CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

Philadelphia Board of Ethics
Advice of Counsel

May 6, 2008

Terrance Adkinson
Personnel Administrator
Department of Public Health
Human Resources Office
1101 Market Street—9th Floor
Philadelphia, PA 19107

Re: Application of State Ethics Act to City Employees in "Sanitarian" Job Title

Dear Mr. Adkinson:

I respond to your letter dated May 1, 2008, in which you requested public advice on whether City employees serving in the civil service title of "Sanitarian" are required to file the Commonwealth of Pennsylvania State Ethics Commission Statement of Financial Interests (commonly called the "State Form"). As will be discussed below, the State Ethics Commission is the final authority on interpretations regarding the State Form, and thus this advisory is effectively a prediction of how the Commission would rule, if asked this question. To that end, I attach a number of rulings from the State Ethics Commission that are instructive. Note especially Advice of Counsel No.05-545 (Hess), which establishes the principle that, for determining which City employees are required to file the State Form, a determination must be made as to whether the employees are "public employees" as defined in the State Ethics Act and the Regulations of the State Ethics Commission.

As you know, it is the practice and policy of the Board of Ethics in the first instance to rely on the operating departments of the City to make initial determinations as to which of their employees are "public employees." Every year we work with the Department of Personnel and the Department of Records to plan the process of managing the financial disclosure process. It is my understanding that, each year around April 1, the Personnel Director sends to all departmental HR managers a tentative listing in the form of a spreadsheet of employees in the department, with an indication of which forms each employee must file. Enclosed with this listing is the document, "Who Must File the State Form," which is also available on the Board of Ethics' web site, www.phila.gov/ethicsboard, under "Financial Disclosure." The document, "Who Must File the State Form," is essentially a summary of the definition of "public employee" under the State Ethics Act and Regulations of the State Ethics Commission.

Based on previous e-mail messages between us, it is my understanding that supervisors in the Health Department, applying the guidelines in "Who Must File the State Form," had determined that employees in the job title of "Sanitarian" were "public employees" and thus required to file the State Form. I attach the job description for this title, which you had supplied. You had advised that at least one employee in this job title had objected to filing the form.[1]

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. I wish to point out that, 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

[1] As I had advised you at the time, once the determination is made by the department that a certain employee must file the State Form, any subsequent request for review of that matter does not "stay" (or put on hold) that determination. Any failure to file beyond the filing deadline would be a continuing violation of the State Ethics Act. Although this Advice of Counsel is intended to address only future conduct, as any past conduct would be an enforcement matter and not appropriate for an Advice of Counsel, I note that, for any employee who is advised by his/her supervisor to file a financial disclosure form and who fails to file on the basis that they intend to challenge that ruling, that employee bears all the risk of counting on that determination being overturned.

about, you are encouraged to contact me for specific advice on the application of the ethics laws to those particular facts.

Applying the State Ethics Act

As mentioned above, I attach several Advices of Counsel of the State Ethics Commission that provide guidance on this issue. To summarize the attached rulings:

Advice of Counsel No. 08-510 (Adams) is a recent ruling that provides, especially on pages 5-8, a detailed analysis of how the Commission interprets the Act's definition of "public employee."

Advice of Counsel No. 05-545 (Hess) is a 2005 ruling involving two classes of City of Philadelphia employees. As noted above, this ruling specifically notes that the determination of who is a "public employee" is dispositive of the requirement to file the State Form.

Advice of Counsel No. 97-598 (Supplee) is a 1997 ruling involving a Sanitarian for the Commonwealth's Bureau of Water Supply Management. The Advice of Counsel notes that, as a Sanitarian, Mr. Supplee "performed inspections [including restaurants], issued enforcement action documents, answered public complaints, collected water samples, and performed consultations for both public and private water supplies." The ruling stated its conclusion at pages 1-2:

> As a Sanitarian . . . you would be considered a "public employee" subject to the . . . Ethics Law . . . This conclusion is based on the description of your duties that you have supplied, which when reviewed on an objective basis, indicates 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.

Advice of Counsel No. 94-551 (Grieneisen) is a 1994 ruling, also involving a Sanitarian for the Commonwealth's Bureau of Water Supply Management. The Advice of Counsel states on page 2 that an employee in that job title is a "public employee" as defined in the Ethics Act.

In applying these rulings, I conclude that a Sanitarian for the City would likewise be a "public employee" as defined in the State Ethics Act. In particular, I note that the job description you supplied compares closely to the duties noted in Advice of Counsel 97-598. The job description states, under "Typical examples of work, " that a Sanitarian for the City typically does the following, among other things: "conducts inspections, checks food handling practices of vendors, reviews reports of other program inspectors regarding the findings, recommends cases for abatement, prepares written reports of violations, informs owner and employees of the establishment of corrective steps required, and recommends enforcement actions."

Even if we did not have these prior rulings on similar Sanitarians, it would be clear from the job description that a Sanitarian for the City is a public employee, since a Sanitarian clearly performs inspections and regulates "restaurants, grocery stores, dairy plants, barber and beauty shops, institutions such as . . . schools," etc. (quoting from job description). In addition, the ability to prepare reports of violations, issue tickets, and recommend enforcement actions can result in fines and/or abatement expense by those regulated, and thus can certainly have an economic impact of such persons. Thus, I conclude that a Sanitarian "is responsible for taking or recommending official action of a nonministerial nature with respect to:

. . .

(4) <u>inspecting</u>, 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."

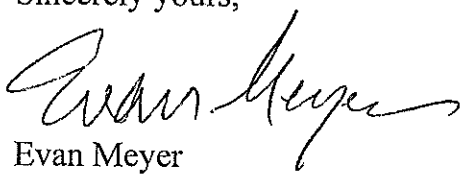
65 Pa.C.S.A. §1102 (definition of "public employee")(emphasis added). Accordingly, you are advised that any City employee in the civil service job title of Sanitarian is required, under the State Ethics Act, to file the Commonwealth Statement of Financial Interests ("State Form").

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. 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 [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.)

Since you have not requested nonpublic advice from the Board of Ethics, we will make this letter public.

