CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2009-505

May 7, 2009

Re: Advisory Board Member's Proposed Representation Before Board

A member of an uncompensated advisory board who is also an officer for a local nonprofit requested advice as to the permissibility of certain actions the member might take to pursue a proposal with the City that would benefit his/her nonprofit.

The member requested to be advised both as to the law and as to any appearance of impropriety.

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 have been provided to the Board. Although previous opinions of this Board, the City Solicitor's Office, and the State Ethics Commission 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. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that the requestor may be

concerned about, the requestor was encouraged to contact the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

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.

The threshold question to be addressed is whether this provision applies to a member of the board in question. As we have said in several advisories:

> The first sentence of Section 10-102, as quoted above, is explicit about which City officers are subject to that provision. The issue, then, is whether the requestor can be considered to fall under any of the categories of "City Officers and Employees" outlined in Section 10-102.
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> Clearly, a board/commission member is none of the enumerated officers, nor a department head, nor a City employee. The issue is whether the requestor is "any other governmental officer or employee whose salary is paid out of the City Treasury." More specifically, the question is whether the requestor's compensation as a member of the board/commission at issue is a "salary" for purposes of Section 10-102. Compensation of board/commission members is provided in Code Section 20-304.

See Advice of Counsel Nos. GC-2008-522; GC-2008-521; GC-2008-518; GC-2008-517. Members of the board in question are not compensated for their service on the board, so they are not subject to Charter Section 10-102, and there is no issue under the Charter.

Philadelphia Code—Application

As a member of a City advisory board, the requestor is a City officer. *See* Board of Ethics Opinion Nos. 2007-004 and 2007-006 at 1-2 (concluding that all members of boards and commissions regardless of powers or compensation are appointed officers of the City); City Code §20-601(2) (defining officer or employee to include "[a]ny person who is elected or appointed to a position in any branch of the government of the City . . . including, but not limited to members of . . . boards and commissions however elected or appointed . . . ."). 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 and prohibited representations are avoided. In that regard, the Philadelphia Code prohibits certain conduct for a City officer that is relevant to this request.

Philadelphia Code—Section 20-602: Representation

The Philadelphia Ethics Code imposes restrictions on City officers and employees representing others in matters involving the City. For City employees, the restriction is broad and, with limited exceptions not detailed here, they may not represent others as an agent or attorney whether or not they are compensated in any transaction involving the City.[1] City Code § 20-602(1)(a), (3), (4). The representation restriction is narrower in scope for part-time City officers such as the board member:

> An uncompensated City officer or employee or a compensated City officer or employee whose service is part-time (excluding members of City Council or other City officers or employees who are paid on an annual

[1] The Ethics Code defines the term "transactions involving the City" as:

> 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.

Philadelphia Code Section 20-601(4).

> basis) is subject to the foregoing paragraph only in relation to a particular matter (a) in which he has at any time participated through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (b) which is pending in the department, agency, authority, board or commission of the City in which he is serving.

Code § 20-602(2). We have issued several Advices that make it clear that this provision would prohibit a board member from representing his/her employer or a client before the board or commission on which the member serves. *See, e.g.,* Advice of Counsel No. 08-526 at page 3; Advice of Counsel No. 08-522 at page 4; Advice of Counsel No. 08-512 at page 4; Advice of Counsel No. 08-506 at pages 2-3. All of these Advices are posted on the Board of Ethics website, www.phila.gov/ethicsboard, under "Advisory Opinions and Publications." The member was advised that his/her proposed presentation of a project in which that person's nonprofit is involved before that person's own board would constitute the type of non-ministerial representation that Code Section 20-602(2) addresses because the member would be acting as an agent of his/her nonprofit in a transaction involving the City. Subsection (a) of Code Section 20-602(2) prohibits the member from representing anyone in a matter in which the member has "at any time participated" as an officer of the City. It is unclear from the member's communications whether the member had already pitched this proposal to his/her board. In any case, under our Regulation No. 4, this Advice can address only future conduct, not past conduct. *See* Regulation No. 4 at ¶ 4.1(d)("advice on future conduct only").

Please note that the personal prohibition against representation under Code Section 20-602(1), (2) is absolute. A board or commission member may not engage in such representation, even if he discloses the interest and disqualifies himself under Section 20-608. Accordingly, no disclosure would permit the requestor personally to represent his/her nonprofit before the City board on which the requestor serves. Therefore, Code §20-602(1), as modified by §20-602(2), restricts the requestor personally from representing anyone, including the nonprofit, in any matter involving the City while serving on the City advisory board, in two ways:

1. In matters in which the requestor acted on the advisory board as a board member, he/she may not represent any person; and

2. In matters currently before the advisory board, the requestor may not represent any person.

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to any outside business of which the City officer is a member, so that anyone in that firm would be prohibited from the same representation ("as agent or attorney") but only in a

matter in which the requestor, as a City officer, has "the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters." However, we were advised that the requestor's organization is not a for-profit entity, so the disclosure requirement of Section 20-602(5) does not apply. Thus, an officer or employee of the nonprofit (other than the requestor) could represent the nonprofit in such a transaction, without any disclosure or disqualification required. The facts presented do not raise this issue; it is mentioned to provide complete advice.

It was suggested to us that part of the requestor's question is whether resignation from the advisory board would "solve the problem." Generally, few ethics issues require resignation of the employee/official involved, unless there is an inherent conflict in the employee/official's official position and an outside employment, which is not the case here. Of course, if the requestor were to resign his/her position on the advisory board, that would obviate any need for disqualification from any future City action. Implied in this question is whether the nonprofit's project could permissibly go forward. We cannot advise on this point. We can only advise the requestor on his/her responsibilities as a City official. If the relevant City officials have a concern about the impact of any actions the requestor may have already taken, they may contact us.

