

In the third paragraph of his letter, Councilor Corcoran continues:

“The Administrative Code sections on City Council and the Mayor both provide “In the event either the Mayor/Administration or City Council require legal representation in an area of conflict, each party shall have the ability to select their own legal counsel independent of the City.” The Personnel Code §1-286. [sic] Providing Employees Legal Counsel states “When a legal action is brought against an employee, the Mayor, Managing Director, City Solicitor and Director of Human Resources shall determine whether or not the City shall be required to provide legal counsel to the employee”. The Charter Board Ordinance provides the ability for the subject of a Charter Board complaint to appeal. None of these sections seem to authorize an elected official to retain legal counsel at the City’s expense.”

The Board interprets the above to ask whether the above cited sections “authorize an elected official to retain legal counsel at the City’s expense” where the elected official’s conduct “violates the City’s Charter, Administrative Code or Ethics Code?”

II. DISCUSSION

A. Prospective or Retrospective

As the Board has cautioned previously, it is constrained to not answer under the guise of an advisory opinion retrospective questions that apply to actual or perceived violations of the Charter or the Administrative Code. The Board will answer as advisory opinions only those questions that are prospective in application. *See* Adv. Ops. No. 11 (September 24, 2008), No. 12 (January 12, 2009), No. 14 (May 12, 2009) *and* No. 30 (November 14, 2012).

Instead, here the context of this advisory opinion request is general and generic. There is no reference to any particular matter or officeholder in the request for advisory opinion, nor does the Board infer one. Further, there is not a reference to past conduct, rather, if there is any inference at all, it is that the conduct is continuing or is about to occur.

The Board cautions that an advisory opinion request is just that, a request for an advisory opinion. An advisory opinion is not enforceable, but does provide the Board’s guidance under

the information provided by the requester. The remedy for a violation of the Charter or Administrative Code is the filing of a Charter Board complaint, not an advisory opinion.

Finding that the advisory opinion request is prospective and not retrospective, the Board answers as set forth below.

B. Retention of Counsel at the City's Expense

1. Applicable Provisions

There are various sections of the Charter, Administrative Code and Personnel Code that address the retention of counsel by City officials and City employees.¹

The Charter at section 801, relating to the qualifications and responsibilities of the City Solicitor, provides:

(a) The Mayor shall appoint, with the approval of Council, a Solicitor who shall be a member of the Bar of the Supreme Court of Pennsylvania and experienced in municipal law. The Solicitor, as Head of the Legal Department, shall serve as chief legal advisor to the Mayor, the Council, and all City departments and agencies; and shall represent the City in all legal proceedings and shall perform such other duties prescribed by law, by this Charter, by the City Administrative Code or action of Council. It is the intent of this Charter that only one person shall be the legal advisor of the City except as may be otherwise required by law.

(b) The Mayor, with the approval of Council, shall have the power, if needed, to engage other temporary Solicitors to represent the City as the need may be. Such appointments shall be temporary and shall be for the purpose of representing the City in specific individual legal matters. Such representation shall be secured by Requests for Proposal.

Administrative Code §§ 1-123 and 1-132, Independent Legal Counsel, provides:

In the event either the Mayor/Administration or City Council require legal representation in an area of conflict, each party shall have the ability to select their own legal counsel independent of the City.

¹ In addition to the sections cited below, the Charter also provides at Amendment I, § 2(b), that "City Council shall appropriate sufficient funds to enable the [Charter] Board to perform the duties assigned to it, including expenses for independent counsel and other necessary staff." Amendment I, § 2(b), is applicable only to the Board.

Administrative Code § 1-192(1), relating to the function of the Department of Law, provides:

A. The Department of Law shall be responsible for representing the City on all legal questions arising in the conduct of municipal business. The Solicitor, as head of the Legal Department, shall serve as chief legal advisor to the Mayor, the Council and all City departments and agencies and shall represent the City in all legal proceedings and shall perform such other duties prescribed by law by the Charter, by the City Administrative Code or by action of Council.

B. In the event either the Mayor/Administrator or City Council requires legal representation in an area of conflict, each party shall have the ability to select their own legal counsel independent of the City Solicitor.

Personnel Code² § 1-286, Providing Employees Legal Counsel, provides:

When a legal action is brought against an employee, the Mayor, Managing Director, City Solicitor and Director of Human Resources shall determine whether or not the City shall be required to provide legal counsel to the employee.

Also, implicit in the retention of counsel outside of the Solicitor's Office, is the City's Purchasing Policy and Procedures ("Purchasing Policy"), as it relates to the purchasing of professional services as well as the Administrative Code's fiscal provisions, including Section 1-186.

