



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Formal Opinion No. 2010-002

December 15, 2010

Re: Conflict / Outside Employment / Board or Commission / Community Group

An employee of City Council requested a nonpublic advisory as to whether the Public Integrity Laws would restrict her actions in writing a letter to a board or commission of the City (“the City body”) in support of the position of a community group, in a particular matter before the City body. The requestor is also a salaried employee of a professional firm (“the firm”) that from time to time represents clients before the City body. The requestor advised that she would be providing the support letter as part of her duties to provide constituent service. It is our understanding that the community group would be considered a party before the City body in any such matter, and that the professional firm would be representing a different party in the same matter. The requestor sought general advice as to the generic situation that occurs “on occasion” and so did not provide specific facts of any particular matter to come before the City body.

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 to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board 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

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

A. REPRESENTATION

Philadelphia Code Section 20-602(1)(a)

Code Section 20-602(1)(a) provides as follows:

§ 20-602. Representation by City Officers, Employees and Members of Council.

(1) (a) No member of the Council nor other 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 member of Council or other City officer or employee in the course of or incident to his official duties, or to any person who holds any City office or position who is not compensated for his service by the City. Subject to Section 20-602(4).

Assuming that for the requestor to write a letter of support for a party before the City body would constitute “representing” the party “as agent or attorney,” the question arises as to whether the letter meets the exception for “assistance rendered by any member of Council or other City officer or employee in the course of or incident to his official duties.” As noted above, the requestor had asserted in her request letter to the Board that it is one of her duties to assist constituents with matters that may come before City agencies, and that she would be writing to the City body “in [her] official capacity.” The Board accepts that writing such letters is considered constituent service and part of the duties of Council and designated Council staff. Therefore, the requestor was advised that the exception applies, and there would be no issue under Code Section 20-602 for her to write such a letter.

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B. CONFLICTS OF INTEREST

Section 1103(a) of the State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, applies to the requestor. Section 1103(a) provides:

- (a) Conflict of interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest.

What is a “conflict of interest” may be determined by reference to the definitions section of the Act for a definition of that term and terms included within that definition, as follows:

Section 1102. Definitions.

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

...

“Authority of office or employment.” The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

“Business.” Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

“Business with which he is associated.” Any 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.

...

“Conflict” or “conflict of interest.” Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or

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employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. “Conflict” or “conflict of interest” 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, a member of his immediate family or a business with which he or a member of his immediate family is associated.

65 Pa.C.S. §1102.

Applying the above definitions, since the requestor is an employee of the firm, it is a business with which she is associated. Thus, she may not use the authority of her office for the private pecuniary benefit of the firm. It is clear from rulings of the State Ethics Commission that the conflict of interest standard of the State Ethics Act regarding a “business with which he is associated” is substantially similar to the standard of Code Section 20-607(b), discussed below. That is, “using” one’s office “for the benefit of” a business does not imply a more direct intentional action than where a financial interest in any contract, lease, case, claim, decision, decree or judgment of the City resides in a member of a firm of which the public official/employee is a member and where she has not disqualified herself from acting officially in that matter. The State Ethics Commission has not applied the phrase “for the benefit of” to mean that the official action needs to necessarily benefit the business. The Commission has ruled many times that Section 1103(a) forbids “participating in an official capacity as to matters involving the business with which [the official] is associated” and that the official action must not “financially impact” such a business. It is clear that the rulings apply to any type of participation or financial impact. *See, e.g.,* Advices of Counsel No. 10-601 at 5-6; 10-598 at 6-7; 10-589 at 4; 10-585 at 4-5. Thus, the requestor may not participate in an official capacity in a matter before the City body in which the firm has a financial interest.

Under published rulings of the State Ethics Commission, this restriction would also extend to clients of the firm. See State Ethics Commission Opinion No. 92-010 (Kannebecker, December 10, 1992). In that Opinion, the Commission ruled that a township supervisor who was also a private attorney had a conflict as to clients of his who have matters pending before the township, even if he represents those clients only in an unrelated matter, not the matter before the township. Opinion 92-010 has been followed by the Counsel of the Commission, who has issued several recent Advices of

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Counsel citing it.

