



## CITY OF PHILADELPHIA

BOARD OF ETHICS  
One Parkway Building  
1515 Arch Street  
18<sup>th</sup> Floor  
Philadelphia, PA 19102  
(215) 686 – 9450 (t)  
(215) 686 – 9453 (f)

### **Philadelphia Board of Ethics Non-Public Board Opinion No. 2019-003**

September 4, 2019

**Re: Application of ethics rules to City employee's application for and acceptance of subsequent employment funded by a City contract**

Dear City Employee:

You have asked whether the City's ethics rules would restrict you from applying for or accepting a position with a private firm, and whether any additional restrictions would apply if the salary for that position would be funded by a City contract. As discussed in more detail below, you are advised that:

- (1) The City Ethics Code's conflict of interest restriction would require you to disqualify yourself from any official action related to a potential employer whose financial interests you have the ability to impact in your City job;
- (2) The State Ethics Act's conflict of interest restriction would also likely require you to recuse yourself from any official action related to the potential employer;
- (3) While you are a City employee, Home Rule Charter Section 10-102 prohibits you from applying for a position that would be funded by a City contract;
- (4) If you leave City service, the post-employment restrictions of the City's Ethics Code would not apply so long as you would not be performing work related to your City department; and
- (5) The post-employment restrictions of the State Ethics Act would not apply so long as you would not be performing work related to your City department.

## **I. Jurisdiction**

Philadelphia Home Rule Charter Section 4-1100 grants the Board of Ethics jurisdiction to administer and enforce all Charter provisions and ordinances pertaining to ethical matters. Charter Section 4-1100 and Philadelphia Code Section 20-606 authorize the Board to render advisory opinions explaining the application of laws under the Board's jurisdiction concerning a City officer or employee's proposed future conduct.<sup>1</sup> Board Regulation No. 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board.

## **II. Facts**

You are an employee of a City department. As part of your current responsibilities, you approve work performed by contractors.

You are considering leaving City service. You are interested in applying for positions with several private firms. Two firms with active postings in your field have contracts with your City department. Your responsibilities include approving work performed by these firms pursuant to their City-related contracts.

One job posting you have provided for our review is for an embedded contractor position with a City program (the "City Program"). According to this job posting, the embedded employee will work as a direct extension of the City Program's staff and may be located at the City Program's office. The City Program is not part of your City department. You have had no involvement with the City Program during your City service.

## **III. Conflicts of Interest**

### **A. General**

Applying for a job would create a conflict of interest with regard to the prospective employer. Section 20-607 of the Ethics Code prohibits a City officer from taking official action when either (a) they have a personal financial interest in that action or (b) a business or other entity of which they are a member has a financial interest in that action. If an employee has a conflict and has the ability to take official action that would financially impact the source of that conflict, the employee must disclose the conflict and disqualify themselves from any such official action. Code §20-608.

A "financial interest" is "an interest involving money or its equivalent or an interest involving any right, power or privilege that has economic value." Code §20-601(9). A person or entity has a financial interest in matters that have a potential impact on the person's or entity's income, compensation, assets, wealth, employment prospects, or business prospects. *See* Board Ops. 2019-002; 2012-001.

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<sup>1</sup> Home Rule Charter Section 4-1100 also gives the Board "concurrent authority" with the Law Department to advise City officials on the application of State law. Our advice on State law, however, does not provide protection from possible enforcement by the State Ethics Commission. For guidance on the State Ethics Act that would provide such protection, you should contact either the State Ethics Commission or the Law Department.

## **B. City Code Section 20-607(a)**

The opportunity to be considered for a job carries a financial interest even if an employment relationship never materializes. A job application or other effort to solicit employment therefore creates a financial interest under the Ethics Code.<sup>2</sup> Thus, a City officer or employee who applies for a non-City job would have a conflict of interest under Section 20-607(a) with regard to the prospective employer.

In your current position, you are responsible for approving work performed by firms that contract with your City department, including the two firms that have active postings in your field. Your approval is necessary for contractors to be paid for their work. As a result, you are in a position to take official action that would directly impact firms that have contracts with your City Department. Therefore, if you apply for a position with any firm that has contracts with your City department, you must comply with the disclosure and disqualification requirements of Section 20-608(c).

