



CITY OF PHILADELPHIA

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**Philadelphia Board of Ethics
Formal Opinion No. 2010-001**

February 17, 2010

Hon. Frank Rizzo, Jr.
Councilman-at-large
City Hall Room 582
Philadelphia, Pennsylvania 19107

Re: “Resign to Run” and Circulation of Nomination Petitions

Dear Councilman Rizzo:

Through your chief of staff, you have requested a public advisory as to whether you would become a “candidate” under the Philadelphia Home Rule Charter by the act of others circulating nominating petitions for you for a different publicly-elected position.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this Opinion is predicated on the facts that you have provided. We do not conduct an independent inquiry into the facts. 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 us for specific advice on the application of the ethics laws to those particular facts.

The “Resign to Run” Provision of the Home Rule Charter

Section 10-107 (Political Activities) of the Charter reads as follows in subsection (5):

- (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.

You are clearly an officer of the City, and Charter provision 10-107(5) applies to you. *See Mayer v. Hemphill*, 411 Pa. 1, 10-14, 190 A.2d 444, 448-450 (1963) (holding City Councilmember is an officer of the City within Charter Section 10-107(5)). The only question is what the standard is for determining when one becomes “a candidate for nomination or election to any public office” (other than re-election), and does the act of circulating nominating petitions meet that standard, such that upon the circulation of nomination petitions for another office, you would then be required to resign your City position as a member of Council.

The Board of Ethics addressed the general issue of the applicable standard in Nonpublic Formal Opinion No. 2009-004:

The issue of when one becomes a “candidate” is important for two of the statutory provisions that are within the jurisdiction of the Board of Ethics: Section 10-107(5) of the Charter and Chapter 20-1000 of The Philadelphia Code. For purposes of Chapter 20-1000, “candidate” is defined in the definitions section of that Chapter, at Section 20-1001(2), as follows:

(2) Candidate.

- (a) An individual who files nomination papers or petitions for City elective office;
- (b) An individual who publicly announces his or her candidacy for City elective office.

See Board of Ethics Opinion No. 2006-003 at page 1, n.1. This is essentially the same definition long used by the Law Department for the “resign to run” provision of the Charter, Section 10-107(5). The one distinction is that Section 10-107(5) applies to any elective office, whether serving the City or Commonwealth or not. See the Law Department Political Activity Guide, at the last Q & A on page 7, as posted on our web site. See also Opinion No. 95-06, *1994-1996 City Solicitor's Opinions* at 88, especially footnote 1, *citing McMenamín v. Tartaglione*, 590 A.2d 802, 810 (Pa. Commw. 1991), *aff'd without op.* 590 A.2d 753 (Pa. 1991).

Nonpublic Formal Opinion No. 2009-004 at 3. The Opinion quoted *McMenamin* on the issue of when Mr. Castille became a candidate:

As to the other [public] conversations in which Castille or others acting at his behest took part, the trial court determined that they involved statements indicating only Castille’s willingness and availability to run for Mayor. *Mayer* is clear that such statements do not constitute a present declaration of candidacy.

McMenamin, 590 A.2d at 810 (*citing Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963)). It seems that the courts have concluded that tentative inquiries to assess possible support in the event a person did become a candidate for office do not constitute a “public announcement” of candidacy.

Nevertheless, the holdings of *Mayer* and *McMenamin* do not establish a clear guideline for evaluating any set of facts as to whether a “present declaration of candidacy” has occurred. The majority opinion in *Mayer* characterizes the facts this way:

Appellant, on the other hand, contends that Tate became a candidate for Mayor *when he announced his availability and his willingness to be a candidate* for nomination for the office of Mayor. This contention is entirely unrealistic and equally devoid of merit. Appellant averred, “8. On December 17th, 1962, JAMES H. J. TATE announced that he was *seeking* the office of Mayor of Philadelphia in the Municipal Election of 1963 and he offered himself for said office. By said declarations, he thereby, became a candidate for the office of Mayor and is at the present time a candidate for the office of Mayor.”

The appellant concedes that he did not aver that on December 17, 1962, Tate announced that he was a candidate, but in effect merely announced that he was willing and glad to become a candidate. There were

undoubtedly several thousand persons in Philadelphia who were available, willing and anxious to be a candidate for Mayor on the Democratic ticket.

Mayer, 411 Pa. at 15, 190 A.2d at 450-51 (footnote omitted)(emphasis in original). The facts in the *McMenamin* case that are relevant to the “public announcement” issue are presented by the Commonwealth Court Opinion as follows:

Under *Mayer* the announcement must be public. The trial court found that statements made by Castille to a limited number of individuals (five) in private in a hotel room without the presence of the media were not public under the *Mayer* case. We agree.

McMenamin, 590 A.2d at 810. The Court decisions in *Mayer* and *McMenamin* thus address only the narrow set of facts before them, and leave much as yet undecided in terms of factual situations that may or may not constitute a “public announcement” of candidacy.

Nevertheless, the issue before this Board, as framed in your request for an advisory, is also narrow: Does the mere act of others circulating nominating petitions on behalf of a public official constitute a public announcement of candidacy for the elective office to which the petitions are addressed?

As noted above on page 2, the standard for who is a candidate is a two-part one, as stated in Section 20-1001(2) of The Philadelphia Code, and articulated in *Mayer* and *McMenamin*. In *McMenamin* the court held:

The question of when one becomes a candidate for purposes of Section 10.10-107(5) was addressed by the Supreme Court in the case of *Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963). There the Supreme Court opined that one becomes a candidate if he or she has filed nomination papers or publicly announced his candidacy for office.

McMenamin, 590 A.2d at 810.

Although your query raises the issue of interpretation of the “public announcement” part of the two-part standard established in *Mayer*, the “filing nominating papers” part is instructive. 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.” However, such facts were not the factual predicate of the question that you requested this Board to answer.

Conclusion

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. To our knowledge, no one has ever asked for an interpretation of what actions might constitute a “public announcement,” beyond the specific facts considered in *McMenamin*, and no prior ruling defines the term. You have now asked, in effect, whether circulation of nominating petitions would constitute a “public announcement.” Based on the facts you have provided, you are advised that you would not become a “candidate” for purposes of Charter Section 10-107(5), and thus required to resign your City position, merely upon the circulation of nominating petitions by others on your behalf.

If you have questions about any other particular activities, you would be well-advised to present the specific facts and request advice on the particular question.

If you have any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since you have requested public advice from the Board of Ethics, we will make this letter public as required by Code Section 20-606(1)(d)(iii).

By the Board:



Richard Glazer, Esq., Chair
Kenya Mann Faulkner, Esq., Member

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Rev. Damone B. Jones, Sr., Member

[At the time of consideration and approval of this Opinion, there were two vacancies on the Board, due to the resignations of Phoebe A. Haddon, Esq., and Richard Negrin, Esq.]