The State Ethics Commission Advices applying *Kannebecker* are as follows. In *Donatelli*, 08-514, an attorney for a law firm who was a township supervisor sought advice on whether his position as supervisor would affect his ability to vote on a certain request for conditional use of a property in the township. Citing Section 1103(a) of the Ethics Act, the Advice states that the supervisor “would generally have a conflict of interest in matters that would financially impact [the supervisor], [his law firm], or the Firm's client(s).” Other Advices supporting this position are *Lamb*, 09-546 (“To the extent that you would be an employee of the Law Firm, the Law Firm would be a business with which you are associated, and in your public capacity as the [elected] City Controller, you generally would have a conflict of interest in matters that would financially impact you, the Law Firm, or the Law Firm's client(s).”); *Giangrieco*, 07-589 (“[I]n your public capacity as a County Commissioner, you would generally have a conflict of interest in matters that would financially impact you, your law firm, or your law firm's clients.”); *Confidential Advice*, 05-598; *Nicholson*, 04-544; and *Confidential Advice*, 02-582 (advising that it was irrelevant that township council member is not a partner of his law firm; and adding: “Township Council Member B would have a conflict of interest as to matters that would come before the Township Council when such matters would pertain to the Township Council Member B, the [Council Member's] Law Firm, or the Law Firm's client(s.”).

Accordingly, the requestor was advised that it is likely that the State Ethics Commission would interpret the State Ethics Act to require her to abstain fully from any participation in any official action as a Council employee that would have a financial impact on the firm or any of its clients, so long as she is an employee of the firm. Prohibited participation is not limited to final votes or determinations. The State Ethics Commission has said many times that the “use of authority of office” that constitutes a conflict of interest “includes more than mere voting; for example, it includes discussing, conferring with others, and lobbying for a particular result.” See, e.g., *Confidential Opinion*, 07-018, at page 6. As to whether the requestor would be required to publicly disclose any such conflict of interest, it is noted that the Act requires public disclosure only of “voting conflicts.” See 65 Pa.C.S. §1103(j).

We note, however, that the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including on the question of whether the Act applies to a particular official or employee. Our advice as to the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To those who rely in good faith on advice from the Commission itself,

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the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107 (10), (11). Upon request, advice from the State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor's opinion. 65 Pa.C.S. §1109(g) ("A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act]."). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. *See Charter §4-1100* (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, the requestor may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Philadelphia Code Section 20-607(a)

Code Section 20-607(a) prohibits personal conflicts of interest. In relevant part, the subsection provides:

- (a) Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, or by any board or body of which he is a member

Although the requestor's employer, the professional firm ("the firm"), may have a financial interest in a matter affecting a client before the City body, the requestor was advised that, as a salaried employee of the firm, she would not have a personal financial interest in such a matter under the facts presented, since her salary would be the same regardless of the matter, if there was no additional compensation involved. Accordingly, there is no issue under Code Section 20-607(a).

Philadelphia Code Section 20-607(b)

Code Section 20-607(b) prohibits conflicts of interest through another entity, such as an employer. In relevant part, the subsection provides:

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(b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section 20-608(a)(b)(c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment. (emphasis added)

Let's follow the underlined language. Is there a case, claim, decision, decree or judgment of the City involved? Yes, a decision of the City body. Is there a for-profit entity with a financial interest in that decision? Yes, the client of the firm, and therefore likely the firm itself. Are there any members of the firm with a financial interest? Yes, if the firm has an interest, then its partners, at least, do also.¹

The final question is this: Is the requestor also a member of the firm? The requestor argued in her request letter that she is not a "member" of the firm for purposes of Section 20-607(b) because she is not a partner of the firm and has no equity participation in the firm. However, this Board has on a number of occasions applied Section 20-607(b) to City employees as "members" of their outside employers, based solely on their being employees. *See, e.g., Advice of Counsel Nos. GC-2010-505 at 5 (even a part-time employee is a "member" of the employing entity); GC-2008-506 at 3 (implied in "officer or employee" of the firm); GC-2007-503 at 3 n.1 (even though this relates to 20-602, clearly "member" has the same meaning; and we say that 20-607(b) applies later in the Advice on pp. 4-5); GC-2008-502; GC-2008-517; GC-2008-518; GC-2008-521; and GC-2008-522.*

¹ We note the extensive discussion of the term "financial interest" in Nonpublic Formal Opinion No. 2009-003, at pages 3-9. Although that Opinion addressed a somewhat different situation, it makes the general point that determinations of whether there is a financial interest are uniquely fact-specific. Therefore, this Opinion represents general advice, since the requestor did not provide the detailed facts of any particular matter before the City body on which she proposed to write a supporting letter.

