



CITY OF PHILADELPHIA

BOARD OF ETHICS  
One Parkway Building  
1515 Arch Street  
18<sup>th</sup> Floor  
Philadelphia, PA 19102  
P: (215) 686 – 9450  
F: (215) 686 – 9453

**Philadelphia Board of Ethics  
Non-Public General Counsel Opinion No. 2015-503**

June 16, 2015

**Re: Service on Nonprofit Board of Directors that Intersects with Former City Work**

Dear Former City Official:

You have requested a non-public advisory opinion about how the City post-employment ethics laws apply to your proposed uncompensated service as a member of a nonprofit board of directors (“Non-Profit Board”) that has various interactions and relationships with the City. The post-employment restrictions do not prohibit an official who has separated from the City from later serving with an organization that partners with the City. Three post-employment restrictions can apply to limit former City officials from engaging in certain activities with respect to their interactions with the City and their former City work. Two of the post-employment restrictions apply only if a financial interest or compensation is present, which is not the case here. This Opinion focuses on the other post-employment restriction, which prohibits you at any time from assisting the Non-Profit Board or any person in a transaction involving the City in which you participated during your City service.

**I. Facts**

*Many of the detailed facts that the requestor and the requestor’s representative provided for this Opinion have been redacted to conceal the identity of the requestor. A summary of the facts provided follows below.*

You provided your employment history and job duties with the City and a description of the potential overlap between your former City work and the responsibilities of the Non-Profit Board.

The City was involved in creating the non-profit whose board you have been invited to join. As a City official, you were involved in the development and drafting of an agreement between the non-profit on whose board you will sit and the City (“the Non-Profit/City Contract”). You reviewed, edited, and provided feedback on multiple drafts of the Non-Profit/City Contract and the bylaws that would apply to the Non-Profit Board (the “Bylaws”). You were involved in approving as ready to be executed the Non-Profit/City Contract and the Bylaws. You provided a copy of drafts of the Non-Profit/City Contract and Bylaws as well as the relevant articles of incorporation.

The Non-Profit Board met for the first time after you had separated from City employment. The current Non-Profit/City Contract was executed by City officials and the Non-Profit Board after you left City service. The Non-Profit Board adopted the Bylaws after you left City service. The Bylaws establish that Non-Profit Board members have a fiduciary duty to the board and must give it their loyalty. You were invited to join the Non-Profit Board after it had adopted the Bylaws and executed the Non-Profit/City Contract. You would not be compensated for your service on the Non-Profit Board.

It is likely that the Non-Profit Board will make amendments and adjustments to the Non-Profit/City Contract in the future. An amendment to the Non-Profit/City Contract would be in writing and signed by both the Non-Profit Board and the City. Similarly, the Bylaws provide that the Non-Profit Board may add to, delete, amend, or repeal the Bylaws by an affirmative vote of a majority of board members.

The City will appoint a City official to Position Y to work with the Non-Profit Board and the City. The Non-Profit Board has a role in the selection of who is appointed to Position Y as well as an ongoing role in evaluating the performance of the individual who holds Position Y. It appears that City Official X is acting as and will be filling Position Y. The Non-Profit Board will evaluate City Official X in Position Y. When you were a City official, you had worked closely with and supervised City Official X.

The facts included a description of your current, post-City work, which does not involve interfacing with the City. You sought the input of your current supervisors, and they endorse your appointment to the Non-Profit Board. If the Non-Profit Board were to seek action from your current private employer, you would recuse yourself from participation as a Non-Profit Board member.

## **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 officer or 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 former City officers and employees who have left City employment or service. The three post-employment restrictions that may apply to former City officials are discussed below. In brief, the post-employment restrictions in the City Code (1) prohibit you at any time from assisting the board of directors, or any person, in a transaction involving the City in which you participated during your City service; and (2) prohibit you for two years after you separate from the City from becoming financially interested in action you took in an official capacity. The State Ethics Act prohibits you from representing any person for compensation before your former governmental body for one-year after you left City employment.

#### **A. Restriction on Assistance in Transactions Involving the City in which You Participated**

The Code prohibits a former City official, at any time after separating from the City, from assisting another person, whether or not for compensation, in any transaction involving the City in which the official participated during City employment. Code § 20-603 (“Post-Employment Representation”). Transactions involving the City include applications, contracts, proceedings, decisions, and other particular matters that 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).<sup>1</sup> This post-employment restriction on assistance does not prohibit you from helping with any project that is related to your former City work. Rather, this restriction prohibits you from assisting any person,<sup>2</sup> including the Non-Profit Board, in a transaction involving the City if you participated in that same transaction while you were a City official. Your prospective service on the Non-Profit Board raises

---

<sup>1</sup> Code Section 20-601(27) 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.

five distinct questions addressed below about the application of the Code post-employment restriction on assistance in transactions involving the City in which you participated.

