



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Formal Opinion No. 2012-001

September 19, 2012

Re: Outside Employment / City Official

A City official (“the official” or “the requestor”) also with a private position as an independent contractor of a professional firm has requested nonpublic advice as to how the Public Integrity Laws might restrict him in relation to his outside employment with the professional firm (“the firm”) and his public position. The official also requested advice on certain specific questions.

The official advised that, as an independent contractor for the firm, he is paid an annual salary and is eligible for a discretionary bonus, but that no portion of his bonus may be as a result of business either from or adverse to the City.

The Public Integrity Laws, in general, permit City officers or employees to maintain employment and other financial interests outside the City government, provided that outside work is not performed on the City's time or using City materials or equipment, and outside income is disclosed as required on any annual financial disclosure statement filed by that officer or employee. Also, those officers and employees who do maintain outside employment and other financial interests must avoid conflicts of interest and must comply with certain other restrictions. In that regard, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is

prohibited for a City officer or employee. The official made certain arguments based on authorities which he provided us, but those authorities did not include a specific analysis of the ethics restrictions in the Philadelphia Code or Charter or rely upon the most current and applicable opinions of this Board, the Solicitor, and the State Ethics Commission. This advisory will discuss the ethics restrictions of the Philadelphia Code and Charter as well as provide information on applicable State Ethics Commission opinions.

Home Rule Charter

Sections 10-100 and 10-102 of the Charter restrict City officials and employees from having interests in City contracts. Section 10-100 applies to Councilmembers and Section 10-102 applies to other City officials and employees. The provisions are virtually identical. Relevant to outside employment, Section 10-102 provides:

As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

Thus, the official may not solicit such a contract with the City for the firm. Additionally, if the firm has, or were to obtain, such a contract with the City, no part of the official's compensation as an independent contractor of the firm may be derived from revenue that the firm receives from the City under that contract. This Board has not previously analyzed Section 10-100 but has interpreted Section 10-102. *See, e.g.*, Board of Ethics Advice of Counsel Nos. GC-2011-503 at page 3 and GC-2010-517 at page 3. For a prior application of Section 10-100, *see* Opinion No. 86-31, *1986-1987 City Solicitor's Opinions* at 108.

Philadelphia Code--Representation

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer or employee from engaging in outside employment (even if unpaid) that involved representing another person, directly or indirectly, as that person's agent or attorney in any transaction

involving the City.¹ The term “represent,” in the context of Code Section 20-602, is narrow, since the provision is qualified by the phrase, “as agent or attorney.”² Accordingly, the official was advised that, so long as he is employed by the City, he may not personally represent the firm as agent or attorney in any City transaction and he may not personally represent any client of the firm as their agent or attorney in any City transaction, whether or not his particular City office is acting in the matter. *See* Board Nonpublic Formal Opinion No. 2010-002 at page 2. Note that the provision does not apply to any assistance provided in the course of or incident to the official’s official duties, as for example constituent service.

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to the entire outside entity of which the City officer is a member, so that anyone in that entity would be prohibited from representation as agent or attorney, but only in a matter in which the requestor, as a City officer, has “the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters.” Unlike Section 20-602(1), Section 20-602(5) allows for the prohibition to be avoided if the City official makes public disclosure and disqualification in

¹ The full provision is as follows:

(1)(a) 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. This Section shall not apply to any assistance rendered by any member of Council or other City officer or employee in the course of or incident to his official duties, or to any person who holds any City office or position who is not compensated for his service by the City. Subject to Section 20-602(4).

The term “transaction involving the City” is defined in Code Section 20-601(4) as follows:

(4) Transactions Involving the City. 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 member of City Council, 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 member of City Council, City officer or employee.

