



CITY OF PHILADELPHIA

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**Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2009-513**

November 18, 2009

**Re: Responding to Offer of Employment from Business with Contract with
the Requestor's City Agency**

A City employee requested nonpublic advice on whether any issue under the ethics laws would arise if he were to accept an offer of employment from a private company that contracts with the City agency that currently employs him.

I. The Facts

The requestor advised us of his title at the City agency that employs him. He informed us that he has been offered a position with a private company headquartered in New Jersey (the "Company"). The Company is seeking to fill a vacant position at a New Jersey facility that contracts with New Jersey governmental authorities.

The requestor advised that among its many other contracts throughout the country, the Company also has a contract with the City of Philadelphia through the requestor's City agency. This contract was awarded almost two years ago through the City's bidding process. The requestor advised that his sole connection with the Company is under the Company's contract with the City and his involvement is and has been from a strictly operational standpoint. During a project related to the Company's contract with the City, the requestor reviewed plans, offered some recommendations, and in other instances objected to some facets of the plans. The requestor played no role in negotiations, if in fact there were any – the Company responded to a RFP posted on the City's website. The requestor additionally had no role in awarding the contract or signing any agreements between the two entities. The requestor did indicate that he continues to have some on-going operational responsibility related to a project connected to the Company's City contract, but he advised that he is not involved in administration of the contract or contract compliance nor do people involved with those functions report to him.

In summary, the requestor advised that the Company is searching for a candidate to fill a vacant position at a single facility in New Jersey and that in accepting the position, he would have absolutely no involvement with any Philadelphia facilities or the Company's contract with the City. His responsibilities would lie solely with the New Jersey facility. The requestor would resign from his City position to take this position with the Company. The requestor asked whether it is permissible for him to accept the offer for employment from the Company.

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.

Since the requestor advised that he is a current City employee, there are two broad areas of ethics laws that apply to his request: (1) whether any action he may take to consider future other employment while he is still a City employee would constitute a conflict of interest; and (2) how the post-employment rules would apply to him after he separates from the City, if he were to accept such employment.

II. Conflict of Interest in Pursuing Future Employment

The Board of Ethics discussed this issue in detail in Advice of Counsel No. GC-2008-520 (Phillis), issued July 7, 2008, and the Formal Opinion cited in, and attached to, that Advice, Confidential Opinion No. 2007-001 (November 5, 2007). These rulings are available on the Board of Ethics' website. Note especially the discussion on pages 8-9 of Opinion No. 2007-001. Essentially, in order to avoid a prohibited conflict of interest under Section 20-607 of The Philadelphia Code, a City employee must publicly disclose¹ any financial interest in a potential employer and disqualify himself from taking any official action that would affect the financial interests of that potential employer once the employee has himself acquired a "financial interest" in a certain potential employer. As Opinion No. 2007-001 notes, a City employee would have a financial interest in a potential employer upon either:

- a) an action by him that a reasonable person would consider to be an application for employment; or
- b) an action by the potential employer that a reasonable person would consider to be a job offer to the requestor.

What would constitute "official action" by a City employee that would trigger the need for disclosure and disqualification is also discussed on page 8 of Opinion No. 2007-001. A City employee would have a conflict in any matter in which a prospective employer has a financial interest if the employee participates personally and substantially in an action involving his personal judgment without

¹ Opinion No. 2007-001 discusses on page 9 the method for disclosure and disqualification that is required under Code §20-608.

which a matter cannot proceed that fixes the personal or property rights, privileges, immunities, duties or obligations of that employer, again assuming that discussions with that employer have reached the stage described in either (a) or (b) above. For example, now that the requestor has received an offer of employment from the Company, if he were to be faced with a question that would require the Company to expend funds, the requestor should disclose and disqualify as provided in Code §20-608 prior to making any official decision in that matter. We invited the requestor to feel free to contact us for advice on a particular factual situation but emphasized that we can only issue advice as to future conduct. To the extent that the requestor's inquiry relates to conduct that has already occurred, such past conduct may not be addressed in the context of an advisory opinion.

