



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
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**Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2012-509**

July 25, 2012

Re: Potential Conflict / City Employee / Nonprofit Organization

A City employee requested a nonpublic advisory opinion as to the effect of the ethics laws on his volunteer service as a member and soon to be president of the PTA of a local charter school, in light of his official position as a City employee in a unit of the City that interacts with such schools.

The requestor advised that one of the schools that he may interact with officially is (“the School”), that he has a child who attends the School, and that he is a member of their Parent Teacher Association (PTA). The requestor further advised that he has been elected as President of the PTA for the School. The requestor advised that he will not be compensated for service as President of the PTA. The requestor later advised of the additional fact that, as president of the PTA, he would be given a seat on the Board of Trustees for the School. It is our understanding that he will not be compensated for this service.

The requestor’s questions were as follows:

[In the requestor’s City position] I have been working on identifying programs the City has available. This may sometimes result in funding.

Being the PTA President, I will also search for opportunities the PTA can take advantage of. Therefore, when searching for these programs, I will be doing so [in my City position] and PTA President. Is this a conflict?

Example: City has funding, PTA applies and is approved for this funding, check is made out to PTA in which my name is listed on the bank account as a check casher and signer on the account.

The requestor was advised that he is not prohibited in general from serving as a volunteer for 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 him. The requestor’s service for the PTA and the School may also impact his financial disclosure requirements.

Benefiting from City Contracts

Charter Section 10-102 prohibits City employees from being “interested directly or indirectly” in certain City contracts. However, because the requestor would not be compensated as a member or president of the PTA, or as a member of the board of trustees of the School, he cannot be “interested” in any City contracts as a result. Therefore, there is no issue under this provision. *See* Nonpublic Advice of Counsel GC-2012-502 at page 2.

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 employee is not compensated for such representation. Consequently, the requestor was advised that he may not represent the PTA or the School as its “agent or attorney” in any transaction involving the City, unless such representation is in the course of or incident to his official duties as a City

employee. This restriction applies to all such transactions, not just those involving the requestor's particular City department.

However, the phrase "as agent or attorney" is a significant limitation on the reach of this prohibition. The requestor did not advise that he was a member of the bar, so he would not be representing any person "as attorney." On the other hand, any representation "as agent" would be subject to this provision. It is assumed that, as president of the PTA or as a trustee of the School, the requestor would be an agent of those respective organizations. Thus, he may not personally represent the PTA or the School in those capacities.

Additionally, as noted, there is an exception for representation that is "in the course of or incident to his official duties," and we were in fact advised that it is part of his official duties to identify programs that the City has available for certain entities, including the School. Nevertheless, since he will be president of the charter school's PTA and a member of the School's board of trustees, the requestor advised that any involvement by him in procuring City assistance to the PTA or the School would be both in his City position and as the PTA president/School trustee (his private position). Clearly, the exception does not contemplate representation in such dual capacities. The requestor was advised that he may not act on his own on both sides of a specific issue. However, if the employee were acting on behalf of the PTA or the School at the direct request of the appropriate governing body of the respective organization, the representation may be permissible, although still subject to an appearance issue.¹

On the other hand, it is noted that Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to the entire outside entity of which the City employee is a member, so that anyone in that entity would be prohibited from the same representation ("as agent or attorney") in certain circumstances, 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 School or of the PTA contacts the City in a matter involving discretion by the City (such as seeking funding, but not limited to funding), there is no issue if that agent is another officer or trustee of

¹ The ethics laws do not explicitly prohibit actions that merely create an appearance of impropriety, but such appearances can be damaging to public confidence in government. *See* Advice of Counsel GC-2011-501 at 10-11. A possible public perception could be that the requestor would have divided loyalties between the public interest (acting in his City capacity) and the private interest of the School or PTA (acting as officer of either entity). Accordingly, the requestor was advised that he may wish to investigate with his superiors whether, considering his position with the PTA and the School, a different employee might be assigned to assist the School and its Parent Teacher Association.

the School/PTA, rather than the requestor. *See* Nonpublic Advice of Counsel No. GC-2009-505 at 5.