In contrast, if a firm does not have or bid on any contracts with your City department, you would not be in a position to take official action that would impact that firm financially. As a result, you would not be required to follow the disclosure and disqualification requirements of Section 20-608(c).

## **C. City Code Section 20-607(b)**

While a job application creates a financial interest under the Ethics Code, it does not make someone a “member” of a firm such that it would create a conflict under Section 20-607(b). A conflict would arise under Section 20-607(b), however, when there is both a job offer and acceptance of the same.<sup>3</sup> If you submit the required disclosure and disqualification letter when you initially apply for a position, however, you would not need to take further action upon acceptance of the position.

## **D. State Ethics Act**

The State Ethics Act imposes restrictions on “public employee[s]”<sup>4</sup> relating to conflicts of interest that are in addition to, and in some cases different from, those imposed on you by City law. *See* 65 Pa. C.S. §1101, *et seq.* The General Counsel of the State Ethics Commission has advised that a conflict may arise under State law where a matter before a public employee involves “a prospective employer with which you would be pursuing or would reasonably anticipate pursuing employment.” Advice of Counsel 11-514, State Ethics Comm’n (Mar. 18, 2011). In light of this, it appears likely that an application for employment with a firm that has a contract with your City department, including the two firms that have active postings in your

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<sup>2</sup> The question of when an officer or employee has applied for another job is fact-dependent. To the extent that you are responding to public postings of open positions and have not had any discussions with the potential employer in advance, you have applied when you submit materials in response to a posting.

<sup>3</sup> An earlier Board Opinion implies that a Section 20-607(b) conflict arises only at the point in a job search where there is a written agreement between the prospective employer and the employee or officer. Board Op. 2007-001. As discussed below, because employment relationships often lack a written contract, the apparent requirement of such a formal instrument unduly narrows this provision. This Opinion supersedes Board Opinion 2007-001.

<sup>4</sup> Because you informed Board staff that you were required to file the State’s financial disclosure form, we treat you as a “public employee” under the State Ethics Act. *See* 65 Pa. C.S. §1102.

field, would create a conflict under State law that would require you to recuse yourself from taking any official action regarding the firm. That said, for definitive guidance on the State Ethics Act, you should contact either the State Ethics Commission or the City Solicitor. *See* 65 Pa. C.S. §1109(g).

#### **IV. Charter Section 10-102**

Section 10-102 states, in relevant part, that City employees

... 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 out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

This is a broad rule meant to limit the ability of City officers and employees to use their status or authority to benefit from City contracts. Section 10-102 also prevents “double dipping” – arrangements where a City employee receives payments from the City on top of the salary already attached to their City job. *See* Board Op. 2014-001 (citing *Golden Motors v. Southern Motors*, 9 Phila. Co. Rptr. 212, 219 (1983), *aff’d* 90 Pa. Commw. 137 (1985)). For example, Section 10-102 prohibits a City employee who owns an office building from leasing office space to the City. *Id.*

Even if payment is made through another person or entity, it is still prohibited if the money came from a City contract. For example, a City employee who authors a book on their own time cannot sell copies of that book to the City, regardless of whether the sales are made directly to the City or through a distributor who then pays royalties to the author. *See* Solicitor’s Op. 96-12 (May 7, 1996) (Ravelli).

Charter Section 10-102 has two clauses. The first clause sets forth a prohibition on a City employee being interested in certain types of City contracts. The second clause states that a City employee shall not solicit any contract in which the employee may have such an interest. The Board has not previously interpreted the prohibition on soliciting contracts set forth in the second clause.<sup>5</sup> We must do so now to determine whether, as a current City employee, you may apply for a private position which would be funded by a City contract.

