Memorandum

TO: Ray O'Connell, Mayor of the City of Allentown
Members of City Council

FROM: City Solicitor's Office

DATE: October 21, 2020

SUBJECT: Ethics Code Questions as to an Employee Running for Office and Legislation Prohibiting Elected Officials from Running for Another Office -LSR 2020-105

I) ISSUES PRESENTED

The Solicitor's Office received an email from the City Clerk, the text of which identified three issues for the Solicitor's Office to address.[1] Attached to the email was a completed Legal Services Requisition (LSR) form that identified two issues for the Solicitor's Office to Address.[2] These questions may be summarized as follows:

1. Under the Code of Ethics, can an appointed official or employee of the city run for office?

2. Do you see any legal issues that are at play in any of the provisions that relate to such political activity?

3. Can Council enact legislation to prevent elected officials from running for another office unless:
   a. they resign; or
   b. are in the last year of their term?

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[1] The issues identified in the email were:
1. Under the ethics code (attached and some provisions below), can an appointed official or employee of the city run for office?
2. Do you see any legal issues that are at play in any of the provisions that relate to such political activity?
3. Can Council enact legislation to prevent elected officials from running for another office unless they resign or are in the last hear of their term?

[2] The issues identified in the LSR were:
1. Under the ethics code, can a city employee run for office.
2. Can Council enact legislation to prevent elected officials from running for another office unless they resign or are in the last [y]ear of their term?

II) BACKGROUND[3]

Allentown has a recent history of egregious ethical violations connected with elections. Less than three years ago, several appointed city officials and several elected officials, were convicted or plead guilty to federal crimes. The crimes arose from pay to play schemes in which governmental influence was given in exchange for monetary donations for political purposes. In the aftermath of these federal convictions, the branches of government committed to solving the problems connected with this unethical activity.

At issue is language from the Code of Ethics adopted in 1992. This was a full revision of a Code of Ethics that had been enacted in 1970. The City of Allentown adopted a Home Rule Charter in 1997. Section 1101 of the City of Allentown Home Rule Charter (HRC) provides that:

> SECTION 1101 CONFLICT OF INTEREST AND CODE OF ETHICS
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> * * * *
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> B. Code of Ethics. As a part of the Administrative Code, City **Council shall adopt and enact a City Code of Ethics within one (1) year of the effective date of this Charter which shall apply to all elected officials, officers and employees.** The Code of Ethics shall adopt regulations implementing the conflict of interest provision set forth above, shall provide for reasonable public disclosure of finances by officials with major decision-making authority over monetary expenditures and contractual matters, and insofar as permissible under state law, provide for fines and imprisonment for violations.

HRC §1101 (emphasis added). City Council has not adopted a City Code of Ethics as required by the HRC but continues to use the 1992 Code of Ethics.

The Code of Ethics contains the following section that places limitation on the political activity of officials (elected and appointed) and employees:

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[3] The Solicitor's Office does not advocate for or against any legislation proposed by any of the branches. It is the Solicitor's Office task, when asked, to evaluate the legal strengths and weaknesses of proposed legislation. It is not our task to discern the intent of those involved. It is not our role to favor one political position or candidate over another. The Solicitor's Office is apolitical and has no interest in being involved in actual or perceived political fights arising from this topic. It is not the role of the Solicitor's Office to slant interpretations to favor one side over another. This LSR response is premised solely in applicable law and our objective interpretation of it. As discussed below, while there are some matters that are sufficiently clear and supported in law so as to likely withstand judicial scrutiny, there are other provisions that may reasonably be interpreted in more than one way. With this backdrop, the Solicitor's Office addresses the proposed questions.

