

## CONFIDENTIAL

March 7, 2013

[Redacted]

**Re: ADVISORY OPINION, Case No. 12072.A**

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### I. SUMMARY OF THE CASE

You are the [boss] of the [City office or office]. [The office] recently conducted an internal investigation into whether [City employee] [Redacted], improperly interceded or benefitted with respect to [an] application to the [Department] for a grant through the [Program]. This Program is administered by [the Department] and overseen by [the office]. Following [the office]'s investigation, you contacted our office [Redacted], and requested an opinion addressing whether [City employee's] actions violated the City's Governmental Ethics Ordinance ("Ordinance"). You told Board staff that you had previously referred this matter [Redacted], but that that office declined to investigate it. You forwarded documents to us, which your office had compiled through its internal investigation.

The Board of Ethics has carefully reviewed the documents you forwarded. Neither the Board nor its staff has conducted an independent investigation into this matter. Instead, the Board has relied on the facts provided by your office, as presented in this opinion, in reaching our conclusions and recommendations.

On the facts presented, the Board has determined that [City employee] violated two Ordinance provisions: Representation of Other Persons, §2-156-090(a); and Fiduciary Duty, §2-156-020. Further, the Board recommends that: (i) [The office] discharge [City employee]; (ii) [The office] consult with the Law Department to ensure that the City's rights and obligations under [the government's] rules are preserved and fulfilled, so that the City does not suffer any penalties that may apply as a result of [City employee]'s conduct; (iii) [The office] confer with the Law Department to discuss whether there may have been criminal fraud, and whether further legal action is appropriate; (iv) [The office], together with the [Department] and Law, develop protocols so that applications filed by City employees or their relatives under this and other relevant programs be identified and handled appropriately before they are approved; and (v) That [the office] and the Law Department pursue an action for monetary damages for violation of the Ethics Ordinance, as provided in §2-156-440.

A statement of the facts and our analysis follow.

### II. FACTS

#### A. [Program] Funding and Eligibility Requirements

The [government] operates various entitlement programs to foster stronger communities by providing [Grants] to eligible applicants. [Grant] funds are administered by local government

units, such as the City, which apply to [the government] and receive funds every year. Within City government, [the office] exercises central oversight over these grant funds: it receives and allocates [Grant] monies to various City departments, including [the Department], for specific programs. You explained that [the office] does not review or make any decisions regarding applications submitted by individual participants or grant recipients. Rather, City departments manage their own programs and select eligible participants within the parameters of [the government]'s announced guidelines.

[The Department] receives and administers [Grant] funds [Redacted] to income-eligible households [Redacted]. [The Department]'s standards for evaluating applicants for [Program] grants are based on [the government]'s guidelines, and include the following: the applicant must, (1) be an owner-occupant [Redacted]; (2) not have received prior assistance; (3) have resided in the [City] for at least one year prior to applying; (4) meet household size income limits; and (5) provide proof of income, utilities, ownership and residency. In providing proof of residency, the applicant must list the name and Social Security numbers of all "household" members. [The Department] conducts [an] inspection before approving any application.

Under the [Redacted] guidelines for [Grant]-funded programs, like [the Program], "*Household* means all persons occupying a housing unit. The occupants may be a family ...; two or more families living together; or any other group of related or unrelated persons who share living arrangements." See 24 CFR 570.3 and 24 CFR 5.403. The CFR does not define *caregiver*, but defines a *live-in aide* as "a person who resides with one or more elderly persons ... and who: (1) Is determined to be essential to the care and well-being of the person; (2) Is not obligated for the support of the person; and (3) Would not be living in the unit except to provide the necessary supportive services. See 24 CFR 5.403.

Although City employees may apply for assistance through [the Program], employees directly involved with the program are excluded by law, according to [Smith] employee for [the Department]. See §2-45-130 of the City's Municipal Code.<sup>1</sup> [Smith] told staff that [Department] employees could not participate because they administer the program, process and approve applications, and that [office] employees may not participate because they have program knowledge before it goes public.

