CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Advice of Counsel

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Re: Request for Advice Regarding Political Activity Restrictions

We received a request from a City employee ("the employee") on whether the ethics laws would prohibit the employee from appearing in a current photograph of his/her family that would be included in campaign literature supporting the candidacy for elective office of a member of the employee's immediate family. We advised that if the employee agreed to appear in campaign literature for any political candidate, including a close family member, the employee would violate the Philadelphia Home Rule Charter because as a public, partisan act such an appearance is a prohibited political activity.

I. Caution on the Limitations of an Advisory Opinion

As usual, we advised the following:

An ethics advisory opinion is necessarily limited to the facts presented, so my advice is predicated on the facts that you have provided me, not on any independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although our previous opinions interpreting the law are guidance for how we will likely interpret the same provisions in the future, previous opinions do not govern application of the law to different facts. Ethics opinions are particularly fact-specific, and anyone wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek an opinion prior to acting and to rely only on an opinion that addresses his or her individual situation. In that regard, to the extent this opinion states general

principles and there are particular fact situations that concern you, I encourage you to contact me for specific advice on the application of the ethics laws to those particular facts.

II. The Facts

The City employee advised of the employee's employment status, including that he/she is civil service. We were also advised as to the details of the proposed campaign for public office. We assumed that the employee would need to grant permission for his/her image to be used in any campaign materials.

III. Analysis

The Philadelphia Home Rule Charter Section 10-107 applies to restrict the employee's political activities because he/she is a City employee. Other than voting and privately expressing an opinion, City employees are prohibited from taking part in the affairs of any political campaign. Charter § 10-107(4). Charter Section 10-107(4) reads in relevant part: "No appointed officer or employee of the City shall . . . take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." Violation of this provision is a misdemeanor punishable by immediate dismissal, ineligibility for any City position for one year, a fine of not more than $300, and imprisonment of not more than ninety days. Charter §§ 10-107(6), 10-109.

Civil Service Regulation 29 demonstrates the expansive reach of Charter Section 10-107's restriction on political activities. *See* Opinion No. 95-20, *1994-1996 City Solicitor's Opinions* at 144, 150-53 (relying on Regulation 29 and its examples to illustrate the Law Department's interpretation of Charter Section 10-107). The Civil Service Commission promulgated Regulation 29 to define the kinds of activities that Civil Service employees, such as the requesting employee, may and may not engage in under Charter Section 10-107. The regulation explains the parameters of the Charter's political activity restriction as follows:

> In general, and unless otherwise specifically provided in the Charter, restrictions on political activity prohibit only activity aimed at promoting or opposing the success of a political party or body or the nomination or election of particular candidates at primary, general or special elections. . . . Since employees retain the right to exercise their franchise in all its aspects and to express privately their opinions on all political subjects, the restrictions on political activity cannot and should not interfere with the

> opportunity of employees to acquire the information upon which intelligent exercise of the franchise is based.

Civ. Serv. Reg. 29 ¶ 29.02. Regulation 29's examples of prohibited political activities illustrate that public expression of support for a candidate is not allowed. Such examples include the following prohibited activities:

> 29.045 - Distribute printed matter, badges or buttons in support of any candidate for public or party office or political party or body.
>
> 29.046 - Wear on his person [or] display badges, emblems, signs, posters and the like which are in favor of or against a political party, body or candidate.
>
> 29.048 - Solicit money from any person for the support of any issue, for the support of any political party or body, or for the support of any political purpose that is identified with or calls for the nomination or election of any particular candidate to public or party office.
>
> 29.0411 - Serve at party headquarters or otherwise engage in campaign activities on behalf of a party or candidate in any political campaign or election.
>
> 29.0412 - Write for publication or publish any letter or article, signed or unsigned in favor of or against any political party, body or candidate for public office.

Regulation 29's examples of permissible activities show that such activities are generally either non-public or non-partisan. Examples of permissible activities include the following:

> 29.037 - Unless he is a uniformed or investigatory officer or employee of the Fairmount Park Commission, Police or Fire Departments, make voluntary contributions for political purposes.
>
> 29.038 - Participate in the public debate of questions which may be submitted to referendum vote or of other issues of public interest, provided such activity is not in support of any political party or body or partisan political club, and is not identified with any particular political party, body or candidate.

29.039 - Attend as a spectator any political meeting or convention.

29.0312 - Distribute printed matter, badges or buttons in support of any political issue provided that such issue is not identified with any particular political party, body or candidate and does not call for the nomination or election of any particular candidate to public or party office.

