



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics Non-Public Board Opinion 2014-004

September 17, 2014

Re: City Employee's Civic Association Activities

Dear City Employee:

You have requested a non-public advisory opinion about the application of the City ethics laws to your involvement in your local civic association. You are not prohibited from participating in the activities of the civic association, its board of directors, or zoning committee. The City Code's representation restriction, however, would prohibit you from being the lead person communicating and negotiating with the City on behalf of your civic association in its application for a grant from a City agency.

I. Jurisdiction

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter ("Charter") provisions and ordinances pertaining to ethical matters. Charter §4-1100. The Charter and City Code authorize the Board to render advisory opinions concerning a City employee's proposed future conduct. Charter §4-1100; Code §20-606(1)(d). Board of Ethics Regulation 4 describes the procedures related to seeking an advisory opinion from the Board and for requesting reconsideration of an advisory opinion issued by the Board. Board Regulation 4, ¶¶ 4.0, 4.26.

II. Facts Provided

You provided detailed facts about activities related to your local civic association ("Civic Association"). You are a full-time City employee working as an attorney in a City agency. The City is your client. Your job necessarily involves interfacing with City employees and officials from various departments.

You are a member of the Civic Association, and you sit on its Board of Directors (“Board”). You have also served a previous term on the Board. The Civic Association is a tax-exempt non-profit community organization that represents a geographic focus area.

You are not compensated for your Civic Association activities as a member of the Board or otherwise. You own a home in the Civic Association’s focus area. You have indicated that your financial interest in your Civic Association work is no more than that of any other property owner. You are involved in your Civic Association because you are interested in promoting a thriving neighborhood, City, and region.

You have years of professional experience with non-profits. In the past, prior to your City employment, you represented the Civic Association as its counsel and, in that capacity, you assisted the Civic Association by incorporating it, drafting its original bylaws (since revised), and applying for and obtaining its 501(c)(3) tax-exempt status. You have not represented the Civic Association as an attorney in litigation.

The Board of Directors oversees various Civic Association committees that manage the operations of the Civic Association. The Board also plans and manages annual activities, communicates with the community on different issues, interfaces with other local civic associations, has a quarterly public meeting, and engages in neighborhood fundraising.

The Civic Association has put together a plan to improve a site within the Association’s boundaries. As part of the plan, the Civic Association will seek a grant through a City program. This grant would serve as a springboard for additional grants made by the City. The Civic Association’s point of contact for the grant application process would be a particular City agency (“City Agency X”). In exchange for a disbursement of grant funds, the Civic Association would make a long-term commitment to establish and maintain the site improvement.

The Civic Association has asked you to take over the project because of your experience with non-profits, real estate, and grantmaking. The Civic Association trusts you to interface with City Agency X as its spokesperson and has asked you to help draft the plan for the current phase of the project. Your interactions with City Agency X, likely with the City program leader, would include phone conversations about the program and email exchanges about relevant documents. You would be responsible for negotiating the terms of the grant and would have input in the drafting of written grant documents. You would take proposed grant documents back to the Civic Association Board for its consideration and an approval vote.

The Civic Association is a Registered Community Organization (“RCO”) that is able to represent the community within its focus area in interactions with zoning applications pursuant to the City Zoning Code.¹ The Civic Association has delegated its authority in these matters to its Zoning Committee. You are one of five members of the Zoning Committee, but you are not the Chair. The Zoning Committee is responsible for organizing and conducting required public meetings to discuss zoning applications, and it provides the City Zoning Board of Adjustment (“ZBA”) and the City Planning Commission with documentation and information about action at these meetings.

Pursuant to the City Zoning Code, an applicant for a variance or special exception gives notice to the Zoning Committee and often the relevant City Council member representing the district. The Zoning Committee schedules a public meeting, which is required by the Zoning Code. The applicant provides notice of the meeting to the community, and the Zoning Committee has input into the notice. Members of the Zoning Committee may ask to inspect the site that is the subject of the application, and they may discuss an applicant’s project prior to the public meeting.