171.07 POLITICAL ACTIVITY

No appointed official or employee of the City shall use the prestige, power or influence of his position on behalf of any political party. (11821 9/1/70)

No appointed official or employee, other than temporary summer employees, shall orally, by letter or otherwise solicit or be in any manner concerned in soliciting any assessment, subscription or contribution to any political party. Such appointed officials and employees, or those seeking office on their own behalf, excluding temporary summer employees and elected officials, shall not take an active part in political campaigns for candidates for City office. No official or employee, whether elected or appointed, shall promise an appointment to any municipal position as a reward for any political activity nor remove or threaten the removal of another official or employee for failure to participate in political activity. (11821 9/1/70; 12192 7/7/76; 13137 7/1/92)

The first paragraph of this Section is relatively clearly worded. It is directed at prohibiting appointed officials or employees from using their position to benefit a political party. Much of the language and intent in the second paragraph seems clear - it is directed at preventing appointed officials and employees:

-from raising funds for a political party or campaign; and

-from taking an active role in any campaign of any person running for a City office.

This second paragraph also prevents officials (appointed or elected) and employees from:

-conditioning the award of a position on someone providing political support; and

-removing someone from a position because a person did not provide political support.

From this it is clear that no such appointed official or employee could use City resources in any manner whether it be physical resources, monetary resources, temporal resources, or the "prestige, power or influence" of the person's city position toward a political party, campaign or candidate. What is arguably less clear, is whether this section precludes, or allows, appointed officials and employees from running for city office without having to resign their city position.

III) SHORT ANSWERS

1. Absent clearer, expressed language, the Solicitor's Office is disinclined to say the existing Code of Ethics language precludes appointed officials or employees from running for city office.

2. It is foreseeable that sufficiently motivated candidates will identify creative legal issues in even the most clearly written language and most established of precedents. The less clear the language that is at issue, the greater the chance for legal challenge.

3. **a.** Long standing precedent that is very likely to withstand judicial scrutiny, allows home rule municipalities such as Allentown to require city officials (elected and appointed) and city employees to resign from their positions prior to running for elected office.

However, language within the HRC may reasonably be interpreted to require that prohibitions against elected city officials running for office must be in the HRC. Under this interpretation, these prohibitions as to elected officials would require charter amendments. However, another reasonable interpretation would allow such prohibitions to be made by ordinance.

There does not appear to be implied or explicit language that would prevent City Council from adopting limitations as to appointed officials and employees. Language that raises questions as to prohibitions for elected officials running for office, are not present for appointed officials and employees. Accordingly, it is more likely than not that prohibitions enacted by ordinance as to appointed officials and employees would withstand scrutiny. Such prohibitions could also be achieved by amendment to the HRC.

b. Yes. But doing so is arguably inconsistent with the policy reasons behind imposing a prohibition against running while serving as an employee or official. Arguably, those policy concerns would be amplified in the person's last year in the position.

IV) DISCUSSION

1. Under the Code of Ethics can an appointed official or employee of the city run for office?

Resolution of this question requires consideration of this sentence from the Code of Ethics:

> Such appointed officials and employees, or those seeking office on their own behalf, excluding temporary summer employees and elected officials, shall not take an active part in political campaigns for candidates for City office.

We are mindful of the rules of statutory construction that are also applicable when interpreting ordinances.[4]

The relevant sentence contains two clauses within it that break up the main sentence. The main sentence without these clauses reads:

> Such appointed officials and employees … shall not take an active part in political campaigns for candidates for City office.

This language is broad and can reasonably be read to prevent an appointed official and employee from taking an active part in a campaign (including his or her own campaign). However, it does not expressly state that – it does not say "An appointed official or employee may not run for a City elected office while serving as an employee or in an appointed position" or some equivalent. By not containing such an expressed limitation, another reasonable

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[4] These rules provide:

> **§ 1921 Legislative intent controls**
> **(a)** ***Object and scope of construction of [ordinances].*** — The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of [City Council]. Every [ordinance] shall be construed, if possible, to give effect to all its provisions.
> **(b)** ***Unambiguous words control construction.*** — When the words of a[n ordinance] are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
> **(c)** ***Matters considered in ascertaining intent.*** — When the words of a[n ordinance] are not explicit, the intention of [City Council] may be ascertained by considering, among other matters:
> **(1)** The occasion and necessity for the statute.
> **(2)** The circumstances under which it was enacted.
> **(3)** The mischief to be remedied.
> **(4)** The object to be attained.
> **(5)** The former law, if any, including other statutes upon the same or similar subjects.
> **(6)** The consequences of a particular interpretation.
> **(7)** The contemporaneous legislative history.
> **(8)** Legislative and administrative interpretations of such statute.

