

ADVISORY OPINION

CONFIDENTIAL

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**Case No. 09012.A, Money for Advice
May 20, 2009**

On March 10, 2009, ██████████, an Assistant Commissioner in the Department ██████████, requested an advisory opinion addressing whether one of the employees under his supervision, ██████████ violated the Ethics Ordinance by testifying as a paid witness in a deposition. As explained in this opinion, the Board has determined that, based on the facts presented and summarized in this opinion, ██████████ did violate §2-156-020 of the Ordinance, entitled Fiduciary Duty, §2-156-050, entitled "Solicitation or Receipt of Money for Advice or Assistance," and §2-156-060, entitled "City-Owned Property." The facts upon which the Board's determination is based and a detailed analysis follow.

FACTS:

History. According to materials ██████████ provided to Board staff, ██████████ began City employment on ██████████ as a ██████████ in what was then called the Department of ██████████ ("Department"). As a ██████████, ██████████ reviewed applications to determine the applicable ██████████ fees, updated his "██████████" whenever changes were made to the ██████████ ordinance, and approved the ██████████ designation ██████████ on the application after reviewing his ██████████.

In 2003, ██████████ became a ██████████ and was transferred to what was then called the Department of ██████████. The responsibilities ██████████ held remained the same as in his previous department.

A letter provided by ██████████ shows that on ██████████, ██████████ was terminated from his ██████████ position in ██████████ because his Department concluded that he violated several paragraphs of Personnel Rule XVIII, namely, giving inappropriate ██████████ approval for a project, approving a ██████████ application without referencing the ██████████ books used to determine the appropriate ██████████ district, and giving inaccurate and/or deliberately incomplete statements when interviewed by the Inspector General's office regarding the above approvals on ██████████.

On ██████████, a hearing officer reviewing ██████████ appeal of his discharge recommended that his termination be reduced to a

time-served suspension (Hearing Officer's Report, Page 12).¹ According to materials provided by [REDACTED], on [REDACTED], [REDACTED] was reinstated to his [REDACTED] position in [REDACTED].

According to an Employee Work History provided by [REDACTED], [REDACTED] has been an [REDACTED] with the Department [REDACTED] since [REDACTED].

His Current City Job. [REDACTED] stated that [REDACTED] current job involves shepherding [REDACTED] application files through the [REDACTED] review processes. Which of these reviews are necessary depends on the nature, scale, and type of project being processed [REDACTED]. [REDACTED] said that as part of that review process, [REDACTED] would have to consult with colleagues in the Department of [REDACTED], (formerly the Department of [REDACTED] if he notices a [REDACTED] designation which is inaccurate or incomplete. [REDACTED] stated that such mis-designation is not something that occurs often, but [REDACTED] would have to know applicable [REDACTED] codes and designations in order to notice possible discrepancies. When [REDACTED] notice discrepancies, they then refer the files to [REDACTED] staff's attention for further corrective action.

[REDACTED] former supervisor, Assistant [REDACTED] Commissioner [REDACTED], told Board staff that the ability to perform a [REDACTED] review is not an "integral" portion of the daily work [REDACTED] Department [REDACTED] perform. However, he said that it is critical for the [REDACTED] to know how to perform a [REDACTED] review, and all [REDACTED] must be capable of working at [REDACTED]. Thus, he stated, all [REDACTED] must be capable of performing [REDACTED] reviews to perform the requirements of their jobs.²

1. [REDACTED] provided a Hearing Officer's Report to the Human Resources Board ("HO's Report"), dated [REDACTED], wherein the hearing officer reviewing [REDACTED] appeal of his discharge found that on two occasions, one in [REDACTED] and the other in [REDACTED], [REDACTED] stamped, signed and approved the [REDACTED] application for the [REDACTED] in areas that were [REDACTED], without referencing the [REDACTED] books used to determine the appropriate [REDACTED] district (HO's Report, Page 11). The report states that on April 25, 2005 and/or June 8, 2005, [REDACTED] was interviewed by the Inspector General's Office, which was investigating fraudulent [REDACTED] permits being issued, regarding the permit applications and issuance of the permits in May 1999 and June 2000 discussed above (HO's Report, Page 8).