#### B. [City employee]'s [Grant] Responsibilities

[City employee] has been a City employee since [Redacted]. As an [employee] at [the office], [City employee] coordinates the drafting of the [Redacted] for administering the [Grant] and other funding programs. [City employee's] work includes establishing the City's priorities, performance measures and long-term [Redacted] grant strategy. [City employee] is [the office]'s

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<sup>1</sup> It provides, "City employees expressly excluded from the definition of Eligible Persons and are thus ineligible for [Program] participation: (ii) With respect to each Eligible Program, the following employees ... shall not constitute "Eligible Persons" for such Eligible Program: any employee or appointed official who, during his/her tenure of employment or appointment, respectively, by the City ... (2) is or was in a position to participate in a decision-making process with respect to such Eligible Program, or with respect to a specific project entered into pursuant to such Eligible Program, or (3) gains or has gained confidential information with regard to such Eligible Program." §2-45-130(b)(ii).

[Redacted] advisor to City departments on [the government] rules and [Grant] regulations. [City employee] works with all the City departments that receive [government]/[Grant] funds to compile information [Redacted] to ensure compliance with [the government]'s regulations. [City employee] also [Redacted] coordinates [Redacted] for the [the government] programs, as required by [the government] regulations. [City employee's] job responsibilities include overseeing the administration of [the government] funding, but not managing the programs themselves. Thus, you said, [City employee] does not review any individual's application, or participate in making any determination on any specific applicant, because those are management functions reserved for each City department that receives [Grant] program funds. In addition, [City employee] [Redacted], coordinates, and serves [Redacted] for [group] activities. This [group] is the City's advisory body on [the government]-funded programs.

C. [Doe]'s [Program] Applications

1. *The 2011 Application Household and Income Information*

[Doe] is [City employee's] [relative]. [Doe] applied for [Program] assistance in 2011, and listed herself as a 1-person household. According to [Program] guidelines, income eligibility for a 1-person household is [Redacted]. In [Doe's] 2011 [Program] application, [Doe] listed [Doe's] income as [Redacted]. Included in [the] application materials were two personal checks from [City employee] for [Redacted] rent, dated [Redacted]. Based on [the] reported information, [Doe] appeared to be eligible for program participation.

2. *The 2011 Application Denial*

The [Program] [Redacted] process requires [an inspection] that [the Department] [Redacted] conducts. The inspection of [Doe]'s home [Redacted] revealed [a problem]. [The Department] [Redacted] determined that [Doe] was ineligible for [the Program] because [Redacted] had incorrectly classified [Redacted] [Doe's] residence [Redacted]. [Redacted].<sup>2</sup> In order to remedy this discrepancy, [Doe] would have had to [fix the problem], which could have caused [Redacted] a tax increase.

[Redacted] [Doe] sent a letter to [the Department]'s Commissioner [Redacted]. In the letter, [Doe] asserted that the City's determination that the [problem] disqualified [Doe] from participating in the [Program] was improper, on the basis that it is a requirement that the City imposes, but not a requirement of the [government], for which [Doe] was otherwise eligible. [Doe] also stated that [Doe] could not [pay without assistance] or [afford to pay more tax], and asked Commissioner [Redacted] whether "anything [could] be done about the program rules the city has created?" and to please help [Doe]. [Doe] did not [fix the problem], and [Redacted], [the Program] determined that [Doe] was ineligible for assistance and denied [the] application. [Redacted]

[Redacted], [City employee] sent an email to [City official Johnson], from [City employee's] personal email account, and wrote that [City employee] was sending it at the request of [relative]. [City employee] did not [self] identify [as a] City employee in this email. In the

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<sup>2</sup> [Redacted].

email, [City employee] stated that [City employee's] [relative] had been found ineligible for [the Program] because of [Doe's] [problem]. [City employee] noted that if [the relative]'s [problem] were fixed, the resulting [Redacted] tax would cause [Doe] difficulty because [Doe] was on a fixed income. [City employee] further suggested reform [Redacted] and stated [City employee's] belief that [the Department] staff could do something so that [the relative] could get the [Program assistance] without having to [fix the problem]. [City employee] then wrote that [Johnson]'s "intervention would make it possible." [Redacted]

### 3. *The 2012 Application Household and Income Information*

[Doe] applied for [Program] assistance again [the following year], and listed [a] 1-person household. In [the] 2012 [Program] application, [Doe] listed [Doe's] income as [Redacted]. [Doe's] 2012 application stated that the [the problem was fixed]. It also stated that [City employee] lived in the home as [Doe]'s "caregiver." The application did not include [City employee's] City salary as part of the household income.

