



City of Philadelphia Law Department

CLIENT NEWS

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POST-EMPLOYMENT ETHICS RESTRICTIONS

Is there life after City employment? For most of us, there is. Whether we separate to take another job, or retire to do nothing more than some volunteer community service, we are going to be doing something. And if that "something" involves an entity that has some contact with the City of Philadelphia (which is likely if it is in this geographical area), the ethics laws are concerned about it. And therefore, you should be aware of those laws and think about the issues before you tell your supervisor off and announce that you are quitting. This newsletter will provide some general guidelines on how the ethics laws apply to your activities after you leave City employ. Please note that there are a number of other issues under the ethics laws relating to the conduct of City employees while they are still employed by the City, which will not be addressed here, with one exception, discussed later in this newsletter.

Important Note on Ethics Matters

This newsletter discusses general guidelines. We wish to emphasize that ethics matters are uniquely fact-specific, and in particular matters we do not encourage reliance on general guidelines, on previous opinions addressing other situations, or on your own interpretation of the statutes. 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 advisory opinion issued as to his or her specific situation, as stated in a formal request that supplies the facts upon which the opinion is to be based. Such an opinion should be obtained before taking official action that may be subject to the opinion, or before separation from the City, if seeking guidance on post-employment restrictions. See the end of this newsletter for further information on requesting an advisory opinion.

The General Principle

The ethics laws are written to prohibit the situation where a government employee can leave the government and be in a position to financially benefit herself or her private employer by exerting influence on her former governmental body. It is important to note that the laws are not dependent on intent--it does not matter whether the former employee is pure at heart, or whether the government officials involved are completely objective and would not actually be influenced by a former colleague--the only issue is whether the objective status of the former employee fits that described in the ethics laws.

What Law Applies?

There are two principal sources of law on post-employment restrictions on City officials and employees: the City Ethics Code and the State Ethics Act. (Two additional, more narrow, sources of law--federal regulations and professional ethics rules for attorneys--will be discussed later in this newsletter). The first question you should ask is "Does this law apply to me?" The City Ethics Code (referred to hereafter in this newsletter as "the Code") is set out in Chapter 20-600 of the Philadelphia Code. The Code applies to every elected or appointed official or employee of the City government. This includes former county offices, such as the Sheriff's Office and the District Attorney's Office, but it does not include the Register of Wills or the First Judicial District. It is important to note that the Code also applies to unpaid officials. Therefore, all members of City boards and commissions are covered, even if they are not compensated for such service.

In contrast, the State Ethics Act does not apply to every City employee. This state

statute, formally the Public Official and Employee Ethics Law (referred to hereafter in this newsletter as "the State Act"), is codified in Title 65 of Pennsylvania Consolidated Statutes, beginning at Section 1101 (65 Pa.C.S §§1101-1114.) The State Act applies only to "public employees" and "public officials" as defined in the State Act, and as such definitions are interpreted by the State Ethics Commission. The analysis can be lengthy, but a capsule guideline would be this: generally, a "public employee" is any City employee who exercises discretion in any matter that has a financial impact on any other person. Therefore, very low level clerks who just do what they are told, and exercise no discretion, are not covered. Very few government employees who do exercise discretion fail to meet the definition on the basis of having no economic impact, although the State Ethics Commission has said that university professors are not "public employees." In cases of doubt, the Law Department should be provided with the applicable job description and asked for an opinion. The State Act also contrasts with the Code in that the State Act explicitly excludes purely advisory boards. Thus, members of City boards and commissions that exercise no City power and do not expend City funds are subject to the City Ethics Code, but not the State Ethics Act. (On the other hand, the State Act is broader in coverage than the Code, since it also governs public employees employed by governmental entities other than the City, such as State authorities. But such entities are not clients of the City Solicitor's Office.) Any person in doubt as to what law applies should seek the advice of this office, as noted in "Important Note on Ethics Matters" above.

Between these two laws, and a couple of other specific provisions, there are

several different restrictions on former governmental employees.

One-Year Restriction on Representing Others

Section 1103(g) of the State Act restricts City officials and employees for one year after they leave City employment, as follows:

No former 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.

This provision contains a number of significant phrases. Whether you are an "official or public employee" to which this applies depends on the Act's definitions (see "What Law Applies" above). "Governmental body with which he has been associated" is generally the entire City government. Thus, a former Streets Department employee could not represent someone before the Revenue Department, even in a matter completely unrelated to the Streets Department. "Matter before the governmental body" means any transaction on which some City official will take official action. Note the phrase, "with promised or actual compensation," which means that nothing prevents a former employee from representing a person before the City for free.

The meaning of "represent" has been the subject of lengthy analysis in several opinions of the State Ethics Commission. It means that the former employee may not: (1) make personal appearances before the

City; (2) attempt to influence the City; (3) submit bid or contract proposals, or invoices, that are signed by, or even contain the name of, the former employee; (4) participate, by acting on behalf of a person, in a matter before the City; (5) lobby the City; or (6) be identified on any document submitted to the City.

"Represent" does not include, and the former employee may permissibly do, the following: (1) assist in the preparation of any document submitted to the City if the employee's name does not appear in the document; (2) counsel any person regarding that person's appearance before the City, so long as that activity is not revealed to the City; or (3) make general informational inquiries to the City to obtain information that is available to the general public, so long as it is not done in a way to influence the City or make known to the City that the former employee represents his new employer. That last phrase is key. In other words, Section 1103(g) would not prohibit you from working for a company that had a City contract, so long as your work for them was entirely internal at the company and your involvement in the project was in no way revealed to the City.

