



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Board Opinion 2012-007

January 23, 2013

Re: Lobbying / Participation at Administrative Hearing

An attorney on staff of a nonprofit organization requested, on behalf of his employer/client (“the nonprofit”), a nonpublic advisory opinion as to whether the participation of the nonprofit in a City administrative hearing would constitute lobbying to the extent that the organization would be required to register with the Philadelphia Lobbying Information System (PLIS) as a principal.

Summary of Conclusions

Based on the facts that were provided to us by the attorney (“the requestor”) that, excluding his participation in the hearings, any lobbying by the nonprofit did not exceed the applicable thresholds in the 3rd Quarter 2012, the requestor was advised that the nonprofit was not required to register as a principal or report expenses, and the requestor was not required to register as a lobbyist. In light of the fact that the requestor, as lobbyist, and the nonprofit, as principal, have already registered and filed an expense report, both may wish to file amended forms.

In general, testimony and participation as a party at a City administrative hearing, if it were not exempt, would constitute “direct communication,” not “indirect communication” as those terms are defined in the Lobbying Code.

The requirement that Item 08 on the PLIS Expense Report include details about all sources “that contributed more than 10% of the total resources received by the principal during the reporting period” does not have an exception for funding received from those sources that cannot be used for lobbying.

Summary of the initial request

The requestor advised that, although the nonprofit, through its membership and volunteers, has engaged in some “grassroots” organizing of testimony at such hearings, expenses incurred by the nonprofit to date in 2012 that are related to such activity—if the requestor’s compensation for his legal representation is not included—would not exceed the threshold amounts to require the nonprofit to register as a principal and to report expenses. *See* Code Section 20-1204(6). However, the requestor was concerned that, since he is compensated by the nonprofit as its employee, his participation in the proceedings might cause the value of the total lobbying expenses for the nonprofit to exceed the \$2500 per quarter threshold and thus the nonprofit would no longer qualify for the exemption under Code Section 20-1204(6) and would be required to register as a principal. Accordingly, the requestor sought an advisory opinion as to whether another exemption might apply, such as one of those in Subsections 20-1204(1) or (10).

Analysis

The requestor had advised that his employer/client, the nonprofit, had “intervened” in the administrative proceeding. We were advised that, under the applicable City Regulations, the nonprofit is technically a Party. The nonprofit members have standing, and that is why the nonprofit requested Party status, which had apparently been accepted by the Hearing Officer.

The initial issue raised by this request is whether the requestor’s representation of the nonprofit by providing testimony (and, likely, research to prepare for such testimony) at the subject administrative hearing is exempt from the lobbying registration and reporting requirements under Code Section 20-1204(1), which provides as follows:

§ 20-1204. Exemption from Registration and Reporting.

The following persons and activities shall be exempt from registration and reporting:

(1) An individual who limits lobbying to preparing testimony and testifying before a committee of Council, or participating in an administrative proceeding of an agency.

Applying this provision to the facts presented, the requestor was advised that any activity by him personally on behalf of the nonprofit that is limited to testifying in such an

administrative hearing, preparing testimony for such a hearing, or related work (such as researching facts or law to support such testimony) is exempt activity under Code Section 20-1204(1), as interpreted by Paragraph 9.24(A) of Board of Ethics Regulation 9.

Additionally, since the nonprofit is a party to the hearings, the requestor's representation of the nonprofit at the hearings would be activity also exempted under Code Section 20-1204(10), as interpreted by Paragraph 9.24(J) of Board of Ethics Regulation 9. The Section 20-1204(10) exemption is for participation as a party, or representative of a party, in certain City administrative adjudications. The Board concludes that the nonprofit's participation in the hearings meets this exemption.¹

Accordingly, any part of the requestor's compensation that is attributable to his time spent in such exempt activity should not be counted in determining whether the nonprofit's lobbying expenses in any quarter exceed the \$2500 threshold for The nonprofit being required to report as a principal. *See* Code Section 20-1204(6) and Paragraph 9.24(F) of Reg. 9. Also, any part of the requestor's time and compensation that is attributable to his time spent in such exempt activity should not be counted in determining whether his lobbying activity in any quarter exceeds either the 20 hours for his employer or the \$2500 threshold for the requestor personally being required to register as a lobbyist. *See* Code Sections 20-1204(4) and (5) and Paragraphs 9.24(D) and (E) of Reg. 9.

Thus, based on the facts that the requestor provided that, excluding his participation in the hearings, any lobbying by the nonprofit did not exceed the applicable thresholds in the 3rd Quarter, 2012, it appears that the nonprofit was not required to register as a principal or report expenses, and the requestor was not required to register as a lobbyist. The requestor advised that he and the nonprofit have already registered and that the nonprofit has filed an expense report for the 3rd Quarter of 2012. Filed forms may not be withdrawn. However, the requestor, as lobbyist, and his principal may file amended forms. Specifically, the nonprofit may wish to file an amended Expense Report, and amend item 03 ("Lobbying Expenditures") by checking the box marked "Total Lobbying Expenses did not exceed \$2500 during the quarter" and leaving the rest of that section blank.

Additional Questions

In a subsequent email, the requestor asked the following additional questions:

¹ The requestor had also suggested, as a possible exemption, the exemption for *pro bono* activity in Code Section 20-1204(15), Paragraph 9.24(P) of the Regulation. However, since the requestor advised that he is compensated by the nonprofit, this exemption is not available.

- 1) If participation in the [administrative] Hearing is not exempt from the registration and reporting requirements under the Lobbying Code, should it be reported as direct or indirect lobbying? (We reported it as indirect lobbying in our expense report because the communication was to a hearing officer and not directly to a city official, but we would be willing to file an amended expense report if it is more appropriately characterized as direct lobbying.)

