

CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

GC-2008-507

**Philadelphia Board of Ethics
Confidential Advice of Counsel**

March 31, 2008

Re: Request for Advice Regarding Expert Testimony

A representative of a head of a City office requested confidential advice concerning whether a deputy in that office would be permitted, under the ethics laws, to testify as an expert witness for a municipal agency in another Pennsylvania city, in a law suit, and to accept the witness fee for so testifying.

The following two paragraphs were provided as our standard advice:

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.

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.

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to this individual.¹ We concluded that there are no conflict of interest issues raised by the facts presented. Thus, the only issue is whether the fee would be a prohibited honorarium.

Section 1103(d) of the Act provides that “No public official or public employee shall accept an honorarium.” The term “honorarium” is defined in Section 1102 of the Act as follows: “Payment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of such services which are nonpublic occupational or professional in nature. The term does not include tokens presented or provided which are of de minimis economic impact.” We advised that we do not interpret these provisions to prohibit receipt of standard payment for outside employment of substantive value.

We interpret the Act’s definition of “honorarium” to mean two things: (1) public employees may not receive payment when they are invited to appear and talk about subjects related to their work because of their official identities; and (2) public employees may not receive payment for other services that is out of proportion to the market value of such services. The presumption is that when public employees are paid to talk about their work or are paid an excessive amount for doing something, the payment may represent a “corrupt bargain” to purchase the employee’s influence. This does not prohibit public employees from having a separate area of expertise apart from their official duties, for which they may be compensated in outside employment. Here we are concerned with the first definition, where employees may only be paid for a separate expertise, or—in the words of the statute—work that is “nonpublic occupational or professional in nature.” On the facts you provided to me, it appears that the deputy commissioner would necessarily be testifying about his experiences with issues similar to

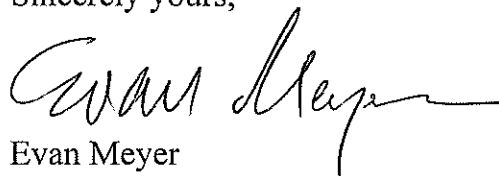
¹ The Act applies only to a “public employee,” defined in the Act to include: “Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering 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. I conclude that it is clear that any deputy commissioner in the City is a “public employee.” We further advised: “However, if you think there may be an issue in this regard, please provide me with a job description and an organization chart showing this individual’s position in the City, and I will review the matter. (Such review might include recommending that you seek a ruling from the State Ethics Commission, if the matter is not clear.)”

those raised in the lawsuit. That is not a matter that is “nonpublic occupational,” so I conclude that the State Ethics Commission, if asked, would advise that for the deputy commissioner to accept an expert witness fee for such testimony would constitute a prohibited honorarium. I attach the Commission’s Advice of Counsel No. 07-575 as guidance. Of course, nothing would prohibit the deputy commissioner from testifying and not accepting any fee from the agency. In addition, if the employee’s appointing authority concludes that it is in the interests of the City for this deputy commissioner to cooperate with the other municipality in this matter, there would be no legal issue if the City of Philadelphia were to reimburse the deputy commissioner for his travel expenses.

We noted 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. 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 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.

Finally, we advised as follows: “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

Attachment—Advice of Counsel 07-575
cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director

ADVICE OF COUNSEL

August 21, 2007

Mary Lynne Good
453 Munntown Road
Eighty Four, PA 15330

07-575

Dear Ms. Good:

This responds to your letters dated July 13, 2007, and July 17, 2007, by which you requested advice from the State Ethics Commission.

Issue: Whether the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 et seq., would present any restrictions upon a former Adult Personal Care Homes Licensing Representative with the Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"), who has returned to work for DPW in the same position as an annuitant, with regard to receiving payment from a university for providing instruction to students in a training course for current and prospective personal care home administrators.

Facts: You state that you recently retired from Commonwealth employment as an Adult Personal Care Homes Licensing Representative (hereinafter also referred to as "Licensing Representative") with the Pittsburgh West Office of DPW. You have submitted a copy of a letter to you dated May 7, 2007, from Jay Bausch ("Mr. Bausch"), Director of the Bureau of Human Resources of DPW. In said correspondence, Mr. Bausch confirms that you retired from your former position with DPW effective June 29, 2007.

