



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-2011-503**

March 23, 2011

Re: Invitation to Advisory Board to Company / Conflict / Honorarium

A City employee (“the requestor”) requested a nonpublic advisory on whether there are any issues under the Public Integrity Laws regarding his outside employment if he were to accept an invitation from a local company (“the company”) to become a member of an advisory board to the company,¹ for which participation the requestor would receive a “stipend” of \$10,000 per year, plus travel and hotel expenses.

As to compensation, the letter states:

You will be compensated with an annual stipend of \$10,000 (which you may elect to donate to a charitable 501(c)(3) organization if you wish), plus payment of your travel and hotel expenses, as detailed in [an enclosed document].

The requestor did not advise as to a term for this appointment, and the appointment letter does not say, but supporting documentation indicate that the appointment is for

¹ This is purely an advisory body, not the company’s board of directors.

at least two years, and may be extended. The requestor advised that, in addition to attending meetings and providing advice, advisory board members may be appointed to task forces to “study, research, and/or report upon issues related to the purpose and work of the [board].”

The requestor is a City employee. As a local company with offices in the City and that does business with the City, the company is an entity whose financial interests can be affected by the decisions of City government. In light of these facts, there are a number of provisions in the Charter, City Code, and State Ethics Act that may apply to this proposed transaction.

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 we 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.

Describing the Transaction

There is no distinction in the Public Integrity Laws between a “stipend” and “outside employment.” Either the \$10,000 per year is compensation for services rendered or it is not. If it is not compensation for services rendered, it is a gift, and it would likely be prohibited by Section 20-604 of the Philadelphia Code. However, based on the facts of which we were advised, the “stipend” is compensation for significant work that is expected of members of the advisory board, and is thus not a gift under the Code.

Home Rule Charter

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. It may be that the company has contracts with the City. However, if any compensation the requestor receives for serving on the advisory board is paid out of other revenue sources and not out of revenue that the company receives from the City, there would be no issue under Section 10-102.

Philadelphia Code Section 20-607(a)

Code Section 20-607(a) prohibits personal conflicts of interest. In relevant part, the subsection provides:

- (a) 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

The requestor did not identify any way in which he, as a City employee, could take official City action that might affect the stipend that he would receive from the company, so there appears to be no issue as to Section 20-607(a).

Philadelphia Code Section 20-607(b)

Code Section 20-607(b) prohibits conflicts of interest through another entity, such as an employer. The subsection 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.

If the requestor participates in the proposed program, he would clearly be a “member” of the advisory board. However, we concluded that the advisory board itself would not be a “partnership, firm, corporation or other business organization or professional association organized for profit.” Although the company is clearly an entity organized for profit, the requestor was advised that participation on the advisory board would not make him a “member” of the company, for purposes of Section 20-607. Accordingly, there is no issue under Section 20-607(b).

State Ethics Act – Section 1103(a)(conflict of interest)

The State Ethics Act, 65 Pa.C.S. §1101 et seq., has a “conflict of interest” provision that is similar to that in the Philadelphia Code. The Act applies to the requestor only if he is a “public employee,” which is defined in the Act to include: “Any individual employed by . . . 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. The requestor provided a job description that included duties related to a City board or commission (not the company’s advisory board) that were deemed to be the equivalent of being the executive director of the City board or commission. As was recently noted in Advice of Counsel GC-2011-501, executive directors of boards and commissions have long been considered to be “public employees” subject to the Act. *See* the Regulations of the State Ethics Commission, 51 Pa. Code § 11.1(iv)(A), (G). Accordingly, the requestor was advised that it is likely that the Commission would determine that he is a “public employee” and subject to the Act, including the “conflict of interest” provision at 65 Pa.C.S. §1103(a) and the “honorarium” provision at 65 Pa.C.S. §1103(d).

Section 1103(a) of the Act provides:

(a) Conflict of interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest.

What is a “conflict of interest” may be determined by reference to the definitions section of the Act for a definition of that term and terms included within that definition, as follows:

Section 1102. Definitions.

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

...

“Authority of office or employment.” The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

“Business.” Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

“Business with which he is associated.” Any business in which the person or a member of the person’s immediate family is a director, officer, owner, employee or has a financial interest.

...

“Conflict” or “conflict of interest.” Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which

affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

...

“Financial interest.” Any financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the assets of the economic interest in indebtedness.

