



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2012-508

July 24, 2012

Re: Potential Conflict / City Official / Nonprofit Organization

A City official requested a nonpublic advisory opinion as to the effect of the ethics laws on her creating a nonprofit organization and serving as an uncompensated board member of that organization while also serving as a City official. In particular, the request stated as follows:

[The City official] would like to establish a non-profit corporation to support community activities that promote safety and positive events in the district. [The City official] will not be compensated. Can she select the board members? Can she raise money from businesses in the District? Can she be listed as ex-officio board member on the stationery?

A City official is not prohibited in general from serving on the board of a nonprofit organization. However, in doing so, the Philadelphia Code (“Code”), the Philadelphia Home Rule Charter (“Charter”), and the State Ethics Act place certain restrictions on the official. Service on the board of a nonprofit may also impact the official’s financial disclosure requirements.

The Philadelphia Code's Conflict of Interest Provision

The City Code prohibits City officers or employees from having conflicts of interest that arise from either having a personal financial interest in their official actions, or from being a member of certain entities that have a financial interest in their official actions.

As to a personal interest, Code Section 20-607(a) prohibits City officers from being "financially interested" in their official actions. Because the requestor would not be compensated as a board member of the nonprofit, she cannot be "financially interested" in any official actions by her that affect the nonprofit. Therefore, there is no issue under this provision. *See* Nonpublic Advice of Counsel GC-2012-502 at page 2; Nonpublic Advice of Counsel GC-2009-501 at page 5 (Amended March 2, 2010).

As to an interest through another entity, Code Section 20-607(b) places certain restrictions on City officials who are members of a "partnership, firm, corporation or other business organization or professional association organized for profit" which have a financial interest in their official actions. However, because the requestor advised that the organization is a nonprofit, there is no issue under this provision, since subsection 20-607(b) applies only to entities "organized for profit." *See* Nonpublic Advice of Counsel GC-2010-505 at page 5.

While the City's conflict of interest provisions raise no issues, the State Ethics Act's conflict of interest provision may prohibit the City official from taking actions which financially affect the nonprofit, if she is on its board of directors. This will be discussed below.

The Commonwealth's Conflict of Interest Provision

The State Ethics Act ("Act"), 65 Pa.C.S. § 1101 *et seq.*, also prohibits conflicts of interest, and clearly applies to City officials. The Act prohibits public officials from "engag[ing] in conduct that constitutes a conflict of interest." 65 Pa.C.S. § 1103(a). A "conflict of interest" is:

Use by a public official or public employee of the authority of his office or employment . . . for the private pecuniary benefit of himself . . . or a business with which he . . . is associated. The term does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an

industry, occupation or other group which includes the public official or public employee . . . with which he . . . is associated.

65 Pa.C.S. § 1102.

Under the Act, a public official may have a conflict of interest if she has a personal financial interest, or a “business” with which she is associated has a financial interest in her official actions.

As to a personal interest, the State Ethics Commission has not, to our knowledge, found a personal financial interest where an official is not compensated by the outside entity, or otherwise financially benefits from the entity. *See* State Ethics Commission Advice of Counsel No. 11-506.

As to an interest through a “business,” the Act is interpreted differently from the City’s conflict of interest provisions. For purposes of the Act, “business” includes nonprofits. *See Rendell v. State Ethics Commission*, 983 A.2d 708, 715-16 (Pa. 2009). As a result, the State Ethics Commission has considered a nonprofit to be a “business” under the Act, and its directors to be “associated” with the nonprofit. *See* 65 Pa.C.S. § 1102 (defining “business with which he is associated” as a “business in which the person . . . is a director,” among other things). Under such an interpretation, the City official would be required to publicly disclose any such conflict of interest and disqualify herself from taking official action on matters in which the nonprofit would have a “private pecuniary interest.” *See* 65 Pa.C.S. §1103(j); State Ethics Commission Advice of Counsel No. 12-513.

For specific guidance on the State Ethics Act, the requestor should seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide a complete defense in any enforcement proceeding initiated by the Commission and is evidence of good faith conduct in any other civil or criminal proceeding, provided the requestor discloses truthfully all the material facts and acts in reliance on the Advice. *See* 65 Pa.C.S. §1107 (10), (11). The State Act would also provide protection from certain penalties if the requestor sought and relied on non-confidential advice from the City Solicitor. *See* 65 Pa.C.S. §1109(g).