Sincerely yours,



Evan Meyer
General Counsel

Attachments (State Ethics Commission Advice of Counsel Nos. 08-510 (Adams); 05-545 (Hess); 97-598 (Supplee); and 94-551 (Grieneisen)

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

4J41
SANITARIAN

Specialties
(Bilingual) (General)

GENERAL DEFINITION

This is environmental health work at the full performance level inspecting a variety of establishments for conformance to public health regulations and codes. Employees in this class perform inspections to identify hazards and examine conditions as they affect public health in such areas as milk and food control, institutional sanitation and safety, hazardous materials, solid waste handling and disposal practice, vector control, lead poisoning, and environmental health. Work is performed under the general supervision of a higher level sanitarian. Light physical effort and some disagreeable aspects are involved in the work.

ALLOCATING FACTORS: (The following conditions must be met for a position to be approved for this class.)

- Employees in this class must perform the work in the Health Department.
- Employees must perform full performance level environmental health inspectional work to determine conformance to public health regulations and codes.

TYPICAL EXAMPLES OF WORK (ILLUSTRATIVE ONLY)

Bilingual Specialty

- Performs the duties described below with English language speaking and designated non-English speaking populations.

Both Specialties

- Conducts inspections, checking sanitary conditions, equipment and operating procedures of restaurants, grocery stores, dairy plants, barber and beauty shops, institutions such as nursing and boarding homes, schools, and swimming pools along with other establishments and sites as determined by the City health code; conducts post-fire inspections; checks food handling practices of vendors during special events; participates in food and drug recalls.
- Sets up mosquito light traps; identifies the different species of mosquitoes once collected from the light traps; investigates dog and other animal bites, obtains

specimens from animals in order to test for rabies; conducts inspections, checking for vector problems in buildings to be demolished or excavated; may appear in court on behalf of the city for non-compliance cases.

- Maintains card and address files for all positive lead cases; sets up appointments for subsequent medical treatment through coordination with parents and the various medical facilities; reviews reports of other program inspectors regarding the findings of home inspections; recommends cases for abatement; reviews completed abatement work; periodically inspects presence of lead paint in paint stores.
- Prepares written reports of violations; informs owner and employees of the establishment of steps necessary to correct unsafe conditions found; maintains files of establishments visited; schedules and conducts reinspections; recommends enforcement action for cases of non-compliance.
- Issues warnings or tickets to individuals regarding public nuisances; provides information to the public regarding health problems or concerns; may give talks to community groups on general or specific topics.
- Performs related work as required.

REQUIRED KNOWLEDGES, SKILLS AND ABILITIES

KNOWLEDGE OF:

- the regulations applicable to environmental health.
- the methods, principles and techniques of environmental health.
- the objectives of public health regulatory activities.
- the basic principles of microbiology and laboratory practice as related to the analysis of milk products, food, food products, and water (other than the water contained in the city of Philadelphia's water distribution system).

ABILITY TO:

- enforce regulations with firmness and tact.
- maintain satisfactory relationships with operators of establishments inspected, associates and community organizations.
- make clear and concise reports and recommendations.
- learn and perform the duties of each environmental health program.
- speak, read and write fluently in the designated non-English language and English language for the bilingual specialty.
- present ideas effectively, both orally and in writing.

MINIMUM ACCEPTABLE TRAINING AND EXPERIENCE

(The following statement represents the minimum training and experience standards which will be used to admit or reject applicants for tests. Applications submitted by candidates for this class will be reviewed based on training and experience requirements as approved on 11/93.)

EDUCATION

- Completion of a bachelor's degree program at an accredited college or university with major course work in dairy or food technology, environmental, agricultural, life or physical science or a combination of acceptable courses from these majors totalling 30 credits.

ADDITIONAL REQUIREMENT FOR THE BILINGUAL SPECIALTY

- Sufficient training and/or experience to be able to understand and speak fluently and clearly in English and the designated non-English language.

PHYSICAL AND MEDICAL REQUIREMENTS

- Ability to physically perform the duties and to work in the environmental conditions required of a position in this class.

LICENSES, REGISTRATIONS, AND/OR CERTIFICATES

- Possession of a current certificate as either a Certified Public Applicator or a Registered Pesticide Applicator from the Department of Agriculture of the Commonwealth of Pennsylvania if required by work assignment.
- Possession of a current certificate as a Lead Inspector and Risk Assessor by the Commonwealth of Pennsylvania if required by work assignment.
- Possession of a valid proper class motor vehicle operator's license issued by the Commonwealth of Pennsylvania prior to and during tenure of employment as a Sanitarian if required by work assignment.

PAY RANGE: EP14
Class Established: 4/1953

Latest Spec. Revision:
CSC - 1/1998 ; **Ad Board** - 4/1998

PS/ps/deb

END OF JOB CLASS SPECIFICATION - 4J41

ADVICE OF COUNSEL

January 31, 2008

Cheryl J. Adams
145 Sheep Bridge Road
York Haven, PA 17370

08-510

Dear Ms. Adams:

This responds to your communications of December 12, 2007, December 18, 2007, and December 22, 2007, by which you requested advice from the State Ethics Commission.

Issue: Whether as a Business Analyst 2 with the Commonwealth of Pennsylvania Department of Health ("DOH"), either prior to retirement or as a temporary annuitant with DOH serving in the same position, you would be considered a "public employee" subject to the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 et seq., and the Regulations of the State Ethics Commission, and upon leaving Commonwealth employment, the restrictions of Section 1103(g) of the Ethics Act pertaining to former public officials/public employees.

Facts: You request an advisory from the State Ethics Commission regarding the post-employment restrictions of the Ethics Act. You have submitted facts that may be fairly summarized as follows.

On June 22, 2007, you retired from Commonwealth employment with DOH. You state that until shortly before your retirement, your position had been classified as a Management Analyst 2. You have submitted a document as a copy of the most recent position description for your position, which document is incorporated herein by reference. Said document references your working title as "Program or Management Analyst 3" and your class code as 01020, which is the classification for "Management Analyst 2." A copy of the job classification specifications for a Management Analyst 2 (job code 01020) has been obtained and is also incorporated herein by reference.

