

CONFIDENTIAL
ADVISORY OPINION
Case No. 10005.A, Outside Employment
, 2010

You are an Assistant Commissioner in the City's Department of [G]. On , 2010, you sent our office a Memorandum requesting an advisory opinion from the Board of Ethics analyzing how the City's Governmental Ethics Ordinance prohibits or restricts [L] a G employee in his dual employment with [C] , a departmental vendor owned by his [relative] , and addressing whether a conflict of interest occurred. As discussed in the body of this opinion, the Board does not have sufficient facts before it to determine whether [G] violated the Ordinance through his conduct either in or related to his outside employment with [C]. There is nothing in the answers he gave on his dual employment form filed with [G] or on his Statements of Financial Interests (FIS) filed with the Board of Ethics, that, *ipso facto*, would cause the Board to conclude that he violated the Ordinance. The Board of Ethics has no complaint before it, and insufficient facts from which it could make a "reasonable cause determination" and commence an investigation. Nonetheless, this opinion sets out a "roadmap" of the relevant Ordinance provisions, and which facts would, if adduced, warrant the conclusion that [L] did violate the Ordinance. And, with your permission and waiver of confidentiality, as stated to the Board, we are forwarding this opinion, containing our recommendations, to the Law Department and Inspector General. Our analysis and specific and more general policy recommendations follow.

Facts.

1. His Dual Employment Form. You provided us with a copy of [L's] dual employment form, which he submitted to your department, as required by the City's Personnel Rules and City policy, in [date] (it is attached). It was approved that month, and bears the signature of then [L] Commissioner, dated (it also bears the signatures of the Division Head the Bureau Head, but these are both undated). On the form, he has written that he works 11 hours per week in "building maintenance" for [C] , listing its address at in Chicago. The form does not ask for, and he does not provide on it, the amount of compensation that he derives or expects to derive from this position. He does indicate on it, in answer to the question "when did (will) you start?" "99." As far as you know, this form was forwarded to the Department of Human Resources and then to the Inspector General's Office, per the City's policy.

2. Your Memorandum. According to your Memorandum, [C] is a company that is owned by [L's relative]. [C] had a contract with [G] to [perform services] (the City is currently taking steps to disbar the company from this and any further City contracts). Your Memo states that [L] currently works as a [title] in the department's Bureau of [Q] , performing . It also explains that he does not have any interaction with outside service vendors, and is not involved in vendor selection or billing, or in supervising employees who work on the [C] contract.

3. His Statements of Financial Interests. [L] filed Statements of Financial Interests with the Board in 2003, 2006, 2007, 2008 and 2009 (all attached). On these forms, he has answered yes (and no) to a number of key questions. Numbers 2, 3, 5, 6, and 7 are the most important questions for this analysis. His responses are not consistent throughout the years. In # 2, he has consistently disclosed that he derived more than \$2500 in compensation from [C] , listing his position with it as either [In # 3, he has disclosed that he received more than \$5,000 for professional, business or other services rendered to a person doing business with the City or a sister agency, namely [C] ; in 2003, 2006 and 2008 he also disclosed that the government agency with which [C] did business was the "City of Chicago." In # 5, on his 2008 and 2009 forms, he indicates that he or his spouse had a "financial interest" in [L] , and that it rendered services" to his [relative] , and that his [relative] does business with the City. We note that, on his 2009 FIS form, he checked "no" but crossed that out and checked "yes" in answer to the question that asks did any entity in which you or your spouse or domestic partner have a financial interest receive \$5,000 or more in compensation from a person doing business with the City? In #6, on his 2009 form only, he indicates a "financial interest" in his [relative], a person doing business with the City. But in his answers to #7, on every form he filed, he indicates that he has no ownership interest in any person conducting business in Chicago—presumably including [C].

4. Unknowns. The Board does not know, and, as you said, neither do you nor [L], whether [L] discussed with or in any way assisted his [relative] or any other employee, agent or owner of [C] , with respect to its contract with [G] . And, the Board does know, and, at your request, has not, in preparing this advisory opinion, made independent inquiry to ascertain, whether [L] has any ownership interest in [C] .

Law and Analysis. The Ordinance does not *per se* prohibit City employees and officials from having outside employment, or outside employment with City vendors, or even outside employment with vendors of their own City department. But it does impose many restrictions and prohibitions on the conduct of City employees who engage in outside employment, both

in their City jobs, and in their outside jobs. The gist of these restrictions is that, in their City jobs, they cannot take or influence any City action or make or influence any City decision that would benefit or directly affect their outside employer or employment, and in their outside job, they cannot assist their outside employer in matters relating in any way to their City job. As in all outside employment cases, several sections of the Ordinance are relevant to [L's] outside employment.

