



# CITY OF PHILADELPHIA

BOARD OF ETHICS  
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## Philadelphia Board of Ethics Board Opinion 2013-001

January 23, 2013

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Legislative Counsel to the Majority Leader  
Philadelphia City Council  
Office of Councilman Curtis Jones, Jr.  
4th District Councilman  
Room 404 City Hall  
Philadelphia, PA 19107

### Re: “Resign to Run” – Charter Section 10-107(5)

Dear Ms. Bricklin:

In an email message received by the Board of Ethics on December 14, 2012, you requested a public advisory regarding whether certain activity involving your exploration of a possible run for public office would require you to resign your City position. You advised us of the following question and facts:

I am considering running for judge in the Court of Common Pleas or Municipal Court in the upcoming May 2013 primary. I understand based on your previous opinions that as a city employee I must resign once I

become a candidate which is either when I make a public announcement or when nominating petitions are filed. My question, for which I would request a public advisory opinion, is whether circulating nominating petitions on my own behalf, prior to their being filed, would require me to resign? Circulation of petitions does not begin until February 19, 2013.

In summary, you have asked whether your circulating your own nominating petitions for elective office would require you, prior to the filing of such petitions, to resign under the “resign to run” provision of the Charter.

You are advised that Section 10-107(5) of the Charter does not require you to resign your City position until you either publicly announce your candidacy or file nominating papers. Nevertheless, what activity might constitute “publicly announcing candidacy” requires some analysis and consideration of particular facts.

**“Resign to Run”—Subsection 10-107(5) of the Charter**

As a legislative aide to Councilman Jones, you are an appointed City employee. Thus, you are subject to subsection 10-107(5) of the Home Rule Charter,<sup>1</sup> which provides:

(5) No officer or employee of the City, except elected officers running for re-election, shall be a candidate for nomination or election to any public office unless he shall have first resigned from his then office or employment.

Therefore, once you become a candidate, you must resign your City position. Thus, the question arises as to when you become a candidate for purposes of this subsection. As

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<sup>1</sup> You may be aware that a 1952 Opinion of the City Solicitor applied a special interpretation for employees of City Council. However, that Opinion applied that interpretation to subsection (4) only. Subsection (5) of Charter Section 10-107 clearly applies to you, as an employee of the City. See Nonpublic Advice of Counsel GC-2008-527; Nonpublic Advice of Counsel GC-2008-523 at page 3 n.1 (citing a number of prior rulings); Nonpublic Advice of Counsel GC-2010-522 at page 2 n.1. Note that Board Regulation 8 has a Subpart K relating to City Council employees, but Regulation 8 applies only to Subsections 10-107(3) & (4) of the Charter (See Para. 8.0, Scope, of the Regulation), and thus the Regulation does not address the “resign to run” provision of subsection 10-107(5).

this Board said in Formal Opinion No. 2010-001:

Previous rulings of State appellate courts, the Board of Ethics and the Law Department have advised that one becomes a candidate for the purposes of Charter Section 10-107(5) upon having filed nomination papers or publicly announced candidacy for office.

Formal Opinion No. 2010-001, at page 5. *See also* Advice of Counsel GC-2011-511 at 2-3. Nevertheless, the question remains as to what activities might constitute “publicly announcing” that one is a candidate for office. In Formal Opinion 2010-001, the Board advised that a City official’s authorizing others to circulate nominating papers on his behalf would not constitute a public announcement of candidacy. Formal Opinion 2010-001 at page 5. Moreover, Formal Opinion No. 2010-001 cited court opinions holding that indicating only “willingness and availability to run” did not make one a candidate for purposes of Section 10-107(5), nor did statements made to a limited number of individuals (five) in private in a hotel room without the presence of the media. Formal Opinion No. 2010-001 at 3-4 (*citing McMenemy v. Tartaglione*, 590 A.2d 802, 810 (Pa. Commw. 1991), *aff’d without op.* 590 A.2d 753 (Pa. 1991) and *Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963)). *See also* Nonpublic Formal Opinion No. 2009-004, at 3-4 (*citing McMenemy and Mayer*).

