



CITY OF PHILADELPHIA

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Evan Meyer
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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2011-510 (Amended)

September 28, 2011
(Amended June 11, 2012)

Re: Potential Conflict / Outside Employment

A City employee requested nonpublic advice as to how the Public Integrity Laws might restrict her in certain private activity for a nonprofit that she created, in view of her public position as a City employee. The requestor noted that her nonprofit enters into contractual arrangements with certain entities, which might include the City, and that the nonprofit might work with the City in order to identify private entities with which to contract. The requestor asked for general advice on her appropriate actions, and specifically inquired whether she may meet with City employees to brainstorm the project, and whether she may call herself the “executive director” of the nonprofit.

The requestor was advised of our standard caution: 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 the Board of Ethics.¹ We do not

¹ This is especially important in this particular Advice of Counsel, since a number of facts seemed to be uncertain or subject to change. The requestor represented that she was unpaid by the nonprofit, but in another place stated that she was unpaid “at this point.” Also, the requestor, in providing details as to the arrangements with the entities with which the nonprofit has dealings, prefaced her description of the arrangements with the word “typically,” and “depends on the organization,” suggesting that some arrangements may differ.

conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. 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 anyone may be concerned about, that person is encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

It was noted that most of the Public Integrity Laws apply to “City officers and employees” and thus applied to the requestor as a City employee.

There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and that conflicts of interest are avoided. In that regard, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is prohibited for a City officer or employee. This advisory will discuss the restrictions of each of those three bodies of law in the following paragraphs, in addition to disclosure and disqualification requirements.

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 representation that the requestor will not receive any compensation from the nonprofit, any City contract with the nonprofit in which there was a financial interest by the nonprofit would not result in the requestor personally being “interested” in the contract, since the interest referred to in Section 10-102 is a financial interest and the requestor is not compensated. *See* Nonpublic Advice of Counsel GC-2009-501 (Amended March 2, 2010) at page 3. Therefore, based on the facts that we were provided, including that the requestor is not compensated by the nonprofit, there is no issue under this provision.

Philadelphia Code Representation Provision

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer or

employee from engaging in outside employment (even if unpaid) that involved representing another person, directly or indirectly, as that person's agent or attorney in any transaction involving the City.² The term "represent," in the context of Code Section 20-602, is narrow, since the provision is qualified by the phrase, "as agent or attorney." (In contrast, "represent" in the post-employment provision of the State Ethics Act, not applicable here, is interpreted much more broadly.) Accordingly, the requestor was advised that, so long as she is employed by the City, she may not personally represent the nonprofit as its agent in any City transaction, whether or not her City office is acting in the matter. *See* Nonpublic Formal Opinion No. 2010-002 at page 2. Note that the provision does not apply to any assistance provided in the course of or incident to an employee's official duties, as for example constituent service.

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to the entire outside entity of which the City employee is a member, so that anyone in that entity would be prohibited from the same representation ("as agent or attorney") in certain circumstances, but that provision applies only to entities "organized for profit," and so does not apply to nonprofit organizations. Accordingly, if there is to be any matter in which an agent of the requestor's nonprofit contacts the City in a matter involving discretion by the City, that agent may not be the requestor. It can be another officer or director of the nonprofit, and no disclosure or disqualification would be required of the requestor. *See* Nonpublic Advice of Counsel No. GC-2009-505 at 5.

² The full provision is as follows:

- (1) (a) No member of the Council nor other City officer or employee shall assist another person by representing him directly or indirectly as his agent or attorney, whether or not for compensation, in any transaction involving the City. This Section shall not apply to any assistance rendered by any member of Council or other City officer or employee in the course of or incident to his official duties, or to any person who holds any City office or position who is not compensated for his service by the City. Subject to Section 20-602(4).

The term "transaction involving the City" is defined in Code Section 20-601(4) as follows:

- (4) Transactions Involving the City. 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.

The requestor was advised that, it may well be that, in her City position, the occasion may not arise that she may be faced with taking official action that could affect her nonprofit, but it is possible, and so that possibility must be addressed. We were asked in particular about whether it would be permissible for the requestor to “sit in on meetings with [City officials] to brainstorm about this project.” The requestor was advised that participating in such a meeting would constitute representing the nonprofit as agent, and thus she may not do so personally. However, as noted above, another officer of the nonprofit (if not a City employee/officer) may participate.

Conflict of Interest Provision—Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or being a member of a business or other entity that has a financial interest in their official decisions. As to the personal interest, Code Section 20-607(a) 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 . . .