You state that in September 2005, your supervisor attempted to have your position with DOH reclassified. Your supervisor changed your title on your position description to "Program or Management Analyst 3" to reflect the desired change. The Office of Administration, Bureau of Classification, Compensation and Workplace Support ("the Bureau"), ultimately reviewed the classification of your position and determined that the appropriate classification for your position was Business Analyst 2. You state that during the time the classification of your position was under review, the responsibilities of your position did not change and only the title on the position description changed.

You have submitted a copy of correspondence dated June 4, 2007, from Ralph Winters, Director of the Bureau, to you, wherein Mr. Winters states that the Business Analyst 2 job specifications better define the focus of your work than the specifications for the Management Analyst 2 position. A copy of the job classification specifications for a Business Analyst 2 (job code 01052) has been obtained and is incorporated herein by reference.

Per the submitted position description, you were responsible for reviewing, coordinating, and evaluating technology usage and functions between and among the three bureaus within the Deputate for Quality Assurance, the office of the Deputy Secretary for Quality Assurance, the Bureau of Information Technology ("BIT"), other state agencies, the federal government, and various external automated technology vendors. Your duties and responsibilities included the following:

- Analyzing, evaluating, and administering the business process development of the State Agency Information System ("SAIS") information system/application, the Electronic Reporting System, the DOH portion of the Patient Safety System ("PA-PSRS"), the Automated Plan of Corrections ("POC") system/application and related web site application, and all other data bases and technologies used by the bureaus;

- Serving as the program office representative for all areas when outside vendors are employed on contractual arrangements between BIT application developers and DOH;

- Negotiating time frames and processes, evaluating contractor work products, and resolving contract disputes;

- Evaluating program applications, recommending needed changes to applications, and overseeing and prioritizing change management requests to BIT;

- Evaluating program needs and developing or revising existing reports to assist with planning and analyzing operations;

- Designing and managing program/business application testing of new application modules and system changes as they come out of development prior to acceptance and usage by DOH employees and/or health care providers;

- Developing test scripts to be followed by staff in conducting testing of new system changes, coordinating business application usage with regional and field office staff, and conducting staff training on all applications;

- Serving as initial point of contact for other agencies interested in utilizing SAIS for Communities of Practice standards, preparing draft requirements needed for other agencies to implement the use of SAIS, and serving as liaison between other agencies and SAIS vendor to secure estimates, discuss requirements and provide other assistance as needed;

- Meeting regularly with the Deputy Secretary, bureau representatives, and BIT to review current operations, make recommendations on needed changes, and oversee institution of changes in all program areas;

- Overseeing all program/business aspects of system development and/or acquisition, preparing work statements for contractual support, coordinating installations of equipment and software for users with BIT, and testing and approving program/business applications prior to acceptance by DOH;

- Designing and managing a deputate-wide AT equipment inventory and equipment replacement schedule;
- Issuing revised or new policies and procedures covering deputate applications; and
- Serving on the Patient Safety Authority/DOH Committee.

Position description, at 1-2.

Per the job classification specifications under job code 01020, the duties and authority of a Management Analyst 2 include, inter alia:

- Evaluating work methods and procedures, organizational structures, or inventory systems in order to improve productivity, to suggest further or initial automation, or to suggest change in agency policy, procedures, or management practices;
- Interviewing employees and supervisors in operational or program units, conducting on site inspections, and negotiating for approval of recommendations;
- Evaluating requests for office equipment;
- Reviewing and analyzing administrative issuances, developing or revising directives or manual issuances, and coordinating internal or external review, printing and distribution; and
- Conducting studies of managerial functions and leading other management analysts in studies.

Job classification specifications, at 1-2.

Per the job classification specifications under job code 01052, a Business Analyst 2:

- Performs analytical work in documenting, enhancing, and maintaining business processes for their application to information technology (IT) systems;
- Prepares or reviews functional specifications for system development or enhancements, develops user test scripts, coordinates or conducts system testing, trains users, and troubleshoots user or system problems;
- Evaluates the effectiveness of a project or contract to ensure goals, objectives, or terms are met and conducts research on business software solutions;
- Analyzes legislation or other business documentation (i.e., RFPs) to determine necessary IT system changes or changes to business processes required to meet the objectives of an agency initiative;
- Works with business users to develop and implement improved business processes for their application to an IT system in support of agency program policy;
- Works with users to develop or enhance system requirements;

- Prepares or reviews detailed functional specifications for complex IT system development or enhancement projects to be used by developers for system coding;
- Participates in the development of detailed functional specifications for highly complex system development and enhancement projects;
- Conducts system testing or coordinates system testing with users and reviews and approves test results performed by contractors;
- Prepares system change requests, plans for the implementation of system changes, and recommends system or system change implementation schedules; and
- Troubleshoots system, data, or process problems.

Job classification specifications, at 1-2.

You state that during your tenure with DOH, you were not required to complete Statements of Financial Interests.

Following your retirement from the Commonwealth, you returned to work with DOH as an annuitant in the same position, working on a part-time basis until November 6, 2007. You state that during the period of your annuitancy, you performed testing of new enhancements, prepared test scenarios, and trained your replacement, but you did not perform the full duties of your prior position.

You state that from 1998 to the present, Alpine Technology Group ("ATG") has been under contract with DOH to create, update, and maintain a comprehensive information system to track health care facility survey and complaint activities. While you were employed as a Business Analyst/Management Analyst 2 with DOH, your responsibilities included reviewing documentation provided by various contractors, including ATG, for new projects and testing the resulting products. Although you reviewed specific contract documents prepared by ATG to ensure consistency with DOH goals, you state that you were not personally responsible for any financial aspects of the contract. You state that BIT administered the contract between DOH and ATG using funding from the program area in which you were employed.

You have recently entered into a contract with ATG to work on a part-time basis as a Business Analyst/Business Developer. You state that your Business Analyst responsibilities with ATG include creating design documents for new enhancements and testing such enhancements, creating project management documents, and assisting the Project Manager with project planning. The aforementioned tasks are performed for several government agencies under contract with ATG, including DOH. You state that your Business Developer responsibilities include new development opportunities with entities other than those currently under contract with ATG.

