



CITY OF PHILADELPHIA

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The Board's Regulation 8 (Political Activity), effective March 28, 2011, represents the Board's interpretation of Charter Section 10-107, and supersedes this advisory opinion to the extent that it is inconsistent with the regulation.

Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-521

December 17, 2010

Re: Effect of Non-authorized Political Action Committee

An employee of City Council requested nonpublic advice on the following question:

Are City Council employees prohibited from having a non-authorized Political Action Committee established in their name? For example, if my friends were to establish a non-authorized PAC named "Friends of [name]," would such action prohibit me from remaining a City Council employee?

We were subsequently advised that the office that is the subject of this activity would be member of City Council, so it would be a City elective office.

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. Accordingly, this Advice does not address anything that may have occurred in the past. The requestor was advised 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 the requestor may be concerned about, he was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

Application of State Election Code

The Pennsylvania Election Code (25 P.S. § 3241, *et seq.*) provides the rules for how to set up political committees and candidates' authorized political committees. The Board of Ethics does not have any jurisdiction over the State Election Code and cannot provide guidance on that law. The requestor was advised that for questions about the Pennsylvania Election Code, either the Secretary of State's Bureau of Commissions, Elections and Legislation or the City Commissioners should be contacted.

In particular, it was noted that the definition of the term "candidate" for purposes of the Pennsylvania Election Code is different from that for purposes of the Philadelphia Home Rule Charter and Chapter 20-1000 of The Philadelphia Code. Accordingly, it may be possible that an individual might not be a candidate for purposes of local law, but that the individual's activities or that of the committee might subject him or her to provisions of the State Election Code relating to a "candidate." See Nonpublic Formal Opinion No. 2009-004; Nonpublic Advice of Counsel GC-2008-527.

General Comment on Application of Charter Section 10-107

Section 10-107 ("Political Activities") of the Home Rule Charter applies to the requestor¹ and covers a variety of activity. Subsections (3), (4), and (5) relate to City officers and employees particularly. Section 10-107 has been the subject of

¹ Readers may be aware that a 1952 Opinion of the City Solicitor applied a special interpretation for employees of City Council. However, as will be discussed below, that Opinion applies that interpretation to subsection (4) only. The other subsections of Charter Section 10-107 apply to the requestor, as an employee of the City. See Nonpublic Advice of Counsel GC-2008-527; Nonpublic Advice of Counsel GC-2008-523 at page 3 n.1 (citing a number of prior rulings).

considerable public attention at least since the appointment of the Mayor's Task Force on Ethics and Campaign Finance Reform in the fall of 2008. Following the Task Force issuing its Final report, the Board of Ethics directed its staff to prepare a draft of a regulation addressing some aspects of Section 10-107. This effort is now underway, and it is anticipated that a regulation will soon be approved for public comment, and after a public hearing, a final regulation will be promulgated in the late winter or spring of 2011.

Any regulation would supersede inconsistent parts of prior interpretations. However, it is not possible at this juncture to anticipate what form the final regulation might take, especially since the required public comment has not yet been sought. Nor would it be reasonable for this Board to require the requestor to wait until the final adoption of the regulation to receive guidance regarding your request for advice. Accordingly, this Advice of Counsel addresses the current prevailing interpretations of Charter Section 10-107, with the understanding that by the time the regulation is adopted, the requestor's question will likely be moot. However, the public and others who read this public version of this Advice should understand that this Advice is being provided for the limited purpose of advising the particular requestor on the immediate request, based on the currently prevailing interpretations, and the anticipated regulation, when it becomes effective, may well supersede parts of this Advice that are inconsistent with the new interpretations of the regulation.

"Resign to Run"—Subsection 10-107(5) of the Charter

Subsection 10-107(5) reads as follows:

(5) No officer or employee of the City, except elected officers running for re-election, shall be a candidate for nomination or election to any public office unless he shall have first resigned from his then office or employment.

Thus, once you become a candidate, you must resign your City position. When do you become a candidate for purposes of this subsection? As this Board said in Formal Opinion No. 2010-001: "Previous rulings of State appellate courts, the Board of Ethics and the Law Department have advised that one becomes a candidate for the purposes of Charter Section 10-107(5) upon having filed nomination papers or publicly announced candidacy for office." Formal Opinion No. 2010-001, at page 5. Nevertheless, the question remains as to what activities might constitute "publicly announcing" that one is a candidate for office.

Specifically with regard to the formation of a political committee,² the mere formation and existence of a political committee by others would not constitute a “declaration of candidacy” for purposes of either Section 10-107 of the Charter or Chapter 20-1000 of the Philadelphia Code. Nonpublic Formal Opinion No. 2009-004. Thus, the formation of such a committee would not, by itself, require resignation from City employment. *Id.* at 5, 9. It is important, however, that the committee and those involved with it make clear in their activities and communications that the subject individual is not yet a candidate for any office, but the committee is merely exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for that person to consider such a candidacy. *Id.* Any activity or communication of a committee that could be viewed as an argument to the voters to support the individual as a candidate may raise an issue under Charter Section 10-107(5). *Id.*

We concluded that if the requestor’s friends were to establish a non-authorized PAC named “Friends of [name],” that action, in and of itself, would not constitute a “declaration of candidacy” by that individual and would not require him to resign his City position under Charter Section 10-107(5). If there are particular actions or activity that the requestor is interested in pursuing, either related to the political committee or otherwise, and he wishes to be advised as to whether those actions or activity would constitute a “declaration of candidacy,” he was advised to contact us for advice.

