



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

Philadelphia Board of Ethics
Advice of Counsel GC-2011-509

August 24, 2011

Robert Biron
Divisional Deputy City Solicitor
City of Philadelphia Law Department - Housing Division
1234 Market Street, 17th Floor
Philadelphia, PA 19107

Re: Post-employment / Attorney

Dear Mr. Biron:

You have requested a public advisory opinion regarding post-employment restrictions and a possible employment position with the Committee of Seventy. In addition, you asked for guidance on whether in the new employment position it would be necessary for you to register under the City's new lobbying law.

You advised us of the relevant facts that follow here. You are currently Divisional Deputy City Solicitor with the City of Philadelphia Law Department's Housing Division. In this capacity, you advise that your job responsibilities are as follows:

- evaluate and advise on the application of federal, state and local laws and regulations to community and economic development projects and programs in Philadelphia
- prepare and review City contracts made through the City's Office of Housing and Community Development and the Commerce Department in the areas of community and economic development
- provide legal counsel to the City of Philadelphia Vacant Property Review Committee

You advise that you are being considered for the position of Deputy Policy Director at the Committee of Seventy with a start date of September 2011. The responsibilities of that position are:

- research and write materials concerning Pennsylvania, City of Philadelphia and regional policy issues
- monitor legislation in Harrisburg and Philadelphia City Council
- help manage the Voter Assistance Program, monitoring polling places and answering questions from voters
- interact with elected and appointed Pennsylvania and City of Philadelphia governmental officials to further the Committee of Seventy's mission of promoting effective and efficient government, including giving testimony before City Council

Since ethics advisory opinions are limited to the facts presented, this advice is predicated on the facts above that you have provided. We do not conduct an independent inquiry into the facts. Ethics advisory opinions are always fact-specific, and any employee who wants to know whether his or her proposed conduct is permissible should seek and rely only on an opinion issued about his or her specific situation. If there are particular fact situations that you are concerned about related to general principles that are described in this opinion, you should ask us for specific advice on the application of the ethics laws to those particular facts.

There are three different ethics laws applicable to you that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act. Each restriction is discussed in turn below, including whether the restriction has a different application to attorneys practicing law, as two of them do.

A. State Ethics Act: One-Year Limitation On Representation before Former Governmental Body

The State Ethics Act applies only to a “public employee.” Your job responsibilities as Divisional Deputy City Solicitor in the Law Department cause you to satisfy the definition of “public employee,” which the Act defines as:

Any individual employed by the Commonwealth or 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. In addition, the State Ethics Act Regulations provide that staff attorneys engaged in representing a department, agency or other governmental body are generally considered public employees. 51 Pa. Code §11.1 (definition of public employee)(iv)(C). Therefore, as a Divisional Deputy City Solicitor, you are a “public employee,” and if you leave employment with the City you will be a “former public employee.”

The State Ethics Act has a post-employment restriction that applies to former public employees and that provides: “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.” 65 Pa.C.S. §1103(g). This is a one-year prohibition on former public employees representing persons, for pay, before the governmental body that had previously employed them. The State Ethics Commission has explained that “[t]his provision of law seeks to prohibit a former public official/employee from gaining an undue advantage from prior public service as a result of his prior relationship with individuals and his functioning within his former governmental body.” State Ethics Commission Opinion 93-005 at 5.

The one-year post-employment restriction under the State Ethics Act restricts a former public employee with respect to the behavior of “representing” a “person” before “the governmental body with which he has been associated.” It is important to understand the meaning of each of the key terms of the one-year prohibition. The term “person” is defined to include “[a] business, governmental body, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of

persons.” This includes the former public employee himself. State Ethics Commission Opinion 93-005 at 6.