The first two are § 2-156-030(a), "Improper Influence," which states:

No official or employee shall make, participate in making or in any way attempt to use his position to influence any City governmental decision or action in which he knows or has reason to know that he has any economic interest distinguishable from its effect on the public generally.

and § 2-156-080(a), "Conflicts of Interest; Appearance of Impropriety," which states:

No official or employee shall make or participate in the making of any governmental decision with respect to any matter in which he has any economic interest distinguishable from that of the general public.

Section 2-156-010(i) defines an "economic interest" as "any interest valued or capable of valuation in monetary terms . . ." These sections prohibit a City employee, such as [L] , from making, participating in or in any way attempting to use his City position to influence a City or governmental decision or action in a matter in which he has an economic interest that is distinguishable from that of the public. Interpreting these sections, the Board has concluded that, "if [a City] employee ... receives an economic interest by virtue of his or her outside employment, and that economic interest is affected by his or her government decision, then a conflict of interests arises." Case Nos. 91059.A.; 98062.A.

Following Board precedent, then, [L] has an economic interest by virtue of his outside, non-City paid employment with [C]. Case Nos. 94009.A; 92023.I; 92044.A. In some past cases involving City employees who had outside employment with persons that had or sought business with their City departments, the Board has determined that conflicts of interests could or did arise. See Case Nos. 98009.Q; 94009.A; 92044.A; 92023.I; 91059.A. In these cases, the outside employment itself was or would be related to or enhanced by decisions these employees would or did make in their City jobs. Following this reasoning, the Board's opinion is that [L] is and has been prohibited from participating in, making or attempting in

any way to use his City position as a machinist with [G] to influence any City decisions or actions that would be related to or enhance his employment with [C] . The Board has no facts before it that would warrant the conclusion that, in his City position, [L] either participated in or in any way attempted to influence or use his position to influence contracting or other decisions or actions relating to [C] . Nonetheless, were facts presented to the Board that indicated that, for example, he spoke with his [G] colleagues or superiors about [C] , or recommended its services to other [G] employees for the , or directed City [business] to [c] , the Board could conclude that he violated these provisions.

The next provision is § 2-156-050, "Solicitation or Receipt of Money for Advice or Assistance," which states:

No official or employee, or the spouse 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 or the spouse of 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.

This provision prohibits a City employee, like [L] , from accepting anything of value, including money, compensation, favors, services or promises of future employment, in return for advice or assistance on matters concerning City operations or business, although accepting compensation from an outside employer for services that are wholly unrelated to the employee's or official's City responsibilities is permitted. See Case No. 93021.A. Consistent with Board precedent interpreting this provision, [L] would be in violation this provision if he would or has assisted [C] , or its owners, agents or employees, with respect to, or advised them on any aspect of, its City contract with [G]. Again, the Board has no facts before it indicating that he rendered such advice or assistance. His position with [C] , listed on his FIS and outside employment forms, themselves shed no light on this issue. However, we note that, in his job with [C] , [L] works for his [relative] , the company's owner, and thus it is a reasonable inference that he has from time to time discussed with or assisted or advised his [relative] with respect to [C's] contract with [G]; moreover, we note that it would be exceedingly difficult to establish an effective screen to keep [L] from discussing [G] contractual or other

matters with his [relative]. The Board also believes that, were it or its staff consulted in advance on whether this outside employment should have been approved, given all the facts cited in this opinion, it would advise against it. But, the Board has no facts before it to warrant the conclusion that a violation of this section has occurred, and cannot draw conclusions or make determinations based on inferences, regardless how reasonable.

The next potentially relevant provision is § 2-156-110, "Interest in City Business," which states, in pertinent part:

No elected official or employee shall have a financial interest in his own name or in the name of any other person in any contract, work or business of the City, or in the sale of any article, whenever the expense, price or consideration of the contract, work, business or sale is paid with funds belonging to or administered by the City, or is authorized by ordinance.

"Financial interest," as defined in §2-156-010(l), means, in relevant part, "(i) any interest as a result of which the owner currently receives or is entitled to receive in the future more than \$2,500.00 per year; [or] (ii) any interest with a cost or present value of \$5,000.00 or more." As the Board has interpreted these provisions, if a company or firm is *owned* completely or in part by a City employee, the value of the employee's interest in the firm's City contract or City business is calculated as the amount of the company or firm's contract, work or business with the City, multiplied by the employee's percentage of ownership interest in the company or firm. Case Nos. 04049.A; 97019.A; 90077.A. If the interest the City employee has in the City contract yields or entitles the employee to receive income of more than \$2,500 per year, or has a cost or present value of \$5,000 or more, then the employee has a prohibited financial interest in City business. The applicable subdefinition in this case is (i), which, the Board recognized in Case No. 97010.A, governs a situation where a City employee or official receives or is entitled to receive money as a result of his or her ownership interest. If the amount of money the employee receives or is entitled to receive from his or her ownership interest in (or in a person with) a City contract or in City business is more than \$2,500 per year, the employee has a prohibited financial interest in City business.

