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GC-2008-521

Philadelphia Board of Ethics
Nonpublic Advice of Counsel (Amended)

September 4, 2008
(Amended October 31, 2008)

Re: Application of Ethics Laws to a Board Member Who Is an Employee of a Firm Involved in the Purchase of City Property

We received a request from a member ("the requestor" or "the member") of a board/commission of the City for nonpublic advice[1] concerning the restrictions the ethics laws would place on the requestor's activities as an employee of a business firm that may have an interest in transactions involving purchases of real property from the City.

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

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[1] Section 20-606(1)(d)(iii) of The Philadelphia Code provides as follows, relating to advisory opinions issued by the Board of Ethics:

> The Board shall make public its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of any City officer or employee or other involved party in accordance with regulations promulgated by the Board.

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.

In his/her position as a member of the 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 that 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 that 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. In this sense, Section 10-102 is a broad prophylactic rule, rather than a typical conflict of interest provision. 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 the board/commission at issue. In Opinion No. 2007-006, the Ethics Board addressed the question of the application of Charter Section 10-107 (political activity) to certain City boards and commissions. However, the provision at hand, Section 10-102 (interest in contracts), is worded differently from Section 10-107. The first sentence of Section 10-102, as quoted above, 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 Section 10-102.

Clearly, a board/commission member is none of the enumerated officers, nor a department head, nor a City employee. The issue is whether the requestor 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 at issue is a "salary" for purposes of Section 10-102. Based on the compensation provided in Code Section 20-304 for the board/commission at issue, we concluded that Section 10-102 of the Charter applies to members of that body.

Thus, we advised that the member may not benefit from or have a direct or indirect interest in certain City contracts. Although the purchase of a real estate property involves a contract, it is clear that the above-cited provision is concerned with funds being paid out of the City Treasury, not purchases of property <u>from</u> the City, in which funds would be paid into the Treasury. In 1997 I wrote for the Law Department, in a published opinion, that "I conclude that the reference to 'purchase of property' in this provision [§10-102] refers to the situation where the City purchases property from an individual, not where the individual purchases property from the City."

Therefore, we concluded, based on the facts that the requestor provided, that Charter Section 10-102 presents no issues in this matter.

Philadelphia Code Representation Provision

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 include 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/commission 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 Section 20-602(1), as modified by 20-602(2), restricts the requestor personally from representing his/her company in any matter involving the City while serving on the board/commission at issue, in two ways:

1. In matters in which the requestor acted on the board/commission at issue as a Board member, the requestor may not represent his/her company; and

2. So long as the requestor is serving on that board/commission, he/she may not represent his/her company in a matter that is before that board/commission.

In addition, 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 ("as an 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." (In the requestor's case, that would mean a matter before the requestor's board/commission.) Unlike Section 20-602(1), however, Section 20-602(5) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in Section 20-608. Thus, an officer or employee of the requestor's firm could

represent the firm in such a transaction, provided the requestor makes the requisite disclosure and disqualification.[2]

The term, "represent," in the context of Code Section 20-602 is narrow, since the provision is qualified by the phrase, "as agent or attorney." (In contrast, "represent" in the post-employment provision of the State Ethics Act, not applicable here, is interpreted much more broadly.)

Conflict of Interest Provision—Philadelphia Code

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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[2] 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 board/commission) and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (employee of the company) 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/commission in which you would be acting; (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 the company may have in City action, the rule is the same: the requestor must disclose the conflict and arrange to be disqualified. That is, in any matter before that City agency, the requestor must publicly disclose the financial interest and announce his/her intention to be disqualified from all official consideration of the matter. *See* footnote 2. Participation that should be avoided would include not only final decisions, but also any preliminary discussion, review, or action.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, applies to the requestor.[3] Section 1103(a) provides: "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, which contains a

[3] The Act applies only to "public employees" and "public officials," as defined in the Act. A board/commission member is generally not a "public employee." The definition of "public official" clearly includes members appointed to City boards and commissions, except those that are merely advisory. We have concluded that the board/commission at issue is not merely advisory. *See* Opinion No. 2007-006.

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.
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> "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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> . . .

> "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 the requestor to take official action that has an economic impact on his/her company 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 his/her company, 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 2 above. *See also* 65 Pa.C.S.A. §1103(j).

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note 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 [certain provisions of the Act]." 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option 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, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

A Further Word on Disclosure and Disqualification

Where a City officer has a financial interest in any legislation, award, contract, lease, case, claim, decree or judgment, the officer must "prior to any City action thereon" disclose the interest and disqualify himself. Code §20-608(1)(c). It is clear that this provision refers only to City action on which it could reasonably be

expected that the particular City officer's duties might require him or her to take official action. *See* Section 20-607(a), referring again to various types of actions such as legislation, award, contract, lease, case, claim, decree or judgment "made by him in his official capacity [or by a body of which he is a member]." Obviously, every employee of the City need not follow the formal process every time a bill is introduced affecting employee benefits, or the wage tax, or the budget of the City. Nor need a member of a City board file a formal disclosure and disqualification letter in anticipation of the possibility that at some uncertain time in the future a matter may come before his or her board affecting any of the various outside interests the member may have. Once a specific matter is identified, however, then the filing requirement must be observed.

Appearance of Impropriety

The ethics laws do not prohibit actions of a City official that "have the appearance of impropriety." Nevertheless, the "Guide to Ethical Conduct for City Officers and Employees," adopted by the former advisory Board of Ethics and published in 1982 City Solicitor's Opinions at page 306, states: "[I]mproper appearances may be as or more detrimental than actual conflicts to the public's confidence in City government. Situations of apparent impropriety should be avoided wherever possible." Even where there is no technical violation of an ethics statute, there may be the appearance of impropriety, in a matter where the possible public perception would be that improper influence was being asserted, or that a public official might be biased by a personal interest. Thus, although this Board of Ethics would have no power to impose sanctions for a mere appearance of impropriety, City board/commission members may wish to avoid such situations.

Conclusion

Based on the facts the requestor provided, and provided that the requestor complies with the requirements of this opinion, including public disclosure of any conflicts as provided in Code Section 20-608(1) and disqualification in matters in which a member of the requestor's company is representing the firm in a matter involving the City and in matters in which official City action would affect the financial interests of the company, I advised the requestor that he/she is not prohibited by State or local law from serving as an appointed member of the

board/commission at issue, in light of the fact that he/she is an employee and officer of a company that may have an interest in transactions involving purchases of real property from the City.

I informed the requestor that if he/she had any additional facts to provide, I would be happy to consider whether they change any of the conclusions in this opinion. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original Advice of Counsel public, but we are issuing 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