



CITY OF PHILADELPHIA

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Evan Meyer
General Counsel

Philadelphia Board of Ethics General Counsel Opinion GC-2013-502

February 25, 2013

Donna E.M. Bailey
1503 Yerkes Street
Philadelphia, PA 19150

Via electronic mail and U.S. Mail

Re: Post-employment / City Office of Health & Opportunity / CBH

Dear Ms. Bailey:

You have requested a public advisory applying the post-employment rules of the Public Integrity Laws to proposed employment changes.

You advise that you are currently employed as Director of Special Projects for the City's Office of Health & Opportunity, which we understand was created in the Office of the Mayor, pursuant to Executive Order No. 3-08 of January 7, 2008, and established certain duties for the Deputy Mayor/Deputy Managing Director for Health and Opportunity. (See Section 6 of the Executive Order.)

You advise as follows:

I am currently employed within the City's Office of Health & Opportunity. My formal title is Assistant Managing Director for Homeless Initiatives;

however, I use the working title of Director, Special Projects. My work focuses on issues related to the City's homeless populations, largely policies and practices related to creating and leveraging permanent supportive housing options for homeless and special needs populations. I routinely interface with staff from the Office of Supportive Housing (OSH) and the Department of Behavioral Health & Intellectual disAbility Services (DBHIDS) on these topics. My work is programmatic and I am not involved in any City department contracts or finances. I report to Susan Kretsge, Chief of Staff for the Office of Health & Opportunity.

You attached to your request a copy of your job description, which I will reference below, as appropriate.

You advise that you are interested in pursuing an employment opportunity with Community Behavioral Health (CBH), a City-established nonprofit 501(c)(3) corporation with which the City contracts to provide mental health and substance abuse services for Philadelphia County Medicaid recipients. The position you would seek is as Special Assistant to the CEO, a Ms. Erney. You have described the duties of the position, which I will reference below, as appropriate.

You have requested a public advisory opinion on whether there are any restrictions on leaving your current City position to take the Special Assistant position at the nonprofit that is CBH.

As we have noted frequently in prior advisories,¹ there are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act.

A. One-Year Limitation On Representing Others—State Ethics Act

Section 1103(g) of the State Ethics Act, 65 Pa.C.S. §1103(g), restricts “post-employment” activities as follows:

No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

¹ See, e.g., Advices of Counsel 2013-501, 2012-516, 2012-503, 2011-509, 2011-508, 2011-506, and 2011-502.

The key words in that provision are defined in Section 1102 of the Act, 65 Pa.C.S. §1102. "Represent" is defined as follows:

To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

"Governmental body with which a public official or employee is or has been associated" is defined as follows:

The governmental body within State government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Based on opinions of the State Ethics Commission, I believe that it is unclear whether your "governmental body" would be merely the City's Office of Health & Opportunity, or whether it might include the entire Mayor's Office or possibly other entities of City government with which you have worked, such as OSH and DBHIDS. Also, note that the Act applies to you only if the Commission concludes that you are a "public employee" based on your job description. It is unclear how the Commission might rule in your case.

Accordingly, assuming the Act applies, you may not for one year after the date you separate from City employment (last day on the payroll) represent anyone—yourself, any firm that employs you, or any of its clients—before your "former governmental body." Please note the broad definition of "represent," which includes having one's name appear on a bid or contract proposal submitted to the former governmental body or otherwise making known to that body one's work for the contractor.

For specific guidance on the State Ethics Act, including whether the Act applies to you, you should seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide you a complete defense in any enforcement proceeding initiated by the Commission and is evidence of good faith conduct in any other civil or criminal proceeding, provided you disclose truthfully all the material facts and acted in reliance on the Commission's advisory.

See 65 Pa.C.S. §1107 (10), (11). The State Act would also provide you protection from certain penalties if you seek and rely on non-confidential advice from the City Solicitor. *See* 65 Pa.C.S. §1109(g).

A request for advice from the State Ethics Commission should be directed to:

State Ethics Commission
Attention: Legal Division
Room 309 Finance Building
P.O. Box 11470
Harrisburg, Pa 17108-1470

B. Permanent Limitation On Assistance With Particular Matters—City Code

Section 20-603(1) of the City Ethics Code states:

No person who has served for compensation as a member of Council, City officer or employee shall assist, at any time subsequent to his City service or employment, another person, with or without compensation, in any transaction involving the City in which he at any time participated during his City service or employment.

