



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-510

August 17, 2010

Re: Gift / Scholarship / Leadership Seminars

A City employee requested nonpublic advice on whether there are any issues under the Public Integrity Laws if she were to accept a scholarship to a series of leadership seminars, where the scholarship is offered by a professional firm that is providing pro bono services to the City on a project on which the employee also working in her capacity as a City employee.

The requestor advised as to the following facts: The requestor is a civil service City employee, working in an operating department. The requestor provided a copy of her job description. The requestor is working on a particular project.

Also working on this project on a contract basis, is a local professional firm, as part of a pro bono advocacy effort by their firm. The requestor works with the professional firm and another City department to identify work to be done and monitor performance by other contractors. These duties are consistent with the

“typical examples of work” that are listed for the requestor’s specialty in her job description. We were advised that the professional firm is a local firm that has in the past done work for the City of Philadelphia.

The requestor further advised that the professional firm has offered to provide the requestor with a scholarship of over \$3000 to defray the fee (or part of the fee) to attend a series of professional development training seminars. Other firms that work with the professional firm have expressed an interest in contributing part of the total scholarship amount. We were also advised that these other firms have input into the selection of the recipient of the scholarship.

The requestor’s question is whether she may accept this scholarship.

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

There are a number of provisions of the Public Integrity Laws that govern gifts to City employees. In particular, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth’s Ethics Act restrict gifts to public employees. Mayor’s Executive Order No. 002-04 also restricts gifts to employees in the Administrative and Executive Branch of government, but interpretation and enforcement of Executive Orders is in the jurisdiction of the Mayor’s Office, not the Board of Ethics. The requestor was advised to consult the City’s Chief Integrity Officer for an interpretation of the Executive Order.

Philadelphia Home Rule Charter – Gratuities

Charter Section 10-105 provides, in relevant part:

§ 10-105. Gratuities.

No officer or employee of the City and no officer or employee whose salary or other compensation is paid out of the City Treasury shall solicit or accept any compensation or gratuity in the form of money or otherwise for any act or omission in the course of his public work.

There is no indication in any of the facts that we were provided, that the scholarship offer is “for any act or omission” in the public work of the requestor. Accordingly, the requestor was advised that there would be no issue under Charter Section 10-105 if she were to accept the scholarship.

Philadelphia Code – Gifts

Section 20-604 of the Code provides:

§ 20-604. Gifts, Loans and Favors to City Personnel.

(1) No member of Council or other City officer or employee, shall solicit, accept or receive any gift, loan, gratuity, favor or service of substantial economic value that might reasonably be expected to influence one in his position in the discharge of his official duties, from any person, firm, corporation or other business or professional organization.

(2) No person, firm, corporation or other business or professional organization shall offer, make or render any gift, loan, gratuity, favor or service of substantial economic value to any member of Council or other City officer or employee which might reasonably be expected to influence such officer or employee in the discharge of his official duties.

Code Section 20-601(8) defines “gift” as “A payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value, unless consideration of equal or greater value is received.” The scholarship would clearly

be a gift to the requestor from the various professional firms that funded it and selected the recipient. The first question under Code Section 20-604 is whether a gift is “of substantial economic value.” The requestor was advised that a gift valued at over \$3000 is of “substantial economic value.” See Advice of Counsel No. GC-2008-501 (January 2, 2008) at 8 (\$7000 party is substantial economic value, *citing* Opinion No. 90-30, *1990 City Solicitor’s Opinions* at 87). See also Opinion No. 91-16, *1991 City Solicitor’s Opinions* (\$700 is substantial economic value).

The second question under Code Section 20-604 is whether the gift is offered under circumstances that “might reasonably be expected to influence one in his position in the discharge of his official duties.” The determination here is an objective one; we do not attempt to determine whether the recipient, personally, is more or less prone to the temptation to favor a benefactor in the exercise of her official duties.¹ Rather, the determination is whether, considering the potential financial impact of the kinds of official decisions that one in the requestor’s position makes (as revealed by the responsibilities outlined in his/her job description) and the likelihood that in the foreseeable future that person might be called upon to make such a decision affecting the donor of the gift, there is a reasonable expectation that such a gift would present a temptation to the average person to act more beneficially toward the donor than an objective consideration of the public interest would call for.

The requestor advised that, in the current project, the professional firm is only providing pro bono advice. Nevertheless, there is a cost in terms of lost opportunity and time and materials to providing pro bono assistance. Thus, any increase in time and materials spent by a pro bono consultant can increase these costs, and represent a financial interest of the consultant. Moreover, as you have noted, the professional firm and at least one of the other firms have provided compensated professional services to the City in the past, and may apply to do so in the future. In any such future project, there is the possibility that the requestor may be assigned and have duties such as described above.

