



CITY OF PHILADELPHIA

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**Philadelphia Board of Ethics**  
**Nonpublic Advice of Counsel GC-2009-510**

September 17, 2009

**Re: Outside Employment as Trainer in Area of Professional Expertise**

A professional/technical employee in a City operating department (“the requestor” or “the employee”) requested nonpublic advice on whether the ethics laws would permit her<sup>1</sup> to serve and be compensated as a workshop trainer in her area of professional/technical expertise while not on work time for the City. Based on the facts presented, the employee was advised that if she abides by the ethics laws described below, her proposed outside work as a trainer would not present an issue under the ethics provisions of the City Code or Home Rule Charter. We recommended, however, that the requestor seek an opinion from the State Ethics Commission regarding the honorarium restriction of the State Ethics Act.

**The Facts**

The requesting employee advised us of the facts provided here. She has worked for the same City department for a number of years and is currently a civil service employee. She has been very active in her professional organization, for which the City pays her membership fee. She is also a member of an international association, for which she pays her own membership dues.

The requestor stated that she has developed knowledge and skills in a particular emerging area of knowledge within her professional expertise via a combination of her work in her City department, active membership and networking in the two professional

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<sup>1</sup> As a policy matter, and in an effort to be gender nonspecific and further conceal the identity of requestors, Nonpublic Advices of Counsel will occasionally use the feminine pronoun throughout or the masculine pronoun throughout, but will not necessarily use the pronoun appropriate to the actual requestor.

associations to which she belongs, active participation on a number of research projects sponsored by a research foundation and outreach to a number of state and regional regulatory agencies. The requestor stated that she has gained experience by investigating and helping to promote improved methods in this area in both the City and the industry in the country at large. She has authored a number of publications. In the past year she co-authored a textbook, for which she receives royalties.

The requestor advised that she has been approached by a consultant who specializes in developing training programs for certified operators in her industry who need to attend training to maintain required continuing education credits to keep their certifications. The consultant would like to develop a training workshop around the requestor's area of expertise and inquired if she was interested in helping develop the workshop content and serving as trainer. For these functions the requestor would receive a fee. The requestor has asked the Board of Ethics whether she would be permitted to receive a fee for working with a consultant to develop and deliver these trainings outside of City time (such as on weekends or vacation leave).

The training sessions would be given once or twice per year in eastern Pennsylvania over the next several years. The requestor advised that it was her understanding that the training she would instruct would be held at a regional training facility or training room of a regional agency. It would be advertised to many similar agencies in southeastern Pennsylvania and would attract certified operators from a number of such agencies. In this context, it might be likely that several certified operators from the requestor's City department could be in attendance. Her understanding from the consultant is that the training would not be scheduled, advertised, or targeted strictly to City of Philadelphia employees, but instead to all similar agencies in the region.

We have also been advised that the consultant with whom the requestor would work has a contract with the City through a miscellaneous purchase order to provide training as needed in the general subject area of her City department. The purpose of this training would be to obtain contact hours for certified operators and prepare others for certification exams. The consultant would not use the requestor for work on this contract.

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 us. 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 Board that interpret statutes are guidance to how this Board 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 concerned about, we encouraged her to contact the Board for specific advice on the application of the ethics laws to those particular facts.

### **Analysis**

Generally speaking, the ethics laws do not prohibit City employees from being employed outside City government, provided that employees do not use City time, materials, equipment or facilities for an outside purpose. City employees must, however, abide by the ethics laws in connection with any outside work and, as discussed in detail below, must avoid conflicts of interest, prohibited representations, and prohibited interests in City contracts. We also address below but do not rule on issues raised by the State Ethics Act's honorarium restriction.

Note that civil service employees are governed by Civil Service Regulation 33.02 on outside employment, on which the Board of Ethics and this Advice cannot advise. As an employee considering outside employment, the requestor was advised that she should determine whether her department has its own policy on outside employment that employees must follow. In addition, if the employee engages in outside employment she may need to report compensation from the outside job on any financial disclosure statements she is required to file.

