

Philadelphia Board of Ethics

September 20, 2006

In Re: Dianah Neff

I. Introduction

On August 15, 2006, Civitium, L.L.C. issued a press release announcing that Dianah Neff, Chief Information Officer for the City of Philadelphia, would be joining the firm as a Senior Partner, beginning in September 2006. Ms. Neff has been the Chief Information Officer for Philadelphia since May 2001. Previously, Civitium had provided consulting services to the City and to Wireless Philadelphia, a nonprofit created by the City.

To address concerns that there may be at least an appearance that Ms. Neff could have been using her City position for the benefit of a future employment opportunity, on August 16, 2006, Mayor John F. Street asked the Philadelphia Board of Ethics to review the matter to ensure that all applicable City and state ethics rules were complied with.

In response to the Mayor's request, the Ethics Board conducted interviews; took two recorded statements under oath; and reviewed documents concerning Civitium's contracts with the City and with Wireless Philadelphia, in an effort to learn more about Civitium's contracts with the City that were awarded and managed by Ms. Neff, and about Ms. Neff's employment negotiations with Civitium.

Interviews:

- 1 Greg Richardson, Managing Partner, Civitium, LLC (via phone, on August 30 & 31, 2006)
- 2 Derek Pew, former acting CEO for Wireless Philadelphia (via phone, on August 23, 2006)

- 3 Thomas H. Speranza, Esq., Partner, Kleinbard, Bell & Brecker, LLP (outside counsel to Wireless Philadelphia) (via phone, on August 23, 2006)
- 4 Kevin Greenberg, Esq., Special Corporate Counsel, City Law Department (via phone, on 18, 2006)
- 5 Greg Goldman, CEO, Wireless Philadelphia (via Phone, on August 31, 2006)

Recorded Statements:

- 1 Dianah Neff, Chief Information Officer, City of Philadelphia, on August 30, 2006
- 2 Joyce Wilkerson, Chief of Staff, Mayor's Office, on September 1, 2006

II. Summary of the Facts

Civitium performed consulting work for the City's Wireless Philadelphia project, beginning in 2004. First conceived in 2003, then later recommended by the Regional Cooperation Committee of the 21st Century Review Forum in early 2004, the goal of the Wireless Philadelphia project is to bring wireless internet access throughout the City.

In the summer of 2004, the City successfully implemented a wireless "hot spot" in Love Park, at Ms. Neff's direction. Based upon the success of the Love Park wireless pilot, in August 2004, the Mayor appointed a volunteer advisory committee, called the Wireless Executive Committee, to develop a business plan for the Wireless Philadelphia project, under the direction of Ms. Neff. (Neff Statement, pp. 6-8). Ms. Neff invited Civitium's managing partner, Greg Richardson, to work with the Executive Committee. Civitium describes itself as "the market-leading strategy, policy, technology and communications planning firm for community broadband initiatives." (See Civitium Press Release dated August 15, 2006).

Ms. Neff had met Mr. Richardson during the summer of 2004 at a municipal wireless event sponsored by Sprint Communications. Ms. Neff had been asked by Sprint Communications to give a presentation at that event. (Neff, pp. 7-8). Ms. Neff characterized Mr. Richardson's work with the Executive Committee as "volunteer" work. However, Ms. Neff

authorized a \$10,000 miscellaneous purchase order to cover Mr. Richardson's travel expenses associated with his work with the Executive Committee. (Neff Statement, pp 28-29). The miscellaneous purchase order was authorized on October 27, 2004, and Civitium was paid on November 11, 2004.

The business plan produced by the Executive Committee recommended that the City first conduct a radio frequency analysis. Pursuant to that recommendation, Ms. Neff awarded a \$138,000 contract to Civitium to conduct the radio frequency analysis (the "RF contract"). (Neff Statement, pp. 15-16). Because the RF contract was for professional services before contract reform measures took effect on February 1, 2006, it was not required to be competitively bid. According to the City's Automated Contract Information System ("ACIS"), the term of Civitium's RF contract ran from November 15, 2004 to December 17, 2004. Ms. Neff was the City's contract manager for Civitium's RF contract, and she authorized payments to the firm pursuant to its terms.