1 Pa.C.S. §1921.

interpretation is that this merely prohibits appointed officials and employees from assisting in the political campaigns of *others* running for City office.

As noted, though, this basic sentence is broken up by two clauses. It is perhaps helpful to look at each clause individually before reading them together.

The second clause "excluding temporary summer employees and elected officials" seems to be a limitation on the two categories of officials and employees identified in the first part of the sentence "[s]uch appointed officials and employees". Reading this limitation as part of the whole sentence (excluding the first clause), the sentence provides that appointed officials and employees cannot take an active part in campaigns for City office unless the appointed official or employee is a temporary summer employee or an elected official. This exception can be reasonably understood because temporary summer employees are a subset of employees.

However, the exception for elected officials is challenging to discern as it is not clear when an appointed official or employee would also be an elected official. While the HRC precludes an elected official from also being an appointed official or employee, the Charter was adopted five years after the 1992 Code of Ethics. It is also not clear that the Third-Class City Code in effect in 1992 would have allowed elected officials in appointed or employee positions. Elected officials do not appear to be subsets of either appointed officials or employees.

Turning to the first clause, "or **those** seeking office on their own behalf", it is unclear if "those" is referring to "appointed officials and employees" or to "those" people other than appointed officials and employees. The use of the term "or" arguably suggests it is a group different than "officials and employees". The Code of Ethics itself defines three types of persons (official[5], employee[6], associate[7]) as well as the term agency[8]. These definitions are arguably not helpful in ascertaining the intent behind this language.

We turn to the legislative development of this section to help evaluate what City Council may have been trying to do through the various amendments to the language of this sentence.

Neither of the two clauses were in the original version of the 1970 Code of Ethics.[9] The

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[5] "**Official** means any elected or appointed member of the City government, its authorities, boards or commissions." Section 171.01.

[6] "**Employee** means any other personnel in the City government." Section 171.01.

[7] "**Associate**, where used to indicate a relationship with any person, means any relative or spouse of such person, or any relative of such spouse, who has the same home as such person." Section 171.01.

[8] "**Agency** means any department, bureau, authority, commission, board or other governmental unit of or established by the City." Section 171.01.

[9] The original version of this section read:

> SECTION 4. Political Activity. No appointed official or employee of the City shall use the prestige, power or influence of his position on behalf of any political party.
>
> No appointed official or employee shall orally, by letter or otherwise solicit or be in any manner concerned in soliciting any assessment, subscription

relevant language in the original version of the Code of Ethics provided that:

> Such appointed officials and employees shall not take an active part in political campaigns for candidates for City office.

(emphasis added). As discussed earlier, this language is arguably broad enough to preclude appointed officials and employees from participating in their own campaigns for office. However, as noted earlier, the prohibition is not explicit. Review of Solicitor Opinions from the 1970s focus on applying the prohibitions of employees taking an active part in campaigns – they do not address employees or appointed officials mounting their own campaigns.

In 1976, Council drafted a revision to this language to enable temporary summer employees to take part in certain types of political activity.[10] This sentence thus read:

> Such appointed officials and employees (excluding temporary summer employees) shall not take an active part in political campaigns for candidates for City office.

(boldface emphasis added). The clear intent here was to modify the existing language by allowing a subset of employees - temporary summer employees - to be active in campaigns for city elected office. Review of solicitor opinions we were able to find from this time frame do not discuss appointed official or employees running for office themselves.

