



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2009-501 (Amended)

January 28, 2009
(Amended March 2, 2010)

Re: Conflict / City Employee on Board of Nonprofit Receiving City Funding

A City employee requested nonpublic advice as to whether a prohibited conflict of interest would exist in certain circumstances, arising out of the employee's City position in light of the employee also holding a private position on the board of directors of a nonprofit corporation with dealings with the employee's City office. We were advised that the nonprofit received certain funding through the employee's City office.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, our advice is predicated on the facts that have been provided to the Board of Ethics. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. 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. The requestor was encouraged to contact the Board for specific advice on the application of the ethics laws to any additional particular facts.

Most of the Public Integrity Laws apply to “City officers and employees,” generally without distinction, so it is immaterial whether a particular paid full-time City employee may also qualify as a “City officer.”

There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and conflicts of interest are avoided. In that regard, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is prohibited for a City officer or employee. This advisory will discuss the restrictions of each of those three bodies of law in the following paragraphs, in addition to disclosure and disqualification requirements.

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. In this sense, Section 10-102 is a broad prophylactic rule, rather than a typical conflict of interest provision. The full text of the provision is as follows:

City Officers and Employees Not to Engage in Certain Activities. As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

As a City employee, the Section clearly applies to the requestor, who thus may not benefit from or have a direct or indirect interest in certain City contracts. Although we were advised that the various funding decisions relating to the nonprofit are memorialized in letters, it is unclear whether any of the applicable letters constitutes a contract, or a contract of the type covered in Section 10-102. Nevertheless, even if any such funding agreement is a contract covered by the Section, we were advised that the requestor is not compensated by the nonprofit for serving on its Board. Accordingly, the requestor has no financial interest in the funding provided to the nonprofit and thus no "direct or indirect interest" in any such funding or contract providing such funding.

Therefore, the requestor was advised that, based on the facts provided to the Board, Charter Section 10-102 presents no issues in this matter.

Philadelphia Code Representation Provision

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer or employee from engaging in outside employment (even if unpaid) that involved representing another person, directly or indirectly, as that person's agent or attorney in any transaction involving the City. The term "represent," in the context of Code Section 20-602, is narrow, since the provision is qualified by the phrase, "as agent or attorney." (In contrast, "represent" in the post-employment provision of the State Ethics Act, not applicable here, is interpreted much more broadly.) The facts presented to the Board did not indicate that the requestor represented the nonprofit in any way in its dealings with the City. As noted above, this Advice can only address future conduct. Accordingly, the requestor was advised that, so long as he/she is employed by the City, any representation of the nonprofit in any City matter (including that involving City offices other than the requestor's) must occur without the active involvement of the requestor.

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 officer is a member, so that anyone in that entity would be prohibited from the same representation ("as agent or attorney") but only in a matter in which the individual, as a City officer or employee, has "the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters." Unlike §20-602(1), §20-602(5) allows for the City official to avoid the prohibition by making

the public disclosure and disqualification provided in §20-608.¹ However, Section 20-602(5)'s restriction and disclosure requirement applies only to for-profit entities, and so does not apply to the requestor's nonprofit. Thus, an officer or employee of the nonprofit (other than the requestor) could represent the organization in such a transaction, without any disclosure or disqualification legally required of the requestor. Nevertheless, to avoid an appearance of impropriety the requestor may do more than the law requires by voluntarily following disclosure and disqualification.

Conflict of Interest Provision—Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to the personal interest, Code Section 20-607(a) 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 . . .

¹ Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for disclosure, 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. The employee's public position and description of duties relevant to the conflict, if not obvious;
3. The employee's private position or financial interest (board member of the nonprofit) that presents the conflict;
4. A statement of how his/her public duties may intersect with his/her private interest or that of the nonprofit (if not obvious from 2 & 3 above); and
5. The employee's intention to be disqualified 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 head of the City office employing the requestor; (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 addressees.

As to the interest through another entity, Code Section 20-607(b) 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.

However, we were advised that the requestor is not compensated by the nonprofit. Accordingly Section 20-607(a) does not apply. Also, a nonprofit is not a “partnership, firm, corporation or other business organization or professional association organized for profit,” so Section 20-607(b) does not apply. Accordingly, there is no issue under Code Section 20-607 in any City action affecting the nonprofit.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to the requestor.² 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:

² The Act applies to a “public employee,” as defined in the Act. Based on the requestor’s description of title and duties, we concluded that the definition is likely met.

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.

“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.

...

“Financial interest.” Any financial interest in a legal entity

engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

65 Pa.C.S. §1102.

Thus, the requestor was advised that he/she may not take official action, as an employee of the City, that has an economic impact on him/herself, but this is not a concern, since we were advised that the requestor is not compensated by the nonprofit.

Also, the requestor may not take official action that has an economic impact on a "business with which he is associated." We originally advised the requestor that a nonprofit did not fit the definition of a "business" under the Act, citing *Rendell v. McGinty*, 2008 Pa. Commw. LEXIS 485, appeal of related case granted by *Rendell v. McGinty*, 958 A.2d 1044; 2008 Pa. LEXIS 1845 (both cases more properly designated *Rendell v. State Ethics Commission*) and that there was thus no issue under the conflict of interest provision of the State Ethics Act. However, on November 30, 2009, the Pennsylvania Supreme Court reversed *Rendell v. State Ethics Commission* (which we had referred to as *Rendell v. McGinty*) and held that a nonprofit does fit the Act's definition of a "business." See *Rendell v. State Ethics Commission*, 983 A.2d 708, 2009 Pa. LEXIS 2491 (November 30, 2009) (*reversing Rendell v. State Ethics Commission*, 961 A.2d 209, 2008 Pa. Commw. LEXIS 485).

Accordingly, the amended advice is that it is likely that the State Ethics Commission would interpret the State Ethics Act to require the requestor to abstain fully from any participation³ in any City official action that would have a financial impact on the nonprofit, so long as the requestor is on its board of directors. Moreover, the requestor would be required to publicly disclose any such conflict of interest. An adequate process for such disclosure would be to follow the procedure outlined in footnote 1, above.

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

³ "Official action" is not limited to final votes or determinations. The State Ethics Commission has said many times that the "use of authority of office" that constitutes a conflict of interest "includes more than mere voting; for example, it includes discussing, conferring with others, and lobbying for a particular result." See, e.g., Confidential Opinion No. 07-018, at page 6.

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.)

Conclusion

Based on the facts provided to the Board, and provided that the requestor complies with the requirements of this opinion, we advised that the requestor is not prohibited by State or local law from serving as an employee of the City, in light of the fact that he/she is a member of the board of the nonprofit.

However, prior to any official action by the requestor’s City office that may have a financial impact on the nonprofit, he/she would be required by the State Ethics Act to publicly disclose the conflict and arrange to be disqualified from acting, as outlined in this Advice. The requestor was advised that he/she may wish to seek an advisory from the Law Department or the State Ethics Commission as to the application of the State Ethics Act.

As usual, we stated that if the requestor has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this advisory. Since the requestor requested nonpublic advice from the Board of Ethics, we are making public only this revised version, edited to conceal the requestor’s identity, as required by Philadelphia Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director