The term “represent” has a broad meaning in this context of acting on behalf of any person in any activity. Specifically, the State Ethics act defines represent as “act[ing] on behalf of any other person in any activity.” 65 Pa.C.S. §1102. Prohibited representations include: (1) personal appearances before the former governmental body or bodies; (2) attempts to influence; (3) submission of bid or contract proposals which are signed by or contain the name of the former public official/public employee; (4) participating in any matters before the former governmental body as to acting on behalf of a person; and (5) lobbying. State Ethics Commission Opinion 08-004 at 5-6 (citing Opinion 89-005); State Ethics Commission Advice of Counsel 00-584 at 3. By way of further illustration, a former public employee may assist in the preparation of any documents presented to his former governmental body, but the former public employee may not be identified on documents submitted to the former governmental body. State Ethics Commission Opinion 08-004 at 6. The former public employee may counsel any person regarding that person’s appearance before the former governmental body as long as the activity is not revealed to the former governmental body. *Id.* Also, this post-employment restriction does not prohibit making general informational inquiries to the former governmental body to secure information that is available to the general public as long as this is not an indirect effort to influence the former governmental body or make the former public employee’s new employment or representation known to the former employer. *Id.*

The term “governmental body with which a public official or employee is or has been associated” is defined as “[t]he 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.”¹ 65 Pa.C.S. §1102. This includes the entire governmental body and is not limited to a particular subdivision of the agency where the public employee may have had influence or control. State Ethics Commission Opinion 00-584 at 6; State Ethics Commission Advice of Counsel 02-596 (concluding that the former governmental body is the entire Philadelphia Department of Licenses & Inspections for a public employee who was Chief of the Mechanical Services Unit of the Permit Services section of the Construction Services division of L&I).

¹ The State Ethics Act defines “governmental body” as “[a]ny department, authority, commission, committee, council, board, bureau, division, service, office, officer, administration, legislative body or other establishment in the executive, legislative or judicial branch of a state, a nation or a political subdivision thereof or any agency performing a governmental function.” 65 Pa.C.S. §1102.

The City Law Department would be the governmental body with which you have been associated. However, based on your description of your job responsibilities, the City's Office of Housing and Community Development, the Commerce Department, and the Vacant Property Review Committee could also be included to the extent your influence and control as Divisional Deputy City Solicitor also extended there. It is not precisely clear how the State Ethics Commission would advise on the scope of your former governmental body, and this is a reason you may wish to seek a ruling directly from the Commission as is discussed below.

It is important to note that the one-year restriction of the State Ethics Act applies only in a limited way to attorneys. The Commission has ruled that the post-employment rule in the Act may not be applied to restrict an attorney's conduct insofar as it constitutes the practice of law because the Pennsylvania Supreme Court has the exclusive authority to regulate an attorney's conduct in that regard. State Ethics Commission Advice of Counsel 11-518 at 3 (citing *Shaulis v. Pennsylvania State Ethics Commission*, 574 Pa. 680, 833 A.2d 123 (2003)); *see also* Board of Ethics Advice of Counsel 2010-504 at 3-4. Therefore, the State Ethics Act's one-year prohibition would apply to restrict your representation of persons before your former governmental body only to the extent such representation would not constitute the practice of law. State Ethics Commission Advice of Counsel 11-539 at 3; State Ethics Commission Advice of Counsel 11-518 at 3; State Ethics Commission Opinion 05-008 at 4; Advice of Counsel 08-528 (concluding that Section 1103(g) applies except as to activities that constitute the practice of law); Advice of Counsel No. 05-583 (same); Advice of Counsel No. 04-524 (same).

Accordingly, so long as you are practicing law, the State Ethics Act one-year post-employment restriction does not apply to you. To the extent you are not engaged in the practice of law as Deputy Policy Director of the Committee of Seventy, you may not for one year after the date of leaving the employ of the City (that is, the date off the payroll) represent anyone, including the Committee of Seventy, before your former governmental body.

This Advice is not binding on the State Ethics Commission, which is the definitive authority on the State Ethics Act subject to judicial review. It is the policy of the Board of Ethics to advise on the State Ethics Act by endeavoring to predict the interpretation of the State Ethics Commission and limiting our advice to matters where prior rulings of the Commission or the text of the Act provide reliable guidance and high confidence in any such prediction. Our advice on the State Ethics Act is guidance only and does not provide protection from penalties. In contrast, an advisory opinion issued by the State Ethics Commission, whether it is confidential or non-confidential, provides a complete

defense in any enforcement proceeding initiated by the Commission and is evidence of good faith conduct in any other civil or criminal proceeding, provided the requester has disclosed truthfully all the material facts and acted in reliance on the Advice. 65 Pa.C.S. §1107 (11). For these reasons, you may wish to seek advice directly from the State Ethics Commission.

