



CITY OF PHILADELPHIA

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**Philadelphia Board of Ethics
Nonpublic Formal Opinion No. 2009-001**

May 13, 2009

Re: Proposed “Loan” of Former Employee’s Services

A head of a City office requested nonpublic advice on whether the ethics laws impose any prohibition on a proposed arrangement by which the office would keep the services of an employee (the “Employee”) after the Employee’s separation from the City, by arranging for a private business to employ the individual and then “lend” his or her services to the City for free.

The advice of the Board of Ethics was sought on two questions:

1. If the Employee is hired by a private employer (or a non-City governmental agency) after separation, would any provision of law prohibit the City office from accepting the offer of that employer to “lend” the services of the Employee to the City office, without that office or the City paying for such services?
2. Would any provision of law prohibit the requestor personally from contacting a private employer (or a non-City governmental agency) and asking if they would be willing to hire the Employee and “lend” him or her back to the requestor’s City office? We were asked to assume that the private employer does business in the Philadelphia region and may be affected by official action of the requestor’s City office. We were also asked whether the requestor’s recusal from City matters affecting the employer would cure any problem with such a contact with the employer by the requestor?

Although the request asked us to consider the proposed arrangement with respect to “any provision of law,” we may only address the ethics laws. Below we examine the request with respect to provisions of the Pennsylvania Public Official and Employee Ethics Act (“State Ethics Act”), the Philadelphia Code and the Philadelphia Home Rule Charter.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. 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 Board that interpret statutes are guidance to how this Board 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 the requestor may be concerned about, the requestor was encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

Philadelphia Code—Section 20-604: Gifts, Loans, and Favors

Implicit in the request is a question as to whether any such “loan” as described would be a prohibited gift under the ethics laws. Section 20-604 of the Code provides:

§ 20-604. Gifts, Loans and Favors to City Personnel.

(1) No member of Council or other City officer or employee, shall solicit, accept or receive any gift, loan, gratuity, favor or service of substantial economic value that might reasonably be expected to influence one in his position in the discharge of his official duties, from any person, firm, corporation or other business or professional organization.

(2) No person, firm, corporation or other business or professional organization shall offer, make or render any gift, loan, gratuity, favor or service of substantial economic value to any member of Council or other City officer or employee which might reasonably be expected to influence such officer or employee in the discharge of his official duties.

Code § 20-604. This provision includes several elements. First, we must determine whether any gift is “of substantial economic value.” Based on the City salary of the Employee, we concluded that such a loan, even for one or two weeks of services, would be a gift of “substantial economic value. Second, we must determine whether the relationship between the donor and the recipient officer or employee, considering the recipient’s official duties, is such that the gift might reasonably be expected to influence the recipient in the discharge of his or her official duties. In other words, we look at whether the official is in a position to take action that could affect the gift giver.¹ We were asked to assume that any private employer who would hire the Employee and lend him or her to the City office does business in the Philadelphia region and may be affected by matters that come before that office. Assuming that the requestor is the recipient of this “gift,” the requestor as head of his/her City office clearly has influence over matters that come before that office.

Finally, we must, in some cases, determine whether the offered or solicited benefit, favor, or service is a “gift” at all to the City officer at issue. This raises the question of whether the free “loan” of the Employee, as described, could be considered to be a gift to the requestor personally. Since the Employee could theoretically (putting aside any ethics questions) be hired by the requestor’s City office as a rehired employee or as an independent contractor for compensation, any assumption of the Employee’s compensation by another is a benefit. However, clearly, no compensation to a City employee or contractor would be paid by the requestor personally, so the requestor would not personally benefit financially to the extent that the Employee would be working for the requestor’s City office for free. *See, e.g.,* Opinion No. 93-31, *1992-1993 City Solicitor’s Opinions* at 343 (no prohibited gift to the official under Code §20-604 or State Ethics Act §1103(b) where no financial benefit to the official). In addition, previous rulings by the Law Department and the previous advisory Board of Ethics have recognized a “gift to the City” exception to Code Section 20-604, wherein the gift defrays what would otherwise be a legitimate cost of doing City business. *See, e.g.,* Opinion No. 91-15, *1991 City Solicitor’s Opinions* at 52 (citing advisory Board of Ethics Opinion Nos. 82-10 and 82-07); Opinion No. 93-8, *1992-1993 City Solicitor’s Opinions* at 276. The Board concludes that the proposed “loan” of the Employee’s services to the requestor’s City office would not be a gift to the requestor personally, and thus would not be prohibited by Code Section 20-604.

