CITY OF PHILADELPHIA

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Evan Meyer
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Philadelphia Board of Ethics
Advice of Counsel

June 25, 2008

Richard Negrin, Esquire
Vice President & Associate General Counsel
ARAMARK
ARAMARK Tower
1101 Market Street
Philadelphia, PA 19107-2988

Re: Request for Advice Regarding Potential Conflict

Dear Mr. Negrin:

In an e-mail message dated June 11, 2008, you have requested public advice on the restrictions the ethics laws would place on your activities as Counsel for Aramark, in light of your City position on the Board of Ethics (Ethics Board). At the time of your request, there had been introduced in City Council a Resolution calling for a public hearing on Aramark's performance and billing practices in Philadelphia. You advise that Aramark is a city contractor in that it currently has a contract with the Philadelphia Prison System (since 1994) and formerly had a contract to provide services to the School District and may also have a current vending contract with the schools. In connection with the public hearing, you advise that you have worked behind the scenes internally, retained outside counsel and have counseled your internal clients on how to prepare for

meetings and a possible hearing. You advise that you have not personally met with, been engaged in any personal correspondence with, or had any direct contact with any member of Council on this matter. Council has now recessed for the summer, and no hearing was held. However, you have advised that you still wish to be advised on the general question of representing Aramark in matters that may involve City Council and other City agencies.

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.

In your position as a member of the Board of Ethics, you are a City officer. *See* Board of Ethics Opinion Nos. 2007-004 and 2007-006. There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and conflicts of interest are avoided. In that regard, 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. I will discuss the restrictions of each of those three bodies of law in the following paragraphs. In addition, I will separately explain disclosure and disqualification requirements and address appearance of impropriety considerations. I conclude that the facts that you have presented do not raise any issues under the ethics laws related to any current matters, but that you should be aware of the restrictions and the appearance issues, for future matters.

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. In this sense, Section

10-102 is a broad prophylactic rule, rather than a typical conflict of interest provision. 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.

The threshold question to be addressed is whether this provision applies to a member of the Ethics Board. As you may know, in Opinion No. 2007-006 the Ethics Board addressed the question of the application of Charter §10-107 (political activity) to certain City boards and commissions. However, the provision at hand, Section 10-102 (interest in contracts), is worded differently from Section 10-107. The first sentence of Section 10-102, as quoted above, is explicit about which City officers are subject to that provision. The issue, then, is whether you can be considered to fall under any of the categories of "City Officers and Employees" outlined in §10-102.

Clearly, you are none of the enumerated officers, nor a department head, nor a City employee. The issue is whether you are "any other governmental officer or employee whose salary is paid out of the City Treasury." As I said in a recent Nonpublic Advice of Counsel, more specifically, the question is whether a board member's compensation as a member of his/her board is a "salary" for purposes of §10-102. However, members of the Board of Ethics are not compensated at all. Accordingly, I conclude that Charter Section 10-102 does not apply to members of the Board of Ethics.

Philadelphia Code Representation Provision

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. However, subsection (2) of this Section provides that subsection (1) applies in a less restrictive way to part-time officials (which would apply to you as a member of a board of the City, which by its nature is a part-time position). Subsection (2) provides that such

board members are "subject to the foregoing paragraph only in relation to a particular matter (a) in which he has at any time participated through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (b) which is pending in the department, agency, authority, board or commission of the City in which he is serving." Therefore, Code §20-602(1), as modified by 20-602(2), restricts you personally from representing Aramark in any matter involving the City while serving on the Ethics Board, in two ways:

1. In matters in which you acted on the Ethics Board as a Board member, you may not represent Aramark; and

2. In matters currently before the Ethics Board affecting Aramark, you may not represent Aramark.

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to any outside firm of which the City officer is a member, so that anyone in that firm would be prohibited from the same representation ("as agent or attorney") but only in a matter in which you, as a City officer, have "the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters." (In your case, that would mean a matter before the Ethics Board.) Unlike §20-602(1), however, §20-602(5) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in §20-608[1]. Thus, an officer or employee of Aramark could represent the firm in such a transaction, provided that you made the requisite disclosure and disqualification. See footnote 1.

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[1] Section 20-608(1)(c) 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 (member of the Ethics Board) and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (employee of Aramark) 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 Executive Director of the board in which you would be acting, the Ethics Board; (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.

Conflict of Interest Provision—Philadelphia Code

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 Aramark may have in City action, the rule is the same: You must disclose the conflict and disqualify yourself. In any matter before your City agency, the Ethics Board, you must publicly disclose the financial interest and announce your intention to disqualify yourself from all official consideration of the matter. *See* footnote 1. Participation that you should avoid would include not only final decisions, but also any preliminary discussion, review, or action. I note, however, that you have not identified any matters pending or anticipated to come before the Ethics Board, concerning Aramark. In the absence of any such matters, there is no issue concerning conflict of interest.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to you.[2] 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:
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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." 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.
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> "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

[2] The Act applies only if you are a "public official," as defined in the Act. The definition clearly includes members appointed to City boards and commissions, except those that are merely advisory. We have concluded that the Ethics Board is not merely advisory. See Opinion No. 2007-006.

> 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.

I conclude that for you to take official action, as a member of the Ethics Board, that has an economic impact on Aramark 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 relative to the use of authority of office to obtain a private pecuniary benefit for Aramark, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, as described in footnote 1 above. See also 65 Pa.C.S.A. §1103(j). As with the City Ethics Code, you have not identified any matters pending or anticipated to come before the Ethics Board, concerning Aramark. In the absence of any such matters, there is no issue concerning conflict of interest.