Note that you also have the option of seeking advice on the State Ethics Act from the Law Department. Charter §4-1100 (providing that at the option of the employee requesting advice the Law Department has concurrent authority with the Board of Ethics to render advisory opinions regarding state law). Good faith reliance on a non-confidential, written Solicitor's opinion provides protection from criminal penalties and civil damages under the State Ethics Act, but a violation could still be found and restitution ordered. *See* 65 Pa.C.S. §1109(g).

B. City Code: Permanent Limitation On Assistance With Particular Matters

The City Code contains a post-employment restriction that is a permanent limitation on assistance with particular matters. This restriction, like the State Ethics Act post-employment restriction, does not apply to attorneys engaged in the practice of law. Section 20-603(1) of the City Code, titled "Post-Employment Representation," 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.

This provision is not a one-year prohibition, but instead 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 means matters in which the employee exercised discretion and not merely, for example, responded to a routine request for information. The term "transactions involving the City" is defined as follows:

Any proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions or other particular matter which the member of City Council, City officer or

employee in question believes, or has reason to believe (a) is or will be the subject of City action; or (b) is one to which the City is or will be a party; or (c) is one in which the City has a direct proprietary interest. This shall not include routine applications or requests for routine information or other matters which are of a ministerial nature and do not require the exercise of discretion on the part of any member of City Council, City officer or employee.

Code § 20-601(4). In addition, the term “person” in this context means a “business, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons.” Code § 20-601(11).

Code Section 20-603(1)’s post-employment representation restriction does not apply to representations of a client by an attorney practicing law. Solicitor’s Opinion 97-16 (advising that the requestor’s activities as an attorney after separation from the City will not be subject to Code Section 20-603(1) based on a Commonwealth Court opinion pre-dating *Shaulis*, which also held the State Act’s post-employment provisions cannot restrict an attorney’s representation of a client); Solicitor’s Opinion 91-47 (same). The regulation of attorneys engaged in the practice of law is solely within the province of the Pennsylvania Supreme Court and the Rules of Professional Conduct.

Thus, Code Section 20-603(1)’s post-employment representation restriction would apply to restrict you as Deputy Policy Director of the Committee of Seventy from representing persons in transactions involving the City in which you had participated as a City employee, only to the extent that you are not practicing law. The same analysis that we applied to the State Ethics Act (see page 5 above) applies here.

C. City Code: Two-Year Limitation On Financial Interests in Official Action

The City Code conflict of interest rule provides for a two-year prohibition on a former employee acquiring a financial interest in official action the employee took during City employment. Specifically, City Code Section 20-607(c) 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 contrast to the City Code's post-employment representation prohibition just discussed above and to the State Ethics Act's one-year post-employment restriction, Code Section 20-607(c) neither clearly restricts representation nor relates exclusively to post-employment activity. It applies "during his term of office or employment and until two (2) years have elapsed since the expiration of service." It is important that the provision does not relate to "assisting another" or "representation" but to "becoming financially interested" in an official action.

In the *Shaulis* opinion, the Pennsylvania Supreme Court made a distinction between restrictions that target attorneys and restrictions that apply to current employees including attorneys. The Court opined that "this Court retains exclusive authority over the conduct of attorneys generally, but that as an employer, in this case the Commonwealth government, can proscribe conduct of its current employees, including attorneys, provided that the proscription is not targeted specifically at attorneys." *Shaulis*, 833 A.2d 123, 131. As a result, ethics laws that apply to current employment do apply to attorneys. Therefore, a strong argument can be made that Section 20-607(c) of the City Code prohibiting a personal financial interest in official action taken for two years after employment does not target attorneys and is constitutional as it applies to attorneys, even after *Shaulis*. Board of Ethics Advice of Counsel 2010-504; *see also* Solicitor's Opinion 97-16 (concluding that, although it was not totally clear, attorneys could be subject to Section 20-607(c) since it is not a direct prohibition against representation); Solicitor's Opinion 91-47 (same).

