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Philadelphia Board of Ethics
Nonpublic Advice of Counsel No. GC-2008-512 (Amended)

April 2, 2008
(Amended November 5, 2008)

Re: Application of Ethics Laws to Board Member Employed by Non-Profit

A member of a City board or commission requested advice on the restrictions the ethics laws would place on that person's activities as an officer for a certain local nonprofit entity in light of the requestor's position on a City board/commission.

We advised as follows: 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 the requestor may be concerned about, the requestor was encouraged to contact me for specific advice on the application of the ethics laws to those particular facts.

We advised the requestor that, as a member of a City board/commission, the requestor is a City officer. *See* Board of Ethics 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. The full text of the provision is as follows:

> City Officers and Employees Not to Engage in Certain Activities. As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

The threshold question to be addressed is whether this provision applies to a member of this particular board/commission. We noted that, in Opinion No. 2007-006 the Ethics Board addressed the question of the application of Charter §10-107 to certain City boards and commissions. However, Section 10-107 is worded differently from Section 10-102. The first sentence of §10-102 is explicit about which City officers are subject to that provision. The issue, then, is whether the requestor can be considered to fall under any of the categories of "City Officers and Employees" outlined in §10-102. We advised that the requestor is clearly none of the enumerated officers, nor a department head, nor a City employee. The issue is whether the requestor, as a member of that particular board/commission, is "any other governmental officer or employee whose salary is paid out of the City Treasury." More specifically, the question is whether the requestor's compensation as a member of the board/commission is a "salary" for purposes of §10-102. Members of the board/commission in question are compensated at more than $85 per meeting. We noted that the specific question of the application of §10-102 to this particular body has never been addressed by any Ethics Board or by the Solicitor's Office. However, prior rulings by the Solicitor's Office to related boards provide some

guidance. In 1992 the City Solicitor ruled that members of the Human Relations Commission (compensation: $100 per meeting, annual maximum of $10,000) were subject to §10-102. Opinion No. 92-27, *1992-1993 City Solicitor's Opinions* at 108. Also, in 1989 the City Solicitor ruled that members of the L & I Review Board (compensation: $85 per meeting, annual maximum of $6,375) were subject to §10-102. Opinion No. 89-13, *1988-1989 City Solicitor's Opinions* at 101. Unlike the political activity restriction, interpretation of Section 10-102 is based particularly on a consideration of what "salary" means and it is appropriate to apply a solely monetary analysis. Accordingly, by analogy to Solicitor Opinions 92-27 and 89-13, I conclude that members of the particular board/commission in question are subject to Charter §10-102.

As to the substance, prior rulings have held that where a City employee, as an individual, enters into a personal services contract with the City that clearly violates §10-102. When the employee works for a firm that has a contract with the City, the provision is violated when the employee works <u>on that contract</u> for the outside contractor. Where the outside contractor has many contracts, and the employee happens to work for the outside contractor but not in any way related to the City contract, the provision is not violated, unless the City employee has a financial interest in the contract, such as where the employee's compensation includes a share of profits or revenue generated by the contract or where the employee otherwise benefits from the contract.

We were advised that, although the nonprofit at which the requestor is an officer receives certain funding from the City, there is no contract between the nonprofit and the City under which the nonprofit provides specific services in exchange for that funding. The requestor advised further that the nonprofit has had some contracts with the City to provide services, but that this activity does not generate considerable revenue and the contracts are a different division of the nonprofit than the division in which the requestor has responsibility. Accordingly, we concluded, it does not appear that the nonprofit has any contract with the City that involves payment out of the City Treasury for purchase of property, construction, or provision of services, where contract funds flow to the requestor. Under those facts, there would be no issue under Charter § 10-102.