You pose the following questions:

1. Whether, in your former position with DOH, you were a "public employee" as the Ethics Act defines that term, such that you would now be considered a former "public employee" subject to Section 1103(g) of the Ethics Act; and
2. To the extent you are a former "public employee" subject to Section 1103(g) of the Ethics Act, whether the one-year period of applicability of Section 1103(g) of the Ethics Act began when you retired from DOH on June 22, 2007, or when your service as an annuitant ended on November 6, 2007.

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 further noted that, pursuant to the same aforesaid Sections 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.

In responding to your inquiries, the threshold question to be addressed is whether, in your former position with DOH--in which you served both prior to retirement and as a temporary annuitant following retirement--you would be considered a "public employee" subject to the Ethics Act. For purposes of responding to your request, this advisory shall refer to your former position as a "Business Analyst 2" with DOH, but such designation shall be deemed to encompass all of the duties and authority set forth in your Position Description and all job classification specifications assigned to you during any applicable time period.

The Ethics Act defines the term "public employee" as follows:

> **§ 1102. Definitions**
>
> **"Public employee."** Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard 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.
>
> The term shall not include individuals who are employed by this Commonwealth or any political subdivision thereof in teaching as distinguished from administrative duties.

65 Pa.C.S. § 1102.

The Regulations of the State Ethics Commission similarly define the term "public employee" and set forth the following additional criteria:

(ii) The following criteria will be used, in part, to determine whether an individual is within the definition of "public employe":

(A) The individual normally performs his responsibility in the field without onsite supervision.

(B) The individual is the immediate supervisor of a person who normally performs his responsibility in the field without onsite supervision.

(C) The individual is the supervisor of a highest level field office.

(D) The individual has the authority to make final decisions.

(E) The individual has the authority to forward or stop recommendations from being sent to the person or body with the authority to make final decisions.

(F) The individual prepares or supervises the preparation of final recommendations.

(G) The individual makes final technical recommendations.

(H) The individual's recommendations or actions are an inherent and recurring part of his position.

(I) The individual's recommendations or actions affect organizations other than his own organization.

(iii) The term does not include individuals who are employed by the Commonwealth or a political subdivision of the Commonwealth in teaching as distinguished from administrative duties.

(iv) Persons in the following positions are generally considered public employes:

(A) Executive and special directors or assistants reporting directly to the agency head or governing body.

(B) Commonwealth bureau directors, division chiefs or heads of equivalent organization elements and other governmental body department heads.

(C) Staff attorneys engaged in representing the department, agency or other governmental bodies.

(D) Engineers, managers and secretary-treasurers acting as managers, police chiefs, chief clerks, chief purchasing agents, grant and contract managers, administrative officers, housing and building inspectors, investigators, auditors, sewer enforcement officers and zoning officers in all governmental bodies.

(E) Court administrators, assistants for fiscal affairs and deputies for the minor judiciary.

(F) School superintendents, assistant superintendents, school business managers and principals.

(G) Persons who report directly to heads of executive, legislative and independent agencies, boards and commissions except clerical personnel.

(v) Persons in the following positions are generally not considered public employes:

(A) City clerks, other clerical staff, road masters, secretaries, police officers, maintenance workers, construction workers, equipment operators and recreation directors.

(B) Law clerks, court criers, court reporters, probation officers, security guards and writ servers.

(C) School teachers and clerks of the schools.

51 Pa. Code § 11.1.

The following terms are relevant to your inquiry and are defined in the Ethics Act as follows:

§ 1102. Definitions

"Ministerial action." An action that a person performs in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of the person's own judgment as to the desirability of the action being taken.

"Nonministerial actions." An action in which the person exercises his own judgment as to the desirability of the action taken.

65 Pa.C.S. § 1102.

Status as a "public employee" subject to the Ethics Act is determined by an objective test. The objective test applies the Ethics Act's definition of the term "public employee" and the related regulatory criteria to the powers and duties of the position itself. Typically, the powers and duties of the position are established by objective sources that define the position, such as the job description, job classification specifications, and organizational chart. The objective test considers what an individual has the authority to do in a given position based upon these objective sources, rather than the variable functions that the individual may actually perform in the position. See, Phillips v. State Ethics Commission, 470 A.2d 659 (Pa. Cmwlth. 1984); Eiben, Opinion 04-002; Shienvold, Opinion 04-001; Shearer, Opinion 03-011. The Commonwealth Court of Pennsylvania has specifically considered and approved the Commission's objective test and has directed that coverage under the Ethics Act be construed broadly and that exclusions under the Ethics Act be construed narrowly. See, Phillips, supra.

The first portion of the statutory definition of "public employee" includes individuals with authority to take or recommend official action of a nonministerial nature. 65 Pa.C.S. § 1102. Likewise, the regulatory criteria for determining status as a public employee, as set forth in 51 Pa. Code § 11.1 ("public employee" (ii)), include not only individuals with authority to make final decisions but also individuals with authority to forward or stop recommendations from being sent to final decision-makers; individuals who prepare or supervise the preparation of final recommendations; individuals who make final technical recommendations; and individuals whose recommendations are an inherent and recurring part of their positions. See, e.g., Reese/Gilliland, Opinion 05-005.