This provision does not prohibit the requestor from having an outside source of income; it only prohibits her from taking official action in her City position that affects that income. Accordingly, should such an action present itself, the requestor would be required to publicly disclose her interest and disqualify herself from such official action, as provided in Code §20-608.³ Participation that she should avoid would include not only final

³ Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for disclosure and disqualification, which involves writing a letter that contains the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. The City employee’s public position and description of duties relevant to the conflict, if not obvious;
3. The person’s private position or financial interest that presents the conflict;
4. A statement of how the person’s public duties may intersect with his/her private interest or that of the outside entity (if not obvious from 2 & 3 above); and
5. The person’s intention to be disqualified from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

decisions, but also any preliminary discussion, review, or action. Based on the requestor's representation that she is "unpaid at this point," this provision would not be an issue. The requestor was advised that, should she begin to receive compensation from the nonprofit, this advice would change.

As to the interest through another entity, Code Section 20-607(b) 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.

Code Section 20-607(b). This provision applies only to entities "organized for profit," so would not apply to the nonprofit. However, the conflict of interest provision of the State Ethics Act differs in this regard; see below.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to some City employees,

The letter should be sent by certified mail to the following: (1) the applicable appointing authority; (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 addressees.

although it is questionable whether it would apply to one in the requestor's position.⁴ Section 1103(a) provides:

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

Under the State Act, a conflict of interest can include acting to affect the financial interests of a "business with which he is associated." Unlike the City Code, for the State Act, the courts have determined that such a "business" can include a nonprofit.

Accordingly, if the State Act applies to the requestor, she may not take official action, as a City employee, that has an economic impact on her nonprofit as a "business with which you are associated."

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. 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 recipient acted on it in "good faith reliance," would protect that person 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 the person obtained a financial gain from violating the State Ethics Act, they could be required to return such gain. *See* 65 Pa.C.S.

⁴ The Act applies only if the individual 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. However, the requestor was advised that if she desires a more detailed analysis as to whether the Act appears to apply to her in general as an employee of the City, she should provide us with a job description. (As noted below, a definitive ruling, on which she could rely, should come from the State Ethics Commission.)

§ 1107(13). Alternately, of course, an advisory may be sought directly from the State Ethics Commission.

Conclusion

In short, given that it is likely that there may be some interaction between this local nonprofit and the City at some point, the requestor was advised that no such interaction may be made by her personally. To the extent that some other officer of the nonprofit represents the nonprofit before the City, no disclosure or disqualification would be required. Should any of the other conflict of interest provisions discussed in this Advice apply, the requestor must file a disclosure and disqualification letter as described in footnote 3, disclosing that she is a City employee with this outside interest and disqualifying herself from taking any City action affecting this nonprofit.

Summary

A City employee requested nonpublic advice as to how the Public Integrity Laws might restrict her in certain private activity for a nonprofit that she created, in view of her public position as a City employee. Based on the facts that the requestor provided, she was advised as to the following conclusions:

1. Under Charter Section 10-102, the requestor may not have a personal financial interest in a City contract. Based on her representation that she receives no compensation from the nonprofit, she would not have a financial interest in any City contract. Thus, under the facts that were presented to us, there should not be an issue under the Charter.
2. Under Code Section 20-602(1), the requestor may not personally represent the nonprofit as agent in any City transaction whether or not she would be acting in the matter as a City employee. This restriction would prohibit her participating in “brainstorming” meetings with City employees/officials regarding the nonprofit’s program. Note that this is an absolute prohibition, so the requestor may not have such participation, even if she files a “disclosure and disqualification” letter.
3. Under Code Section 20-602(5), another member of the nonprofit may represent, as agent or attorney, the nonprofit in a transaction involving the City, and no additional process is required.
4. Under Code Section 20-607(a), the requestor may not take official action in her City position that affects her income from the nonprofit. Presently, this should not be an issue, since the requestor advised that she is not compensated by the nonprofit.

5. Code Section 20-607(b) does not apply, since the entity of which the requestor is an officer is a nonprofit.
6. Based on the facts that were provided to us, the requestor is an officer of the nonprofit. The Public Integrity Laws do not govern whether she may call herself “executive director” or some other title.
7. Under Section 1103(a) of the State Ethics Act, the requestor may not take official action, as a City employee, that has an economic impact on herself, or on the nonprofit as a “business with which you are associated.” As to the conflict from a personal financial interest or an interest of her employer, this is essentially the same requirement as under the City Code conflict provisions, as discussed above, and the same public disclosure and disqualification would be required. However, it is questionable whether the Act would apply to a person in the requestor’s position. A job description would have to be reviewed to provide advice on this point.
8. Code Section 20-608 provides the requirements for making public disclosure and disqualification under the City Code, and such a filing should also satisfy the filing requirements of the State Ethics Act conflict provision, as well.
9. The requestor was advised that, for any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and she may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.

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 6-7 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