CITY OF PHILADELPHIA

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The Board's Regulation 8 (Political Activity), effective March 28, 2011, represents the Board's interpretation of Charter Section 10-107, and supersedes this advisory opinion to the extent that it is inconsistent with the regulation.

Philadelphia Board of Ethics
Nonpublic Formal Opinion No. 2009-004

September 21, 2009

Re: Exploratory Committee for Potential Candidacy for Elective Office

An employee ("the requestor") in the Executive and Administrative Branch of City government requested nonpublic advice on a number of questions related to the possibility of that person seeking elective office. Specifically, the requestor advised that the requestor wished to form an exploratory committee "to see if there is support for my potential candidacy before I decide whether I am going to run" and also to raise money for these exploratory efforts. The requestor asked the following questions:

1. As a city employee, would the formation of an exploratory committee constitute a declaration for political office?

2. As a city employee, would I be forced to resign my position if I explored the possibility of running for office?

3. Would my exploratory committee be allowed to fundraise?

4. Would the formation of an exploratory committee that fundraises cause me, a city employee, to violate any provision of the City Codes, Charter, or any other ethic laws?

5. Does the development of a personal website constitute a declaration for political office?

Scope of this Opinion

Please note that this Formal Opinion[1] can address only matters within the jurisdiction of the Board of Ethics. Paragraph 4.1(b) of the Board's Regulation No. 4 addresses this jurisdiction:

> (b) **Permissible subjects of requests.** In accordance with Section 4-1100 of the Home Rule Charter, the Board or its staff, as provided below, shall provide advice concerning provisions of the Home Rule Charter and City ordinances pertaining to ethical matters, which matters shall include conflicts of interest, financial disclosure, standards of governmental conduct, campaign finance matters, prohibited political activity, disclosures required by Code Ch. 17-1400, and such other matters as may be assigned by Council.

It is important to note that the named subjects, such as "campaign finance matters" and "prohibited political activity" are only within our jurisdiction to the extent that they are "provisions of the Home Rule Charter and City ordinances" as stated earlier in the same sentence. Thus, the requestor was advised that, to the extent that the requestor may have questions about the application of the State Election Code, Title 25 of the Pennsylvania Statutes, such questions are not addressed in this Formal Opinion. The one exception is that we do provide an analysis of the State Ethics Act, since many of the issues under that Act are very similar to issues under ethics provisions of the Charter and the City Ethics Code. See the caution later in this Opinion that final authority rests with the State Ethics Commission.

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,

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[1] Although the requestor requested an Advice of Counsel, the Board concluded, applying Regulation No. 4, that this matter is appropriate for a Formal Opinion.

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 of Ethics for specific advice on the application of the ethics laws to those particular facts.

Becoming a Candidate

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 McMenamin v. Tartaglione*, 590 A.2d 802, 810 (Pa. Commw. 1991), *aff'd without op.* 590 A.2d 753 (Pa. 1991).

In *McMenamin*, the court addressed factual findings related to the fund-raising restriction under Charter Section 10-107(3), when now-Justice Castille was considering a run for Mayor of Philadelphia:

> The only factual findings which pertain to alleged financial activities on the part of Castille are No. 4, which indicates only that a cocktail party was planned and that invitations were sent for the purpose of raising campaign funds, and No. 5, which indicates only that Castille met with certain persons "to assess the availability of funds" for his mayoral campaign.

> McMenamin does not point to any evidence in the record that Castille demanded, solicited or received a contribution or made any expenditure for his campaign prior to his resignation. We are unpersuaded, as was the trial court, that a mere inquiry (even if posed at a cocktail party) as to whether certain individuals would consider lending financial support to a campaign constitutes a violation of Section 10.10-107(3) of the Home Rule Charter.

Id. As to the question of when Mr. Castille became a candidate, the court held:

> 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.

Id. (*citing Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963)). The court in *McMenamin* also relied on the definition of "candidate" in the State Election Code, which deems a person to be a candidate if the person:

> Received a contribution or made an expenditure or has given his consent for any other person or committee to receive a contribution or make an expenditure, for the purpose of influencing his nomination or election to such office, whether or not the individual has made known the specific office for which he or she will seek nomination or election at the time the contribution is received or the expenditure is made.

McMenamin, 590 A.2d at 810 n.6, *citing* 25 P.S. §3241(a)(1). The *McMenamin* court also pointed out that:

> Alternatively, one is defined as a candidate if he has "[t]aken the action necessary under the laws of the Commonwealth to qualify himself for nomination or election to such office."

Id. The *McMenamin* Court noted that *Mayer* had defined the "action necessary" as follows: "[O]ne becomes a candidate if he or she has filed nomination papers or publicly announced his candidacy for office." *McMenamin,* 590 A.2d at 810.