29.0313 - Participate in any non-partisan campaign for the registration of voters.

Appearing in campaign literature constitutes engagement in campaign activity and promotes the success of a particular candidate in an election. Such an appearance is a public expression of support for a political candidate, not a private expression of opinion. Along these lines, the Board of Ethics recently found a Charter Section 10-107(4) violation where a City employee appeared in a State Senate candidate's filmed advertisement, website and brochure mailed to voters. The Board concluded that the police officer's appearances qualified as engagement in campaign activities on behalf of a political candidate and entered into a settlement agreement with the officer in which he agreed to withdraw his consent for the campaign to use his image. *See* Board of Ethics April 16, 2008 Meeting Minutes at 2 (describing settlement with police officer regarding his appearance in campaign advertisements and literature), *available at* http://www.phila.gov/ethicsboard/pdfs/Meeting_Minutes_Public_41608.pdf.

Similarly, at least one published Solicitor's opinion found that a City employee's public appearance with a candidate constituted a violation of Charter Section 10-107(4) and Regulation 29. *See* Opinion No. 11, *1983 City Solicitor's Opinions* at 66 ("An off-duty officer accompanying a candidate to even one appearance may violate the Charter's prohibition on political activities if that officer, once at the appearance, holds himself out in such a way as to appear that, by his presence, he is public[ly] representing the candidate or is part of the candidate's official party."). Taking together past applications of the Charter's political activity restriction and the guidance of Regulation 29, it is clear that a City employee voluntarily participating in a photo in a candidate's campaign literature falls squarely within the prohibitions of Charter Section 10-107(4).

It may seem like a harsh result that a City employee would be restricted from appearing in a family photo supporting a close relative's candidacy that presumably would not reveal the employee's employment by the City in any visible manner. Some may argue that what would otherwise be a partisan political

activity is rendered non-partisan due to the close family relationship between the City employee and the candidate. A fair reading of Charter Section 10-107(4), however, does not allow for such an exception.

There is some support in the ethics laws for different application of restrictions in the context of a City employee's family members. For example, although the City Ethics Code prohibits City employees from representing anyone in a transaction with the City, the Code provides an exception for the employee's parents, spouse, children, siblings or anyone to whom the employee has a fiduciary duty. Phila. Code § 20-602(4). City employee gift prohibitions also provide for exceptions for relatives. Phila. Code § 20-601(8) (defining prohibited gifts to exclude items from anyone within a third degree of sanguinity to the City employee and their spouses); Mayor's Exec. Order 002-04 § 2(a) (allowing gifts from a friend, parent, spouse, child or other close relative). In addition, the exceptional closeness between City employees and their relatives is recognized in the context of conflicts of interest, where a benefit to the latter has the same effect as a benefit to the former. 65 Pa.C.S. § 1102 (A conflict arises where a pecuniary benefit is extended to a City employee's parent, spouse, child or sibling); Phila. Code § 20-607(a) (A conflict arises when a financial interest is held by a City employee's parent, spouse, child, sibling or like relative-in-law). Notably, however, these familial exceptions are present in the text of all the laws described above. In contrast, the text of Charter Section 10-107(4) plainly does not provide for such an exception.

Charter Section 10-107's political activity prohibitions "are phrased so that they may not be evaded by any indirect means whatsoever." Charter § 10-107, annotation 6. Given its phrasing, Section 10-107(4) has a broad sweep that easily encompasses a City employee's appearance in a candidate's campaign literature. Neither the text of the Charter nor any past opinions interpreting Section 10-107 that I have reviewed reveal support for a family-member exception to the political activity restriction. Indeed, Section 10-107's expansive call for a "divorcement of politics from [City] employment" urges the conclusion that the partisan nature of the employee's appearance in campaign literature is not eliminated by the family relationship between the employee and the candidate. Charter § 10-107, annotation 1.

IV. Conclusion

Based on the facts that we were provided and not having seen the photo or proposed campaign literature at issue, we advised that the requesting City employee's voluntary appearance in campaign literature photographs for any political candidate, including a close relative, would violate Charter Section 10-

107(4) because it is a public, partisan act that promotes the election of a candidate and is therefore a prohibited political activity.

As usual, we advised that if the requesting employee has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since the requesting City employee requested nonpublic advice from the Board of Ethics, we are not making the initial Advice of Counsel public. We are instead providing this revised version, edited to conceal the requestor's identity, as required by Philadelphia Code Section 20-606(1)(d)(iii).

Evan Meyer
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