosure and imposing the fatality rule. On the contrary, we believe any such interpretation would defeat and not serve the benefit of the electorate or the interests of justice. Not only did Brady act in a reasonable and responsible manner in filing his FIS, he filed his amendment without consultation with anyone immediately upon learning through a newspaper article that there was a possible problem because of his failure to report financial interests which were reported in his Federal financial interest disclosure form. Where, as here, there is a potential for competing interpretations, the resolution should favor the candidate. As the Court noted in In Re: Carroll, 586 Pa. 624, 896 A.2d 566, fn. 10, 579 (2006):

“For reasons set forth at greater length below, the plainly-stated purpose of the statute, and the harsh consequences that would accompany a construction that would lead to a finding of material non-

disclosure convince us that any ambiguity in the definition should be construed most favorably to candidates seeking ballot access.

This is not a case where the electorate has been totally denied the opportunity of disclosure of the candidate's financial interests. Brady's financial interests in all of the entities involved have been laid out with considerable detail in the Federal financial disclosure forms which have been filed and are a public record and open for inspection by any interested citizen. The interpretations of Brady and his attorneys and accountant which prompted and supported the responses provided in the FIS were clearly reasonable. Even the plain language utilized in the Act and instructions could be construed to be ambiguous, and it would be inequitable and unfair to Brady or his advisors for failing to predict any other judicial interpretation. The lack of clarity in the Act and the instructions is contrary to the "clear guideline" direction of 65 Pa. C.S.A. Sec. 1101.1(a). In cases like this our resolution of the issues should be "tempered by the well-established policy that favors the preservation, where possible, of a candidate's right to run for office and does not limit our citizens' electoral choices. Nomination Petition of McMonagle, 793 A.2d 174, 177 (Pa. Cmwlth. 2000). For any and all of these reasons, we believe that any information which has not been disclosed by Brady does

not, under the facts and circumstances in this record, require striking his candidacy for the office of Mayor of the City of Philadelphia. We find and hold that any non-disclosures under the unique facts and circumstances of this case, if in error, are not fatal, but correctible.⁹

The University of Pennsylvania

Brady readily admits that he is employed as a Professor at the University of Pennsylvania and was employed for the reporting year of 2006 and that he is paid a salary of \$2 per year, \$1 for each semester. (Hearing Record pp. 171-172.) Since the amount of the compensation received is \$2 per year, Brady is not required to disclose the University of Pennsylvania as a source because the stated salary does not meet the \$1,300 minimum amount required by Sec. 1105(b)(5) of the Ethics Act. However, simply because disclosure of the University of Pennsylvania as a "source" in Block 10 is not required does not necessarily mean that the employment relationship is not required to be disclosed in Block 13. The Objectors insist that Brady's failure to disclose his

⁹ Our disposition of this argument also applies to the objections involving the Carpenters Union as more fully discussed later in this Opinion.

employment relationship with the University of Pennsylvania constitutes a fatal defect to his petition to appear on the ballot under Sec. 1104(b)(3). We disagree

In In Re: Carroll, 586 Pa. 624, 896 A.2d 566 (2006) the Court held that disclosure of the employment relationship is required of a "business entity" and that encompasses "only for-profit entities." The Sections cited by the Objectors do not require disclosure of all employment or other affiliations irrespective of whether they implicate a candidate's financial interests. Carroll's candidacy was not stricken by the fatal error rule even though he failed to disclose his uncompensated position on the board of a municipal authority. The Court noted Carroll's affiliation did not remotely involve or implicate any financial interest in the authority.

The only significant difference we discern between Carroll's non-disclosure and Brady's is that Brady receives a salary of \$2 per year while Carroll was an uncompensated board member. We do not believe the lack of disclosure implicates Brady's financial interests. In addition, the University of Pennsylvania is a not-for-profit entity. Without further discussion, we hold that, under the facts and circumstances

presented, disclosure of the University of Pennsylvania affiliation was not required, and if it was, the defect is curable by amendment.

The Philadelphia Democratic Campaign Committee

The Objectors contend that Brady is the Chairman of the Board of the Philadelphia Democratic Campaign Committee a/k/a the Philadelphia Democratic City Committee, a Democratic political party committee, and as such, he was required by 65 Pa. C.S.A. Sec. 1105(b)(8) to report his chairmanship position in Block 13. Brady readily admits that he is the Chairperson and that he did not disclose that position in his FIS. Brady testified that he receives no salary for the position, and there is no evidence in the record to establish otherwise. Objectors argue that Brady has by virtue of his position as Chairman received numerous political contributions which, according to the Objectors, constitute income and mandate disclosure of the source in Block 10. We disagree.