Accordingly, although we cannot advise on an interpretation of the State Election Code, we conclude that for purposes of the Public Integrity Laws, contributions

received by an exploratory committee would not be deemed to be "for the purpose of influencing . . . nomination or election," so long as there is no other indication that the person who is exploring a possible candidacy has announced his/her actual candidacy or filed nominating papers, and so long as the contributions are not used to support any active campaign or any partisan political purpose. That is, mere receipt by an exploratory committee of contributions to fund its exploratory activities does not in itself make the subject of the committee a "candidate" for purpose of the laws under the jurisdiction of the Board of Ethics.

As to the effect of formation alone of an exploratory committee, the analysis is similar. Assuming that the requestor has not filed nomination papers or petitions for elective office (and up to the time that either event occurs), the requestor's question as to whether formation of an exploratory committee PAC would constitute a declaration of office requires a determination of whether the formation of, or activities of, such a committee and PAC would amount to a public announcement of candidacy. Here it is important to emphasize, as noted above, that we do not conduct an independent inquiry into the facts; this Formal Opinion is predicated on the facts provided to us. We have not been advised, and we have no independent information, as to what activities are necessarily contemplated by an "exploratory committee." Our research does not disclose that there is any particular legally-defined or commonly-understood single description of the scope of the activities of what may be called an "exploratory committee." Provided that any exploratory committee and PAC associated with it make it clear in their activities and communications that the requestor is not yet a candidate for any office, but are merely exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for the requestor to consider such a candidacy, the requestor is advised that the mere formation and existence of an "exploratory committee" would not constitute a "declaration of candidacy" for purposes of either Section 10-107 of the Charter or Chapter 20-1000 of the Philadelphia Code.

Philadelphia Code Chapter 20-1000

Generally, Code Ch. 20-1000 applies to candidates (and only candidates for City elective office). Since the requestor advises that the position being considered is not City elective office as defined in Code Section 20-1001(5), the Code Chapter does not apply to that position. In any case, except for provisions applying to any individual and for provisions requiring filings with the Board of Ethics of disclosures otherwise required

to be filed with the City Commissioners,[2] the requestor is advised that Code Chapter 20-1000 would not apply to the formation and activities of an exploratory committee, so long as the requestor does not qualify as a "candidate" as discussed above.

State Ethics Act

Although Charter Section 4-1100 gives the Board of Ethics the power to "administer and enforce" only matters under the Charter and City ordinances, Section 4-1100 does refer to the Board's "concurrent authority" with the Law Department to "render advisory opinions" in matters "regarding State law." It is clear that this language refers to the necessity, in order to advise on many ethics matters, to include, for completeness, how the State Ethics Act, 65 Pa.C.S.A. §§1101 *et seq.*, might apply. Nevertheless, only the State Ethics Commission has complete statutory authority to provide advice interpreting the Act. As noted above, under "Scope of our Opinion," there is no other State Law that is within our jurisdiction to provide advice, and accordingly this Opinion does not address any other law.

The State Ethics Act does provide for some advice to be obtained from a local solicitor. Opinions and Advices of Counsel of this Board that include reference to the Act always include a statement that the Act provides that: "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 . . . shall not be subject to the penalties provided for in [certain provisions of the Act]." 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

In other words, to obtain advice on which the requestor may rely as against any possible enforcement by the State Ethics Commission, the requestor was advised to seek advice from the State Ethics Commission or the Law Department of the City.

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[2] Code Section 20-1006 requires copies to be filed with the Board of Ethics of certain reports required by State law to be filed with the Secretary of the Commonwealth. As noted above, the extent to which State election law applies is not addressed in this Formal Opinion.

In order to fulfill the "concurrent authority" of this Board, however, this Opinion will attempt to identify issues under the Act that may be raised by the requestor's query. The only provision of the State Ethics Act that appears to apply to this query is the requirement in Section 1104(b) that a candidate for State or local office file a statement of financial interests with the Commission. The Act, however, defines "candidate" differently from the definition applied above to the Philadelphia Code and the Charter. The term, "candidate" is defined in Section 1102 of the Act as follows:

> **"Candidate."** Any individual who seeks nomination or election to public office by vote of the electorate, other than a judge of elections, inspector of elections or official of a political party, whether or not such individual is nominated or elected. An individual shall be deemed to be seeking nomination or election to such office if he has:
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> (1) received a contribution or made an expenditure or given his consent for any other person or committee to receive a contribution or make an expenditure for the purpose of influencing his nomination or election to such office, whether or not the individual has announced the specific office for which he will seek nomination or election at the time the contribution is received or the expenditure is made; or
>
> (2) taken the action necessary under the laws of this Commonwealth to qualify himself for nomination or election to such office.
>
> The term shall include individuals nominated or elected as write-in candidates unless they resign such nomination or elected office within 30 days of having been nominated or elected.