You may be aware of the well-publicized case of Frank Antico, a former official in L & I, who shortly after separation from City service was seen in the concourse of the Municipal Services Building acting as an "expediter" and assisting citizens with their permit applications. How could he do this? The answer is that he couldn't. In August of 1997 the State Ethics Commission issued an adjudication finding that Antico violated Section 1103(g) of the State Act and entered into a consent agreement for a substantial restitution payment.

Another frequent question is that of whether an employee can be hired back by his or her former department (or even by a different department) as a consultant. This question often comes up when a valuable employee retires, and the Department, rather than lose that employee's expertise, wants to arrange immediately with the employee to continue to provide similar services during retirement, under contract with the City. This is prohibited by Section 1103(g). The phrase, "a person," includes the former public official himself and thereby includes representing himself in negotiating a consultant contract with his former body. Thus, such "revolving door" consulting contracts are prohibited in the first year after the employee separates (since it is presumably impossible to obtain one without representing yourself, at the least in signing the contract).

Two-year Limitation On Acquiring Financial Interest in Official Action

The Code prohibits a City official or employee for two years from obtaining a financial interest in any official action by the public employee. 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.

This provision focuses on matters in which the employee exercised discretion. For example, if you award a City contract to an outside firm, you may not go to work for that firm on that contract until two years after you separate from City service. The second paragraph of the section means that you may not avoid this requirement by arranging for someone else (such as a corporation you set up) to have the contract but pass the proceeds along to you. The second paragraph does not prohibit a relative of yours from having a contract on their own behalf within the two year period, provided that other provisions relating to conflicts during governmental employment are not violated.

Permanent Limitation on Assistance with Particular Matters

The Code restricts City officials and employees from ever in the future assisting another person in a matter that the City employee worked on during his or her government employment. Section 20-603(1) of the 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).

We have also interpreted "transaction" to refer only to the particular action taken by the City employee. Therefore, if a City employee awards a contract, he or she would not necessarily be forever prohibited from assisting the contractor in performing the contract, only in any issues specifically related to the action of awarding the contract (such as litigation challenging the award as improper or a dispute as to whether the City should be bound by representations made in the contract negotiation). Of course,

"transaction" may be any of a wide variety of official actions, not just the award of a contract. It is important to note, moreover, that this section prohibits such assistance "with or without compensation." Thus, unlike the State Act one-year provision, this provision does apply to representing someone for free.

Limitations Imposed By Federal Regulations

In a more limited case, federal conflict of interest regulations concerning the use of Community Development Block Grant (CDBG) Funds, codified at 24 C.F.R. §570.611, would require the City to seek an exception from HUD, if your new employer is a subrecipient of such funds. Section 570.611(c) prohibits persons including employees, officers, or elected officials or appointed officials of the recipient from engaging in activities set forth in subsection (b) of the same section. “The recipient” for this purpose is the City as the recipient of CDBG Funds. The regulation applies for one year after separation for a CDBG-assisted activity, but is a permanent restriction for the UDAG program.

Limitations Addressed to Attorneys

The Pennsylvania Supreme Court has held that the Supreme Court itself has the sole authority to regulate the conduct of attorneys, and that therefore the post-employment ethics laws do not apply to attorneys, at least to the extent they are practicing law. Instead, the Rules of Professional Conduct, as promulgated by the Supreme Court, apply to attorneys. (Attorneys still in the employ of the City may be required to abide by the ethics laws in other respects, including filing financial disclosure forms, however.) The Rules do have conflict of interest provisions, but in

general these may be waived by the parties, which is why you may know of a former City attorney who has appeared in court against the City or before the City representing a client within the first year after leaving City employment.

Penalties

Violations of the Ethics Code are punishable by a fine of up to \$300. Repeat violations may be punishable by imprisonment for up to 90 days. (These original penalties were based on stated limits in the Charter; however, recent State law authorized City Council to impose greater penalties by ordinance. An amendment to Code §20-612 took effect on June 5, 2006, increasing penalties to as much as \$2000.) Moreover, the Code states that "any person in violation of this Chapter is forever disqualified from holding any elected or appointed City office or employment with the City, its agencies, authorities, boards or commissions."

The State Ethics Act provides that any person who violates Section 1103(g) "is guilty of a misdemeanor and shall be fined not more than \$1,000 or imprisoned for not more than one year, or be both fined and imprisoned."

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.

For Further Information

As noted earlier in this newsletter, City officials and employees are strongly urged to seek the formal advice of the Board of Ethics (or, alternately, the Law Department or the State Ethics Commission, for matters under the State Act) prior to taking any action that may subject them to restrictions or penalties under the ethics laws. Supervisors of employees who plan to leave City employment and officials who have official dealings with former City employees may also request an opinion. (Ethics opinions will not be issued to City employees as to other employees, where the requestor does not have a direct, official need to know.) Such requests should state all relevant facts, such as the employee's current position and duties, his or her future position, any interaction between the future

employer and any agency of the City government, and the expected involvement of the employee with such matters for the future employer. Requests for confidential opinions will be honored, but it should be noted that an opinion that states that the State Ethics Act is not violated does not protect the requestor from penalties under the State Act if the opinion is not public (see Section 1109(g) of the State Act).

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This Client News was drafted by Senior Attorney Evan Meyer. Feel free to call Evan (683-5008) with questions about this issue.