



CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 Sansom Street
2nd Floor
Philadelphia, PA 19102-3026
(215) 686 – 9450
FAX 686 – 9453

Evan Meyer
General Counsel

Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-508

June 7, 2010

Re: Potential Conflict / City Employee / Board of Nonprofit Organization

A City employee (the requestor) requested advice on whether there are any issues under the Public Integrity Laws if she were to take official action as Executive Director of a City advisory board (the City board) in authorizing the purchase of tickets to a fund-raiser for a nonprofit organization of which the requestor is a member of the board of directors.

We were advised as to the following facts: As the Executive Director of the City board, the requestor is the authorized signer on any budget request. She advised that she is also a board member of a local nonprofit that addresses issues related to the work of the City board. It is presumed that she is not compensated for serving on the nonprofit's board of directors.

The requestor advises that her City board occasionally supports local nonprofits by sponsoring events. We were advised that typically this "support" or "co-sponsoring" consists of the City board buying a number of tickets or sponsoring a table at a fund-raiser for the nonprofit that the City board desires to support, so that members of the City board might attend the event, and the City board is recognized as a sponsor.

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. *See* Code Section 20-606(1)(d)(ii). Accordingly, this Advice does not address anything that may have occurred in the past. The requestor was 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 she may be concerned about, the requestor was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

The requestor was advised that, in her position as Executive Director of the City board, she is a City employee. 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.

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. Although the purchase of a ticket to an event is technically a contract, no services are provided to the City, so this is not the type of contract limited by Section 10-102. Therefore, under the facts that were provided, there is no issue under this Charter provision.

Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise either from having a personal financial interest or from being a member of a business or other for-profit 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 . . .

In light of the assumed fact that the requestor is not compensated for service on the City board, there is no issue of a personal conflict under Section 20-607(a).

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.

Code Section 20-607(b)(emphasis added). Thus, an official action by the requestor as a City employee would be restricted by this provision, if it affected a for-profit entity of which she is a member. However, the outside entity is a nonprofit organization, so Section 20-607(b) does not apply. *See* Nonpublic Advice of Counsel GC-2010-505.

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 she has gained, or will gain, in her service for the City, that may violate this provision.

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.) As noted above, this Advice can only address future conduct. Accordingly, the requestor was advised that, so long as she is employed by the City, any representation of the outside nonprofit in any City matter (including that involving City offices other than the requestor's City board) must occur without her active involvement as agent for the nonprofit.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., appears to apply to the requestor.¹ 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

¹ The Act applies only if the requestor is a "public employee," as defined in the Act. We were not provided a job description, but since the requestor advised that she has budget authority, she was advised that she appears to be a "public employee," which is defined in the Act to include: "Any individual employed by . . . a political subdivision who is responsible for taking or recommending official action of a nonministerial 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. Typically, executive directors of boards and commissions have been considered to be "public employees." See the Regulations of the State Ethics Commission, 51 Pa. Code §11.1 (definition of "public employee," subsections (iv)(A), (G)). As noted on pages 8-9 of this Advice, a definitive ruling, on which the requestor could rely, should come from the State Ethics Commission.

section of the Act for a definition of that term and terms included within that definition, as follows:

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.

The State Act conflict provision is similar to the City Code conflict provision (with one important exception, noted below). You may have a conflict if you have a personal financial interest, and you may have a conflict if your outside entity has a financial interest in City action. The difference is the extent of the connection with the entity, and the type of entity, that subjects you to the provision. For the City Code, you must be “a member” of the business, such as an employee or a member of the board of directors, and a nonprofit is not a “business” under the City Code. For the State Act, a business may be a “business with which you are associated” if you are an employee, a director, or have a “financial interest” in the business. Also, there is a significant difference between the City Code and the State Act on the issue of nonprofits. The City Code excludes nonprofit entities from “business,” so a City employee who is also an uncompensated member of the board of directors of a nonprofit (such as the requestor) would not have a conflict in a City matter affecting that nonprofit, under the Code.

Until recently, the rule was the same for the State Act. However, on November 30, 2009 the Pennsylvania Supreme Court 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 (Pa. Commw. 2008). Accordingly, the two conflict of interest rules are no longer identical in how they apply to a member of a nonprofit organization. Therefore, the requestor was advised that it is likely that the State Ethics Commission would interpret the State Ethics Act to require her to abstain fully from any participation in any City official action that would have a financial impact on the nonprofit, and publicly disclose the financial interest, so long as she is on its board of directors. *See* Nonpublic Advice of Counsel GC-2010-505; Nonpublic Advice of Counsel GC-2009-501 (Amended March 2, 2010).

In such a case, Section 1103(a) of the State Act would restrict the requestor’s activities as a public employee relative to the use of authority of office to obtain a private pecuniary benefit for the nonprofit and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action

being taken.² See also 65 Pa.C.S.A. §1103(j). Presumably, the Chair of the requestor's City board can consult with the appropriate City officials to arrange for the expenditure, without the requestor's involvement.

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 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, including whether the Act applies to the requestor. 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

The Board of Ethics was asked for advice concerning the application of the

² Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The requestor was advised that she 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. Her public position (Executive Director of the City board) and description of duties relevant to the conflict, if not obvious (e.g., signing budget authorization);
3. Her private position or financial interest (board member of the nonprofit) that presents the conflict;
4. A statement of how her public duties may intersect with her private interest or that of the nonprofit of which she is a member (for example, providing financial support through the purchase of tickets to a fund-raiser for the nonprofit) and
5. Her intention to disqualify herself 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 Chair of the City board; (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.

Public Integrity Laws as to the requestor's position as Executive Director of a City board, in light of her outside position as an uncompensated member of the board of directors of a local nonprofit, and with respect to a proposed purchase of tickets to a fund-raiser for the nonprofit. Based on the facts that were provided to us, the requestor was advised as to the following:

1. The Board of Ethics can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past.
2. There is no issue under Charter Section 10-102 since the purchase of tickets does not involve a contract for the provision of services to the City.
3. If the requestor's City board is considering expending funds from its appropriated budget to purchase tickets to a fund-raiser for the nonprofit., it is likely that the State Ethics Commission would interpret the State Ethics Act to require the requestor to abstain fully from any participation in any such City official action and publicly disclose the financial interest, so long as she is on the board of directors of that nonprofit. The conflict of interest provision of the City Code would not apply.
4. Under Code Section 20-602, the requestor may not represent, as agent or attorney, the nonprofit in a transaction involving the City.
5. Remember that for any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and the requestor may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.

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 opinion. Since the requestor asked for 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