> or contribution to any political party. **Such appointed officials and employees shall not take an active part in political campaigns for candidates for City office.** No official or employee, whether elected or appointed, shall promise an appointment to any municipal position as a reward for any political activity nor remove or threaten the removal of another official or employee for failure to participate in political activity.

Ordinance 11821 9/1/70, Section 4 (boldface emphasis added).

[10] This revision is shown below in underlines:

> 171.04 POLITICAL ACTIVITY
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> No appointed official or employee of the City shall use the prestige, power or influence of his position on behalf of any political party.
>
> No appointed official or employee, other than temporary summer employees, shall orally, by letter or otherwise solicit or be in any manner concerned in soliciting any assessment, subscription or contribution to any political party. Such appointed officials and employees (excluding temporary summer employees) shall not take an active part in political campaigns for candidates for City office. No official or employee, whether elected or appointed, shall promise an appointment to any municipal position as a reward for any political activity nor remove or threaten the removal of another official or employee for failure to participate in political activity.

Ordinance 12192, 7/7/76 (underlining in the original). The initial version of this bill also would have allowed "part-time employees" to participate in campaigns. The bill as enacted only enabled temporary summer employees to participate in campaigns.

In 1992, Council adopted a new Code of Ethics in its entirety. Mayor Dadonna described the revised Code as "more detailed, more extensive and more comprehensive than the [then] present Code."[11] This new Code of Ethics retained the Political Activity language of the 1970 Code of Ethics, as amended in 1976, but added:

> -a new clause that read "or those seeking office on their own behalf";
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> -removed the parenthetical around the reference to temporary summer employees; and
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> -added a reference to elected officials in the clause that had referenced temporary summer employees.

The new sentence read:

> Such appointed officials and employees, or those seeking office on their own behalf, excluding temporary summer employees and elected officials, shall not take an active part in political campaigns for candidates for City office.

(underlines added to indicate language changes from the prior version). This language has not been changed since 1992 and is the current language of the provision.

It is unclear what the addition of "and elected officials" to the temporary worker clause does. As noted above, the temporary worker clause was added to limit the effect of the "appointed officials and employees" language that preceded it. Employees could not take an active part political campaigns unless the employees were temporary summer employees. Similarly, adding the "and elected officials" words to this limiting clause would seem to be a limitation on the language that precedes it. Accordingly, reading the language of the clause as was done for temporary workers, this sentence reads that appointed officials and employees cannot play an active role in a city campaign unless the appointed official and employee is also an elected official. As noted above, it is not likely that an appointed official or employee was also an elected official.

Additionally, as discussed above, it is not entirely clear what was intended by the clause "or those seeking office on their own behalf".

The rules of construction provide that "[e]very [ordinance] shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. §1921. In reviewing the development of this statutory language since 1970, we note the intent behind adding the "temporary summer worker" clause was to reduce the number of individuals who would be unable to participate in local campaigns. The addition to this clause of the term "elected officials" in the 1992 revision seems to be an effort to make clear that elected officials could take active parts in campaigns for local positions. As noted earlier, the term official is defined to include both elected and appointed. While the use of the term "appointed official" in the first part of the sentence would imply the

[11] Memo on Revised Code of Ethics, dated April 10, 1992, to Department Heads, City Solicitor and Bureau Managers, at page 2.

limitation does not apply to elected officials, the intent of adding the term "elected officials" to this second clause seems to be to make that implied intent explicit.

What seems clear, is that this sentence prevents appointed officials and employees from taking an active role in the campaigns of anyone running for an elected City of Allentown office, but does not impose that prohibition on elected officials. What is unclear, is if it prevents an appointed official or employee from running for a City Office – from taking an active part in his or her own campaigns.

Again turning to the development of this statutory language, we read the most likely intent of the clause "or those seeking office" is to identify a subset of the groups identified in the first part of the sentence, "appointed official and employees". This subset is "those" "appointed officials and employees" who are "running for office on their own behalf". Reading this into the context of the full sentence, those appointed official and employees who are running for office on their own behalf may not take active roles in the campaigns of others running for local office.