You have submitted a copy of a job posting for the position of Licensing Representative for the Western Region Office of DPW, which is incorporated herein by a reference. A copy of the job classification specifications for the position of Licensing Representative (job code 43671) has been obtained and is also incorporated herein by reference.

In your July 17, 2007, letter, you stated that you planned to return to work on July 23, 2007, as an annuitant in the same position of Licensing Representative with DPW, working two to three days a week until the end of this year. You have submitted a copy of a letter to you dated July 20, 2007, from Mr. Bausch. In said letter, Mr. Bausch confirms your reemployment with DPW, Office of Social Programs, effective July 16, 2007, as a Licensing Representative under the 95-day annuitant program (see, 71 Pa.C.S. § 5706(a.1)).

You state that you have been offered a two-day job teaching two modules of a 100-hour training course (hereinafter referred to as "the Training Course") for current and prospective personal care home administrators. You have submitted a course outline for the two modules that you would be teaching. Substantively, you would

instruct students on DPW's personal care home regulations at 55 Pa. Code § 2600 et seq., which regulations DPW enforces and you will be enforcing in your annuitant position with DPW. You state that you would not be teaching any DPW staff, and no DPW staff other than you would be involved in teaching the two course modules.

The Training Course will start in early September 2007 at the McKeesport campus of the Pennsylvania State University ("Penn State"). You would be paid by Penn State for teaching the two modules. The students for these courses would pay their tuition to Penn State. You state that there may still be a few course scholarships available from the Harrisburg Office of Mental Retardation, but you would have no input as to which students would receive such scholarships.

You request guidance as to whether the Ethics Act would permit you to teach the aforesaid two modules of the Training Course and receive payment from Penn State for your services.

Discussion: It is initially noted that pursuant to Sections 1107(10) and 1107(11) of the Ethics Act, 65 Pa.C.S. §§ 1107(10), (11), advisories are issued to the requester based upon the facts that the requester has submitted. In issuing the advisory based upon the facts that the requester has submitted, the Commission does not engage in an independent investigation of the facts, nor does it speculate as to facts that have not been submitted. It is the burden of the requester to truthfully disclose all of the material facts relevant to the inquiry. 65 Pa.C.S. §§ 1107(10), (11). An advisory only affords a defense to the extent the requester has truthfully disclosed all of the material facts.

In your former capacity as a Licensing Representative for DPW, you would be considered a "public employee" subject to the Ethics Act and the Regulations of the State Ethics Commission. See, 65 Pa.C.S. § 1102; 51 Pa. Code § 11.1. This conclusion is based upon the job classification specifications for your former position, which when reviewed on an objective basis, indicate clearly that the power exists to take or recommend official action of a non-ministerial nature with respect to one or more of the following: contracting; procurement; planning; inspecting; administering or monitoring grants; leasing; regulating; auditing; or other activities where the economic impact is greater than de minimis on the interests of another person.

Although you have retired from Commonwealth employment, you have returned to work as an annuitant with DPW in the same capacity that you previously held, specifically, as a Licensing Representative. In so doing, you have again become a "public employee" subject to the Ethics Act. See, Graves, Opinion 00-009; McGlathery, Opinion 00-004.

Section 1103(a) of the Ethics Act provides:

§ 1103. Restricted activities

(a) Conflict of interest.--No public official or public employee shall engage in conduct that constitutes a conflict of interest.

65 Pa.C.S. § 1103(a).

The following terms pertaining to conflicts of interest are defined in the Ethics Act as follows:

§ 1102. Definitions

"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. The term 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.

"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.

65 Pa.C.S. § 1102.

Section 1103(a) of the Ethics Act prohibits a public official/public employee from using the authority of public office/employment or confidential information received by holding such a public position for the private pecuniary benefit of the public official/public employee himself, any member of his immediate family, or a business with which he or a member of his immediate family is associated.

Section 1103(d) of the Ethics Act provides as follows:

§ 1103. Restricted activities.