Nevertheless, there remains an issue of an “appearance of impropriety.” As noted above, issue no. 2 posed by the requestor proposes the requestor contact a

¹ The determination on this point is an objective one. The Board of Ethics does not evaluate the actual integrity of a particular officer. Rather, the consideration is whether an officer in that City position has the capacity to take official action that would affect such a donor.

private employer (or a non-City governmental agency) and ask if they would be willing to hire the Employee and “lend” him or her back to the requestor’s City office, and we are to assume that the private employer does business in the Philadelphia region and may be affected by matters that come before the requestor’s City office. Essentially, we were asked if it would be appropriate for a head of a City office to solicit a private employer to hire a former City employee and lend him or her back to that City office. This unique proposal raises an appearance issue that concerns this Board. Situations in which there is no conflict of interest or prohibited gift under the letter of the law can nevertheless create appearances of impropriety. Although the ethics laws do not prohibit appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, such appearances can undermine public confidence in government. There is no formal definition of “appearance of impropriety” in the laws under which this Board has jurisdiction, but generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon or by a public official or that a public official’s personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest.

For a head of a City office to solicit a donation of free professional services of significant value from a firm that may be the subject of official action by that official’s City office, particularly where the purpose seems to be to avoid application of an ethics provision (State Ethics Act §1103(g)), may well present a situation that, if known, would tend to undermine public confidence in government. A clearly possible public perception could be that the firm would feel coerced by an implicit threat of adverse City action, or implicit promise of positive City action, in such a case. *See* Opinion No. 86-27, *1986 City Solicitor’s Opinions* at 102 (“The concern would be that an appearance of undue pressure or influence would be created by soliciting and accepting funds from entities which are affected by decisions of the [official], or by decisions made by City government in general.”). The public perception might be that it may be tempting to any official to be grateful to any firm that acceded to such a request for free services. Even placing an official in the position to face this kind of temptation is what the ethics laws seek to avoid, and so the spirit of the law is implicated.

Philadelphia Home Rule Charter—Section 10-105: Gratuities

The Home Rule Charter prohibits City officers from soliciting or accepting gratuities for acts or omissions in their official work. Specifically, Section 10-105 of the Charter provides:

Gratuities. No officer or employee of the City and no officer or employee whose salary or other compensation is paid out of the City Treasury shall solicit or accept any compensation or gratuity in the form of money or otherwise for any act or omission in the course of his public work. Provided, however, that the head of any department, board or commission of the City or other agency receiving appropriations from the City Treasury may permit an employee to receive a reward publicly offered and paid, for the accomplishment of a particular task.

Charter § 10-105. The facts presented in this request do not appear to trigger this provision because they do not provide that the requestor's solicitation or acceptance of the loan of the Employee's services would be linked to any act or omission in the course of the work of the requesting official or the official's office.

Philadelphia Code– Section 20-608: Disclosure and Disqualification

The questions posed by the requestor included whether any problem raised by that official contacting a private entity with this proposal would be cured by the official's recusal from matters before the official's office affecting that entity. Recusal would not be helpful in addressing any of the issues in this Opinion. The City Code provides that a public disclosure and disqualification process, which is described in Code Section 20-608, is a remedy only in two situations. City Code § 20-608; *see also* 65 Pa.C.S. 1103(j). Disclosure and disqualification should be followed where a City official has a conflict of interest as defined in Code Section 20-607 or is faced with a prohibited representation by a member of a for profit entity of which the official is also a member as defined in Code Section 20-602(5). Code §§ 20-602(5), 20-607, 20-608. A conflict of interest would not exist under the facts presented because they do not involve a situation in which the requestor would have a personal financial interest or a financial interest through a family member or a for profit entity.² Similarly, the supplied facts do not constitute a prohibited representation. For these reasons, disclosure and disqualification would not be helpful in reducing any of the concerns stated in this Opinion.

² For example, if the Employee were to be loaned to the City office through the proposed arrangement, the Employee would have a conflict of interest with respect to matters involving the entity that is paying his or her salary and would need to follow Code Section 20-608's disclosure and disqualification process for those matters.