In applying the objective test in the instant matter, the necessary conclusion is that in your former capacity as a Business Analyst 2 with DOH--both prior to your retirement and following your retirement as a temporary annuitant with DOH serving in the same position--you would be considered a "public employee" subject to the Ethics Act. See, Graves, Opinion 00-009; McGlathery, Opinion 00-004. As a Business Analyst 2 with DOH, you had the ability to take or recommend official action with respect to subparagraph (5) within the definition of "public employee" as set forth in the Ethics Act, 65 Pa.C.S. § 1102. Specifically, the following duties set forth in the position description and job classification specifications would be sufficient to establish status as a "public employee" subject to the Ethics Act:

- Serving as the program office representative for all areas when outside vendors are employed on contractual arrangements between BIT application developers and DOH;
- Negotiating time frames and processes, evaluating contractor work products and resolving contract disputes;
- Designing and managing program/business application testing of new application modules and system changes as they come out of development prior to acceptance and usage by DOH employees and/or health care providers;
- Serving as initial point of contact for other agencies interested in utilizing SAIS for Communities of Practice standards, preparing draft requirements needed for other agencies to implement the use of SAIS, and serving as liaison between other agencies and SAIS vendor to secure estimates, discuss requirements and provide other assistance as needed;
- Overseeing all program/business aspects of system development and/or acquisition, preparing work statements for contractual support, coordinating installation of equipment and software for users with BIT, and testing and approving program/business applications prior to acceptance by DOH;
- Designing and managing a deputate-wide AT equipment inventory and equipment replacement schedule;
- Evaluating the effectiveness of a project or contract to ensure goals, objectives, or terms are met;
- Working with business users to develop and implement improved business processes for their application to an IT system in support of agency program policy;
- Working with users to develop or enhance system requirements; and

- Conducting system testing or coordinating system testing with users and reviewing and approving test results performed by contractors.

The foregoing activities would also meet the criteria for determining your status as a public employee under the Regulations of the State Ethics Commission, specifically at 51 Pa. Code § 11.1, "public employee," subparagraphs (i) and (ii).

Turning to your second specific inquiry, you are advised that the restrictions of Section 1103(g) of the Ethics Act apply for a full one-year period each time an individual becomes a former public employee. Graves, supra; McGlathery, supra. Thus, when you initially retired from DOH on June 22, 2007, you became a former public employee subject to the restrictions of Section 1103(g) of the Ethics Act. When you returned to work as an annuitant with DOH after your retirement, you once again became a public employee subject to the provisions of the Ethics Act. On November 6, 2007, when you terminated your service as an annuitant with DOH, you again became a "former public employee" subject to the restrictions of Section 1103(g) of the Ethics Act, and the one-year period of applicability of Section 1103(g) began to run anew from that point in time.

Although you have not posed a specific inquiry with respect to the post-employment restrictions of Section 1103(g), the submitted facts provide that you have entered into a contract to perform work for a private firm that provides services to several governmental agencies, including DOH. Therefore, in order to provide a complete response to your inquiries, this advisory shall set forth the restrictions of Section 1103(g) of the Ethics Act.

While Section 1103(g) of the Ethics Act 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 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/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 public service, 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/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 No. 90-006; Sharp, Opinion 90-009-R.

The governmental body with which you are deemed to have been associated upon termination of public service, hereinafter referred to as your "former governmental

body," is DOH in its entirety as well as any boards, committees, and the like on which you served in your public capacity.

At such times as Section 1103(g) of the Ethics Act would apply to you, it would prohibit you from engaging in prohibited representation of ATG before your former governmental body. Although Section 1103(g) of the Ethics Act would only apply to restrict you with respect to prohibited "representation" before your former governmental body, you are advised that to the extent ATG would provide services to other entities that would have involvement with your former governmental body, you would have to exercise caution to ensure that you would not engage in prohibited representation before your former governmental body as to such services, such as, for example, through the prohibited inclusion of your name on documents submitted to your former governmental body.

Based upon the facts that have been submitted, the latter portion of 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.

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: In the former capacity as a Business Analyst 2 with the Commonwealth of Pennsylvania Department of Health ("DOH"), both prior to your retirement and following your retirement as a temporary annuitant with DOH serving in the same position, you were a "public employee" subject to the Public Official and Employee Ethics Act, 65 Pa.C.S. § 1101 et seq. ("Ethics Act"). When you initially retired from DOH on June 22, 2007, you became a former public employee subject to the restrictions of Section 1103(g) of the Ethics Act. When you returned to work as an annuitant with DOH after your retirement, you once again became a public employee subject to the provisions of the Ethics Act. On November 6, 2007, when you terminated your service as an annuitant with DOH, you again became a "former public employee" subject to the restrictions of Section 1103(g) of the Ethics Act, and the one-year period of applicability of Section 1103(g) began to run anew from that point in time. The governmental body with which you are deemed to have been associated upon termination of public service, hereinafter referred to as your "former governmental body," is DOH in its entirety as well as any boards, committees, and the like on which you served in your public capacity. The restrictions as to representation outlined above must be followed. The propriety of the proposed conduct has only been addressed under the Ethics Act.

Further, since service has been 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 service.

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

ADVICE OF COUNSEL

May 24, 2005

Robert V. Hess
Deputy Managing Director
Special Needs Housing
Office of Emergency Shelter & Services
City of Philadelphia
1321 Arch Street, 5th Floor
Philadelphia, PA 19107

05-545

Re: Public Employee; SFI; Social Service Program Analyst; Social Service Program Supervisor; City of Philadelphia; Office of Emergency Shelter and Services.

Dear Mr. Hess:

This responds to your letter dated April 20, 2005, by which you requested advice from the State Ethics Commission.

Issue: Whether a Social Service Program Analyst and Social Service Program Supervisor with the City of Philadelphia, Office of Emergency Shelter and Services would be considered "public employees" subject to the Public Official and Employee Ethics Act (the "Ethics Act"), 65 Pa.C.S. § 1101 et seq., and the Regulations of the State Ethics Commission, and particularly, the requirements for filing Statements of Financial Interests.

Facts: As the current employer of fifteen (15) individuals (collectively referred to herein as the "Employees") holding the job title of either Social Service Program Supervisor or Social Service Program Analyst, you seek an advisory from the State Ethics Commission as to whether such Employees are "public employees" subject to the Ethics Act and the Regulations of the State Ethics Commission. See, 65 Pa.C.S. §1102; 51 Pa. Code §11.1. You specifically question whether they are required to file Statements of Financial Interests. You have submitted facts that may be fairly summarized as follows.