Principles of statutory construction require us to give the second clause of Section 10-102 meaning and effect separate from that of the first clause. *Cf.* 1 Pa. C.S. §1921(a) (“Every statute shall be construed...to give effect to all its provisions.”).<sup>6</sup> The second clause cannot, therefore, be read to describe the same conduct as the first. The first clause of Section 10-102 states that City employees “shall not be interested” in any contract that is (1) for property sales, construction or services and (2) paid out of the City Treasury. The second clause prohibits solicitation of “any

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<sup>5</sup> The Board previously interpreted Section 10-102 as a whole to apply only if a job offer was “memorialized in a contract” obligating the prospective employer to pay the applicant out of a City contract. Board Op. 2007-001. The Board did not discuss the ban on solicitation. As noted in footnote 3 above, this Opinion supersedes Board Opinion 2007-001.

<sup>6</sup> While the State Statutory Construction Act does not apply to the interpretation of a Home Rule Charter, 1 Pa. C.S. §1502(a)(1)(ii), it nonetheless incorporates general principles of statutory construction.

contract” in which the employee “may have any such direct or indirect interest.” “[S]uch...interest” by necessity refers to the prohibited interests described in the first clause.

Notably, the second clause uses “may” – rather than “shall” as used in the first clause – to describe the relationship between “any contract” and prohibited interests. This distinction indicates that the ban on solicitation applies to future interests, i.e. those that would accrue if the solicitation was successful and a contract was formed. Accordingly, we read the second clause of Section 10-102 to prohibit the solicitation of *any* contractual arrangement that would result in a prohibited interest.

A job application is clearly solicitation of employment. While most employment relationships do not involve a written contract, even at-will employment is inherently contractual in nature. *See* 19 Summ. Pa. Jur. 2d Employment & Labor Relations §1:36 (2d ed.). Soliciting employment that would be paid for by a City contract is soliciting a contractual relationship that, if ultimately formed, would create a prohibited interest. As a result, we interpret Section 10-102 to prohibit a City employee from applying for a job or otherwise soliciting employment that would be funded by a City contract.

In this case, applying for the embedded contractor position would be soliciting an employment agreement under which you would be paid out of a City contract. As a result, you cannot apply for this position while you are still employed by the City. Similarly, if any other position you are considering will involve work funded by City contracts, you would be prohibited from applying for that position while employed by the City.

## **V. Post-Employment Restrictions**

If you leave City employment, you will be subject to post-employment restrictions under the City’s Ethics Code and the State Ethics Act.

### **A. City Post-Employment Restrictions**

The Ethics Code prohibits a City officer or employee from becoming “financially interested” in official action taken “during his [or her] term of office or employment and until two (2) years have elapsed” since leaving City service. Code §20-607(c). So long as your work for your new employer is not related to your work for your City department, the two-year restriction would not apply. For example, if a position with a new employer does not overlap with official actions you took during your City service, the two-year ban would not apply.

In addition, the Ethics Code permanently bans a former City officer or employee from “assist[ing]...another person, with or without compensation, in any transaction involving the City in which [the officer or employee] at any time participated during their City service or employment.” Code §20-603(1). So long as your work for your new employer does not involve any transactions with your City department, this restriction would not apply. If your new job will involve work at your City department, however, you must ensure that you avoid participating in transactions with the City you were involved in during your City service.

## B. State Post-Employment Restriction

The State Ethics Act prohibits public employees from representing any individual or organization before their former governmental body for compensation. 65 Pa. C.S. §1103(g). It is likely that the State Ethics Commission would only treat entities within your City department as part of your former governmental body. *See e.g.*, Advice of Counsel 19-520, State Ethics Comm'n (May 10, 2019). Therefore, if work for a new employer during the first year of employment does not involve any entities of your City department, this provision would not apply. In contrast, a job that would involve projects at your City department would require greater care to avoid engaging in representation of your new employer or its clients before your City department. As noted above, you should consult with the State Ethics Commission or the City Solicitor for definitive guidance on the State Ethics Act.

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Thank you for your concern about compliance with the City's Ethics Code and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board's jurisdiction, unless they have omitted or misstated material facts in their requests. Code § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, a version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. Please let Board Staff know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

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cc: J. Shane Creamer, Jr., Esq., Executive Director  
Michael J. Cooke, Esq., Acting General Counsel