



CITY OF PHILADELPHIA

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Evan Meyer
General Counsel

Philadelphia Board of Ethics Confidential Advice of Counsel

December 21, 2007

Re: Post-Employment Restrictions

A director of one of several departmental units requested a confidential advisory ethics opinion as to the effect of post-employment restrictions of the ethics laws if that person resigned as director of the unit to take a position with a large non-profit corporation ("The Corporation") with a number of contracts with the Department.

The departmental unit is part of a Division within an operating department of the City. The requestor advised of having recently been offered a position with the Corporation. The position this person was offered is to be a Regional Coordinator on a particular issue for the five southeast Pennsylvania counties: Bucks, Chester, Delaware, Montgomery, and Philadelphia. The position would be paid by a grant from the Pennsylvania State entity going to The Corporation, and no money would be coming to the Department. The individual would be supervising five Corporation employees who would be working with each of the five counties. This person advised that in the past he/she had oversight over two Corporation contracts with the City.

We advised, as usual, that in keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, our advice is predicated on the facts that we have been provided. We pointed out that, although previous opinions of this Board, the City Solicitor's Office, and the State Ethics Commission

that interpret statutes are guidance as 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. 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, anyone is encouraged to contact the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

There are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act. We advised that the provision in the State Act may present some difficulty for the requestor in accepting the offered position.

One-Year Limitation On Representing Others—State Ethics Act

As a public employee, the requestor is subject to the Public Official and Employee Ethics Law, also known as the State Ethics Act (“Act”).¹ Section 1103(g) of the Act, 65 Pa.C.S. §1103(g), restricts “post-employment” activities as follows:

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.

The key words in that provision are defined in Section 1102 of the Act, 65 Pa.C.S. §1102. “Represent” is defined as follows:

To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations,

¹ The Act applies only to a “public employee,” defined in the Act to include: “Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect 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. I conclude that there is no question that the director of a departmental center is a “public employee.”

lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

“Governmental body with which a public official or employee is or has been associated” is defined as follows:

The governmental body within State government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Based on opinions of the State Ethics Commission, we advised that the requestor’s “governmental body” would be the entire government of the City of Philadelphia. Accordingly, the requestor may not for one year after the date of separation from the employ of the City (that is, the date the individual is off the payroll) represent anyone—including The Corporation or any other entity with which The Corporation contracts or otherwise does business—before the City. Please note the broad definition of “represent,” which includes having one’s name appear on a bid, contract proposal, or invoice submitted to the former governmental body, the City; personal appearances with officials of the City or otherwise making known to the City the former employee’s work for the new employer, The Corporation. See, e.g., State Ethics Commission Opinion No. 04-016, Advice of Counsel 07-503. This means that until one year after separation from City service, the requestor may not have any involvement in any transaction where a new employer, such as The Corporation, contacts the City regarding any City transactions such as contracts, unless that person’s involvement is purely internal at the new employer and not in any way revealed to the City. On the particular facts provided by the requestor we noted that we were advised that the position offered is a Regional Coordinator for the five southeast Pennsylvania counties, including Philadelphia. We concluded that it is hard to imagine that the Regional Director could function without at some point “representing” (as defined) The Corporation before the City of Philadelphia. Attached is a recent advisory, Advice of Counsel No. 07-578 of the State Ethics Commission, which illustrates the Commission’s interpretation of post-employment issues. Accordingly, we advised that the requestor would be prohibited by the State Ethics Act from leaving the City to immediately (or any time within one year) take the position as Regional Director, with responsibility for Philadelphia. Whether some other arrangement with The Corporation could be made, so that the requestor would have no contact with Philadelphia for the first year, involves facts of which we have not been advised.

It is important to note that the State Ethics Commission has final administrative jurisdiction over interpretation of the State Ethics Act. Thus, we advised, the requestor may wish to request the advice of the Commission to obtain a definitive ruling on any particular fact situation or on whether the Act applies to the requestor. Please note 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 [the Act].” 65 Pa.C.S. §1109(g). Presumably, it is this provision that is the reason for the concurrent jurisdiction of the Law Department provided for in Charter §4-1100 as to matters involving State law. Since the Board of Ethics is not “the solicitor” of the City, the requestor may, if desired, also 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. Since the requestor requested confidential advice from the Board of Ethics, we will not make this letter public. However, we noted that we are required to issue an edited version of this letter, under Code Section 20-606(1)(d)(iii). This document is that public version.

