CITY OF CHICAGO

BOARD OF ETHICS

April 16, 2024

Re: Cases 23060.EO, 23061.EO, 23062.EO, 23064.EO; Mayoral Executive Order 2011-2

At its April 15, 2024 meeting, the Board considered arguments raised by counsel for the four respondents, all registered lobbyists, in the above-captioned cases, and voted unanimously to dismiss these cases for the reasons explained below.

The cases involve registered lobbyists who made political contributions (both direct and in-kind) to Friends of Brandon Johnson, the Mayor's official candidate committee. Mayoral Executive Order 2011-2, signed by then Mayor Rahm Emanuel on May 11, 2011, his first day in office, provides that "[i]t shall be a violation of this Order for any Lobbyist to make a Contribution of any amount to the Mayor or to his Political Fundraising Committee." It further provides that "[t]he Board of Ethics shall not accept a lobbyist registration statement from any person who it finds to have violated this Order." Accordingly, the Board commenced enforcement actions with respect to each of these lobbyists, duly notifying them of the Board's probable cause finding, and affording them an opportunity to respond. Arguments were made that: (i) an Executive Order issued by a previous Mayor no longer remains in force; and (ii) the Board of Ethics has no authority to enforce this particular Executive Order.

At its February 2024 meeting, the Board, recognizing the significance of these issue not only for these four cases, but as to the continuing validity of all non-rescinded Executive Orders after the Mayor who issued them leaves office, voted to request a formal opinion of counsel through the City's Law Department addressing: i) whether Executive Order 2011-2 is still in force, given that it was issued by a former Mayor; and ii) if it is still in force, whether the Board of Ethics has the authority to enforce it. On April 5, in response, the Board received the attached opinion from the Jones Day law firm. The Board's request and the opinion are attached. The opinion concludes that this Executive Order remains in force, but that its selection by the Mayor of the Board of Ethics as the means of enforcement exceeds the limits of the Mayor's and the Board's authority under the express provisions of the Governmental Ethics Ordinance.

Accordingly, the Board voted 5-0 to dismiss these matters, and to formally recommend to Mayor Johnson and the City Council that the substantive prohibitions of this Executive Order be codified into law so that the Board can enforce it, and the Office of Inspector General could investigate potential violations of it, if necessary.

As a matter of transparency, and because of the importance of the Executive Order process in City government, the Board voted 5-0 to make the opinion of counsel public.

CITY OF CHICAGO

BOARD OF ETHICS

CONFIDENTIAL

January 24, 2024

Via Email

Mary Richardson-Lowry
Corporation Counsel
City of Chicago Department of Law
121 N. LaSalle St., Room 600
Chicago, IL 60602

Re: Request for Legal Opinion

Dear Corporation Counsel Richardson-Lowry:

The Board of Ethics ("Board") has before it several cases involving lobbyists registered with the City who appear to have violated Mayoral Executive Order ("EO") 2011-2[1] by making campaign contributions to Brandon Johnson or his authorized political fundraising committee, Friends of Brandon Johnson.[2] Part 3 of that EO provides that the Board "shall not accept a lobbyist registration statement from any person who it finds to have violated this Order."

Historically, the Board has been consulted about this Executive Order, and has advised many lobbyists about the prohibition contained in it. However, the Board has not had occasion to consider any case that presents an apparent violation of EO 2011-2 until now. At its monthly meeting on Monday, the Board voted unanimously to request a legal opinion through your office that addresses whether this or other EOs remain in effect once the Mayor issuing them is no longer in office, and, if so, whether the Board has authority to enforce Part 3 of EO 2011-2. This question poses interesting and complex issues which require expert analysis and legal consideration.

The Board recognizes that, under §2-60-020 of the Municipal Code, the Corporation Counsel has the authority to advise and represent all City departments; however, as the issue and circumstances here involve an EO's

[1] We attach a copy of the Order, and it is posted on the City Clerk's website: https://www.chicityclerk.com/legislation-records/journals-and-reports/executive-orders?q=legislation-records/journals-and-reports/executive-orders&page=2

[2] Please note that Friends of Brandon Johnson has already made refunds of some of these contributions to the lobbyists who made the contributions.

applicability to an independent agency, we ask that you appoint Special Assistant Corporation Counsel to issue the requested opinion, so as to not to place your office in an awkward position.

The Board respectfully requests that an opinion be prepared by April 5, 2024 so that it may make determinations in the cases before it at the Board's April meeting. We are available to assist in whatever manner you think appropriate.

Thank you in advance for your assistance. Please let us know as soon as possible how this request will be handled.

Should you have any questions about this matter, or if we can assist it any way, please contact Board of Ethics staff at 312-744-9660 or Steve.Berlin@CityofChicago.org.