- 2) Does the requirement to identify source(s) of contribution to principal in Section 08 of the quarterly expense report apply to all sources that contribute more than 10% of the total resources received by the principal during the reporting period, even if the funding received from those sources cannot be used for lobbying? (As we noted in Section 08 of our expense report, we received more than 10% of our total resources from certain nonprofit foundations, but that funding was restricted and could not be (and was not) used for lobbying activities. We are concerned that identifying those foundations in our expense report could lead to the incorrect inference that the funding was used for lobbying, which is strictly prohibited, but we would be willing to file an amended expense report if this disclosure is indeed required.)

Although the conclusion above that the requestor's participation in the hearing is likely exempt activity would seem to render unnecessary his questions on reporting expenses, it is possible that in the future the nonprofit may qualify for reporting. For that reason, and since it may be helpful to others, we will address those questions.

1. Direct/Indirect Lobbying. the requestor suggested that participation in the applicable administrative hearing—if it were not exempt—would be indirect communication, because the communication was to a hearing officer and not directly to a city official. As we have noted previously in a General Counsel advisory:

The definition of “indirect communication” (Para. 9.1(U) of Regulation 9, which is a direct quote from the statute, Code Section 20-1201(15)) is the following:

An effort, whether written, oral or by any other medium, to encourage others, including the general public, to take action, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action, including, but not limited to, letter-writing campaigns, mailings, telephone banks, print and electronic media advertising, billboards, publications and educational campaigns on

public issues, but not including regularly published periodic newsletters primarily designed for and distributed to members of a bona fide association or charitable or fraternal nonprofit corporation. (emphasis added)

Nonpublic Advice of Counsel GC-2012-504 at 2-3 (quoting Paragraph 9.1(U) of Regulation 9). The examples of “indirect communication” given in the Regulation (letter-writing campaigns, mailings, telephone banks, print and electronic media advertising, billboards, publications and educational campaigns on public issues) illustrate the intent of the definition, which is a broadly-based educational effort to influence City officials indirectly by influencing others, such as the public, to support certain City official action. In general, such communications would not be directed to a City official. In contrast, communications directed to a City official would appear to meet the definition of “direct communication,” as stated in Paragraph 9.1 (L) of Regulation 9:

An effort, whether written, oral or by any other medium, made by a lobbyist or principal, directed to a City official or employee, the purpose or foreseeable effect of which is to influence legislative action or administrative action. The term includes personnel expenses and office expenses. (emphasis added)

The fact that the subject administrative hearing testimony would be expected to be passed on to the applicable City official or officials to make the final decision would make the communication one that was “directed to a City official or employee” and thus would be direct communication, rather than indirect communication. However, with regard to filing an amendment to the 3rd Quarter Expense Report, as noted above it is presumed that the nonprofit will not have any reportable expenses.

2. Reporting Contributions to a Principal. The requestor next asked: “Does the requirement to identify source(s) of contribution to principal in Section 08 of the quarterly expense report² apply to all sources that contribute more that 10% of the total resources received by the principal during the reporting period, even if the funding received from those sources cannot be used for lobbying?”

This requirement is stated in Code Section 20-1203(2)(h) and Paragraph 9.21 of Regulation 9. Note especially that Paragraph 9.21(B) of Regulation 9 states:

² That is, Item 08 (“Source(s) of Contributions to Principal”) on the Interim PLIS Expense Report Form.

(B) The term “total resources” includes all contributions to the principal and all dues and grants received by the principal during the reporting period.

There is no exception stated in the Code for contributions from particular types of sources. It is likely that this measure is designed to prevent certain entities from funding “straw principals” so that the straw principal can hire the lobbyists (perhaps with other funds freed up by exempt funds) and report as the principal and thus allow the real principal to hide its involvement. For such a measure, it is immaterial whether the funds may be used for lobbying.

Conclusion

Based upon all the facts presented in this matter, we conclude that any activity by the requestor personally on behalf of the nonprofit that is limited to testifying in the specified City administrative hearing at which the nonprofit is a party, preparing testimony for such a hearing, or related work (such as researching facts or law to support such testimony) is exempt activity under Code Subsections 20-1204(1) and (10).

Therefore, excluding the requestor’s participation in the hearings, any lobbying by the nonprofit did not exceed the applicable thresholds in the 3rd Quarter, 2012. On that basis, the requestor was advised that the nonprofit was not required to register as a principal or report expenses, and the requestor was not required to register as a lobbyist. In light of the fact that the requestor, as lobbyist, and the nonprofit, as principal, have already registered and filed an expense report, both may wish to file amended forms.

In general, testimony and participation as a party at a City administrative hearing, if it were not exempt, would constitute “direct communication,” not “indirect communication” as those terms are defined in the Lobbying Code.

The requirement that Item 08 on the PLIS Expense Report include details about all sources “that contributed more than 10% of the total resources received by the principal during the reporting period” does not have an exception for funding received from those sources that cannot be used for lobbying.

In keeping with the concept that an advisory opinion of this Board is necessarily limited to the facts presented, this Opinion has been predicated on the facts that were provided to the Board of Ethics. 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 office that interpret statutes are guidance as 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 and lobbying 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 laws under our jurisdiction 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 is a concern about particular fact situations, any affected individual is encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts. For information on requesting reconsideration of an Advisory Opinion, see Regulation No. 4 at Subpart H.

Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we are required to make public this revised version, edited to conceal facts that are reasonably likely to identify the requestor, as required by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4.

By the Board:

Michael H. Reed, Esq., Chair
Judge Phyllis W. Beck (Ret.), Vice-Chair
Sanjuanita González, Esq., Member
Brian J. McCormick, Jr., Esq., Member

[There is a vacancy on the Board, due to the resignation of William H. Brown III, Esq.]