



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
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**Philadelphia Board of Ethics
Advice of Counsel GC-2010-501**

January 22, 2010

Arthur C. Evans, Jr., Ph.D., Director
Department of Behavioral Health and
Mental Retardation Services
1101 Market Street, 7th Floor
Philadelphia, PA 19107-2907

Re: Trip Funded by Foundation Grant / Gift

Dear Dr. Evans:

You have asked to be advised as to whether any ethics issues would arise if you agreed to participate in a foreign exchange program funded by a local foundation.

You have forwarded to us a letter of invitation from Israel Elwyn, a non-profit corporation based in Jerusalem. The letter states that the Samuel P. Mandell Foundation, an organization based in Philadelphia, funds a professional exchange between the United States and Israel. The foundation has made a grant to the American Friends of Israel Elwyn to support an exchange, in which two professionals from Israel would come to the U.S. to learn about our models for disability services and services. In the same year, two professionals from the U.S. would travel to Israel to do the same. The letter adds that the foundation grant would pay you, as a participant in the fellowship, up to \$2450 for the trip, which usually lasts about six days.

The letter states that participants would only be reimbursed for their actual costs, and that the \$2450 can usually cover all expenses, since Israel Elwyn, as the Israeli host, will provide some meals and local travel.

Separately, you have advised as follows: “I will do this on my own time and no city resources will be involved. The costs will be covered by the Mandell Foundation and myself. The Foundation is not affiliated with any provider or organization that we fund.”

Threshold Issue

An issue that must first be addressed is how to characterize your receipt of this trip, funded by the Mandell Foundation. I conclude that it is not outside employment, since there is an exchange, and moreover, it appears that the person who is likely to benefit most from your visit to Israel is yourself, since you will be there to learn about their systems. It is an exchange, funded by the third party. Accordingly, it appears that a gift analysis is most appropriate (I will also discuss the honorarium provision under the State Act, which is related).¹

There are a number of provisions in the Public Integrity Laws that address gifts. The following analysis follows principles discussed in Nonpublic Formal Opinion No. 2009-001.²

The Home Rule Charter

The Home Rule Charter, in Section 10-105, prohibits gratuities, “in the form of money or otherwise for any act or omission in the course of [the employee's] public work.” In other words, a reward or tip in gratitude for something that official/employee did as part of his/her City job, for which their salary should have been the only compensation. There is no indication in your facts that either the Mandell Foundation or Israel Elwyn is providing anything “for

¹ There is a substantial question whether an international exchange—where both governments (Philadelphia and the State of Israel or selected city in Israel) each benefit from the associated visit from professionals of the other—is a gift at all, rather than a reciprocal agreement for mutual consideration.

² Nonpublic Formal Opinion No. 2009-001 may be found on the website of the Ethics Board at http://www.phila.gov/ethicsboard/pdfs/Formal_Opinion_2009001.pdf.

any act or omission” by you as a City official, so there is no issue under Section 10-105.

Philadelphia Code

Section 20-604 of the Code provides:

§ 20-604. Gifts, Loans and Favors to City Personnel.

(1) No member of Council or other City officer or employee, shall solicit, accept or receive any gift, loan, gratuity, favor or service of substantial economic value that might reasonably be expected to influence one in his position in the discharge of his official duties, from any person, firm, corporation or other business or professional organization.

(2) No person, firm, corporation or other business or professional organization shall offer, make or render any gift, loan, gratuity, favor or service of substantial economic value to any member of Council or other City officer or employee which might reasonably be expected to influence such officer or employee in the discharge of his official duties.

Assuming that there is a gift, and from a source that fits the description (“person, firm, corporation or other business or professional organization”), this is essentially a two-part analysis: (1) is the gift “of substantial economic value”; and (2) is the status of the source and the responsibilities of the recipient such that the gift “might reasonably be expected to influence” the recipient in the performance of his/her official duties?

Even if the exchange is a gift “of substantial economic value” to you, I conclude that it is not a gift which might reasonably be expected to influence you in the discharge of your official duties. You have advised that the Mandell Foundation is not affiliated with any provider or organization that is funded by your office. Nor have you identified any way in which your office might take action that might affect the Mandell Foundation, Israel Elwyn, the American Friends of Israel Elwyn, or the State of Israel. Accordingly, you are advised that acceptance of reimbursement for the travel expenses under this grant would not violate Code Section 20-604.

State Ethics Act

The gifts provisions of the State Ethics Act, 65 Pa.C.S.A. Sect. 1103(b) and (c) basically prohibit bribes. That is, there must be an understanding that the official receiving the gift would be influenced by the gift. This does not appear to be an issue from the facts you provide.

Section 1103(d) of the Act provides that “No public official or public employee shall accept an honorarium.” The term “honorarium” is defined in Section 1102 of the Act as follows: “Payment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of such services which are nonpublic occupational or professional in nature. The term does not include tokens presented or provided which are of de minimis economic impact.”

I interpret the Act’s definition of “honorarium” to mean two things: (1) public employees may not receive payment when they are invited to appear and talk about subjects related to their work because of their official identities; and (2) public employees may not receive payment for other services that is out of proportion to the market value of such services. The presumption is that when public employees are paid to talk about their work (since it is part of their job to explain their work to the public) or are paid an excessive amount for doing something, the payment may represent a “corrupt bargain” to purchase the employee’s influence.

However, you are not being paid to talk about your work. Indeed, if anything, you are being “paid” (if that is the correct characterization for this reimbursement of travel expenses) to listen to Israeli officials talk about their work.

Accordingly, you are advised that there is no issue under Section 1103(b), (c), or (d) of the State Ethics Act, under the facts as you have presented them.

Nevertheless, you are advised that the State Ethics Commission is the definitive authority on the State Ethics Act. Our advice on the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To those who rely in good faith on advice from the Commission itself, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107(10), (11). Upon request, advice from the

State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor's opinion. 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, including whether the requestor is a "public employee" subject to the 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.)

For these reasons, you may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Executive Order No. 002-04

Executive Order No. 002-04 prohibits gifts of any kind from various sources to any officer or employee in the Administrative and Executive Branch.

Nevertheless, an Executive Order is not one of the Public Integrity Laws under our jurisdiction, but a directive from the Mayor to those under his authority. Accordingly, interpretation is up to the Mayor. It is my understanding that the Mayor has delegated such matters to the Chief Integrity Officer, Joan Markman. Since your request email was also addressed to Ms. Markman, I presume that you will be advised by Ms. Markman as to whether the Mandell Foundation is a prohibited "source" and also as to whether this exchange would be considered to be a "gift" under the Executive Order, whether it might be accepted under the "gift to the City" exception, or whether some other exception applies.

Conclusion

Under the Public Integrity Laws within the jurisdiction of the Board of Ethics, you are advised that there is no prohibition against your participating in the

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international exchange funded by the Mandell Foundation, under the terms as described by you. It is my understanding that you have asked Chief Integrity Officer Joan Markman for advice on interpretation of Executive Order No. 02-004. You may wish to consult with the State Ethics Commission for a definitive ruling on the State Ethics Act.

If you have any additional facts to provide, we will be happy to consider if they change any of the conclusions in this Advice. Since you have not requested nonpublic 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