



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-514

September 17, 2010

Re: Seeking New Employment / Conflicts / Post-employment

A City employee requested a nonpublic advisory as to whether pursuing an employment opportunity with a nonprofit that has City contracts, or obtaining such employment, would violate any ethics laws.

The City employee advised that she has been contacted by a search firm with regard to a position with a nonprofit with contracts with the City (the nonprofit). The requestor advised that she has already filed a disclosure letter, disqualifying herself from any City work involving the nonprofit.

This inquiry presents two questions, depending on the requestor's status:

- (1) Whether her present activities as a current City employee, in pursuing this employment opportunity, represent a conflict of interest; and
- (2) Whether, if she is offered and accepts a position with the prospective employer, there are any restrictions on her future employment after

separation from the City, under the post-employment provisions of the ethics laws.

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 we have been 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 the requestor may be concerned about, she was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

Also, as provided by the City Code, our advisories may address only potential future conduct. Accordingly, this advisory will not address any past behavior. The same general issues presented by this request were addressed at length in Confidential Opinion No. 2007-001 (November 5, 2007) and Advice of Counsel No. GC-2008-520, and this Advice is based on those advisories. *See also* Advice of Counsel No. GC-2010-513.

I. Conflict of Interest in Pursuing Future Employment

The first general issue is whether any action the requestor may take to pursue employment with a local entity, such as the nonprofit, while she is still a City employee would constitute a conflict of interest.

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. As discussed in Opinion No. 2007-001, we recommend that the requestor execute no employment agreement that contractually obligates another entity to employ her before she separates from the City, if the entity does any business with the City. If the requestor

accepts that recommendation, no issue under Charter Section 10-102 should present itself.

Philadelphia Code Section 20-607(b)

Code Section 20-607(b) prohibits conflicts of interest through another entity, such as an employer. In relevant part, the subsection 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.

As to this provision, interest through another entity, this would only apply if the requestor's pursuit of an employment opportunity had progressed to the point that the other entity was obligated to her contractually, so that it could be said that she had become "a member of" the entity prior to her separation from the City. In order to avoid this issue, we recommend, as above in the discussion of the Charter, that the requestor avoid any such contractual obligation prior to separation, if possible. Nevertheless, Code subsection 20-607(b) does not apply to nonprofits, so employment with a nonprofit would not require public disclosure of, and disqualification from, any City department decision that would have a financial impact on such an entity.

Philadelphia Code Section 20-607(a)

Code Section 20-607(a) prohibits personal conflicts of interest. In relevant part, the subsection 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, or by any board or body of which he is a member

As noted in Confidential Opinion No. 2007-001, application of this provision to a City employee pursuing future employment opportunities resolves into two basic issues:

- 1) What degree of progress along the job search path—from general inquiry about interest to negotiating terms of an offer—gives a City official sufficient interest in possible future employment with a company that it constitutes “being financially interested” in City decisions that affect the company; and
- 2) What actions by an official relative to such a company, its officers, or affiliates would constitute an “award, contract, lease, case, claim, decision, decree or judgment made by him” in the language of Section 20-607(a)?

See the discussion in Confidential Opinion No. 2007-001, at pages 4-8. In particular, the Board of Ethics concluded as follows:

[F]or purposes of Philadelphia Code §20-607, a City official is “financially interested” in an entity that has either contacted the official regarding any interest in employment or an entity that the official has contacted to inquire about any interest in the official only upon either:

- a) an action by the official that a reasonable person would consider to be an application for employment; or
- b) an action by the entity that a reasonable person would consider to be a job offer.

Additionally, the Board concludes that, for purposes of Code §20-607, a City official makes an “award, contract, lease, case, claim, decision, decree or judgment made by him” when the official participates personally and substantially in an action involving his personal judgment

without which a matter cannot proceed that fixes the personal or property rights, privileges, immunities, duties or obligations of any person.

Accordingly, . . . where you have become “financially interested” in a prospective future employer as defined above, before you are presented with a situation where you are called upon to take official action that would constitute making an “award, contract, lease, case, claim, decision, decree or judgment,” as defined above, you must publicly disclose the financial interest and disqualify yourself from any such official action, as described below, under “Method of Disclosure.”

The requestor’s request email, and her disclosure letter, suggests that she was aware that she must publicly disclose her financial interest in the nonprofit and disqualify herself from any City action of her department affecting the nonprofit, prior to opening employment discussions with the nonprofit. As noted above, we do not advise on past conduct, so this Advice addresses only the actions the requestor must take in the future.