Following a presentation of an application at the public meeting, the Zoning Committee may ask questions, and the Committee allows the public to make comments or ask questions. A vote is ordinarily taken by the Zoning Committee at the meeting or immediately following the meeting. The results of the vote are memorialized in a letter stating the Zoning Committee’s support, non-opposition, or opposition to the application. The Zoning Committee sends the letter to the ZBA and may copy the letter to the member of City Council representing the district in which the Civic Association’s focus area is located. In addition to the vote, the letter may contain information about the tenor of the neighborhood discussion about a project. The Civic Association Board of Directors does not ratify the letter or take further action. The Zoning Committee’s letter is printed on Civic Association letterhead, which does not list the names of individual members, and is signed by the Chair of the Zoning Committee. The members of the Zoning Committee are not required to interface with the ZBA. As is the case in the site improvement project, because of your familiarity with relevant law and processes, the Zoning Committee places great weight on your input in making decisions.

At present, you have recused yourself from participation in Board votes on matters involving the City and from all Zoning Committee action pending issuance of an advisory opinion from the Board of Ethics.

¹ The relevant process for the handling of zoning applications and the role of RCOs are set forth in City Code Chapter 14-300. Zoning applications that are relevant here include applications for zoning variances, applications for special exceptions, and applications meeting the requirements for Civic Design Review.

III. Questions Presented & Brief Answers

1. Are you permitted to lead your Civic Association's efforts to apply for a grant administered by City Agency X where your activities would include communicating directly with City Agency X on behalf of the Association and negotiating the terms of the grant?

No, this would be prohibited by the City Code representation restriction.

2. Are you permitted to remain on the Board of Directors of the Civic Association if the Civic Association pursues the grant from City Agency X? If so, are you permitted to vote on a motion before the Board of Directors about whether to pursue the grant? Are you permitted to participate as a Board member in the Civic Association's consideration and formulation of the grant application that will be submitted to the City?

Yes, these activities would not be prohibited by the City Code representation restriction.

3. As a member of the Civic Association's Zoning Committee, are you permitted to vote on the Committee's feedback to the City about a zoning application, which is communicated in a letter to the City Zoning Board of Adjustment? Are you permitted to conduct research about zoning applications that come before the Zoning Committee, such as inspecting a site or researching public records concerning the subject property?

Yes, these activities would not be prohibited by the City Code representation restriction.

4. As a Board member of the Civic Association, are you permitted to vote to appeal a decision of the City Zoning Board of Adjustment to the Court of Common Pleas?

Although this would not be prohibited by the City Code representation restriction, rules or policies outside the jurisdiction of the Board of Ethics, such as the policies of the City agency that employs you or the Pennsylvania Rules of Professional Conduct, may apply to your participation in the Civic Association's decision to file a lawsuit against the City.

IV. Discussion

City ethics laws do not prohibit you from volunteering your time to a non-profit organization, including one that has contact with the City. As a City employee, however, you must abide by the ethics laws in connection with your volunteer work for the Civic Association. Also, you must not use City time, materials, equipment, or facilities for the Civic Association's benefit.

A. Representation Restriction

Section 20-602 of the City Code provides that no full-time City 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." Code §20-602(1)(a). Transactions involving the City include proceedings, decisions, and matters

(such as contracts, leases, and applications) that you have reason to believe may be subject to City action, involve the City as a party, or include a direct proprietary interest of the City. Code §20-601(27).²

1. History of the City Code Representation Restriction

The representation restriction was enacted in 1963 as part of the City's Ethics Code. Bill No. 1715-A (enacted June 13, 1963). The Mayor's Ad Hoc Committee on Improvement in Municipal Standards and Practices, a three-member panel appointed in 1961 by then-mayor Richardson Dilworth, recommended the text of the restriction. Final Report of the Mayor's Ad Hoc Committee on Improvement in Municipal Standards and Practices at 13 (March 15, 1962). The Ad Hoc Committee's proposed recommendation for a representation restriction for full-time employees was enacted. *See* Bill No. 1715-A.

The Final Report of the Ad Hoc Committee espoused the familiar proposition that a man cannot serve two masters as a fundamental idea to guide ethical conduct of City employees, including with respect to relationships involving the representation of others. Final Report of the Ad Hoc Committee at 9. The Final Report explained that:

[O]bviously [this idea] carries over into the public service where all personnel are in a broad sense representatives of the interest of the community. It is an ethical principle, which should be given vital application in the municipal services. While the principle is clear enough as a basic general proposition, its formulation for effective and reasonable application is extremely difficult, especially in this day of extraordinary interdependence and complexity in human relations and of a welter of loyalties in the living pattern of a particular individual.