Permanent Limitation On Assistance With Particular Matters—City Code

Section 20-603(1) of the City Ethics Code states:

No person who has served for compensation as a member of Council, City officer or employee shall assist, at any time subsequent to his City service or employment, another person, with or without compensation, in any transaction involving the City in which he at any time participated during his City service or employment.

The “transactions” to which this provision applies are defined broadly in Section 20-601(4) to include matters (i) which are or will be the subject of City action; (ii) to which the City is or will be a party; or (iii) in which the City has a direct proprietary interest. This provision is not a one-year prohibition, like the State Ethics Act provision, but applies “at any time” after a person leaves City employ. However, it is much narrower in scope than the State Ethics Act provision, since it only applies to matters in which the employee “participated” during City employ. This has been interpreted to mean matters in which the employee exercised discretion (and not merely, for example, responded to a routine request for information). Thus, if during the requestor’s service with the City, the requestor took official action on any particular transaction concerning which a future employer (such as The Corporation) should contact the City at any time henceforth, the requestor may not assist that future employer in the matter relating to that transaction. On the other hand, we interpret

“matter” to mean only the particular issue or issues on which decisions were made by The City with the requestor’s involvement, not every issue related to that project that may arise after separation from City service.

Thus, for example, the requestor would not be prohibited from assisting The Corporation with interpreting or applying a provision of the contract between The Corporation and the City unless the requestor had worked on that same issue while with the City.

Two Year Limitation On Financial Interests—City Code

Section 20-607(c) of the Code states:

No member of Council or other City officer or employee shall become financially interested, subsequent to final action, in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, during his term of office or employment and until two (2) years have elapsed since the expiration of service or employment in the term of office of said member of Council or other City officer or employee.

This prohibition shall apply so as to prevent a parent, spouse, child, brother, sister or like relative-in-law or any person, firm, partnership, corporation, business association, trustee or straw party from becoming financially interested for or on behalf of a member of City Council, City officer or employee within said two (2) year period.

In short, this provision prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official decisions she made while in City employ. Thus, if the requestor had, for example, been officially involved in securing for The Corporation any funding that passed through the City, or if the requestor were involved in renewing, amending, or administering the City’s contract with The Corporation, the requestor could not for two years be employed by and receive any compensation from The Corporation, if such compensation was derived from revenue received under that City action. This would include the two City contracts that the requestor advised were under the requestor’s oversight during that person’s City employment.

Summary

In summary, we reached the following conclusions:

(1) The requestor may not for one year after the requestor leaves the employ of the City represent anyone, including The Corporation, before the City. Please note the broad definition of "represent," which includes having the requestor's name appear on a bid, contract proposal, or invoice submitted to that person's former governmental body, the City of Philadelphia. This is not limited to any particular department or office of the City. We noted that it is hard to see how the requestor could avoid violating this provision if the requestor accepted the position at The Corporation of Regional Coordinator for the five southeast Pennsylvania counties, including Philadelphia.

(2) The requestor may never in the future assist anyone, such as The Corporation, in a transaction involving the City on a particular issue or issues on which decisions were made by the City with involvement of the requestor.

(3) The requestor may not for two years after the requestor leaves the employ of the City acquire a financial interest in any official decision the requestor made while in City employ.

Finally, we noted that the requestor is free to request further advice from the Board of Ethics, or the State Ethics Commission, if the requestor has additional facts to provide. We also again drew attention to the option of requesting advice of the City Solicitor, as discussed on page 4 above.

Sincerely yours,



Evan Meyer
General Counsel

Attachment (Advice of Counsel No. 07-578)

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director

ADVICE OF COUNSEL

August 30, 2007

Sharon B. Lipscomb
1015 Spring Street
McDonald, PA 15057

07-578

Dear Ms. Lipscomb:

This responds to your letters of June 30, 2007, and August 1, 2007, by which you requested advice from the State Ethics Commission.

Issue: Whether the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 *et seq.*, would present any restrictions upon employment of a Health Care Coordinator following termination of employment with the Commonwealth of Pennsylvania Department of Public Welfare, Office of Developmental Programs.

Facts: You are currently employed as a Health Care Coordinator with the Commonwealth of Pennsylvania Department of Public Welfare ("DPW"), Office of Developmental Programs ("ODP"). You have submitted copies of two documents that you state are your current job description and position description for your position with DPW. Both documents are incorporated herein by reference. It is noted that these documents list the same working title but different class titles for your position. A copy of the job classification specifications under job code 41710 has been obtained and is also incorporated herein by reference.