Additionally, as more fully discussed in the answer to question 3a, the ability of individuals to run for office is an important right. Statutory or charter language that limits such a right should be expressed and clear, and not merely implied. **In the absence of such clarifying language, the Solicitor's Office reads this language to mean that appointed officials and employees are able to run for office, but they are not able to take an active role in the campaign of others who are running for city office.** This opinion is limited to the application of the City's Ordinances and Charter. It does not address other limitations to running imposed by Federal or Pennsylvania law, agreements or professional codes that may apply.

The Solicitor's Office is open to reviewing other arguments and interpretations and, if appropriate, reconsidering the opinion expressed above.

2. **Do you see any legal issues that are at play in any of the provisions that relate to such political activity?**

In all matters, genuinely unclear ordinance and charter language may lead to legal challenges, the outcome of which might be uncertain. Additionally, candidates and their personal counsel can find legal issues in even the clearest of language and most established of precedent. This is even more true the less clear language is. Our sense of potential legal issues that could arise from existing language and proposed action is discussed in sections IV 1 and 3 of this LSR response.

3. **Can Council enact legislation to prevent elected officials from running for office unless:**

   a. **Can Council enact legislation to prevent elected officials from running for office unless they resign?**

      i) Long-standing precedent allows it.

In Commonwealth ex rel. Specter v. Moak, 452 Pa. 482, 487-490, 307 A.2d 884, 889 (1973), the Pennsylvania Supreme Court concluded that a municipality "has a compelling interest which requires City officers and employees to resign before becoming a candidate for nomination or election for any public office...." This precedent is still valid and is binding law on the City. It is longstanding precedent that is almost 50 years old. It relies on rationales discussed as to the Hatch Act which the US Supreme Court found permissible going back to the 1940s. The rationale would likely continue to withstand scrutiny.

In the case, the Court dealt with the following language in the Philadelphia's Charter:

> No officer or employee of the City, except elected officers running for re-election shall be a candidate for nomination or election to any public office unless he shall have first resigned from his then office or employment.

(emphasis added). Rather than summarize the Pennsylvania Supreme Court's discussion, relevant portions of it are presented below:

> Appellants further urge that the prohibition against political candidacy for public ... is an unconstitutional infringement upon their First Amendment rights.
>
> Manifestly, appellants are correct in their assertion that freedom of political expression and activity is embodied in the First Amendment. As the United States Supreme Court said in *Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1212 (1957)*: "Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations."
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> * * * *
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> [T]he United States Supreme Court has specifically recognized that the State does have certain interests, as an employer, in regulating the activity of its employees. In *Pickering v. Board of Education, supra at 568, 88 S. Ct. at 1734-35*, the Court said: "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the . . . [activity] of its employees that differ significantly from those it possesses in connection with regulation .

. . of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the . . . [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

In striking this balance, we are guided by further principles enunciated by the Supreme Court. In *United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556 (1947)*, for example, the Court rejected a constitutional attack on portions of the Hatch Act and held that Congress may "regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action." *Id. at 102, 67 S. Ct. at 571*. See also *Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S. Ct. 544 (1947)*.

...The "reasonableness" test employed by the Court in *Mitchell* has been amplified by the 'compelling interest' standard. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S. Ct. 412, 417 (1960)*. Accord, *Sherbert v. Verner, supra*; *Gibson v. Florida Legislative Investigation Com., 372 U.S. 539, 83 S. Ct. 889 (1963)*; *Northern Virginia Regional Park Authority v. United States Civil Service Commission, 437 F. 2d 1346 (4th Cir. 1971)*, cert. denied, *403 U.S. 936, 91 S. Ct. 2254 (1971)*; *National Association of Letters Carriers v. United States Civil Service Commission, 346 F. Supp. 578 (D.D.C. 1972)*, cert. granted, *409 U.S. 1058, 93 S. Ct. 560 (1972)*; *Mancuso v. Taft, 341 F. Supp. 574 (D.R.I. 1972)*; *Minielly v. State, 242 Ore. 490, 411 P. 2d 69 (1966)*; *Fort v. Civil Service Commission, 61 Cal. 2d 331, 392 P. 2d 385, 38 Cal. Rptr. 625 (1964)*.