**Question 1:** Are you permitted to take action as a Non-Profit Board member on the Non-Profit/City Contract, such as helping re-draft or dispute the agreement or voting on amendments to it?

**Response:** *No, this activity would constitute assisting the Non-Profit Board with a transaction involving the City in which you participated during your City employment and would be prohibited.* You believe it is likely that the Non-Profit Board will make amendments and adjustments to the Non-Profit/City Contract in the future. It is possible that as a Non-Profit Board member you could be asked to vote to rescind the current Non-Profit/City Contract in this timeframe or to take part in drafting or approving amendments to the Non-Profit/City Contract.

While you were a City official, you participated in formulating, drafting, and approving as ready for execution the Non-Profit/City Contract. As a contract to which the City is a party, the Non-Profit/City Contract between the City and the Non-Profit Board is a “transaction involving the City.” *See* Code § 20-601(27). The Code post-employment restriction on assistance in transactions involving the City in which you participated bars you from assisting the Non-Profit Board with actions the board may take with respect to the Non-Profit/City Contract. This restriction applies even though you will not be compensated for your service as a board member and would not have a financial interest in the assistance. Under this restriction, acting as a Non-Profit Board member to draft and vote on language alterations to the current Non-Profit/City Contract would be prohibited. Even if some terms of the current Non-Profit/City Contract that you participated in drafting as a City official are revised as the result of a pending review, based on the information provided, such a revision appears to involve alterations to the current Non-Profit/City Contract, rather than the creation of a new contract. For this reason, a Non-Profit/City Contract that contains some revisions would remain a “transaction involving the City” in which you had participated as a City official, and you would continue to be barred from assisting the Non-Profit Board with actions the board may take with respect to the Non-Profit/City Contract, such as disputing with the City a meaning of a particular provision.

---

<sup>2</sup> Code Section 20-601(20) defines a “person” as: “A business, individual, corporation, non-profit, union, association, firm, partnership, committee, political committee, club, or other organization or group of persons.”

**Question 2:** Are you permitted to participate as a Non-Profit Board member in drafting or voting on amendments to or taking other action with respect to the Bylaws?

**Response:** *Yes, this would be permitted because the Bylaws are not a transaction involving the City in which you participated during your City employment. You participated in drafting and approving as ready to be executed the Bylaws that govern the Non-Profit Board while you were a City official. Unlike the Non-Profit/City Contract, the Bylaws do not bind the City. The Bylaws are not a contract or decree to which the City is a party or that is or will be the subject of City action, and the City does not have a direct proprietary interest in the Bylaws. As a result, the Bylaws do not constitute a “transaction involving the City,” and the post-employment assistance restriction would not prohibit you as a board member from assisting the Non-Profit Board with action it takes regarding the Bylaws. See Code § 20-601(27) (defining “transaction involving the City”).*

**Question 3:** Are you permitted to participate in evaluating the performance of the individual who holds Position Y, currently City Official X?

**Response:** *Yes, this would be permitted because you would not be assisting the Non-Profit Board with a transaction involving the City in which you participated during your City employment. During your City service, you worked closely with and supervised City Official X. As a member of the Non-Profit Board, you would be part of the approval process for determining who fills Position Y, which is now held by City Official X. The post-employment restriction on assistance with transactions involving the City in which you participated would not prohibit you from participating in the Non-Profit Board’s review of City Official X in Position Y. The Non-Profit Board’s evaluation of City Official X will be based on a review of City Official X’s performance in Position Y, a position that did not exist while you were with the City. The Non-Profit Board’s evaluation of City Official X would not overlap with the supervisory decisions or reviews of City Official X in which you participated while you were with the City. Indeed, the Non-Profit/City Contract underscores that the Non-Profit Board’s involvement in evaluating the individual holding Position Y does not impact the individual’s employment relationship with the City. Your participation as a Non-Profit Board member in evaluating City Official X does not raise an issue under this post-employment restriction because you would not be assisting the Non-Profit Board with a transaction involving the City in which you participated as a City official.*

**Question 4:** Are you permitted to participate as a Non-Profit Board member in duties of the board that involve interactions with the City with respect to substantive matters that you did not encounter in your former City work? You provided examples of these substantive matters that were drawn from the Non-Profit/City Contract.