Your job description and position description indicate that you work for a Regional Office of Mental Retardation. It is administratively noted that ODP was created within DPW in or about February 2007, through a reorganization of the Office of Mental Retardation.

You state that you have accepted a position of employment with the Tuscarora Intermediate Unit ("Tuscarora IU") as a "Consultant for Office of Mental Retardation Statewide Supports Coordination Initiative" ("Consultant"). In a telephone conversation with Commission staff on August 1, 2007, you confirmed that you would resign from your position with DPW if the Ethics Act would permit you to work as a Consultant for Tuscarora IU following your termination of employment with DPW.

You have submitted a copy of the job description for the Consultant position with Tuscarora IU, which document is incorporated herein by reference. Per said job description, the Consultant reports to the Director of the "OMR Statewide Supports Coordination Initiative/Early Intervention Technical Assistance." The "Fundamental Duties/Essential Functions" of the Consultant include, in pertinent part:

- Participating in the development and, when necessary, the revision of the Training and Technical Assistance Plan;
- Participating in development and implementation of state technical assistance priorities, including statewide training and travel, established by the Bureau of Special Education and Office of Mental Retardation;
- Developing technical assistance plans with counties annually or as needed;
- Providing on-site technical assistance and training locally and statewide for Office of Mental Retardation regional and county office personnel, MH/MR County staff, service provider agencies, local community service agencies, parent groups and consumer groups;
- Performing a combination of topical state and regional technical assistance activities as well as maintaining coordination of local technical assistance;
- Participating in local community and state conferences, workshops and college course work as determined by the Director and the "Departments" to maintain an awareness of innovations in the field;
- Traveling locally and state wide as a major part of the work scope to provide technical assistance, give presentations and attend meetings; and
- Performing other tasks as assigned by the Director of Statewide Supports Coordination Initiative Early Intervention Technical Assistance and/or the "Departments" that support EITA.

Per the Tuscarora IU Consultant job description, the Consultant must be able to work well and cooperate with county and "departmental" staff. The job description does not identify the specific "departments" to which it refers. The job description states that all of the enumerated duties and requirements are essential job functions, and that "Employees will be required to follow any other job related instructions and to perform any other job related duties required by their supervisor." Tuscarora IU Consultant Job Description, at 2.

To further clarify your advisory request, you have also submitted a copy of an unsigned letter dated July 31, 2007, which you state was authored by Richard D. Daubert ("Mr. Daubert"), Executive Director of Tuscarora IU. The letter indicates that you have applied for a full-time employment position with Tuscarora IU as a consultant for a statewide training system known as the "Office of Developmental Programs Consulting System," which system is administered by Tuscarora IU. The letter states that in the said consultant position, you would provide technical assistance and training to individuals and entities that provide services to individuals with intellectual disabilities. Per the letter, you would join the current staff of eight Tuscarora IU employees who provide this service on a statewide basis, and you would report to the Tuscarora IU employee who is the director of the training program. The letter states that Tuscarora IU has contracted with DPW for thirteen years to provide training and technical assistance services. The letter further states that in your position with DPW, you have not been involved in any prior negotiations of contracts or in any decisions to contract with Tuscarora IU. Finally, the letter states that in the potential position with Tuscarora IU, you would not represent Tuscarora IU in any contract negotiations or decision to contract with DPW in the future.

Based upon the above submitted facts, you seek guidance as to whether the Ethics Act would impose any restrictions upon you with regard to your prospective employment as a Consultant with Tuscarora IU following termination of your employment with DPW.

Discussion: It is initially noted that pursuant to Sections 1107(10) and 1107(11) of the Ethics Act, 65 Pa.C.S. §§ 1107(10), (11), advisories are issued to the requester based upon the facts that the requester has submitted. In issuing the advisory based upon the facts that the requester has submitted, the Commission does not engage in an independent investigation of the facts, nor does it speculate as to facts that have not been submitted. It is the burden of the requester to truthfully disclose all of the material facts relevant to the inquiry. 65 Pa.C.S. §§ 1107(10), (11). An advisory only affords a defense to the extent the requester has truthfully disclosed all of the material facts.

It is noted that, pursuant to Sections 1107(10) and (11) of the Ethics Act, 65 Pa.C.S. §§ 1107(10), (11), an opinion/advice may be given only as to prospective (future) conduct. To the extent that your inquiry relates to conduct that has already occurred, such past conduct may not be addressed in the context of an advisory opinion. However, to the extent your inquiry relates to future conduct, your inquiry may and shall be addressed.

