



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics Non-Public General Counsel Opinion No. 2019-505

October 15, 2019

Re: Ethics restrictions that apply to a former City employee who is an attorney

Dear Former City Employee:

You have asked to what extent City and State ethics laws restrict your activities as a former City employee. You have also asked whether you would be required to register as a lobbyist under the City’s Lobbying Law. As discussed in more detail below, it is my opinion that:

- The State Ethics Act does not prohibit you from lobbying officers or employees of your former City department on behalf of your new employer, but you should contact the State Ethics Commission for definitive guidance on this point.
- The City’s Ethics Code prohibits you from assisting your new employer on any particular transactions you personally participated in while working for your former City department.
- If in a given quarter of a calendar year you engage in 20 or more hours of lobbying of City officials on behalf of your new employer and are compensated more than \$2,500 for that work, you must register as a lobbyist with the Board.

I. Jurisdiction

Philadelphia Home Rule Charter Section 4-1100 grants the Board of Ethics jurisdiction to administer and enforce all Charter provisions and ordinances pertaining to ethical matters. Charter Section 4-1100 and Philadelphia Code Section 20-606 authorize the Board to render advisory opinions explaining the application of laws under the Board’s jurisdiction concerning a City officer or employee’s proposed future conduct.¹ Board Regulation No. 4 describes the procedures related to advisory opinions, including for requesting reconsideration or appeal of an advisory opinion issued by the General Counsel.

¹ Home Rule Charter Section 4-1100 also gives the Board “concurrent authority” with the Law Department to advise City officials (or former officials, in this case) on the application of State law. Our advice on State law, however, does not provide protection from possible enforcement by the State Ethics Commission. For guidance on the State Ethics Act that would provide such protection, you should contact the State Ethics Commission.

II. Background

You are an attorney licensed in Pennsylvania. In October of 2019, you started work for your new, non-City employer. Prior to that, you worked for the City. You anticipate that your work for your new employer will include:

- Researching and advising your new employer concerning state, local, and regional policy issues.
- Advising on City administrative and legislative policy, and assisting in managing and implementing a specific policy initiative of your new employer.
- Serving as primary liaison for various committees of your new employer on all matters related to local government advocacy.
- Interacting with elected and appointed City and Philadelphia-based State, governmental officials to further your new employer’s policy initiatives, particularly the legislative portion of the specific initiative mentioned above, including from time to time giving testimony before City bodies.

III. Applicable Restrictions

A. State Post-Employment Restriction

Section 1103(g) of the State Ethics Act prohibits former public employees from being paid to represent someone before their former governmental body for one year after separating from public employment. It is my understanding that, for the purposes of this restriction, your former governmental body is your specific former City department, not the City as a whole. Therefore, the State Ethics Act would not prevent you from representing your new employer in any matters involving a different branch of government or a City department other than your prior department.

In addition, the Pennsylvania Supreme Court has significantly limited the application of this restriction to attorneys whose work for their new employer constitutes the practice of law. *See Shaulis v. State Ethics Comm’n*, 574 Pa. 680 (2003) (finding that State Constitution preempts Section 1103(g) of the State Ethics Act as applied to lawyers). The Supreme Court has also held that lobbying by a lawyer is the practice of law. *See Gmerek v. State Ethics Comm’n*, 569 Pa. 579 (2002). In light of the *Shaulis* and *Gmerek* decisions, the State Ethics Commission has advised that Section 1103(g) of the State Ethics Act does not apply to a former public official who is a lawyer when that former official’s “representation” of someone before their former governmental body constitutes the practice of law, which includes lobbying on behalf of their new employer. *See, e.g.*, Opinion of the Commission No. 19-001; Advice of Counsel No. 19-526 (copies enclosed).

Based on these cases and the published opinions from the State Ethics Commission, it seems that Section 1103(g) of the State Ethics Act would not preclude you from lobbying officers or employees of your former City department on behalf of your new employer. Please keep in mind, however, that my advice on State law does not provide protection from possible enforcement by the State Ethics Commission. For guidance on the State Ethics Act that would provide such protection, you should contact the State Ethics Commission.

B. City Post-Employment Restrictions

i. Code Section 20-607(c)

Section 20-607(c) of the Ethics Code prohibits a City officer or employee from becoming “financially interested” in official action taken “during his [or her] term of office or employment and until two (2) years have elapsed” since leaving City service. For example, if, while a City employee, you approved a contract to a vendor, you could not, for two years after leaving City service, receive any payment out of that contract. From the information you provided, it does not seem that this restriction would apply to your work for your new employer.

ii. Code Section 20-603

Section 20-603 of the Ethics Code permanently bans a former City officer or employee from “assist[ing]...another person, with or without compensation, in any transaction involving the City² in which [the officer or employee] at any time participated during their City service or employment.”