[Redacted] we will not address whether [City employee] also violated Ordinance §2-156-110, "Interest in City Business."

In 2012, [Doe]'s application for [Program] assistance was approved and [Doe] received [Program assistance].

### 4. *[The office]'s Review of the [Redacted] 2011 Appeal*

[The government] conducts audits of the City's [government]-funded programs including [the Program]. As part of its regular audit process, [the government] requested information regarding the handling of [the Department] appeals. Pursuant to [the office]'s oversight authority over [Grant] programs, [Jones], [an office employee] reviewed the paperwork submitted by [the Department] with respect to [the government]'s request before it was produced to [the government]. [Jones] noticed that [the Department]'s documentation included information on [Doe]'s 2011 appeal, based on [the] letter to Commissioner [Redacted]. [City employee's] email to [Johnson] was included within those materials and raised concerns of potential violations of the Ethics Ordinance. [The office] confirmed that [Doe] was [City employee's] [relative] and both lived at the same address.

[The office] then commenced a more in depth review. This review revealed a striking similarity between [City employee's] handwriting and [Doe]'s signatures. It also revealed a significant difference between [Doe]'s signature on [Doe's] 2011 and 2012 applications, and [Doe's] signature on [Doe's] Quitclaim Deed, Medicare card, letter to Commissioner [Redacted], and other documentation.

[Doe]'s letter to Commissioner [Redacted], which discussed the [Redacted] grant standards compared to the City's program standards, also raised concerns for [the office]. Since [City employee's] position as an [Redacted] is to oversee and advise City Departments on [the government] and [Grant] [Redacted] regulations and compliance, [the office] was concerned that [City employee] had authored and signed the letter on [the relative]'s behalf. These concerns caused [the office] to refer the matter to the Board.

5. *[City employee's] Non-Disclosure of Potential Conflicts*

[City employee] did not disclose to either [City employee's] [office], or to [the Department], which evaluates [Program] applications, that [the relative] was applying for [Program] assistance, [Redacted] for a program [City employee] oversees in [City employee's] position with [the office] [or that City employee lived with Doe]. Further, [City employee] did not disclose that [City employee] had written to [Johnson] on [the relative]'s behalf to request that [Johnson] intercede to secure approval of [the relative]'s 2011 [Program] application. [City employee] did not contact the Board of Ethics for advice or guidance on any potential conflicts [City employee] might have had given [the relative]'s [Program] application to participate in a [Grant] program that [City employee] oversees.

**III. LAW AND ANALYSIS<sup>3</sup>**

We address several relevant sections of the Ordinance.

1. Representation of Other Persons

The applicable Ordinance provision, §2-156-090(a), provides that:

*No employee may represent, or have an economic interest in the representation of, any person other than the City in any formal or informal proceeding or transaction before any City agency in which the agency's action or non-action is of a nonministerial nature; provided that nothing in this subsection shall preclude any employee from performing the duties of his employment ...*

This provision prohibits City employees, such as [City employee], from representing or advocating for any third party, such as [Doe], before a City agency, such as [Johnson's office] or [the Department], unless [City employee] was representing that person as part of [City employee's] City duties. The Board has held that representation includes submitting documents to the City on behalf of another. See Case Nos. 11045.A, 90035.A, and 97061.A.<sup>4</sup>

Our review of the facts presented warrants our conclusion that [City employee] was advocating for [the relative], a third party, when [City employee] email[ed] [Johnson] asking for intervention so that [the Program] would approve [the relative]'s 2011 application. As a City employee, [City employee] was prohibited from asking for intercession on behalf of a third party

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<sup>3</sup> In this Advisory Opinion, the Board of Ethics applies the provisions of the Ethics Ordinance in effect until Nov. 1, 2012, because the conduct that we address occurred prior to that date.