As a Health Care Coordinator for DPW, ODP, you would be considered a "public employee" subject to the Ethics Act and the Regulations of the State Ethics Commission. See, 65 Pa.C.S. § 1102; 51 Pa. Code § 11.1. This conclusion is based upon the job description, position description, and job classification specifications, which when reviewed on an objective basis, indicate clearly that the power exists to take or recommend official action of a non-ministerial nature with respect to one or more of the following: contracting; procurement; planning; inspecting; administering or monitoring grants; leasing; regulating; auditing; or other activities where the economic impact is greater than de minimis on the interests of another person.

Consequently, upon termination of employment with DPW, you would become a "former public employee" subject to Section 1103(g) of the Ethics Act.

While Section 1103(g) does not prohibit a former public official/public employee from accepting a position of employment, it does restrict the former public official/public employee with regard to "representing" a "person" before "the governmental body with which he has been associated":

§ 1103. Restricted activities

(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) (Emphasis added).

The terms "represent," "person," and "governmental body with which a public official or public employee is or has been associated" are specifically defined in the Ethics Act as follows:

§ 1102. Definitions

"Represent." To act 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.

"Person." A business, governmental body, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons.

"Governmental body." Any department, authority, commission, committee, council, board, bureau, division, service, office, officer, administration, legislative body or other establishment in the executive, legislative or judicial branch of a state, a nation or a political subdivision thereof or any agency performing a governmental function.

"Governmental body with which a public official or public employee is or has been associated." The governmental body within State government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

65 Pa.C.S. § 1102.

The term "person" is very broadly defined. It includes, inter alia, corporations and other businesses. It also includes the former public employee himself, Confidential Opinion, 93-005, as well as a new governmental employer. Ledebur, Opinion 95-007.

The term "representation" is also broadly defined to prohibit acting on behalf of any person in any activity. Examples of prohibited representation include: (1) 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/public employee; (4) participating in any matters before the former governmental body as to acting on behalf of a person; and (5) lobbying. Popovich, Opinion 89-005.

Listing one's name as the person who will provide technical assistance on a proposal, document, or bid, if submitted to or reviewed by the former governmental body, constitutes an attempt to influence the former governmental body. Section 1103(g) also generally prohibits the inclusion of the name of a former public official/public employee on invoices submitted by his new employer to the former governmental body, even though the invoices pertain to a contract that existed prior to termination of service with the former governmental body. Shay, Opinion 91-012. However, if such a pre-existing contract does not involve the unit where the former public employee worked, the name of the former public employee may appear on routine invoices if required by the regulations of the agency to which the billing is being submitted. Abrams/Webster, Opinion 95-011.

A former public official/public employee may assist in the preparation of any documents presented to his former governmental body. However, the former public official/public employee may not be identified on documents submitted to the former governmental body. The former public official/public employee may also counsel any person regarding that person's appearance before his former governmental body. Once again, however, the activity in this respect should not be revealed to the former governmental body. The Ethics Act would not prohibit or preclude making general informational inquiries to the former governmental body to secure information which is available to the general public, but this must not be done in an effort to indirectly influence the former governmental body or to otherwise make known to that body the representation of, or work for the new employer.

Section 1103(g) only restricts the former public official/public employee with regard to representation before his former governmental body. The former public official/public employee is not restricted as to representation before other agencies or entities. However, the "governmental body with which a public official/public employee is or has been associated" is not limited to the particular subdivision of the agency or other governmental body where the public official/public employee had influence or control but extends to the entire body. See, Legislative Journal of House, 1989 Session, No. 15 at 290, 291; Sirolli, Opinion 90-006; Sharp, Opinion 90-009-R.

The governmental body with which you would be deemed to have been associated upon termination of employment with DPW would be DPW in its entirety including, but not limited to, ODP. Therefore, for the first year after termination of employment with DPW, Section 1103(g) of the Ethics Act would apply and restrict "representation" of "persons" before DPW.

Having set forth the restrictions of Section 1103(g) of the Ethics Act, your specific inquiry shall be addressed.