² The provisions of the ethics laws that relate to outside employment would apply no differently to officials/employees who may be a member of the bar, or may be acting as an attorney in any outside employment. The Pennsylvania Supreme Court has made it clear that state or local governments may apply their ethics rules to current government employees who happen to be attorneys, during their government employment. *P.J.S. v. State Ethics Commission*, 555 Pa. 149, 723 A.2d 174 (1999).

the manner provided in Section 20-608. However Section 20-602(5) applies only to an entity of which the City official "is a member." The Board advised the requestor that, as an independent contractor of the firm, he would not be a "member" of the firm. *See* Nonpublic Advice of Counsel GC-2010-505 at 5 (part-time employee is a "member" but free-lancer is not); Advice of Counsel GC-2008-502 at 3 n.1 (distinguishing "employee" from "independent contractor").

Therefore, if an employee of the firm other than the official represents a client in "any matter in which [the official] has the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters," Section 20-602(5) would not apply and the official would not be required to make public disclosure and disqualification under Section 20-608.

The requestor specifically asked about lobbying. Lobbying is representation of a client as agent. Therefore, the official may not personally lobby any office of the City on behalf of a principal. However, any other representative of the firm may lobby the City, without further process being required. Section 20-602(5) would not apply and would not require the official to disqualify himself or make any disclosures under Section 20-608.

The requestor also asked about the firm representing the City or a City-related entity in a matter pending before his City agency, giving an example of a representative appearing on behalf of a City-related agency. The requestor was advised that if an employee from his firm were to represent either a City or quasi-City agency in a City matter, as noted in the above paragraph, Section 20-602(5) would not apply and would not require the official to disqualify himself or make any disclosures under Section 20-608.

In the official's final specific question that relates to Code Section 20-602 he asked whether Code Section 20-602 is implicated in certain matters where the firm may provide professional services related to a City decision pending before the requestor's City office. As with the above two paragraphs, because the official is an independent contractor, not an employee, of the firm, he is not a "member" of the firm and Section 20-602(5) would not apply and would not require the official to disqualify himself or make any disclosures under Section 20-608.

Moreover, it is our understanding that in such matters the firm is chosen after the particular City decision is made by the requestor's office. In that case, Code Section 20-602 would not require him to disclose and disqualify from the matter, because, at the time of the decision, the firm would not be affected in a matter in which the requestor would have "the

responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters.”³

Philadelphia Code--Conflict of Interest

The Philadelphia Ethics Code prohibits a City officer from taking official action when either a) he or she has a personal financial interest in that action or b) a business or other entity of which he or she is a member has a financial interest in that action. A person or entity has a financial interest in matters that have a potential impact on the person or entity's income,⁴ compensation, value of assets, wealth, employment prospects, or business prospects. *See* Board Opinion 2010-002; Board Opinion 2009-003; Board Opinion 2007-001; Advice of Counsel GC-2009-507. A financial interest may also arise from an ongoing, present financial relationship. *See* Board Opinion 2009-003 at 3-4. However, in some cases, a financial interest may be too remote to give rise to a conflict of interest under Code § 20-607. *See* Board Opinion 2009-003.

1. Conflict through a personal interest—Code Section 20-607(a)

As to the personal interest, Code Section 20-607(a) provides:

(a) 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 . . .

This provision does not prohibit the requestor from having an outside source of income; it only prohibits him from taking official action in his City position that could affect that income. Accordingly, should such an action present itself, the official would be required to publicly disclose his interest and disqualify himself from such official action, as provided in Code Section 20-608. *See* the section of this Opinion entitled “Philadelphia Code—

³ Nor would the official have to disclose and disqualify pursuant to Code Section 20-607 (which is discussed below), because the firm would not have a financial interest at the time of the decision.

⁴ The term "income" is defined at Code Section 20-601(10) as: "Any money or thing or value received, or to be received as a claim on future services, whether in the form of a fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital gain or any other form of recompense or any combination thereof."

Disclosure and Disqualification” below. Participation that the official should avoid would include not only final decisions, but also any preliminary discussion, review, or action.

