



CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 Sansom Street
2nd Floor
Philadelphia, PA 19102-3026
(215) 686 - 9450
FAX 686 - 9453

Evan Meyer
General Counsel

**Philadelphia Board of Ethics
Advice of Counsel GC-2010-518**

November 9, 2010

Christopher Newman
Human Resources Manager
Philadelphia Office of Housing & Community Development
1234 Market Street, 17th Floor
Philadelphia, PA 19107

Re: Gifts and Gratuities / Employee Recognition Program

Dear Mr. Newman:

You have requested public advice on whether there are any issues under the Public Integrity Laws regarding a proposed Employee Recognition Program. You advise that your office is currently exploring creation of such a program, and one of the options under consideration is rewarding employees with gift certificates of "nominal value," for such uses as restaurant meals, book stores, and department stores.¹

¹ You have not explained your use of the phrase "nominal value" nor provided a maximum value for the proposed awards. We note that the phrase "nominal value" has no precise definition. We will assume that the proposed program would involve awards of less than \$200 in value. (This is not to imply that the figure of \$200 has particular legal significance for purposes of the Public Integrity Laws.)

FOR PUBLIC RELEASE

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 provided. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past. You are advised 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 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.

You are advised that a properly-designed program as discussed below would raise no issues under the Public Integrity Laws.

What is a gift?

A threshold question that is presented by your query is how to characterize, for purposes of the ethics laws, a gift certificate provided by OHCD to an employee under such an incentive program. If the gift certificate is part of the compensation provided by law for the employee's City work, it is clearly permissible and not a gift. However, if it is a gift, even from a superior, it may tend to tempt the recipient to be influenced in official actions to favor the views or interests of the gift-giver, rather than acting objectively in the best interests of the City. In such a case, ethics laws prohibiting certain gifts might apply.

At the suggestion of this office, you had sought an opinion from the Law Department as to whether the proposed incentive program would constitute "additional compensation for extra services" and thus raise an issue under Section 8-107 of the Charter. You have forwarded the opinion of Senior Attorney Martha Johnston of November 2, 2010, concluding as follows:

While the OHCD proposed Employee Recognition Program may not be the type of "extra compensation" at which Charter Section 8-107 was originally aimed, that section, as discussed above, has been interpreted as

prohibiting any type of “extra compensation” to certain select employees that is not part of the pay plan. The proposed program would be potentially applicable to all of your employees, but only if they perform particularly outstanding work meriting special recognition. It is my opinion that such a program, with clearly established guidelines for achieving the “recognition,” would not violate Section 8-107 of the Charter, if it is approved in advance of its implementation by the Administrative Board and certified to the City Controller in accordance with the proviso of the Section. Compliance with that procedure will ensure that the program, while providing for recognition of extraordinary service, is part of the employees’ regular compensation, and is not an “extra” payment prohibited by Section 8-107.

Opinion of November 2, 2010, at 2. Whether similar reasoning applies to specific gift provisions of the Public Integrity Laws requires analysis of the individual provisions.

Home Rule Charter--Gratuities

Charter Section 10-105 reads as follows:

§ 10-105. Gratuities.

No officer or employee of the City and no officer or employee whose salary or other compensation is paid out of the City Treasury shall solicit or accept any compensation or gratuity in the form of money or otherwise for any act or omission in the course of his public work. Provided, however, that the head of any department, board or commission of the City or other agency receiving appropriations from the City Treasury may permit an employee to receive a reward publicly offered and paid, for the accomplishment of a particular task.

The Annotation to this provision reads as follows:

Public officers and employees are compensated with public funds to perform the task for which they were elected, appointed or employed. Their holding office or employment presupposes their faithful discharge of all their duties without more. An exception is recognized and permitted in instances of a special reward authorized by the head of an agency for special accomplishments, such as the apprehension of a

criminal, acts of particular courage and bravery, the devising of new methods or inventions to effect economies in the expenditure of City funds, and the like. Otherwise, however, no public official or employee should do that which he ought to do or not do that which he is not supposed to do because of the inducement of receiving directly or indirectly any benefit in addition to that which is the lawful incident of his position. The solicitation or acceptance of any such benefit by any City officer or employee of the executive or legislative branch or by any County or other governmental employee whose compensation is paid from the City Treasury is prohibited.

The question then occurs whether the proposed employee recognition program fits the exception for a “special reward authorized by the head of an agency for special accomplishments, such as the apprehension of a criminal, acts of particular courage and bravery, the devising of new methods or inventions to effect economies in the expenditure of City funds, and the like.” Clearly, the concept of this exception is that any such reward must be announced in advance and involve clearly-established criteria, to avoid the possibility that a supervisor may show favoritism by making an award on a pretext. Accordingly, you are advised that if the proposed program is implemented as suggested in the above-referenced Law Department opinion: approved in advance and involving clearly established guidelines for achieving the “recognition,” which guidelines are announced in advance of any awards, no issues would be presented under Charter Section 10-105.

Philadelphia Code – Gifts

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.

Code Section 20-601(8) defines "gift" as "A payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value, unless consideration of equal or greater value is received." In light of the Law Department's advice that any award under the proposed program would be "part of the employees' regular compensation," you are advised that no such award would be a "gift." Accordingly, there would be no issue under Code Section 20-604. Compare Nonpublic Advice of Counsel No. GC-2010-510 for other issues under 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 public employee² receiving the gift would be influenced by the gift in exercising his or her official action or judgment. This does not appear to be an issue from the facts you provide.

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

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

² In light of the conclusion that there is no issue under Section 1103(b), it is not necessary to address the question of which OHCD employees would be "public employees" as defined in the Act, and thus subject to the provisions of the Act.

subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

Mayor's Executive Order No. 002-04

Mayor's Executive Order No. 002-04 also restricts gifts to employees in the Administrative and Executive Branch of government, but interpretation and enforcement of Executive Orders is in the jurisdiction of the Mayor's Office, not the Board of Ethics. You are advised to consult the City's Chief Integrity Officer for an interpretation of the Executive Order.

Conclusion

You have requested public advice on whether there are any issues under the Public Integrity Laws regarding a proposed Employee Recognition Program, which would reward employees with gift certificates of "nominal value," for such uses as restaurant meals, book stores, and department stores

Based on the facts that you have provided, you are advised as to the following:

1. Provided that the proposed incentive program is implemented as suggested in the Law Department opinion referenced herein, approved in advance and involving clearly established guidelines for achieving the "recognition," which guidelines are announced in advance of any awards, no issues would be presented under Charter Section 10-105.
2. Similarly no such award would be a "gift" as defined in the City Code. Accordingly, there would be no issue under Code Section 20-604.
3. There is no issue under Section 1103(b), (c) of the State Ethics Act, under the facts as you have presented them.
4. Remember that for any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and you may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.
5. This Advice is limited to the Public Integrity Laws under the jurisdiction of the Board of Ethics. Specifically not addressed is Mayor's Executive Order No. 002-04.

Nonpublic Advice of Counsel GC-2010-518 (C. Newman, OHCD)

November 9, 2010

Page 7 of 7

You may wish to refer to the Chief Integrity Officer for interpretation of the Executive Order.

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 requested public 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