



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-505

May 6, 2010

Re: Potential Conflict / Outside employment with news media

A City employee requested nonpublic advice on whether there are any issues under the Public Integrity Laws regarding his outside employment for several media organizations, considering that he is in a position for a City department that works with the news media.

The Facts

The requestor advised us of the facts provided here. He works for a City department in a civil service-exempt position, the duties of which include using the media to accomplish departmental policy goals. He also serves in a paid part-time position in a regional newspaper. The primary source of revenue for the newspaper is the Sheriff Sale advertisement, which the paper runs four to five times a year. The newspaper is only published when it carries that ad.

The requestor also advised that he occasionally writes freelance articles for a out-of-state nonprofit organization. He advises that he is paid \$1,000 for each article. He advised that he also serves, uncompensated, on the board of directors of a local nonprofit organization concerned with media communication.

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 the Board of Ethics 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, we encouraged the requestor that to the extent that this opinion states general principles, and there are particular fact situations that he may be concerned about, he should contact the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

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. In this sense, Section 10-102 is a broad prophylactic rule, rather than a typical conflict of interest provision. The full text of the provision is 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.

The question that usually arises is what constitutes a “direct or indirect interest.” Prior rulings have held that where a City employee, as an individual, enters into a personal services contract with the City, that interest clearly violates Section 10-102. When the employee works for a firm that has a contract with the City, the provision is violated when the employee works on that contract for the outside contractor. Where the outside contractor has many contracts, and the employee happens to work for the outside contractor but not in any way related to the City contract, the provision is not violated, unless the City employee has a financial interest in the contract, such as where the employee’s compensation includes a share of profits or revenue generated by the contract or where the employee otherwise benefits from the contract. *See* Advice of Counsel GC-2008-515 at page 3.

The requestor advised that he serves in a paid part-time position in a regional newspaper. He also advised that the primary source of revenue for the newspaper is the Sheriff Sale advertisement, which the paper runs four to five times a year, and that the newspaper is only published when it carries that ad. Since the Sheriff’s Office is part of the City, the purchase of advertising space in the newspaper is a contract with the City. Since the requestor is paid by the newspaper, clearly he has a financial interest in the newspaper’s periodic contracts with the City. Such an interest is prohibited by Charter Section 10-102. Since the newspaper would not publish—and thus he would not receive payment—if there is no Sheriff’s Sale ad, this is a direct interest, and not *de minimis*. Accordingly, based on the facts that were provided, the requestor was advised that his interest in the Sheriff’s Sale advertisements in the newspaper is prohibited by the Charter so long as he is employed by the City, and he may not be compensated by the newspaper out of revenue received under such advertising contracts.

The requestor did not identify any City contracts held by the out-of-state non-profit, so there does not appear to be an issue under Charter Section 10-102 as to his work for that organization. The requestor advised that he is not compensated for serving on the board of the local communications nonprofit, so there would not be an issue under Charter Section 10-102 as to his service on that board.

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 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 . . .

This provision does not prohibit a City employee from having an outside source of income; it only prohibits him from taking official action in his City job that affects that income. Accordingly, the requestor would be required to publicly disclose his interest and disqualify himself from such official action, as provided in Code §20-608.¹ Participation that should be avoided would include not only final decisions, but also any preliminary discussion, review, or action. For example, if the requestor's department were considering whether to place an advertisement in the regional newspaper for which he works, he may not be involved in that decision for his City department. Similarly, as to the out-of-state nonprofit, he may not use his City position to enhance his income from that employer. For example, if he were to contact the nonprofit using City letterhead, phones, or resources, and use that contact to arrange to write, for compensation, a free-lance article, that would violate Code Section 20-607, since that would give him a financial interest in a decision, decree or judgment made by him in his official capacity. As to the local communications nonprofit, since we were advised that he is not compensated for service on that 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,

¹ The requestor was advised as follows: Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: You 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. Your public position (title and City department) and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (employment by the newspaper) that presents the conflict;
4. A statement of how your public duties may intersect with your private interest or that of your employer (if not obvious from 2 & 3 above); and
5. Your intention to disqualify yourself 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) your appointing authority; (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.

