



CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 Sansom Street
2nd Floor
Philadelphia, PA 19102-3026
(215) 686 – 9450
FAX 686 – 9453

Evan Meyer
General Counsel

Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2009-509

September 14, 2009

Re: Board Member Heads Group Applying for City Grant

A member of a City board or commission (“the requestor’s board”) requested nonpublic advice on whether he would have a prohibited conflict of interest or the appearance of a conflict resulting from the fact that he volunteers as the president of a nongovernmental group that is considering applying for a City grant where staff of a City department affiliated with the requestor’s board will have a role in reviewing applications and awarding the grants. Based on the facts presented, we advised the requestor that he would not have a conflict of interest in this situation.

The Facts

The requestor advised us of the facts provided here. He has recently been appointed to the requestor’s board. He currently serves, in a non-City position, as the president of a nongovernmental group (the “Nongovernmental Group”). In his capacity as president of the Nongovernmental Group he is an unpaid volunteer. The Nongovernmental Group is contemplating applying for a grant the City is offering to similar groups to undertake capital improvements. The requestor’s understanding is that staff of a City department affiliated with the requestor’s board, with help from the staff of a not-for-profit organization, will be reviewing the applications and awarding the grants. In particular, the requestor stated that the requestor’s board has no role in reviewing or recommending these grants. The requestor asked us whether given his City board membership and Nongovernmental Group position, he has any conflict or appearance of conflict because the Nongovernmental Group may be applying for this City grant.

Evan Meyer
General Counsel

**Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2009-509**

September 14, 2009

Re: Board Member Heads Group Applying for City Grant

A member of a City board or commission (“the requestor’s board”) requested nonpublic advice on whether he would have a prohibited conflict of interest or the appearance of a conflict resulting from the fact that he volunteers as the president of a nongovernmental group that is considering applying for a City grant where staff of a City department affiliated with the requestor’s board will have a role in reviewing applications and awarding the grants. Based on the facts presented, we advised the requestor that he would not have a conflict of interest in this situation.

The Facts

The requestor advised us of the facts provided here. He has recently been appointed to the requestor’s board. He currently serves, in a non-City position, as the president of a nongovernmental group (the “Nongovernmental Group”). In his capacity as president of the Nongovernmental Group he is an unpaid volunteer. The Nongovernmental Group is contemplating applying for a grant the City is offering to similar groups to undertake capital improvements. The requestor’s understanding is that staff of a City department affiliated with the requestor’s board, with help from the staff of a not-for-profit organization, will be reviewing the applications and awarding the grants. In particular, the requestor stated that the requestor’s board has no role in reviewing or recommending these grants. The requestor asked us whether given his City board membership and Nongovernmental Group position, he has any conflict or appearance of conflict because the Nongovernmental Group may be applying for this City grant.

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 the Board of Ethics 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, we encouraged the requestor that to the extent that this opinion states general principles, and there are particular fact situations that he may be concerned about, he should contact the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

Conflicts of Interest Generally

The issue before us is whether the requestor has a conflict of interest as a City board member because he is the president of a nongovernmental group that is considering applying for a City grant, and staff of a City department affiliated with the requestor's board will have a role in reviewing the applications and awarding grants. The general purpose of laws against a "conflict of interest" is to prevent a City officer from having a conflict between his duty in acting honestly and capably on behalf of the public on the one hand and a personal interest in obtaining or preserving a financial benefit to himself (perhaps indirectly through an employer or relative) on the other hand. It is desirable to prevent such situations because that officer may be tempted to act in a way that benefits that personal interest to the detriment of the proper execution of his official duties. Even if the officer does not actually yield to the temptation of incurring a private benefit to himself, public confidence in the officer's decisions and in the impartiality of government is undermined by the mere existence of such competing interests.

Philadelphia Code – Conflicts of Interest

The Philadelphia Ethics Code prohibits City officers from having conflicts of interest that arise from having a personal financial interest or from being a member of an entity that has a financial interest in their official decisions. As to a personal conflict of interest, Code Section 20-607(a) provides in relevant part:

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, or by any board or body of which he is a member

Since the requestor advised that the requestor's board will not have any role in reviewing or awarding the grants for which the Nongovernmental Group plans to apply, there is no action the requestor would be taking as a member of his City board that could give rise to a conflict of interest under Code Section 20-607(a). The requestor informed us that staff of a City department affiliated with the requestor's board will help review and award the grants. Although the requestor's board is a departmental board associated with this City department, action by staff of that department is not the equivalent of action by the associated Board or its members. Moreover, a financial interest is necessary to give rise to a personal conflict of interest, and the facts the requestor provided do not indicate that as an unpaid volunteer president of the Nongovernmental Group he would be financially interested in the award of a City grant to the Nongovernmental Group.

The City Code also prohibits conflicts of interest arising through a relative or business, providing as follows in Section 20-607(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.

