



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2012-506

July 16, 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 situation as a current board member of a nonprofit organization while also working for a City agency that regularly does business with various nonprofits. The employee advised that she serves, without compensation, on the board of directors of a 501(c)(3) nonprofit charter school. She asked the following questions:

1. Does my service on the charter school's board of directors preclude me from contracting with the charter school through my job as a city employee under the State and City ethics laws?
2. Does contracting with the charter school present a conflict of interest under the State and City ethics laws?
3. If so, how do I remedy the conflict if I have already begun the contracting process?

A city employee is not prohibited in general from serving on the board of a nonprofit organization. However, in doing so, the Philadelphia Code ("Code"), the Philadelphia Home Rule Charter ("Charter"), and the State Ethics Act place certain

restrictions on the employee. A City employee's service for a nonprofit organization may also impact the employee's 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 employee in this case would not be compensated as a board member of the charter school, 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-2012-502 at page 2.

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 employee would not be compensated as a board member of the charter school, she cannot be "financially interested" in any official actions by her that affect the school. 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" that has a financial interest in their official actions. However, because the organization in this case is a nonprofit, there is no issue under this provision, because 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 employee from taking actions which financially affect the charter school. 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 city employee. 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, a city employee 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 could find that because the employee is not compensated in her position with the charter school, 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 State 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 result, the State Ethics Commission could consider the charter school to be a "business" under the Act. Further, the Commission might then consider the City employee to be "associated" with the school because she serves 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 might interpret the Act to require the employee to abstain from participating in any official City action that would cause the charter school 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. Under such an interpretation, the employee would be required to publicly disclose any such conflict of interest should

her public duties intersect with the financial interest of the school. An adequate procedure for such disclosure is set out in Code Section 20-608(1)(c).¹ See Nonpublic Advice of Counsel GC-2009-501 at page 7 (Amended March 2, 2010).

However, the above discussion is complicated by the fact that the State Ethics Commission considers charter schools to be political subdivisions and thus members of their boards to be public officials. See State Ethics Commission Opinion No. 09-005, State Ethics Commission Advice of Counsel No. 11-516. Moreover, 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.

City employees seeking specific guidance on the State Ethics Act, including whether the Act applies to them,² should seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide 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 that

¹ Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for disclosure and disqualification under the Code, 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 employee's public position and description of duties relevant to the conflict, if not obvious;
3. The employee's private position or financial interest (representative for and/or director of your nonprofit) that presents the conflict;
4. A statement of how the employee's public duties may intersect with her private interest or that of the nonprofit (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; (2) the Ethics Board, c/o Evan Meyer, General Counsel; 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. Please note that our offices are moving effective June 25, 2012, so prior to that date, notices may be sent to Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102, and after that date to One Parkway Building, 18th Floor, 1515 Arch Street, Philadelphia, PA 19102.

² 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. As noted above, a definitive ruling on which an employee can rely must come from the State Ethics Commission.

the requesting employee truthfully disclosed 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 protection from certain penalties if an employee sought and relied on non-confidential advice from the City Solicitor. *See*, 65 Pa.C.S. §1109(g).

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 an employee is not compensated for such representation. Consequently, the employee in this case may not represent the charter school 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 transactions between the charter school and the City, not just those involving the employee’s specific department.

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 charter school contacts the City in a matter involving discretion by the City (such as seeking a contract, but not limited to contracts), that agent may not be the city employee. It can be another officer or director of the school. *See* Nonpublic Advice of Counsel No. GC-2009-505 at 5.

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 charter school could not advance the employee's "financial interest" because she is not compensated in her position with the school. However, making available confidential City information to the School 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

A position on a nonprofit board of directors may impact what a City employee must disclose on both City and Commonwealth financial disclosure forms. If the employee in this case is required to fill out a City financial disclosure form, then she must disclose her directorship at the charter school on that form. Likewise, if she is required to file the Commonwealth's financial disclosure form, then she must disclose her directorship on that form.