Shortly after Civitium's RF contract was concluded, Ms. Neff awarded the firm a second contract to draft a Request for Proposals for the City's Wireless Philadelphia project (the "RFP contract"). According to ACIS, the RFP contract ran from January 24, 2005 to June 24, 2005 and was valued at \$165,000. The RFP contract was not required to be competitively bid for the same reason that the RF contract was not required to be competitively bid. As with the first Civitium contract, Ms. Neff was the City's contract manager for the RFP contract, and she authorized payments to the firm pursuant to its terms.

On February 15, 2005, while Ms. Neff was managing Civitium's RFP contract with the City, Civitium issued a press release describing its successful completion of the RF analysis for the City. Ms. Neff was quoted in Civitium's February 15, 2005 press release as follows:

"The City is thrilled with the results of Civitium's study and excited to validate that license-exempt spectrum and metro-scale Wi-Fi and pre-WiMAX technologies are viable options to further the goals of Wireless Philadelphia, said Dianah Neff, Chief Information Officer for the City of Philadelphia."

Ms. Neff stated that she approved the use of her quote for Civitium's press release, and understood that it was being used to promote the firm. (Neff Statement, p. 42). In addition to being quoted in Civitium's February 15, 2005 press release, Ms. Neff was listed under "contacts" at the top of the release, along with Mr. Richardson. Ms. Neff's City telephone number was also provided. (Although Ms. Neff said that it was her practice to get approval for such outside quotes from the Mayor's Press Office, the Ethics Board could not independently confirm that she had done so in this case.)

On March 30, 2005, during Civitium's RFP contract with the City, Mayor Street announced Wireless Philadelphia and signed articles of incorporation as a non-profit. In June 2005, Earthlink was selected as the carrier for the Wireless Philadelphia project, pursuant to the RFP process. Beginning in June 2005 and ending in February, 2006, a series of contracts were negotiated between Earthlink, PAID, the City and Wireless Philadelphia.

In August 2005, Civitium was hired by Wireless Philadelphia as a consultant to assist it with its contract negotiations. By its terms, the \$150,000 contract between Civitium and Wireless Philadelphia was set to expire in December 2005, however the term of the contract (but not the amount), was extended into early February 2006, because contract negotiations took longer than initially expected. As the sole board member to Wireless Philadelphia at the time, Ms. Neff participated in the decision to award the consulting contract to Civitium and also authorized payments to the firm pursuant to its terms.

The August 2005 consulting contract with Wireless Philadelphia was Civitium's last contract with either the City or Wireless Philadelphia. The last payment by Wireless Philadelphia to Civitium was made on February 13, 2006, in an amount of \$15,000.

In late May 2006, Ms. Neff began to discuss the possibility of leaving the City to work for Civitium. Mr. Richardson initiated the discussions, which continued in July 2006. Mr. Richardson offered Ms. Neff a position on July 11, 2006. Although neither Mr. Richardson nor Ms. Neff could recall the specific date on which she accepted Civitium's employment offer, Mr. Richardson thought that it was approximately one week after the July 11th offer.

During her employment negotiations with Civitium, Ms. Neff agreed to participate in a “podcast” for Civitium on July 7, 2006. (The podcast is available on Civitium’s web site). Mr. Richardson asked Ms. Neff to participate in the podcast a couple of days before it was recorded.

In July, Ms. Neff told Ms. Wilkerson and the Mayor that she was considering offers from three firms, but she did not identify them at that time. (Neff Statement, p. 35; Wilkerson Statement, p. 4). While Ms. Neff said that she provided this information in early July, Ms. Wilkerson said that it occurred on July 19th, which was when she sent an email to the Mayor about it. Ms. Wilkerson said that she would have sent such an email within a day of receiving the information from Ms. Neff. (Wilkerson Statement, p. 5).

On August 15, 2006, Civitium issued a press release announcing that Ms. Neff would be joining the firm in September 2006. Ms. Neff authorized a quote for the August 15, 2006 press release, and understood that it was being issued to promote the firm. (Neff Statement, p. 39).

Ms. Neff said that before the August 15, 2006 press release was issued, she told both the Mayor and his Chief of Staff, Joyce Wilkerson, that she had accepted an offer from Civitium. Ms. Wilkerson said that she and the Mayor did not learn that Ms. Neff was going to join Civitium until they read the press release. (Neff Statement, pp. 39-41; Wilkerson Statement, p. 5).