Id.

Testifying before City Council on behalf of the Mayor's Ad Hoc Committee, Committee Chairman and University of Pennsylvania Law School Dean Jefferson

² Code Section 20-601(27) defines "transactions involving the City" as:

Any proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions or other particular matter which the City officer or employee in question believes, or has reason to believe (a) is or will be the subject of City action; or (b) is one to which the City is or will be a party; or (c) is one in which the City has a direct proprietary interest. This shall not include routine applications or requests for routine information or other matters which are of a ministerial nature and do not require the exercise of discretion on the part of any City officer or employee.

Fordham stated that the conduct proscribed by the representation restriction is “objectionable from an ethical standpoint because the public servant is dividing his time and his efforts between the work of the [City] and the service of others who have dealings of some sort with the [City].” *Public Hearing on Bill No. 1715 Held by the Committee on Law and Government*, Philadelphia City Council at 18 (June 27, 1962) (statement of Jefferson Fordham). He added that “in formulating restrictions upon representation by [C]ity personnel, it is important to try to achieve a sensible balance,” noting that restrictions that are too strict may have an adverse impact on recruitment for City service. *Id.* at 19. He also observed that “the very position of the public officer or employee might be thought to be influential without regard to the merits of the matter at hand.” *Id.* at 18-19.

2. The Representation Restriction

The representation restriction of Code Section 20-602 prohibits assistance by a full-time City employee only if the employee is representing another person as that person’s agent or attorney in a matter that comes within the definition of a transaction involving the City. Code §20-602(1)(a). An employee is engaged in representing another person as that person’s agent if the employee acts with authority on behalf of and in the best interests of that person with respect to a third party. *See Basile v. H&R Block*, 563 Pa. 359, 367-68 (2000) (“The agent is subject to a duty of loyalty to act only for the principal’s benefit.”); *Walton v. Johnson*, 66 A.3d 782, 786-88 (Pa. Super. 2013) (explaining that grant of authority from principal to agent is critical to establishing agency relationship); Webster’s New College Dictionary 963 (3d ed. 2008) (defining “represent” as “to function as the official and authorized delegate or agent for” and “to act as a spokesperson for”). Representing someone as an attorney involves an attorney acting on behalf of or as an agent for a client. *See* Restatement (Third) of Agency §1.01 cmt. c (observing that an agency relationship is present between a lawyer and client); Restatement (Third) Of Law Governing Lawyers Ch. 2 Intro. Note (2000) (“A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity.”).

3. Application of Representation Restriction to Facts Presented

Although you have acted as an attorney for the Civic Association in the past, prior to your City employment, you are not the Association’s attorney at this time, and you do not propose to be engaged as the Association’s attorney with respect to any of the behavior on which you have asked us to opine.³ For this reason, we examine below

³ We note that an attorney-client relationship can arise even absent an express contract if (1) the purported client sought advice or assistance from the attorney; (2) the advice sought was within the attorney’s professional competence; (3) the attorney expressly or impliedly agreed to render such assistance; and (4)

whether your proposed activities would constitute representation as an agent of the Civic Association in a transaction involving the City.

a. Negotiating with City Agency X on Behalf of Civic Association

You have asked whether you are permitted to lead the Civic Association's efforts to apply for a grant administered by City Agency X. You would communicate personally with City Agency X on behalf of the Civic Association and negotiate the terms of the grant. Negotiation would involve working out the details of a long-term commitment to maintain the site improvement and would be an important undertaking on behalf of the Civic Association. As the main point of contact for interfacing with the City on the grant application, you would communicate directly with a representative of City Agency X concerning the Association's proposal. You would also communicate information from the City back to the Civic Association.