Philadelphia Code—Section 20-607: Conflict of Interest

Additionally, 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 . . .

Thus, for a personal financial interest that the requestor may have in City action (such as if an action of the requestor's advisory board affecting the nonprofit may impact on any compensation or continued employment), the requestor must publicly disclose the conflict and announce an intention to be disqualified from all official consideration of the

matter. Participation that should be avoided would include not only final decisions, but also any preliminary discussion, review, or action.[2]

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.

Subsection 20-607(b) would not apply to a situation involving the requestor's nonprofit, since we were advised that it is a not-for-profit entity and thus there could not be a financial interest arising in a member of "a partnership, firm, corporation or other business organization or professional association organized for profit."

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[2] Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The member should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. The official's public position (member of the City advisory board) and description of duties relevant to the conflict, if not obvious;
3. The official's private position or financial interest (position with the nonprofit) that presents the conflict;
4. A statement of how the official's public duties may intersect with his/her private interest (if not obvious from 2 & 3 above); and
5. The official's intention to disqualify self from any official action in matters affecting the private interest (should indicate that such disqualification <u>precedes</u> any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair, Executive Director, or Secretary of the board in which the official would be acting; (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.

Note, also, that Section 20-609 of the Code provides that 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." Obviously, if the requestor were to make available to the nonprofit any confidential City information he/she learns in service on the advisory board, that would violate this provision.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, does not apply to the requestor. The Act applies only if a board member is a "public official," as defined in the Act. The definition clearly includes members appointed to City boards and commissions, except those that are merely advisory. We were advised that the board in question is advisory only.

Appearance of Impropriety

As noted above, if the requestor is not compensated by the nonprofit, the requestor would not have a personal financial interest in City action and thus no conflict of interest as defined in Section 20-607. Moreover, since the requestor's outside entity is a nonprofit, the requestor would not have a conflict through the nonprofit's financial interest. Situations in which there is no conflict of interest under the letter of the law can nevertheless create appearances of impropriety. Although there is no formal definition of "appearance of impropriety" in the laws under which this Board has jurisdiction,[3] generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon a public official or that a public official's personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest. Although the Public Integrity Laws prohibit conflicts of interest, not appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, appearances of impropriety can undermine public confidence in government and can cause an official's actions and the government to be perceived as corrupt.

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[3] Along the lines of defining appearance of impropriety, the U.S. Judicial Conference recently revised the federal judiciary's code of conduct to require judges to avoid appearances of impropriety and to defines that term as follows: "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." Tony Mauro, *Judicial Conference Adopts New Ethics Code*, LEGAL TIMES, Mar. 18, 2009.

Appearance issues, in addition to clear legal violations, may implicate the policy behind the ethics laws. The purpose of legally-mandated disclosure of conflicts of interest was expressed by the Court of Appeals for the Third Circuit as follows:

> Were it easy to detect and prosecute public officials for bribery, the need for public officials to disclose conflicts of interest would be greatly reduced. . . . One reason why federal and state law mandates disclosure of conflicts of interest, however, is that it is often difficult or impossible to know for sure whether a public official has acted on a conflict of interest. The only difference between a public official who accepts a bribe and a public official who receives payments while taking discretionary action *that benefits that payor*, as [the defendant] did in this case, is the existence of a quid pro quo whereby the public official and the payor agree that the discretionary action taken by the public official is in exchange for payment. Recognizing the practical difficulties in proving the existence of such a quid pro quo, disclosure laws permit the public to judge for itself whether an official has acted on a conflict of interest.

United States v. Kemp, 500 F.3d 257, 283 (3d Cir. 2007)(*quoting United States v. Panarella*, 277 F.3d 678, 697 (3d Cir. 2002))(internal citations omitted). Thus, the general purpose of laws against a "conflict of interest" is to prevent an official from having a conflict between his duty in acting honestly and capably on behalf of the public on the one hand and a personal interest in obtaining or preserving a financial benefit to himself (perhaps indirectly through an employer, relative, or gift-giver) on the other hand. It is desirable to prevent such situations because that official may be tempted to act in a way that benefits that personal interest, to the detriment of the proper execution of his official duties. Even if the official does not actually yield to the temptation of incurring a private benefit to himself, public confidence in the official's decision and in the impartiality of government is undermined by the mere existence of such competing interests. As the federal court suggested, proving actual conflicts can be difficult, so the ethics laws are generally prophylactic prohibitions on officials' being in the kinds of situations that create temptation, and thus implicate the policy behind the ethics laws.

A common type of appearance issue arises when the situation presented narrowly misses being prohibited by a conflict of interest law in that it presents behavior that is close to but just outside the bounds of prohibited behavior. For example, under the facts presented with the instant request to this Board, the requestor may not have a personal financial interest if uncompensated by the nonprofit. And the nonprofit's financial interest would not cause a conflict under the Code, since it is a nonprofit. Still, an outside observer may think it likely that the requestor would be influenced when participating as

a member of the City board on a recommendation that the City contract with the nonprofit. In such a case, the appearance of impropriety can be greatly diminished by the official's voluntary disclosure and disqualification.

Accordingly, it was suggested that the requestor follow the disclosure and disqualification process of Code Section 20-608, as outlined in footnote 2.

Conclusion

Based on the facts supplied to us, the requestor was advised that the representations proposed, regarding a program managed by the nonprofit organization with which the requestor is associated, if made before his/her own City board, are prohibited by Code Section 20-602(2). However, another member of the organization could permissibly provide such representation, since the organization is a nonprofit. In such a case disclosure and disqualification is not required by the law, but suggested, in order to avoid appearance issues.

Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we are making 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