We advise that for two years after leaving City employment you should not acquire a financial interest in action you took in your official capacity as Divisional Deputy City Solicitor. Based on the facts that you have presented, this would not appear to be an issue if you should take the proposed position with the Committee of Seventy. If, however, within the two years, you should take a position with a housing agency with

a contract with OHCD on which you had worked while with the City, there might be an issue, and you should contact us for further advice.

D. Note on the Rules of Professional Conduct

Generally speaking, post-employment representation restrictions are not applicable to attorneys practicing law and the Rules of Professional Conduct for Pennsylvania attorneys control. It is not within the jurisdiction of the Board of Ethics to advise on the Rules of Professional Conduct, so the Rules are mentioned here merely as information. Rule 1.11(a) addresses “Special Conflicts of Interest for Former and Current Government Officers and Employees” and provides in part that a former government lawyer “shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent to the representation.”

Board Regulation on Lobbying is Pending

In your request, you also asked for guidance on whether as Deputy Policy Director of the Committee of Seventy it would be necessary for you to register under the City’s new lobbying law. It would be premature for us to advise on this issue, as the Board of Ethics is currently in the midst of creating a regulation that interprets and implements the City’s new lobbying law. Note, however, that the requirements of the lobbying ordinance, including the registration requirements, are not being enforced pending promulgation of the regulation and to a certain extent pending creation of an electronic filing system. By resolution adopted on July 7, 2011, which is enclosed, the Board of Ethics announced: “The Board shall not exercise its authority to enforce against acts or omissions that would constitute violations of the City’s Lobbying Law until 30 days after the effective date of Board of Ethics Regulation No. 9 on Lobbying.” July 7, 2011 Resolution ¶ 2. In addition, the Board stated:

[I]t shall not be a violation of Philadelphia Code Section 20-1202(1) to fail to register as a lobbyist, lobbying firm or principal if Board of Ethics Regulation No. 9 is not yet effective or, as provided in the Resolution the Board approved on June 15, 2011, if the mandatory lobbying electronic filing system, the Philadelphia Lobbying Information System, is not yet available.

July 7, 2011 Resolution ¶ 3. You are welcome to ask for guidance on the registration requirements of the lobbying ordinance once the Board has a lobbying regulation in place² and you are in the position of Deputy Policy Director of the Committee of Seventy.

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,

Evan Meyer
General Counsel

Enclosure (Resolution of July 7, 2011)

cc: Richard Glazer, Esq., Chair

J. Shane Creamer, Jr., Esq., Executive Director

² Regulation No. 9 will take effect ten days after a Hearing Report, approved by public vote of the Ethics Board and by the Law Department, is filed with the Department of Records. Since the next regularly scheduled meeting of the Ethics Board is September 21, 2011, it appears unlikely that Regulation No. 9 will take effect earlier than October 3, 2011, and it could be later.

**RESOLUTION of the CITY OF PHILADELPHIA
BOARD of ETHICS**

Declaring that the Board of Ethics will not exercise its authority to enforce Philadelphia Code Chapter 20-1200, the City's Lobbying Law, until the Board has a lobbying regulation in effect.

WHEREAS, the Board of Ethics notes the following points of relevant fact:

