



CITY OF PHILADELPHIA

BOARD OF ETHICS
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**Philadelphia Board of Ethics
Non-Public General Counsel Opinion No. 2014-503**

August 26, 2014

Re: Post-City Position at Non-Profit that Receives Funding Through City Contract

Dear Requestor:

You have requested a non-public advisory opinion about how the ethics laws will apply to your work after you leave the City and in a position you have accepted with a non-profit organization. This non-profit receives funding pursuant to a contract with your City agency, where you have been employed since 2007. In brief, the post-employment restrictions in the City Code (1) prohibit you from becoming financially interested in actions you have taken in an official capacity for two years after you separate from the City; and (2) prohibit you at any time from assisting the non-profit for which you will work, or any person, in a transaction involving the City in which you participated during your City service.

I. Facts Provided

You provided the facts stated here. You have been an employee with your City agency since October 2007. You have held your current position with your City agency since February 2013 and are responsible for oversight and operations matters.

From the time you were hired by your City agency in 2007 until you took your current position in 2013, you served in a previous role with your City agency pertaining to a federal program (the "Federal Program"). Your City agency acts as a local administrator for the Federal Program, contracting with non-profit organizations that pay funds on behalf of eligible program participants. The only eligible use of federal funding made available under the Federal Program is reimbursement to non-profits on behalf of eligible participants. The grant funding may not be used for compensation of non-profits' staff.

FOR PUBLIC RELEASE

Grants of Federal Program initial project funding are determined on the basis of contract proposals submitted to your City agency by non-profits. At your City agency, you participated in preparation of the City's annual Request for Proposals for the Federal Program by assisting another City employee with standardizing a portion of the City's contract template that articulated federal requirements for the Federal Program. You also participated in multi-person review panels for the evaluation of initial project funding proposals.

A non-profit organization that has received initial project funding is eligible to apply to your City agency for Federal Program renewal funding following expiration of the grant period for its initial project funding. Renewal funding is provided through a one-year contract between your City agency and a non-profit organization. In the first few years you worked for your City agency, you helped review and rank Federal Program renewal funding applicants, again as part of a multi-person panel of evaluators. In the last two to three years, you have not been part of the renewal funding review panel and have had no other role in the ranking of renewal projects.

A contract for Federal Program renewal funding between the City and a funded non-profit organization is a new, stand-alone document, not an amendment or an extension of the preceding grant contract. The contract for renewal funding often may contain many of the same provisions as the prior year's contract but also may contain new provisions as necessary to conform to changes in federal regulations or City requirements.

Your other responsibilities in support of the Federal Program include supervising your City agency's program monitoring staff and operations staff. Your role with respect to operations is to provide oversight to ensure that your City agency's operations program operates effectively and that operations-related policy changes are implemented.

You plan to leave the City and have accepted employment with a non-profit organization that receives Federal Program renewal funding. Your future employer has been subject to monitoring and operations oversight by your City agency. You do not have any responsibilities in your City job that require contact with your future employer. At your future employer, you will supervise staff who conduct activities funded in part by Federal Program renewal funding. Your future employer employs finance and accounting staff who issue payments for expenses and reimbursement requests to the City, but you will not supervise these staff in your new position.

II. Jurisdiction

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter ("Charter") provisions and ordinances pertaining to ethical matters. Charter §4-1100. The Charter and the Philadelphia Code ("Code") authorize the Board to

render advisory opinions concerning a City employee's proposed future conduct. Charter §4-1100; Code §20-606(1)(d). Board of Ethics Regulation 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of a General Counsel opinion. Board Regulation 4, ¶¶ 4.0, 4.24.

III. Discussion

Post-employment restrictions govern the conduct of City employees after they leave City service. These restrictions prohibit former City employees from engaging in certain activities with respect to their interactions with the City and with respect to their former City work. The three post-employment restrictions that can apply to former City employees are discussed below.

A. Two-Year Restriction on Acquiring a Financial Interest

Code Section 20-607(c) prohibits you from “becom[ing] financially interested, subsequent to final action, in any . . . award, contract, lease, case, claim, decision, decree or judgment” you have taken in your official capacity as a City employee for two years following your separation from City employment. This provision prohibits you, for two years after you leave City employment, from receiving compensation derived from action you took in your official capacity, such as actions related to the award of contracts for Federal Program funding and to your operations and oversight work for your City agency. This post-employment restriction also prohibits for the same two-year period certain close relatives or business interests from becoming financially interested on your behalf in action you have taken in your official capacity. Code §20-607(c).

Based on the facts you have provided, your acceptance of the position with your future employer does not appear to raise an issue under the Code's two-year post-employment restriction on becoming financially interested in action you took in your official capacity while employed by the City. Federal Program renewal funding contracts are standalone documents with one-year terms, and you have not participated in the contracting process in two years or more. Consequently, any renewal funding contracts you were involved in approving have expired, and you have not taken action in your official capacity on the current contract for your future employer's renewal funding. Furthermore, under the legal terms of Federal Program renewal funding, your future employer cannot compensate you out of the Federal Program funding that it receives as this funding may only be used for specific reimbursements.

B. Restriction on Assistance In Transactions Involving the City In Which You Participated

Code Section 20-603(1) prohibits you at any time after you separate from the City from assisting another person, whether or not you are compensated, in any transaction involving the City in which you participated during your City employment. Transactions involving the City include proceedings, decisions, and matters (such as contracts, leases, and applications) that you have reason to believe may be subject to City action, involve the City as a party, or include a direct proprietary interest of the City.¹ Code §20-601(27). This restriction prohibits you from assisting your future employer or any other person in a transaction involving the City only if you participated in that particular transaction as a City employee.