A request for advice from the State Ethics Commission should be directed to:

State Ethics Commission
Attention: Legal Division

Room 309 Finance Building
P.O. Box 11470
Harrisburg, Pa 17108-1470

Representing Others in Transactions Involving the City

The Philadelphia Code imposes certain restrictions on City officers or employees representing others in transactions involving the City. Code Section 20-602(1)(a) provides:

No . . . City officer or employee shall assist another person by representing him directly or indirectly as his agent or attorney, whether or not for compensation, in any transaction involving the City. This Section shall not apply to any assistance rendered by any . . . City officer or employee in the course of or incident to his official duties. . . .

This provision applies even if the City official is not compensated for such representation. Consequently, a City official may not represent the nonprofit as its “agent or attorney” in any transaction involving the City, unless such representation is in the course of or incident to her official duties as a City official. This restriction applies to all such transactions, not just those involving the official’s department.

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to the entire outside entity of which the City official is a member, so that if anyone in that entity engaged in the same representation (“as agent or attorney”), disclosure and disqualification would be required of the City official, but that provision applies only to entities “organized for profit,” and so does not apply to nonprofit organizations. Accordingly, if there is to be any matter in which an agent of the nonprofit contacts the City in a matter involving discretion by the City (such as negotiating a contract, but not limited to contracts), that agent may not be the City official. It can be another officer or director of the nonprofit. *See* Nonpublic Advice of Counsel No. GC-2009-505 at 4-5.

Financial Disclosure

A City official’s position on the board of directors of the nonprofit may impact what she must disclose on the Commonwealth’s financial disclosure form, filed each May 1. Public officials are required to file the Commonwealth’s financial disclosure form. This form requires disclosure of the City official’s directorship with any outside “business,”

which includes nonprofits. Note, however, that the form is required by the State Ethics Act. As discussed above, the State Ethics Commission has jurisdiction over all questions related to the Act.

Particular Questions

With regard to the requestor's particular questions concerning her selecting board members of the nonprofit, soliciting charitable donations from businesses, and being listed as a board member on the stationery of the nonprofit, none of these actions presents a fact that raises a particular issue under the Public Integrity Laws, so long as the general prohibitions against conflicts of interest or representing another in a transaction involving the City are observed. There can be an appearance issue with solicitation of contributions, if the public perceives a *quid pro quo*. See Advice of Counsel GC-2007-501 at pages 2-3.

Also, a City official seeking to raise funds for a nonprofit corporation may wish to be aware of certain provisions of the contract reform provisions for no-bid contracts in Title 17 of the Code. Code Section 17-1402(1)(b)(i)(.4) requires this mandatory disclosure in any application to the City for a no-bid contract: "The name and title of each City officer or employee who, within two years prior to the date the application must be filed, asked the Applicant, any officer, director or management employee of the Applicant, or any Person representing the Applicant, to give money" Additionally, Code Section 17-1402(1)(d)(iii) requires that any City no-bid contract shall include this term: "The Contractor shall, during the term of such contract and for one year thereafter, disclose the name and title of each City officer or employee who, during such time period, asked the Contractor, any officer, director or management employee of the Contractor, or any Person representing the Contractor, to give money"

These contract reform provisions do not impose any requirement on the fundraiser's activities, but if a City official plans to solicit funds on behalf of a nonprofit, she should know that if anyone she solicits has, or later applies for, a City contract, they may have to disclose her solicitation. Questions about the contract reform provisions should be addressed to Stephanie Tipton in the Finance Director's Office.

Summary

A City official has asked for advice as to the effect of the ethics laws on her creating a nonprofit organization and serving as an uncompensated board member of that organization while also serving as a City official. Based on the facts provided, the

requestor is advised as to the following. The facts presented do not identify a conflict of interest under Code Section 20-607. Because of its treatment of nonprofits, there might be a different interpretation under the conflicts provision of the State Ethics Act, but the State Ethics Commission is the entity with jurisdiction over the Act. Code Section 20-602(1)(a) would prohibit the City official personally from representing the nonprofit as its agent or attorney in a transaction involving the City, but another member of the nonprofit could permissibly provide such representation, without restriction. The Commonwealth's financial disclosure form would require that the City official disclose her directorship with the nonprofit when she files that form next April.

In keeping with the concept that an advisory opinion on the Public Integrity Laws is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past. The requestor was advised that, although previous opinions of this office that interpret statutes are guidance to how this office will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Opinions on the Public Integrity Laws are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the applicable laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this Advice states general principles, and there are particular fact situations that the requestor may be concerned about, she was encouraged to contact us for specific advice on the application of the Lobbying Code to those particular facts.

Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we will be required to make public this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director