State Ethics Act

Although we can provide guidance on the State Ethics Act, our opinions do not provide protection from possible enforcement action by the State Ethics Commission. Philadelphia Home Rule Charter Section 4-1100 gives the Board of Ethics “concurrent authority” with the Law Department to advise City officials on matters of State law: “[T]he Board shall render advisory opinions; provided that, with respect to opinions regarding State law, the Law Department, at the option of an employee requesting advice, shall have concurrent authority to render advisory opinions.” Charter § 4-1100.

To those who rely in good faith on the State Ethics Commission’s advice, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107(10), (11). Upon request, such advice from the State Ethics Commission can be redacted to protect the identity of those involved. *Id.* The State Act also provides certain protection from penalties for those who rely on a nonconfidential Solicitor’s opinion. The Act states:

Reliance on solicitor’s opinion.--A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision or upon an opinion of the solicitor of the political subdivision, publicly stated at an open meeting of the political subdivision and recorded in the official minutes of the meeting, shall not be subject to the penalties provided for in subsections (a) and (b) nor for the treble damages provided for in subsection (c). However, this subsection shall not apply in situations where the solicitor’s opinion has been rendered under duress or where the parties seeking and rendering the solicitor’s opinion have colluded to purposefully commit a violation of this chapter.

65 Pa.C.S.A. § 1109(g). This protection is not provided by Board of Ethics opinions because none of our advisories can be an “opinion of the solicitor of the political subdivision.” The Act defines “Solicitor” as a “person elected or appointed to the office of solicitor for the political subdivision.” *Id.* § 1102. Thus, our advice on the State Act is guidance only, and the Commission is the definitive authority on the Act. Accordingly, it is the policy of this Board to advise on the State Ethics Act by endeavoring to predict the interpretation of the State Ethics Commission and limiting our advice to matters where prior rulings of the Commission or the text of the Act

provide reliable guidance and high confidence in any such prediction. For these reasons, with regard to certain provisions of the State Act implicated by this request and discussed in greater detail below, the Board advised the requestor to seek advice directly from the State Ethics Commission. *See* Board of Ethics Regulation No. 4, at Paragraph 4.1(f).

State Ethics Act – Section 1103(e): Contingent Payments

The proposed “lending” arrangement is likely problematic under Section 1103(e)(1) of the State Ethics Act, which states:

(e) CONTINGENT AND SEVERANCE PAYMENTS.—

(1) No person shall solicit or accept a severance payment or anything of monetary value contingent upon the assumption or acceptance of public office or employment.

65 Pa.C.S. §1103(e)(1). The State Ethics Commission has relied upon this provision in disapproving some proposed executive-on-loan arrangements, finding they have the prohibited element of acceptance of money contingent upon the assumption of public duties. Although the State Ethics Commission has also upheld some such loan programs, we believe the arrangement proposed by the requestor is more factually similar to the programs the Commission found would violate Section 1103(e).

In Opinion No. 90-014, the Commission considered whether a mayor could appoint an individual to a position where the individual’s existing corporate employer would continue to pay his salary. The Commission explained as follows that the loan of the individual was prohibited:

Under the circumstances, we must assume that there have been discussions or negotiations between this individual, the Mayor and possibly the corporation as to the source of payment of the salary. Therefore, because of the pre-existing negotiations or discussion prior to the acceptance of assumption of the public employment, we believe that the requisite ‘contingent’ element exists which would prohibit such an arrangement.

State Opinion No. 90-014 at 5. The facts presented, in which the requestor and the private employer arrange for the loan of the Employee, appear to raise the contingent

element issues that the Commission found problematic in the single-individual loan of Opinion No. 90-014. Indeed, the facts presented by the requestor's questions may be more problematic in that the Employee would be hired by the private employer in order to be loaned to the requestor's City office, whereas in Opinion 90-014 the individual was to be loaned by an existing employer.

