

CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

Philadelphia Board of Ethics
Advice of Counsel GC-2011-505

June 17, 2011

Kevin Dow
Chief Operating Officer and Deputy Commerce Director
Commerce Department
1515 Arch Street, 12th Floor
Philadelphia, Pennsylvania 19102

Re: Potential Conflict / City Employee / Board of Nonprofit Organization

Dear Mr. Dow:

You have requested a public advisory opinion as to the effect of the ethics laws on your proposed service as a board member of a nonprofit organization while also working for the Commerce Department.

You advise that you are Chief Operating Officer and Deputy Commerce Director of the Commerce Department. You advise that you have been nominated to the board of directors for United Way of Southeastern Pennsylvania (“United Way”). You advise that this is a “volunteer” position. Further, you advise that there are no current contracts between the Commerce Department and United Way, and that no such contracts are expected in the future. Finally, you advise that you would “recuse” yourself from any

discussion of contracts between the City and the Commerce Department, both as a board member of United Way and as a City official.

For the purposes of this Advice, I will assume that you are not compensated in your position with United Way. However, conclusions made in this Advice will not be applicable should you ever be compensated in the future (in which case you may wish to seek further advice).

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 may serve on United Way's board. However, in doing so, the Philadelphia Code ("Code"), the Philadelphia Home Rule Charter ("Charter"), and the State Ethics Act place certain restrictions on you. Your service for United Way may also impact your financial disclosure requirements.

Benefiting from City Contracts

Charter Section 10-102 prohibits City employees from being "interested directly or indirectly" in certain City contracts. However, because you would not be compensated in your position with United Way, you cannot be "interested" in any City contracts as a result. Therefore, there is no issue under this provision. *See* Nonpublic Advice of Counsel GC-2009-501 at page 2 (Amended March 2, 2010). Given that you advised that there are no contracts between the City and United Way and that none are anticipated, this information is provided merely to be complete.

The Code's Conflict of Interest Provision

The Code prohibits City employees from having conflicts of interest that arise from either having a personal financial interest in their official actions, or from being a member of certain entities that have a financial interest in their official actions.

As to a personal interest, Code Section 20-607(a) prohibits City employees from being "financially interested" in their official actions. Because you are not compensated in your position with United Way, you cannot be "financially interested" in your official actions as a result. Therefore, there is no issue under this provision. *See* Nonpublic Advice of Counsel GC-2009-501 at page 5 (Amended March 2, 2010).

As to an interest through another entity, Code Section 20-607(b) places certain restrictions on City employees who are members of a "partnership, firm, corporation or other business organization or professional association organized for profit" which have a financial interest in their official actions. However, because United Way is a nonprofit, there is no issue under this provision. *See* Nonpublic Advice of Counsel GC-2010-505 at page 5.

While the City's conflict of interest provisions raise no issues, the State Ethics Act's conflict of interest provision may prohibit you from taking actions which financially affect United Way. This will be discussed below.

The Commonwealth's Conflict of Interest Provision

The State Ethics Act ("Act"), 65 Pa.C.S. § 1101 *et seq.*, also prohibits conflicts of interest. It appears to apply to you.¹ If it does, it prohibits you from "engag[ing] in

¹ The Act applies to any "public employee," which it defines as: "[a]ny individual employed by . . . a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard 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. While we have not been presented with a job description, executive and special directors or assistants reporting directly to the agency head or governing body have generally been considered "public employee[s]." *See* Regulations of the State Ethics Commission, 51 Pa. Code §11.1(iv)(A). However, as will be discussed, a definitive ruling, on which you could rely, can only come from the State Ethics Commission.

conduct that constitutes a conflict of interest.” 65 Pa.C.S. § 1103(a). A “conflict of interest” is:

Use by a public official or public employee of the authority of his office or employment . . . for the private pecuniary benefit of himself . . . or a business with which he . . . is associated. The term 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 . . . with which he . . . is associated.

65 Pa.C.S. § 1102.

Under the Act, you may have a conflict of interest if you have a personal financial interest, or a “business” with which you are associated has a financial interest, in your official actions in your position with the City.

As to a personal interest, the State Ethics Commission would likely find that because you are not compensated in your position with United Way, you cannot have a “personal financial interest” in your official actions as a result. It would thus likely find that you cannot have a conflict of interest through a personal interest. *See* Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

As to an interest through a “business,” the Act is interpreted differently from the City’s conflict of interest provisions. For purposes of the Act, “business” includes nonprofits. *Rendell v. State Ethics Commission*, 983 A.2d 708, 715-16 (Pa. 2009). As a result, United Way is likely a “business” under the Act. Further, you will be “associated” with United Way when you serve on its Board. *See* 65 Pa.C.S. § 1102 (defining “business with which he is associated” as a “business in which the person . . . is a director,” among other things).

Therefore, the State Ethics Commission would likely interpret the Act to require you to abstain from participating in any official City action that would cause United Way to receive a “private pecuniary benefit” so long as you serve on its board. *See* Nonpublic Advice of Counsel GC-2010-505 at page 8. Moreover, you would be required to publicly disclose any such conflict of interest should your public duties intersect with the financial interest of United Way. An adequate procedure for such disclosure is set out in Code

Section 20-608(1)(c).² See Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the State Ethics Act. This Advice is not binding on the State Ethics Commission.

