



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics General Counsel Opinion No. 2015-501

January 28, 2015

Lee Huang
1435 Walnut Street, 3rd Floor
Philadelphia, PA 19102

Re: Prospective City Board Member Affiliated with Business that Has City Contracts

Dear Mr. Huang:

You have requested a public advisory opinion about the application of the City ethics laws, particularly the conflict of interest provisions, to your prospective service as a board member on the City of Philadelphia Water, Sewer and Storm Water Rate Board. In your private capacity, you are a Senior Vice President and Principal for Econsult Solutions, a business that has contracts with various City departments and engages in consulting work for the City. The City ethics laws do not prohibit you from becoming a member of the Water, Sewer and Storm Water Rate Board, but as a City official you will be required to abide by City ethics laws. The City ethics laws most directly applicable to a City official who is engaged in private employment are restrictions on conflicts of interest, interests in certain City contracts, and representation of others in transactions involving the City.

I. Facts Provided

You provided the facts stated here. You are currently a Senior Vice President and Principal for Econsult Solutions (“ESI”). ESI provides businesses and policy makers with economic consulting services through the evaluation of economic and fiscal outcomes of events and programs. You are a part-owner and an employee of the firm, from which you draw a salary.

The City is a client of ESI. ESI currently has contracts with City Council, the City Treasurer, the City Office of Economic Opportunity (“OEO”), and the City Water Department (“Water Department”). ESI was also a subcontractor for the Water Department through two different companies, WRT and AMEC, that were engaged as consultants for the Water Department. As part of working for AMEC, ESI advised on the transition involved in the Water

Department's new storm water rate approach by filing a report with AMEC about the effects of the new rate structure after the rates were enacted. ESI did not design or promote the new rates or system before it was enacted. As part of ESI's work for the Water Department, it has been asked to design a "playbook" about incentive programs and may be asked to work on establishing a fee-in-lieu program. ESI has not been asked or engaged to consult in relation to implementing or setting City water rates.

Your job duties with ESI pertain to business development, business operations, and supervising consulting work. You are the lead consultant on ESI's work for the City Treasurer and OEO and are peripherally involved in ESI's work for City Council. You are not involved in ESI's work for the Water Department. In late 2014, you were nominated by Mayor Nutter to serve as a board member on the Philadelphia Water Sewer and Storm Water Rate Board ("Water Rate Board"). If City Council confirms your nomination, your service on the Water Rate Board will be voluntary and uncompensated, and you will be entitled to reasonable expenses.

The Water Rate Board is an independent five-member body established by City ordinance at Code Chapter 13-100 pursuant to the Philadelphia Home Rule Charter at Section 5-801. The Water Rate Board has its own budget. The frequency and topics for meetings are set at the Water Rate Board's discretion and vary throughout the year. The Philadelphia Code requires that to serve on the Water Rate Board an individual must have a minimum of five years professional experience in one or more of the following fields: public or business administration, finance, utilities, or engineering and water resources management. At least one member must have experience as a consumer advocate in utility rate cases, and one member must be a commercial and/or industrial ratepayer with knowledge and experience related to storm water management and rates. You have a master's degree in Public Administration and have performed public administration related consulting work for approximately nine years. It is your understanding that your experience at ESI was a positive factor in qualifying you to serve on the Water Rate Board.

The City ordinance establishing the Water Rate Board outlines that its primary function is to fix and regulate rates and charges for supplying water, sewer and storm water service through a number of metrics, including financial standards, financial stability, peer utility practices, best management practices, industry standards, and sound utility rate making practices. The Water Rate Board establishes open and transparent processes and procedures for public input and comment on proposed water rates and charges, and it adopts regulations for public hearings and determining rates and charges. You believe that your role as a Water Rate Board member would be to serve as a third-party evaluator of proposed rates in a fair and transparent manner, evaluating available evidence to determine if proposed rates make sense.

You do not know if the Water Rate Board will be using consultants at all and if so for what purpose. If the Water Rate Board needs outside consultants, that may represent an opportunity for ESI. As such, if the Water Rate Board were to take up deciding whether consultants should be hired, you would recuse yourself and not participate. You would also recuse yourself and not participate in the Water Rate Board deciding which consultants to select if it determines consultants are needed. You assume that some work product that ESI has

previously produced for the Water Department may be of use to and could be used by the Water Rate Board.