### **Philadelphia Home Rule Charter – Interest in a City Contract**

The City's Home Rule Charter prohibits employees from benefiting from or having a direct or indirect interest in certain City contracts, even if their City work has no official connection with the contract. In this sense, the Charter restriction is a broad prophylactic rule rather than a typical conflict of interest provision. Charter Section 10-102 reads 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.

Although the consultant with whom the requestor is proposing to work has a separate City training contract, the requestor specifically stated that the outside work she is contemplating would not be related to the consultant's City contract. To avoid an indirect interest in a City contract prohibited by Charter Section 10-102, the requestor was advised that the compensation fees the consultant pays her for her training work should not originate from funds she has as a result of her City contract. Assuming this is the case and under the facts that were supplied, there would be no issue under Charter Section 10-102 if the requestor worked on the training workshops described, as such work would not involve a City contract and the requestor's compensation would not derive from a City contract.<sup>2</sup>

### **Philadelphia Code – Conflicts of Interest**

The Philadelphia Code prohibits City employees from having conflicts of interest that arise from a personal financial interest in their official decisions or from being a member of an entity that has a financial interest in their official decisions. As to personal conflicts of interest, City Code Section 20-607(a) provides in relevant part:

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, or by any board or body of which he is a member. . . .

The City Code also prohibits conflicts of interest arising through a relative or business, providing as follows in Section 20-607(b):

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<sup>2</sup> The facts provided indicate that several City employees could be in attendance at the proposed trainings, but we were not advised whether the City would be paying for such attendance by City employees. Assuming that attendance is either paid by the employees, or reimbursed to them by the City, there would be no issue under Charter Section 10-102. However, if the City were to contract with the requestor's employer to train City employees, that would be a City contract in which the requestor would have a financial interest, which would be prohibited by Section 10-102.

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.

Based on the facts provided, it does not appear that there would be an intersection between the requestor's duties for the City and her outside employment as a trainer that would create a conflict of interest. In other words, the facts do not indicate that the requestor would be in a position to take official action in which she, a relative, or an entity that she is affiliated with would have a financial interest. The requestor was advised that if she finds herself in such a position, for example with the ability to recommend that a training company that employs her be given a City contract, then she may have a conflict of interest and should refrain from acting and contact us for advice on those specific facts.

### **Philadelphia Code – Prohibited Representations**

The City Code generally prohibits City employees from representing others in City transactions. Code Section 20-602(1)(a) provides:<sup>3</sup>

No member of the Council nor other City officer or employee shall assist another person by representing him directly or indirectly as his agent or

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<sup>3</sup>Exceptions to the representation restriction are stated in Section 20-602(4):

A member of the Council or any other City officer or employee may act, with or without compensation, on his own behalf or as agent or attorney for, or otherwise aiding or assisting, his parents, spouse, child, brother, sister or any person for whom he is serving as guardian, executor, administrator, trustee, or other personal fiduciary, except in those matters in which he has participated personally as a member of Council, City officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility.

attorney, whether or not for compensation, in any transaction involving the City. This Section shall not apply to any assistance rendered by any member of Council or other City officer or employee in the course of or incident to his official duties, or to any person who holds any City office or position who is not compensated for his service by the City.

According to the facts provided, the requestor's acting as a workshop developer and trainer would not involve her making any representations of others in transactions involving the City. The requestor was advised that if she finds herself in such a position, for example being asked to represent a training company that employs her in negotiations with a City department, then she may be faced with a prohibited representation and should refrain from acting and contact us for advice on those specific facts.

#### **Philadelphia Code – Confidential Information**

The City Code prohibits the requestor from sharing any confidential information she may have as a result of her City employment with the consultant she may be working with on the trainings (or with anyone else) so that she or others could benefit financially. Specifically, Code Section 20-609 on confidential information states:

No member of the Council or other elected official or City officer or employee, paid or unpaid, full-time or part-time, 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.