In Opinion No. 91-005, the Commission considered a proposed loan of two or three attorneys from a law firm to a city solicitor's office where the law firm would continue to pay the same full salary and benefits to the associates during the six months they were to work for the solicitor. The Commission found Opinion No. 90-014 dispositive, the contingent element present, and the proposed loan prohibited by Section 1103(e). The Commission later reconsidered this ruling in Opinion No. 91-005-R. The reconsideration reversed the prior ruling based upon additional facts that had not previously been supplied, namely that the attorneys were not told that they should accept employment with the city, but instead were given a series of options of places to work that were acceptable to the law firm. The Commission wrote:

Under the additional facts which have been submitted, we feel that such activity as to these two associates would not be barred by Section 3(e) of the Ethics Law. It has been stated that the associates were not told either explicitly or implicitly that they should accept employment with the City A. In addition, the associates were informed by the law firm of B that their salaries would continue with benefits through October 31, 1991 by working for either the city solicitor's office, entity I or other public or private entities acceptable to the firm. In such circumstances, we believe that the operative element of Section 3(e), namely, that the acceptance of public employment be "contingent" upon the receipt of anything of value is lacking under these circumstances. It is clear that the associates were given a series of options: working in the city solicitor's office, the district attorney's office, which is a separate elected office, or any other public or private entity acceptable to the law firm. In actuality, one associate did split up her time between the district attorney's office and entity H while the other attorney worked in the city solicitor's office until Confidential Opinion 91-005 was issued which caused him to work for entity I.

Based upon the unique factual situation in this case, and in particular the latitude allowed by the law firm as to the associate lawyers to choose among various options for employment either in the public and private sector and either in or out of state, we must conclude that the

“contingent” element of Section 3(e) of the Ethics Act is not present in the instant matter.

State Opinion No. 91-005-R at 6. It appears the scenario presented by the requestor’s questions is more similar to the situation in Opinion 91-005 in which the contingent element was present than to the program approved in Opinion 91-005-R because the Employee would not have a choice among various possible entities to which he/she would be loaned by his/her new employer.

In Opinion No. 92-001, issued to Philadelphia’s then Mayor-Elect Edward Rendell and City Solicitor Charisse Lillie, the Commission found no violation of Section 1103(e) by a proposed executive-on-loan program that would involve short-term volunteering by individuals who would maintain their already existing employment relationships with their employers and would not be compensated by the City. The Commission highlighted the relevant facts as follows:

[W]e note that volunteerism is the operational aspect of this particular program. Since it is expressly stated and assumed that all business executives are not directed by their private employers to leave industry and join the City but rather are given a real choice whether to serve and spend time in City government as consultants, we must therefore conclude that the “contingent” element of Section 3(e) is not present in this case.

State Opinion No. 92-001 at 5. Again, the situation presented by the requestor appears to lack the “real choice” that the Commission finds critical in finding a lack of the contingent element prohibited by Section 1103(e). *See* State Opinion No. 92-003 (finding no violation of Section 1103(e) where a corporate executive would accept a deputy mayor position as a volunteer and his salary would continue to be paid by his current corporate employer where doing so would be on a purely voluntary basis without any requirement he take the government position and where he could elect to remain in his current job).

We note that the State Ethics Commission’s rulings we have described are heavily fact-based, and none of the rulings we have identified has facts that are just like the facts presented in this request. Although some of these rulings approve executive-on-loan programs, those programs involve an already existing employee of the lending firm who is given a real option of continuing with the firm or of being “lent” to the government agency. In contrast, this request involves an employee who would be taking employment with the employer, apparently at the request of the

requesting City official, for the sole purpose of being lent to the official's office during the period of the one-year post-employment restriction imposed by State Act Section 1103(g) (see discussion below). If the requestor wishes to pursue this matter, therefore, the Board recommended that before proceeding, the official request a definitive opinion from the State Ethics Commission.

State Ethics Act—Section 1103(g): One-Year Post-Employment Restriction

The State Ethics Act has a one-year post-employment restriction in Section 1103(g) that provides:

(g) FORMER OFFICIAL OR EMPLOYEE.—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). The State Act defines the term “represent” as “act[ing] on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.” *Id.* § 1102. As the requestor correctly assumed, Section 1103(g) would prohibit the Employee from personally executing a contract with his/her former City office to work as an independent contractor-consultant within one year of his/her separation date. *See* State Advice of Counsel No. 09-501 at 3 (“Generally, a former ‘public official’ or former ‘public employee’ may not contract with his former governmental body during the first year following termination of public service, because such contracting would constitute prohibited representation before the former governmental body in contravention of Section 1103(g) of the Ethics Act.”).

However, we were asked whether the Employee may be hired by a private employer and “loaned” to the Employee’s former City office, providing that City office services at no cost to the office. It is difficult to predict how the State Ethics Commission would rule if presented with these facts because they are unique. The Commission routinely advises that:

The term “representation” is also broadly defined to prohibit acting on behalf of any person in any activity. Examples of prohibited representation include: personal appearances before the former governmental body or bodies; (2) attempts to influence; (3) submission

of bid or contract proposals which are signed by or contain the name of the former public official/employee; (4) participating in any matters before the former governmental body as to acting on behalf of a person' and (5) lobbying.