As the Supreme Court of Oregon recently stated: The state must show that it has a compelling governmental interest warranting a restriction of a First Amendment right. *Bates v. Little Rock, 361 U.S. 516, 524, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960)*; *Gibson v. Florida, 372 U.S. 539, 555, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963)*; NAACP v. Button, supra, 371 U.S. at 438. Such compelling interest must be the controlling justification for the statute." *Minielly v. State, supra at 505, 411 P. 2d at 76*.

Additionally, the governmental unit has the burden of showing that the restriction on the First Amendment activity is the least drastic means for achieving the governmental purpose. "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose

> cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker, supra at 488, 81 S. Ct. at 252* (footnotes omitted). Accord, *Sherbert v. Verner , supra*; *Northern Virginia Regional Park Authority v. United States Civil Service Commission, supra*; *National Association of Letter Carriers v. United States Civil Service Commission, supra*; *Mancuso v. Taft, supra.*
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> Applying these standards here, we hold that the prohibition on political candidacy ... is a constitutionally permissible restriction on the political activity of Philadelphia's officers and employees. While the test employed in *Mitchell* may not be all inclusive the principle it announced is very much alive today. "The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.'" *United Public Workers v. Mitchell, supra at 96-97, 67 S. Ct. at 568*."
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> **We conclude that the City of Philadelphia has a compelling governmental interest which justifies requiring City officers and employees to resign before becoming a candidate for nomination or election for any public office. The reason -- as stated in the Annotation to [the Section at issue] -- for imposing this requirement is "because an officer or employee who is a candidate for elective office is in a position to influence unduly and to intimidate employees under his supervision and because he may neglect his official duties in the interests of his candidacy."**

Id. (boldface emphasis added)(footnote omitted).

Thus, the Pennsylvania Supreme Court, balanced the Constitutional rights of individuals in running for office against concerns of improper influence in government, and found that there is a compelling, and therefore, constitutional basis for preventing:

> officers or employee of the City, except elected officers running for re-election shall be a candidate for nomination or election to any public office unless he shall have first resigned from his then office or employment.

Id.

A federal court in Pennsylvania questioned whether the state needed to establish a compelling state interest but agreed that "resign to run" laws appropriately balanced individuals constitutional rights with government's interest in ethical government. The case involved a

magistrate judge who sought to run for Congress but was prohibited by state rules requiring magistrate judges to resign from office. The analysis follows:

> [T]he plaintiff challenges [the resign to run rule] as an unacceptable burden on his First Amendment right to engage in political activity. He argues that the provision is unconstitutional unless the defendants can demonstrate that the "resign to run" rule furthers a compelling state interest. The court cannot agree.
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> The relevant authorities provide that federal and state officials may regulate the First Amendment rights of various government employees to an extent greater than is appropriate for regular citizens. The issue is not whether a "compelling state interest" supports the relevant law. Rather, the proper test involves a balance between the individual's First Amendment rights and the interests the government has at stake. Broadrick v. Oklahoma, 413 U.S. 601, 606, 93 S. Ct. 2908, 2912, 37 L. Ed. 2d 830 (1973) (state civil service); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 564, 93 S. Ct. 2880, 2889, 37 L. Ed. 2d 796 (1973) (federal civil service); Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1969) (public school teachers); Blameuser v. Andrews, 630 F.2d 538 at 542-543 (7th Cir., 1980) (military officers). In Morial v. Judicial Commission of the State of Louisiana, 565 F.2d at 299-303, the Court of Appeals for the Fifth Circuit held that this principle extends to state judicial officers. Furthermore, the precedent provided the rationale for resolving Adams's argument.
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> It must be conceded that "resign to run" laws place substantial burdens on a potential candidate's right to seek office. Yet the "chilling" effect of these provisions should not be exaggerated, since they do not reach a wide variety of other activities protected by the First Amendment guarantee of free speech. The statutes, moreover, serve important state interests. For example, they help prevent the abuse of judicial office by candidates and former candidates and they safeguard the appearances of propriety. Finally, as the Morial court noted, the less-restrictive alternative of a forced leave of absence would not be sufficient to guard the state's interests, because the danger of corruption, real or perceived, would persist with regard to defeated candidates on their return to the bench. Weighing these considerations, it must be concluded that the Morial analysis is compelling and the "resign to run" law is constitutional.

