



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2009-506

June 11, 2009

Re: Potential Conflict / Board or Commission / Relative-in-law / Lawyer

A City employee ("the employee" or "the requestor") asked to be advised on procedures that he/she must take to ensure compliance with the ethics laws, because the employee serves as another official's alternate on a City board or commission ("board"), and in the near future the board will consider a matter in which the applicant is represented by the law firm of which a relative-in-law of the employee is a partner, although the relative is not involved in the representation. The board is not merely advisory, but has a statutory mandate to make determinations that directly affect the financial interest of applicants before it.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board 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 the requestor may be concerned about, we encouraged the requestor to contact the Board for specific advice on the application of the

ethics laws to those particular facts.

The issue is whether the requestor must take any actions to avoid a conflict of interest. The City Ethics Code and the State Ethics Act both contain provisions that address conflicts of interest.

Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from taking official action that affects either a personal financial interest or an interest held by their business or by certain relatives. As a designee to a City board or commission, the requestor is not only a City employee, but also a City officer in his/her capacity as a member of the board. Code Section 20-607(a) applies to any personal interest that the requestor might have as an officer or employee. That provision is not relevant here, as we were not advised that the requestor had a personal financial interest in either the applicant or the law firm.

As to the interest through another person or 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.

Since the phrase "like relative-in-law" clearly includes the relation at issue, and since the requestor's relative-in-law is a partner of the law firm, the requestor was advised that he/she may not take official action in a matter affecting the law firm in which the relative-in-law has a direct financial interest. It cannot be assumed that every matter that

affects the finances of a law firm's client also affects the financial interests of any particular partner of that law firm. Accordingly, Code subsection 20-607(b) would require the requestor's disclosure and disqualification from any City decision that would have a financial impact on the law firm only where the financial impact specifically extends to the requestor's relative-in-law. The question is whether the law firm's representation of its client constitutes a financial interest in the matter affecting that client, to the degree that the financial interest then resides in all partners of the firm, and creates a conflict for a City officer/employee with discretion in the matter who is a relative of a partner.

The Code does not define "financial interest." Nor are we aware of any controlling authority (such as a prior Opinion by this Board or an Opinion of the Law Department) that construes the term "financial interest" in the context of Code Section 20-607¹. In general, "financial interest" has been used to describe an on-going and present financial relation, such as an employer-employee relationship, a compensated directorship, or an investment (such as equity ownership) in the subject entity. In this case, it might well be the case that the law firm is receiving an hourly fee that will not be affected by the result of the City's decision. One could argue, however, that success in the matter will likely mean that the law firm will receive more billings in matters related to executing and carrying out the project, if not future work for that client (or other clients) as a result of the client being pleased with the law firm's representation.

On the other hand, interpretation of the reach of the term "financial interest" is really a question of first impression, such that it would be more appropriate for a Formal Opinion of the Board of Ethics, rather than an Advice of Counsel. *See* Board of Ethics Regulation No. 4, Paragraph 4.5. However, there are no Ethics Board meetings scheduled before the board meeting at issue, and hence no opportunity to consider a Formal Opinion in this matter.²

Accordingly, Counsel cannot advise that the Code clearly compels the conclusion that the requestor has a "financial interest" under Section 20-607(a), such that the requestor is required by Code Section 20-608(1)(c) to follow the procedure for public notice outlined in that subsection.

¹ Note that a discussion of financial interest—in the very different context of a City employee's pursuit of future employment opportunities—may be found in Confidential Opinion No. 2007-001 (November 5, 2007), which is available on the website of the Board. *See* pages 5-9 and 14-16 of Confidential Opinion No. 2007-001.

² For a discussion of the possibility of postponing a matter before a City board/commission in order to address ethics issues, *see* Advice of Counsel GC-2008-524, at page 3.

Nevertheless, there is at least an appearance issue that would arise from the requestor's participation on the board in this matter. *See* the discussion of "appearance of impropriety" in Formal Opinion No. 2009-001 (May 13, 2009), pages 3-4. In light of that issue, the requestor was advised that the better course of action would be not to participate in consideration of that pending application before the board.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., likely applies to the requestor, assuming that his/her job duties meet the definition of "public employee" under the Act. However, unlike the City Code, the Act's conflict of interest provision does not reach a "like relative-in-law." The Act's definition of "conflict of interest" reaches official action that benefits the public official himself, "a member of his immediate family, or a business with which he or a member of his immediate family is associated." 65 Pa.C.S. §1102(definition of "conflict of interest"). The term "immediate family" is defined as: "A parent, spouse, child, brother or sister." 65 Pa.C.S. §1102(definition of "immediate family"). In-laws are not included. Thus, the requestor was advised that financial interests held by the requestor's relative-in-law would not implicate the State Ethics Act conflict of interest provision.

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 [certain provisions of the Act]." 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option to 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, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

Conclusion

The requestor was advised that, in light of the lack of prior rulings on similar facts construing the term "financial interest," the requestor was not required to file a public

disclosure under Code Section 20-608. However, the requestor was advised that he/she should not participate in this matter before the board. The requestor was advised that, if this situation is likely to recur, he/she may wish to seek a Formal Opinion from the Board of Ethics, in advance of future board matters.

Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we are making public this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

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