The Civic Association's application for a grant from City Agency X is a "transaction involving the City" because it is an application that will be the subject of City action in the form of a decision by City Agency X. *See* Code §20-601(27). The role and activities you propose taking on for the Civic Association would involve communicating with City Agency X as a spokesperson for the Civic Association and negotiating grant terms with City Agency X on behalf of the Civic Association with the goal of advancing the Civic Association's interests. In carrying out these activities, you would be acting on behalf of and in the best interests of the Civic Association and thus would be representing the Association as its agent in the grant application transaction involving the City. Consequently, the representation restriction of Code Section 20-602 prohibits you from engaging in this proposed conduct.

b. Participating as a Board Member by Voting and Helping Formulate Grant Proposal

With respect to the grant application transaction involving the City, you have also asked several questions related to your involvement with respect to the internal workings of the Civic Association, in contrast to external activity engaging City Agency X. Specifically, you have asked (1) whether you are permitted to remain on the Board of Directors of the Civic Association if the Civic Association pursues the grant from City Agency X; (2) whether you are permitted to vote on a Board motion about whether to

it is reasonable for the putative client to believe the attorney was representing him. *E.g. Minnich v. Yost*, 817 A.2d 538, 542 (Pa. Super. 2003). Code Section 20-602 applies to representation as either an agent or attorney, and the specific capacity in which you may represent the Civic Association would not change our analysis for the purposes of this Opinion. Acting in the capacity of an attorney may, however, implicate other provisions with which you must comply, such as the Pennsylvania Rules of Professional Conduct or the policies of the City agency where you work.

pursue the grant; (3) and whether you are permitted to participate as a Board member in the Civic Association's consideration and formulation of the grant application that will be submitted to the City. You are permitted to remain on the Board and to engage in these various activities of the Civic Association because in these activities you would not be representing the Civic Association as its agent or attorney. You would be engaging in internal activities of the Civic Association, participating and expressing your personal views as a Board member by voting, and would not be representing the Civic Association's views or acting on behalf of its interests with respect to a third party.

c. Participating as Zoning Committee Member

You have asked questions related to your activity as a member of the Civic Association's Zoning Committee. You have inquired (1) whether you are permitted to vote on the Committee's feedback to the City about a zoning application, which is communicated in a letter to the ZBA that does not include your name; and (2) whether you are permitted to conduct research about zoning applications that come before the Zoning Committee, such as inspecting a site or researching public records concerning the subject property.

A zoning application is a "transaction involving the City" because it is an application that will be the subject of City action in the form of a decision by the ZBA. *See* Code §20-601(27). Although the zoning application is initiated by the zoning applicant, pursuant to the City Zoning Code, the Zoning Committee has an opportunity to provide input for the ZBA's decision. You are permitted to engage in the proposed activities of the Civic Association's Zoning Committee because they would not involve you representing the Civic Association as its agent or attorney. You would be participating in internal activities of the Civic Association, not representing the Civic Association as an agent or attorney with respect to a third party. Your vote is an expression of your personal views as a Board member. Similarly, your research concerning zoning applications would not be representation of the Civic Association.

d. Voting to Appeal a Decision of a City Agency

You have inquired whether you are permitted as a Board member of the Civic Association to vote to appeal a decision of the ZBA to the Court of Common Pleas. An appeal of a City board's final decision is a "transaction involving the City" because it is a proceeding in which the City, through the ZBA, will be a party. *See* Code §20-601(27). The representation restriction would not prohibit your proposed conduct because it does not involve you representing the Civic Association as its agent or attorney, as your vote would be an expression of your personal views as a Board member.

Although this activity would be permissible under the representation restriction, caution is warranted because you are an attorney employed by the City and the City is

your client. You should consult with your supervisor and determine whether your Department head or your City agency has a policy that would prohibit your participation in a decision to initiate litigation against the City or otherwise limit your activities as a member of the Civic Association Zoning Committee. In addition, as an attorney, your professional conduct is governed by the Pennsylvania Rules of Professional Conduct. Providing advice on the Rules is beyond our jurisdiction. If you are a member, you may contact the Legal Ethics & Professional Responsibility Committee of the Pennsylvania Bar Association, 1-800-932-0311, ext. 2214, or the Professional Guidance Committee of the Philadelphia Bar Association, (215) 238-6328, for guidance about the Rules.