The Water Department is the only entity that may initiate the process for a rate change by filing a petition with the Water Rate Board. The Water Rate Board must then hold a public hearing on the petition. You do not know if you would be present at these public hearings, but if you did not attend the hearings you plan to review the transcripts from the hearings. You do not know at this point, but it is conceivable given ESI's work for the Water Department that ESI could be asked by the Water Rate Board, the Water Department, or any other entity interested in rate change matters to provide testimony to the Water Rate Board.

After a public hearing, the Water Rate Board votes to approve, deny, or amend the Water Department's petition and issues a written report outlining the basis for its decision. Any monies generated from a rate change are provided to the Water Department, which budgets the monies. Monies are not provided to any individuals or entities directly, but a group of rate payers, including you as a Philadelphia resident, may nominally benefit as part of rate changes if those changes result in lower payments for water services. ESI does not directly pay water charges.

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 the proposed future conduct of a City officer or employee or of any person who is subject to, or reasonably could be subject to, a law within the Board's jurisdiction. Charter §4-1100; Code §20-606(1)(d); Board Regulation 4, ¶4.5. 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

City ethics laws do not prohibit City officers, including City board members, from maintaining employment and other financial interests outside City government, provided that private work is not performed using City facilities or resources (including equipment, materials, and staff time), and outside employment, sources of income, and financial interests are disclosed as required on annual financial disclosure statements.¹ Board Opinion 2012-001 at 1; *see also* Code §20-610. City officers and employees who maintain outside employment and other financial interests must avoid conflicts of interest and must abide by the other City ethics restrictions described below. Board Opinion 2012-001 at 1.

¹ The Code requires all City board and commission members, whether or not they are compensated, to file an annual statement of financial interests for the preceding calendar year by May 1 of each year they hold office as well as the year after leaving office. Code §20-610(1). In addition, all City board and commission members must participate in annual ethics training conducted by the Board of Ethics. Code §20-606(1)(b)(iii).

A. Conflicts of Interest

The Code conflict of interest restriction prohibits a City official from taking action in an official capacity when either (a) the official has a personal financial interest in that action; or (b) a business of which the official is a member, or a fellow member of such business, has a financial interest in the official's action. *See* Code §20-607(a)-(b); Board Opinion 2012-001 at 5. The Board of Ethics has advised that a person or entity has a financial interest in matters that have a potential impact on the person or entity's income, compensation, value of assets, wealth, employment prospects, or business prospects. Board Opinion 2012-001 at 5. The Board has opined that a financial interest may also arise from an on-going, present financial relationship and that it is possible for a financial interest to be too remote in some cases to give rise to a conflict of interest. *Id.*; *see also* Board Opinion 2009-003 at 4-5.

You would have a conflict of interest if you are in a position to take action as a Water Rate Board member in a matter that would affect your personal financial interests² or, since you are a member of ESI, those of an ESI colleague. *See* Board Opinion 2010-002 at 7 (advising that "members" of a for-profit business include not only partners and equity holders in a business, but also employees of the business). In addition, you would have a conflict of interest if you are able to take action impacting the financial interests of a client you have through ESI. *See* Board Opinion 2012-001 at 6 (advising City official that he would have a personal financial interest in a matter that financially affected a law firm client of his). Moreover, you would have a conflict if you are in a position to take action that impacts the financial interests or business prospects of ESI.³ For this reason, it is important that you have indicated that if the Water Rate Board were to take up deciding whether consultants should be hired, this may represent an opportunity for ESI, so you would recuse yourself and not participate as a board member.