Adams v. Supreme Court of Pennsylvania, 502 F. Supp. 1282, 1292 (US. Dist. MD PA 1980).

Applied to the present question, Allentown City Council could place limits on officials (elected or appointed) and employees, from running for office if Council if the limitations are enacted to maintain the integrity of government. Concerns of undue influence and neglect of official duties are among the justifications sufficient to support imposing such limitations.

ii) Home Rule Municipalities may act unless authority specifically prevents it from doing so.

Home rule jurisdictions have authority to enact ethics provisions as those adopted in Moak because "A home rule jurisdiction may 'exercise any power and perform any function not denied by [the Pennsylvania] Constitution, by its home rule charter or by the General Assembly." Ricci v. Matthews, 2 A.3d 1297 (Pa. Cmwlth. 2010)(*en banc*) (quoting Pa. Const. art. 9, §2), *affirmed sub nominee* Behr v. Matthews, 610 Pa. 455, 21 A.3d 1187 (2011). It does not appear that the HRC or other applicable law that would prevent Council from prohibiting appointed officials and employees from running for office without resigning.

iii) The Home Rule Charter may prevent Council from enacting limitations on elected officials running for office.

There are three elected branches in Allentown City Government: Mayor, City Council, and the Controller. Each elected branch has its own Article in the HRC that, among other things, discusses the qualifications for the office, the responsibilities of the office, and prohibitions of office. Each of the three articles also contains a section titled "Prohibitions" that specifically identifies things that that particular elected office holder or holders is not permitted to do. The HRC specifically identifies prohibitions against concurrent appointed and elective employment

for Council[12], the Mayor[13], and the Controller[14]: Many of these relate to positions the elected

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[12] SECTION 209 PROHIBITIONS

A. No Council Member shall hold any compensated appointive City office or City employment.

B. No Council Member shall serve as a compensated elected official in any other office in the Commonwealth of Pennsylvania or political subdivision thereof.

C. No Council member shall hold any compensated appointive City office or City employment until one year after his or her resignation or one year after the expiration of the term for which the member was elected to the Council.

...

F. No Council Member shall serve as an employee of any municipal authority, which is created solely or jointly by the City with one or more political subdivisions until one (1) year after the expiration of the term for which the Member was elected to Council.

G. Any Council Member who has a financial interest, direct or indirect, or by reason of ownership of stock in any corporation in any sale of land with the City or in any contract with the City, shall immediately make publicly known their interest and shall refrain from voting upon, or otherwise participating in the sale of such land or making of such contract. A statement of such interest shall be filed with the City Clerk. Any Council Member who willfully conceals such interests shall be guilty of malfeasance in office.

[13] SECTION 306 PROHIBITIONS

A. The Mayor shall not hold any compensated appointive City office or City employment during the term of office for which the Mayor was elected.

B. The Mayor shall not serve as an elected official in any other office in the Commonwealth of Pennsylvania or political subdivision thereof. March 2020 Home Rule Charter 8

C. The Mayor shall not serve as an employee of a municipal authority, which is created solely or jointly by the City with one or more political subdivisions until one year after the expiration of the term of office for which the Mayor was elected.