This provision would apply, however, if and only if [L] is in fact an owner of [C] (or was at any time in which he was a City employee and [C] had one or more City contracts). The provision does *not* apply if a City employee, like [L], is merely an employee of the firm with the City contract (or City subcontract). In those situations, the other provisions discussed in this opinion apply. The Board does not have before it any facts from which it

could conclude that [] has or has had an ownership interest in [C] . His FIS forms are themselves inconclusive: in his answers to #7, he has consistently responded "no" when asked whether he has any "ownership interest" in any company or person conducting business *in* Chicago; this presumably would include [C] . And yet, in his answer to # 5, on his 2008 and 2009 forms, he indicates that he or his spouse had a "financial interest" in [C] , and that it rendered "shop maintenance services" to his [relative], and that his [relative] does business with the City. In #6, on his 2009 form only, he indicates a "financial interest" in his [relative], a person doing business with the City. It is possible that either he overdisclosed, or, given that he crossed out no and checked yes in #5 on his 2009 form, that he (not surprisingly) misinterpreted the term "financial interest" to include the fact he made or makes more than \$5,000 in salary from his [relative's] company. Again, however, the Board has insufficient facts before it to draw a conclusion as to whether [L] violated this provision. To make that determination, the Board would need to ascertain whether he has had an ownership interest in [C] , what percentage of ownership he has had, and when, and the amount of [C's] City contracts during those time periods, and the amount of income that he was entitled to receive by virtue of his ownership interest during those times.

Finally, three other Ordinance provisions apply to [L's] outside employment, as they do in all situations in which City employees or officials have outside employment. Section 2-156-020, "Fiduciary Duty," obligates him to use her City position responsibly and in the best interests of the City, and to exercise professional judgments free from conflicting duties to other entities, such as [C] or his [relative]. It also prohibits him from using City time for a non-City job or for any private benefit. Section 2-156-060 prohibits him from any unauthorized use of City property or resources in her non-City employment, and § 2-156-070 prohibits him from using or disclosing, other than in the performance of his official City duties, confidential information gained in the course of or by reason of his City job. Again, however, the Board has no facts before it that would warrant the conclusion that [L] violated any of these provisions.

Conclusions and Recommendations. As discussed above, the Board does not have sufficient facts before it to determine whether [L] violated the Ordinance through his conduct either in or related to his outside employment with [C] . There is nothing in the answers he gave on his outside employment or FIS forms that, *ipso facto*, would cause the Board to conclude that he violated the Ordinance. Nonetheless, additional investigation would yield sufficient facts from which the Board could make these determinations. However, the Board of Ethics has no complaint before it, and no facts before it from which it could make a "reasonable

cause determination," that is, conclude from the facts presented that [L] did violate one or more provisions of the Ordinance. This means that, pursuant to Rule 4-1 of the Board's Rules & Regulations, the Board cannot investigate this matter until and unless it receives such a complaint or such facts. Thus, we recommend that [G] discuss with the Law Department and/or the Inspector General's Office whether it is in the City's best interests to either file a complaint with the Board so as to allow us to investigate possible violations of the Ordinance, or, if potential violations of other rules, laws, or policies are involved, to request that the Inspector General's Office conduct an investigation. As in all cases involving potential issues under and requiring interpretation of the Governmental Ethics Ordinance, the Board and its staff remain available for assistance, consultation and guidance as requested.

As a more general matter, the Board also recommends that the Law Department, Board of Ethics, Inspector General's Office, and any other relevant departments, such as the Department of Procurement Services, work together to develop effective protocols whereby information pertaining to City employees with outside employment and City contractors who hire them may be shared and utilized effectively. The Board looks forward to assisting in developing and implementing those protocols.

Please note that, at your request, and with your waiver of the confidentiality that would otherwise attach to this opinion, we are forwarding a copy of this opinion to the Corporation Counsel and the Inspector General so that they can consider our recommendations. Please also note that, pursuant to Rule 3-8 of our Rules & Regulations, [L], as the opinion's subject, is entitled to a copy and we are thus forwarding it to him as well.

The Board's opinion in this case does not necessarily dispose of all the issues relevant to this case, but is based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in the opinion. If the facts presented are inaccurate, please notify us, as a change in facts may change our conclusions and opinions. We also note that other rules, regulations or policies may apply to this case, including the City's Personnel Rules, specifically Rules XVIII and XX.

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: Mara S. Georges, Corporation Counsel
Joseph Ferguson, Inspector General
[L]