In the past, the Board’s General Counsel has opined that Section 20-603 does not apply to former City employees when they are acting as attorneys. *See, e.g.,* General Counsel Op. 2012-514; General Counsel Op. 2011-509. In doing so, the General Counsel relied upon the *Shaulis* case, which is discussed above. *Shaulis*, however, addressed only Section 1103(g) of the State Ethics Act, not the City’s Ethics Code. Moreover, in 2017, in *Yocum v. Commonwealth*, the Supreme Court limited the application of *Shaulis*. In *Yocum*, the Court upheld certain post-employment restrictions created by the Gaming Act because they applied to “all employees of the [Gaming Control] Board engaged in a wide array of activities...[and were] not ‘specifically targeted’ at attorneys.” 639 Pa. 521, 550. The restrictions of Section 20-603 are much more like those at issue in *Yocum* than those in *Shaulis*. Section 20-603 applies to all former City officers or employees, not just attorneys, and bars a very specific type of conduct (switching sides on a particular transaction) that can easily be seen to result in actual harm to the public interest. In addition, “assisting” someone in a transaction involving the City does not necessarily involve the practice of law. As such, to the extent that Section 20-603 limits the conduct of attorneys, that is only because they are part of a larger group of affected individuals (all former City officers and employees). Moreover, Section 20-603 is consistent with the Pennsylvania Rules of Professional Conduct, which contain a similar restriction at Rule 1.11.

² As defined by Code Section 20-601(27), a transaction involving the City is:

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.

Given the Supreme Court's holding in *Yocum*, it is my opinion that the State Constitution does not preempt Section 20-603. Therefore, City law prohibits you from providing assistance to your new employer regarding any transactions with which you were personally involved while a City employee, even if you are acting as an attorney when you do so. For example, in your new position, you could not lobby City officials about a matter you had worked on while you were a City employee, nor could you draft testimony or talking points on such matter for another representative of your new employer to present. This provision, however, would not prevent you from assisting your new employer on a matter with which you had no involvement when you worked for the City.

C. City Lobbying Law

The City's Lobbying Law requires individuals to register with the Board as lobbyists if, in a given quarter of the calendar year, they earn more than \$2,500 for non-exempt lobbying activities. *See* Regulation No. 9, Paragraph 9.2(b). Note, however, that an individual who engages in lobbying on behalf of their employer is not required to register if he or she spent less than 20 hours on such activity in that quarter. *Id.*³

Thus, if in a given quarter of a calendar year you engage in 20 or more hours of lobbying of City officials on behalf of your new employer and are compensated more than \$2,500 for that work, you must register as a lobbyist. Registration is due within ten days of exceeding these thresholds. *See* Regulation No. 9, Paragraph 9.2(b). In addition, your new employer must list you on the registration statement it files with us and also include your lobbying activities in its quarterly expense reports.⁴ *See* Regulation No. 9, Paragraphs 9.5 and 9.13.

Lobbying is any effort "to influence legislative or administrative action, whether through (i) direct communication; (ii) indirect communication; or (iii) by providing any gift, hospitality, transportation or lodging to a City officer or employee for the purpose of advancing the interest of the lobbyist, lobbying firm or principal." Regulation No. 9, Paragraph 9.1(s).

Please note that the Lobbying Law specifically exempts from the registration and reporting requirements certain activities. *See* Regulation No. 9, Subpart D. For example, the Law exempts communications with City officers and employees about routine, ministerial matters. *Id.* This means that you do not need to include time spent on such activities when assessing whether you meet the thresholds described above.

If you have any questions about how to calculate the registration thresholds or need any assistance filing a registration statement, please do not hesitate to contact our office.

³ Regulation No. 9 is found on our website: www.phila.gov/ethicsboard/aboutus/Pages/Regulations.aspx.

⁴ Note that Pennsylvania Rule of Professional Conduct 1.19 provides that a lawyer "acting as lobbyist, as defined in any...ordinance enacted by a local government unit, shall comply with all regulation, disclosure, or other requirements of such...ordinance which are consistent with the Rules of Professional Conduct."

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. 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 their requests.

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

BY THE PHILADELPHIA BOARD OF ETHICS

/s/Michael J. Cooke

Michael J. Cooke, Esq.
General Counsel

Enclosures

cc: Michael H. Reed, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director