



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2011-508

September 8, 2011

Re: Post-employment Restrictions

A City employee in a technical position in an operating department, who had prior service in a different department, requested nonpublic advice on post-employment restrictions. The employee advised that she was considering leaving City employment and applying for a position with a company that does business within the City.¹

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. Although previous opinions of

¹ Advice was not sought concerning any present conflict of interest involving the requestor's current employment with the City. It was noted that once she has applied or has an offer from a company, she would have a financial interest in that company, and may be restricted in actions she may take for her current department concerning that company before leaving City employment. See Advice of Counsel No. GC-2010-515 at pages 4-5.

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, it was noted that we should be contacted for specific advice on the application of the ethics laws to those particular facts.

There are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act.

A. 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.

However, the Act applies only to City employees who fit the Act’s definition of “public employee.”² Although we have not reviewed a formal job description, based on the requestor’s job title, department, and description of duties, it was concluded that it is likely that the State Ethics Commission would determine that a City employee in that position would be a “public employee” and subject to the Act.

The key words in Section 1103(g) are defined in Section 1102 of the Act, 65 Pa.C.S. §1102. “Represent” is defined as follows:

² The term “public employee” 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.

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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.

Based on opinions of the State Ethics Commission, it was noted that it is likely that the Commission would determine that the requestor’s “governmental body” would be the two City departments where she worked, but based on some older rulings, it could be the entire City of Philadelphia.³ Accordingly, the requestor may not for one year after the date she separates from City employment (last day on the payroll) represent anyone—herself, any firm that employs her, or any of its clients—before those City departments. 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 (either department) one’s work for the new employer. This means that, until the anniversary date of the requestor’s separation, any interaction between her or any future employer or one of her or its clients and one of those City departments regarding any City transactions (such as a contract) may not have any involvement by the requestor, unless such involvement is purely internal at her employer, and not in any way revealed to the City.

More particularly, Section 1103(g) would prohibit the requestor for one year from separation from representing any person before those City departments. 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 governmental body; (2) attempt to influence the former governmental body; (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 governmental body; (5) lobby the former governmental body; or (6) be identified on any document submitted to the former governmental body. This

³ As noted on page 5 below, the State Ethics Commission is the final authority in interpreting the State Ethics Act, so our advice is guidance only.

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would include telephone calls, e-mails, and attendance at meetings.

“Represent” does not include, and the former employee may permissibly do, the following: (1) assist in the preparation of any document submitted to the former governmental body if the employee’s name does not appear in the document; (2) counsel any person regarding that person’s appearance before the former governmental body, so long as that activity is not revealed to the former governmental body; or (3) make general informational inquiries to the former governmental body to obtain information that is available to the general public, so long as it is not done in a way to influence the former governmental body or make known to the former governmental body that the former employee represents his new employer. That last phrase, “make known to the former governmental body,” is important. In other words, Section 1103(g) would not prohibit a former City employee from working for an agency that had a City contract, so long as his work for them was entirely internal at the agency and his involvement in the project was in no way revealed to the City or those parts of City government for which the employee worked.

In addition, it was 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 she might personally contract with the City 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 her for one year after her separation from City service from executing a personal consultant contract to work for the City (either department), in any capacity at all. This was mentioned in order to provide complete advice, although it does not relate to the requestor’s question about potential employment with another entity.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including whether the Act applies to a particular requestor. This Advice is not binding on the Commission. Please note that the Act provides that: “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].” 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics

matters under State law); Opinion of the Solicitor of May 30, 2008 at page 3 n.1. Since the Board of Ethics is not “the solicitor” of the City, requestors have the option to obtain a nonconfidential opinion from the Law Department as to the application of the State Ethics Act. Such an opinion, if the requestor acted on it in “good faith reliance,” would protect her 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; advice of solicitor is not a complete defense). Further, if that requestor obtained a financial gain from violating the State Ethics Act, he or she could be required to return such gain. *See* 65 Pa.C.S. § 1107(13). Alternately, of course, an advisory may be sought directly from the State Ethics Commission.

B. 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 service with the City, she took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, she may not assist that future employer in the matter relating to that transaction. On the other hand, we interpret “matter” to mean only the particular issue or issues on which decisions were made by the City with the requestor’s involvement, not every issue related to that project that may arise after separation from City service.

C. 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 or she made while in City employ. Thus, if the requestor had, for example, been officially involved in awarding, renewing, amending, or administering a City contract with the outside entity, she could not for two years be employed by and receive any compensation from that entity, if such compensation was derived from revenue received under that City action affecting the contract.

Summary

As an employee of a City department, and a former employee of another department, the requestor sought a nonpublic advisory as to whether the post-employment ethics laws would restrict her in your possible future employment for the a certain firm. Based on the facts that the requestor provided, she was advised as to the following conclusions:

(1) The State Ethics Act likely applies to the requestor. Under the Act, she would be prohibited for one year after she leaves the employ of the City from representing anyone, including herself and any future employer (or any client of herself or any future employer), before either of her former City departments. Please note the broad definition of “represent,” which includes having your name appear on a bid,

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contract proposal, engineering report, invoice, or other official document submitted to your former governmental body, the City departments for which she worked.

(2) Please note that this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. The requestor was advised that if she has any questions regarding the advice herein as to the State Ethics Act, she is advised to contact the State Ethics Commission.

(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 the City with her involvement.

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

The requestor was encouraged to feel free to request further advice from the Board of Ethics, or the State Ethics Commission, if she should have additional facts to provide. Please also note the option of requesting advice of the City Solicitor (as to the State Act only), as discussed on pages 4-5 above.

Since the requestor requested nonpublic advice from 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