Depending on judgments made by the requestor, her decisions can affect the amount of work done by the professional contractors, which in turn could affect their costs. Accordingly, a City employee in that position who was favorably

¹ Similarly, the stated motivations of the donor in making the offer are not relevant to the objective determination of whether the plain language of Code Section 20-604 prohibits such a gift.

inclined toward such professional contractors would have the ability to take official action that would have a financial impact on those contractors. As a result, the requestor was advised that the offered gift to her of the professional development scholarship is one that “might reasonably be expected to influence one in [her] position in the discharge of [her] official duties.”

Since both elements of Code Section 20-604 are met, the requestor was advised that the gift is prohibited under that Section.

Potential Exception: Is it a Gift to You?

City employees may be aware of the concept of a “gift to the City.” The Board of Ethics has previously ruled that, in certain circumstances, a gift may be considered to be a “gift to the City” and not a gift to an individual City officer or employee, provided that certain criteria are met. These criteria were outlined in Advice of Counsel No. GC-2008-501, dated January 2, 2008:

As to the “gift to the City” exception, although the City Solicitor’s Office and our predecessor board, the advisory Board of Ethics, have both allowed City employees to accept certain gifts as a “gift to the City,” the advisory Board had spelled out, in a number of rulings, the criteria:

- The gift must not simply be offered to and accepted by the City employee receiving the benefit of the gift.
- Instead, the private entity wishing to make a gift to the City, such as attendance at a dinner or conference by certain mid-level managers, must make the offer to the appointing authority of any officials invited to attend, so that appointing authority can approve acceptance and then make the decision as to which City employee/official is the logical person to represent the City at the dinner or conference.
- The recipient official’s appointing authority must be able to articulate a defensible justification as to a legitimate governmental purpose of the City that is advanced or assisted by the acceptance of this gift.

- In determining whether a gift is justifiable, the official should consider whether the City would be willing to expend funds out of the City budget for a similar purpose.

See Opinion Nos. 2004-01, 2004-02, and 2005-01 of the former, advisory Board of Ethics (all posted on the Board's web site).

Advice of Counsel GC-2008-501, pages 6-7. *See also* Formal Opinion No. 2009-006 (October 21, 2009) and Nonpublic Formal Opinion No. 2009-001 (May 13, 2009) (applying the "gift to the City" exception where a gift defrays what would otherwise be a legitimate cost of doing City business). These advisories can be found on our website. Nevertheless, based on the facts that were presented, where the gift offer had been made to the requestor directly, the offer does not appear to meet the criteria for a "gift to the City" for purposes of the Public Integrity Laws.

In light of suggestions that the proposed gift was subject to revision, it was strongly suggested that requestor consult with the Chief Integrity Officer as to any application of Executive Order No. 02-004 prior to requesting any reconsideration of this Advice of Counsel. In view of the fact that the Executive Order is generally more strict in its terms than Code Section 20-604, it would be helpful to us to know the view of the Mayor's Office prior to proceeding further.

State Ethics Act

The gifts provisions of the State Ethics Act, 65 Pa.C.S.A. Sect. 1103(b) and (c), basically prohibit bribes. That is, there must be an understanding that the public employee² receiving the gift would be influenced by the gift in exercising his official action or judgment. This does not appear to be an issue from the facts you provide.

Accordingly, the requestor was advised that there is no issue under Section 1103(b), (c) of the State Ethics Act, under the facts as presented.

² In light of the conclusion that there is no issue under Section 1103(b), it is not necessary to address the question of whether the particular job title of the requestor would qualify her as a "public employee" as defined in the Act, and thus subject to the provisions of the Act.

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. 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.)

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.

Conclusion

The requesting City employee asked for advice concerning the offer of a gift to her of a scholarship, valued at more than \$3000, to a series of leadership seminars, where the scholarship is offered by a professional firm that is providing pro bono services to the City on a project on which the employee also working in her capacity as a City employee. Based on the facts provided by the requestor, she was advised as follows:

1. There is no issue under Charter Section 10-105.
2. This is a gift to the requestor, a City employee. A “gift to the City” exception to Code Section 20-604 does not apply to the facts provided.
3. Since this is a gift “of substantial economic value that might reasonably be expected to influence one in [her] position in the discharge of [her] official duties,” the requestor is prohibited from accepting it, under Code Section 20-604.
4. The gift is not prohibited under Section 1103(b), (c) of the State Ethics Act.

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.

6. The requestor should consult with the City's Chief Integrity Officer, regarding application of the executive order relating to gifts, and particularly prior to requesting any amended advice based on any proposal to amend the offer.

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 requested nonpublic advice from the Board of Ethics, we will not make this letter public, but we will be required to make public a 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