



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-506

May 6, 2010

Re: Conflict / Board or Commission / Nonprofit Negotiations with Department

A member of a City board or commission (“the requestor’s board”) requested nonpublic advice on whether she would have a prohibited conflict of interest or the appearance of a conflict resulting from the fact that she volunteers as a member of a committee for a nonprofit organization that is working with the City on a contractual matter, where staff of a City department affiliated with the requestor’s board and of other City offices will have a role in negotiating the contract and in related City actions. Based on the facts presented, we advised the requestor that she would not have a conflict of interest in this situation, but that she may wish to address appearance issues.

The Facts

The requestor advised us of the facts provided here. She serves as a member of the requestor’s board. She currently serves, in a volunteer, non-City position, as member of a committee of a nonprofit organization. The nonprofit organization is currently negotiating a lease agreement with the City, working with staff of various City offices.

The requestor asked us whether, given her City board membership and volunteer position with the nonprofit organization, she has any conflict or appearance of conflict arising out of the nonprofit’s dealings with the City, and thus any

restrictions on the degree to which she may participate in these dealings as a member of a City board.

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

Conflicts of Interest Generally

The issue before us is whether the requestor has a conflict of interest as a City board member because she is a committee member of a nonprofit organization that is negotiating with the City for a lease and making related contact with staff of various City offices. The general purpose of laws against a “conflict of interest” is to prevent a City officer from having a conflict between her 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 herself (perhaps indirectly through an employer or relative) on the other hand. It is desirable to prevent such situations because that officer may be tempted to act in a way that benefits that personal interest to the detriment of the proper execution of her official duties. Even if the officer does not actually yield to the temptation of incurring a private benefit to herself, public confidence in the officer’s decisions and in the impartiality of government is undermined by the mere existence of such competing interests.

Philadelphia Code – Conflicts of Interest

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

Since the requestor advised that she is unpaid by, and has no financial interest in, the nonprofit organization, there is no personal financial interest, and no issue under Section 20-607(a).

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.

This provision would not be triggered by an interest in a nonprofit organization, as it applies only where a City officer is a member of a business organization that is for profit. Thus, there is no issue under Section 20-607(b).

Accordingly, we advised the requestor that, under the facts presented, she would not be restricted by the Code's conflict of interest provisions, which prohibit her from having a financial interest personally or through a business in actions she takes as

a City board member. She would not have a conflict of interest that would need to be publicly disclosed and there would be no City board action from which she could or should disqualify herself.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, also has a conflict of interest provision, but we do not discuss it here because we believe the Act likely does not apply to the requestor. The Act applies to “public officials,” and that term does “not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof.” 65 Pa.C.S. §1102.

We note, 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 the requestor¹. 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 of Ethics regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, we advised the requestor that she may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

¹ If the Act did apply, a conflict issue might arise from the facts that were presented. Unlike the City Code, the Act defines “conflict of interest” to include an interest through a nonprofit entity, if the requestor is an officer or director of the entity, even if unpaid. *See* Advice of Counsel GC-2009-501 (Amended March 2, 2010). However, it is unclear whether the State Ethics Commission would consider membership on a committee of a nonprofit organization to be an “officer” of that nonprofit.

Philadelphia Code – Confidential Information

The City Code prohibits the requestor from sharing any confidential information gained through her City board service with the nonprofit organization to assist in its negotiations with the City. 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.

This information was provided merely to be complete, not to suggest that there is any concern that this appears to be an issue under the facts presented.

Philadelphia Code – Prohibited Representations

The City Code restricts City officers, such as board members, from representing others before their boards. Section 20-602 provides in relevant parts:

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.

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An uncompensated City officer or employee or a compensated City officer or employee whose service is part-time (excluding members of City Council or other City officers or employees who are paid on an annual basis) is subject to the foregoing paragraph only in relation to a particular matter (a) in which he has at any time participated through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (b) which is pending in the department, agency, authority, board or commission of the City in which he is serving.

City Code § 20-602(1)(a), (2). A similar provision restricts employees of for-profit entities to which a commission member belongs from making such a representation before the commission member's commission, unless the member follows a prescribed disclosure and disqualification process. City Code § 20-602(5). Under the facts provided, the nonprofit organization's negotiations for a lease agreement would not appear to involve the requestor or any member of the nonprofit in making a representation as an agent of the nonprofit before the requestor's board. Therefore, there would be no issue under the Code's representation restriction of Code Section 20-602. In avoiding appearances of impropriety, which we discuss below, it may be helpful to keep in mind the policy considerations that underlie the Code's representation rule: no one should be represented by a City official where that person or entity could gain or be perceived as gaining an advantage due to the possible sway or influence the official may have with other City officials or employees.

Appearance of Impropriety

The requestor specifically asked us to address appearance issues in her request for advice. We commended the requestor for being sensitive to the spirit as well as the letter of the law. In a recent opinion, the Board of Ethics explained appearances of impropriety as follows:

Situations in which there is no conflict of interest or prohibited gift under the letter of the law can nevertheless create appearances of impropriety. Although the ethics laws do not prohibit appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, such appearances can be damaging to public confidence in government. There is no formal definition of "appearance of impropriety" in the laws under which this Board has jurisdiction, but generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon or by a public official or that a public official's personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest.

Formal Opinion 2009-001 at 4. The facts the requestor presented are somewhat susceptible to an appearance of impropriety for fact-specific reasons and because as a member of the nonprofit organization she presumably would have an interest, although not a financial interest, in the organization successfully negotiating a favorable lease. To avoid an appearance of impropriety with regard to the nonprofit organization's

lease matter, we recommended that the requestor not take any actions that would cause it to appear that she is attempting to influence the outcome of the leasing process. For example, she could refrain from contacting the City staffers involved in the process (especially about the lease itself), and she could otherwise not represent the nonprofit before the City in the matter. Such measures would reduce the possible appearance that the nonprofit organization could gain special consideration or an advantage due to the requestor's City board position.

The requestor stated that she would voluntarily disqualify herself from related action on her City board. Again, as discussed above, such disqualification is not required by the ethics laws, but is recommended only, in order to avoid a possible public perception of potential bias or influence.

Conclusion

We advised that, applying the City Ethics Code to the facts the requestor presented, she would not have a conflict of interest to disclose and need not disqualify herself from any action by her City board. We emphasized, however, that if the facts should change, she is not entitled to rely on the advice herein. It was noted that the City Code's prohibition on the disclosure of confidential information applies to the requestor. Also, the Code's restrictions on representations before her City board apply, although she advised that the matter in question does not involve direct action by that board. Finally, it was suggested that the requestor follow the recommendations on how to minimize an appearance of impropriety stated in this Advice.

We advised the requestor that if she 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 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