65 Pa.C.S. §1102. The question that arises is whether the company would be a “business with which he is associated” during the requestor’s participation on the advisory board. Clearly, he would not be a director, officer, or owner of the company. He would not have a financial interest that comprised 5% of the equity of the company. The only question is whether he would be an employee of the company. However, even if he could be considered to be an independent contractor, the State Ethics Commission might well still apply the “conflict of interest” analysis. See State Ethics Commission Advice of Counsel 09-525 at 5.

Accordingly, the requestor was advised that, during the period in which he participates on the company’s advisory board, the State Ethics Act would likely require that he disqualify himself from taking any official City action that would affect the private pecuniary interests of the company.

State Ethics Act – Section 1103(d)(honoraria)

Section 1103(d) of the Act provides that “No public official or public employee shall accept an honorarium.” The term “honorarium” is defined in Section 1102 of the Act as follows: “Payment made in recognition of published works, appearances, speeches and presentations and which is not intended as consideration for the value of such services which are nonpublic occupational or professional in nature. The term does not include tokens presented or provided which are of de minimis economic impact.”

We interpret the Act's definition of "honorarium" to mean two things: (1) public employees may not receive payment when they are invited to appear and talk about subjects related to their work because of their official identities; and (2) public employees may not receive payment for other services that is out of proportion to the market value of such services. The presumption is that when public employees are paid to talk about their work (since it is part of their job to explain their work to the public) or are paid an excessive amount for doing something, the payment may represent a "corrupt bargain" to purchase the employee's influence. *See* Advice of Counsel GC-5010-501.

However, it was not clear that the requestor's participation on the advisory board would be as a representative of the City government or sharing information about his City work. Nevertheless, he was advised that it might be advisable to provide relevant facts to the State Ethics Commission and request a ruling. If the Commission were to conclude that the \$10,000 stipend for serving on the advisory board is an honorarium, the Act would prohibit receipt of that payment.

As an additional note, the requestor mentioned in his request that the program would allow him to "direct to a nonprofit" the \$10,000 annual stipend. As with other issues under the State Ethics Act, whether such a donation would avoid an issue under Section 1103(d) would be a matter for the State Ethics Commission. However, it was noted that at least one court opinion casts some doubt on whether a prohibition on a receipt of money can be made acceptable by diverting the funds to a charity. *See Keller v. State Ethics Commission*, 860 A.2d 659, 664-666 (Pa. Commw. 2004). *See also* State Ethics Commission Opinion No. 09-002 (Crompton, April 30, 2009).

The requestor was advised, however, that the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including on the question of whether the Act applies to him. Our advice as to 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 may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Financial Disclosure

If the requestor serves on the advisory board, he may be required to disclose the \$10,000 annual stipend as income on his State financial disclosure form, filed by the following May 1. As noted above, the ultimate authority on his financial disclosure obligations under the State Ethics Act is the State Ethics Commission.

Conclusion

A City employee asked for advice concerning whether there are any issues under the Public Integrity Laws if he were to accept an invitation from a local company to become a member, for at least a two-year period, of an advisory board to the company, for which participation the requestor would receive a “stipend” of \$10,000 per year, plus travel and hotel expenses.

Based on the facts that the requestor provided, he was advised as follows:

1. The \$10,000 annual stipend for service on the advisory board is compensation for services rendered and is not a gift. Thus, there are no issues under the ethics laws restricting gifts.
2. Even though it is presumed that the company has contracts with the City, there will be no issue under Charter Section 10-102 if the requestor’s compensation is derived out of company revenues other than from City contracts.
3. There is no issue under Code Section 20-607(a) for personal conflicts of interest.
4. Under Code Section 20-607(b), there could be a conflict if the requestor acts to benefit a firm of which he is a member. However, participation in the advisory board

would not make the requestor a “member” of the company. Accordingly, there is no conflict under Section 20-607(b).

5. Based on the requestor’s job description, the requestor was advised that the State Ethics Commission would likely conclude that he is a “public employee” subject to the State Ethics Act. On this point, and on the below points, this advisory is not binding on the State Ethics Commission.

6. Under the State Ethics Act, the requestor was advised that the State Ethics Commission might well conclude that the “conflict of interest” provision of the Act would prohibit him from taking official City action that affected the company, during any period in which he serves on the advisory board.

7. It is unclear whether the State Ethics Commission would consider the \$10,000 annual stipend for serving on the advisory board to be an honorarium prohibited by the Act, and if so, whether the option of directing that stipend to a charitable nonprofit would avoid the prohibition. The requestor was advised that he may wish to obtain an advisory from the Commission.

8. If the requestor serves on the advisory board, he may be required to disclose the \$10,000 annual stipend as income on his State financial disclosure form, filed by the following May 1.

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. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but are required to make 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