The City of Philadelphia ("City"), Office of Emergency Shelter Services ("OESS") is responsible for providing shelter and supportive services for homeless adults and families in the Philadelphia area through a variety of City offices and outside agencies that contract with the City. Certain Social Service Program Analysts and Supervisors assigned to OESS are responsible for monitoring compliance by contracted shelters with the provisions of the emergency shelter services contracts for homeless families and single adults. Other responsibilities include monitoring, inspecting, and providing technical assistance to a specified number of shelters, and providing overall contractual

monitoring for compliance and operations, which activities translate into an Annual Compliance Report that meets Federal, State, and County requirements.

Specific responsibilities of a Social Service Program Analyst include periodically monitoring case management services provided under contract for single adults in emergency shelter placement, ensuring compliance with City requirements mandated by the Department of Licenses and Inspections and Health Department environmental reports, and following up to assure compliance with City Code violations. In addition, an individual in this position participates in various meetings and in the implementation and integration of Client-based Performance Measurements, which include contracts, proposal and budget reviews and recommendations.

Critical technical support is provided to contracted providers by means of site visits, follow-up telephone calls and other interventions directed toward conditions that affect the health and safety of residents.

You state that based upon the foregoing, OESS concluded that individuals holding the job title of either Social Service Program Supervisor or Social Service Program Analyst are "public employees," and requested such individuals to file Statements of Financial Interests ("SFIs"). OESS was recently advised by AFSCME District Council 47 that their members have been instructed not to comply with OESS's request.

You have submitted copies of the following documents, which documents are incorporated herein by reference: City of Philadelphia, Division of Social Services, Adult Services Organization Chart; Contracts Management Unit Organization Chart; Housing Support Services Division Organization Chart; Quality Management Team Organization Chart; job descriptions for Social Service Program Supervisor and Social Service Program Analyst; and a list of the names of the individuals on whose behalf you seek this advisory and their corresponding job titles.

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.

The Ethics Act defines the term "public employee" as follows:

> **§ 1102. Definitions**
>
> **"Public employee."** Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard 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.
>
> The term shall not include individuals who are employed by this Commonwealth or any political subdivision thereof in teaching as distinguished from administrative duties.

65 Pa.C.S. § 1102.

The Regulations of the State Ethics Commission similarly define the term "public employee" and set forth the following additional criteria:

> (ii) The following criteria will be used, in part, to determine whether an individual is within the definition of "public employe":
>
> (A) The individual normally performs his responsibility in the field without onsite supervision.
>
> (B) The individual is the immediate supervisor of a person who normally performs his responsibility in the field without onsite supervision.
>
> (C) The individual is the supervisor of a highest level field office.
>
> (D) The individual has the authority to make final decisions.
>
> (E) The individual has the authority to forward or stop recommendations from being sent to the person or body with the authority to make final decisions.
>
> (F) The individual prepares or supervises the preparation of final recommendations.
>
> (G) The individual makes final technical recommendations.
>
> (H) The individual's recommendations or actions are an inherent and recurring part of his position.
>
> (I) The individual's recommendations or actions affect organizations other than his own organization.
>
> (iii) The term does not include individuals who are employed by the Commonwealth or a political subdivision of the Commonwealth in teaching as distinguished from administrative duties.
>
> (iv) Persons in the following positions are generally considered public employes:
>
> (A) Executive and special directors or assistants reporting directly to the agency head or governing body.

(B) Commonwealth bureau directors, division chiefs or heads of equivalent organization elements and other governmental body department heads.

(C) Staff attorneys engaged in representing the department, agency or other governmental bodies.

(D) Engineers, managers and secretary-treasurers acting as managers, police chiefs, chief clerks, chief purchasing agents, grant and contract managers, administrative officers, housing and building inspectors, investigators, auditors, sewer enforcement officers and zoning officers in all governmental bodies.

(E) Court administrators, assistants for fiscal affairs and deputies for the minor judiciary.

(F) School superintendents, assistant superintendents, school business managers and principals.

(G) Persons who report directly to heads of executive, legislative and independent agencies, boards and commissions except clerical personnel.

(v) Persons in the following positions are generally not considered public employes:

(A) City clerks, other clerical staff, road masters, secretaries, police officers, maintenance workers, construction workers, equipment operators and recreation directors.

(B) Law clerks, court criers, court reporters, probation officers, security guards and writ servers.

(C) School teachers and clerks of the schools.

51 Pa. Code § 11.1.

Status as a "public employee" subject to the Ethics Act is determined by applying the above definition and criteria to the position held. The focus is necessarily upon the position itself, and not upon the individual incumbent in the position, the variable functions of the position, or the manner in which a particular individual occupying the position may carry out those functions. See, Phillips v. State Ethics Commission, 470 A.2d 659 (Pa. Commw. Ct. 1984); and Mummau v. Ranck, 531 Fed. Supp. 402 (E.D. Pa. 1982). Furthermore, the Commonwealth Court of Pennsylvania has directed that coverage under the Ethics Act be construed broadly and that exclusions under the Ethics Act be construed narrowly. See, Phillips, supra.

Based upon the above judicial directives, the provisions of the Ethics Act, the State Ethics Commission Regulations, and the opinions of the State Ethics Commission, in light of the duties and responsibilities of a Social Service Program Supervisor or Social Service Program Analyst, the necessary conclusion is that the Employees are "public employees" subject to the financial reporting and disclosure requirements of the Ethics Act.

With regard to a Social Service Program Supervisor, it is clear that an individual holding this position has the ability to take or recommend official action with respect to subparagraphs (1), (2), (4), and (5) within the definition of "public employee" as set forth in the Ethics Act, 65 Pa.C.S. § 1102. Specifically, the job responsibilities of a Social

Service Program Supervisor include, but are not limited to the following: supervising a staff of subordinate Social Service Program Analysts; participating in developing program budgets, locating funding sources and drafting applications for funding; developing objective criteria for evaluating the effectiveness of programs; determining whether program operations conform with stated objectives and established guidelines; supervising and participating in the work of analysts engaged in conducting on-site evaluations of operations of contracted agencies as well as in-house organizational units; supervising the evaluation of federal and state social service program funding legislation to identify programs qualified for funding; writing requests for funding; reviewing proposals for contracted social services and recommending the selection of potential providers; and participating in formulating strategies for developing and modifying programs for children and youths or adults. These activities would also meet the criteria for determining status as a public employee under the Regulations of the State Ethics Commission, specifically at 51 Pa. Code § 11.1, "public employee," subparagraph (ii). Therefore, an Employee serving in the position of a Social Service Program Supervisor is a "public employee" subject to the Ethics Act and such an Employee is required to file Statements of Financial Interests pursuant to the Ethics Act.