III. Home Rule Charter

As noted in Confidential Opinion No. 2007-001, 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. However, as that Opinion noted, this could apply to an offer of employment only in limited circumstances. Only if an offer of future employment is memorialized in a contract that obligates the entity to pay the City employee out of a City contract in the future would there be an issue under this provision. Thus, it was recommended that, before he separates from the City, the requestor execute no employment agreement that contractually obligates another entity to employ him, if the entity does any business with the City. We advised that if the requestor accepts this recommendation, no issue under Charter Section 10-102 should present itself, and employment by the Company would not be prohibited under the Charter.

IV. Post-Employment Restrictions

There are three different ethics laws that relate to post-employment restrictions on a City employee's activity for any future employer, two in the City Code and one in the State Ethics Act. The provision in the State Act may present some difficulty for the requestor in doing certain consulting work for the City of Philadelphia or for vendors to the City.

A. A Threshold Question on What Law Applies

The State Ethics Act applies only if, during City employment, an employee is a “public employee.” “Public employee” is 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. It is our conclusion that it is likely that the State Ethics Commission would conclude that the requestor is a “public employee” under the Act and that the Act applies to him. However, we did not review the requestor’s job description, and we do not have final authority on interpreting the Act. See the discussion below on the authority of the State Ethics Commission, pages 7- 8.

B. One-Year Limitation On Representing Others—State Ethics Act

Section 1103(g) of the State Ethics Act, 65 Pa.C.S. §1103(g), restricts “post-employment” activities as follows:

No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

The key words in that provision are defined in Section 1102 of the Act, 65 Pa.C.S. §1102. “Represent” is defined as follows:

To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

“Governmental body with which a public official or employee is or has been associated” is defined as follows:

The governmental body within State government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

As to what would be the requestor's former "governmental body," rulings of the State Ethics Commission regarding municipal employees are heavily dependent on the particular facts. Again, the Commission interprets the State Ethics Act. For purposes of this Advice of Counsel, we will assume that the requestor's "governmental body" would be the City agency that employs him.² Accordingly, the requestor may not for one year after the date he separates from City employment (last day on the payroll) represent anyone—himself, any firm that employs him, or any of its clients—before his former City agency. Please note the broad definition of "represent," which includes having one's name appear on a bid or contract proposal submitted to the former governmental body or otherwise making known to that body (the former City agency) one's work for the contractor. This means that, until the anniversary date of the requestor's separation, any interaction between him or any future employer or one of his or its clients and the former City agency regarding any agency transactions (such as a contract) may not have any involvement by the requestor, unless such involvement is purely internal at the requestor's employer (if another entity, other than a sole proprietorship) and not in any way revealed to the former City agency.

More particularly, Section 1103(g) would prohibit the requestor for one year from separation from representing any person before his former City agency. The meaning of "represent" has been the subject of lengthy analysis in several opinions of the State Ethics Commission. It means that the former employee may not: (1) make personal appearances before the former City agency; (2) attempt to influence the former City agency; (3) submit bid or contract proposals, or invoices, that are signed by, or even contain the name of, the former employee; (4) participate, by acting on behalf of a person, in a matter before the former City agency; (5) lobby the former City agency; or (6) be identified on any document submitted to the former City agency. This would include telephone calls, e-mails, and attendance at meetings.

² Accordingly, the advice that follows in this section concerns possible contacts with the requestor's City agency. However, the Commission could consider the requestor's former governmental body to be the entire government of the City of Philadelphia, in which case the following references to "former City agency" in this section should read "the City."

“Represent” does not include, and a former employee may permissibly do, the following: (1) assist in the preparation of any document submitted to the former City agency if the employee’s name does not appear in the document; (2) counsel any person regarding that person’s appearance before the former City agency, so long as that activity is not revealed to the former City agency; or (3) make general informational inquiries to the former City agency to obtain information that is available to the general public, so long as it is not done in a way to influence the former City agency or make known to the former City agency that the former employee represents his new employer. That last phrase, “make known to the former City agency,” is important. In other words, Section 1103(g) would not prohibit a former City agency employee from working for a company that had a contract with the former City agency, so long as his work for the company on that contract was entirely internal at the company and his involvement in the project was in no way revealed to the former City agency, or his work for them involved only other clients than the former City agency. As the requestor advised that his responsibilities would lie solely with a New Jersey facility, this provision would not appear to present any difficulties under the State Act, provided that the requestor does not contact his former City agency on behalf of either his new employer, the Company, or the New Jersey facility, within the first year after separating from the City.