Contributions—Subsection 10-107(3) of the Charter

Charter Subsection 10-107(3) provides as follows:

(3) No officer or employee of the City and no officer or employee of any governmental agency whose compensation is paid from the City Treasury shall, from any person, and no officer or member of a committee of any political party or club shall, from any civil service employee, directly or indirectly demand, solicit, collect or receive, or be in any manner concerned in demanding, soliciting, collecting or receiving, any assessment, subscription or contribution, whether voluntary or involuntary, intended for any political purpose whatever. No officer or member of the Philadelphia Police or of the Fire Department shall pay or give any money or valuable thing or make any

² As noted above, rules relating to the formation and nature of political committees are a matter of State law, specifically the Pennsylvania Election Code, over which the Board of Ethics has no jurisdiction, and we express no opinion concerning the application of the Election Code to this matter.

subscription or contribution, whether voluntary or involuntary, for any political purpose whatever.

As an employee of the City, this subsection applies to the requestor. As noted in footnote 1 above, the interpretation of Solicitor's Opinion No. 50 of 1952 relates only to subsection (4), not to subsection (3). *See* the extensive discussion of this point as relates to Council employees in Nonpublic Advice of Counsel GC-2008-523.

The current authority interpreting subsection (3) is Nonpublic Formal Opinion No. 2009-004. In that Opinion, the Board advised that fundraising and contributions received by a political committee associated with a City employee exploring a possible run for public office would not cause the employee to violate Charter §10-107(3) as long as: (1) the employee did not yet qualify as a "candidate" (by having filed nomination papers or made a public announcement of candidacy); and (2) the committee's fundraising only involved raising funds to support activities "limited to exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for the [City employee] to consider such a candidacy." Formal Opinion 2009-004 at page 11. Examples of such activities include rental of office space, payment of utilities, purchase of printing services and payment of staff to the committee. *Id.* at 7, n.3 and 11.

Campaign Activity—Subsection 10-107(4) of the Charter

Charter Section 10-107(4) provides as follows:

(4) No appointed officer or employee of the City shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

In this particular case, since the requestor is an employee of City Council, the applicable guidance is Advice of Counsel GC-2008-527, which holds that subsection (4) does not apply to an employee of City Council. Advice of Counsel GC-2008-527 at 8, *citing* Opinion No. 50, 1952 *City Solicitor's Opinions* at 111. Accordingly, the activities of the proposed PAC raise no issues for the requestor under Charter Section 10-107(4).

Code Chapter 20-1000 and the State Ethics Act

Under the City's campaign finance law, a person does not become a candidate until he or she has either filed nominating papers or publicly declared his or her candidacy. *See* Code Section 20-1001(2); Board of Ethics Reg. 1, Paragraph 1.1(c). The formation of a political committee, even a candidate's authorized political committee, does not, on its own, constitute a public declaration of candidacy under the City's campaign finance law. Nonpublic Formal Opinion No. 2009-004 at 5-6. Once one is a candidate because he has either filed nominating papers or publicly declared his candidacy, he will be subject to the City's campaign finance law, including the contribution limits and the rules regarding excess pre-candidacy contributions. For more information on the contribution limits and other rules of the City's campaign finance law, readers may consult the Board of Ethics' Regulation No. 1.

Please note that the City's definition of candidate is different from the definition of candidate under the State Election Code and the State Ethics Act. The fact that the requestor may not be a candidate under the City's campaign finance law does not relieve him of his obligations to comply with the State Election Code and the State Ethics Act. Readers may wish to refer to the discussion of the State Ethics Act in Nonpublic Formal Opinion No. 2009-004 at 6-8.

Conclusion

Based on the facts that were provided to us, and applying the currently applicable prior rulings of the Board of Ethics, the requestor was advised as follows:

1. This Advice is being provided for the limited purpose of advising the requestor on the immediate request, based on the currently prevailing interpretations. The Board's anticipated political activity regulation, when it becomes effective, may well supersede parts of this Advice that are inconsistent with the new interpretations of the regulation.
2. Under the Home Rule Charter and the City's Campaign Finance Law, the requestor will not become a candidate until he either files nominating papers or publicly declares his candidacy.
3. The formation of a political committee named "Friends of [name]," would not in and of constitute itself a "declaration of candidacy" by the requestor and would not require the requestor to resign his City position under Charter Section 10-107(5).

4. Under Charter Section 10-107(3), fundraising and contributions received by a political committee for the sole purpose of defraying expenses related to exploring a possible run for office would not cause the requestor to violate this provision. However, the requestor was cautioned that this does not mean that any and all activities of such a PAC or that he might take related to such a PAC are permissible. The requestor was advised to seek further advice if he has questions about specific actions.

5. Charter Section 10-107(4) does not apply to restrict the requestor's activities related to this political committee because he is an employee of City Council.

6. The City's definition of candidate is different from the definition of candidate under the State Election Code and the State Ethics Act, and even if the requestor is not a candidate under the City's campaign finance law, this would not relieve him of his obligations to comply with the State Election Code and the State Ethics Act.

7. This Advice addresses only questions under the Public Integrity Laws that are within the jurisdiction of the Board of Ethics. Explicitly not addressed are any issues under the Pennsylvania Election Code.

The requestor was advised that if he has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Readers may wish to review the prior rulings cited in this Advice. They can be found on the Board of Ethics website, at www.phila.gov/ethicsboard, under "Advisory Opinions & Publications." Since the requestor has requested nonpublic advice from the Board of Ethics, we will not make this letter public, but we will be required to make public a 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