- A. Chapter 20-1200 of the Philadelphia Code was signed into law June 16, 2010 and established a completely new lobbying registration and reporting law for the City of Philadelphia.
- B. Philadelphia Code Section 20-1206 provides that the Board of Ethics shall have the power and duty to administer and enforce the City's Lobbying Law.
- C. Philadelphia Code Section 20-1207 provides for penalties that the Board of Ethics may impose or seek a court to impose for violations of the City's Lobbying Law.
- D. Philadelphia Code Section 20-1210 provides that the Board of Ethics shall promulgate regulations necessary to carry out the City's Lobbying Law.
- E. Philadelphia Home Rule Charter Section 8-407 mandates a specific process for a City agency to promulgate a regulation. This process gives an implementing agency, such as the Board of Ethics, the benefit of public comments on a preliminary draft of a regulation and the opportunity to modify the regulation in response to public comment prior to adoption of a final regulation.
- F. The regulation-making process mandated by Philadelphia Home Rule Charter Section 8-407 includes the following steps: (i) approval by the Law Department of the Board's draft regulation; (ii) publication of the draft regulation for public review; (iii) opportunity for the public to comment on the draft regulation, which may include a public hearing as it did in the case of the Board's draft lobbying regulation; (iv) preparation by staff of a hearing report to respond to public comments, including possible modifications to the regulation; (v) approval by the Board of a hearing report and final version of the regulation; (vi) approval by the Law Department of the hearing report and final version of the regulation; and

(vi) filing of the hearing report with the Department of Records. The Charter also requires that all regulations shall be published.

- G. The Board of Ethics is currently engaged but has not completed the process mandated by Charter Section 8-407 for promulgating a lobbying regulation, entitled Regulation No. 9, to interpret and implement the City's Lobbying Law. The Board has published a proposed draft of Regulation No. 9 for public comment and has, on June 15, 2011, conducted a public hearing to receive comments on the draft regulation.
- H. The Board is in the process of considering the substantial testimony and written comments for possible modifications to Regulation No. 9 as part of the on-going Charter-mandated regulation-making process.
- I. Under Home Rule Charter Section 8-407 the earliest date on which Regulation No. 9 could become effective is ten days after the Board of Ethics files with the City's Department of Records a hearing report that has been approved by the Law Department. Board staff currently anticipates that the earliest staff will be able to present a draft hearing report to the Board for its consideration is at the public Board meeting scheduled for August 17, 2011. Even after the Board approves a hearing report the regulation-making process would still not be complete because Law Department approval for the hearing report and final regulation, which could take significant time, would still need to be given.

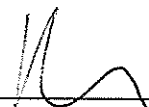
NOW THEREFORE BE IT RESOLVED, BY THE BOARD OF ETHICS OF THE CITY OF PHILADELPHIA THAT:

1. The Board shall not exercise its authority to enforce against acts or omissions that would constitute violations of the City's Lobbying Law until 30 days after the effective date of Board of Ethics Regulation No. 9 on Lobbying.
2. The Board of Ethics shall exercise its authority to enforce the City's Lobbying Law only with respect to acts, omissions, or violations that occur 30 days after the effective date of Board of Ethics Regulation No. 9. This Resolution, however, does not preclude the Board from enforcing against violative acts or omissions that occur 30 days after the lobbying regulation's effective date but that were part of a continuing conduct that began before the effective date of Regulation No. 9.
3. Although Philadelphia Code Section 20-1202 establishes that registration for lobbyists, principals, and lobbying firms, including payment of a

registration fee, shall begin July 1, 2011, it shall not be a violation of Philadelphia Code Section 20-1202(1) to fail to register as a lobbyist, lobbying firm or principal if Board of Ethics Regulation No. 9 is not yet effective or, as provided in the Resolution the Board approved on June 15, 2011, if the mandatory lobbying electronic filing system, the Philadelphia Lobbying Information System, is not yet available.

4. Although Philadelphia Code Section 20-1201 defines four specific reporting periods per year, each spanning three months, the Board shall not exercise its authority to enforce against any failure to file expense reports covering any period of time prior to 30 days after the effective date for Regulation No. 9. The Board shall not require any registrant to retain substantiating records relating to expenses prior to that date.
5. The Board of Ethics as soon as possible shall publish on its website the Board's hearing report on Regulation No. 9 and the approved regulation. The Board shall also send a copy of the hearing report and approved regulation to all parties who provided comment on the draft regulation. In addition, the Board shall send notice of the availability of the hearing report and approved regulation on the Board's website to the distribution list of potentially interested parties that Board staff has compiled and which now includes approximately 180 e-mail addresses and 660 mailing addresses.

This Resolution shall take effect immediately.

By the Board: 
Richard Glazer, Chair

Adopted by the Board, July 7, 2011