



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2011-512

November 30, 2011

Re: Conflict of Interest / Ownership of Business

A City employee in an operating department asked for a nonpublic advisory as to the effect of the ethics laws on her in owning a local business while also working for a City department that may regulate that business. The employee advised that she is considering purchasing, along with a partner, an existing business located in the city.

The requestor further advised that, in her City position, she is responsible for the staff that takes City action in regulating such businesses. She advised that she understands that she would be required to “disclose and disqualify” herself from any City action affecting the business, but stated that she would like to better understand the full scope of such disclosure and disqualification.

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. All 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

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

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 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.

Home Rule Charter

Section 10-102 of the Charter prohibits certain compensated City officers and employees from benefiting from, or having a direct or indirect interest in, certain City contracts, even if they had no official connection with the contract. In this sense, Section 10-102 is a broad prophylactic rule, rather than a typical conflict of interest provision. The full text of the provision is as follows:

City Officers and Employees Not to Engage in Certain Activities. As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

The question that usually arises is what constitutes a "direct or indirect interest." Prior rulings have held that where a City employee, as an individual, enters into a personal services contract with the City, that interest clearly violates Section 10-102. When the employee works for a firm that has a contract with the City, the provision is violated when the employee works on that contract for the outside contractor. Where the outside contractor has many contracts, and the employee happens to work for the outside contractor but not in any way related to the City contract, the provision is not violated, unless the City employee has a financial interest in the contract, such as where the employee's compensation includes a share of profits or revenue generated by the contract

or where the employee otherwise benefits from the contract. *See* Advice of Counsel GC-2008-515 at page 3.

The requester had not advised that the proposed business would have or seek any contracts with the City, so it appears that there would not be an issue under Charter Section 10-102.

Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise either from having a personal financial interest or from 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 job that affects that income. Accordingly, prior to any official action affecting such an interest, the requestor would be required to publicly disclose her interest and disqualify herself from such official action, as provided in Code §20-608.¹ Participation that she should avoid

¹ Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The employee should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. The employee's public position (title and department) and description of duties relevant to the conflict, if not obvious;
3. The employee's private position or financial interest (her ownership of the local business) that presents the conflict;
4. A statement of how her public duties may intersect with her private interest or that of your business(if not obvious from 2 & 3 above); and
5. The employee's intention to disqualify herself 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).

The letter should be sent by certified mail to the following: (1) the employee's appointing authority (in this case, her department head); (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.

would include not only final decisions, but also any preliminary discussion, review, or action. For example, if the requestor's unit is faced with taking any possible City action affecting the business, the requestor may not be involved in the consideration or decision of that matter. It is recommended that the request contact her department head to assign another official to supervise any such matters that involve her business.

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)(emphasis added). Thus, an action by the requestor (as City employee) that affected any member of the business (such as her partner), or the business itself, would be restricted by this provision, if the requestor would be a "member" of the business. As a part-owner, the requestor was advised that she would be a "member" of the business. Thus, even if the requestor somehow had an arrangement with her partner that the partner would receive all income from certain business actions, the requestor would still have a conflict since her business has an interest. Then, disclosure and disqualification, as noted in footnote 1, would be required.

Note, also, that Section 20-609 of the Code provides that no City officer or employee "shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others." Obviously, if the requestor were to make available to her partner, or other person not entitled to it, any confidential City information she learned in her service for the City, that may violate 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.

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.) For example, if the requestor were to pick up at her office a blank form that is freely available to the public, that action would not be "representing" any party. As noted above, this Advice can only address future conduct. Accordingly, the requestor was advised that, so long as she is employed by the City, she may not personally represent her business or partner in any City matter, including those involving her department, as well as any other City offices. Nevertheless, the requestor's partner or other employee of her business, if not a City employee, would not be subject to this prohibition. In the case of representation by another officer or employee of her business, however, the requestor would be required to file the disclosure and disqualification letter described in footnote 1 above.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, has a "conflict of interest" provision that is similar to that in the Philadelphia Code. The Act applies only if the requestor is a "public employee," as defined in the Act. The requestor was advised that she appears to be 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.

Assuming that the Act applies, it prohibits the requestor 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 . . . or a

business with which he . . . 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 . . . with which he . . . is associated.

65 Pa.C.S. § 1102.

Under the Act, the requestor may have a conflict of interest if she has a personal financial interest, or a “business” with which she is associated has a financial interest, in her official actions in her position with the City.

Therefore, the State Ethics Commission would likely interpret the Act to require the requestor to abstain from participating in any official City action that would cause either her or her business to receive a “private pecuniary benefit.” *See* Nonpublic Advice of Counsel GC-2010-505 at page 8. Moreover, the requestor would be required to publicly disclose any such conflict of interest should her public duties intersect with the financial interest of her business. An adequate procedure is the same “disclosure and disqualification” process as under the City Code. *See* footnote 1 above.

The requestor was advised, however, that the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including on the question of whether the Act applies to her. Our advice as to the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To those who rely in good faith on advice from the Commission itself, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107 (10), (11). Upon request, advice from the State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor’s opinion. 65 Pa.C.S. §1109(g) (“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].”). Since the Board of Ethics is not “the solicitor” of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, the requestor may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Financial Disclosure

The requestor's interest in this business may impact what she must disclose on the Commonwealth's financial disclosure form. However, the form that will be due May 1, 2012 discloses interests for calendar year 2011. Therefore, if the requestor acquires a financial interest in the business on or after January 1, 2012, she would not have to disclose that interest on the financial disclosure form until filing in 2013 for calendar year 2012.

Conclusion

The requestor, a City employee in an operating department, asked for a nonpublic advisory as to the effect of the ethics laws on her in owning a local business while also working for a City department that may regulate that business.

Based on the facts that were provided to us, the requestor was advised as to the following:

1. The Board of Ethics can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past.
2. Charter Section 10-102 prohibits the requestor from having a direct or indirect financial interest in a City contract.
3. The requestor may not take official action as a City employee on any matter in which she or her business has a financial interest. In any such City matter, the requestor must disclose her financial interest and disqualify herself from working on that matter for the City, as provided in footnote 1 of this Advice.
4. The requestor may not represent any person as agent or attorney in any transaction involving the City, including her business and her partner. Her partner may represent the business, if the requestor follows the "disclose and disqualify" procedure.
5. The requestor was advised that the State Ethics Act has a similar "disclose and disqualify" requirement, which is similar to the City's in procedure.
6. Remember that for any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and the requestor may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.

7. Under Code Section 20-609, the requestor must not disclose confidential City information she acquired in her service with the City to any other person for the purpose of advancing her financial interest or that of her business or partner.

8. The Commonwealth's financial disclosure form will require that the requestor disclose her financial interest in this business when she files that form by May 1 of the year following the calendar year in which she acquires the business.

The requestor was advised that if she has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. 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 her 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