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Philadelphia Board of Ethics Nonpublic General Counsel Opinion GC-2012-514

December 27, 2012

Re: Post-employment / Attorney / Lobbyist

A former City employee, a member of the bar, requested a nonpublic advisory opinion regarding post-employment restrictions that apply to her.

The requestor was advised that there are three different ethics laws applicable to her that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act. Each restriction is discussed in turn below, including whether the restriction has a different application to attorneys practicing law, as two of them do.

A. State Ethics Act: One-Year Limitation On Representation before Former Governmental Body

The State Ethics Act has a post-employment restriction that applies to former public employees and that provides: “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.” 65 Pa.C.S. §1103(g).

However, as was discussed separately by email with the requestor, the State Ethics Act is interpreted by the State Ethics Commission. In view of the fact that there appear to be a number of unique issues that may be presented by this request, including whether the Act applies to the requestor, what would be the requestor’s “former governmental body,” whether her proposed post-employment activity would be considered to be “representing,” and whether any such activity would be the “practice of law” and thus not applicable under the *Shaulis* opinion,¹ it was clear that such questions would be more appropriately addressed to the State Ethics Commission.

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

The City Code contains a post-employment restriction that is a permanent limitation on assistance with particular matters. This restriction, under the *Shaulis* opinion cited in footnote 1, does not apply to attorneys engaged in the practice of law. Section 20-603(1) of the City Code, titled “Post-Employment Representation,” 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.

This provision is not a one-year prohibition, but instead applies “at any time” after a person leaves City employ. However, it is narrow in scope, since it only applies to matters in which the employee “participated” during City employ. This means matters in which the employee exercised discretion and not merely, for example, responded to a routine request for information. Thus, the requestor was advised that, if during her service with or for the City, she took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, she may not assist that future employer in the matter relating to that transaction. On the other hand, “matter” is interpreted to mean only the particular issue or issues on which decisions were made by

¹ The State Ethics Commission has ruled that the post-employment rule in the Act may not be applied to restrict an attorney’s conduct insofar as it constitutes the practice of law because the Pennsylvania Supreme Court has the exclusive authority to regulate an attorney’s conduct in that regard. State Ethics Commission Advice of Counsel 11-518 at 3 (citing *Shaulis v. Pennsylvania State Ethics Commission*, 574 Pa. 680, 833 A.2d 123 (2003)); *see also* Board of Ethics Advice of Counsel GC-2010-504 at 3-4.

the City with her involvement, not every issue related to that project that may arise after she separated from City service. *See* Nonpublic Advice of Counsel GC-2012-503 at 4-5.

Moreover, the post-employment representation restriction of Code Section 20-603(1) does not apply to representation of a client by an attorney practicing law. The regulation of attorneys engaged in the practice of law is solely within the province of the Pennsylvania Supreme Court and the Rules of Professional Conduct. *See* Advice of Counsel GC-2011-509 at 7.

Thus, the post-employment representation restriction of Code Section 20-603(1) would apply to restrict the requestor in her future employment from representing persons in transactions involving the City in which she had participated as a City employee, only to the extent that she is not practicing law. Lobbying by an attorney on behalf of a client/principal is generally considered to be the “practice of law,” but see the definition of “lobbying” in Board of Ethics Regulation 9, at Paragraph 9.1(X).

C. City Code: Two-Year Limitation On Financial Interests in Official Action

The City Code conflict of interest rule provides for a two-year prohibition on a former employee acquiring a financial interest in official action the employee took during City employment. Specifically, City Code Section 20-607(c) 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 contrast to the City Code’s post-employment representation prohibition just discussed above and to the State Ethics Act’s one-year post-employment restriction, Code Section 20-607(c) neither clearly restricts representation nor relates exclusively to post-employment activity. It applies “during his term of office or employment and until two

(2) years have elapsed since the expiration of service.” It is important that the provision does not relate to “assisting another” or “representation” but to “becoming financially interested” in an official action.