65 Pa.C.S.A. §1102. This definition is identical to that of the Election Code, as discussed above. As also noted above, the Board of Ethics has no authority to interpret the Election Code. Considering the language of *McMenamin*, we conclude that it is likely that the Commission and the courts would interpret the above definition to permit contributions to an exploratory committee for the purpose of allowing that committee to incur expenses related to exploring a possible candidacy, where such expenses were not actually intended to influence "nomination or election."[3] Nevertheless, as to whether the

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[3] For example, such expenses might include rental of office space, payment of utilities, purchase of printing services, and payment of staff to the committee, provided that all the activities were limited to exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for the subject of the committee to consider such a candidacy.

Commission would require the requestor to file as a "candidate" under Section 1104(b) of the Act, the requestor was advised to seek the definitive ruling of the State Ethics Commission or Law Department, as suggested above.

Home Rule Charter

The potential activities related to formation of such an exploratory committee raise several issues under various subsections of Section 10-107 of the Charter.

A. Subsection 10-107(3). This subsection clearly applies to the requestor as an employee of the City. Thus, the requestor is prohibited from being in any manner concerned in demanding, soliciting, collecting or receiving, any assessment, subscription or contribution, whether voluntary or involuntary, intended for any political purpose whatever. In Nonpublic Advice of Counsel No. 2008-527, we addressed similar issues concerning an exploratory committee. In that Advice of Counsel we advised:

> You are advised that, to the extent that an exploratory committee or a PAC associated with it solicits or receives donations to fund its activities, there is a significant issue that those donations would be "for a political purpose." This conclusion is not without doubt, and there is no prior interpretation that provides guidance in this matter. However, if possible, the better course would be to avoid such fund-raising.

In that particular Advice of Counsel it was a significant fact that the exploratory committee was proposed to be organized by others than the requestor and that the requestor would not necessarily be involved in the activities of the committee, so it was unnecessary to resolve the issue of interpretation of the phrase "for a political purpose." Since the requestor plans to be directly involved in this proposed explorative committee, it is appropriate to revisit this issue.

Legislative provisions restricting political activities by public employees are generally construed by the courts to refer to partisan, as opposed to nonpartisan, political activity. *See generally*, Annot., "Validity, Construction, and Effect of State Statutes Restricting Political Activities of Public Officers or Employees," 51 ALR4th 702 (1987). Such court opinions do not generally go on to define "partisan." Indeed, one federal court has concluded that the line between partisan and nonpartisan political activities is difficult to draw. *See Magill v. Lynch,* 560 F.2d 22, 29 (1st Cir. 1977).

Some definitions of "partisan" can be found, however. The Pennsylvania Supreme Court has given as examples of partisan political activity: "being committee-persons, working at the polls or running for public office." *Commonwealth ex rel. MacElree v. Legree*, 530 Pa. 381, 609 A.2d 155, 157 (Pa. 1992). *See also In re Dobson*, 517 Pa. 19, 534 A.2d 460, 462 (1987). More recently, the federal District Court has held that "the plain meaning of 'political activities' includes any action which involves the advocation of partisan decision-making." *Coover v. Saucon Valley Sch. Dist.*, 955 F.Supp. 392, 401 (E.D. Pa. 1997). The *Coover* Court cited a U.S. Supreme Court decision that interpreted "partisan" to refer to activities directed "toward party success." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556, 37 L.Ed.2d 796, 804 (1973).

Moreover, as advised above, the mere formation and existence of an "exploratory committee" would not constitute a "declaration of candidacy" for purposes of either Section 10-107 of the Charter or Chapter 20-1000 of the Philadelphia Code, and contributions received by an exploratory committee are not deemed to be "for the purpose of influencing . . . nomination or election" if there is no candidacy and if the contributions are not used for other than exploratory activity. In such a case, there is no "political purpose" to any contributions. Accordingly, the requestor is advised that any activities with respect to the exploratory committee and the website, prior to any candidacy, would not violate Charter Section 10-107(3), even if such activities involved soliciting contributions to support the exploratory activities of the exploratory committee, including expenditures such as those noted in footnote 3 above.

B. Subsection 10-107(5). This subsection clearly applies to the requestor, as an appointed employee of the City. The requestor would be required to resign his/her position with the City upon becoming a candidate for public office, as described in "Becoming a Candidate" above. As discussed in that section of this Opinion, the requestor is advised that the mere formation and existence of an "exploratory committee" would not constitute a "declaration of candidacy" for purposes of Subsection 10-107(5), and thus the formation of such a committee would not, by itself, require resignation from City employment. However, it must be again emphasized that the "exploratory" line must not be crossed, and that any activity or communication of a purportedly exploratory committee that could be viewed as an argument to the voters to support the requestor as a candidate may raise an issue under Charter Section 10-107(5).