The Philadelphia Code's Conflict of Interest Provision

The City Code prohibits City 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 employees from being “financially interested” in their official actions. Because the requestor would not be compensated as a member or president of the PTA of the School or as a member of the School’s board of trustees, he cannot be “financially interested” in any official City action by him that affects the PTA or the School. Therefore, there is no issue under this provision. *See* 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 employees who are members of a “partnership, firm, corporation or other business organization or professional association organized for profit” that has a financial interest in their official actions. However, because the School and the PTA are both nonprofit entities, 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 Code’s conflict of interest provisions raise no issues, the State Ethics Act’s conflict of interest provision may prohibit the requestor from taking actions that financially affect the PTA or the School. This issue will be discussed below.

Disclosure of Confidential Information

The Code also prohibits City employees from making available confidential City information they acquire in their employment with the City. Specifically, Code Section 20-609 provides:

No . . . City officer or employee . . . shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others.

Making available confidential City information to the School or the PTA could not advance the requestor's personal "financial interest" because he is not compensated in his position with the PTA. However, making available confidential City information to the School or the PTA for the purpose of advancing either entity's "financial interest" would violate this provision. Therefore, the requestor may not reveal confidential City information to the School or the PTA in the course of assisting either organization.

Please note that this information is provided merely to be complete, not to suggest that there appears to be any concern that this is an issue under the facts that we were provided.

The Commonwealth's Conflict of Interest Provision

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to some City employees, although it is unclear whether it would apply to the requestor's job title.² The Act prohibits public employees 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 he has a personal financial interest, or a "business" with which he is associated has a financial interest, in his official actions.

² The Act applies only if the individual is a "public employee," which is defined in the Act to include: "Any individual employed by . . . a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person." 65 Pa.C.S. §1102. However, we have not reviewed a job description. (As noted below, a definitive ruling should come from the State Ethics Commission.)

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/trustees and officers 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 [or] officer,” among other things). Under such an interpretation, the requestor would be required to publicly disclose any such conflict of interest and disqualify himself from acting 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, including whether the Act applies to him, the requestor was advised to seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide him 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 disclosed truthfully all the material facts and acted 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 should seek and rely 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

Summary

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this Advice is predicated on the facts that have been provided. 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. Ethics opinions 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 ethics 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, he was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

Based on the facts that were provided, we have concluded that the ethics laws do not completely prohibit the requestor's service with the Parent Teacher Association of the School going forward, but there are certain limitations on his activities. In particular:

(1) The Charter's restriction on benefitting from City contracts contained in Charter Section 10-102 does not restrict the requestor.

(2) Under Code Section 20-602, the requestor may not represent others, including the School or its PTA, as "agent or attorney" in transactions involving the City. Although an argument could be made that the exception for representation "in the course of or incident to his official duties" might apply, it is not without doubt, especially if he would be representing either entity both in his official capacity and in his private capacity, without explicit authority granted from the entity. Even with such authority, there may be an appearance issue if the requestor were to act on both sides of an issue.

(3) The Code's conflict of interest provisions, Code subsections 20-607(a) and 20-607(b), do not restrict the requestor.

(4) However, the State Ethics Act's conflict of interest provision may apply to the requestor and to the financial interests of a nonprofit that he serves as an officer. As a result, it is possible that the Act would prohibit him from taking any official action, in his position with the City, which causes the School or its PTA to receive a "private pecuniary

benefit.” Furthermore, should the requestor’s official duties intersect with the financial interests of the School, this provision could require that he disclose this interest and disqualify himself from acting for the City, in the manner required by the Act (likely similar to Code Section 20-608(1)(c)).

(5) However, this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. The requestor has the option to seek a public opinion from the City Solicitor, which may shelter him from certain penalties for violating the State Ethics Act’s conflict of interest provision.

(6) Under Code Section 20-609, the requestor must not disclose confidential City information that he acquired in his service with the City to the School or to the PTA for the purpose of advancing the financial interests of either entity.

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