

CITY OF PHILADELPHIA

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GC-2008-503

Philadelphia Board of Ethics Advice of Counsel

January 10, 2008

William Yurkow
Director of Finance & Administration
Office of Housing & Community Development
City of Philadelphia
1234 Market Street
Philadelphia, PA 19107

Re: Request for Advice Regarding Potential Conflict

Dear Mr. Yurkow:

In e-mail messages dated January 8, 2008, you have requested advice on the restrictions the ethics laws would place on your activities as an employee of the Philadelphia Office of Housing & Community Development (OHCD), if you were to serve as an uncompensated member of the board of directors of two nonprofit organizations, the Utility Emergency Services Fund and the Women's Community Revitalization Project (collectively, "the nonprofits"). You advise that you serve the City as an employee in OHCD.

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.

There is no general requirement that City officers or employees refrain from all private or self-employment while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment. However, 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.

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. 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.

Prior rulings have held that where a City employee, as an individual, enters into a personal services contract with the City, that clearly violates this provision. When the employee works for a firm that has a contract with the City, the provision is violated when the employee works on that contract for the outside contractor. Where the outside contractor has many contracts, and the employee happens to work for the outside contractor but not in any way related to the City contract, the provision is not violated, unless the City employee has a financial interest in the contract, such as where the employee's compensation includes a share of profits or revenue generated by the contract or where the employee otherwise benefits from

the contract. However, since you advise that you will not be compensated by the nonprofits, there is no issue under this Charter provision.

Philadelphia Code

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. This provision may not be avoided by disclosure and disqualification. However, note that the prohibition is "as agent or attorney," so it merely requires that you not contact the City acting on behalf of either nonprofit. Section 20-602(5) applies a similar restriction to any outside firm of which the officer is a member, so that anyone in that firm would be prohibited from the same representation. Unlike §20-602(1), however, §20-602(5) does not apply if the City official makes the public disclosure and disqualification provided in §20-608¹. Thus, an officer or employee of one of the nonprofits could represent the nonprofit in a transaction involving the City, provided that you made the requisite disclosure and disqualification.

Additionally, 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:

¹ Section 20-608(1) 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 (and description of duties relevant to the conflict, if not obvious);
3. Your private position or financial interest (or that of a relative or business of the discloser or relative) 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 agency in which you would be acting, presumably OHCD; (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.

(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 . . .

Since you advise that you will not be compensated by the nonprofits, there would be no issue under Section 20-607(a), as there would be no personal financial interest. 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.

As a member of the board of directors of each nonprofit, you would be a "member" of each nonprofit. Accordingly, any City action in which either nonprofit would have a financial interest can result in a conflict of interest for you. Thus, for a financial interest that either nonprofit may have in City action, you must disclose the conflict and disqualify yourself. In such matters, you must publicly disclose the financial interest and announce your intention to disqualify yourself from all official consideration of the matter. Participation that you should avoid would include not only final decisions, but also any preliminary discussion, review, or action.

Note, also, that Section 20-609 of the Code provides that no City officer or employee "shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others."

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:

...

“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.

“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.

...

² The Act applies only if you are a “public official” or “public employee,” as defined in the Act. You have not advised as to your job responsibilities within OHCD. However, I presume that as Director of Finance & Administration, you are a “public employee,” which is defined in the Act to include: “Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person.” 65 Pa.C.S. §1102. However, if you wish a definitive determination as to whether the Act applies to you in general as an employee of the City, please provide me with a job description.

“Conflict” or “conflict of interest.” Use by a public official or public employee of the authority of his office or employment or any 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.

Based on several rulings of the State Ethics Commission concerning board members of nonprofit entities, I conclude that either nonprofit would be a “business with which you are associated.” Therefore, I conclude that for you to take official action that has an economic impact on either nonprofit 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 or public employee relative to the use of authority of office to obtain a private pecuniary benefit for the nonprofit involved, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, by OHCD, that would affect the nonprofit. See also 65 Pa.C.S.A. §1103(j).

Section 1103(f) of the State Ethics Act, 65 Pa.C.S. §1103(f), requires that a contract valued at more than \$500 between a City official or his spouse or child or a business with which one of those individuals is associated and the official's "governmental body" must be awarded through an "open and public process," involving prior public notice of the contract opportunity and public disclosure of all proposals considered and contracts awarded. The same provision applies to any subcontract under such a contract. Based on opinions of the State Ethics Commission, I conclude that the City's RFP process generally meets this requirement. However, a sole source contract would not, unless the provisions of City Code Chapter 17-1400 were applied.

Finally, I note that the State Ethics Commission has final administrative jurisdiction over interpretation of the State Ethics Act. Thus, you may wish to request the advice of the Commission to obtain a definitive ruling on any particular fact situation, including whether the Act applies to you. 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 [the Act]." 65 Pa.C.S. §1109(g). Presumably, it is this provision that is the reason for the concurrent jurisdiction of the Law Department provided for in Charter §4-1100 as to matters involving State law. Since the Board of Ethics is not "the solicitor" of the City, you may, if you wish, also obtain a nonconfidential opinion from the Law Department as to the application of the State Ethics Act.

Financial Disclosure

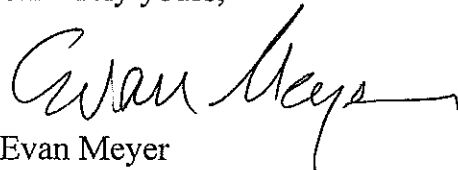
You would also be required to disclose your office as a board member of the nonprofits in the financial disclosure forms you must file each May 1.

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 from official City action that would affect the financial interests of the nonprofits, I advise you that you are not prohibited by State or local law from serving as an uncompensated member of the board of directors of the two nonprofit organizations, the Utility Emergency Services Fund and the Women's Community Revitalization Project, while serving the City as Director of Finance & Administration in the Office of Housing & Community Development.

If you have any additional facts to provide, I will be happy to consider if they change any of the conclusions in this opinion.

Sincerely yours,



Evan Meyer
General Counsel

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