#### **State Ethics Act**

It is the policy of this Board to advise on the State Ethics Act by endeavoring to predict the interpretation of the State Ethics Commission and limiting our advice to matters where prior rulings of the Commission or the text of the Act provide reliable guidance and high confidence in any such prediction. *See* Board of Ethics Regulation No. 4, at Paragraph 4.1(f). For these reasons, with regard to the honorarium restriction of the State Act implicated by the requestor's request and discussed in greater detail below, we recommend that the requestor seek advice directly from the State Ethics Commission.

The State Ethics Commission is the definitive authority on the State Ethics Act, including on the question of whether the Act applies to the requestor. Our advice on 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.

We believe the State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, likely applies to the requestor. The Act applies to "public employees" which is defined to include:

Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a non-ministerial 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. After reviewing the job description for a the requestor's position that is available on the City Personnel Department's website and consulting the State Ethics Regulations, we concluded it is likely that her job duties cause her to qualify as a "public employee." See 51 Pa. Code § 11.1 at iv ("public employee").

For the requestor to take official action that has an economic impact on the requestor personally would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) of the Act would restrict her activities as a public employee relative to the use of authority of her office to obtain a private pecuniary benefit for herself. See 65 Pa.C.S. § 1103(a) ("No public official or public employee shall engage in conduct that constitutes a conflict of interest."). Based on the facts provided, it does not appear that the requestor's proposed outside

employment as a trainer would involve the use of authority of her government office in a manner that would give rise to a conflict of interest under the State Act.

The State Ethics Act has a prohibition on accepting honoraria, providing that: "No public official or public employee shall accept an honorarium." 65 Pa.C.S. §1103(d). The definition of honorarium is:

Payment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of such services which are nonpublic occupational or professional in nature. The term does not include tokens presented or provided which are of de minimis economic impact.

65 Pa.C.S. §1102. In a recent advisory opinion, the State Ethics Commission's Chief Counsel explained the general principles of the honorarium restriction:

Section 1103(d) of the Ethics Act is an absolute prohibition against accepting honoraria. The question of whether a given payment is an honorarium prohibited by Section 1103(d) is determined by an application of the statutory definition set forth in the Ethics Act, not by the mere label that may have been attached to the payment. Confidential Opinion, 01-001. The statutory definition of "honorarium" generally includes payments which are made in recognition of speaking engagements/presentations, appearances, and published works, but excludes such payments if: (1) they are legitimately intended as consideration for the value of such services; and (2) they are undertaken in the public official's/public employee's private professional or occupational capacity and are not related to the public position. Id.

In Baker, Opinion 91-004, the State Ethics Commission set forth criteria for determining whether the exclusion applies in any given instance, which criteria include the following: the private occupation of the public official/public employee; the expertise of the public official/public employee in the area; the history of activity in the occupation prior to public service; the purpose for the invitation; the capacity in which the public official/public employee is invited; the subject of the speech, work or presentation; the group spoken to and the composition as to members or non-members of the group; the purpose for gathering the group; the amount of the fee relative to the services performed; the source of the invitation; the event at which the speech is given; the subject matter of the speech or

published work as compared to the normal subject matter dealt with by the occupational/professional group and any other relevant factors. See also, Confidential Opinion, 01-001.

State Ethics Commission ("SEC") Advice of Counsel 09-515 at 5-6 (issued March 6, 2009). These general principles of the honorarium restriction demonstrate that the requestor would not be in violation of the restriction if (1) the fees she would receive for her training course are legitimately intended as consideration for the value of the services she will provide; and (2) she provides the trainings in her private professional or occupational capacity and not in relation to her City position.