Very truly yours,

William F. Conlon, Chair

Attachment

OFFICE OF THE MAYOR
CITY OF CHICAGO

RAHM EMANUEL
MAYOR

Executive Order No. 2011-2

WHEREAS, the people of the City of Chicago are entitled to have absolute faith in the integrity of governmental decisions and it is crucial that individuals who are elected to public office have the trust, respect and confidence of the citizenry; and

WHEREAS, in order to promote public confidence in government and its decision-making, it is necessary that public officials adhere to the highest ethical standards and avoid transactions and circumstances that may compromise or appear to compromise the independence of any City decision; and

WHEREAS, it is essential that the public have confidence that City government and its policies are driven by the City's best interests; and

WHEREAS, current state statutes and local ordinances governing political contributions prohibit anonymous political contributions or contributions in the names of other persons and prohibit anyone from compelling, coercing or intimidating another into making political contributions; and

WHEREAS, the provisions of this Order represent a message to every Chicagoan that the City's Mayor is committed to a city administration based on the highest ethical standards; and

WHEREAS, by this Order, an unmistakable message about ethical conduct will be conveyed; now, therefore,

I, RAHM EMANUEL, Mayor of the City of Chicago, do hereby order as follows:

1. **Definitions**

"Contribution" means a "political contribution" as defined in Section 2-156-010 of the Municipal Code of Chicago.

"Lobbyist" means a person who is registered as a lobbyist with the Board of Ethics pursuant to Chapter 2-156 of The Municipal Code of Chicago.

"Political Fundraising Committee" means a "political fundraising committee" as defined in Section 2-156-010 of the Municipal Code of Chicago.

2. Violations

It shall be a violation of this Order for any Lobbyist to make a Contribution of any amount to the Mayor or to his Political Fundraising Committee.

3. Enforcement

The Board of Ethics shall not accept a lobbyist registration statement from any person who it finds to have violated this Order.

4. General Provisions

a. If any provision of this Order or the application of such provision is held to be invalid, the remainder of this Order and other dissimilar applications of such provision shall not be affected.

b. Nothing in this Order shall be construed to impair or otherwise affect authority granted by law to a department, agency, board or the head thereof

c. This Order shall be implemented consistent with applicable law.

d. This Order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the City of Chicago, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

5. Effective Date

This Order shall take effect upon its execution and filing with the City Clerk.

Mayor

Received and filed May 16, 2011

City Clerk

JONES DAY

110 NORTH WACKER DRIVE • SUITE 4800 • CHICAGO, ILLINOIS 60606

TELEPHONE: +1.312.782.3939 • JONESDAY.COM

DIRECT NUMBER: +1.312.269.4303

BBIESENTHAL@JONESDAY.COM

April 5, 2024 PRIVILEGED & CONFIDENTIAL
ATTORNEY WORK PRODUCT

City of Chicago Board of Ethics
c/o William F. Conlon, Chair
740 North Sedgwick Street, 5th Floor
Chicago, Illinois 60654

Re: EO 2011-2

Dear Board Members:

I understand that the Board of Ethics ("Board") has several cases before it involving lobbyists registered with the City of Chicago ("City") who appear to have violated mayoral Executive Order ("EO") 2011-2 by making campaign contributions to Mayor Brandon Johnson and/or his authorized political fundraising committee, Friends of Brandon Johnson. You sought guidance as to "whether this or other EOs remain in effect once the Mayor issuing them is no longer in office, and, if so, whether the Board has authority to enforce Part 3 of EO 2011-2." Letter from W. Conlon to M. Richardson-Lowry dated January 24, 2024 ("Letter").

Absent rescission, executive orders remain in effect into and throughout subsequent administrations. However, longstanding principles of administrative law suggest that the Board lacks authority to enforce Part 3 of EO 2011-2. I express no view as to the likelihood that EO 2011-2 withstands judicial scrutiny on other grounds, nor do I recommend that the Board take any specific action in these or any future cases. I note, however, that the Board may "recommend such legislative action as it may deem appropriate to effect the policy of [the Ordinance]." Chi. Mun. Code § 2-156-380(f), and that codification of EO 2011-2's prohibition on certain political contributions would enable the Board to enforce it. *See infra* Section II.

I. Executive Orders Survive the Departure of the Issuing Mayor

EO 2011-12 remains in force despite the two intervening mayoral transitions. The Board can infer this from the consensus treatment of executive orders across the levels and branches of government, along with the lack of anything to the contrary in the state Constitution, state law, or City ordinances. None of these sources specifically addresses the authority or permanence of mayoral executive orders. Likewise, I found no discussion by a court in this State of whether mayoral or gubernatorial executive orders automatically expire. But in practice, the uniform treatment of executive orders and background legal principles strongly suggest that executive orders remain in force until rescinded by the issuing authority or overruled by statute.