Your plan to not participate in the Water Rate Board deciding whether to hire consultants or which consultants to select is advisable, however to avoid a conflict of interest you must also follow the specific disclosure and disqualification process that the Code mandates. When you have a conflict of interest, you must publicly disclose in a letter the nature and extent of the financial interest that you, ESI, an ESI colleague, or a client has in a matter and disqualify yourself from all further action as a Water Rate Board member on the matter. Code §§20-607(a)-(b), 20-608(1); *see also* Board Opinion 2012-001 at 5-6. You are required to send the disclosure

² You have said that a group of rate payers, including you as a Philadelphia resident, may nominally benefit as part of rate changes if those changes result in lower payments for water services. A possible nominal benefit to you as a Philadelphia resident rate payer would not cause you to have a conflict of interest in the Water Rate Board's actions regarding rate changes as this financial interest is not particularized to you and is shared by a large class of individuals. *See* Board Opinion 2009-003 at 4-5 (discussing Solicitors' opinions advising City Council members that a conflict of interest does not arise if a personal financial interest in a Council bill is not direct, immediate and particular, as distinct from the interests that might be shared by a larger group). Furthermore, it is worth noting that Water Rate Board members are required to be Philadelphia residents. *See* Code §13-101(3)(c).

³ You mentioned that some work product that ESI has previously produced for the Water Department may be of use to and could be used by the Water Rate Board. The Water Rate Board's use of work product that ESI has previously produced for the City would not raise a conflict of interest for you unless it occurred in a manner that promoted ESI's business prospects or financial interests. If this situation arises, you may wish to contact us for guidance based on the specific facts.

letter by registered or certified mail to the following: the Board of Ethics, the Department of Records, and the relevant Commissioner, Secretary and/or Executive Director of the Water Rate Board. Code §20-608(1)(c). Participation that you must avoid when you have a conflict with respect to a matter includes not only final decisions, but also preliminary discussion, review, or action. Board Opinion 2012-001 at 6.

It is also important to note that if ESI were hired by the Water Rate Board without your participation you would still have a conflict of interest with respect to subsequent actions you could take as a board member that would impact ESI's financial interests, including as a paid consultant to the board. If this situation arises, you should contact us as our guidance would depend on the specific facts regarding your potential actions as a board member and the financial interests of ESI.

B. Prohibited Interests in Certain City Contracts

Charter Section 10-102 prohibits a City official whose salary is paid out of the City Treasury from soliciting or being interested in certain City contracts that are paid for by City Treasury funds. Charter §10-102 ("City Officers and Employees Not to Engage in Certain Activities"). An official who is paid a salary by the City is prohibited from soliciting or having an interest in City contracts for the purchase of property of any kind, for the erection of any structure, or for the supplying of any services regardless of whether a connection exists between official duties and the contracts. *See* Board Opinion 2014-001 at 2. Charter Section 10-102 applies only to City board and commission members who earn a salary, which is defined as compensation for services paid on a regular basis, such as bi-weekly, monthly or yearly, not including payment on an hourly wage or per-meeting basis. Board Regulation 6, ¶ 6.1.

If confirmed as a member of the Water Rate Board, you will not receive compensation for your service beyond possible reasonable expenses. Since you would not receive a salary for serving on the board, the Charter Section 10-102 prohibition on interests in certain City contracts would not apply to you.

C. Representation Restriction

The Code representation restriction would prohibit you as a Water Rate Board member and uncompensated City officer from representing another person directly or indirectly as agent or attorney in a transaction involving the City⁴ in relation to a particular matter (a) in which you have at any time previously participated as a City officer through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or (b) which is pending before the Water Rate Board. *See* Code §20-602(1), (2).⁵ A broader version of this restriction applies to compensated and full-time City officers and employees, barring them from

⁴ Transactions involving the City include a "proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions" 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. Code §20-601(27).

⁵ Representing another person as an agent involves acting with authority on behalf of that person and in the best interests of that person with respect to a third party. Board Opinion 2014-004 at 6.

such representation in transactions involving the City more generally. *See* Code §20-602(1); Board Opinion 2012-001 at 2-3. As an unpaid City board member, however, you would be restricted only from representing persons before the Water Rate Board in transactions involving the City that are pending while you serve on the board or in which you have previously participated as a City official. *See* Code §20-602(2).

