



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2009-511

September 18, 2009

Re: Employee Joining Board of Non-profit Agency that Contracts with City

A City employee (“the employee” or “the requestor”) requested nonpublic advice on whether any issue under the ethics laws, such as a conflict of interest, would result from his unpaid participation as a board member of a non-profit agency that has contracts with the City. Based on the facts presented, the employee was advised that he¹ would not have a conflict of interest in this situation and that for him to serve as an unpaid member of the board of this nonprofit agency would not present a problem provided that he follows some ethics rules that are detailed below.

The Facts

The requestor advised us of the facts provided here. The requestor is employed in the Administrative and Executive Branch of City government. His work is focused on a particular issue related to disadvantaged citizens. He is primarily involved with

¹ 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.

implementing and managing a particular program, a large part of which is the City's partnership with a certain quasi-governmental agency. He works closely with staff of certain other offices in the City on operational and systemic matters related to the program.

As an outside pursuit, the requestor advises that he has been invited to participate on the board of a nonprofit social service agency. His participation on the nonprofit's board would be unpaid service, and he would have no financial interest in the agency. The nonprofit's core services do not relate to the substance of the City program on which the requestor works.

The nonprofit has contracts with the City, but the requestor advised that, as a City employee, he has no involvement with funding matters or contracts related to such contracts.

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, the requestor was advised that to the extent that this opinion states general principles, and there are particular fact situations that he may be concerned about, he was encouraged 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 volunteering their time to non-profit organizations or from being employed outside City government. City employees, however, must abide by the ethics laws in connection with their work for a non-profit organization and must avoid conflicts of interest, prohibited representations, and prohibited interests in City contracts. Also, City employees must not use City time, materials, equipment or facilities for an outside purpose.

Philadelphia Code – Conflicts of Interest

The general purpose of laws against a “conflict of interest” is to prevent a City employee 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 or relative) on the other hand. It is desirable to prevent such situations because that employee 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 employee does not actually yield to the temptation of incurring a private benefit to himself, public confidence in the employee’s decisions and in the impartiality of government is undermined by the mere existence of such competing interests.

The Philadelphia Ethics Code prohibits City officers from having conflicts of interest that arise from having a personal financial interest or from being a member of an entity that has a financial interest in their official decisions. As to a personal conflict of interest, 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):

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.

The requestor was advised that his participation on the nonprofit's board will not cause him to have a conflict of interest under Code Section 20-607(a) or (b) because, based on the facts that he has provided, such participation would not cause him, a family member, or a business of which he is a member to have a financial interest in any actions he may take as a City employee.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, also has a conflict of interest provision. Based on the requestor's title and description of his job duties, we believe the State Ethics Act likely applies to him. The Act applies to "public employees," which are 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. For the requestor to take official action that has an economic impact on himself 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 the employee's activities as a public employee relative to the use of authority of his office to obtain a private pecuniary benefit for himself. *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 that we were provided, it does not appear that the requestor's participation in the nonprofit's board would involve the use of authority of his government office in a manner that would give rise to a conflict of interest under the State Act.

The requestor was advised, however, that the State Ethics Commission is the definitive authority on the State Ethics Act, including on the question of whether the Act applies to him. 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 was advised that he may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Philadelphia Code – Prohibited Representations

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

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 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.

This representation restriction prohibits the requestor from representing the nonprofit, its clients and others not excepted, in transactions involving the City.² For example, he may not represent the nonprofit in its contract negotiations with a City department.

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.

² Exceptions to the representation restriction are stated in Code 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.

Code Section 20-601(4) defines "transactions involving the City" as follows:

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.

The requestor advised that the nonprofit has City contracts, including contracts in the general area of social services. The requestor was advised that his board membership, however, would not cause issues under Charter Section 10-102 because it is an unpaid position and we were advised that the requestor will have no financial interest in the nonprofit.

Philadelphia Code – Confidential Information

The City Code prohibits the requestor from sharing any confidential information gained through his City employment with the nonprofit or anyone else, for their financial benefit. 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.

Conclusion

The requestor was advised that his proposed nonprofit board membership would not be problematic under the relevant ethics provisions of the City Code and Home Rule Charter provided the he abides by the City ethics restrictions we have detailed above. Although the board membership does not appear to present concerns under the State Ethics Act, we have explained the limits of our ability to advise on the State Ethics Act, and the requestor may choose to seek advice that offers enforcement protection directly from the State Ethics Commission or from the Law Department.

The requestor was advised that if he 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 had 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).

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