D. A Mayor who has a financial interest, direct or indirect, or by reason of ownership of stock in any corporation, in any contract with the City or in the sale of land, shall immediately make known that interest to Council. A Mayor who willfully conceals any such interests shall be guilty of malfeasance in office. Violation of this section with the knowledge expressed or implied of the person or corporation contracting with or making a sale to the City shall render the contract or sale voidable by the City

[14] SECTION 406 PROHIBITIONS

A. The City Controller shall not hold any compensated appointive City office or City employment during the term of office for which the City Controller was elected.

B. The City Controller shall not serve as an elected official in any other office in the Commonwealth of Pennsylvania or political subdivision thereof.

official may not hold after leaving the position the elected official was currently serving in. None of these prohibitions go to running for another elected City office.

It can be argued reasonably that by specifically identifying employment prohibitions for Council, the Mayor, and the Controller, the Charter, in effect, denies any further legislation that could serve to add additional restrictions upon the employment of those officials. Under this analysis, a Charter amendment would be necessary to add further restrictions upon those elected officials.

Another reasonable interpretation though, is that the section of the Charter that directs Council to adopt a Code of Ethics, Section 1101 (see Section II of this LSR) serves to give Council the power to adopt regulations regulating the ethical conduct of all officials (elected and appointed) and employees.[15]

Limitations imposed on elected officials by a charter amendment would likely withstand judicial scrutiny. Limitations imposed on elected officials by statutory amendment of the Code of Ethics may withstand scrutiny.

C. The City Controller shall not hold any compensated appointed City office or City employment until one (1) year after the expiration of the term for which the City Controller was elected.
D. The City Controller shall not serve as an employee of a municipal authority which is created solely or jointly by the City with one or more political subdivisions until one (1) year after the expiration of the term for which the City Controller was elected.

E. A City Controller who has a financial interest, direct or indirect, or by reason of ownership of stock in any corporation, in any sale of land with the City or in any contract with the City, shall immediately make known that interest to Council. A City Controller who willfully conceals any such interest shall be guilty of malfeasance in office. Violation of this section with the knowledge expressed or implied of the person or corporation contracting with or making a sale to the City shall render the contract or sale voidable by the City.

[15] Additionally, Section 502 of the HRC may also give Council the power to adopt such a provision by Ordinance:

> SECTION 502 – COMMON ADMINISTRATIVE PROCEDURES
>
> City Council shall have the power, by ordinance, to adopt uniform administrative procedures, regulations and forms to be followed by all elected officials, departments, offices and agencies.

b. Can Council enact legislation to prevent elected officials from running for office unless they are in the last year of their term?

The above discussion controls this issue as well. However, we suggest that allowing this may be inconsistent with the rationale, as discussed in Moak above, for requiring officials and employees to resign to run. Arguably, the concerns with elected officials using city resources for personal, political gain are amplified in the final year of a position.

V) CONCLUSION

Neither the HRC nor the existing Code of Ethics prevents appointed city officials and employees from running for an elected city office. Long-standing legal authority enables home rule communities to enact provisions requiring officials and employees to resign before seeking another office.

Council is encouraged to review its Code of Ethics and make appropriate updates. It is noted that the HRC requires Council to adopt a Code of Ethics. The existing Code of Ethics was in place in 1997 when the Charter was adopted. It must be presumed the drafters of the HRC were aware of this existing Code of Ethics. That the Charter drafters nonetheless imposed a requirement to adopt a Code of Ethics may suggest an intent for Council to revisit the then relatively new Code of Ethics. It has now been 23 years since the Charter has been adopted, and 28 years since the Code of Ethics was last updated as a whole. Recent significant ethical failures within the City arising from pay to play violations suggest a renewed focus on the Code of Ethics may be in order.

The Solicitor's Office is open to reviewing any authority or arguments that supports or opposes the conclusions expressed in this LSR Response.