



CITY OF PHILADELPHIA

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Evan Meyer
General Counsel

Philadelphia Board of Ethics Advice of Counsel

January 29, 2008

Kenneth Gruen
7930 Revere Street
Philadelphia, PA 19152

Re: Post-Employment Restrictions

Dear Mr. Gruen:

You have requested an advisory ethics opinion as to the effect of post-employment restrictions of the ethics laws on you as a former City employee in the Health Department, if you were to start a private consulting business which would aid restaurants and food stores in their efforts to stay in compliance with the City Health Code.

You advise that you separated from City service on December 21, 2007. You advise that up to that date you served as "Sanitarian Supervisor" in the Environmental Health section of the Philadelphia Health Department. You advise that you were responsible for coordinating the daily activities of five Sanitarians (Health Inspectors) in the West Philadelphia area. You further advise that occasionally you personally performed inspections of restaurants and food stores, and also represented the Health Department in Common Pleas Court when the Department brought action against restaurant owners who were in violation.

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. I wish to point out that, although previous opinions of this Board, the City Solicitor's Office, and the State Ethics Commission 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. 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 the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

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

One-Year Limitation On Representing Others—State Ethics Act

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

No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

¹ The Act applies only to a "public employee," defined in the Act to include: "Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person." 65 Pa.C.S. §1102. I conclude that it is clear, from your description of your duties that you were at least involved in "inspecting, licensing, regulating or auditing any person." Accordingly, I will assume that you qualify as a "public employee." However, if you think there may be an issue in this regard, please provide me with a job description and an organization chart showing your former position in the City, and I will review the matter. (Such review might include recommending that you seek a ruling from the State Ethics Commission, if the matter is not clear.)

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

To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

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

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

Based on opinions of the State Ethics Commission, I believe that your "governmental body" would be the entire government of the City of Philadelphia. Accordingly, you may not for one year after the date you left the employ of the City (that is, the date you are off the payroll), or until December 21, 2008, represent anyone—including your own business or any of its clients—before the City. Please note the broad definition of "represent," which includes having your name appear on a bid, contract proposal, or invoice submitted to the former governmental body, the City; personal appearances with officials of the City or otherwise making known to the City your work for a new employer or client. See, e.g., State Ethics Commission Opinion No. 04-016, Advice of Counsel 07-503. This means that until one year after you separated from City service, you may not have any involvement in any transaction where a new employer or client contacts the City regarding any City transactions such as contracts, permits, or inspections, unless your involvement is purely internal at your new employer and not in any way revealed to the City. As to your particular facts, this provision would not prohibit you from giving advice to clients, so long as the clients were not using your name, or documents containing your name, in their dealings with the City. However, you would be prohibited from contacting City officials or employees on behalf of your clients or your business, before the year had expired.

It is important to 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 or on 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 an opinion from the Law Department as to the application of the State Ethics Act, including whether the Act applies to you. Any such request, to receive the protection, could not be confidential

Permanent Limitation On Assistance With Particular Matters—City Code

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

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

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

Thus, for example, after December 21, 2008, you would not be prohibited from assisting a client restaurant or store in an inspection matter unless you had worked on that same inspection while you were with the City.

Two Year Limitation On Financial Interests—City Code

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

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

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

In short, this provision prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official decisions she made while in City employ. Thus, if you had, for example, been officially involved in awarding a food service contract to a City vendor, you could not for two years be employed by and receive any compensation from that vendor, if such compensation was derived from revenue received under that Health Department action. If you were to be employed by a food provider under a permit that you worked on while with the City, that would be a difficult question, for which we would need to review the particular facts.

Summary

In summary, I reach the following conclusions:

(1) You may not for one year after you leave the employ of the City, or until December 21, 2008, represent anyone, including your own consulting business or any of its clients, before the City. Please note the broad definition of “represent,” which includes having your name appear on a bid, contract proposal, or invoice submitted to your former governmental body, the City of Philadelphia. This is not limited to any particular department or office of the City.

(2) You may never in the future assist anyone, such as a client, in a transaction involving the City on a particular issue or issues on which decisions were made by Health with your involvement.

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

Please feel free to request further advice from the Board of Ethics, or the State Ethics Commission, if you have additional facts to provide. Please also note the option of requesting advice of the City Solicitor, as discussed on pages 3-4 above. . Since you have not requested confidential advice from the Board of Ethics, we will make this letter public, as required under Code Section 20-606(1)(d)(iii).

