

CITY OF PHILADELPHIA

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Evan Meyer
General Counsel

**Philadelphia Board of Ethics
Advice of Counsel GC-2010-502**

January 26, 2010

Carl Coin, Executive Director
Sinking Fund Commission
Municipal Services Building, Room 630
1401 John F. Kennedy Blvd.
Philadelphia, PA 19102

Re: Sinking Fund Commission / Conflict of Interest

Dear Mr. Coin:

Through counsel, you have made a request on behalf of the Sinking Fund Commission, of which you are executive director. You have asked to be advised on procedures that must be taken at a meeting of the Sinking Fund Commission to ensure compliance with the ethics laws, because one of the members is concerned about a possible conflict of interest. You advise that the Sinking Fund Commission has three members, one of whom is the City Controller (*see* Charter Section 3-915). It is my understanding that the Sinking Fund Commission oversees the investment of a reserve that is held by the City for the payment of bond interest and principal and for the assets of the PGW Pension Fund, and therefore employs investment managers for that purpose. One of those investment managers, Weaver C. Barksdale & Associates (Barksdale), has had a contract with the Commission for the past four years, and, as the contract is to

expire shortly, an RFP was issued for the new contract. Barksdale was one of the respondents.

You advise that recently, a meeting was held of the Commission to interview five candidates for the position including the incumbent, Barksdale. In their marketing materials, Barksdale lists Robert O'Donnell, Esq. as Executive Vice President and Chief Counsel. You advise that Mr. O'Donnell is a recent hire as an employee of the firm (although he had previously provided contract assistance). Mr. O'Donnell also has a current contract with the Controller's Office as a consultant on Pension Fund matters. You advise that in this role, Mr. O'Donnell does not consult or have any involvement with Sinking Fund Commission./PGW Pension Plan matters. You advise that the Controller was unaware of any relationship or employment between Mr. O'Donnell and the investment manager prior to this meeting.

The pending action is the vote to approve rehiring the incumbent, but the Controller wants to know whether he may vote on that question, and accordingly I am advised that the vote on that question has been delayed, pending this Advice. I believe the general questions are two: (1) whether Mr. O'Donnell has a conflict, such that the contract would be illegal or ill-advised and affect the Commission as a whole in voting; and (2) whether the Controller himself has a conflict, such that he may be precluded from voting on the matter. You are advised that neither question raises an issue.

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 you have provided. We do not conduct an independent inquiry into the facts. 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 us for specific advice on the application of the ethics laws to those particular facts.

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.

Accordingly, no compensated City officer or employee (except for some board or commission members; *see* Board of Ethics Regulation No. 6) may have a financial interest in the Sinking Fund's investment manager contract. However, Mr. O'Donnell is not a City officer or employee; he is a consultant to the Controller's Office. As an independent contractor, he is not subject to the Public Integrity Laws, in particular Charter Section 10-102. Nor does the fact that the Controller employs Mr. O'Donnell as a consultant give the Controller an interest in any contract in which Mr. O'Donnell may be paid.

Accordingly, you are advised that there is no issue under Charter Section 10-102.

Philadelphia Code—Conflict of Interest

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 . . .

As with Charter Section 10-102, the Code provision applies only to City officers and employees, not to contractors or employees of contractors. Accordingly, Mr. O'Donnell would not be subject to the provision, either as an employee of Barksdale or a contractor

for the Controller's Office¹. Nor would the Code provision mean that the Controller would have a conflict. The phrase "financially interested" means a personal interest. The Controller himself would not be financially interested in a Sinking Fund Commission decision that benefited Mr. O'Donnell, just because Mr. O'Donnell is a consultant to the Controller's Office.

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 this situation since the Controller is not a member of Barksdale, and you do not advise that Mr. O'Donnell is a close relative of the Controller.

Accordingly, based on the facts you provided, you are advised that there is no issue under Code Section 20-607.

State Ethics Act

Similar to the Code, conflict of interest provision of the State Ethics Act, 65 Pa.C.S. §1103(a), applies to the Controller as a City officer, but not to Mr. O'Donnell.

You are advised that for the Controller to take official action that has an economic impact on himself personally would be a conflict under the State Act in the same way it

¹ Moreover, even if the conflict of interest provision did apply to Mr. O'Donnell, he would only be required to disclose any financial interest in a City decision and disqualify himself from participating in such action. As you have advised that he does not assist the Controller in Sinking Fund matters, there would be no conflict.

would be under the City Code. Since there is no personal financial interest, there is no issue under the State Ethics Act

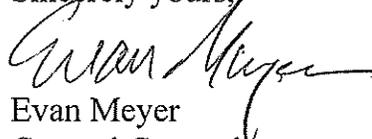
Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that the Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [the Act]." 65 Pa.C.S. §1109(g). 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.) Alternately, you may wish to apply directly to the State Ethics Commission for a ruling.

Conclusion

Based on the facts of which we were advised, you are advised that there is no issue under the Public Integrity Laws if the Controller were to participate as a member of the Sinking Fund Commission in selecting as an investment manager, or contracting with, Weaver C. Barksdale & Associates, in light of the fact that an employee and officer of Barksdale, Robert O'Donnell, also is a consultant for the Controller's Office.

If you have any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. 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
Joshua Stein, Deputy City Solicitor