



# CITY OF PHILADELPHIA

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## Philadelphia Board of Ethics Advice of Counsel GC-2012-513

October 17, 2012

Allyson B. Davis  
Assistant City Solicitor  
City of Philadelphia Law Department  
Real Estate and Economic Development Division  
1515 Arch Street, 17th Floor  
Philadelphia, PA 19102

### **Re: Potential Conflict / City Attorney / Board of Nonprofit Organization**

Dear Ms. Davis:

You have requested an advisory opinion as to the effect of the ethics laws on your current service as a board member of a nonprofit organization while also working for the City's Law Department. You advise that you serve, without compensation, on the board of directors of the World Communications Charter School ("the Charter School"), a 501(c)(3) nonprofit corporation. You have also been elected Vice President of that board.

You are not prohibited in general from serving on the board of a nonprofit organization. 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 the Charter School 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 as a board member of the Charter School, 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-2012-502 at page 2.

### **The Philadelphia Code’s Conflict of Interest Provision**

The City 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 would not be compensated as a board member of the Charter School, you cannot be “financially interested” in any official actions by you that affect the Charter School. 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 the Charter School is a nonprofit, there is no issue under this provision, since subsection 20-607(b) applies only to entities “organized for profit.” *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 official City actions that financially affect the Charter School. 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. If it does, it prohibits you from "engag[ing] in 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 the Charter School, you cannot have a "personal financial interest" in your official actions as a result. *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, the State Ethics Commission may well consider the Charter School to be a "business" under the Act. Further, the Commission might then consider you to be "associated" with the Charter School since you serve on its board of directors. *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 might well interpret the Act to require you to abstain from participating in any official City action that would cause the Charter School 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. Under such an interpretation, you would be required to publicly disclose any such conflict of interest should your public duties intersect with the financial interest of the Charter School. An adequate procedure for such disclosure is set out in Code Section 20-608(1)(c).<sup>1</sup> *See* Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

However, the above discussion is complicated by the fact that the State Ethics Commission considers charter schools to be political subdivisions and thus members of their boards to be public officials. *See* State Ethics Commission Opinion No. 09-005, State Ethics Commission Advice of Counsel No. 11-516. Moreover, 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.

For specific guidance on the State Ethics Act, including whether the Act applies to you,<sup>2</sup> you should seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide you a complete defense in any enforcement proceeding initiated by the Commission and is evidence of good faith conduct in any other civil or criminal proceeding, provided you disclose truthfully all the material facts and acted in reliance on the Advice. *See* 65 Pa.C.S. §1107(10), (11). The State Act would also provide you protection from certain penalties if you seek and rely on non-confidential advice from the City Solicitor. *See* 65 Pa.C.S. §1109(g).

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<sup>1</sup> Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for disclosure and disqualification under the Code, which involves writing a letter that contains the following elements:

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

The letter should be sent by certified mail to the following: (1) the City Solicitor; (2) the Ethics Board, c/o Evan Meyer, General Counsel, One Parkway Building, 18<sup>th</sup> Floor, 1515 Arch Street, 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 addressees.

<sup>2</sup> The Act applies if you are a “public employee,” as defined in the Act. Municipal attorneys are clearly “public employees.”

### 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 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 the Charter School as its “agent or attorney” in any transaction involving the City,<sup>3</sup> unless such representation is in the course of or incident to your official duties as a City employee. This restriction applies to all such transactions, not just those involving the Law Department.

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to the entire outside entity of which the City employee is a member, so that anyone in that entity would be prohibited from the same representation (“as agent or attorney”) in certain circumstances, but that provision applies only to entities “organized for profit,” and so does not apply to nonprofit organizations. Accordingly, if there is to be any matter in which an agent of the Charter School contacts the City<sup>4</sup> in a matter involving discretion by the City (such as seeking a contract, but not limited

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<sup>3</sup> The term “transaction involving the City” is defined in Code Section 20-601(4) as follows:

(4) Transactions Involving the City. Any proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions or other particular matter which the member of City Council, City officer or employee in question believes, or has reason to believe (a) is or will be the subject of City action; or (b) is one to which the City is or will be a party; or (c) is one in which the City has a direct proprietary interest. This shall not include routine applications or requests for routine information or other matters which are of a ministerial nature and do not require the exercise of discretion on the part of any member of City Council, City officer or employee.

<sup>4</sup> For this purpose, “the City” means the municipal government of the City of Philadelphia, as organized under the Home Rule Charter. The phrase does not include the School District.

to contracts), that agent may not be you. It can be another officer or director of the Charter School. See Nonpublic Advice of Counsel No. GC-2009-505 at 5.

### **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 the Charter School could not advance your “financial interest” because you are not compensated in your position with the School. However, making available confidential City information to the School 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 the Charter School may impact what you must disclose on the Commonwealth’s financial disclosure form. This form requires disclosure of your directorship with the Charter School.

### **Summary**

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. 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.

Based on the facts that you have provided, we have concluded that the ethics laws do not completely prohibit your service with the Charter School, but there are certain limitations on your activities.<sup>5</sup> 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 may apply to you and to the financial interests of a nonprofit on whose board you serve. As a result, it is possible that the Act would prohibit you from taking any official action, in your position with the City, which causes the Charter School to receive a "private pecuniary benefit." Furthermore, should your official duties intersect with the financial interests of the School, you should disclose this interest and disqualify yourself from acting for the City, in the manner required by the Act (likely similar to 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 a public opinion from the City Solicitor, which may shelter you from certain penalties for violating the conflict of interest provision of the State Ethics Act.

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<sup>5</sup> The provisions of the ethics laws that relate to outside employment would apply no differently because you are a member of the bar, or may be acting as an attorney in any outside employment. The Pennsylvania Supreme Court has made it clear that state or local governments may apply their ethics rules to current government employees who happen to be attorneys, during their government employment. *P.J.S. v. State Ethics Commission*, 555 Pa. 149, 723 A.2d 174 (1999).

(5) Under Code Section 20-609, you must not disclose confidential City information you acquired in your service with the City to the Charter School for the purpose of advancing the financial interests of the School.

(6) Under Code Section 20-602, you may not represent others, including the Charter School, as “agent or attorney” in transactions involving the City.

(7) The Commonwealth's financial disclosure form requires that you disclose your directorship with the Charter School, when you file that form next April. And if you were on the board of the School as of May 1, 2012 and did not disclose that position on the forms you filed this year, you should file amended forms.

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 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