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 action by the requestor that affected any member of the newspaper, or the entity itself, would be restricted by this provision, if the requestor is a “member” of the newspaper. As a part-time employee, the requestor was advised that he would be a “member” of the newspaper. Thus, even if he did not work on a particular issue, if a department ad were to be placed in that issue, hw would still have a conflict, and disclosure and disqualification, as noted in footnote 1, would be required. As to the out-of-state nonprofit, as an occasional free-lance writer, he would not be a “member” of the organization, so Code Section 20-607(b) would not apply. As to the local communications nonprofit, it is not an organization organized for profit, and thus subsection 20-607(b) does not apply to that organization.

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 any of the outside entities any confidential City information he learns in his 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 he is employed by the City, any representation of the newspaper, the out-of-state non-profit, or the local communications nonprofit in any City matter (including that involving City offices other than the requestor's department) must occur without his involvement as agent for any of those entities.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., appears to apply to the requestor.² 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 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

² The Act applies only if the requestor is a "public employee," as defined in the Act. We were not provided a job description, but, based on his description of his duties, it appears likely that he is 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. However, the requestor was advised that, if he wishes a more detailed analysis as to whether the Act appears to apply to him in general as an employee of the City, he should provide us with a job description. (As noted on pages 8-10 of this Advice, a definitive ruling, on which he could rely, should come from the State Ethics Commission.)

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). A City employee may have a conflict if he has a personal financial interest, and he may have a conflict if his business has a financial interest in City action that he takes. There is a difference between the State Act and the City Code as to the required connection between the employee and the entity that gives rise to a conflict. For the City Code, he 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 Code. For the State Act, a business may be a “business with which he is associated”

if he is 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 under the Code in a City matter in which he takes action as a City employee affecting that nonprofit.

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 (Pa. 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 him to abstain fully from any participation in any City official action that would have a financial impact on the local communications nonprofit, and publicly disclose the financial interest, so long as he is on its board of directors.

In such a case, Section 1103(a) of the State Act would restrict his activities as a public official relative to the use of authority of office to obtain a private pecuniary benefit for local communications nonprofit, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, as described in footnote 1 above. See also 65 Pa.C.S.A. §1103(j).

We note, however, that the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including on the question of whether the Act applies to the requestor. Our advice as to 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.

Conclusion

The requestor, a City employee, asked for advice concerning the application of the Public Integrity Laws as to his position with his City department, in light of his outside interests as a part-time employee for a regional newspaper, an occasional free-lance writer for an out-of-state non-profit, and an uncompensated member of the board of directors of a local communications nonprofit. Based on the facts that were provided, 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. The requestor did not present any facts that raise any issues concerning the types of articles that he writes for publication or the appearance of articles by any other person in the same publications.
3. Charter Section 10-102 prohibits his interest in advertisements placed by the City in the the newspaper, and accordingly, he may not be compensated by the newspaper out of revenue received under such advertising contracts.
4. The requestor's writing for the out-of-state non-profit and service on the board of the local communications nonprofit raise no issues under Charter Section 10-102.
5. If the City should consider the regional newspaper for placement of an advertisement or any other official action that might involve the requestor's official work for the City, both the City Code and the State Ethics Act would require that he publicly disclose the financial interest and disqualify himself from taking action for the City in the matter.
6. If the City should consider the out-of-state non-profit for any official action that might involve his work for the City and on which he may have a personal financial interest (such as that the out-of-state non-profit might pay him for writing on the subject), both the City Code and the State Ethics Act would require that he publicly disclose the financial interest and disqualify himself from taking action for the City in the matter. However, any City action affecting the out-of-state non-profit that did not involve a personal financial interest would not require him to disclose or disqualify himself from action.

7. If the City should take action (including recommendations and preliminary work, such as designing an RFP) regarding local communications nonprofit involving the requestor's work for the City, it is likely that the State Ethics Commission would interpret the State Ethics Act to require him to abstain fully from any participation in any such City official action and publicly disclose the financial interest, so long as he is on the board of directors of that nonprofit. The conflict of interest provision of the City Code would not apply.

8. Under Code Section 20-602, the requestor may not represent, as agent or attorney, any of the outside entities in a transaction involving the City.

9. The requestor was reminded 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 he 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