As an employee of your City agency, you participated in drafting the City's Requests for Proposals for the Federal Program and acted as a panelist in ranking proposals for Federal Program initial project and renewal funding. As described above, you have not participated as a City employee in your future employer's current contract with your City agency for Federal Program renewal funding. Therefore, Code Section 20-603(1) does not prohibit you from doing work at your future employer related to its Federal Program renewal funding through the City, such as supervising your future employer's staff who assist eligible participants in activities funded in part by Federal Program renewal funding.

Some of the work performed by your future employer has been overseen by your City agency. Code Section 20-603(1) does not prohibit you from doing work for your future employer related to matters that may be overseen by your City agency. Rather, you are prohibited from assisting your future employer in a matter in which you participated as a City employee. For example, an issue may arise under this post-employment restriction if you were to assist your future employer to dispute an operations matter that you had worked on as a City employee. Based on the facts you have provided, your

¹ The Code defines "transactions involving the City" as:

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 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 City officer or employee.

Code §20-601(27).

responsibilities with your future employer do not appear to require you to assist any person in transactions involving the City in which you participated as a City employee.

C. Conflict of Interest with Respect to Prospective New Employer

The City Code's conflict of interest provision prohibits you from being financially interested in action you take in your official capacity as a City employee. Code §20-607. While you remain a City employee, an issue would arise under the Code's conflict of interest prohibition if you take action in your official capacity that affects your future employer. The Board has previously advised that a City employee would be financially interested in an entity if the employee has applied for a job with the entity or if that entity has made a job offer to the employee. Non-Public Board Opinion 2007-001 at 8. In the event you are in a position to take action on a matter involving your future employer, to avoid a prohibited conflict of interest under the Code you should publicly disclose your financial interest with respect to your future employer and disqualify yourself from taking official action that would affect your future employer. *See* Code §20-608(1)(c); Non-Public Board Opinion 2007-001 at 9.

D. The State Ethics Act

The State Ethics Act, 65 Pa. C.S. §1101 *et seq.*, imposes a post-employment restriction on a former "public employee" that is in addition to and different from the restrictions imposed by the City Code. Although the Charter gives the Board concurrent authority with the Law Department to provide advisory opinions on State law, the Board's authority to give advice regarding the State Ethics Act is limited. *See* Charter §4-1100. Unlike an opinion issued by the State Ethics Commission or a non-confidential opinion issued by the City Solicitor, guidance from the Board regarding the State Ethics Act is not binding on any person and does not provide any protection from penalties or sanctions imposed for a violation of the Act. Board Regulation 4, ¶4.4; *see also* 65 Pa.C.S. §§1107(10), (11), 1109(g). For this reason, the provisions of the State Ethics Act that appear relevant to your inquiry are merely outlined below. Also, you have indicated that you will seek guidance from the State Ethics Commission about the application of the State Ethics Act one-year post-employment restriction.

The State Ethics Commission has explained that the State Ethics Act's post-employment restriction "seeks to prohibit a former public official/employee from gaining an undue advantage from prior public service as a result of his prior relationship with individuals and his functioning within his former governmental body." State Ethics Commission Opinion 93-005 at 5. The State Ethics Act restriction applies only to former public employees, and the Act defines "public employee" in terms of job

responsibilities.² The State Ethics Act post-employment restriction prohibits former public employees from representing themselves or other persons on any matter before the governmental body with which they have been associated for one year after leaving public employment. 65 Pa.C.S. §1103(g). Under the Act, representing another person means acting on behalf of the person in activities that include, but are not limited to, personal appearances, negotiations, and submitting contract proposals that are signed by or contain the name of a former public employee. 65 Pa. C.S. §1102. The governmental body with which a public employee has been associated is the governmental body within the City by which the public employee has been employed, and is not limited to a particular subdivision of the agency where the public employee may have had influence or control. 65 Pa. C.S. §1102; *see also* State Ethics Commission Advice of Counsel 13-547 (concluding that the former governmental body is entire agency for a public employee who was a program analyst in one office within specific bureau of agency); State Ethics Commission Advice of Counsel 02-596 (concluding that the former governmental body is the entire Philadelphia Department of Licenses & Inspections for a public employee who was Chief of the Mechanical Services Unit of the Permit Services section of the Construction Services division of L&I).

IV. Conclusion

Thank you for your concern about compliance with the City’s post-employment restrictions and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. If you have questions about scenarios that vary from these facts, you should ask for specific advice on the application of the law to those particular facts. After you separate from the City, you can still request advice about the laws within the Board’s jurisdiction that may apply to you. Accordingly, if a particular post-employment issue arises, you can contact us for guidance. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board’s jurisdiction, unless they

² The State Ethics Act defines a “public employee” as:

Any individual employed by the Commonwealth or 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. The term shall not include individuals who are employed by this Commonwealth or any political subdivision thereof in teaching as distinguished from administrative duties.

65 Pa.C.S. §1102. The State Ethics Act regulations provide that executive and special directors, assistants, and other persons reporting directly to an agency head or governing body are generally considered public employees. 51 Pa. Code §11.1.

have omitted or misstated material facts in their requests. Code §20-606(1)(d)(ii); Board Regulation 4, ¶4.12.

Since you requested a non-public opinion, the original Opinion issued to you will not be made public. As required by the City Code, this version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. Please let me know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

Maya Nayak
General Counsel

cc: Michael H. Reed, Esq., Chair