**Response:** *Yes, this would be permitted because you would not be assisting the Non-Profit Board with a transaction involving the City in which you participated during your*

*City employment.* The examples of substantive matters and activities of the Non-Profit Board that you provided involve contact or an interaction with the City, such as working in consultation with the City or submitting findings or recommendations to the City. You did not encounter or engage in these activities while you were a City official. For example, because the Non-Profit Board met for the first time only after you separated from the City, you have not participated as a City official in any transaction involving the City related to interacting with the active Non-Profit Board. In addition, after you join the Non-Profit Board, certain interactions between the board and the City could evolve into new transactions involving the City. For example, the Non-Profit Board could create protocols in consultation with the City that would be the subject of City action. Assisting the Non-Profit Board with transactions involving the City that arose after you left City service or that arise after you join the board could not involve a transaction involving the City in which you participated as a City official.

**Question 5:** Are you permitted to participate as a Non-Profit Board member in duties of the Non-Profit Board that are similar to functions you engaged in as a City official or that involve City processes that you participated in as a City official? You provided examples of these Non-Profit Board member duties that were drawn from the Non-Profit/City Contract.

**Response:** *Yes, this would be permitted because you would not be assisting the Non-Profit Board with a transaction involving the City in which you participated during your City employment.* As a member of the Non-Profit Board, you would participate in a number of Board activities that involve City processes that you routinely participated in as a City official, such as the annual City budget process.

The post-employment restriction on assistance with a transaction involving the City in which you participated would not prohibit you from helping the Non-Profit Board with matters in subject areas with which you are familiar because of your former City work. The examples of these Non-Profit Board member duties that were drawn from the Non-Profit/City Contract largely involve periodic assessments or reviews. For example, as a City official, you participated in various matters related to the budget. Each year's budget is new, separate legislation and involves unique transactions involving the City. These activities of the Non-Profit Board will address matters and transactions involving the City that arose after your City service and are unlikely to touch activities in which you participated as a City official. Although your prior City service may put you in a position of being familiar with certain City processes, you are not prohibited from assisting the Non-Profit Board regarding these processes unless that assistance involves a particular transaction involving the City in which you participated as a City official. For example, the post-employment assistance restriction *would* prohibit you from helping the Non-Profit Board approve a draft application that you had reviewed and approved for submission as a City official.

## **B. Two-Year Restriction on Acquiring a Financial Interest**

The Code prohibits a former City official from “becom[ing] financially interested subsequent to final action in any . . . award, contract, lease, case, claim, decision, decree or judgment” taken in the official’s official capacity for two years following separation from the City. Code § 20-607(c). This provision prohibits you, for two years after you leave City employment, from receiving compensation derived from action you took in your official capacity as a City official, such as your approval of a contract for services to be provided to the City. This restriction also prohibits certain close relatives, organizations, and other individuals and entities from becoming financially interested on your behalf in action you took in your official capacity. *See* Code § 20-607(c).

Based on the facts you have provided, your proposed service on the Non-Profit Board does not raise an issue under this two-year restriction. You will not be compensated as a member of the Non-Profit Board, and your service on the board will not cause you to acquire a financial interest in action you took in your official capacity as a City official. In addition, your current private work does not appear to cause you to acquire a financial interest in action you took in your capacity as a City official.

## **C. The State Ethics Act**

The State Ethics Act, 65 Pa. C.S. § 1101 *et seq.*, imposes a post-employment restriction on a former public official that is in addition to and different from the restrictions imposed by the City Code described above. The State Ethics Act restriction applies only to former public officials, and the term “public official” generally includes heads of executive agencies. 65 Pa.C.S. § 1103(g); 51 Pa. Code § 11.1 (defining “public official” and providing examples). 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, the provisions of the State Ethics Act that might be relevant to your inquiry are merely outlined below. 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).

The State Ethics Act post-employment restriction prohibits former public officials from representing themselves or another person for promised or actual compensation on any matter before the governmental body with which they have been associated for one year after leaving that body. 65 Pa.C.S. § 1103(g). It is notable that your proposed service on the Non-Profit Board would be uncompensated, and the State Act’s one-year post-employment restriction applies where there is promised or actual compensation. 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. 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 former public official has been associated is the governmental body within the City by which the public official has been employed, and it is not limited to a particular subdivision of the agency where the public official may have had influence or control. 65 Pa. C.S. § 1102.

#### **IV. Conclusion**

Thank you for your concern about compliance with the City post-employment restrictions and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the complex fact pattern that you presented, the details of which have been redacted here. If you have questions about a specific situation that arises in the future, you can request guidance from us about the application of the post-employment restrictions to those particular facts. 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 have omitted or misstated material facts in the request. Code § 20-606(1)(d)(ii); Board Regulation 4, ¶ 4.12.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, this version of the Opinion that is 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