



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-522

December 17, 2010

Re: “Resign to Run” – Charter Section 10-107(5)

An employee of City Council has indicated that she is possibly interested in running for City elective office, and requested nonpublic advice on whether she may have a few one-on-one private conversations with friends, advisors, and knowledgeable people about her chances for success and the details of running (such as when would she have to decide and what would she need to do to become an official candidate and when can she begin to raise money), and whether having those conversations would, by itself, require her to resign under the “resign to run” provision of the Charter.

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, she was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

The requestor was advised that Section 10-107(5) of the Charter does not require her to resign her City position until she either publicly announces her candidacy or files nominating papers.

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 report political contributions and expenditures. The Board of Ethics does not have any jurisdiction over the State Election Code and cannot provide guidance on that law. If anyone has questions about the Pennsylvania Election Code, they should contact either the Secretary of State's Bureau of Commissions, Elections and Legislation or the City Commissioners.

In particular, readers may wish to note 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 the requestor would not be a candidate for purposes of local law, but that her activities or that of the committee might subject 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.

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

The requestor is an appointed City employee. Thus, she is subject to subsection 10-107(5) of the Home Rule Charter,¹ which provides:

(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.

¹ Readers may be aware that a 1952 Opinion of the City Solicitor applied a special interpretation for employees of City Council. However, that Opinion applied that interpretation to subsection (4) only. Subsection (5) of Charter Section 10-107 clearly applies 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).

Therefore, once the requestor becomes a candidate, she must resign her 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. In Formal Opinion 2010-001, the Board advised that a City official authorizing others to circulate nominating papers on his behalf would not constitute a public announcement of candidacy. Formal Opinion 2010-001 at page 5. Moreover, Formal Opinion No. 2010-001 cited court opinions holding that indicating only “willingness and availability to run” did not make one a candidate for purposes of Section 10-107(5), nor did statements made to a limited number of individuals (five) in private in a hotel room without the presence of the media. Formal Opinion No. 2010-001 at 3-4 (citing *McMenamin v. Tartaglione*, 590 A.2d 802, 810 (Pa. Commw. 1991), *aff’d without op.* 590 A.2d 753 (Pa. 1991) and *Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963)). *See also* Nonpublic Formal Opinion No. 2009-004, at 3-4 (citing *McMenamin* and *Mayer*).

On review of the above authorities, we concluded, and the requestor was advised, that if the requestor were to have several one-on-one private conversations with friends, advisors, and knowledgeable people about her chances for success and the details of running (such as when would one have to decide and what would one need to do to become an official candidate and when can one begin to raise money), the fact of having those private conversations, in and of itself, would not constitute a “declaration of candidacy” by the requestor and would not require her to resign her City position under Charter Section 10-107(5). If there are other particular actions or activity that the requestor is interested in pursuing, and she wishes to be advised as to whether those actions or activity would constitute a “declaration of candidacy,” the requestor was encouraged to contact us for advice.

Conclusion

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

1. Under the Home Rule Charter and the City's Campaign Finance Law, the requestor will not become a candidate until she either files nominating papers or publicly declares her candidacy.

2. If the requestor were to have several one-on-one private conversations with friends, advisors, and knowledgeable people about her chances for success and the details of running (such as when would she have to decide and what would she need to do to become an official candidate and when can she begin to raise money), that action, in and of itself, would not constitute a "declaration of candidacy" by the requestor and would not require her to resign her City position under Charter Section 10-107(5).

3. 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. This Advice also assumes that the requestor's question does not involve the solicitation or receipt of any contributions or the formation of any political committee.

The requestor was advised that if she has any additional facts to provide or additional questions, 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 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 her 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