



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic General Counsel Opinion GC-2012-515

December 28, 2012

Re: Potential Conflict of Interest / Board or Commission / Interests of Firm Employing Child of Member

A City official (“the requestor” or “the official”) requested a nonpublic advisory opinion concerning a potential conflict of interest. The official advised that he serves on a board/commission of the City. The board/commission seeks to contract with a professional firm, of which a child of the official is an associate employee (but not typically assigned to such matters as the contract in question). Also, the board/commission might contract with a lobbying firm that is currently under contract with the official’s office. The official asked whether these matters required his “recusal.” Finally, the official asked if any recusal would also extend to his assistant, who routinely attends meetings of that board/commission as the official’s designee.

The issue is whether the requestor must take any actions to avoid a conflict of interest arising out of his membership on the City board/commission, in light of his child’s employment at the professional firm. The Home Rule Charter, City Ethics Code, and the State Ethics Act all contain provisions that address conflicts of interest.

Home Rule Charter

Sections 10-100 and 10-102 of the Charter restrict City officials and employees from benefitting from or being “interested directly or indirectly” in certain City contracts. However, these Charter provisions apply only to the official himself or herself; there is no restriction on interests by relatives. The phrase “interested . . . indirectly” has never been interpreted to mean that if a relative has an interest, the official is indirectly interested. Accordingly, there is no issue under the Charter.

Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from taking official action that affects either a personal financial interest or an interest held by their business or by certain relatives. The requestor is a City officer both in his capacity as an employee of the City and also as a member of a City board or commission. Code Section 20-607(a) applies to any personal financial interest that he might have as an officer or employee. That provision is not relevant here, as we were not advised that the official has a personal financial interest in the private professional firm or any of its clients that might appear before the board/commission. Of course, if a party should come before the board/commission in which the requestor did have a personal financial interest, Section 20-607(a) would become relevant.

As to the interest through another person or 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, 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. (emphasis added)

Since the requestor advised that his child is an associate in the professional firm, the requestor may not take official action in a matter affecting that firm in which his child has a direct financial interest. *See* Nonpublic Formal Opinion No. 2009-003 at 3. However, unlike the situation in Opinion 2009-003, where the applicable law firm member was a partner, and thus presumably shared in the firm's profits, we were advised that the requestor's child is an associate of the firm. It cannot necessarily be assumed that every matter that affects the finances of that firm or one of its clients also affects the financial interests of any particular firm associate. Accordingly, Code subsection 20-607(b) would require the requestor's disclosure and disqualification from any City decision that would have a financial impact on the professional firm only where the financial impact specifically extends to his child. The question is whether the firm's own interest or its work for a particular client in a particular matter constitutes a financial interest in the matter, to the degree that the financial interest so affects the finances of the firm that it may affect the employment or salary of associates, and thus creates a conflict for a City officer with discretion in the matter and who is a relative of an associate at the firm.

The Code does not define "financial interest." The Board of Ethics engaged in an extended discussion of the meaning of "financial interest" in Formal Opinion 2009-003, at pages 3-9. That Opinion addressed a similar, but significantly different, situation. In Opinion 2009-003, the requestor was a member of a City board/commission, and the requestor's relative was a partner in a law firm that appears before the board/commission. The relative in this case is not a partner, but an associate. It is presumed that associates at the firm do not share in the profits of the firm.

In Opinion 2009-003, the Board considered a "range of possibilities" and concluded that a conflict would be presented for the City official due to that official's relative being a partner of the law firm, in the following scenario:

A major party in an action before a City board/commission, the result of which will have significant financial effect on the party, with the possibility of an appeal or additional legal work, is represented by the law firm. It is clear that success in the matter means that the party will hire the law firm for future work.

Opinion 2009-003 at 7. However, this conclusion was clearly based on the assumption that partners share in firm profits, and that any future work for the firm would affect those profits, and thus the financial interests of all partners. In the facts at hand, the compensation of the City official's child, as an associate, is not likely to be affected by whether the professional firm is employed for future work by the City board/commission, assuming that the official's child does not personally work on such matters.

Accordingly, the requesting official was advised that in any matter in which an applicant before the board/commission is to be represented by his child's professional firm, or in which the board/commission is taking action that directly affects that firm, but that in either case the requestor's child is not involved and does not have a financial interest as discussed above, the requestor would not have a conflict of interest and need not publicly disclose the conflict and disqualify himself. Should the facts concerning the involvement or financial interest of the requestor's child be less clear, the requestor should at a minimum request the advice of this office as to whether he has a conflict that requires disclosure and disqualification¹ under Code Sections 20-607 and 20-608. Of course, the official always has the option of filing such a disclosure letter and disqualifying himself without an opinion, since that would be the maximum remedy, prior to board/commission action.²

As to the contract firm, the fact that a firm has a contract with another office in which the requestor has authority does not create a conflict if he takes official action at the board/commission concerning that firm.

As to the official's assistant participating as his designee on the board/commission in matters affecting the professional firm, so long as the designee exercises independent judgment, he may participate in such matters.³ Of course, for the requestor to instruct his designee how to vote (or take other action) in any matters in which the requestor's child has a financial interest would be just as much a conflict of interest as the requestor's personally voting.

The Knowledge Requirement

It is noted that there may be a variety of scenarios that might arise, and also that it may be difficult for a board/commission member to learn much in advance of any meeting of the board/commission that the agenda includes a matter in which a party is assisted by a firm in which a member or his relative has an interest. It is important to note that Code Section 20-607 requires disclosure and disqualification only where a financial interest in official action of a City officer is held by a defined relative of that officer "and where said

¹ We prefer this term to "recusal" since it more effectively reflects the public disclosure procedure and disqualification from all official participation required.

