ADVISORY OPINION

To: [Mr. John Smith]

Date: [Date] 2010

Re: 10025.A, Post-employment

Facts and Issue: You are [an official associated with the City]. On [Date], 2010, you raised a question of first impression. You would like to [have] nominate[d] [Ms. Jones], currently a[n] [employee] in the City's Department of [X], to become a Commissioner of a Special Service Area (SSA) upon her retirement, which is scheduled [Date], 2010. You asked us to assume that, if confirmed to that appointment, [she] would work on matters as an SSA Commissioner similar to those on which she worked during her City employment, and that, if the Ordinance's post-employment restrictions apply, she may well be subject to one or more one-year and possibly permanent prohibitions, were she to take a position with a private company, for example. Your question is whether the Governmental Ethics Ordinance's post-employment provisions apply to this situation and prohibit her from working on such matters, were she appointed to the SSA. As explained in this advisory opinion, we determined at our [Date] 2010 meeting that they do not. Our Executive Director conveyed our conclusion and advice to you that evening, and we have prepared this advisory opinion to confirm our advice to you, and so that we can provide guidance for applicable future cases.

Law: The relevant language in the Ordinance is in § 2-156-100(b), entitled "Post-Employment Restrictions." It provides, in relevant part:

> "no ***former*** official ***or*** employee shall, for a period of one year ***after the termination of the official's or employee's term of office or employment*****,** assist or represent any person ..." (emphasis added.)

Analysis: We note at the outset that SSA Commissioners are appointed officials for purposes of the Ethics Ordinance. *Memorandum, January 6, 1993* (Board approved January 13, 1993: "find[ing] that members of Boards of all subsequently created Special Service Areas are, on their appointment, appointed officials under the Ethics Ordinance..." p. 3). There are no prior Board cases addressing whether movement from the status of City employee to the status of appointed City official, upon retirement or other departure from City employment, triggers the post-employment provisions. However, we have cases informing our reasoning and policy considerations. In Case No. 93018.A, the Board found that the post-employment provisions do not prevent an employee who leaves City service from becoming a consultant to the City to perform the same work she performed at the City, provided certain conditions are met. That case recites the purpose of post-employment provisions: "to
prevent former employees from using 'inside knowledge' to benefit third parties, thus impairing the integrity of government services and creating the appearance of impropriety." *Id*. page 2. So, if the conditions set forth in that case are met, then the provisions' purposes are not frustrated,

namely:

"'inside knowledge' is used only to benefit the City; no other party would have the benefit of the former employee's knowledge[;] the former employee is not exposed: to dual loyalties; the former employee is serving only the City and owes loyalty only to it. The City's interests are foremost. The major harm contemplated by post-employment provisions is thus avoided." *Id*. The conditions to which the case refers include that "the City seeks the services of the former employee[;] stands to benefit by hiring the former employee as a consultant[;] and the former employee does not represent the interests of any other entity in connection with his or her consulting responsibilities to the City."

Id. The key condition in that case were that the employee individually–not as an employee or agent of any third party–execute a contract with the City reciting that "[she is] ... obligate[d] to 'at all times act in the best interests of the City of Chicago, consistent with the trust and confidence' that the City would place in [her]."

In Case No. 94044.A, a 25-year City employee retired and then was retained by his former department as an independent contractor for a period of one year. He asked what projects he could work on after his independent contract expired, either for the City or a third party. The Board determined that: i) for purposes of the Ordinance, independent contractors retained by the City are not City employees; ii) the post-employment provisions only apply to matters in which a former employee was involved while an *employee* of the City, *not* to those on which he worked as a *contractor* to the City; and iii) noting that this former employee was retained as an independent contractor to the City upon his retirement and thus during that time was subject to the Ordinance as a contractor, the one-year post-employment prohibition begins after an employee leaves his/her City *employment*, and *not* when he or she terminates the independent contractor status.

Discussing a question presented on June 11, 2008, the Board's consensus was that, for purposes of the Ordinance, a former City employee who resigned from City service and was out of City service for longer than one year before being rehired by the City as an employee had two separate "terms of employment." Thus, "any one-year post-employment restrictions to which he would be subject would stem only from his second "term" of City employment.