The Election Code authorizes the creation of political committees and regulates the financial dealings of such bodies. See 25 P.S. Sec. 3243. In addition, the Election Code requires candidates and political committees to file timely financial reports

disclosing all political contributions and expenditures. (25 P.S. Sec. 1626) The Election Code also provides appropriate sanctions for violation of any provisions relating to financial expenditures and political contributions.

In view of the fact that political contributions are governed and controlled by the Election Code, we do not believe they are required to be reported on a candidate's FIS.

This position is bolstered by the instructions provided by the Ethics Commission for completion of the FIS form, more particularly Block 11 which provides:

"GIFTS: For each source, provide the name and address of the source and the circumstances and value of any gift(s) received valued at \$250 or more in the aggregate. Do not report political contributions otherwise reported as required by law . . ."

Pursuant to the above instruction, a candidate is not required and, in fact, is directed not to report political contributions on his FIS which have been reported pursuant to the Election Code. If the political contributions have not been reported on the financial disclosures required by the Election Code, then such contributions would appear to be reportable as gifts and fall within the disclosure requirements of 65 Pa. C.S.A. 1105(b)(6) and the instructions provided by the Ethics Commission for completion of Block 11.

While there has been considerable mention or reference to political contributions, the record is absolutely devoid of any credible evidence to establish that any political contribution was not properly made and recorded in accordance with the terms of the Election Code. The financial disclosure reports of the candidates and political committees are available and open for inspection. The Objectors have provided no evidence that the cited contributions have not been appropriately reported in accord with the Election Code, and accordingly, there is no reason under the ethics law and its instructions to require disclosure of the "source" of any such political contribution. In the absence of proof that the contributions in question were not properly reported under the Election Code, we have no reason, factual or legal, to require a disclosure of such contributions in any way under the Ethics Act.

The Metropolitan Regional Council
United Brotherhood of Carpenters and Joiners of America (Carpenters Union)

The basis for this issue is the Objectors' contention that Brady is employed by the Carpenters Union as a part-time administrative assistant, and under some agreement, monthly contributions are made to the pension and annuity fund in Brady's name by the Carpenters Union. They contend that the monthly contributions made to

the pension fund constitute income under Pa. C.S.A. Sec. 1102 and that Brady's failure to disclose his employment with the Carpenters Union in Block 13 and the Carpenters Union as a "source" of income in Block 10 constitutes a fatal defect.

Brady testified that he is employed by the Carpenters Union as an unpaid administrative assistant. (Hearing Record p. 126.) He further testified that the Carpenters Union is non-profit and that he "was an employee with the Carpenters Union since 1964 and then when I went to Congress I'm not allowed to be employed by the Carpenters or any other entity and I stopped becoming a paid employee with the Carpenters Union and do not have a break in service in case I don't decide to run for Congress again I won't have a break in service and if I choose to go back to the employment but as a paid employee they would." (Hearing Record pp. 127-128.) Brady testified he is past 55 years of age and has never asked for nor has he ever received any payment from the fund. (Hearing Record p. 128.) He testified he did not know if his pension was vested and he did not believe he could apply for benefits until over the age of sixty.

If the record reflected only that Brady was an unpaid assistant for the Carpenters Union, we would have no difficulty in declaring that, under the authority of In Re: Carroll, 586 Pa. 624, 896 A.2d 566 (2006), Brady as an unpaid employee in a not-for-profit association was not required to disclose his employment with the Carpenters Union in Block 13 or to identify the Union as a source of income under Block 10.

The record in this case, however, discloses that for some unspecified reason the Carpenters Union makes a monthly remittance or contribution to a pension fund account in Brady's name. (See Hearing Record p. 145.) Brady estimated the annual amount paid into the pension fund in his name for 2005 was approximately \$13,500 and estimated that about the same amount was received in 2006. (Hearing Record p. 132.)¹⁰

Brady denies the deposited funds constitute income within the meaning of the Act. Brady denies receiving any income because, in effect, he has not received in hand any payment from the Carpenters Union or the annuity fund, and unless and until he is eligible and applies for benefits, he (and apparently his attorneys, accountant and

¹⁰ The documents produced in response to a subpoena by the Carpenters Union and admitted as P-5 disclose that the 2006 contributions totaled \$14,209.05.

political advisor) did not feel a responsibility to make disclosures in either Block 13 or Block 10 of the FIS.