² See Advice of Counsel GC-2011-501 at 10-11 on "appearance of impropriety."

³ As a designee to the board/commission, the assistant would be considered to be a City officer as a board or commission member, and would be subject to all the ethics laws that apply to City officers, including the requirement to file the City financial interest statement due next May 1.

... City officer or employee has knowledge of the existence of such financial interest.” Of course, one may not avoid application of Section 20-607(b) by consciously avoiding such knowledge; the requestor would be expected to make a good-faith effort to learn when his child’s firm is poised to assist a client before the board/commission or to be itself the subject of board/commission action. This includes making best efforts to learn the agenda of meetings in advance, if possible. In this regard, the Board of Ethics, in Opinion 2009-003, adopted the following policy with respect to board and commission members:

(1) to take whatever steps they can to ensure they are informed of who will be appearing before them in good time so the occurrence of such last-minute situations is minimized; and (2) if such a situation occurs, to request their body postpone official action until they can comply with the Code’s disclosure requirements; or (3) if postponement is not practicable, to announce their nonparticipation publicly at the meeting, leave the room during consideration of the matter, and bring themselves into compliance with the Code’s requirements as soon as possible. This includes writing and filing a letter that is in full compliance with the requirements of Code Section 20-608(1)(c) no later than 5 calendar days after the Board action.

Opinion 2009-003 at 9-10. It is important to note that the deadline of “no later than 5 calendar days after the Board action” is applicable only when it is not feasible to file the disclosure letter prior to Board action, as is required by the language of Code Section 20-608.

Disclosure and Disqualification

In the case of a financial interest in City action, the Code requires public disclosure of the interest and disqualification from taking official action. Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The official with a conflict 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. His public position (City job and member of the board/commission) and description of duties relevant to the conflict, if not obvious;
3. His private position or financial interest that presents the conflict interest (such as approval of contract with, approval of fees to, or representation of a party by the firm of which the requestor’s child is an associate);

4. A statement of how the requestor's public duties may intersect with his private interest (the board/commission is considering a matter in which the firm has a financial interest and in which he would normally participate as a board/commission member); and
5. His intention to disqualify himself from any official action in matters affecting the private interest (should indicate, if possible, 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) the Chair, Executive Director, or Secretary of the board/commission in which you would be acting; (2) the Ethics Board, c/o Evan Meyer, General Counsel, One Parkway Bldg., 1515 Arch St., 18th 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.

Representation

Code Section 20-602 prohibits certain involvement in transactions involving the City, wherein a City official represents a person in the matter, or—in some circumstances—is a member of the firm that is representing a person in the matter. However, since the requestor himself is not a member of the professional firm and has not asked about himself representing persons before the board/commission, we need not address this provision.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, likely applies to the requesting official, both as a board/commission member and as a City employee, making him a “public official” under the Act. Although the Act’s conflict of interest provision is similar to that of the City Code, the Act is broader in one respect. Not only does the Act identify as a conflict matters affecting the financial interests of the official directly, his or her business, and certain close relatives, but—unlike the City Code—the Act additionally reaches financial interests of “a business with which . . . a member of his [the official’s] immediate family is associated.” Thus, to find a conflict, the Act would not require that the official’s child have a personal financial interest, merely that the firm that employs the child has a financial interest.⁴

⁴ The disqualification provision of the Act can be found at 65 Pa.C.S. § 1103(j). It is likely that the procedure described above under “Disclosure and Disqualification” would satisfy this requirement.

However, the State Ethics Commission is the ultimate arbiter of interpretations of the State Ethics Act. This Advice is not binding on the State Ethics Commission.

For specific guidance on the State Ethics Act, the requestor was advised to seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide him 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 the requestor discloses truthfully all the material facts and acts in reliance on the Advice. *See* 65 Pa.C.S. §1107(10), (11). The State Act would also provide protection from certain penalties if the requestor would 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

Conclusion

A City official advised that he serves on a board/commission of the City, which seeks to contract with a professional firm, of which a child of the official is an associate employee (but not typically assigned to such matters as the contract in question). The official requested advice in how to avoid a conflict of interest in taking official action as a member of the board/commission.

The requestor was advised that there is no issue under the Charter. Code subsection 20-607(b) would require his disclosure and disqualification from any City decision that would have a financial impact on the professional firm only where the financial impact specifically extends to the official's child—which may be limited, since he is an associate, not a partner, in the firm.

The fact that the requestor's City office contracts with a certain company would not create a conflict for the requestor in any matter in which the board/commission acts regarding that company, since there is no conflict through contractors to an official's office. Also the requestor's designee may participate in any board/commission matter in

which the requestor is disqualified, provided that the designee acts independently, and not on instructions from the requestor.

Please note the discussion under “The Knowledge Requirement” regarding identifying matters before the Board/commission that may require disclosure and disqualification.

Since the requestor would not personally be representing any party before the board/commission, the “representation” provision of Code Section 20-602 does not apply to this matter.

The requestor was advised that he may wish to request advice from the State Ethics Commission regarding the application of the State Ethics Act.

Since ethics advisory opinions are limited to the facts presented, this advice is predicated on the facts above that have been 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 you are concerned about related to general principles that are described in this opinion, you 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.

Evan Meyer
General Counsel

cc: J. Shane Creamer, Jr., Esq., Executive Director