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.)

A Further Word on Disclosure and Disqualification

Where a City officer has a financial interest in any legislation, award, contract, lease, case, claim, decree or judgment, the officer must "prior to any City action thereon" disclose the interest and disqualify himself. Code §20-608(1)(c). It is clear that this provision refers only to City action on which it could reasonably be expected that the particular City officer's duties might require him or her to take official action. *See* Section 20-607(a), referring again to various types of actions such as legislation, award, contract, lease, case, claim, decree or judgment "made by him in his official capacity [or by a body of which he is a member]." Obviously, every employee of the City need not follow the formal process every time a bill is introduced affecting employee benefits, or the wage tax, or the budget of the City. Nor need a member of a City board file a formal disclosure and disqualification letter in anticipation of the possibility that at some uncertain time in the future a matter may come before his or her board affecting any of the various outside interests the member may have.

This concludes my discussion of the law. Based on the facts of which you have advised me, there is no issue under the ethics laws, and no requirement that you disclose your interest in Aramark or disqualify yourself from any specified City matter. Nevertheless, as a policy matter, the Board may, in appropriate cases advise as to appropriate behavior that is not legally required, but may be suggested in order to avoid the appearance of impropriety or a possible public perception that improper influence could be exerted.

Appearance of Impropriety[3]

As you pointed out in your e-mail message requesting advice, matters affecting Aramark may come before City Council from time to time. Where there is no anticipated involvement by the Board of Ethics, there would be no legal requirement that you disqualify yourself from any actions in such matters. Nevertheless, we must take notice

[3] The Ethics Board has not itself established a policy on appearance issues. Rather, the Board has been relying on several City Solicitor's Opinions that in turn cite to a "Guide to Ethical Conduct for City Officers and Employees," adopted by the former advisory Board of Ethics and published in the Board of Ethics addendum in the volume 1982 City Solicitor's Opinions at page 306. Nevertheless, until the Board considers this issue and adopts a policy, either for its own members, or for the City in general, I conclude that it is appropriate for me to outline the considerations, since this part of this Advice of Counsel is a suggestion only, in any case.

that members of the Board of Ethics are in a unique position in City government. First, the Board, as the Executive Director testified at our recent budget hearing, has an overall mission "to enhance and promote public confidence in City government." Accordingly, members of the Board of Ethics have a unique responsibility, I believe, to be above reproach in their personal integrity. Indeed, personal integrity is a requirement for appointment. *See* Charter §3-806(a). Second, the scope of the types of matters in which the Board could conceivably become involved is very broad. The Board has responsibilities for oversight of campaign finance filings by candidates for City elective office, for oversight of financial disclosure filings by City officials, and for enforcement of the ethics laws in general. Any of these matters may, from time to time, involve members of City Council, other elected officials, or appointed City officials—either in a advisory matter or in an enforcement matter by the Ethics Board. The Charter-mandated role of the Board of Ethics in preserving public confidence in government and the Board's wide-reaching responsibilities related to integrity calls for its members to exercise particular caution and sensitivity to potential appearances of impropriety.

Returning to the language of Code Section 20-602(5), you would be required to disqualify yourself before any Aramark employee could represent the Company in a matter where you had "the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters." This degree of responsibility may be more difficult to determine than for, say, an employee of a City operating department. The Board of Ethics may, at any time, be called upon for "the rendering of advice" on an ethical issue concerning a City matter. Similarly, it is not possible to know in advance when a complaint may be filed, requiring an investigation, which may involve you as Vice Chair of the Board, such as where the Chair is not available and approval of a subpoena is sought by the Executive Director.

To state an extreme hypothetical situation: where a member of the Ethics Board may have to vote next week on a Board enforcement matter affecting a councilmember and today advises a client in a hearing before that Councilmember's committee on an unrelated matter affecting that client, there would be no technical requirement under the ethics laws that the Ethics Board member not participate, but his/her involvement might well be perceived to have a chilling effect on the Councilmember's ability to aggressively question the client/witness. In such a situation, I would recommend that the Ethics Board member notify the Chair of the Board that he/she will not participate in the enforcement matter.

On the other hand, where there is no identifiable enforcement or advisory matter on which Ethics Board action is anticipated in the near future, I do not think there is an appearance of impropriety in an Ethics Board member participating in a Council hearing,

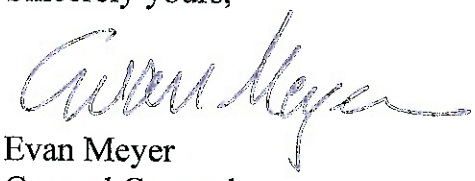
including testifying on behalf of an employer or client, merely because at some point in the future there is a possibility that an unidentified Councilmember may be the subject of a Board matter. Similar considerations would apply to participation in other City action involving other elected or appointed officials.[4]

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 in matters in which a member of Aramark is representing the firm in a matter before the Board of Ethics and also disqualify yourself from official City action that would affect the financial interests of Aramark, I advise you that you are not prohibited by State or local law from serving as an appointed member of the Philadelphia Board of Ethics, in light of the fact that you are an employee and officer of Aramark.

If you have any additional facts to provide, I will be happy to consider if they change any of the conclusions in this opinion. Since you have requested public advice from the Board of Ethics, we will make this letter public.

Sincerely yours,



Evan Meyer
General Counsel

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

[4] I only used Council as a hypothetical example because your initial question presupposed a pending Council hearing.