Because the Carpenters Union is a non-profit organization and not a business entity, Brady was not required to make any disclosure in Block 13. However, merely because he was not required to make a disclosure in Block 13 does not mean that he was not required to identify the Carpenters Union if it was a source of "income" in Block 10.

Income under the Ethics Act is obviously not limited to money actually paid in hand to a person. The definition of income in the Ethics Act is much broader:

"Income. Any money or thing of value received or to be received as a claim on future services or in recognition of services rendered in the past, whether in the form of a payment, fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital gain, reward, severance payment, proceeds from the sale of a financial interest in a corporation, professional corporation, partnership or other entity resulting from termination or withdrawal therefrom upon assumption of public office or employment or any other form of recompense or any combination thereof. The term refers to gross income and includes prize winnings and tax exempt income. The term does not include gifts, governmentally mandated payments or benefits, retirement, pension or annuity payments funded totally by contributions of the public official or employee, or miscellaneous, incidental income of minor dependent children."

We cannot conclude that the disclosed monthly contributions are without factual or legal significance. Whatever they are, it is beyond question that they are a thing of

value and that, if and when Brady qualifies for and receives actual payment from the fund, he will derive a benefit from those contributions. In the meantime, the value of the fund is being increased monthly to what we believe is Brady's present and future interest and benefit. We believe the evidence of record is sufficient to establish an indirect, if not direct, financial benefit to Brady by virtue of the contributions. Accordingly, we find that the value of the monthly contributions for the year 2006 fall within the broad definition of "income" and Brady was required to identify the Carpenters Union as a source in Block 10. We believe and hold that these contributions clearly implicate Brady's financial interests and, as such, are not exempt from disclosure by In

Re: Carroll.

Objectors also contend that Brady received numerous political contributions from the Union and that such contributions constituted income requiring identification of the Carpenters Union as a source in Block 10. Again, political contributions are not required to be reported on the FIS if they have been reported under the financial disclosures and reporting requirements of the Election Code. The Objectors have provided evidence establishing a number of political contributions that were made.

They have not established that those political contributions were not reported in accord with the Election Code. Accordingly, there is no factual or legal basis requiring any disclosure or identification of any contributor on the FIS.

Conclusion

We believe, whenever possible, election contests should be decided by the hand of the voter in the election booth and not by the pen of a judge in a judicial chamber. We further believe under the facts and circumstances of this case that the fatal error rule is not warranted or required and that any non-disclosures are, under the special facts and circumstances of this case, curable by amendment.

For all the reasons stated, this Court is satisfied and concludes:

1. That Brady's City pension is a governmentally mandated benefit which was not required to be reported in Block 10.
2. That the University of Pennsylvania is a non-profit organization, and because of the nature of the relationship and the nominal amount of salary, Brady was not required to identify the employment in Block 13.

3. That Brady was not required to disclose his political chairmanship on the FIS, and any political contributions received or made were not required under the circumstances to be disclosed in the FIS.

4. That the monthly payments made to Brady's pension and annuity fund for the year 2006 constitute income and, accordingly, required Brady to disclose the Carpenters Union as a "source" in Block 10.

5. That under the unique facts and circumstances of this case, any judicially determined non-disclosure is and should be curable by amendment and not subject to the fatal error rule of 65 Pa. C.S.A. Sec. 1104(b)(3)¹¹.

Accordingly, we enter the following Order:

¹¹ The fatality or fatal error rule which only applies to candidates has been criticized by judges on every level of our judicial system. To strike the candidacy of a person is a harsh and drastic penalty. In an effort to protect a candidate from such a fate and attempt to provide appropriate financial disclosure, the Ethics Act could be amended to provide that a candidate who timely files his nomination papers and financial interest forms shall be permitted to file an amended financial interest statement "as of course" within three (3) days of receipt of a copy of any objections. If the amended statement discloses the information the objections allege was omitted, the objection should be dismissed. If the amendment is not timely filed or, if filed, fails to disclose the required information, the election matter continues and any lack of disclosure can then be subject to the fatal defect rule and prevent the appearance of the candidate on the ballot.

Allowing an amendment of a financial statement as a matter of course would assure that the public is promptly provided with all the financial information required by the Ethics Act or the candidate will be removed from the ballot. Allowing such an amendment would protect the rights of the candidates and the voters as well as saving the judicial time and effort often expended in hearing and resolving election contest cases. A similar process is employed by the Rules of Civil Procedure pertaining to the resolution of preliminary objections. See Pa. R.C.P. 1028(c)(1).