The “transactions” to which this provision applies are defined broadly in Section 20-601(4) to include matters (i) which are or will be the subject of City action; (ii) to which the City is or will be a party; or (iii) in which the City has a direct proprietary interest. This provision is not a one-year prohibition, like the State Ethics Act provision, but applies “at any time” after a person leaves City employ. However, it is much narrower in scope than the State Ethics Act provision, since it only applies to matters in which the employee “participated” during City employ. This has been interpreted to mean matters in which the employee exercised discretion (and not merely, for example, responded to a routine request for information). *See* Advices cited in footnote 1.

Thus, if during your service with the City, you took official action on any particular transaction concerning which a future employer (such as CBH) or one of its clients should contact the City at any time henceforth, you may not assist that future employer or client in the matter relating to that transaction. On the other hand, “matter” has been interpreted to mean only the particular issue or issues on which decisions were made by the City (that is, by or with the Office of Health & Opportunity) with your involvement, not every issue related to that project that may arise after you separate from City service.

By referring to matters in which you "participated," the provision means official City actions that you were involved in as part of your duties, in a way that is more than merely ministerial (such as by handing a blank form to someone). In other words, you made a recommendation, did some research, participated in a meeting, analyzed some data, drafted a document, or the like. "Transaction" generally means any "proceeding, application, submission, request for a ruling or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation" and would include the creation of any policy, regulation, or grant of a permit or license, creation of any right or responsibility, or assessment of any fee. If it can be said that the City (or an official of the City) officially acted, that is likely a 'transaction.'

However, even if you participated in a transaction while you were a City employee, the rule of Code Section 20-603 only permanently prohibits you (assuming that the one-year rule and two-year rule don't apply) from assisting another person (that is, not the City) in that same transaction, which means that the specific prior transaction must still be "live" in some way. It is presumed that in most matters, CBH would be acting in coordination with the City, rather than at arm's-length, and then there would likely be no issue.

C. Two Year Limitation On Financial Interests—City Code

Section 20-607(c) of the Code states:

No member of Council or other City officer or employee shall become financially interested, subsequent to final action, in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, during his term of office or employment and until two (2) years have elapsed since the expiration of service or employment in the term of office of said member of Council or other City officer or employee.

This prohibition shall apply so as to prevent a parent, spouse, child, brother, sister or like relative-in-law or any person, firm, partnership, corporation, business association, trustee or straw party from becoming financially interested for or on behalf of a member of City Council, City officer or employee within said two (2) year period.

In short, this provision prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official decisions she made while in City employ.

For example, if during your service with the City, you were officially involved in awarding, renewing, amending, or administering the City contract with CBH, you could not for two years be employed by and permissibly receive any compensation from CBH, if such compensation was derived from revenue received under that City action affecting the contract.

D. Summary

In summary, based on the facts that you have provided, you are advised as to the following conclusions:

(1) Under the State Ethics Act, you may not for one year after the date you separate from City employment represent anyone—yourself, any firm that employs you, or any of its clients—before your “former governmental body,” which may or may not be limited to the City’s Office of Health & Opportunity. Moreover, it is unclear whether the Act applies to you. You may wish to seek the advice of the State Ethics Commission.

(2) You are a City employee. Therefore, upon separating from the City (for example, to take a position with CBH), the post-employment rules of the City Code would apply.

(3) Under City Code Section 20-603, after separating from the City, you may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by City’s Office of Health & Opportunity, or in connection with that office, with your involvement.

(4) Under City Code Section 20-607(c), you may not for two years after you leave the employ of the City acquire a financial interest in any official decision you made while in City employ. As to working for a City contractor (like CBH), “official decision” involves matters affecting the award, significant terms, or financial details of the contract.

Please feel free to request further advice, if you have additional facts to provide.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this Opinion is predicated on the facts that you have provided. We do not conduct an independent inquiry into the facts. 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 you may be concerned about, you are encouraged to contact us for specific advice on the application of the ethics laws to those particular facts. For information on requesting reconsideration of an Advisory Opinion, see Regulation No. 4 at Subpart H.

Since you have not requested nonpublic advice from the Board of Ethics, we will make this letter public, as required by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4.

Sincerely yours,

Evan Meyer
General Counsel

cc: Michael H. Reed, Esq. Chair
J. Shane Creamer, Jr., Esq., Executive Director