



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2011-502

March 3, 2011

Re: Post-employment Restrictions / Contractor with the City

A City employee advised that she was considering leaving City employment and applying for a position with a particular firm that has a City contract ("the firm") and with which the employee has contact in her City work. The employee requested a nonpublic advisory as to whether the post-employment ethics laws would restrict her in her future employment as an employee of the firm. The employee noted that she expects that, if hired by the firm, she may perform services to the City as an employee of the firm.

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. Further, we can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past. The requestor was 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 the requestor may be

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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 the employee's request were addressed at length in Advice of Counsel Nos. GC-2010-513, GC-2010-514, and GC-2010-515, and this Advice is based on those advisories, which may be found on our website at www.phila.gov/ethicsboard, under "Advisory Opinions and Publications." However, those advisories also addressed "conflict of interest" issues arising out of contacts with the potential future employer while still a City employee. The requestor advised that she had not had contact with the firm regarding potential employment with them, and did not ask to be advised on any conflict of interest questions.

Post-Employment Restrictions

There are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act.

A. 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.

However, the Act applies only to City employees who fit the Act's definition of "public employee." Although we have not reviewed a formal job description (the employee is exempt, so there is no civil service job description), the employee described her duties as technical line-level work.

Based on this description, the employee was advised that the State Ethics Commission would conclude that an employee in this position would not be a "public employee" under the Act, and thus would not be subject to the one-year post-employment

restriction of Section 1103(g).¹

The requestor was advised, however, that the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including on the question of whether the Act applies to him. Our advice as to 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. 65 Pa.C.S. §1109(g) ("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]."). 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. *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, the requestor may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

The requestor was advised that, if the Act did apply, it might make it difficult to engage in work as an employee of the firm on a contract for the City of Philadelphia. The Act's broad definition of "represent" 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 (the employee's department) one's work for the contractor. Thus, if the Act applied, in the first year after the employee's separation, any City work by the firm could not have any involvement by the requestor, unless such involvement was purely internal at the firm, and not in any way revealed to the employee's former City department.

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.

B. 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 service with the City, 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 employee’s City department with her involvement, not every issue related to that project that may arise after she separates from City service.

For example, if there is currently a dispute between the employee’s department and the firm (that she is considering applying to) regarding a City claim against the firm for a mistake the firm made and the employee worked on that matter, she may not, if hired by the firm, “switch sides” and assist the firm with understanding the City’s position on the same matter, if it is still a live dispute at that time. However, the mere fact that the firm has a contract with the employee’s department would not mean that Section 20-603(1) would prohibit her doing any work at all under that contract, so long as her work did not involve adversarial assistance with her previous work for her City department.

C. 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 firm, she could not for two years be employed by and receive any compensation from the firm, if such compensation was derived from revenue received under that City action affecting the contract. However, it does not appear from the requestor's description of her duties at her City department that she has responsibilities that affect the contract terms. In that event, there should be no issue under Code Section 20-607(c).

D. Other Law Not Addressed

This Advice of Counsel addresses only the provisions of the Public Integrity Laws that are within the jurisdiction of the Philadelphia Board of Ethics, as defined in Section 4-1100 of the Home Rule Charter. Specifically not addressed is any law pertaining to copyrights, patents, royalties, or other intellectual property issues.

Summary

Based on the facts that were provided to us, the requestor was advised as to the following:

- (1) The State Ethics Act likely does not apply to the requestor. Thus, the one-year restriction on "representing" an employer before her former governmental body would not apply.
- (2) Please note that this Advice is not binding on the State Ethics Commission,

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which has authority to interpret the State Ethics Act. If the requestor has any questions regarding the advice herein as to the State Ethics Act, she is advised to contact the State Ethics Commission.

(3) 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 her City department with her involvement.

(4) Under the City Code, she may not for two years after she leaves the employ of the City acquire a financial interest in any official decision that she made while in City employ.

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. The requestor was advised to request further advice from the Board of Ethics, or the State Ethics Commission, if she has additional facts to provide. Please also note the option of requesting advice of the City Solicitor (as to the State Act only), as discussed on page 3 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