



CITY OF PHILADELPHIA

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**GC-2008-526**

**Philadelphia Board of Ethics  
Nonpublic Advice of Counsel**

December 4, 2008

**Re: Member of City Board/Commission—Proposal to that Body**

A member of a City board/commission requested nonpublic advice as to the application of the ethics laws to certain circumstances arising out of the member's position on the board/commission, in light of the member's private interest in a nonprofit organization, of which the member is an unpaid officer.

The requestor advised that a different nonprofit program had made a presentation to his/her board/commission. It was agreed by the board/commission that it was a worthwhile program and approved in concept. There was some talk about that program and the requestor's organization starting the program immediately since the requestor's organization already had a relationship with the board/commission. A proposal and budget was submitted in the name of the two organizations jointly, in order to cover the expenses of implementing this program along with specifics on the implementation and time frame.

The requestor advised that, under the proposal, the requestor's nonprofit would provide support to the other nonprofit in implementing the programs. Funding was

required to be approved by vote of the requestor's board/commission.

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. The Board of Ethics does not conduct an independent inquiry into the facts. Although previous opinions of this office or the Law Department 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. 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, the requestor was encouraged to contact the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

In his/her position as a member of a City board or 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. The restrictions of each of those three bodies of law are discussed in the following paragraphs. Based on the facts provided, it was concluded that the only issue is under the "representation" provision of the City Code, which prohibits the requestor from representing his/her nonprofit before his/her City board/commission.

Please note that Section 20-606(1)(d)(ii) of The Philadelphia Code provides that: "Advisory opinions shall be issued only with respect to proposed future conduct or action by a City officer or employee." To the extent that the Board has separate authority under the Charter, there is similar applicable language in the Board's Regulation No. 4, at paragraph 4.1(d):

(d) **Advice on future conduct only.** Except as provided in paragraph (e) below, the Board or its staff shall only issue advice to a City officer or employee or a supervisor of such City officer or employee, or to a candidate, candidate political committee, or political committee with

respect to the proposed future conduct or action of the subject whose conduct is at issue.

Accordingly, the requestor was advised that, to the extent that his/her inquiry relates to conduct that has already occurred, this advisory will not address past conduct.

### **Philadelphia Code—Prohibited Representation**

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) prohibits a City officer from 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 includes the requestor as a member of a board/commission of the City, by its nature 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 §20-602(1), as modified by 20-602(2), restricts the requestor personally from representing his/her private organization or any of its clients in any matter involving the City while serving on the City board/commission, in two ways:

1. In matters in which the requestor acted previously on that City board/commission as a member, the requestor may not represent anyone; and
2. In matters currently before the City board/commission affecting the requestor's nonprofit or a client of that nonprofit, the requestor may not represent his/her organization or that client.

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, have "the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters." 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. However, the disclosure requirement Section 20-602(5) applies only to for-profit entities, and so does not apply to the requestor's

nonprofit. Thus, an officer or employee of the nonprofit (other than the requestor) could represent the organization in such a transaction, without any disclosure or disqualification required of the requestor.

**Philadelphia Code—Conflict of Interest**

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 for-profit entity that has any member with a financial interest in the official decisions of that City officer or employee. 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 . . .

This does not appear to be a concern under the provided facts, since we were advised that the requestor is not compensated for his/her service with the nonprofit.

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.

Subsection 20-607(b) would not apply to a situation involving the nonprofit, since, as a nonprofit, there could not be a financial interest arising in a member of “a partnership,

firm, corporation or other business organization or professional association 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 he/she learns 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.<sup>1</sup> 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.

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.

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<sup>1</sup> The Act applies only if the requestor is 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. The Board of Ethics previously concluded that this particular board/commission 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.

“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.

As to a private pecuniary benefit to the requestor personally, as with the City Code, it was concluded that there is not a conflict here, since we were advised that the requestor is not compensated by the nonprofit. As to a benefit to the nonprofit as a “business with which you are associated,” the law on this issue has recently changed. In the past, we have advised as follows:

The State Ethics Act differs from the Philadelphia Code in this regard. The State Ethics Commission has ruled many times that a nonprofit corporation may be a "business with which he is associated."

However, 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 one is a non-compensated officer or member of the board of directors of a nonprofit, that person may take official action affecting that nonprofit; 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 the person would have a conflict. That difference is now eliminated. *See Rendell v. McGinty*, 2008 Pa. Commw. LEXIS 485.

Therefore, the requestor was advised that, under the State Ethics Act, for him/her to take official action that has an economic impact on the nonprofit would not be a conflict under the State Act, so long as the requestor is not compensated by the nonprofit, and 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 [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.)

### **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. There is no authority that has determined whether members of the requestor's board/commission are subject to Section 10-102. In any case, it is unclear whether the proposal at issue involves a contract "for . . . the supplying of any services to be paid for out of the City Treasury," such as

would implicate Section 10-102. Moreover, we were advised that the requestor is not seeking compensation out of this proposal. In light of all the facts provided, the requestor was advised that even if such funding would involve a "contract for the supplying of any services to be paid for out of the City Treasury," any financial interest that the requestor 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.

### **Conclusion**

Based on the facts provided by the requestor, he/she was advised that there is no issue under the Home Rule Charter, the State Ethics Act, or Section 20-607 of The Philadelphia Code. However, Section 20-602 of The Philadelphia Code prohibits the requestor from representing his/her private organization, or any of its clients in any matter involving the City in which the requestor acted previously acted while on the City board/commission. Also, the same provision prohibits him/her from representing the nonprofit, or any of its clients, while serving on the City board/commission in any matter that comes before that body. Another officer or employee of the nonprofit may represent the organization before the board/commission. As noted above, this Advice of Counsel does not address any past conduct.

Since nonpublic advice was requested, 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