



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2012-502

March 9, 2012

Re: Potential Conflict / City Employee / Board of Nonprofit Organization

A City employee requested a nonpublic advisory opinion as to the effect of the ethics laws on her proposed service as a board member of a nonprofit organization while also working for the City.

In general, it is rare that an outside activity would present such a severely conflicted situation that the ethics laws would completely prohibit the outside activity. Rather, the ethics laws may impose restrictions on the requestor's official actions for the City and holding certain outside interests or activities on behalf of an outside entity. This advisory will outline these restrictions. However, the requestor must decide how our advice applies to her particular facts, especially since some of the facts seem uncertain.¹ Finally, the requestor was advised that, although certain ethics laws may require her to "recuse" herself (we prefer the phrase "disclose and disqualify" since it emphasizes the important public disclosure element and the mandated procedure for any disqualification) from certain City action, conflicts under the ethics laws are not in general avoided by "recusal" in the outside activity (that is, by not participating in matters on the nonprofit's board).

¹ For example, the requestor advised that the scope of her duties at the nonprofit is "not established," and that she "may be" involved in "certain elements" of unspecified future contracts between the nonprofit and the City.

The requestor was advised that she is not prohibited in general from serving on the board of the nonprofit. However, in doing so, the Philadelphia Code (“Code”), the Philadelphia Home Rule Charter (“Charter”), and the State Ethics Act place certain restrictions on the requestor. Her service for the nonprofit may also impact her financial disclosure requirements.

Benefiting from City Contracts

Charter Section 10-102 prohibits City employees from being “interested directly or indirectly” in certain City contracts. However, because the requestor advised that she would not be compensated as a board member of the nonprofit, she cannot be “interested” in any City contracts as a result. Therefore, there is no issue under this provision. *See* Nonpublic Advice of Counsel GC-2009-501 at page 2 (Amended March 2, 2010).

The Philadelphia Code’s Conflict of Interest Provision

The City Code prohibits City employees from having conflicts of interest that arise from either having a personal financial interest in their official actions, or from being a member of certain entities that have a financial interest in their official actions.

As to a personal interest, Code Section 20-607(a) prohibits City employees from being “financially interested” in their official actions. Because the requestor would not be compensated as a board member of the nonprofit, she cannot be “financially interested” in any official actions by her that affects the nonprofit. Therefore, there is no issue under this provision. *See* Nonpublic Advice of Counsel GC-2009-501 at page 5 (Amended March 2, 2010).

As to an interest through another entity, Code Section 20-607(b) places certain restrictions on City employees who are members of a “partnership, firm, corporation or other business organization or professional association organized for profit” which have a financial interest in their official actions. However, because the requestor’s organization is a nonprofit, there is no issue under this provision, since subsection 20-607(b) applies only to entities “organized for profit.” *See* Nonpublic Advice of Counsel GC-2010-505 at page 5.

While the City’s conflict of interest provisions raise no issues, the State Ethics Act’s conflict of interest provision may prohibit the requestor from taking actions which financially affect the nonprofit. This will be discussed below.

The Commonwealth's Conflict of Interest Provision

The State Ethics Act (“Act”), 65 Pa.C.S. § 1101 *et seq.*, also prohibits conflicts of interest. It appears to apply to the requestor.² If it does, it prohibits her 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.

As to a personal interest, the State Ethics Commission would likely find that because the requestor is not compensated in her position with the nonprofit, she cannot have a “personal financial interest” in her official actions as a result. *See* Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

As to an interest through a “business,” the Act is interpreted differently from the City’s conflict of interest provisions. For purposes of the Act, “business” includes nonprofits. *Rendell v. State Ethics Commission*, 983 A.2d 708, 715-16 (Pa. 2009). As a

² The Act applies to any “public employee,” which it defines as: “[a]ny individual employed by . . . a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard 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. While we have not been presented with a job description, executive and special directors or assistants reporting directly to the agency head or governing body have generally been considered “public employee[s].” *See* Regulations of the State Ethics Commission, 51 Pa. Code §11.1(iv)(A). However, as will be discussed, a definitive ruling, on which the requestor could rely, can only come from the State Ethics Commission.

result, the State Ethics Commission may well consider the nonprofit to be a “business” under the Act. Further, the Commission would likely consider the requestor to be “associated” with the nonprofit if she were to serve on its board of directors. *See* 65 Pa.C.S. § 1102 (defining “business with which he is associated” as a “business in which the person . . . is a director,” among other things).

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 the nonprofit to receive a “private pecuniary benefit” so long as she serves on its board. *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 the nonprofit. An adequate procedure for such disclosure is set out in Code Section 20-608(1)(c).³ *See* Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the State Ethics Act. This Advice is not binding on the State Ethics Commission.