Formal Opinion No. 2010-001 held that a City employee would not become a “candidate” for purposes of Charter Section 10-107(5), and thus required to resign his or her City position, merely upon the circulation of nominating petitions by others on the behalf of the City employee. However, no ruling of this Board has addressed the impact of a City employee personally circulating nominating petitions on his or her own behalf.

In Nonpublic Advice of Counsel GC-2010-522, we advised a City employee that, were that employee to have several one-on-one private conversations with friends, advisors, and knowledgeable people about her chances for success and the details of running (such as when would she have to decide and what would she need to do to become an official candidate and when can she begin to raise money), the fact of having those private conversations, in and of itself, would not constitute a “declaration of candidacy” by the employee and would not require her to resign her City position under Charter Section 10-107(5).

We also addressed this issue in Nonpublic Advice of Counsel GC-2011-511. In that matter, the requestor, a City employee, advised that he had been asked to meet with a group of community members to share his thoughts on the community, the

community's needs and his willingness to run for public office. The requestor advised that, if asked the question he would let the group know that he is willing and able to run and is exploring the possibilities, but added: "At no time would I commit to running for office nor would I make a public statement stating such." In Advice of Counsel GC-2011-511 we advised that, so long as nothing the City employee would say at the proposed meeting is a statement that he is a candidate or making a commitment to run, mere statements of "willingness and availability to run" would not make him a candidate and would not require that he resign his City office, under Charter Section 10-107(5).

To address the facts presented by you in the request at hand, this Board notes the following policy statement from Opinion 2010-001:

In particular, if one becomes a candidate upon the filing of nominating papers, it is implicit that the mere preparation of those papers, such as circulating them to obtain the necessary number of signatures, does not, by itself, meet the standard. Similarly, it follows that merely authorizing others to circulate nominating papers would not constitute a "public announcement" of candidacy. Indeed, a person who is weighing a decision whether to run or not may well wish to "test the waters" and assess the strength of support for a possible candidacy by circulating nomination petitions and seeing how easy or difficult it is to obtain signatures.

On the other hand, if, for example, those circulating nominating petitions at the same time announce, orally or via a poster or sign, that they are doing so for "Frank Rizzo, Candidate for Lieutenant Governor" (or some other particular office) and such an announcement is not contrary to instructions from you, then there is a separate issue of whether that is a "public announcement."

Opinion 2010-001 at 4-5. This Board agrees, and finds that the same policy applies when the person circulating nominating papers is the potential candidate herself. Thus, until nominating papers are filed, and so long as you make no public statements that indicate that you have already decided to be a candidate, or that you are doing anything more than "considering a run" or "testing the waters," you may circulate nominating papers on your own behalf without being required by Charter Section 10-107(5) to resign your City employment.

### Conclusion

Based on the facts that you have provided and to respond to the particular question that you have posed, you are advised as follows:

1. Under the Home Rule Charter and the City's Campaign Finance Law, you will not become a candidate until you either file nominating papers or publicly declare your candidacy.
2. Until nominating papers are filed, and so long as you make no public statements that indicate that you have already decided to be a candidate, or that you are doing anything more than "considering a run" or "testing the waters," you may circulate nominating papers on your own behalf without being required by Charter Section 10-107(5) to resign your City employment.
3. This Advice addresses only questions under the Public Integrity Laws that are within the jurisdiction of the Board of Ethics. Explicitly not addressed are any issues under the Pennsylvania Election Code. This Advice also assumes that your question does not involve the solicitation or receipt of any contributions or the formation of any political committee.

In keeping with the concept that an advisory opinion of this Board is necessarily limited to the facts presented, this Opinion has been predicated on the facts that were 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 as 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 and lobbying 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 laws under our jurisdiction 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 you may be concerned about, you are encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts. For information on requesting reconsideration of an Advisory Opinion, see Regulation No. 4 at Subpart H.

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Since you have requested public advice from the Board of Ethics, we will make this letter public, as mandated by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4.

By the Board:

Michael H. Reed, Esq., Chair  
Judge Phyllis W. Beck (Ret.), Vice-Chair  
Sanjuanita González, Esq., Member  
Brian J. McCormick, Jr., Esq., Member

[There is a vacancy on the Board, due to the resignation of William H. Brown III, Esq.]