Remedying Past Behavior

Generally, the Board advises that we can only issue advice as to future conduct, and therefore, each of our Advices typically states that it does not address anything that may have occurred in the past. However, our Regulation No. 4, in Paragraph 4.1(e), does permit us to address past behavior in an advisory opinion if necessary to provide advice as to corrective action or future action that represents part of a continuing course of conduct that began prior to the request. Paragraph 4.1(e) also notes the following:

The decision to address past conduct in a Formal Opinion or Advice of Counsel may include advice requiring remedial action going forward, shall not provide protection from penalties or sanctions under the ethics laws, as set forth in paragraph 4.1(f) below, and shall in no way preclude the Board from

initiating an investigation or pursuing an enforcement action concerning the past conduct.

In the employee's third question, she asked, regarding any conflict of interest: "how do I remedy the conflict if I have already begun the contracting process?" It is unclear from the question when the contracting process began, how far it has progressed, and whether the employee is referring to "beginning the process" on behalf of the School as an applicant or on behalf of the City, or both. Also, as noted above, it is unclear whether the employee would have a conflict under the State Ethics Act in taking action on behalf of the City that would affect the School. Accordingly, only Code Section 20-602 is addressed in this Advice. Any question of remedial action with regard to a possible conflict under the State Ethics Act would have to be addressed by the State Ethics Commission.

As noted in the "Representing Others" section of this advisory on page 5, the City employee is absolutely prohibited from representing the charter school in a transaction involving the City. Therefore, if the employee has been acting as the School's agent in applying for, discussing, or negotiating a contract, those efforts must cease immediately. Another official/employee of the School may represent the School, subject to the Advice on pages 5-6 and the below paragraph.

To the extent that a City employee has been personally representing a charter school in seeking a City contract (or any other City action), that employee may not take official action as a City employee in that matter. Thus, the employee must immediately cease any official City action in the matter, and arrange with an appropriate officer for some other official to proceed in her place. It is strongly recommended that the employee consult with the Chief Integrity Officer, Joan Markman, as to how best to proceed.³

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. We have addressed past behavior as necessary, as discussed above, under "Remedying Past Behavior." Be advised that, although previous opinions of this office that interpret statutes are guidance to how this

³ Although Mayor's Executive Orders are not in our jurisdiction, the employee may also wish to consult with Ms. Markman on any application of Executive Order No. 2-11 (January 25, 2011) on outside employment.

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

Based on the facts provided, we have concluded that the ethics laws do not completely prohibit the employee's service with the charter school going forward, but there are certain limitations on the employee's activities. In particular:

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

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

(3) However, the State Ethics Act's conflict of interest provision may apply to the employee and to the financial interests of a nonprofit on whose board she serves. As a result, it is possible that the Act would prohibit her from taking any official action, in her position with the City, which causes the charter school to receive a "private pecuniary benefit." Furthermore, should the employee's official duties intersect with the financial interests of the School, she should disclose this interest and disqualify herself from acting for the City, in the manner required by the Act (likely similar to 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 employee has the option to seek a public 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 employee must not disclose confidential City information acquired in her service with the City to the School for the purpose of advancing the financial interests of the School.

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

(7) Both the City financial disclosure form and the Commonwealth's financial disclosure form require that the employee disclose her directorship with the charter school, if the employee is required to fill out those forms. If the employee was on the board of the School as of May 1, 2012 and did not disclose that position on the forms she filed this year, she should file amended forms.

(8) Although advice going forward does not preclude a possible enforcement action concerning past conduct, as to remedial action the employee is advised to cease immediately any representation of the School in any City matter, and take no further City action in any such matter. It is strongly recommended that the employee consult with the Chief Integrity Officer on how best to proceed going forward.

If the employee is later concerned about any particular situation, we would be happy to consider the application of the ethics laws to those particular facts.

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 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