With regard to a Social Service Program Analyst, it is clear that an individual holding this position has the ability to take or recommend official action with respect to subparagraphs (1), (2), (4), and (5) within the definition of "public employee" as set forth in the Ethics Act, 65 Pa.C.S. § 1102. Specifically, the job responsibilities of a Social Service Program Supervisor include, but are not limited to the following: conducting on-site evaluations of provider agencies to evaluate the social service programs and activities contracted by the City; determining agencies' conformance with stated objectives and departmental and governmental standards; identifying problem areas in the delivery of contracted services; analyzing staffing patterns, work process, and administrative operations and procedures; developing methodology for collecting information used for program or budget planning evaluation; selecting sampling techniques, analyzing data, and evaluating findings; performing in-house organizational quality control evaluations; participating in formulating strategies to improve existing programs and procedures; participating in the development of new program proposals to ensure their conformance with stated guidelines; identifying funding criteria and program guidelines of federal and state program legislation and ascertaining their impact on providers' social services; identifying social service programs qualified for funding under federal or state program legislation; writing requests for funding based upon funding criteria or legislation; processing and tracking contracts for provider social services; and securing all necessary contract signatures for finalization. These activities would also meet the criteria for determining status as a public employee under the Regulations of the State Ethics Commission, specifically at 51 Pa. Code § 11.1, "public employee," subparagraph (ii). Therefore, an Employee serving in the position of a Social Service Program Analyst is a "public employee" subject to the Ethics Act and such an Employee is required to file Statements of Financial Interests pursuant to the Ethics Act.

Conclusion: The fifteen (15) individuals on whose behalf you seek this advisory (collectively referred to herein as the "Employees") who hold the job title of either Social Service Program Supervisor or Social Service Program Analyst with the City of Philadelphia ("City"), Office of Emergency Shelter Services ("OESS"), are "public employees" subject to the Public Official and Employee Ethics Act and the Regulations of the State Ethics Commission. Accordingly, such Employees must file Statements of Financial Interests each year in which they hold their positions and the year following their termination of such service.

If the Employees have not already done so, they must file Statements of Financial Interests within 30 days of this Advice.

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,

Vincent J. Dopko
Chief Counsel

STATE ETHICS COMMISSION
309 FINANCE BUILDING
P.O. BOX 11470
HARRISBURG, PA 17108-1470
TELEPHONE (717) 783-1610

ADVICE OF COUNSEL

July 23, 1997

John A. Supplee
293 East South Street
Wilkes Barre, PA 18702-5805 97-598

Re: Former Public Employee; Section 3(g); Department of Environmental Protection, Bureau of Water Supply Management; Sanitarian.

Dear Mr. Supplee:

This responds to your letter of June 23, 1997 by which you requested advice from the State Ethics Commission.

Issue: Whether the Public Official and Employee Ethics Law presents any restrictions upon employment of a Sanitarian following termination of service with the Department of Environmental Protection.

Facts: You are employed by the Department of Environmental Protection (DEP), Bureau of Water Supply Management, in the position of Sanitarian. You have held that position since March, 1992. From June, 1989 to March, 1992 you held the position of Mining Specialist with the Bureau of Mining and Reclamation.

Your duties as Mining Specialist included the issuance of bonding increment on coal and non-coal mining permits, the issuance of small non-coal mining permits, coal and non-coal mining permit amendments/revisions and transfer of permits.

Your duties as Sanitarian include the enforcement of the Safe Drinking Water Act. You performed inspections, issued enforcement action documents, answered public complaints, collected water samples, and performed consultations for both public and private water supplies. You also performed inspections on restaurants, farm labor camps, public bathing places and campgrounds/organized camps which functions were transferred to the Department of Agriculture in October, 1995.

You are considering terminating State employment to pursue employment with a consulting firm in the area of water quality/hydrogeology and request an advisory as to any restrictions that may be placed upon you under the Ethics Law.

Discussion: As a Sanitarian with the Department of Environmental Protection (DEP), Bureau of Water Supply Management, you would be considered a "public employee" subject to the Public Official and Employee Ethics Law ("Ethics Law") and

the Regulations of the State Ethics Commission. See, 65 P.S. §402; 51 Pa.Code §11.1. This conclusion is based upon the description of your duties that you have supplied, which when reviewed on an objective basis, indicates 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 public service, you would become a "former public employee" subject to Section 3(g) of the Public Official and Employee Ethics Law.

While Section 3(g) does not prohibit a former public official/public employee from accepting a position of employment, it does restrict the public official/public employee with regard to "representing" a "person" before "the governmental body with which he has been associated":

> Section 3. Restricted activities.
>
> (g) 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 P.S. §403(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 Law as follows:

> Section 2. 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 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 P.S. §402.

The term "Person" is very broadly defined. It 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/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 3(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 public service, 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 public official/public employee may not be identified on documents submitted to the former governmental body. The 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 Law 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 3(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/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 No. 90-006; Sharp, Opinion 90-009-R.

The governmental body with which you were associated upon termination of public service would be DEP in its entirety, including but not limited to the Bureau of Water Supply Management. Therefore, for the first year after termination of your service with DEP, Section 3(g) of the Ethics Law would apply and restrict "representation" of "persons" before DEP.

Based upon the facts which have been submitted, this Advice has addressed the applicability of Section 3(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 3(a) of the Ethics Law. Further, you are advised that Sections 3(b) and 3(c) of the Ethics Law provide in part that no person shall offer to a public official/employee and no public official/employee shall solicit or accept anything of monetary value based upon the understanding that the vote, official action, or judgment of the public official/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 Law; 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 Law.