<u>Philadelphia Code</u>

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 the requestor as a member of

a board/commission 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, Code §20-602(1), as modified by 20-602(2), restricts the requestor personally from representing the nonprofit in any matter involving the City while serving on the City board/commission, in two ways:

1. In matters in which the requestor acted on the City board/commission as a member, the requestor may not represent the nonprofit; and

2. In matters currently before the City board/commission, the requestor may not represent the nonprofit.

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to any outside business of which the City officer is a member, so that anyone in that firm would be prohibited from the same representation ("as agent or attorney") but only in a matter in which the requestor as a City officer has "the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters." Unlike §20-602(1), §20-602(5) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in §20-608. However, the requestor advised he/she is an officer of a non-profit entity, so the disclosure requirement of §20-602(5) does not apply. Thus, an officer or employee of the nonprofit other than the requestor could represent the nonprofit in such a matter without any disclosure or disqualification by the requestor.

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 . . .

Thus, for a personal financial interest the requestor may have in City action (such as the board at issue taking action that affects the nonprofit in a manner that impacts the requestor's compensation or continued employment), the requestor must disclose the conflict and arrange to be disqualified. In such matters, the requestor must publicly disclose the financial interest and announce his/her intention to disqualify himself/herself from all official consideration of the matter.[1] Participation that should be avoided would include not only final decisions, but also any preliminary discussion, review, or action. 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.

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[1] Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The requestor 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. The requestor's public position (member of the City board/commission) and description of duties relevant to the conflict, if not obvious;
3. The requestor's private position or financial interest (employee of the nonprofit) that presents the conflict;
4. A statement of how the requestor's public duties may intersect with his/her private interest or that of the nonprofit employer (if not obvious from 2 & 3 above); and
5. The requestor's intention arrange to be disqualified 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 City board/commission; (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.

Subsection 20-607(b) would not apply to a situation involving the entity for which the requestor is an officer because it is a non-profit, and thus there could not be a financial interest arising in a member of "a partnership, firm, corporation or other business organization or professional organization organized for profit."

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 the requestor were to make available to the nonprofit any confidential City information gained in service on the City board/commission that would violate this provision.

State Ethics Act

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

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

[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 board/commission in question is not merely advisory. *See* Opinion No. 2007-006.

> "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.
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> "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.
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> . . .
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> "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.
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> . . .
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> "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.

We concluded that for the requestor to take official action that has an economic impact on the requestor personally 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 the requestor's activities as a public official relative to the use of authority of office to obtain a private pecuniary benefit for the requestor, 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).

However, as to an action that has an economic impact only on the nonprofit, the result is different. On October 3, 2008, the Commonwealth Court ruled that the

definition of "business" in the State Ethics Act does not include nonprofit entities. This eliminates a difference between the State Act and the City Code in what a "conflict of interest" is. Under the City Code, if you are an officer or member of a nonprofit, you may take official action affecting that nonprofit if you have no personal financial interest; there is no conflict. But up to now, under the State Act, that nonprofit would still be a "business with which you are associated" and you would have a conflict. That difference is now eliminated. *See Rendell v. McGinty*, 2008 Pa. Commw. LEXIS 485.

Therefore, I conclude that the State Ethics Act does not provide that for the requestor to take official action that has an economic impact on the nonprofit would be a conflict under the State Act, so long as the requestor personally has no financial interest in the matter.

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, the requestor may wish also to 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, the requestor would also be required to disclose his/her compensation as an employee of the nonprofit as income in the financial disclosure forms that must be filed each May 1.

Conclusion

Based on the facts that we were provided, and provided that the requestor comply with the requirements of this opinion, including that he/she publicly disclose any conflicts as provided in Code §20-608(1), we advised that the requestor is not prohibited by State or local law from serving as an appointed member of the City board/commission in light of the fact that the requestor is an employee and officer of the nonprofit.

We advised the requestor that if he/she had any additional facts to provide, we would be happy to consider if they change any of the conclusions in this opinion. Since

the requestor sought nonpublic advice, we are making public this revised version, edited to conceal the identity of the requestor, as required by Philadelphia Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

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