<sup>4</sup> The Board has interpreted the term "represent" to include a broad range of activities in which one person acts as a spokesperson for someone other than the City and seeks to communicate or promote the interests of that party, such as attending or speaking at face-to-face meetings, making telephone calls or signing documents submitted to a City department or agency. See Case No. 11045.A.

regardless of whether [City employee] [self] identified as a City employee in [the] communication.<sup>5</sup>

We note here that the Ordinance would not prohibit [City employee] from representing [City employee's] *own* interests as a private citizen before a City agency, but that is not what [City employee] did. In fact, [Doe]'s applications do not list [City employee] as part of the household but rather as a "tenant" in 2011 and as a "caregiver" in 2012, although [the office] records indicate that this had been [City employee's] residence since [Redacted]. Moreover, [City employee's] salary alone would have disqualified [City employee] from participating in [the Program], so that [City employee] could not have advocated on [City employee's] own behalf, as a private citizen, with respect to the program. In order for [City employee] to have advocated for [the relative] before [the Department], [Johnson's office], or any other City agency, within the constraints of the Ordinance, [City employee] would have had to have served as [the relative]'s legal guardian or agent through a Power of Attorney for Property. However, the available documentation does not support this relation.

For these reasons, on the facts as presented, we conclude that [City employee] represented [the relative] before [Johnson's office] in violation of the Ordinance.

## 2. Fiduciary Duty

The next relevant Ordinance section we address is §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.*

Under this section, [City employee] owes the City a fiduciary duty in the performance of [City employee's] City duties. However, [City employee] did not undertake the conduct at issue here in the performance of [the] City duties; rather, it was [City employee's] "private conduct," undertaken on behalf of [the relative], and indirectly on [City employee's] own behalf. Nonetheless, this Board has recognized that an employee's fiduciary duty extends to certain outside activities, which involve knowledge or use of City standards, programs, or data, in order to secure a private benefit. In Case No. 92014.A, we found that a police officer violated this provision by accessing City traffic citation records for his own private insurance business. We wrote that this provision:

"not only prohibits a City employee from performing private business activities during hours officially designated as City time, but also from using their City positions or City resources to obtain a private benefit... the Governmental Ethics Ordinance was instituted for the purpose of engendering and preserving public confidence in the fair and honest administration of City government and it does so by providing for 'the avoidance of conflicts of interest, impropriety, or the appearance of them.' When City employees

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<sup>5</sup> From the facts presented to us, we also note that it seems reasonable to draw the inference that [City employee] also authored and signed the letter to [the Department] on behalf of her [relative], but our conclusions, determinations and recommendations do not depend on that finding, which we cannot make on the record before us.

receive private benefits or obtain an advantage over the public generally by virtue of their City positions, then public confidence in government is undermined. Such conduct by City employees is exactly the kind of activity the Governmental Ethics Ordinance was designed to avert.”

[City employee] is [the office]’s [Redacted] advisor to City departments on [the government] rules and [Grant] regulations. [Grant] funds [the Program] and [City employee] works with [the Department], among other City departments, to coordinate and ensure program compliance with [the government] regulations. The facts presented in this case show that [City employee] knew of [the relative]’s two applications, wrote an email to [Johnson] asking for their intercession on [the relative]’s behalf, knew that [City employee] lived in the property (either as a tenant or as a “caregiver”) and knew, or should have known, that [office] employees, like [City employee], were prohibited from participating in the [Program]. Moreover, [City employee] knew the City’s own rules for eligibility, as well as [the government]’s rules. [City employee] knew that [City employee] was a resident of [the relative]’s household and that if [City employee]’s own income were included as part of that household, [Doe] would not have qualified for [Program] assistance.

Knowing of [the relative]’s applications, but still allowing them to be submitted (and in fact aiding in [the relative]’s submission of them), [City employee] placed [City employee]’s own, and [the relative]’s, monetary interests ahead of the City’s interest in providing [Program assistance] to truly qualified applicants. While [Doe] qualified on [Doe]’s own for [the Program], the application itself omitted [City employee] as a household member thereby excluding [City employee]’s City income from consideration. We can draw the reasonable inference that [City employee] knew that if [City employee]’s own income had been disclosed, [the relative] would not have been eligible to receive this assistance. Put another way, [City employee] derived a collateral benefit of over \$[x] that [City employee] would not have otherwise been entitled to receive, because [City employee] knew that [City employee] was disqualified from participating in the [Program].