B. Interest in a City Contract

Charter Section 10-102 prohibits you from benefitting from or having an interest in certain City contracts that are paid out of the City Treasury, even if you take no action on the contract in your official capacity. Charter §10-102. In this case, a possible grant may involve an agreement between the Civic Association, which is a non-profit organization, and City Agency X. Here, the Civic Association would be the party to the contract, and because you are not compensated for your volunteer work with the Civic Association, you will not benefit from or be financially interested in the contract. As a result, your Civic Association activities do not present an issue under Charter Section 10-102.

C. Confidential Information

The City Code prohibits you from disclosing confidential information concerning the property, government, or affairs of the City without proper legal authorization for the purposes of advancing your own financial interests or those of others. Code §20-609. For example, you may not disclose confidential information you learn as an attorney with your City agency to the Civic Association for purposes of furthering its financial interests. Your proposed Civic Association activities do not appear to present an issue under this restriction, but you should be aware of it because in your City position you may be privy to confidential City information.

D. State Ethics Act

The State Ethics Act, 65 Pa. C.S. §1101 *et seq.*, contains a conflict of interest prohibition and financial disclosure requirements that are separate from and in addition to those imposed by City ethics laws. 65 Pa. C.S. §§ 1103(a), 1104, 1105. The State Ethics Act restriction applies only to public employees, and the Act defines “public employee” in terms of job responsibilities.⁴ The Board’s authority to provide advisory opinions on

⁴ Under the State Ethics Act, an objective analysis is applied to determine if an individual qualifies as a public employee, which is defined as:

State law is limited. Board Regulation 4, ¶4.4. For this reason, we merely outline below the provisions of the State Ethics Act that may be relevant to your inquiry. You can seek advice concerning the application of the State Ethics Act to your situation from the State Ethics Commission or the City Law Department, either of which can provide binding guidance that provides protection from penalties or sanctions imposed for a violation of the Act. 65 Pa.C.S. §§1107(10)-(11), 1109(g).

A public employee has a prohibited conflict of interest under Section 1103(a) of the State Ethics Act if he or she uses the authority of his or her office or confidential information received through holding public employment for the private pecuniary interest of himself or herself, a family member, or a business with which the employee or a member of the employee's immediate family is associated. 65 Pa. C.S. §§1102, 1103(a). The term "business" as used in the State Ethics Act includes non-profit entities. *Rendell v. State Ethics Commission*, 603 Pa. 292, 306 (2009); State Ethics Commission Advice of Counsel 12-513 at 3 ("A non-profit entity is a 'business' as that term is defined by the Ethics Act."). Section 1103(a) of the State Ethics Act also prohibits the use of government time, equipment, facilities, or property for non-governmental purposes, including business or personal purposes. State Ethics Commission Opinion 05-001 at 3-4.

The State Ethics Act also requires a public employee to file an annual statement of financial interests for the preceding year, which includes disclosure of any office, directorship, or employment of any nature whatsoever in any business entity. 65 Pa.C.S. §§ 1104(a), 1105(b)(8).

V. Conclusion

Thank you for your concern about compliance with the City's ethics restrictions and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. If you have questions about scenarios that vary from these facts, you should ask for specific advice on the application of the law to those particular facts. Requestors of advisory opinions are entitled to act in reasonable

Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard 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. The State Ethics Act regulations provide that staff attorneys engaged in representing a department, agency or other governmental bodies are generally considered public employees. 51 Pa. Code §11.1; *see also P.J.S. v. Pa. State Ethics Commission*, 555 Pa. 149, 156 (1999) (attorney employed by governmental body who was responsible for taking or recommending action of nonministerial nature was public employee subject to State Ethics Act).

reliance on opinions issued to them and not be subject to penalties under the laws within the Board's jurisdiction, unless they have omitted or misstated material facts in their requests. Code §20-606(1)(d)(ii); Board Regulation 4, ¶4.12.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, this version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. Please let Board Staff know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS⁵

Michael H. Reed, Esq., Chair
Judge Phyllis W. Beck, (Ret.), Vice-Chair
Brian J. McCormick, Jr., Esq., Member
Father C. Kevin Gillespie, Member

⁵ Board Member Sanjuanita González, Esq., did not participate in the approval of this Opinion.