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Accordingly, where the requestor is aware that a financial interest in a City decision, in which she is involved, is held by a party appearing before the City body that is represented by the firm, a firm of which the requestor is a member, she would have a conflict of interest in that City decision, to the extent that she would take official action relating to it. A conflict of interest would exist regardless of whether the requestor's official action would tend to support or oppose the position or interest of the firm, since she would be required to disqualify herself from "any further official action" under Code Section 20-607(b).

Thus, where there is a financial interest, the requestor would have a conflict in any official action, and may not write a letter supporting a party before the City body in a matter in which the firm also represents a party.

In most cases, a City official disqualified by a conflict would also be required to follow the disclosure and disqualification process mandated by Code Section 20-608. The question the requestor has presented to us is different, because, as we understand it, whether or not she writes a letter supporting a community group to the City body is a matter that is entirely optional and within her own discretion. Based on these assumptions, since the requestor normally would have no expected role in a matter before the City body, she would not need to file a public letter disqualifying herself, since there would be no action from which to announce that she is removing herself, so long as she takes no official action. As noted above, our General Counsel can review particular facts and advise the requestor in specific matters, such as whether there is a financial interest in any member of the firm. In light of the conclusion above regarding application of the State Ethics Act, the requestor was advised that she may wish simply to avoid writing any such support letter.

This Advice of Counsel addresses only the Public Integrity Laws under our jurisdiction.

Conclusions

An employee of City Council requested a nonpublic advisory as to whether the Public Integrity Laws would restrict her actions in writing a letter, as constituent service, to a board or commission of the City, in support of the position of a community group, where a professional from a firm of which the requestor is also a salaried employee is representing another party in that same matter.

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Based on the facts that were provided to us, the requestor was advised as follows:

1. The Board accepts the requestor's characterization that writing a letter supporting a community group in a matter before the City body would be constituent service, and that thus it would be incident to her official duties. Accordingly, providing such a letter would not be prohibited representation under Code Section 20-602.
2. The State Ethics Commission has ruled several times that public officials have a conflict of interest in matters that would financially impact the official, his firm, or his firm's client, and that prohibited official participation would include "discussing, conferring with others, and lobbying for a particular result." Accordingly, the requestor was advised that rulings of the Commission support the conclusion that the Commission would likely advise that Section 1103(a) of the State Ethics Act would prohibit writing the support letter proposed by the requestor.
3. Our advice as to the State Ethics Act is predictive only, and is not binding on the State Ethics Commission. The requestor may wish to seek a direct ruling from the Commission.
4. As a salaried employee of the firm, the requestor would not have a personal financial interest in a matter in which another professional from the firm represented a client, if there was no additional compensation involved. Accordingly, the requestor would not have a prohibited personal financial interest under Code Section 20-607(a).
5. As a salaried employee, the requestor is a "member" of the firm, for purposes of Code Sections 20-607. Writing a letter supporting a party before the City body would be "official action" as a City official/employee, regarding that matter before the City body. Where another member of the firm would have a financial interest in a matter before that same City body in which the firm represents a client, the requestor may not take official action in that matter. Accordingly, Code Section 20-607(b) prohibits such action on her part, where there is a financial interest.
6. We express no opinion on any application of rules not within our jurisdiction.

The requestor was advised that, if she has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this Opinion. This point was emphasized particularly with respect to this request, since the requestor was not specific as to the details of any particular case before the City body. As was noted

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early in this Opinion, ethics opinions are particularly fact-specific. Accordingly, the requestor may well wish to obtain advice from our General Counsel as to the application of this Opinion to a particular matter, by supplying the specific details of the matter, the parties, the client of the firm, the community group, etc.

We also noted the option of requesting advice of the City Solicitor (as to the State Act only), as discussed on page 6 above. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we are making public this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

By the Board:

Richard Glazer, Esq., Chair
Nolan N. Atkinson, Jr., Esq., Vice-Chair
Rev. Damone B. Jones, Sr., Member
Sr. Mary Scullion, Member

[At the time of consideration and approval of this Opinion, there was a vacancy on the Board, due to the resignation of Kenya Mann Faulkner, Esq. Although Nolan Atkinson voted to approve the original Opinion sent to the requestor, he resigned effective October 18, 2010, was not present at subsequent meetings, and did not participate in the approval of the edited public version.]