In addition, it is noted that the same principles apply to any other employment that the requestor may obtain in the first year after leaving the City, including the possibility that he might contract with the former City agency itself to provide consultant services. Section 1103(g) of the Act prohibits a former public employee or official from representing “a person” before his “former governmental body” for one year after he leaves governmental employment. The State Ethics Commission, in Opinion No. 93-005, has held that “a person” includes the former public official himself, and thereby includes representing himself in negotiating a consultant contract with his former body. Thus, such “revolving door” consulting contracts are prohibited (since it is presumably impossible to obtain one without representing one’s self, at least in signing the contract). Therefore, the requestor was advised that the State Ethics Act would prohibit him for one year after his separation from City service from executing a personal consultant contract to work for his former City agency, in any capacity at all.

It is noted, however, that the State Ethics Commission is the definitive

authority on the State Ethics Act, including whether the Act applies to the requestor and what his “former governmental body” would be. 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 regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, the requestor was advised that he may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

C. Permanent Limitation On Assistance With Particular Matters—City Code

Section 20-603(1) of the City Ethics Code states:

No person who has served for compensation as a member of Council, City officer or employee shall assist, at any time subsequent to his City service or employment, another person, with or without compensation, in any transaction involving the City in which he at any time participated during his City service or employment.

The “transactions” to which this provision applies are defined broadly in Section 20-601(4) to include matters (i) which are or will be the subject of City action; (ii) to which the City is or will be a party; or (iii) in which the City has a direct proprietary interest. This provision is not a one-year prohibition, like the State Ethics Act provision, but applies “at any time” after a person leaves City employ.

However, it is much narrower in scope than the State Ethics Act provision, since it only applies to matters in which the employee “participated” during City employ. This has been interpreted to mean matters in which the employee exercised discretion (and not merely, for example, responded to a routine request for information). Thus, if during the requestor’s City service, he took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, he may not assist that future employer in the matter relating to that transaction. On the other hand, the term “matter” has been interpreted to mean only the particular issue or issues on which decisions were made by the former City agency with the requestor’s involvement (such as, for example, an issue involving specific advice the requestor gave), not every issue related to that project that may arise after the requestor separates from City service.

D. Two Year Limitation On Financial Interests—City Code

Section 20-607(c) of the Code states:

No member of Council or other City officer or employee shall become financially interested, subsequent to final action, in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, during his term of office or employment and until two (2) years have elapsed since the expiration of service or employment in the term of office of said member of Council or other City officer or employee.

This prohibition shall apply so as to prevent a parent, spouse, child, brother, sister or like relative-in-law or any person, firm, partnership, corporation, business association, trustee or straw party from becoming financially interested for or on behalf of a member of City Council, City officer or employee within said two (2) year period.

In short, this provision prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official decisions he made while in City employ. Thus, if the requestor had, for example, been officially involved in awarding, renewing, amending, or administering the City’s contract with the Company, he could not for two years be employed by and receive any

compensation from the Company, if such compensation was derived from revenue received under that City contract, as affected by his official action with the former City agency.

V. Summary

In summary, the requestor was advised of the following conclusions:

(1) While the requestor is still a City employee, he may be required to disclose a conflict of interest and disqualify himself from taking certain official action for the City, if his pursuit of employment with a certain potential employer reaches the level that he has a “financial interest” in the company, as defined in Opinion No. 2007-001, including receipt of an offer of employment.

(2) The State Ethics Act likely applies to the requestor. Under the Act, he would be prohibited for one year after he leaves the employ of the City from representing anyone, including himself and any future employer (or any client of his or any future employer), before his former City agency. Please note the broad definition of “represent,” which includes having the requestor’s name appear on a bid, contract proposal, engineering report, invoice, or other official document submitted to his former governmental body. The Act would not prohibit the requestor from working in New Jersey for a New Jersey facility, where his work does not involve contact with the City of Philadelphia.

(3) Under the City Code, the requestor may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by his City agency with his involvement as a City employee.

(4) Under the City Code, the requestor may not for two years after he leaves the employ of the City acquire a financial interest in any official decision he made while in City employ.

We thanked the requestor for being concerned about ethics compliance and for recognizing a situation that could present issues under the ethics laws. We advised that if the requestor has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this Advice. Please also note the option of requesting advice of the City Solicitor (as to the State Act only), as discussed on pages 7- 8 above. Since the requestor sought nonpublic advice from

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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