(d) Honorarium.--No public official or public employee shall accept an honorarium.

65 Pa.C.S. § 1103(d).

The Ethics Act defines the term "honorarium" and the related term "de minimis economic impact" as follows:

§ 1102. Definitions

"Honorarium." Payment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of such services which are nonpublic occupational or professional in nature. The term does not include tokens presented or provided which are of de minimis economic impact.

"De minimis economic impact." An economic consequence which has an insignificant effect.

65 Pa.C.S. § 1102.

Section 1103(d) of the Ethics Act is an absolute prohibition against accepting honoraria. The question of whether a given payment is an honorarium prohibited by Section 1103(d) is determined by an application of the statutory definition set forth in the Ethics Act, not by the mere label that may have been attached to the payment.

Confidential Opinion, 01-001. The statutory definition of "honorarium" generally includes payments which are made in recognition of speaking engagements/presentations, appearances, and published works, but excludes such payments if: (1) they are legitimately intended as consideration for the value of such services; and (2) they are undertaken in the public official's/public employee's private professional or occupational capacity and are not related to the public position. Id.; 65 Pa.C.S. §1102.

In Fiorello, Order 1363, the Commission stated:

It is perhaps easier to understand honorarium from the perspective of what it is not. If the payment is not consideration for the value of the services, the payment is an honorarium. If the payment is not for services that are non-public occupational or professional in nature, the payment is an honorarium. If either (or both) of the foregoing two negatives apply, the payment is an honorarium.

Fiorello, Order 1363 at 87.

An application of the relevant criteria establishes that any payment you would receive from Penn State for teaching the two aforesaid modules of the Training Course while serving as an annuitant/Licensing Representative for DPW would constitute an honorarium prohibited by Section 1103(d) of the Ethics Act. This is because the subject matter of the modules that you would be teaching as part of the Training Course would be related to the work that you perform in your public position as an annuitant/Licensing Representative with DPW. Therefore, you are advised that Section 1103(d) of the Ethics Act would prohibit you from receiving payment from Penn State for providing instruction to students of the Training Course.

Lastly, the propriety of the proposed conduct has only been addressed under the Ethics Act; the applicability of any other statute, code, ordinance, regulation, or other code of conduct other than the Ethics Act has not been considered in that they do not involve an interpretation of the Ethics Act. Specifically not addressed is the applicability of the Governor's Code of Conduct.

Conclusion: In the former capacity as an Adult Personal Care Homes Licensing Representative with the Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"), you would be considered a "public employee" as that term is defined in the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 et seq. Although you have retired from DPW, you have returned to work as an annuitant with DPW in the same capacity. In so doing, you have again become a "public employee" subject to the Ethics Act. Section 1103(d) of the Ethics Act, which provides that no public official or public employee shall accept an honorarium, would prohibit you from receiving payment from the Pennsylvania State University for instructing students in a training course for prospective and current personal care home administrators with regard to DPW's regulations at 55 Pa. Code Chapter 2600, pertaining to personal care homes.

The propriety of the proposed conduct has only been addressed under the Ethics Act.

Further, should service be terminated, as outlined above, the Ethics Act would require that a Statement of Financial Interests be filed by no later than May 1 of the year after termination of service.

Pursuant to Section 1107(11), an Advice is a complete defense in any enforcement proceeding initiated by the Commission, and evidence of good faith

conduct in any other civil or criminal proceeding, provided the requester has disclosed truthfully all the material facts and committed the acts complained of in reliance on the Advice given.

This letter is a public record and will be made available as such.

Finally, if you disagree with this Advice or if you have any reason to challenge same, you may appeal the Advice to the full Commission. A personal appearance before the Commission will be scheduled and a formal Opinion will be issued by the Commission.

Any such appeal must be in writing and must be actually received at the Commission within thirty (30) days of the date of this Advice pursuant to 51 Pa. Code § 13.2(h). The appeal may be received at the Commission by hand delivery, United States mail, delivery service, or by FAX transmission (717-787-0806). Failure to file such an appeal at the Commission within thirty (30) days may result in the dismissal of the appeal.

Sincerely,

Robin M. Hittie
Chief Counsel