Sincerely yours,



Evan Meyer
General Counsel

Attachment (Advice of Counsel No. 07-578)

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

ADVICE OF COUNSEL

May 24, 2007

Barbara Breen, R.N.
1101 Shannon Lane
Carlisle, PA 17013

07-538

Dear Ms. Breen:

This responds to your letter of April 16, 2007, by which you requested advice from the State Ethics Commission.

Issue: Whether the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 et seq., presents any restrictions upon employment of a Nurse Administrator following termination of service with the Pennsylvania Department of Public Welfare, Office of Developmental Programs.

Facts: You are currently employed as a Nurse Administrator with the Pennsylvania Department of Public Welfare ("DPW"), Office of Developmental Programs ("ODP"). You have submitted a copy of your position description, which is incorporated herein by reference. A copy of the job classification specifications for your position (job code 30770) has also been obtained and is incorporated herein by reference. In your position with DPW, you are an instructor for the DPW Medication Administration Train the Trainer Program ("Train the Trainer Program"). You state that the Train the Trainer Program is required in several settings licensed by DPW.

You plan to retire in June, 2007. You have been offered a position with a private corporation doing business as "Tuscarora Intermediate Unit" ("Tuscarora IU"). Tuscarora IU is under contract with ODP and provides administrative support for the Train the Trainer Program. You state that ODP has contracted with Tuscarora IU for many years, but that you have never been involved in the contract negotiations or in decisions to contract or continue to contract with Tuscarora IU.

You state that in your future position with Tuscarora IU, you would train community providers to DPW, conduct the training of the medication program, train instructors, evaluate program data, and maintain training materials.

You have submitted a work statement for the Medication Administration Instructor for the Tuscarora IU which is incorporated herein by reference. You state that in your prospective employment with Tuscarora IU, you would not participate in contract negotiations with DPW or represent any person, agency or entity before DPW.

Based upon the facts that you have submitted, you seek guidance as to whether the Ethics Act would impose any restrictions upon you with regard to accepting employment with Tuscarora IU following your retirement from DPW.

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

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

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

While Section 1103(g) does not prohibit a former public employee from accepting a position of employment, it does restrict the former 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/public employee; (4) participating in any matters before the former governmental body as to acting on behalf of a person; and (5) lobbying. Popovich, Opinion 89-005.

Listing one's name as the person who will provide technical assistance on a proposal, document, or bid, if submitted to or reviewed by the former governmental body, constitutes an attempt to influence the former governmental body. Section 1103(g) also generally prohibits the inclusion of the name of a former public 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 employee may assist in the preparation of any documents presented to his former governmental body. However, the former public employee may not be identified on documents submitted to the former governmental body. The former 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 employee with regard to representation before his former governmental body. The former public employee is not restricted as to representation before other agencies or entities. However, the "governmental body with which a public official/public employee is or has been associated" is not limited to the particular subdivision of the agency or other governmental body where the public official/public employee had influence or control, but extends to the entire body. See, Legislative Journal of House, 1989 Session, No. 15 at 290, 291; Sirilli, Opinion 90-006; Sharp, Opinion 90-009-R.

The governmental body with which you would be deemed to have been associated upon termination of public service would be DPW in its entirety. Therefore, for the first year after termination of service with DPW, Section 1103(g) of the Ethics Act would apply and restrict "representation" of "persons" before DPW.

Having set forth the restrictions of Section 1103(g) of the Ethics Act, you are advised that Section 1103(g) would not prohibit you from accepting employment with Tuscarora IU to provide training to community providers to DPW, conduct the training of the medication program, train instructors, evaluate training data, or maintain training materials as long as, in so doing, you would not engage in prohibited representation before DPW for one year following termination of Commonwealth employment. Cf., Shaub, Order 1242.

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

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

Conclusion: As a Nurse Administrator for the Pennsylvania Department of Public Welfare ("DPW"), Office of Developmental Programs ("ODP"), you would be considered a "public employee" as that term is defined in the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 et seq. Upon termination of service with DPW, you would become a "former public employee" subject to Section 1103(g) of the Ethics Act. The former governmental body would be DPW in its entirety. The restrictions as to representation outlined above must be followed. Section 1103(g) would not prohibit you from accepting employment with Tuscarora IU to provide training to community providers to DPW, conduct the training of the medication program, train instructors, evaluate training data, or maintain training materials as long as in so doing, you would not engage in prohibited representation before DPW for one year following termination of Commonwealth employment.

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

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