



CITY OF PHILADELPHIA

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Evan Meyer
General Counsel

GC-2008-504

Philadelphia Board of Ethics Confidential Advice of Counsel

April 1, 2008

Re: Request for Advice Regarding Potential Conflict in Proposed Appointment to City Board or Commission

In an e-mail message a City department head requested confidential advice on the restrictions the ethics laws would place on the activities of an attorney for a legal organization, if that attorney were to be appointed to an unpaid position on a particular City board/commission. The department head advised that he/she would like to recommend to the Mayor that he appoint to the body a particular lawyer for the outside organization. We were advised that the organization does sue the City on occasion.

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.

If the Mayor were to appoint the subject attorney to a position on a board or commission of the City, the attorney would be a City officer in that position. See Opinion Nos. 2007-004 and 2007-006 and Advice of Counsel of January 29, 2008. There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and conflicts of interest are avoided. 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. Since the subject individual would not be compensated for service on the board/commission in question, this provision does not apply.

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. However, subsection (2) of this Section provides that subsection (1) applies in a less restrictive way to uncompensated officers or part-time officials (either of which would apply to the subject individual as an unpaid member of a board of the City, which by its nature is a part-time position). Subsection (2) provides that such board members are "subject to the foregoing paragraph only in relation to a particular matter (a) in which he has at any time participated through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (b) which is pending in the department, agency, authority, board or commission of the City in which he is serving." Therefore, to the extent that Code §20-602(1), as modified by 20-602(2), restricts the subject individual personally from representing the outside legal organization in any matter involving the City while serving on the City board/commission, there should be no issue, as the requesting department head advised that the subject individual does not intend to participate in any such

representation. However, this does not address a separate restriction on any other employee of the outside legal organization, as imposed by a separate provision, Section 20-602(5). Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to any outside firm of which the City 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) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in §20-608¹. Thus, an officer or employee of the outside legal organization could represent that organization or a client in a transaction involving the City (such as a lawsuit against the City), provided that the subject individual 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:

(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 . . .

¹ Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The subject individual 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. Her public position (member of the board/commission) and description of duties relevant to the conflict, if not obvious;
3. Her private position or financial interest (employee of the outside legal organization) that presents the conflict;
4. A statement of how her public duties may intersect with her private interest or that of her employer (if not obvious from 2 & 3 above); and
5. Her intention to disqualify herself 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 Chair, Executive Director, or Secretary of the City board/commission in which she would be acting; (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.

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.

Thus, for either a personal financial interest or an interest that the Outside legal organization may have in City action, the rule is the same: The subject individual must disclose the conflict and announce the individual's disqualification. In such matters, the person must publicly disclose the financial interest and announce his/her intention to be disqualified from all official consideration of the matter. Participation that should be avoided 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." Obviously, if The subject individual were to make available to the outside legal organization any confidential City information learned in service on the City board/commission, that would violate this provision.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., has a similar conflict of interest provision, but the State Ethics Act does not apply to officials who are members of boards that are merely advisory. Nevertheless, the State Ethics Commission is the

ultimate arbiter of interpretations of the Act. We noted 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, we advised the requestor: “you may, if you wish, also obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive the protection, could not be confidential.”

Financial Disclosure

As a City officer, the subject attorney would also be required to disclose his/her compensation as an employee of the outside legal organization as income in the financial disclosure form filed each May 1, pursuant to Code Section 20-610(1).

Other Authority Not Addressed

This Advice of Counsel addresses only the application of the ethics laws relating to the conduct of governmental employees of the City. I do not address any other source of law. Explicitly not addressed is the Rules of Professional Conduct that govern the conduct of attorneys admitted to practice in Pennsylvania.

Conclusion

Based on the facts that we were provided, and provided that the subject individual complies with the requirements of this opinion, including that the individual publicly disclose any conflicts as provided in Code §20-608(1) and announce intention to be disqualified in matters in which the outside legal organization is representing itself or its clients in a matter involving the City and also be disqualified from official City action that would affect the financial interests of the outside legal organization, we advised the requesting official that the subject individual is not prohibited by State or local law from serving in an unpaid position on the City board/commission, while also serving as an employee of the outside legal organization.

Confidential Advice of Counsel

April 1, 2008

Page 6 of 6

Finally, we also advised: If you have any additional facts to provide, I will be happy to consider if they change any of the conclusions in this opinion. Since you have requested confidential advice from the Board of Ethics, we will not make this letter public. However, we will be required to make public an edited version of this letter, redacted to conceal the identity of the principals, under Code Section 20-606(1)(d)(iii).

Sincerely yours,

Evan Meyer
General Counsel

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