The hearing officer described [REDACTED] as a "relatively minor actor in a far reaching scenario" and she noted in a footnote accompanying the comment, "more than a few of the other employees involved in the approval of permits resigned as a consequence of their involvement" in the subject permit application approval process." (HO's Report, page 11). The Hearing officer further stated that "it is possible to see the Respondent not only as a wrongdoer in his own right, but also as a scapegoat for the wrongdoing of others" in that [REDACTED], "a relative newcomer to the world of [REDACTED] requirements, would not, after less than eleven months on the job, have sole authority to grant [REDACTED] approval to a large project...(HO's Report, Page 12)." Since the hearing officer determined that the City failed to prove several of the charges against [REDACTED] and concluded that [REDACTED] role was comparatively minor, on [REDACTED], the hearing officer recommended that [REDACTED] termination be reduced to a time-served suspension. (HO's Report, Page 12).

2. [REDACTED] stated that [REDACTED] typically do not get involved with [REDACTED] reviews except when they spot an error/oversight by the [REDACTED] examiners or the applicant changes the scope of work after obtaining [REDACTED] approval from the Department [REDACTED]. [REDACTED] explained that if the scope of work changes after [REDACTED] has been approved, then the [REDACTED] should send the application back to [REDACTED] for another review (due to the changes).

There are [redacted] other [redacted] in the [redacted] Department who also perform the same duties as [redacted].³

According to [redacted], currently, only the [redacted] Department's [redacted] perform [redacted] reviews for their small projects. [redacted] reviews include consulting the [redacted] books to ensure that the prospective project matches the [redacted] designation of the area in which the application approval is being sought. [redacted] is not a [redacted], but works [redacted].

[redacted] Outside Employment Disapprovals. In [redacted], [redacted], Assistant Director of [redacted], contacted our office for an opinion on a Dual Employment request [redacted] submitted to his department pursuant to City Personnel Rule XX, requesting permission to act as a [redacted] in [redacted] and [redacted]. [redacted] attached a note to his request which stated, in part, "I have not conducted this business for a fee since returning back to work. May be possible in future [since] I do this on a daley (*sic*) bases (*sic*) for free." [redacted] stated that [redacted] was not aware that [redacted] was requesting an opinion. [redacted] Division Head marked "no" next to approvals on the form.⁴ In [redacted], [redacted] submitted another Dual Employment Form to his department pursuant to the City's Personnel Rule XX, again requesting permission to act as a [redacted] matters. [redacted] provided a copy of that form after it had been reviewed by the proper personnel in [redacted] department. That form shows that "no" is marked next to "Approvals" by his Division and Department Heads. [redacted] confirmed to Board staff that [redacted] was informed of these denials.

[redacted] Deposition Testimony. According to the Affidavit of [redacted] in the matter of [redacted] ("Plaintiff"), v. [redacted] ("Defendant"), Docket Number [redacted] (pending in [redacted]), in or around [redacted], [redacted] agreed to act as an expert witness for the plaintiff and testify in the above-captioned case.⁵ [redacted] then testified in a discovery deposition on October 15, 2008. As disclosed in a copy of the deposition transcript ("Deposition Transcript") [redacted] provided to Board staff, [redacted] was hired by [redacted], plaintiff's attorney, as an expert witness based on his knowledge of [redacted] provisions in the City of Chicago. [redacted] of

3. [redacted] and all the other [redacted] also performed [redacted] reviews at [redacted] Intake Appointments for permit applications for several years until then-[redacted] Commissioner Rodriguez gave that task back to [redacted] in the [redacted] of [redacted].

4. On [redacted], our [redacted] emailed [redacted] and outlined the prohibitions under the Ethics Ordinance and advised [redacted] to tell then-[redacted] Commissioner [redacted] that he should consult with the Law Dept. to determine "whether, under the City's Personnel Rules, he has the authority to deny [redacted] request, or at least to inform [redacted] that his activities must be confined to consultations about [redacted] located outside the City of Chicago."

