



CITY OF PHILADELPHIA

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The Board's Regulation 8 (Political Activity), effective March 28, 2011, represents the Board's interpretation of Charter Section 10-107, and supersedes this advisory opinion to the extent that it is inconsistent with the regulation.

Philadelphia Board of Ethics Nonpublic Formal Opinion No. 2009-005 (Amended)

January 22, 2010

Re: Campaign Interaction with Current City Employees to Prepare for Possible Transition After Election / Charter Section 10-107 (Political Activities)

We received a request from the representative for the campaign of a candidate for City elective office, which requested nonpublic advice on the following question: "[W]hether and to what extent, a group of volunteers to the campaign . . . can engage in pre-transition planning."

I. Scope of this Opinion

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board 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 the requestor may be concerned about, the requestor was encouraged to contact the Board of Ethics for specific advice on the

application of the ethics laws to those particular facts.

II. Facts

We were advised as to the facts that follow in this paragraph. The campaign has assembled a group of volunteers that it is anticipated would engage in a process—separate from any campaign activities—of review and consideration of the present priorities and major projects of the office being sought by the candidate, in order to provide several reports on the office to be used in the formal transition process after Election Day, regardless of who should win the election. The volunteers would be asked to consider, for example, what new priorities or initiatives might be undertaken in a new administration, what budget obstacles exist, and who has achieved notable accomplishments in the past. The campaign would like the volunteers to reach out to “stakeholders” in the community, including current government officials and employees in related offices in order to gather impressions about the current work of the office being sought and good ideas about improvements going forward. The requestor advised, “we do not envision this group [the volunteers] having anything to do with the actual campaign, the creation of campaign policy papers, or to be doing anything other than described above.” The requestor emphasized: “[W]e do not want to have any of this work cross over into the formation of campaign policies, speeches or positions. The purpose of this pre-transition planning is just that: getting a head start on the very important and complicated matters that any eventual winner will have to address in the actual transition following Election Day.”

III. Standing and Application of the Public Integrity Laws

The only statutory provision as to which an issue is presented by this request is Section 10-107 of the Home Rule Charter. Subsection (4) of that Section 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.” However, this provision applies only to City officers and employees subject to the Charter. We presume that the group that was identified as “volunteers to the campaign” includes no City officers or employees, since that would directly raise an issue under Section 10-107(4) for any such individuals. As to any volunteers who are not current City officers or employees, no such individuals could violate Section 10-107(4). Rather, the issue is whether, if the volunteers consult with any current City officers or employees, such participation by those City officers or employees would violate Section 10-107(4).

As a legal matter, if such participation did violate Section 10-107(4), there would be no issue under that provision for the campaign, its volunteers, or the candidate. An initial question is whether the requestor, as a representative of the campaign, has standing to ask a question whether the activities of such officers or employees who would be participating in this process would cause them to violate Section 10-107. Directly, the answer to that question is no. No officer or employee may rely on this Opinion as personal advice as to their own exposure under the Charter provision. Nevertheless, there may be at least an appearance of impropriety for the campaign if it engaged in a process that involved City officers or employees possibly violating the law, and the requestor is entitled to be advised on that issue. This necessarily involves an analysis of how Section 10-107(4) would apply to the proposed activity.

III. Analysis

In Formal Opinion No. 2009-002 (May 13, 2009), issued to City Solicitor Shelley Smith, the Board of Ethics opined on Charter Section 10-107(4), stating: "The campaign activity prohibition of Charter Section 10-107(4) has long been interpreted as prohibiting public, partisan expressions of support for political candidates and political parties while permitting private and non-partisan political expression." Formal Opinion No. 2009-002 at 12. We must now apply this general principle to the specific facts of this inquiry, to wit, the participation of City officers or employees in a process of providing impressions about the current work of the office being sought and good ideas about improvements going forward, solely for the purpose of this pre-transition planning and not for the purpose of the formation of campaign policies, speeches or positions. Provided that any such impressions or other communications are used solely for transition planning and not used in the campaign, any such participation would not be campaign activity and would not implicate Charter Section 10-107(4) because it would not be a public, partisan expression of support for a candidate. However, the requestor is cautioned that prior to the closing of the polls on Election Day, no communication from the candidate or the campaign may refer to such activity.

For example, let us suppose that conversations between campaign volunteers and City employees reveal a need for a particular initiative by the office the candidate is seeking, and the candidate determines that he or she will adopt such a proposal. If then, prior to the election, the candidate or the campaign should publicly announce such a proposal and make it plain that the proposal was based on conversations with current City employees, such an announcement would raise an issue as to whether those City employees were participating in the campaign in violation of Charter Section 10-107. As noted above, that would not constitute a violation of law by the candidate or

the campaign, but participating in a process that involved a Charter violation by City employees would certainly create an appearance of impropriety.

Accordingly, the requestor is advised to closely adhere to the representations that were made in the request memo: "we do not envision this group [the volunteers] having anything to do with the actual campaign, the creation of campaign policy papers, or to be doing anything other than described above [gather impressions about the current work of the office being sought and good ideas about improvements going forward]." It is important, as stated in the request memo, that the volunteers' work—especially to the extent that it involves or is based on communications with current City employees—not "cross over into the formation of campaign policies, speeches or positions."

Conclusion

In summary, based on the facts of which the requestor has advised us, the requestor is advised as follows:

1. Only City officers and employees are subject to the restrictions of Charter Section 10-107(4), and accordingly, any prohibited campaign activity by any City officers or employees who are contacted by campaign volunteers would only be an issue for those City officers or employees themselves. There would be no issue for the candidate, unless and until he or she becomes a City officer or employee, nor any issue for his or her campaign committee as an entity, nor any volunteers or campaign staff who are not City officers or employees.
2. This Nonpublic Formal Opinion of the Board of Ethics may not be relied on by any such City officers and employees as protection from an enforcement action under Code Section 20-606(1)(d)(ii). Any City officer or employee wishing an advisory opinion on which they could rely may apply to the Board of Ethics for such an advisory.
3. Neither Charter Section 10-107 nor any of the other Public Integrity Laws prohibits an "appearance of impropriety" and an enforcement action may not be brought based on a mere allegation of an appearance issue. Nevertheless, the campaign is advised, as a policy matter, to avoid any appearance of impropriety, such as the involvement of the campaign in any public communication prior to the close of the polls on Election Day, that would reveal the involvement of City officers or employees in the proposed "pre-transition planning."

If the requestor has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since the requestor requested nonpublic advice from the Board of Ethics, we are not making the original Formal Opinion public, but we are making public this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

By the Board:

Richard Glazer, Esq., Chair

Kenya S. Mann, Esq., Member

Rev. Damone B. Jones, Sr., Member

[There was one vacancy on the Board at the time of the approval of the original Formal Opinion, due to the resignation, prior to the September 16 Board meeting, of Phoebe A. Haddon, Esq., and there were two vacancies as of this amendment, due to the additional resignation of Richard Negrin, Esq. In addition, Richard Negrin did not participate in the consideration of, or the vote to approve, the original Opinion.]