Conclusion: As a Sanitarian with the Department of Environmental Protection (DEP), Bureau of Water Supply Management, you would be considered a "public employee" as defined in the Ethics Law. Upon termination of service with DEP, you would become a "former public employee" subject to Section 3(g) of the Ethics Law. The former governmental body would be DEP in its entirety, including but not limited to the Bureau of Water Supply Management. The restrictions as to representation outlined above must be followed. The propriety of the proposed conduct has only been addressed under the Ethics Law.

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

Pursuant to Section 7(11), this 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, providing the requestor 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,

Vincent J. Dopko
Chief Counsel

STATE ETHICS COMMISSION
309 FINANCE BUILDING
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ADVICE OF COUNSEL

April 14, 1994

Timothy M. Grieneisen
Sanitarian
Water Supply and Community Health
Pennsylvania Department of Environmental Resources
Knox District Office
White Memorial Building
Knox, PA 16232

94-551

Re: Conflict, Public Official/Employee, Sanitarian, Department of Environmental Resources, Private Employment or Business, Board of Director for Rails-to-Trails.

Dear Mr. Grieneisen:

This responds to your letter of March 24, 1994, in which you requested advice from the State Ethics Commission.

Issue: Whether a Sanitarian for the Department of Environmental Resources is prohibited or restricted by the Public Official and Employee Ethics Law from working with, being employed by or associated with a business/person in a private capacity in addition to public service.

Facts: You are currently employed as a Sanitarian with the Bureau of Water Supply and Community Health of the Pennsylvania Department of Environmental Resources, Northwest Regional Office. Your official headquarters is the Knox District Office. Your duties involve regulating public water systems, inspecting and licensing public eating and drinking facilities, inspecting swimming pools, inspecting public schools, and investigating complaints in regard to the same.

You have been asked to serve on the Board of Directors for a Rails-to-Trails group. They are organized to develop an abandoned railroad from DuBois (Clearfield County) to Ridgeway (Elk County), Pennsylvania. This group formed approximately two years ago has made substantial progress toward this effort. As of the writing of this memo you have yet to be involved in <u>any</u> of their activities; however, you have been asked to serve on their Board of Directors.

You believe that Rails-to-Trails projects promote similar goals of the Department and you personally perceive little potential conflict relative to your duties.

Accordingly, you are requesting an Advisory from the State Ethics Commission as to whether there would be potential conflict in your duties with a director of Rails-to-Trails which proposes to develop this trail.

Discussion: As a Sanitarian for the Department of Environmental Resources, you are a public employee as that term is defined under the Ethics Law, and hence you are subject to the provisions of that law.

Section 3(a) of the Ethics Law provides:

> Section 3. Restricted Activities.
>
> (a) No public official or public employee shall engage in conduct that constitutes a conflict of interest.

The following terms are defined in the Ethics Law as follows:

> Section 2. Definitions.
>
> "Conflict or conflict of interest." Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.
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> "Authority of office or employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public

employment.

> "Business with which he is associated." Any business in which the person or a member of the person's immediate family is a director, officer, owner, employee or has a financial interest.

In addition, Sections 3(b) and 3(c) of the Ethics Law provide in part that no person shall offer to a public official/employee anything of monetary value and no public official/employee shall solicit or accept anything of monetary value based upon the understanding that the vote, official action, or judgement of the public official/employee would be influenced thereby. Reference is made to these provisions of the law not to imply that there has or will be any transgression thereof but merely to provide a complete response to the question presented.

In applying the above provisions of the Ethics Law to the instant matter, we note that Section 3(a) of the Ethics Law does not prohibit public officials/employees from outside business activities or employment; however, the public official/employee may not use the authority of office for the advancement of his own private pecuniary benefit or that of a business with which he is associated. Pancoe, Opinion 89-011. A public official/employee must exercise caution so that his private business activities do not conflict with his public duties. Crisci, Opinion 89-013. Thus, a public official/employee could not perform private business using governmental facilities or personnel. In particular, the governmental telephones, postage, staff, equipment, research materials, personnel or any other property could not be used as a means, in whole or part, to carry out private business activities. In addition, the public official/employee could not during government working hours, solicit or promote such business activity. Pancoe, supra. Similarly, Section 3(a) would expressly prohibit the use of confidential information received by holding public office/ employment for such a prohibited private pecuniary benefit.

In the event that your private employer or business has a matter pending before your governmental body or if you as part of such official duties must participate, review or pass upon that matter, a conflict would exist. Miller, Opinion 89-024. In those instances, it will be necessary that you be removed from that process.

In such cases as noted above, Section 3(j) of the Ethics Law would require not only that you abstain from participation but also file a written memorandum to that effect with the person recording the minutes or your supervisor.

In summary, the Ethics Law would restrict the following:

1. The use of authority of office to obtain any business in a private capacity;

2. utilization of confidential information gained through public position;

3. participating in discussions, reviews, or recommendations on matters which relate to the business/private employer which may come before the governmental body and in such cases publicly announcing the relationship or advising the supervisor as well as filing a written memorandum as per the requirements of Section 3(j) of the Ethics Law. Brooks, Opinion 89-023.

The propriety of the proposed conduct has only been addressed under the Ethics Law; the applicability of any other statute, code, ordinance, regulation or other code of conduct other than the Ethics Law has not been considered in that they do not involve an interpretation of the Ethics Law. Specifically not addressed herein is the applicability of the Governor's Code of Conduct or the Civil Service Act.

Conclusion: As a Sanitarian for the Department of Environmental Resources, you are a public employee subject to the provisions of the Ethics Law. Section 3(a) of the Ethics Law would not preclude you from outside employment/business activity subject to the restrictions and qualifications as noted above. In the event that the employer/business has matters pending before your governmental body, then you could not participate in that matter and the disclosure requirements of Section 3(j) of the Ethics Law as outlined above must be satisfied. Lastly, the propriety of the proposed conduct has only been addressed under the Ethics Law.

Pursuant to Section 7(11), this 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, providing the requestor 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 <u>actually received</u> at the Commission within fifteen (15) 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).

Sincerely,

Vincent J. Dopko
Chief Counsel