

CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

Philadelphia Board of Ethics Advice of Counsel GC-2011-507

July 25, 2011

Brian Abernathy, Chief of Staff
Managing Director's Office
Suite 1430 Municipal Services Building
1401 John F. Kennedy Blvd.
Philadelphia, PA 19102

Re: Potential Conflict / Spouse / Oversight of City Contract

Dear Mr. Abernathy:

You have requested a public advisory opinion as to the effect of the ethics laws on your administrative duties in the Managing Director's Office ("MDO"), given that your wife works for a company that has responded to a request for proposals ("RFP") issued by Philly311, which reports to the MDO.

You advise that you are Chief of Staff to the Managing Director and that you have direct management responsibility for the administrative functions of the MDO.

You advise that Philly311, which reports to the MDO and whose budget is contained in the MDO's budget, has issued an RFP to which the Harrisburg office of the accounting firm Grant Thornton LLP has responded. You advise that your wife is a Senior Manager in Grant Thornton's audit practice in Philadelphia, and that she will not participate in this contract. Further, you advise that you did not participate in the development of the RFP, that you will not review the responses, and that you will not manage the contract. Finally, you advise that you have the authority to approve professional services contracts.

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. You are 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 you may be concerned about, you are encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

While neither the Home Rule Charter nor the City Code restrict your conduct of your official City duties, in order to comply with the State Ethics Act, you likely need to disqualify yourself from approving, or exercising oversight over, Grant Thornton's contract with the City.

Benefitting from City Contracts—Home Rule Charter

Charter Section 10-102 prohibits City employees from being "interested directly or indirectly" in certain City contracts. However, based on the facts that you have provided, it appears that you will not receive any compensation from Grant Thornton. In that case, you would not be "interested" in a contract between Grant Thornton and the City. *See* Nonpublic Advice of Counsel GC-2009-501 at page 3 (Amended March 2, 2010). Therefore, there is no issue under this provision.

Conflict of Interest—City Code

The Code prohibits City employees from having conflicts of interest that arise either from having a personal financial interest in their official actions, or from having a financial interest in their official actions through another person or entity. As to a personal interest, Code Section 20-607(a) prohibits City employees from being “financially interested” in their official actions. Because, based on the facts that you have provided, it appears that you will receive no compensation from Grant Thornton and because you have indicated no other potential source of a financial interest, you are not “financially interested” in your official actions with respect to Grant Thornton. *See* Nonpublic Advice of Counsel GC-2009-501 at page 5 (Amended March 2, 2010). Therefore, there is no issue under 20-607(a).

As to an interest through another entity or person, Code Section 20-607(b) places certain restrictions on City employees whose spouses have a financial interest in their official actions. However, because, based on the facts that you have provided, it appears that your wife will receive no additional compensation if Grant Thornton’s proposal is accepted, she does not have a financial interest in your official actions with respect to Grant Thornton. *See* Formal Opinion 2010-002 at page 6 (finding that the requester did not have a personal financial interest in taking an action affecting her company’s clients because she would receive no additional compensation as a result). Therefore, there is no issue under 20-607(b).

Conflict of Interest—State Ethics Act

The State Ethics Act, 65 Pa.C.S. § 1101 *et seq.*, also prohibits conflicts of interest. The Act likely applies to you.¹ Assuming the Act applies to you, it

¹ The Act applies to any “public employee,” which it defines as: “[a]ny individual employed by . . . a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard 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. Given that you have authority to approve contracts, you likely meet this definition. However, as will be discussed, a definitive ruling, on which you could rely, can come only from the State Ethics Commission.

prohibits you from “engag[ing] in conduct that constitutes a conflict of interest.” 65 Pa.C.S. § 1103(a). A “conflict of interest” is:

Use by a public official or public employee of the authority of his 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. The term 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.

65 Pa.C.S. § 1102.

Under the State Ethics Act, you may have a conflict of interest if you have a personal financial interest, or if a business with which you or a member of your immediate family (which includes a spouse) is associated has a financial interest, in your official actions. As to a personal interest, the State Ethics Commission would likely find that, based on the assumed fact that you will not receive compensation from Grant Thornton, you do not have a personal financial interest in your official actions with respect to Grant Thornton. It would thus likely find that you do not have a conflict of interest through a personal interest. *See* Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

As to an interest through a business with which your wife is associated, your wife is “associated” with Grant Thornton because your wife is an employee of the firm. *See* 65 Pa.C.S. § 1102 (defining “business with which he is associated” as, among other things, a “business in which the person . . . is a[n] . . . employee”). Therefore, the State Ethics Commission would likely require you to abstain from participating in any official action that would cause Grant Thornton to receive a “private pecuniary benefit.” This includes approving a contract between the City and Grant Thornton.

Moreover, you are required to publicly disclose any conflicts of interest when your public duties intersect with the financial interest of Grant Thornton, as being in a position to approve Grant Thornton’s contract likely would. An adequate

procedure for such disclosure is set out in Code Section 20-608(1)(c).² *See* Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the State Ethics Act. This Advice is not binding on the State Ethics Commission.

Please note that you have the option to seek a nonconfidential opinion from the Law Department as to the effect of the State Ethics Act. Such an opinion, if you acted on it in "good faith reliance," would protect you from criminal penalties and civil damages under the State Ethics Act. *See* 65 Pa.C.S. § 1109(g). However, a violation of the State Ethics Act could still be found. *See* State Ethics Commission Order No. 1119, at page 11-12 (finding that the respondent "technically violated" the State Ethics Act). Further, if you obtained a financial gain from violating the State Ethics Act, you could be required to return such gain. *See* 65 Pa.C.S. § 1107(13).

Summary

Based on the facts that you have provided, we have concluded the following as to your administrative duties in the Managing Director's Office:

(1) The Charter's prohibition on City employees benefitting from City contracts contained in Charter Section 10-102 does not restrict you.

² This Section requires you to write a letter that sets out the following:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Your public position and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (your wife being an employee of Grant Thornton) that presents the conflict;
4. A statement of how your public duties may intersect with the interest of Grant Thornton (if not obvious from 2 & 3 above); and
5. Your intention to be disqualified from any official action in matters affecting Grant Thornton's private interest (which should indicate that such disqualification precedes any official action being taken).

The letter should be sent by certified mail to the following: (1) the Managing Director; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addresses.

July 25, 2011

Page 6 of 6

(2) The Code's conflict of interest provisions, Code subsections 20-607(a) and 20-607(b), do not restrict you.

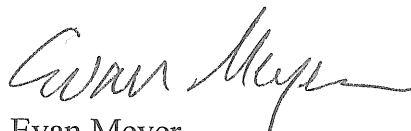
(3) However, the State Ethics Act's conflict of interest provision likely applies to you and restricts you because of your wife's employment by Grant Thornton. Consequently, you should not participate in any official action that causes Grant Thornton to receive a "private pecuniary benefit." This likely includes approving a contract between the City and Grant Thornton. Furthermore, given that your official duties will intersect the financial interest of Grant Thornton if you are in a position to approve its contract with the City, you should disclose this and disqualify yourself from approving Grant Thornton's contract with the City, in the manner required by Code Section 20-608(1)(c).

(4) However, this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. You may wish to seek advice from the Commission. You also have the option to seek an opinion from the City Solicitor, which may shelter you from penalties for violating the State Ethics Act's conflict of interest provision.

If you are later concerned about any other situation, we would be happy to consider the application of the ethics laws to those particular facts.

Since you have requested public advice from the Board of Ethics, we will make this letter public as required by Code Section 20-606(1)(d)(iii).

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Evan Meyer", with a stylized flourish at the end.

Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director