In this case, [the employee] would become an appointed official, a term that is included in the definition of the term "official" in the § 2-156-010(q). As we have recognized, appointed officials are subject to the entire Ordinance, including its post-employment provisions. See Case No. 94001.A.

The issue here is how to characterize a former employee for purposes of the post-employment restrictions when the former employee, upon retirement, becomes an appointed official and otherwise would be subject to these restrictions. Put another way, the question is whether the post-employment provisions are "triggered" by this "move," and whether [her] termination of her City employment, followed immediately by her assumption of a position as an appointed official, is to be considered a "termination of her employment or term of office," thus triggering the post-employment restrictions, or whether she should be considered, as of when she terminates her employment, a "former" employee if she then assumes a position as an appointed official.

Clearly, an appointed official *qua* appointed official is neither a contractor nor a City employee. Should she be? Setting aside other arguments for or against, were she considered a contractor, she would not then be subject to the Ordinance's post-employment provisions, because they do not apply to contractors or former contractors; however, she would by contract be subject to fiduciary duty and perhaps other obligations to the City. On the other hand, if she were considered an employee, her ability to work at a regular job or have a business might be frustrated, and she might thus refuse the appointment, thereby frustrating the City's ability to retain qualified appointed officials (moreover, we have recognized that SSA Commissioners are appointed officials anyway). We believe then, that, consistent with our earlier opinions, she becomes simply an appointed official upon her change in status, subject to the Ordinance as an appointed official. Her position change will then be treated and characterized by the Board as if she were effectively transferring from one City department to another, though here she is transferring from "employee" to "appointed official." Thus, this "transfer" is not "an exception" to the post-employment provisions, but merely a change in jobs, a continuation of her City service. The implication of our reasoning is that each capacity or position in which [she], a City employee-become-appointed-official, has served, whether as City employee or appointed official, would then be included in the subject matters in which she has participated during her City service for purposes of the Ordinance's post-employment provisions, which would then be triggered at the time she officially terminates her last concurrent City position.

As a City appointed official, [she] will continue to be subject to the Governmental Ethics Ordinance. From the standpoint of the policy behind the post-employment provisions, she is at least as benign with respect to the City as is the independent contractor in Case No. 93018.A (actually, she is moreso, subject to a statutory obligation rather than a contractual one). The main purpose of the post-employment restrictions would be satisfied: her "inside knowledge" would still be used only by and for the City, but under a statutory, not a contractual obligation. The only difference is that she would be appointed rather than hired in her new City position (doing old City work). For purposes of the post-employment provisions, we believe that this is a "distinction without a difference," and protects the City even more. An appointed official is not an employee or contractor: he or she is a Mayoral appointee. Thus we conclude that the best in these scenarios is to treat the former employee as a "continuing" City servant, *i.e.*, he or she simply walked out of one City office as an employee one day and entered another City office the next day, doing the same work, but as an "appointed official." Each capacity in which [she], an employee-become-appointed-official, has served would then be included in the subject matters in which she has participated for purposes of the Ordinance's post-employment provisions, which would then be triggered at the time she eventually, inevitably, and officially terminates her last City position. We advise you, though, to take steps to ensure that [she] does not have a "break" in her City service, that is, that she "transfer" from employee to appointed official as soon as practicable after her last effective date as a City employee.

Determination: We determine that the Ordinance's post-employment restrictions are not triggered by [the employee's] move from City employee to City appointed official, which is, for purposes of the Ordinance, a transfer, effectively a change in City positions within City service. Each position or capacity in which she, as an employee-become-appointed-official will have served, will then be included in the subject matters in which she has participated, and the contracts over which she will have exercised management authority, for purposes of the Ordinance's post-employment provisions. These provisions will then be triggered at the time she officially ends the term of office of her last City appointed position, whether this one or another

concurrent appointment.

Our opinion 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 those facts are inaccurate, please notify us, as a change in facts may change our advice or recommendations. We also note that other rules, regulations or laws may apply to this case.

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