5. The case involves [redacted]

██████████, defendant's attorney, performed the examination of ██████████ during the deposition. ██████████ testified that, based on his review of documents provided by plaintiff's counsel, and the documents he gathered from City ██████████ records, in his expert opinion, there ██████████, and none of the documents provided to or inspected by him (see below) indicated ██████████.

██████████ testified that this was his first time being hired as an expert witness and that he was going to be compensated \$1,500 for his testimony, including trial testimony, if necessary (Deposition Transcript, Page 6).⁶ ██████████ testified that his current employment is with the ██████████ Department and that he works ██████████ (Deposition Transcript, Page 10). He stated that he considers himself "pretty close to an expert" on ██████████ matters (Deposition Transcript, Page 14). When asked by ██████████ what he meant by "pretty close to an expert," ██████████ testified that he's "been out of ██████████ for ██████████," but he is still very knowledgeable in ██████████ matters and that he keeps updated on most of the ██████████ changes. He indicated that his current department handled ██████████ matters up until ██████████ years ago. (Deposition Transcript, Page 14). ██████████ replied "yes" in response to ██████████ question, "So would you consider yourself an expert in how the City of Chicago ██████████?" (Deposition Transcript, Page 17.)

Prior to the deposition, plaintiff's counsel provided ██████████ with a packet of documents relating to the case, including a copy of the complaint, a copy of the response, and response to interrogatories.⁷ ██████████ brought ██████████ to the deposition that he had obtained himself (Deposition Transcript, Page 7). ██████████ testified that he requested these ██████████ records from ██████████ sometime ██████████ or early October 2008, to aid him in determining ██████████ (Deposition Transcript, Page 65). ██████████ then offered his professional opinions based on the information contained in the documents provided by plaintiff's attorney and the identifying information in the ██████████ records that he himself had already requested and obtained from ██████████ for this purpose (Deposition Transcript, Page 63). ██████████ testified that he was able to access City records by pulling ██████████ "from [the City/work computer on his] desk" (Deposition Transcript, Page 63). ██████████ also stated on the deposition record that he

6. In a phone call to ██████████ on ██████████, Board staff was told that, on ██████████, ██████████ was barred from testifying in the case for which he was hired as an expert. He said that Presiding Judge ██████████ stated in open court on or around ██████████ that ██████████ had violated the City's Governmental Ethics Ordinance by receiving payment for his deposition testimony. ██████████ said that plaintiff's counsel asked the judge whether it would make a difference if ██████████ returned the money, and that the Judge responded that the violation had already occurred.

7. With respect to the documents provided by plaintiff's attorney prior to the deposition, ██████████ comments reflected that the materials were available to the public, but, he said, "this is microfiche, so you had to go ... and fill out a Freedom of Information form (Deposition Transcript, Page 63)."

checked ██████████ Department records on his City computer to see if there were any previous ██████████ and to ensure that the information provided by Plaintiff's attorney was accurate (Deposition Transcript, Page 64).

LAW AND ANALYSIS: This situation presents issues under three sections of the Governmental Ethics Ordinance.

1. The first section of the Ordinance is Fiduciary Duty, §2-156-020, which states:

Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City.

The Board has held that a City employee or official violates his or her fiduciary duty City by using his or her City position to obtain a private benefit (See Case No. 92014.A). In 92014.A., the Board determined that it would be a violation of the Ordinance for an employee to use his direct access to departmental records for the purpose of acquiring clients for his private business transactions, thus bypassing the standard freedom of information procedure that persons without the advantage of his City position must use to obtain similar information. Here, ██████████ testified in a deposition that he used the access to City ██████████ records that he had by virtue of his official City position to directly retrieve City records, using his City computer, in order to prepare testimony as a paid expert witness in a case. ██████████ bypassed the Freedom of Information form which any person without the advantage of his City position would have had to have used to obtain this information. The Board concludes that ██████████ violated his fiduciary duty to the City by directly accessing ██████████ records outside of the regular FOIA process for use in preparing for testimony as a paid expert witness.

2. The next section under which this situation presents an issue is City-Owned Property, §2-156-060, which states:

No official or employee shall engage in or permit the unauthorized use of City-owned property.