Ms. Neff’s last day with the City was September 8, 2006. She started her employment with Civitium on September 11, 2006.

III. Analysis

There are a number of different ethics provisions that could conceivably present an issue under the facts of this matter. We will discuss each in turn.

A. Charter Section 10-102

Section 10-102 of the Charter prohibits certain compensated City officers and employees from benefiting from, or having a direct or indirect interest in, certain City contracts, even if they had no official connection with the contract. The full text of the provision is as follows:

City Officers and Employees Not to Engage in Certain Activities. As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

Prior Opinions of the City Solicitor and Board of Ethics have said that where a City employee, as an individual, enters into a personal services contract with the City, that clearly violates this provision. When the employee works for a firm that has a contract with the City, the provision is violated when the employee works on that contract for the outside contractor. Where the outside contractor has many contracts, and the employee happens to work for the outside contractor but not in any way related to the City contract, the provision is not violated, unless the City employee has a financial interest in the contract, such as where the employee's compensation includes a share of profits or revenue generated by the contract or where the employee otherwise benefits from the contract.

However, we have also said that where the City official or employee is in a compensated position of high authority (such as an officer or director) at the outside entity that has a City contract, that official or employee has at least an indirect interest in the City contract, even if no contract funds directly flow to that individual. See Opinions No. 92-2, 1992-1993 City Solicitor's Opinions, at 14; No. 92-14, 1992-1993 City Solicitor's Opinions, at 64; No. 92-27, 1992-1993 City Solicitor's Opinions, at 108. Thus, the Charter would prohibit such an interest. This prohibition may not be avoided by disclosure and disqualification (or "recusal"), as with some other ethics provisions.

In this particular matter, it is clear that Dianah Neff had no such interest in any of Civitium's contracts with the City. Nor did she have a prohibited interest in the City's contract with the nonprofit, Wireless Philadelphia, since the interests of the City are not separate from those of

Wireless Philadelphia. The application of Section 10-102 to such a situation is discussed in two opinions of the City's Board of Ethics, Opinion Nos. 82-12 and 83-01. In Opinion No. 83-01, the Ethics Board considered the question of whether the Managing Director, the Director of OHCD, and a Deputy Director of Finance may properly sit in their public capacities on the board of directors of a private non-profit housing rehabilitation corporation, PRP, Inc. The Ethics Board noted that the City officials served as directors of PRP, Inc. solely as "representatives of the City" and received no compensation from PRP, Inc. The Ethics Board discussed Charter Section 10-102 and Section 20-607 of the Philadelphia Code and observed:

At the very least, statutes of this nature are clearly intended to prohibit government officials from using their public positions to further their private interests, whatever their nature.

After quoting the well-known dictum, "No man can serve two masters," which is often cited by the courts in issues of conflict of interest, the Ethics Board opined:

In the instant situation where public officials are sitting on the Board of Directors of PRP, Inc. solely as an extension of their official duties, it would seem clear that they are properly serving but one master--the City of Philadelphia.

The Board concluded as follows:

In summary, this Board finds that the City officials whose conduct is in question here sit on the Board of Directors of PRP, Inc., in furtherance of a policy decision that the City's interests in housing rehabilitation can be furthered by such an arrangement. In this context, participation in the corporate affairs of PRP, Inc. is an incident of the official duties of these public servants and in no way involves their private interests, financial or otherwise. . . .

We believe that public officials must be afforded wide latitude to achieve in the manner that they deem appropriate the public purposes for which they were elected or appointed, so long as they maintain their singular loyalty to the public interest. Where, as here, officials neither profit from nor in any way devote their allegiance to

the private business in whose affairs they participate to help achieve these public purposes, there can be no conflict of interest.

Opinion No. 82-12 is similar. These two opinions thus describe an exception to the application of Charter Section 10-102. However, it is noteworthy that in both Opinions the Board of Ethics concluded that the outside employment in an entity with a City contract would be permissible only if the City official received no additional compensation for his/her service with the outside entity. We are advised that Dianah Neff was not compensated by Wireless Philadelphia. Her employment by Civitium did not begin until after her separation from the City. Accordingly, there is no issue under the Charter.

