CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

GC-2008-506

Philadelphia Board of Ethics
Advice of Counsel

January 29, 2008

Richard R. Harris, Esquire
Obermayer Rebmann Maxwell & Hippel LLP
One Penn Center, 19th Floor
Philadelphia, PA 19103

Re: Request for Advice Regarding Potential Conflict

Dear Mr. Harris:

In an e-mail message dated January 23, 2008, you have requested advice on the restrictions the ethics laws would place on your activities as an attorney for the law firm of Obermayer Rebmann Maxwell & Hippel LLP ("Obermayer"), if you were to be appointed to a position on the Board of Trustees of the Philadelphia Prisons ("Prison Board"). You advise that Obermayer has in the past represented Aramark Corporation, which provides food service and building maintenance service to the prisons and that your firm may represent Aramark in prison litigation within the next few months. You advise that if Aramark hires you to handle its litigation, you would decline to handle any litigation involving the Philadelphia prisons.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. I wish to point out 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 opinion states general principles, and there are particular fact situations that you may be concerned about, you are encouraged to contact me for specific advice on the application of the ethics laws to those particular facts.

If the Mayor were to appoint you to a position on the Prison Board, you would be a City officer in that position. See Opinion Nos. 2007-004 and 2007-006. There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and conflicts of interest are avoided. In that regard, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is prohibited for a City officer or employee.

Home Rule Charter

Section 10-102 of the Charter prohibits certain compensated City officers and employees from benefiting from, or having a direct or indirect interest in, certain City contracts, even if they had no official connection with the contract. Members of the Board of Trustees of the Prisons are compensated at $70 per meeting, up to an annual maximum of $1,680. Code §20-304(33) There is no authority that has determined whether such Trustees are subject to Section 10-102. Nevertheless, even if your firm were to litigate a matter on behalf of Aramark that involved a City contract, I conclude that any financial interest that you would have in the matter would be too remote to be considered even an indirect interest in the contract. Accordingly, there is no issue under the Charter.

Philadelphia Code

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer from engaging in outside employment that involved representing another person, directly or indirectly, as that person's agent or attorney in any transaction involving the City. However, subsection (2) of this Section provides that subsection (1) applies in a less restrictive way to part-time officials (which would apply to you as a member of a board of the City, which by its nature is a part-time position). Subsection (2) provides that such board members are "subject to the foregoing paragraph only in relation to a particular matter (a) in which he has at any time participated through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or

otherwise, or (b) which is pending in the department, agency, authority, board or commission of the City in which he is serving." Therefore, to the extent that Code §20-602(1), as modified by 20-602(2), restricts you personally from representing Aramark, or any other Obermayer client, in any matter involving the City wh ile serving on the Prison Board, there should be no issue, as you have advised that you do not intend to participate in any such representation. However, this does not address a separate restriction on any other employee of Obermayer, as imposed by a separate provision, Section 20-602(5). Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to any outside firm of which the City officer is a member, so that anyone in that firm would be prohibited from the same representation. Unlike §20-602(1), however, §20-602(5) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in §20-608[1]. Thus, an officer or employee of Obermayer could represent an Obermayer client in a transaction involving the City (such as a lawsuit against the City), provided that you made the requisite disclosure and disqualification.

Additionally, the Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to the personal interest, Code Section 20-607(a) provides:

> (a) Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity . . .

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[1] Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: You should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Your public position (member of the Prison Board) and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (employee of Obermayer) that presents the conflict;
4. A statement of how your public duties may intersect with your private interest or that of your employer (if not obvious from 2 & 3 above); and
5. Your intention to disqualify yourself from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair, Executive Director, or Secretary of the board in which you would be acting, the Prison Board; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

As to the interest through another entity, Code Section 20-607(b) provides:

> (b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section 20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

Thus, for either a personal financial interest or an interest that Obermayer may have in City action, the rule is the same: You must disclose the conflict and disqualify yourself. In such matters, you must publicly disclose the financial interest and announce your intention to disqualify yourself from all official consideration of the matter. Participation that you should avoid would include not only final decisions, but also any preliminary discussion, review, or action. See footnote 1.