The requestor advised that his compensation from the firm is an annual salary and although he is eligible for a discretionary bonus, no portion of his bonus may be as a result of business either from or adverse to the City. Nevertheless, the requestor was advised that he would have a personal financial interest in a matter that financially affected a client of his. Thus, if the requestor is in a position to take action in his official capacity in a matter that affects a client of his, then he would have a conflict of interest under Code Section 20-607(a). Likewise, he would have a conflict of interest under Code Section 20-607(a) in a matter that could affect his compensation or the firm's ability to employ him.

2. Conflict through another entity—Code Section 20-607(b)

As to the interest through another 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, Life Partner, 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.

However, Section 20-607(b) applies only to an entity of which the City official “is a member,” and, as noted above, we do not interpret “member” to include independent contractors. Thus, Section 20-607(b) provides no restrictions under the facts provided by the requestor.

Philadelphia Code—Disclosure and Disqualification

Code Section 20-608 provides the mandated procedure for public disclosure and disqualification when required under either Code Section 20-602 or 20-607. Section 20-608

has different subsections providing for different procedure, depending on the position of the City official/employee and whether the matter involved is legislative or not.

For example, for a financial interest or representation in any “award, contract, lease, case, claim, decree or judgment, other than legislation, Code Section 20-608(1)(c) requires that the City officer/employee affected make public the nature and extent of the financial interest or representation and declare that he is disqualifying himself in the matter by sending a certified letter to three recipients:

- (a) the Commissioner, Secretary and/or Executive Director of the pertinent agency, authority, board or commission; and
- (b) the Board of Ethics; and
- (c) the Department of Records, which will maintain the notice as a public record.

State Ethics Act

The State Ethics Act imposes restrictions on public officials regarding conflicts of interest that are in addition to, and in some case different from, those imposed on the requesting official by City law.⁵ See 65 Pa.C.S. §1101, *et seq.* Most notably, given the contrast to the City conflict of interest rule, the State Ethics Commission has said that an official can have a conflict of interest if he or she takes official action on a matter involving a client, based upon an ongoing business relationship, a reasonable and legitimate expectation that a business relationship will form, or situations involving “reciprocity of power.” See State Ethics Commission Opinion No. 92-010 (Kannebecker). This ruling has been applied to an attorney who was “of counsel” to a firm, Advice of Counsel No. 09-546 (Lamb) at 6, and to a client of an independent contractor, Advice of Counsel No. 12-526 (Say) at 5; Advice of Counsel No. 10-561 (Haley) at 9.

For specific guidance on the State Ethics Act, the official was advised that he should seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide 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 disclosed truthfully all the material facts and acted 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 were to seek and rely on non-

⁵ Philadelphia Home Rule Charter Section 4-1100 gives the Board “concurrent authority” with the Law Department to advise City officials on matters of State law. However, our advice is limited as it does not provide protection from possible enforcement by the State Ethics Commission.

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

Other Authority

This Opinion addresses only the Public Integrity Laws under our jurisdiction. The Board expresses no opinion on any application of rules not within our jurisdiction.

Conclusion

A City official asked for advice concerning the application of the Public Integrity Laws as to his outside employment position as an independent contractor of a professional firm and his public position. Based on the facts provided, the requestor was advised as to the following. Charter Section 10-100/102 and Philadelphia Code Section 20-602(1)(a) are absolute restrictions on his activity. Code Section 20-607(a), may require, in certain circumstances, that the official publicly disclose an interest and disqualify himself from City official action, in accordance with Section 20-608. Code Sections 20-602(5) and 20-607(b) do not restrict the official since, as an independent contractor, he is not a “member” of the outside firm.

In keeping with the concept that an ethics advisory opinion 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 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 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, 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.

Since the requestor requested 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).

By the Board:

Richard Glazer, Esq., Chair
Michael H. Reed, Esq., Vice-Chair
Judge Phyllis W. Beck (Ret.), Member
Sanjuanita González, Esq., Member

[William H. Brown III, Esq. resigned from the Board effective July 30, 2012. Mr. Brown participated in the consideration of this Opinion, but was not present for the vote on final approval, and did not participate in the vote to adopt this public version.]