State Ethics Advice of Counsel 09-501 at 3 (citing Opinion 89-005) (emphasis in original). Advisories of the Commission on Section 1103(g) generally state that the provision prohibits, among other things, listing one's name as the person who will provide technical assistance on a proposal, document, or bid or being identified on documents submitted to the former governmental body. In addition, the Commission has often stated that the former public official/public employee may also counsel any person regarding that person's appearance before his former governmental body, however, the activity in this respect should not be revealed to the former governmental body.

Notably, in State Advice of Counsel No. 09-503, the Commission's General Counsel specifically ruled that Section 1103(g) would prohibit a former employee from returning as an employee of a consulting firm and working under the direction of the employee's former office as a consultant and having his name appear on invoices from the consultant-employer. Although invoices would presumably not be an issue in the scenario presented here, it does not appear invoices alone were the problem in the Advice 09-503 situation. *See also* State Advice of Counsel 07-530 at 3 (advising that Section 1103(g) would prohibit the requestor from working with former bureau in a contractor position in first year following retirement because, among other things, that would involve personal appearances before the former governmental body). Under the State Ethics Act, the Employee's former City office could retain the subject Employee's services by rehiring him/her. For example, in Opinion No. 00-004 the State Ethics Commission wrote:

[W]e note that within the strictures of Section 1103(g), the only way that you could perform services involving such direct contact with PennDOT [the requestor's former governmental body] during the first year following your retirement would be as an employee. To perform such services as an independent contractor would transgress Section 1103(g) because it would necessarily involve prohibited representation before your former governmental body. However, Section 1103(g) does not prohibit the rehiring of the former public employee provided that a true public employment relationship exists." (internal citations omitted).

Id. at 6-7.

Given the very broad language concerning “being identified on documents” or “activity being revealed to” the former governmental body, we conclude that it is possible the State Ethics Commission could find that the scenario presented is problematic, where a former employee within one year of his/her departure would be providing services to his/her former governmental body essentially as a consultant without a direct contract and who would be paid and loaned by a private firm at the former governmental body’s request. Nevertheless, given the uniqueness of the facts presented and the lack of clear precedential rulings from the State Ethics Commission as to how Section 1103(g) would apply to those facts, the Board recommends that, if the requesting official wishes to pursue this matter, he or she submit a request to the State Ethics Commission for a definitive advisory.

State Ethics Act—Section 1103(c): Accepting Improper Influence

The State Ethics Act prohibits solicitation and acceptance of gifts and loans where there is an understanding that the official would be influenced. Specifically, the Act provides:

Accepting improper influence.--No public official, public employee or nominee or candidate for public office shall solicit or accept anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on any understanding of that public official, public employee or nominee that the vote, official action or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby.

65 Pa.C.S. § 1103(c). The facts presented in this request do not appear to trigger this provision because they do not provide that the requesting official’s solicitation or acceptance of the loan of the Employee’s services would be based on an understanding of influence or linked to any official actions or judgments by the official or by his/her City office.

Conclusion

Based on the facts supplied to us, we conclude that the proposed loan of the services of the former Employee of the requestor’s City office would not implicate

Charter Section 10-105 or State Ethics Act Section 1103(c). We think the proposed arrangement could be problematic with respect to State Act Sections 1103(e) and 1103(g) and recommend that the requestor seek advice directly from the State Ethics Commission, if desirous of proceeding with this matter. In addition, we conclude that the solicitation or acceptance by the City office of the Employee's services, for which he/she would be compensated by a private entity, would not represent a gift to the head of the City office personally that would be prohibited by Section 20-604 of the Philadelphia Code. However, we advise that an appearance of impropriety could exist if the official were to solicit such a "loan" from a firm that does business in the Philadelphia region and may be affected by matters that come before the official's City office.

The Board thanked the requestor for being concerned about ethics compliance and for recognizing a situation that presents issues under the ethics laws. As always, we advised the requestor that if he/she has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. 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
Richard Negrin, Esq., Vice-Chair
Phoebe A. Haddon, Esq., Member
Kenya S. Mann, Esq., Member

[As of the consideration of this Opinion, there was a vacancy on the Board.]