B. Philadelphia Code Section 20-607 (Conflict of Interest)

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to the personal interest, Code Section 20-607(a) provides:

(a) Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity . . .

As to the interest through another entity, Code Section 20-607(b) provides:

(b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section

20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

Note, also, that Section 20-609 of the Code provides that no City officer or employee "shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others." We have no information that Ms. Neff improperly used confidential City information.

Thus, for either a personal financial interest or an interest that an outside employer may have in City action, the rule is the same: Ms. Neff would have been required to disclose the conflict and disqualify herself. In such matters, she must publicly disclose the financial interest and announce her intention to disqualify herself from all official consideration of the matter.

We turn to how to apply these principles to Ms. Neff's situation. We have found no prior opinions that explicitly address whether an official has a prohibited conflict of interest when faced with taking official action that financially affects a potential future employer. Clearly, in the absence of a binding commitment from a potential employer, an individual is not yet a "member" of that firm, for purposes of Code 20-607(b). Nor is it clear that the individual would be personally "financially interested" in any official action affecting a firm, merely because the firm might hire that individual in the future. On the other hand, it is obvious that a City official who receives, or seeks, a promise of future employment in exchange for favorable City action, violates the law. However, the current investigation has not revealed any facts that support such an allegation.

In a newsletter issued in 1998 on the subject of post-employment restrictions, Client News No. 2-98, the Law Department advised the following on negotiating for employment:

A Sidelight on Negotiations with Potential Employers

Although this newsletter is intended to deal only with post-employment restrictions, there is one related question that affects current employees. We are occasionally asked whether a current City employee who is contemplating leaving City service may interview with or negotiate employment terms with a prospective employer who does business with the City. No ethics law addresses the issue of a public official negotiating for employment with a private company. However, for a City official to negotiate for future employment with a private company while simultaneously making official decisions that directly affects whether that company will be subject to favorable or unfavorable City action is certainly a matter that a reasonable member of the public could consider improper, and may well undermine public confidence in government. Certainly, if there is an understanding that the City official will favor his or her future employer, that would violate the ethics laws. Therefore, once a City employee begins talks with a prospective future employer, the official would be well-advised to take no official action with respect to that entity. If in doubt, ask. It is understandable that a City employee may not want to request a formal, public opinion where the employee may not want it yet known that he or she is looking for other employment. Please see the note below on confidential requests.

As noted in the “Summary of Facts” section above, the last contract between the City and Civitium expired in February 2006, with the last payment made from Wireless Philadelphia to Civitium on February 13, 2006. Also noted is that Ms. Neff did not begin to discuss employment opportunities with Civitium until late May 2006. Accordingly, we are in possession of no facts that raise an issue under Code Section 20-607. Nevertheless, as suggested in Client News No. 2-98, any official in Ms. Neff’s situation would certainly have been well advised to seek formal advice from the Law Department or the Ethics Board on any restrictions on her conduct that may have been imposed by the ethics laws.

C. Philadelphia Code Section 20-602 (Representation)

Code Section 20-602(1) prohibits a City officer from engaging in outside employment that involved representing another person, directly or indirectly, as that person's agent in any transaction involving the City. We

conclude that Ms. Neff's actions promoting the Wireless Philadelphia project were taken in her capacity of Chief Information Officer of the City, and not on behalf of any outside entity. Accordingly, there was no improper representation.

D. State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to Ms. Neff, as a public official. Section 1103(a) provides:

(a) Conflict of interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest.

What is a "conflict of interest" may be determined by reference to the definitions section of the Act for a definition of that term and terms included within that definition, as follows:

Section 1102. Definitions.

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

...

"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." Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

"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.

...

“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.

...

“Financial interest.” Any financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

65 Pa.C.S. §1102. These conflict of interest rules provide essentially the same requirement as provided under the City Code, as discussed above. Accordingly, since there is no issue under the Code, there is none under the State Ethics Act.