For specific guidance on the State Ethics Act, the requestor was advised to seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide her with 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 requestor disclosed truthfully all the material facts and acted in reliance on the Advice. *See*, 65 Pa.C.S. §1107 (10), (11). The State Act would also provide the requestor protection from certain penalties if she would seek and rely on non-confidential advice from the City Solicitor. *See*, 65 Pa.C.S. §1109(g).

³ This Section would require the requestor to write a letter that sets out the following:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Her public position and description of duties relevant to the conflict, if not obvious;
3. Her private position or financial interest (board member of the nonprofit) that presents the conflict;
4. A statement of how her public duties may intersect with the interest of the nonprofit (if not obvious from 2 & 3 above); and
5. Her intention to be disqualified from any official action in matters affecting the private interest (which should indicate that such disqualification precedes any official action being taken).

The letter should be sent by certified mail to the following: (1) the head of her City office; (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 addresses.

Representing Others in Transactions Involving the City

The Philadelphia Code imposes certain restrictions on City officers or employees representing others in transactions involving the City. Code Section 20-602(1)(a) provides:

No . . . 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 . . . City officer or employee in the course of or incident to his official duties. . . .

This provision applies even if the City officer/employee is not compensated for such representation. Consequently, the requestor may not represent the nonprofit as its “agent or attorney” in any transaction involving the City, unless such representation is in the course of or incident to her official duties as a City employee. This restriction applies to all such transactions, not just those involving the employee’s City office.

The requestor noted, in her request, that she may in the future be involved in the execution of certain elements of an already established contract, including that she may be involved in facilitating work between the nonprofit and her City office (i.e. participating in meetings, helping to coordinate efforts, etc.) after the contract is established. To the extent that such activities could be considered to be representation of the nonprofit as its agent, they would only be permitted if they are in the course of the requestor’s official duties for her City office, as assigned by her appointing authority. Based on information provided by the requestor, it does not appear that any actions she would take as a member of the nonprofit’s board would be considered to be in the course of her official duties as an employee of the City.

The requestor advised that she will not be involved in the decision to contract with the nonprofit nor with establishing the details of any future contract. However, the ethics laws are not merely concerned with final actions involving contracts. As a board member of the nonprofit, the requestor would have a certain loyalty to that organization. Such loyalty may not conflict with her loyalty to the City. To reiterate: under Code Section 20-602, the requestor may not represent the nonprofit in any transaction involving the City. This applies even if the requestor is not personally involved in the matter, even if the matter does not involve the awarding or details of a contract, and even if the City matter has nothing to do with the requestor’s City office. It is an absolute prohibition. There is no disclosure and disqualification (or “recusal”) that makes such representation permissible.

Disclosure of Confidential Information

The Code also prohibits City employees from making available confidential City information they acquire in their employment with the City. Specifically, Code Section 20-609 provides:

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.

Making available confidential City information to the nonprofit could not advance the requestor's own "financial interest" because she is not compensated in her position with the nonprofit. However, making available confidential City information to the nonprofit for the purpose of advancing its "financial interest" would violate this provision.

Please note that this information is provided merely to be complete, not to suggest that there appears to be any concern that this is an issue under the facts provided.

Financial Disclosure

The requestor was advised that her position with the nonprofit may impact what she must disclose on any financial disclosure form. All financial disclosure forms require that the filer disclose directorships that he/she holds, including in nonprofits.

Summary

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. 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 Advice states general principles, and there are particular fact situations that the requestor may be

concerned about, she was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

Based on the facts that were provided, we have concluded that the ethics laws do not prohibit the requestor's service with the nonprofit, but there are certain limitations on her activities of which she should be aware. In particular:

(1) The Charter's restriction on benefitting from City contracts contained in Charter Section 10-102 does not restrict the requestor.

(2) The Code's conflict of interest provisions, Code subsections 20-607(a) and 20-607(b), do not restrict the requestor.

(3) However, the State Ethics Act's conflict of interest provision likely applies to the requestor and to the financial interests of a nonprofit on whose board she serves. As a result, the requestor should not, in her position with the City, take any official action which causes the nonprofit to receive a "private pecuniary benefit." Furthermore, should the requestor's official duties intersect with the financial interests of the nonprofit, she should disclose this interest and disqualify herself from acting for the City, in the manner required by Code Section 20-608(1)(c).

(4) However, this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. The requestor has the option to seek an opinion from the Commission, or a nonconfidential opinion from the City Solicitor, which may shelter her from certain penalties for violating the State Ethics Act's conflict of interest provision.

(5) Under Code Section 20-609, the requestor must not disclose confidential City information that she acquired in her service with the City to the nonprofit for the purpose of advancing financial interest of the nonprofit.

(6) Under Code Section 20-602, the requestor may not represent others, including the nonprofit, as "agent or attorney" in transactions involving the City.

(7) Any financial disclosure form that the requestor files in April 2013 will require that she disclose the directorship with the nonprofit, if she joins the board in calendar year 2012.

Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we will be required to make public this revised

Nonpublic Advice of Counsel GC-2012-502

March 9, 2012

Page 8 of 8

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