CITY OF PHILADELPHIA

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Advice of Counsel

January 9, 2008

Ruben David
Capital Program Office
City of Philadelphia
One Parkway Building, 11th Floor
1515 Arch Street
Philadelphia, PA 19102

Re: Request for Advice Regarding Outside Employment

Dear Mr. David:

In e-mail messages dated January 7 and 8, 2008, you have requested advice on the restrictions the ethics laws would place on your activities as an employee of the Philadelphia Capital Program Office, if you were to take a paid position as a course instructor for Temple University. You advise that you serve the City as a civil service employee in the Capital Program Office. You advise that you would be using personal time for this proposed outside employment, and that the teaching opportunity, for which you were recruited by Temple Engineering, is not part of any arrangement between Temple and the City.

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

There is no general requirement that City officers or employees refrain from all private or self-employment while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment. However, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is prohibited for a City officer or employee.

Home Rule Charter

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 rulings have held 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 <u>on that contract</u> 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.

It may well be that Temple University has at least one contract with the City. Accordingly, if you obtain this proposed position with Temple, and the University has, or acquires, any contract with the City that involves payment out of the City Treasury for purchase of property, construction, or provision of services, you could be in violation of the Charter, if contract funds flow to you. However, Temple is a large university, and I presume that there are other accounts out of which you may be paid.

Philadelphia Code

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer from engaging in outside employment that involved representing another person, directly or indirectly, as that person's agent or attorney in any transaction involving the City. This provision may not be avoided by disclosure and disqualification. However, it should not be difficult for you to avoid representing Temple before the City, and I would not expect that any representation would be expected of an instructor in one course. Section 20-602(5) applies a similar restriction to any outside firm of which the officer is a member, so that anyone in that firm would be prohibited from the same representation.[1] Unlike §20-602(1), however, §20-602(5) does not apply if the City official makes the public disclosure and disqualification provided in §20-608[2]. Thus, an officer or employee of Temple University could represent the firm in a transaction involving the City, provided that you made the requisite disclosure and

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[1] You have not advised whether Temple would consider you to be a part-time employee or an independent contractor. If you will be an employee of Temple, you would be a "member" of the university, for purposes of this provision.

[2] Section 20-608(1) of the Philadelphia Code spells out the precise procedure for the disclosure required: you should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Your public position (and description of duties relevant to the conflict, if not obvious);
3. Your private position or financial interest (or that of a relative or business of the discloser or relative) that presents the conflict;
4. A statement of how your public duties may intersect with your private interest or that of your employer (if not obvious from 2 & 3 above); and
5. Your intention to disqualify yourself from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the agency in which you would be acting, presumably the Capital Program Office; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

disqualification. However, this would not apply, if you will be an independent contractor. See note 1.

Additionally, 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.

Thus, for either a personal financial interest or an interest that Temple University may have in City action, the rule is the same: you must disclose the conflict and disqualify yourself. In such matters, you must publicly disclose the financial interest and announce your intention to disqualify yourself from all official consideration of the matter. Participation that you should avoid would include not only final decisions, but also any preliminary discussion, review, or action.

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."

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to you.[3] 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.
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> 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:
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> . . .
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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.
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> "Business." Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or

[3] The Act applies only if you are a "public official" or "public employee," as defined in the Act. You have not advised as to your title or job responsibilities within the Capital Program Office. Hence, I cannot determine whether you are a "public employee," which is defined in the Act to include: "Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person." 65 Pa.C.S. §1102. I will assume, without deciding, that the Act applies to you also as an employee of the Capital Program Office, since the Act's conflict of interest provision is similar to that of the City Code, and therefore, that Act imposes no additional requirement. However, if you wish a definitive determination as to whether the Act applies to you in general as an employee of the City, please provide me with a job description.

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.
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> . . .
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> "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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> . . .
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> "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.

I conclude that for you to take official action that has an economic impact on Temple University would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) would restrict your activities as a public official or public employee relative to the use of authority of office to obtain a private pecuniary benefit for Temple University, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, by the Capital Program Office, that would affect Temple See also 65 Pa.C.S.A. §1103(j).

Section 1103(f) of the State Ethics Act, 65 Pa.C.S. §1103(f), requires that a contract valued at more than $500 between a City official or his spouse or child or a business with which one of those individuals is associated and the official's "governmental body" must be awarded through an "open and public process," involving prior public notice of the contract opportunity and public disclosure of all proposals considered and contracts awarded. The same provision applies to any subcontract under such a contract. Based on opinions of the State Ethics Commission,

I conclude that the City's RFP process generally meets this requirement. However, a sole source contract would not, unless the provisions of City Code Chapter 17-1400 were applied.

Finally, I note that the State Ethics Commission has final administrative jurisdiction over interpretation of the State Ethics Act. Thus, you may wish to request the advice of the Commission to obtain a definitive ruling on any particular fact situation, including whether the Act applies to you. Please note that the Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [the Act]." 65 Pa.C.S. §1109(g). Presumably, it is this provision that is the reason for the concurrent jurisdiction of the Law Department provided for in Charter §4-1100 as to matters involving State law. Since the Board of Ethics is not "the solicitor" of the City, you may, if you wish, also obtain a nonconfidential opinion from the Law Department as to the application of the State Ethics Act.

Civil Service Regulations

You advise that you are a Civil Service employee. Civil Service Regulation 33.02 provides, in relevant part:

> 33.02 OUTSIDE EMPLOYMENT. An employee performing "outside work" by working for an employer other than the City, engaging in private or self-employment or rendering service for private interests may do so only in accordance with the following provisions:
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> 33.021 CONFLICT OF INTEREST. No employee shall perform outside work which is incompatible with the proper discharge of his official duties.
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> . . .
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> 33.023 COMMUNITY RELATIONS. The outside job must be one that will not bring disfavor or disrespect upon the employee, the department or the City, in accordance with the judgment of the responsible authority of the respective Office, Board or Commission involved.
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> 33.024. IMPAIRMENT OF EFFICIENCY. The outside work must not interfere with the employee's effectiveness on his City job. It must not impede, or adversely affect the performance of his City work and shall not be arduous, strenuous, laborious, dangerous or exhausting.
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> . . .

Other provisions provide further guidelines. The only ones directly relevant to this opinion are Regulations 33.025 and 33.026, which provide that a department may develop more detailed policies, which may include requiring employees to obtain advance approval of outside employment, but these must be consistent with Regulation 33. I have not been advised whether the City's Capital Program Office has a procedure for approval of outside employment. You may wish to check with your superiors.

Financial Disclosure

You would also be required to disclose your compensation as an instructor for Temple University as income in the financial disclosure forms you must file each May 1.

Conclusion

Based on the facts you have provided, and provided that you comply with the requirements of this opinion, including that you publicly disclose any conflicts as provided in Code §20-608(1) and disqualify yourself from official City action that would affect your personal financial interests and those of Temple University, I advise you that you are not prohibited by State or local law from obtaining outside employment as a part-time employee of Temple University while serving the City as an employee in the Capital Program Office.

If you have any additional facts to provide, I will be happy to consider if they change any of the conclusions in this opinion.

Sincerely yours,

Evan Meyer
General Counsel

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