Note, also, that Section 20-609 of the Code provides that 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." Obviously, if you were to make available to the Obermayer firm or any of its clients any confidential City information you learn in your service on the Prison Board, that would violate this provision.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to you.[2] Section 1103(a) provides:

> (a) Conflict of interest. No public official or public employee shall

[2] The Act applies only if you are a "public official," as defined in the Act. The definition clearly includes members appointed to City boards and commissions, except those that are merely advisory. We have concluded that the Prison Board is not merely advisory. See Opinion No. 2007-006.

engage in conduct that constitutes a conflict of interest.

What is a "conflict of interest" may be determined by reference to the definitions section of the Act for a definition of that term and terms included within that definition, as follows:

> Section 1102. Definitions.
>
> The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:
>
> . . .
>
> "Authority of office or employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.
>
> "Business." Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.
>
> "Business with which he is associated." Any business in which the person or a member of the person's immediate family is a director, officer, owner, employee or has a financial interest.
>
> . . .
>
> "Conflict" or "conflict of interest." Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" 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, a member of his immediate family or a business with which he or a member of his immediate family is associated.
>
> . . .
>
> "Financial interest." Any financial interest in a legal entity

> engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

65 Pa.C.S. §1102.

I conclude that for you to take official action that has an economic impact on Obermayer would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) would restrict your activities as a public official relative to the use of authority of office to obtain a private pecuniary benefit for the Obermayer firm, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, as described in footnote 1 above. See also 65 Pa.C.S.A. §1103(j).

This restriction may also extend to clients of yours. See State Ethics Commission Opinion No. 92-010 (Kannebecker, December 10, 1992). In that Opinion, the Commission ruled that a township supervisor who was also a private attorney had a conflict as to clients of his who have matters pending before the township, even if he represents those clients only in an unrelated matter, not the matter before the township. Opinion 92-010 has been followed by the Counsel of the Commission, who has issued several recent Advices of Counsel citing it. See Advice No. 96-514 (lawyer/councilmember has conflict as to clients who have matters before Council even where lawyer does not represent them in the matter, provided there is an ongoing attorney-client relationship or retainer); Advice No. 96-547 (private engineer/public code officer has conflict in matters in which his engineering firm represented clients before the Borough); Advice No. 96-550 (private engineer/public official has conflict in matters in which he takes official action as to individuals who are clients in unrelated matters); Advices Nos. 05-564, 05-568, 06-595. 07-504, 07-534, 07-009. Thus, you would be required to publicly disclose the potential conflict and disqualify yourself from taking any official City action with respect to any client of yours through the Obermayer firm, applying the same principles as for the City Code above.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that the Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [the Act]." 65 Pa.C.S. §1109(g). Presumably, it is this provision that is the reason for the concurrent jurisdiction of the Law Department provided for in Charter §4-1100 as to matters involving State law. Since the Board of Ethics is not "the solicitor" of the City, you may, if you wish, also obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive the protection, could not be confidential.

Financial Disclosure

As a City officer, you would also be required to disclose your compensation as an employee of the Obermayer firm as income in the financial disclosure form you must file each May 1, pursuant to Code Section 20-610(1).

Other Authority Not Addressed

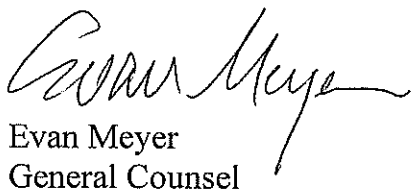
This Advice of Counsel addresses only the application of the ethics laws relating to the conduct of governmental employees of the City. I do not address any other source of law. Explicitly not addressed is the Rules of Professional Conduct that govern the conduct of attorneys admitted to practice in Pennsylvania.

Conclusion

Based on the facts you have provided, and provided that you comply with the requirements of this opinion, including that you publicly disclose any conflicts as provided in Code §20-608(1) and disqualify yourself in matters in which Obermayer is representing itself or its clients in a matter involving the City and also disqualify yourself from official City action that would affect the financial interests of the Obermayer firm, I advise you that you are not prohibited by State or local law from serving as an appointed member of the Board of Trustees of the Philadelphia Prisons, in light of the fact that you is an employee of the Obermayer law firm.

If you have any additional facts to provide, I will be happy to consider if they change any of the conclusions in this opinion. Since you have not requested confidential advice from the Board of Ethics, we will make this letter public, as required by Code Section 20-606(1)(d)(iii).

Sincerely yours,



Evan Meyer
General Counsel

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