You are advised that Section 1103(g) of the Ethics Act would not prohibit you from being employed by Tuscarora IU following termination of employment with DPW. However, during the first year following termination of employment with DPW, Section 1103(g) of the Ethics Act would prohibit you from performing any job duties as a Tuscarora IU employee that would involve prohibited representation before DPW as set forth above. Cf., Briechle, Opinion 04-013 (Where a former DPW Regional Area Service Manager sought to subcontract with an Intermediate Unit to provide consulting services relative to the Intermediate Unit's training contract with the Office of Mental Retardation, Section 1103(g) would prohibit such individual from having contact or interaction with DPW that would involve acting on behalf of himself or the Intermediate Unit as to matter(s) relating to the training contract or his subcontract.)

Under the submitted facts, during the first year following termination of employment with DPW, it would be impossible for you to perform some of the duties of the Consultant position without running afoul of Section 1103(g) of the Ethics Act. For example, during the one-year period of applicability of Section 1103(g), you would clearly be prohibited from providing on-site technical assistance and training locally and statewide for DPW personnel. See, Metzgar, Opinion 06-002; Ziegler, Opinion 98-001. The aforesaid examples should not be construed as a complete listing of the job duties of the Consultant position that would involve prohibited representation before DPW. Based upon a review of the Tuscarora IU Consultant job description, which refers to unidentified "departments," and which does not specifically indicate which duties would involve contact with DPW, it is not possible to provide a complete listing within this advisory of all of the job duties of the Consultant position that would involve prohibited representation before DPW.

Based upon the facts that have been submitted, this Advice has addressed the applicability of Section 1103(g) only. It is expressly assumed that there has been no use of authority of office for a private pecuniary benefit as prohibited by Section 1103(a) of the Ethics Act. Further, you are advised that Sections 1103(b) and 1103(c) of the Ethics Act provide in part that no person shall offer to a public official/public employee and no public official/public employee shall solicit or accept anything of monetary value based upon the understanding that the vote, official action, or judgment of the public official/public employee would be influenced thereby. Reference is made to these provisions of the law not to imply that there has been or will be any transgression thereof but merely to provide a complete response to the question presented.

Lastly, the propriety of the proposed conduct has only been addressed under the Ethics Act; the applicability of any other statute, code, ordinance, regulation, or other code of conduct other than the Ethics Act has not been considered in that they do not

involve an interpretation of the Ethics Act. Specifically not addressed herein is the applicability of the Governor's Code of Conduct.

Conclusion: As a Health Care Coordinator for the Commonwealth of Pennsylvania Department of Public Welfare ("DPW"), Office of Developmental Programs ("ODP"), you would be considered a "public employee" as that term is defined by the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 *et seq.* Upon termination of employment with DPW, you would become a "former public employee" subject to Section 1103(g) of the Ethics Act. The former governmental body would be DPW in its entirety including, but not limited to, ODP. The restrictions as to representation outlined above must be followed. Section 1103(g) of the Ethics Act would not prohibit you from being employed by Tuscarora Intermediate Unit ("Tuscarora IU") following termination of employment with DPW. However, during the first year following termination of employment with DPW, Section 1103(g) of the Ethics Act would prohibit you from performing any job duties as a Tuscarora IU employee that would involve prohibited representation before DPW. Under the submitted facts, during the first year following termination of employment with DPW, it would be impossible for you to perform some of the duties of a Tuscarora IU "Consultant for Office of Mental Retardation Statewide Supports Coordination Initiative" without running afoul of Section 1103(g) of the Ethics Act.

The propriety of the proposed conduct has only been addressed under the Ethics Act.

Further, should employment with DPW be terminated, as outlined above, the Ethics Act would require that a Statement of Financial Interests be filed by no later than May 1 of the year after termination of such employment.

Pursuant to Section 1107(11), an Advice is a complete defense in any enforcement proceeding initiated by the Commission, and evidence of good faith conduct in any other civil or criminal proceeding, provided the requester has disclosed truthfully all the material facts and committed the acts complained of in reliance on the Advice given.

This letter is a public record and will be made available as such.

Finally, if you disagree with this Advice or if you have any reason to challenge same, you may appeal the Advice to the full Commission. A personal appearance before the Commission will be scheduled and a formal Opinion will be issued by the Commission.

Any such appeal must be in writing and must be actually received at the Commission within thirty (30) days of the date of this Advice pursuant to 51 Pa. Code § 13.2(h). The appeal may be received at the Commission by hand delivery, United States mail, delivery service, or by FAX transmission (717-787-0806). Failure to file such an appeal at the Commission within thirty (30) days may result in the dismissal of the appeal.

Sincerely,

Robin M. Hittie
Chief Counsel