

CITY OF PHILADELPHIA

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Evan Meyer
General Counsel

GC-2008-508

Philadelphia Board of Ethics
Advice of Counsel

February 7, 2008

Paulette M. Smith
Sanitarian Supervisor
Childhood Lead Poisoning Prevention Program
Philadelphia Department of Public Health
PNH, Building No. 3
2100 West Girard Avenue
Philadelphia, PA 19130

Re: Request for Advice Regarding Potential Conflict

Dear Ms. Smith:

In your letter dated January 22, 2008, you have requested advice on the restrictions the ethics laws would place on your activities as Sanitation Supervisor for the City, if you were to open your own business, providing the Food Safety Certification course that is required of food establishments throughout the City and suburbs. You advise that for nine years you worked in the Environmental Health Services unit of the Health Department, principally doing food inspections and reviewing plan submissions for restaurants. You further advise that in August of 2006, you permanently transferred to the Lead Poisoning Prevention Unit of the Health Department, where you are currently supervising the environmental staff and representing the Department in Lead Court hearings. You advise that this is a

separate unit from Environmental Health and that you have not been involved in any aspect of Environmental Health Services in over a year.

You advise that over the years you have accumulated many certifications and licenses, including a Masters degree in Public Health. One of your certifications is Certified Food Safety Trainer. You advise that you would like to open your own business, providing the Food Safety Certification course, and you ask whether there is any conflict of interest in having such a business while employed by the City Health Department in your current position.

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 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. In that regard, 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. You have not provided any facts that indicate that you plan to offer your services to any entity that would pay you under a contract with the City. Assuming that is

correct, there is no issue under the Charter.

Philadelphia Code

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 . . .

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 any new business of yours may have in City action, the rule is the same: You must disclose the conflict and disqualify yourself from acting as a City official in the matter. In such matters, you must publicly disclose the financial interest and announce your

intention to disqualify yourself from all official consideration of the matter, as provided in Code §20-608.¹ Participation that you must avoid would include not only final decisions, but also any preliminary discussion, review, or action. You must file the disclosure and disqualification letter prior to any City action being taken (even if it is City action in which you are not involved) that may affect the financial interests of yourself, your new business, or any of the clients of that business.

Additionally, the Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit you 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, you have provided no facts that indicate that you would be representing food establishments before the City.

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 you were to make available to your business or any of its clients any confidential City information you learn in your service for the Health Department, that would violate this provision.

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 the Capital Program Office; (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.

State Ethics Act

The Public Official and Employee Ethics Act (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

² 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, from your description of your duties that you are and have been at least involved in “inspecting, licensing, regulating or auditing any person.” Accordingly, I will assume that you qualify as a “public employee.” However, if you think there may be an issue in this regard, please provide me with a job description and an organization chart showing your former 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.)

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.

...

“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.

I conclude that for you to take official action that has an economic impact on any new outside business of yours 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 relative to the use of authority of office to obtain a private pecuniary benefit for the new business or you personally, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, as described in footnote 1 above. See also 65 Pa.C.S.A. §1103(j).

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. 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.

Post-employment Rules

As you may know, both the State Ethics Act and the Philadelphia Ethics Code have restrictions that apply to City employees in certain periods after they separate from City service. See Code §§20-603 and 20-607(c); State Ethics Act, 65 Pa.C.S.A. §1103(g). However, these rules apply only to former City employees. You have not advised that you are intending to resign as a City employee, and I understand your request to relate to restrictions on you as a current City employee, who has an outside business.

Financial Disclosure

As a City employee who meets the definition of “public employee” under the State Ethics Act, you would also be required to disclose your compensation as an employee or owner of your new business as income in the State financial disclosure form you must file each May 1, pursuant to the Act.

Civil Service Regulations

I assume that you are a Civil Service employee. Civil Service Regulation 33.02 provides, in relevant part:

33.02 OUTSIDE EMPLOYMENT. An employee performing "outside work" by working for an employer other than the City, engaging in private or self-employment or rendering service for private interests may do so only in accordance with the following provisions:

33.021 CONFLICT OF INTEREST. No employee shall perform outside work which is incompatible with the proper discharge of his official duties.

...

33.023 COMMUNITY RELATIONS. The outside job must be one that will not bring disfavor or disrespect upon the employee, the department or the City, in accordance with the judgment of the responsible authority of the respective Office, Board or Commission involved.

33.024. IMPAIRMENT OF EFFICIENCY. The outside work must not interfere with the employee's effectiveness on his City job. It must not impede, or adversely affect the performance of his City work and shall not be arduous, strenuous, laborious, dangerous or exhausting.

...

Other provisions provide further guidelines. The only ones directly relevant to this opinion are Regulations 33.025 and 33.026, which provide that a department may develop more detailed policies, which may include requiring employees to obtain advance approval of outside employment, but these must be consistent with Regulation 33. I have not been advised whether the City's Health Department has a procedure for approval of outside employment. You may wish to check with your superiors.

Conclusion

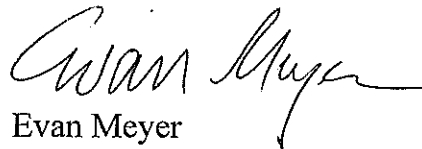
Based on the facts you have provided, and provided that you comply with the requirements of this opinion, I advise you that you are not prohibited by State or local law from opening your own business, providing the Food Safety Certification course that is required of food establishments throughout the City and suburbs. You must observe these restrictions, as discussed above:

1. You may not have a direct or indirect interest in any City contract.
2. Neither you nor your business may have a financial interest in any City official action taken by you. Accordingly, once you start this business, you must publicly disclose the financial interests and disqualify yourself from taking official action that affects those interests.
3. You may not represent, as agent, your business or any of its clients in any transaction involving the City.

4. You may not use confidential City information to advance the financial interests of yourself, your business, or its clients.
5. You must comply with the Civil Service Regulations and any Health Department policy on outside employment.
6. You must disclose your interest in your business in the annual financial disclosure filing each May 1.

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 not requested confidential advice from the Board of Ethics, we will make this letter public, as required by Code Section 20-606(1)(d)(iii).

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Evan Meyer".

Evan Meyer
General Counsel

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