In the *Shaulis* opinion, the Pennsylvania Supreme Court made a distinction between restrictions that target attorneys and restrictions that apply to current employees including attorneys. The Court opined that “this Court retains exclusive authority over the conduct of attorneys generally, but that as an employer, in this case the Commonwealth government, can proscribe conduct of its current employees, including attorneys, provided that the proscription is not targeted specifically at attorneys.” *Shaulis*, 833 A.2d 123, 131. As a result, ethics laws that apply to current employment do apply to attorneys. Therefore, a strong argument can be made that Section 20-607(c) of the City Code prohibiting a personal financial interest in official action taken for two years after employment does not target attorneys and is constitutional as it applies to attorneys, even after *Shaulis*. Board of Ethics Advice of Counsel GC-2010-504; *see also* Solicitor’s Opinion 97-16 (concluding that, although it was not totally clear, attorneys could be subject to Section 20-607(c) since it is not a direct prohibition against representation); Solicitor’s Opinion 91-47 (same).

The requestor was advised that for two years after leaving City employment she may not acquire a financial interest in action she took in her official capacity as a City employee, including any of the various positions that she held. A typical example would be a City contract that the employee involved in awarding, and under which she would now be paid, if she were to go to work for the contractor. The question may arise whether the requestor may—within two years of separation from the City—represent for compensation as lobbyist, a principal in a matter that would not exist but for work she previously did as a City employee. That is a difficult question, on which we would have to review the particular facts.

D. Note on the Rules of Professional Conduct

Generally speaking, post-employment representation restrictions are not applicable to attorneys practicing law and the Rules of Professional Conduct for Pennsylvania attorneys control. It is not within the jurisdiction of the Board of Ethics to advise on the Rules of Professional Conduct, so the Rules are mentioned here merely as information. Rule 1.11(a) addresses “Special Conflicts of Interest for Former and Current Government Officers and Employees” and provides in part that a former government lawyer “shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent to the representation.”

E. City Lobbying Code

The requestor suggested that in a potential future private position, she may be lobbying City agencies on behalf of private clients on a variety of issues. As a lobbyist, she would be subject to the same application of the City's Lobbying Code as to any lobbyist lobbying the City. See Philadelphia Code Ch. 20-1200 and Board of Ethics Regulation 9. Neither provision has any special restrictions on a lobbyist who happens to be a former City employee, however. The requestor was advised to ask, if she has specific questions about how the Lobbying Code would apply to particular lobbying activity.

F. Specific Questions and Conclusion

Most of the requestor's specific questions related to representation of persons before certain City entities within one year of her separation from the City. As noted above in Section A of this opinion, such questions relate to interpretation of the State Ethics Act, and should be addressed to the State Ethics Commission.

Section B discusses Section 20-603(1) of the City Code. This section does not specifically relate to representation of others before specific City entities and thus does not raise issues concerning which agencies are covered. Rather, the Section concerns a nexus between a financial interest by the former employee personally and "any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity" while with the City. Some of these terms, such as 'decision' and 'judgment' do not necessarily describe the exercise of final authority but could include recommendations. Construing a similar phrase in Code Section 20-607(a), the Board recently concluded that the phrase prohibited "taking official action" and added: "Participation that the official should avoid would include not only final decisions, but also any preliminary discussion, review, or action." Nonpublic Formal Opinion No. 2012-001 at 5-6. Accordingly, the requestor's assertion that in some of her City positions she "did not have decision making authority" with regard to certain actions, does not necessarily mean that there could not be a question under Code Section 20-603(1), if—within two years of separation—she were to acquire a financial interest in a matter in which she participated officially while with the City. The requestor was advised that she may wish to identify particular matters and request advice on the specific facts.

As to restrictions beyond one year after separation, as noted above, Section B relates to a permanent restriction, and Section C relates to a two-year restriction. The

requestor's question about activities as an attorney has been addressed above, where appropriate.

Since ethics advisory opinions are limited to the facts presented, this advice is predicated on the facts above that were provided to us. We do not conduct an independent inquiry into the facts. Ethics advisory opinions are always fact-specific, and any employee who wants to know whether his or her proposed conduct is permissible should seek and rely only on an opinion issued about his or her specific situation. If there are particular fact situations that an employee or former employee is concerned about related to general principles that are described in this opinion, that person should ask us for specific advice on the application of the ethics laws to those particular facts.

Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we will be required to make public this revised version, edited to conceal facts that are reasonably likely to identify the requestor, as required by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4.

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