2. Discussion of Applicable Provisions Relating to Retention of Counsel

There is no provision of the Charter, Administrative Code or Personnel Code that expressly "authorizes an elected official to retain legal counsel at the City's expense" where the elected official's conduct "violates the City's Charter, Administrative Code or Ethics Code," nor

² Charter Amendment I, § 2(b), expressly limits the Board's jurisdiction as limited to the "Charter [and] Administrative Code, except that its jurisdiction shall not extend to any case arising under the Ethics Code or the Personnel Code." The Board has consistently held that it may interpret and consider provisions of the Personnel Code in conjunction with its charge to "hear and decide all cases alleging violations of the Charter or Administrative Code." The Board here utilizes the Personnel Code for purposes of interpreting the applicable Charter and Administrative Code provisions relevant to this advisory opinion.

is there a provision that expressly forbids such a situation. Rather, these authorities provide the limited and exclusive circumstances for when City officials or employees may retain counsel³ paid for by the City.

a. *When may counsel be retained at the City's expense?*

The Charter, Administrative Code and Personnel Code provide only three instances where, at the expense of the City, an attorney other than the City Solicitor may represent a City official or employee.

i. *Representation of the City*

The first instance where an attorney, paid for by the City, other than the City Solicitor, may represent a City official or employee is where the Mayor retains such an attorney for a temporary representation in specific legal matters. Charter § 801(b). Ordinarily, the City Solicitor, as head of the City's Legal Department, "shall serve as chief legal advisor to the Mayor, the Council, and all City departments and agencies; and shall represent the City in all legal proceedings and shall perform such other duties prescribed by law, by this Charter, by the City Administrative Code or action of Council." The Charter's intent is "that only one person shall be the legal advisor of the City except as may be otherwise required by law." *See generally* Charter § 801(a). *See also* Admin. Code § 1-192(1)(A).

Section 801(b) provides the Mayor, after having the approval of Council, with the power to engage temporary counsel "to represent the City as the need may be." The purpose of such temporary counsel shall be "representing the City in specific individual legal matters." Further, the Charter requires that such representation "shall be secured by Requests for Proposal."

Charter § 801 authorizes the Mayor to retain temporary special counsel for representation of the City only (as opposed to a particular official or employee).

³ Other than the City Solicitor.

ii. Conflict between City Council and the Mayor

The second instance of where an attorney paid for by the City, other than the City Solicitor, may represent a City official or employee is when a conflict exists between the Mayor and City Council.

Both Administrative Code §§ 1-123 and 1-132 provide that if the Mayor or City Administration and City Council stand in conflict in a situation requiring counsel, then “each party shall have the ability to select their own legal counsel independent of the City.” For these provisions to apply, the Mayor/Administration and City Council must 1) stand in conflict and 2) be in a situation requiring counsel. If there is no conflict of interest or no situation requiring counsel, then independent legal counsel would not be permitted. Admin. Code §§ 1-123 and 1-132. *See also* Admin. Code § 1-192(1)(B).

As is clear, independent counsel is only permitted for the Mayor/Administration and City Council when there is a conflict of interest between them making representation by the City Solicitor impermissible.

iii. Suit against an Employee

The final instance of where an attorney, paid for by the City, other than the City Solicitor, may represent a City official or employee is when a legal action is brought against an employee.

When a legal action is brought against an employee, the Mayor, Managing Director, City Solicitor and Director of Human Resources shall determine whether or not the City shall be required to provide legal counsel to the employee. Personnel Code § 1-286. City officials would not fall within this provision as it applies only to a City employee. Further, a determination must be made by the Mayor, Managing Director, City Solicitor and Director of Human Resources as to the City’s requirement to provide legal counsel to the employee.

III. OPINION OF THE BOARD

The Opinion of the Board is as follows:

- A. There is no provision of the Charter or Administrative Code expressly authorizing or prohibiting the City's retention of and payment for counsel for a City official or employee where that official's or employee's conduct which necessitated the representation violated the Charter, Administrative or Ethics Code.
- B. There is no provision for any City officials to retain counsel paid for by the City, except for the Mayor and City Council where the Mayor and City Council are in a conflict which prohibits the City Solicitor from serving as counsel, in accordance with Administrative Code §§ 1-123,1-132 and 1-192(1)(B).
- C. There is no provision authorizing any City official to retain counsel for the purpose of representing that City official and to have such counsel paid for by the City except as provided in Administrative Code §§ 1-123,1-132 and 1-192(1)(B), relating to the Mayor and City Council in situations involving a conflict.
- D. Special counsel under Charter § 801(b) may be retained by the Mayor to represent only the City.

CITY OF READING CHARTER BOARD

By: *Susan T. Gibson*
Susan Gibson, Chair

Date: April 8, 2013