Please note that the State Ethics 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 State Ethics Act]." 65 Pa.C.S. § 1109(g). Since the Board of Ethics is not "the solicitor" of the City, you have the option to seek an opinion from the Law Department as to the application of the State Ethics Act. See Charter § 4-1100 (giving the Law Department concurrent jurisdiction with the Board of Ethics regarding ethics matters under Commonwealth law). Such an opinion could protect you from any penalties available for violating the State Ethics Act's conflict of interest provision.

Representing Others in Transactions Involving the City

The Philadelphia Code imposes certain restrictions on City officers or employees representing others in transactions involving the City. Code Section 20-602(1)(a) provides:

No . . . City officer or employee shall assist another person by representing him directly or indirectly as his agent or attorney, whether or not for compensation, in any transaction involving the City. This Section shall not apply to any assistance

² This Section would require you to write a letter that sets out the following:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Your public position and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (board member of the nonprofit) that presents the conflict;
4. A statement of how your public duties may intersect with the interest of the nonprofit (if not obvious from 2 & 3 above); and
5. Your intention to be disqualified from any official action in matters affecting the private interest (which should indicate that such disqualification precedes any official action being taken).

The letter should be sent by certified mail to the following: (1) the Commerce Director; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addresses.

rendered by any . . . City officer or employee in the course of or incident to his official duties. . . .

This provision applies even if you are not compensated for such representation. Consequently, you may not represent United Way as its “agent or attorney” in any transaction involving the City. This restriction applies to all such transactions, not just those involving the Commerce Department.

Disclosure of Confidential Information

The Code also prohibits City employees from making available confidential City information they acquire in their employment with the City. Specifically, Code Section 20-609 provides:

No . . . City officer or employee . . . shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others.

Making available confidential City information to United Way could not advance your “financial interest” because you are not compensated in your position with United Way. However, making available confidential City information to United Way for the purpose of advancing its “financial interest” would violate this provision.

Please note that this information is provided merely to be complete, not to suggest that there appears to be any concern that this is an issue under the facts you provided.

Financial Disclosure

Your position with United Way may impact what you must disclose on both the Mayor’s financial disclosure form and the Commonwealth’s financial disclosure form. As you know, as Deputy Commerce Director, you are required to file the Mayor’s financial disclosure form. This form requires that you disclose directorships that you hold, including in nonprofits (obviously including your directorship with United Way). You are also required to file the Commonwealth’s financial disclosure form. This form also requires disclosure of your directorship with United Way.

Recusal in Your Position with United Way

You have advised that you will recuse yourself from discussion of contracts between the City and United Way both in your official capacity with the City and as a board member of United Way. While you may, of course, choose to recuse yourself from taking actions as a board member of United Way which involve the City, the ethics laws do not require you to do so. As has been discussed, however, disclosure and disqualification,³ in your official capacity with the City, from decisions that financially affect United Way may be required by the State Ethics Act, as discussed above.

Summary

Based on the facts that you have provided, we have concluded that the ethics laws do not prohibit your service with the United Way, but there are certain limitations on your activities of which you should be aware. In particular:

(1) The Charter's restriction on benefitting from City contracts contained in Charter Section 10-102 does not restrict you.

(2) The Code's conflict of interest provisions, Code subsections 20-607(a) and 20-607(b), do not restrict you.

(3) However, the State Ethics Act's conflict of interest provision likely applies to you and to the financial interests of a nonprofit on whose board you serve. As a result, you should not, in your position with the City, take any official action which causes United Way to receive a "private pecuniary benefit." Furthermore, should your official duties intersect with the financial interests of United Way, you should disclose this interest and disqualify yourself from acting for the City, in the manner required by Code Section 20-608(1)(c).

(4) However, this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. You have the option to seek an opinion from the City Solicitor, which may shelter you from penalties for violating the State Ethics Act's conflict of interest provision.

³ We prefer "disclosure and disqualification" to "recusal" as a term to describe the process, as "recusal" does not adequately capture the required process, which includes public disclosure of the outside financial interest and written public commitment to be disqualified from taking official action affecting that financial interest.

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(5) Under Code Section 20-609, you must not disclose confidential City information you acquired in your service with the City to United Way for the purpose of advancing United Way's financial interest.

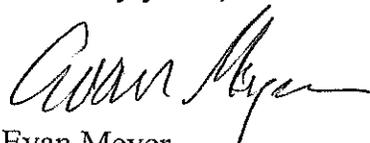
(6) Under Code Section 20-602, you may not represent others, including United Way, as "agent or attorney" in transactions involving the city.

(7) Both the Mayor's financial disclosure form and the Commonwealth's financial disclosure form require that you disclose your directorship with United Way, when you file those forms next April.

If you are later concerned about any particular situation, we would be happy to consider the application of the ethics laws to those particular facts.

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