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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2011-511

October 7, 2011

Re: “Resign to Run” – Charter Section 10-107(5)

A City employee requested a nonpublic advisory regarding whether certain activity involving exploration of a possible run for public office would require him to resign his City position. The requestor advised us of the following facts:

I have been asked to meet with a group of community members as they would like me to share my thoughts on the community, the community’s needs and my willingness to run for [public] office. If asked the question I would let them know that I am willing and able and am exploring the possibilities.

Additionally, I would be asked about what I have done as far as work experience and background. At no time would I commit to running for office nor would I make a public statement stating such. . . .

I would not be the organizer of this meeting and would be attending as a guest of community members less than 15 in number. There would be no media present during this meeting.

FOR PUBLIC RELEASE

The requestor asked whether his attending this meeting, as described, would require him to resign under the “resign to run” provision of the Charter.

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. 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.

The requestor was advised that Section 10-107(5) of the Charter does not require him to resign his City position until he either publicly announces his candidacy or files nominating papers. Nevertheless, what activity might constitute “publicly announcing candidacy” requires some analysis and consideration of particular facts.

“Resign to Run”—Subsection 10-107(5) of the Charter

As an appointed City employee, the requestor is subject to subsection 10-107(5) of the Home Rule Charter, which provides:

- (5) No officer or employee of the City, except elected officers running for re-election, shall be a candidate for nomination or election to any public office unless he shall have first resigned from his then office or employment.

Therefore, once the requestor becomes a candidate, he must resign his City position. Thus, the question arises as to when he becomes a candidate for purposes of this subsection. As this Board said in Formal Opinion No. 2010-001:

Previous rulings of State appellate courts, the Board of Ethics and the Law Department have advised that one becomes a candidate for the purposes of

Charter Section 10-107(5) upon having filed nomination papers or publicly announced candidacy for office.

Formal Opinion No. 2010-001, at page 5. Nevertheless, the question remains as to what activities might constitute “publicly announcing” that one is a candidate for office. In Formal Opinion 2010-001, the Board advised that a City official authorizing others to circulate nominating papers on his behalf would not constitute a public announcement of candidacy. Formal Opinion 2010-001 at page 5. Moreover, Formal Opinion No. 2010-001 cited court opinions holding that indicating only “willingness and availability to run” did not make one a candidate for purposes of Section 10-107(5), nor did statements made to a limited number of individuals (five) in private in a hotel room without the presence of the media. Formal Opinion No. 2010-001 at 3-4 (*citing McMenemy v. Tartaglione*, 590 A.2d 802, 810 (Pa. Commw. 1991), *aff’d without op.* 590 A.2d 753 (Pa. 1991) and *Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963)). *See also* Nonpublic Formal Opinion No. 2009-004, at 3-4 (*citing McMenemy and Mayer*).

Additionally, in Nonpublic Advice of Counsel GC-2010-522, we advised a City employee that, were that employee to have several one-on-one private conversations with friends, advisors, and knowledgeable people about her chances for success and the details of running (such as when would she have to decide and what would she need to do to become an official candidate and when can she begin to raise money), the fact of having those private conversations, in and of itself, would not constitute a “declaration of candidacy” by the employee and would not require her to resign her City position under Charter Section 10-107(5).

The facts on which the requestor in this matter asked us to base this advice go somewhat beyond “several one-on-one private conversations.” Based on the authorities cited above, the requestor was advised that, so long as nothing he says at the proposed meeting is a statement that he is a candidate or a commitment to run, mere statements of “willingness and availability to run” would not make him a candidate and would not require that he resign his City office, under Charter Section 10-107(5).

Conclusion

Based on the facts that were provided to us, and to respond to the particular question that was posed by the requestor, and applying the currently applicable prior rulings of the Board of Ethics, the requestor was advised as follows:

1. Under the Home Rule Charter and the City’s Campaign Finance Law, the requestor will not become a candidate until he either files nominating papers or publicly declares his candidacy for public office.

2. If the requestor were to meet with a group of fewer than 15 community members and share his thoughts on the community, the community's needs and his willingness to consider a run for public office and his qualifications (but not committing to run), that action, in and of itself, would not constitute a "declaration of candidacy" by the requestor and would not require him to resign his City position under Charter Section 10-107(5).

3. This Advice addresses only questions under the Public Integrity Laws that are within the jurisdiction of the Board of Ethics. Explicitly not addressed are any issues under the Pennsylvania Election Code. This Advice also assumes that the requestor's question does not involve the solicitation or receipt of any contributions or the formation of any political committee.

The requestor was advised that if he has any additional facts to provide or additional questions, we will be happy to consider if they change any of the conclusions in this opinion. Readers may wish to review the prior rulings cited in this Advice. They can be found on the Board of Ethics website, at www.phila.gov/ethicsboard, under "Advisory Opinions & Publications." Since the requestor requested nonpublic advice from the Board of Ethics, we will not make this letter public, but we will be required to make public a revised version, edited to conceal his 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