If the Nongovernmental Group is a non-profit organization, this provision would not be triggered, as it applies only where a City officer is a member of a business organization that is for profit. Even if the Nongovernmental Group is a for profit organization, as with Section 20-607(a), since the requestor advises that there is no action he will be taking as a City board member, there is no “decision, decree, or judgment” or the like by the requestor that could give rise to a conflict of interest under Code Section 20-607(b) and therefore no action from which he would be required to disqualify himself.

Accordingly, we advised the requestor he would not be in violation of the Code’s conflict of interest provisions, which prohibit him from having a financial interest personally or through a business in actions he takes as a City board member, if the Nongovernmental Group seeks a City grant that staff of a City department affiliated with the requestor’s board have a role in awarding. He would not have a conflict of interest that would need to be publicly disclosed and there would be no City board action from which he could or should disqualify himself.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, also has a conflict of interest provision, but we do not discuss it here because we believe the Act likely does not apply to the requestor. The Act applies to “public officials,” and that term does “not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof.” 65 Pa.C.S. §1102.

We note, however, that the State Ethics Commission is the definitive authority on the State Ethics Act, including on the question of whether the Act applies to the requestor. Our advice on the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To those who rely in good faith on advice from the Commission itself, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107(10), (11). Upon request, advice from the State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor’s opinion. 65 Pa.C.S. §1109(g) (“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].”).

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. *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board of Ethics regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, we advised the requestor he may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Philadelphia Code – Confidential Information

The City Code prohibits the requestor from sharing any confidential information gained through his City board service with the Nongovernmental Group to assist in its application for the City grant. Specifically, Code Section 20-609 on confidential information states:

No member of the Council or other elected official or City officer or employee, paid or unpaid, full-time or part-time, 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.

Philadelphia Code – Prohibited Representations

The City Code restricts City officers, such as board members, from representing others before their boards. Section 20-602 provides in relevant parts:

No member of the Council nor other City officer or employee shall assist another person by representing him directly or indirectly as his agent or attorney, whether or not for compensation, in any transaction involving the City.

....

An uncompensated City officer or employee or a compensated City officer or employee whose service is part-time (excluding members of City Council or other City officers or employees who are paid on an annual basis) is 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.

City Code § 20-602(1)(a), (2). A similar provision restricts employees of for-profit entities that a board member belongs to from making such a representation before the board member's board, unless the board member follows a prescribed disclosure and disqualification process. City Code § 20-602(5). Under the facts the requestor provided, the Nongovernmental Group's application for a City grant would not involve him or any other member of the Nongovernmental Group making a representation as an agent of the Nongovernmental Group before the requestor's board. Therefore, there would be no issue under the Code's representation restriction of Code Section 20-602. In avoiding appearances of impropriety, which we discuss below, it may be helpful to keep in mind the policy considerations that underlie the Code's representation rule: no one should be represented by a City official where that person or entity could gain or be perceived as gaining an advantage due to the possible sway or influence the official may have with other City officials or employees.

Appearance of Impropriety

The requestor specifically asked us to address appearance issues in his request for advice. We commended him for being sensitive to the spirit as well as the letter of the law. In a recent opinion, the Board of Ethics explained appearances of impropriety as follows:

Situations in which there is no conflict of interest or prohibited gift under the letter of the law can nevertheless create appearances of impropriety. Although the ethics laws do not prohibit appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, such appearances can be damaging to public confidence in government. There is no formal definition of "appearance of impropriety" in the laws under which this Board has jurisdiction, but generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon or by a public official or that a public official's personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest.

Formal Opinion 2009-001 at 4. The facts the requestor presented are somewhat susceptible to an appearance of impropriety for fact-specific reasons and because as

president of the Nongovernmental Group he presumably would have an interest, although not a financial interest, in the organization receiving the grant. To avoid an appearance of impropriety with regard to the Nongovernmental Group's grant application, we recommended that he not take any actions that would cause it to appear he is attempting to influence the outcome of the grant application process. For example, he could refrain from contacting the City department staff involved in the grant review during that process (especially about the application itself); he could omit any mention of his City board position in the Nongovernmental Group's grant application; he could omit his name from the grant application papers; and he could otherwise not represent the Nongovernmental Group before the City in its grant application. Such measures would reduce the possible appearance that the Nongovernmental Group could gain special consideration or an advantage due to the requestor's City board position.

Conclusion

We advised that, applying the City Ethics Code to the facts the requestor presented, he would not have a conflict of interest to disclose and need not disqualify himself from any action by his City board. We emphasized, however, that if the facts should change, he is not entitled to rely on the advice herein. It was noted that the City Code's prohibition on the disclosure of confidential information applies to the requestor. Also, the Code's restrictions on representations before his City board apply, although he advised that the grant in question does not involve action by that board. Finally, it was suggested that the requestor follow the recommendations on how to minimize an appearance of impropriety stated in this Advice.

We advised the requestor that if he has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this Advice. Since the requestor asked for 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