Based on the totality of these facts, we conclude that [City employee] violated [City employee]’s fiduciary duty to the City. [City employee] misused [the] knowledge of City and [government] rules, and enabled [the relative] to submit an application to the City with materially incomplete information. [City employee]’s failure to prevent this application from being submitted with incomplete and inaccurate information, and [the] knowledge that [City employee] would have been ineligible to participate in the program, constituted a misuse of [City employee]’s City position in order to secure a private benefit for [the relative] and [City employee], and thus [City employee] breached [City employee]’s fiduciary duty to the City in violation of the Ordinance.

### 3. Potential Violations of Other Rules and Regulations

The Board of Ethics has the authority to interpret and administer only the provisions of the Ethics Ordinance. From the record before us, it appears that [City employee]’s actions and omissions may constitute violations of other City rules and regulations, including Personnel Rule XVIII, Section 1, subsection 6, “Causes for Disciplinary Action.” That Rule provides that “*Failing to disclose any information requested or providing a false or misleading answer to any*

*question in any application, questionnaire, information form or other document provided by the City” shall be cause for discipline.*

Further, we point out that there may be an issue as to whether [City employee] was in fact part of the “household” or a “caregiver/live-in aide,” as defined in 24 CFR 570.3 and 24 CFR 5.403. That, however, appears to be a question requiring interpretation of [the government]’s regulations. Our review of the record indicates that in 2011, [City employee] was a part of the household where [City employee] has resided for the last [Redacted], perhaps longer. Because these matters are beyond the Board’s purview, we advise you to consult with the Law Department to ensure that the City’s rights are protected.

#### **IV. DETERMINATION AND RECOMMENDATIONS**

On the facts as presented, the Board determines that, by interceding on behalf of [the relative]’s application for [Program] assistance with [Johnson], and enabling [the relative]’s applications to be submitted, with materially incomplete and inaccurate information, for a program over which [City employee] had oversight, and from which [City employee] was prohibited from participating, [City employee] violated two Ordinance provisions: (1) Representation of Other Persons, §2-156-090(a); and (ii) Fiduciary Duty, §2-156-020.

Under the version of the Ordinance in effect when these violations were committed, the penalty provisions for these violations stated, “Any employee found to have violated any of the provision of this chapter ... shall be subject to employment sanctions, including discharge, in accordance with procedures under which the employee may otherwise be disciplined.” See §2-156-410(a).

Accordingly, the Board recommends that: (i) [The office] discharge [City employee]; (ii) [The office] consult with the Law Department to ensure that the City’s rights and obligations under [the government]’s rules are preserved and fulfilled, so that the City does not suffer any penalties that may apply as a result of [City employee]’s conduct; (iii) [The office] confer with the Law Department to discuss whether there may have been criminal fraud, and whether further legal action is appropriate; (iv) [The office], together with the [Department] and Law Department, develop protocols so that applications filed by City employees or their relatives under this and other relevant programs be identified and handled appropriately before they are approved; and (v) That [the office] and the Law Department pursue an action for monetary damages for violation of the Ethics Ordinance, as provided in § 2-156-440.<sup>6</sup> See Case No. 12065.A.

The Board’s opinion is directed solely towards the conduct of [City employee]. The Board has not considered the economic needs or conditions of [Doe]. Moreover, the Board’s conclusions and 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 information provided. If the information is incorrect or incomplete, please notify the Board immediately, as any change may alter our conclusions or determinations.

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<sup>6</sup> This section, entitled “Other Remedies,” provides “Nothing in this chapter shall preclude the City from maintaining an action for an accounting for any pecuniary benefit received by any person in violation of this chapter or other law, or to recover damages for violation of this chapter. (Prior Code §26.2-44) As of November 1, 2012, it is renumbered as §2-156-485.



**V. RELIANCE**

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

Sincerely,

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Stephen W. Beard  
Chair, Board of Ethics