C. Subsection 10-107(4). The requestor was advised that, as an appointed City employee ") in the Executive and Administrative Branch, subsection 10-107(4) applies to the requestor. Hence, to the extent that any activity related to the formation of, or operation of, an exploratory committee can be considered to be the "management or

affairs of any political party or in any political campaign," the Charter would restrict that employee's involvement in such activity. However, as discussed in point #A on subsection 10-107(3) on the previous pages, "political" in this context means "partisan" and relates to a declared candidacy, either of the employee or someone else. Accordingly, the requestor was advised that activities on an exploratory committee where there has been no declaration of candidacy would not violate subsection 10-107(4), provided that those activities were limited to exploring the viability of the requestor's candidacy and were not otherwise supportive of the success at the polls of a political party or candidate.

Conclusion

To address the requestor's stated questions, based on the facts of which we were advised, the requestor was advised as follows:

1. On the question, "As a city employee, would the formation of an exploratory committee constitute a declaration for political office?"—the requestor was advised that, under the Philadelphia Code and Home Rule Charter, the formation of a PAC serving as an "exploratory committee" or part of such a committee would not, in and of itself, constitute a declaration of candidacy for elective office, provided that any exploratory committee and PAC associated with it make it clear in their activities and communications that the subject of the committee is not yet a candidate for any office, but they are merely exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for the requestor to consider such a candidacy, and unless and until the requestor makes a public announcement of candidacy or files nomination papers or petitions for elective office.

2. On the question, "As a city employee, would I be forced to resign my position if I explored the possibility of running for office?"—the requestor was advised that unless and until the requestor becomes a candidate as discussed in this Opinion, Charter subsection 10-107(5) would not require that's employee's resignation from his/her City position merely upon the creation of an exploratory committee

3. On the question, "Would my exploratory committee be allowed to fundraise?"—the requestor was advised that, similar to question #1, use of the requestor's name would not, in and of itself, constitute a declaration of candidacy for elective office, provided that any exploratory committee and PAC associated with it make it clear in their activities and communications that the requestor is not yet a candidate for any office, but is merely exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for that individual to consider such a candidacy, and unless

and until the requestor makes a public announcement of candidacy or file nomination papers or petitions for elective office. Such fundraising must be limited to raising funds to support solely exploratory activity, such as rental of office space, payment of utilities, purchase of printing services, and payment of staff to the committee, provided that all the activities were limited to exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for the requestor to consider such a candidacy.

4. On the question, "Would the formation of an exploratory committee that fundraises cause me, a city employee, to violate any provision of the City Codes, Charter, or any other ethic laws?"—the requestor was advised that, unless and until becoming a candidate, there are no issues under Code Chapters 20-1000 or 20-600, nor any provision of the Charter.

5. On the question, "Does the development of a personal website constitute a declaration for political office?"—the requestor was advised that the development of a personal website, in and of itself, does not constitute a declaration for political office, if no content, heading, or use of the website explicitly stated that person's candidacy for a particular office or argued for that person's desirability or fitness for such an elected office. Based on the facts that we have been provided about the website, the requestor has not identified any feature of the website that causes a concern in this area. However, different facts can have different results. Nor is it the function of the Board of Ethics to review websites and provide "approval" that a particular website raises no issues. As noted in the last paragraph of "Scope of this Opinion" on pages 2-3 of this Opinion, this Opinion is predicated on the facts that have provided to the Board of Ethics by the requestor.

Given the nature of this Opinion, which is to provide prospective advice, it is not possible to anticipate, and advise on, every conceivable issue or fact pattern that may arise in the course of the activities of a proposed exploratory committee, prior to announcement of candidacy. In view of that fact, the requestor is urged to be sensitive to the general issues raised in this Opinion and seek the prior advice of the Board of Ethics in any particular matters that may arise where the application of the advice herein is not clear. The Board cautions the requestor that, in light of the lack of any statutory definition or caselaw interpretation of "exploratory committee," bright lines of permissible conduct are particularly difficult to draw. Accordingly, in addition to complying with the letter of the law, the Board suggests that the requestor be sensitive to any appearance of impropriety, where a technically legal activity may appear to the public to be improper political activity by a City employee.

If the requestor 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 are not making the original Formal Opinion 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
Kenya S. Mann, Esq., Member
Rev. Damone B. Jones, Sr., Member

[There was one vacancy on the board, due to the resignation, prior to the September 16 Board meeting, of Phoebe A. Haddon, Esq.]