City employees, such as ██████████, violate this section if they engage in or permit the unauthorized use of City-owned property (See Case No. 98025.I.06). ██████████ testified in a deposition that he used his City computer to access information he gathered in preparing the opinions he offered as a paid witness in a case, and he testified that he obtained records from another City Department in order to confirm the accuracy of the documents he was provided by plaintiff's attorney in the case. As a City employee, ██████████ had twice sought, and been denied, approval to engage in such conduct (acting as a ██████████ in ██████████ matters), and thus, this use of his City computer was clearly not authorized. Thus, the Board concludes that ██████████ engaged in the unauthorized use of

City-owned property when he used his City computer to access records to prepare his testimony as a paid expert witness in this case.

3. Finally, this situation presents an issue under Solicitation or Receipt of Money for Advice or Assistance, §2-156-050, which states:

No official or employee, or the spouse, domestic partner, or minor child of any of them, shall solicit or accept any money or other thing of value including, but not limited to, gifts, favors, services or promises of future employment, in return for advice or assistance on matters concerning the operation or business of the City; provided, however, that nothing in this section shall prevent an official or employee from accepting compensation for services wholly unrelated to the official's or employee's City duties and responsibilities and rendered as part of his or her non-City employment, occupation, or profession.

City employees, such as ██████████, violate this section if they accept money or anything else of value in return for advice or assistance on matters concerning the operation or business of the City, unless it is for services wholly unrelated to their City duties and responsibilities and rendered as part of their non-City employment. (See Case Nos. 02011.A; 98062.A; 91041.A;). ██████████ explained that all ██████████ must have an ability to understand and handle ██████████ matters as part of their job duties, including ██████████. In addition, ██████████ stated that all ██████████ must be available to work in ██████████ and, in those offices, all ██████████ must be capable of performing full ██████████ reviews, no matter their current duties respecting ██████████. ██████████ himself testified in his deposition that he considered himself "pretty close to an expert" on ██████████ matters. Both ██████████ and ██████████ told Board staff that ██████████ would become involved in greater depth in ██████████ matters in cases where a ██████████ issue error or oversight was detected by the ██████████ him/herself.

The factual record presented in this opinion is clear that: (i) ██████████ current City position requires him to perform varying duties in the area of ██████████, including reviewing and exercising judgment on ██████████ matters; (ii) ██████████ performance of his ██████████ responsibilities is integral to the accurate performance of his current City position; (iii) ██████████ testified at a deposition as to matters concerning City ██████████, which is a component of his current City job; and (iv) Mr. Bivins stated that he was giving that testimony in return for compensation. Therefore, the Board concludes that ██████████ testimony, given in a deposition on ██████████, for which he was compensated \$1,500, and which he gave on behalf of a litigant in the matter of ██████████), about City ██████████ matters, was not "wholly unrelated" to his official responsibilities with the City, and thus he violated §2-156-050 of the City's Governmental Ethics Ordinance.

DETERMINATION AND RECOMMENDATION: Based on the Board's analysis of the facts presented in this opinion under the City's Governmental Ethics Ordinance, the Board determines that [REDACTED]: (i) violated §2-156-020 of the City's Governmental Ethics Ordinance by bypassing the regular FOIA procedures to access [REDACTED] records to prepare his testimony as a paid expert witness in a case; (ii) violated §2-156-050 of the City's Governmental Ethics Ordinance by giving paid testimony as an expert in the matter of [REDACTED], on [REDACTED]; and (iii) violated §2-156-060 by using his City computer to access City records to testify as a paid witness in the above case. Accordingly, under §§ 2-156-410(a) and -380(e) of the City's Governmental Ethics Ordinance, the Board, having considered the nature of the determined violations, recommends to the Department of Buildings that it consider pursuing discharge of [REDACTED] from City employment.

The Board's determinations do not necessarily dispose of all issues relevant to this situation, but are based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. Other City rules or policies or laws may also apply.⁸ If the facts stated are incorrect or incomplete, please notify us immediately, as any change may alter those determinations.

RELIANCE: This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

Miguel A. Ruiz, Chair

cc: [REDACTED]

8. Although the Board has no authority to interpret the City's Personnel Rules, the Board nonetheless recommends that the Department of [REDACTED] pursue all available remedies for potential willful violations thereunder.