Method of Disclosure

Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: the employee with a conflict 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 employee’s public position (and description of duties relevant to the conflict, if not obvious);
3. The private financial interest (i.e., potential future employment in the nonprofit) that presents the conflict;
4. A statement of how her public duties may intersect with the private interest (if not obvious from 2 and 3 above, e.g., the current or future City contracts);
5. The employee’s intention to disqualify herself from any official action in matters affecting the nonprofit (should indicate that such disqualification precedes any official action being taken in any such matter); and
6. A statement that she or her appointing authority will notify appropriate officials in the government as to the official that the appointing authority has approved to act in the requestor’s stead and

directing such officials that all matters from which the requestor is disqualified must be referred to that official.

The letter should be sent by certified mail to the following: (1) the relevant appointing authority as stated in Code §20-608(1)(c); (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 2nd Floor, 1441 Sansom Street, Philadelphia, PA 19102; and (3) the Department of Records, Room 162-A, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addresses.

Section 1103(a) of the State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, applies to City employees who fit the Act's definition of "public employee." The requestor was advised, based on the facts provided, that she is likely a "public employee."¹ 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.

¹ The term "public employee" is defined in the Act to include: "Any individual employed by . . . a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person." 65 Pa.C.S. §1102. (As noted on pages 7-8 of this Advice, a definitive ruling, on which the requestor could rely, should come from the State Ethics Commission.)

“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.

65 Pa.C.S. §1102.

As noted in Confidential Opinion No. 2007-001, our advice as to public disclosure and disqualification under the State Ethics Act remains the same as under the City Code. Thus, the requestor would be required to publicly disclose the potential conflict and disqualify herself from taking any official City action, as discussed under “Method of Disclosure” above, prior to any applicable City action being taken.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including whether the requestor is a “public employee” to whom the Act applies. The requestor may apply directly to the Commission for a ruling. Also, 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.)

II. Post-Employment Restrictions

The second general issue is how the post-employment rules would apply to the requestor after separation from the City, if she were to accept employment with the nonprofit. There are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act. Because of the nature of the proposed position for the nonprofit, some of these provisions may present issues concerning the requestor’s service for that organization.

One-Year Limitation On Representing Others—State Ethics Act

Section 1103(g) of the State Ethics Act, 65 Pa.C.S. §1103(g), restricts “post-employment” activities as follows:

No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

The key words in that provision are defined in Section 1102 of the Act, 65 Pa.C.S. §1102. “Represent” is defined as follows:

To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

“Governmental body with which a public official or employee is or has been associated” is defined as follows:

The governmental body within State government or a political subdivision by which the public official or employee is or has been

employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Based on opinions of the State Ethics Commission, the requestor was advised that his “governmental body” would be her particular department, but based on some rulings, it could be the entire City of Philadelphia. Accordingly, she may not for one year after the date she separates from City employment (last day on the payroll) represent anyone—herself, any firm that employs her, or any of its clients—before that governmental body. Please note the broad definition of “represent,” which includes having one’s name appear on a bid or contract proposal submitted to the former governmental body or otherwise making known to that body one’s work for the contractor. This means that, until the anniversary date of her separation, any interaction between the requestor or any future employer or one of her or its clients and her former City department regarding any City transactions (such as a contract) may not have any involvement by the requestor, unless such involvement is purely internal at her employer, and not in any way revealed to the City.

More particularly, Section 1103(g) would prohibit the requestor for one year from separation from representing any person before the City. The meaning of “represent” has been the subject of lengthy analysis in several opinions of the State Ethics Commission. It means that the former employee may not: (1) make personal appearances before the City; (2) attempt to influence the City; (3) submit bid or contract proposals, or invoices, that are signed by, or even contain the name of, the former employee; (4) participate, by acting on behalf of a person, in a matter before the City; (5) lobby the City; or (6) be identified on any document submitted to the City. This would include telephone calls, e-mails, and attendance at meetings.

“Represent” does not include, and the former employee may permissibly do, the following: (1) assist in the preparation of any document submitted to the City if the employee’s name does not appear in the document; (2) counsel any person regarding that person’s appearance before the City, so long as that activity is not revealed to the City; or (3) make general informational inquiries to the City to obtain information that is available to the general public, so long as it is not done in a way to influence the City or make known to the City that the former employee represents his new employer. That last phrase, “make known to the City,” is important. In other words, Section 1103(g) would not prohibit a former City employee from working for a company that had a City contract, so long as his work for them was entirely internal at the company and his involvement in the project was in no way revealed to the City. (In the above two paragraphs “the City” may be read to be “the requestor’s

department,” depending on the State Ethics Commission’s interpretation of the requestor’s “former governmental body.”)