E. Appearance of Impropriety

As the Law Department observed in its 2000 newsletter, Client News No. 6-00:

The ethics laws do not prohibit actions of a City official that "have the appearance of impropriety." Nevertheless, the "Guide to Ethical Conduct for City Officers and Employees," published in 1982 City Solicitor's Opinions at page 306, states: "[I]mproper appearances may be as or more detrimental than actual conflicts to the public's confidence in City government. Situations of apparent impropriety should be avoided wherever possible."

This newsletter, as well as the one quoted earlier, Client News No. 2-98, emphasized that any official or employee whose conduct may be questioned is well advised to seek advice before proceeding. See also Philly Solicitor, Vol. 2, No. 2 (November 2002) and point no. 10 of “Ten Things Every Employee Should Know About the Ethics Rules,” posted on the home page of the Ethics Board’s Web site at www.phila.gov/ethicsboard. The importance of being sensitive to possible ethics issues and the necessity of seeking appropriate advice is also an important part of the ethics trainings that the Ethics Board has been conducting over the past year in all City departments. It approaches the level of being shocking for any City official, in the current atmosphere of scrutiny of official conduct, to proceed in any arguably questionable manner, without seeking advice from the Board of Ethics or the Law Department. The Law Department reports that Ms. Neff had sought their advice on a number of non-conflict matters, chiefly involving gifts, over the years, so she certainly was aware of the procedure.

IV. Findings

There is no evidence, in the information gathered by this Board, that Ms. Neff used the authority of her office to ensure that she would get hired by Civitium, or to benefit Civitium, having determined that she would be hired by them. Accordingly, the Board of Ethics concludes that there was no violation of the conflict of interest rules, either City Code Section 20-607 or Section 1103(a) of the State Ethics Act. There are no issues under any of the other ethics provisions considered.

Accordingly, the Board recommends that no enforcement action be pursued.

Nevertheless, the Board considers it a matter of concern that a high City official, who has very recently had responsibility for awarding and monitoring a contract with a vendor, would pursue an employment opportunity with that vendor, without consulting with either the Law Department or the Board of Ethics about possible restrictions under the ethics laws. Mayor’s Executive Order No. 001-04 charges this Board with the responsibility to “advise the Mayor, the Cabinet, the Personnel Director, and such other officials as the Board deems appropriate, regarding the most effective manner of ensuring that all City officials and employees fully

understand and appreciate both the specifics of the applicable ethics laws and the importance of compliance with such laws.”

The Board intends to make this Report public and to urge, once again, that City officers and employees make sure that they have attended an ethics training and commit themselves to seek advice when any potential ethics issue presents itself. All City officers and employees are urged to attend to the recommendation in Section V (“Recommendation”) of this Report.

IV. Opportunity to Respond

The Ethics Board provided Ms. Neff with a draft of this Report on September 14, 2006 and invited her to respond, which she did on September 17, 2006.

In her response, Ms. Neff notes that the Ethics Board did not find that she violated any conflict of interest rules, and takes issue with the Board’s express concerns about her conduct. Ms. Neff added that, since there are no formal rules or procedures that City employees must follow when considering potential employment opportunities with a former City vendor, the Board’s notation her failure to seek advice from either the Law Department or the Board is unfair.

The Board considered Ms. Neff’s response, but did not change or modify its findings. As stated in the Law Department’s newsletter issued in 2000, “situations of apparent impropriety should be avoided wherever possible.” Although conduct that creates an appearance of impropriety does not explicitly violate any particular ethics law, such conduct tends to weaken public confidence in government.

The pursuit of an employment opportunity with a former City vendor by a City official who had very recent responsibility for awarding and monitoring multiple contracts with that vendor creates a situation of apparent impropriety. It creates the appearance that the City official may have exercised their official authority in a way that may have created or enhanced a personal financial opportunity. This situation of apparent impropriety could have been avoided had Ms. Neff sought confidential guidance from either the Law Department or the Ethics Board as soon as she began employment negotiations with Civitium.

V. Recommendation

All City officers should follow the **ASK** procedure:

Acquire a basic knowledge of the ethics rules by attending a training and keeping informed of updates from the Ethics Board;

Sensitize yourself to the kinds of situations that raise ethical issues and learn to recognize when such a situation arises; and

Know how the ethics laws apply to your particular situation when such a situation arises, by asking for advice from the Board of Ethics.