The advisory opinion quoted above was addressed to a prospective member of the Pennsylvania Early Learning Council ("ELC") who in her private, non-governmental job accepted payments for presenting certain workshops for which presenters receive fees and honoraria. SEC Advice of Counsel 09-515 at 1-2. The requestor had asked whether her workshop presentation would cause a violation of the honorarium restriction, and the SEC's Chief Counsel advised as follows:

[T]he submitted facts do not indicate the subject matter of all of the various workshops that you would teach. Therefore, this advisory must necessarily be limited to providing the following general guidance. To the extent that a particular workshop presentation would be given in your private capacity as the Director of the Institute and would not be related to your public capacity as a Member of the ELC, a payment that would be legitimately intended as consideration for the value of such services would not constitute an "honorarium" as that term is defined by the Ethics Act, and you would be permitted to accept such payment subject to the restrictions of Section 1103(a) of the Ethics Act. However, to the extent that a particular workshop presentation would be related to your public position as a Member of the ELC, a payment for such presentation would constitute an honorarium prohibited by Section 1103(d) of the Ethics Act. A workshop that would be related to the work of the ELC would be considered related to your public position as a Member of the ELC, such that you would be prohibited from accepting an honorarium for such workshop.

SEC Advice of Counsel 09-515 at 6. This advice illustrates that to the extent the training workshops the requestor is proposing to teach are not related to her City position and are not related to her work for her City department, then it would appear that she would not violate the honorarium restriction.

We provide two other examples of the SEC's advice on the honorarium restriction to illustrate application of the law: Commission Opinion 91-004 and SEC Advice of Counsel 07-575. The Commission advised a State legislator who was a political scientist with a Ph.D. in government that he would not violate the honorarium restriction by receiving \$500 for serving as an academic expert seminar speaker speaking about legislative priorities for local government. SEC Opinion 91-004 at 5. The Commission described its reasoning for advising there would be no honorarium violation:

[W]e must conclude by applying the above criteria that your speaking engagement is nonpublic occupational professional in nature and hence not an honorarium. Your topic for speaking was "Legislative Priorities for Local Government." Your presentation concerned the topic of political science/government and you hold three academic degrees in that area. You have published articles in your area of professionalism and have on prior occasions served as a speaker or panelist on such subjects. Under these circumstances, we believe that the instant speaking engagement is one in a series of activities on your part consisting of your teaching as an assistant professor, publishing and speaking in your area of academic and professional expertise, namely political science.

SEC Opinion 91-004 at 4. The facts provided by the requestor appear similar in respects to those presented in Opinion 91-004, namely that the requestor has authored a number of publications and a text book and has had active participation in research projects and outreach to a number of state and regional regulatory agencies, all in her area of professional expertise.

In Advice of Counsel 07-575, the SEC's Chief Counsel advised a public employee that being paid to instruct a training course at a university would violate the honorarium restriction where the regulations that the public employee enforces in her public position would be part of the subject matter of the course. The Advice reasoned there would be an honorarium violation "because the subject matter of the modules that you would be teaching as part of the Training Course would be related to the work that you perform in your public position as an annuitant/Licensing Representative with DPW." SEC Advice of Counsel 07-575 at 4. This underscores that the substance of the trainings the requestor here proposes to undertake should not be related to her City job.

We do not draw a conclusion here as to whether the requestor's accepting a fee for the proposed trainings would violate the State Act's honorarium restriction. Given the potential intersection between the substance of her proposed trainings and her City

position, we recommended that, if the requestor wishes to pursue this matter, she should submit a request to the State Ethics Commission (or to the Law Department) for a definitive advisory.

### **Conclusion**

The requestor was advised that, applying the relevant ethics provisions of the City Code and Home Rule Charter to the facts that were presented, the requestor may accept a fee for serving as a workshop trainer in her area of professional/technical expertise while not on work time for the City, provided that she abides by the City ethics restrictions we have detailed above. We have explained the limits of our ability to advise on the State Ethics Act and recommend that the requestor seek definitive advice that offers enforcement protection directly from the State Ethics Commission (or from the Law Department) regarding the Act's honorarium restriction. We also alerted the requestor to applicable Civil Service Regulations, the possibility her individual department may have a policy on outside employment, and that financial disclosure requirements may require her to report her outside income.

The requestor is to be complimented for being concerned about ethics compliance and for recognizing a situation that could present issues under the ethics laws. 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 Advice. 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