In addition, it was noted that the same principles apply to any other employment that the requestor may obtain in the first year after leaving the City, including the possibility that she might contract with the City itself to provide consultant services. Section 1103(g) of the Act prohibits a former public employee or official from representing “a person” before his “former governmental body” for one year after she leaves governmental employment. The State Ethics Commission, in Opinion No. 93-005, has held that “a person” includes the former public official herself, and thereby includes representing herself in negotiating a consultant contract with his former body. Thus, such “revolving door” consulting contracts are prohibited (since it is presumably impossible to obtain one without representing one’s self, at least in signing the contract). Therefore, the requestor was advised that the State Ethics Act would prohibit her for one year after her separation from City service from executing a personal consultant contract to work for her former department, in any capacity at all.

Again, as noted above, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. The requestor was advised to discuss with the potential employer the nature of any expected interactions with the City, since the nonprofit has contracts with the City.

Permanent Limitation On Assistance With Particular Matters—City Code

Section 20-603(1) of the City Ethics Code states:

No person who has served for compensation as a member of Council, City officer or employee shall assist, at any time subsequent to his City service or employment, another person, with or without compensation, in any transaction involving the City in which he at any time participated during his City service or employment.

The “transactions” to which this provision applies are defined broadly in Section 20-601(4) to include matters (i) which are or will be the subject of City action; (ii) to which the City is or will be a party; or (iii) in which the City has a direct proprietary interest. This provision is not a one-year prohibition, like the State Ethics Act provision, but applies “at any time” after a person leaves City employ. However, it is much narrower in scope than the State Ethics Act provision, since it only applies to matters in which the employee “participated” during City employ. This has been

interpreted to mean matters in which the employee exercised discretion (and not merely, for example, responded to a routine request for information). Thus, if during the requestor's City service, she took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, she may not assist that future employer in the matter relating to that transaction. On the other hand, we interpret "matter" to mean only the particular issue or issues on which decisions were made by the City with the requestor's involvement, not every issue related to that project that may arise after she separates from City service.

For example, the requestor advised that she had worked on an RFP for the City, related to the nonprofit's contract with the City. If the nonprofit were to hire her, and once she was employed by the nonprofit, a question should arise that would present an opportunity to assist the new employer with further understanding of the work that the requestor did previously as a City employee in developing the RFP and related tasks, she may not provide that assistance to the new employer. However, if a contract were to be awarded to the nonprofit, Section 20-603(1) would not prohibit her doing any work at all under that contract, so long as her work did not involve assistance with her previous work for her City department.

Two Year Limitation On Financial Interests—City Code

Section 20-607(c) of the Code states:

No member of Council or other City officer or employee shall become financially interested, subsequent to final action, in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, during his term of office or employment and until two (2) years have elapsed since the expiration of service or employment in the term of office of said member of Council or other City officer or employee.

This prohibition shall apply so as to prevent a parent, spouse, child, brother, sister or like relative-in-law or any person, firm, partnership, corporation, business association, trustee or straw party from becoming financially interested for or on behalf of a member of City Council, City officer or employee within said two (2) year period.

In short, this provision prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official decisions she made while in City

employ. Thus, if the requestor had, for example, been officially involved in awarding, renewing, amending, or administering a City contract with the nonprofit, she could not for two years be employed by and receive any compensation from the nonprofit, if such compensation was derived from revenue received under that City action affecting the contract. However, this would not prohibit a nonprofit with multiple funding sources from providing for the requestor's compensation out of other sources.

III. Summary

In summary, based on the facts provided by the requestor, she was advised of the following conclusions:

(1) There will be no issue under Charter Section 10-102 if the requestor is not contractually obligated to the nonprofit before separating from City service.

(2) While the requestor is still a City employee, she may be required to disclose a conflict of interest and disqualify herself from taking certain official action for the City, if her pursuit of employment with a certain potential employer reaches the level that she has a "financial interest" in the employer, as defined in Confidential Opinion No. 2007-001. However, where the employer is a nonprofit, Code Section 20-607(b) does not apply.

(3) The State Ethics Act applies to the requestor. Under the Act, she would be prohibited for one year after she leaves the employ of the City from representing anyone, including herself and any future employer (or any client of herself or any future employer), before her former City office. Please note the broad definition of "represent," which includes having one's name appear on a bid, contract proposal, engineering report, invoice, or other official document submitted to one's former governmental body.

(4) Please note that this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act.

(5) Under the City Code, the requestor may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by the City with her involvement.

(6) Under the City Code, the requestor may not for two years after she

leaves the employ of the City acquire a financial interest in any official decision she made while in City employ. This would include being employed by a nonprofit with City contracts if her salary at the nonprofit were to be paid out of proceeds from a City contract the award of which she was officially involved in for the City.

The requestor was advised that, if she has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Please also note the option of requesting advice of the State Ethics Commission or the City Solicitor (as to the State Act only), as discussed on pages 7-8 above. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but are required to make public 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