The representation restriction also provides that no member or employee of a business entity organized for profit of which you are a member shall represent any person directly or indirectly as agent or attorney in any matter in which you as a Water Rate Board member are responsible for the decision, approval, disapproval or otherwise determining the matter, unless you publicly disclose the fact and disqualify yourself from responsibility in the matter. Code §20-602(5). Thus, if a member or employee of ESI represents a client or another person as an agent in a transaction involving the City in which you would be in a position to take action as a Water Rate Board member, then this restriction would require you to make a public disclosure and disqualify yourself from taking action. Similar to the conflict of interest context, disqualification involves filing a letter that discloses that an ESI colleague will be engaging in a representation before your City board and therefore you are disqualifying yourself from taking any official action or having any responsibility as a board member in the matter. Code §20-602(5) (providing for public disclosure and disqualification as set forth in Code §20-608). You would be required to send this letter by registered or certified mail to the Board of Ethics, the Department of Records, and the relevant Commissioner, Secretary and/or Executive Director of the Water Rate Board. Code §20-608(1)(c).

You have said that you do not know at this point, but it is conceivable that ESI could be asked to provide testimony to the Water Rate Board regarding rate change matters. Given your uncertainty that this situation will arise and your preferred timeline for receiving an advisory opinion, the discussion here does not address application of the representation restriction to this hypothetical situation. However, should it become a more likely prospect that ESI will present testimony to the Water Rate Board while you are a board member, you should contact us for guidance based on specific facts.

D. Confidential Information

The Code would prohibit you from directly or indirectly disclosing or making available confidential information concerning the property, government, or affairs of the City without proper legal authorization for the purpose of advancing your own financial interest or that of another person. Code §20-609. For example, you would not be allowed to disclose confidential City information that you learn as a member of the Water Rate Board for the purpose of furthering ESI's financial interests.

E. State Ethics Act

The State Ethics Act, 65 Pa. C.S. §1101 *et seq.*, contains a conflict of interest prohibition and financial disclosure requirements that are separate from and in addition to those imposed by City ethics laws. 65 Pa. C.S. §§1103(a), 1104, 1105. The State Ethics Act applies to “public officials” who include any person elected or appointed by a governmental body or an appointed

official in the executive, legislative or judicial branch. 65 Pa. C.S. §1102. The Act does not apply to members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or City. *Id.*; *see also* 51 Pa. Code Section 11.1 (definition of “public official” and criteria to assess if a board is advisory). The Board’s authority to provide advice on the State Ethics Act is limited, and guidance from the Board regarding the State Ethics Act is not binding on any person and does not provide any protection against penalties or sanctions for a violation of the Act. Board Regulation 4, ¶ 4.4. For this reason, we merely outline below the provisions of the State Ethics Act that might be relevant to your inquiry. You can seek advice concerning the application of the State Ethics Act to your situation from the State Ethics Commission or the City Solicitor. An opinion from the State Ethics Commission or a non-confidential opinion from the City Solicitor provides protection from certain penalties imposed for violations of the Act. 65 Pa.C.S. §§1107(10)-(11), 1109(g).

A public official has a prohibited conflict of interest under the State Ethics Act if he or she uses the authority of his or her office or confidential information received through holding public employment for the private pecuniary interest of himself or herself, a family member, or a business with which the employee or a member of the employee’s immediate family is associated. 65 Pa.C.S. §§1102, 1103(a). ESI is a business with which you are associated,⁶ and it is advisable for you to seek guidance from the State Ethics Commission about the application of the State Ethics Act to you as a Water Rate Board member if you could possibly be in a position of using your authority as a board member or confidential City information learned as a board member for the private pecuniary interest of ESI or a client. The State Ethics Act also requires a public official to file an annual statement of financial interests for the preceding year. 65 Pa.C.S. §§1104, 1105.

IV. Conclusion

Thank you for your concern about compliance with the City ethics laws and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided as stated here. If you have questions about specific situations that arise after you join the Water Rate Board, you should request guidance from us about those particular facts. You are entitled to act in reasonable reliance on this Opinion and not be subject to penalties under the laws within the Board’s jurisdiction, unless you have omitted or misstated material facts in your request. Code §20-606(1)(d)(ii); Board Regulation 4, ¶4.12.

⁶ A business with which a person is associated is a business in which the person or a member of the person’s immediate family is a director, officer, owner, employee, or has a financial interest as defined by the Act. 65 Pa.C.S. §1102.

Since you have requested a public opinion from the Board of Ethics, we will make this Opinion public as required by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4, Paragraph 4.22. Please let me know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

A handwritten signature in black ink, appearing to read 'Maya Nayak', written in a cursive style.

Maya Nayak
General Counsel

cc: Michael H. Reed, Esq., Chair