A. Mayoral Authority to Issue Executive Orders Is Not Explicitly Defined or Limited

While no provision of the Illinois Constitution, Illinois law, or the Chicago Municipal Code explicitly grants (or limits) mayoral authority to issue executive orders as a category, their legitimacy has never seriously been questioned. But this silence does not imply that mayoral executive orders are unlawful: they are similarly situated to gubernatorial and presidential executive orders, which likewise often lack an explicit source of authority. *See, e.g.*, John C. Duncan, Jr. *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 Vt. L. Rev. 333, 333 (2010) ("There is no statutory authority for the federal executive order or any other source that describes its legal effect, as such, there is no formal definition."). Executive orders are merely a formal way for the executive to exercise pre-existing authority. As a general rule, so long as executive orders do not violate other statutory or constitutional law, they are permissible. *See, e.g.*, *Vill. of Orland Park v. Pritzker*, 475 F. Supp. 3d 866, 888 (N.D. Ill. 2020) (upholding the use of gubernatorial orders issued pursuant to the governor's "sweeping powers in the event a disaster strikes all or part of Illinois" because the orders did not violate federal or state law and arguably fell within the scope of the governor's emergency powers); *see also State ex Raoul v. Hitachi, Ltd.*, 192 N.E.3d 1, 8 ("[A] court may not overturn discretionary executive action unless it 'contravenes a statute or constitution (or does not comport with the relevant enabling statute)'" (citation omitted)).

The mayor's authority to issue executive orders can likewise fairly be inferred from background legal principles. The Illinois Constitution grants a "home rule" city like Chicago authority to "exercise any power and perform any function pertaining to its government and affairs" except as forbidden elsewhere in the Constitution. Ill. Const. 1970, art. VII § 6(a). It may "exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." *Id.* § 6(i). These "[p]owers and functions … shall be construed liberally." *Id.* § 6(m). Moreover, the mayor is authorized by state law to "take care that the laws and ordinances are faithfully executed," 65 ILCS 5/3.1-35-5, and the City Municipal Code styles him "the chief executive officer of the city," with "the authority to act … in the enforcement of any ordinance of the city" except when a more specific ordinance provides otherwise. Chi. Mun. Code § 2-4-030. Based on available records, the mayor's authority to act by executive order has gone largely unquestioned since the practice started, with records available as early as 1978. *Cf.* Office of the City Clerk, *Executive Orders*, (2024), *last accessed* Mar. 26, 2024, https://www.chicityclerk.com/index.php/legislation-records/journals-and-reports/executive-orders?page=5. While the Illinois legislature has placed temporal limitations on other executive powers, *see, e.g.*, 20 ILCS 3305/7, no such express limitation exists in local, state, or federal law with respect to executive orders generally.

B. Courts Apply Executive Orders Issued By Previous Mayors

Despite statutory and constitutional silence on the issue, longstanding treatment of executive orders at the local, state, and federal levels by courts and executive officials confirm that they generally (absent direct law to the contrary) survive the departure of the issuing executive. Nothing else could explain the practice of succeeding executives' affirmatively *rescinding* executive orders issued by predecessors. *See, e.g.*, *Dep't of Cent. Mgmt. Servs. v. Ill. State Lab. Rels. Bd.*, 619 N.E. 2d 239, 241–42 (Ill. App. Ct. 1993) (explaining that a governor "continued" a previous governor's executive order by declining to revoke it); Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 25, 2021) (rescinding various executive orders issued by President Trump). Likewise, nothing else explains the practice of issuing last-minute executive orders before a change in leadership. *See* Exec. Order No. 13978, 86 Fed. Reg. 6809 (Jan. 22, 2021) (President Trump executive order issued two days before President Biden's inauguration); Chicago Mayoral EO 2023-9 (issued by Mayor Lightfoot days before Mayor Johnson's inauguration). Whenever the question has come up, courts in the state have uniformly assumed, without comment, that the departure of an executive official does not affect executive orders' validity. *See, e.g.*, *Aldridge v. Boys*, 424 N.E.2d 886 (Ill. App. Ct. 1981) (enforcing an executive order from previous governor); *O'Sullivan v. Bd. of Comm'rs of Cook Cnty.*, 687 N.E.2d 1103 (Ill. App. Ct. 1997) (applying Cook County executive order without finding it was issued by current executive); *Health All. Med. Plans, Inc. v. Dep't of Healthcare & Fam. Servs.*, 957 N.E.2d 447 (discussing previous governor's executive order as if it had present effect).[1] The permanence of executive orders also accords with the fundamental "bright-line rule that a statute has effect until it is repealed." *See* Antonin Scalia & Bryan A. Garner, *Reading Law* § 57, at 336 (2012).

Given this longstanding consensus, I see no reason to doubt that EO 2011-2 is as enforceable today as it was when issued.

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[1] Courts outside Illinois, meanwhile, have expressly addressed the question and held that executive orders remain in force through changes in administrations. *See Alexander v. State Adjutant Gen.'s Off.*, 858 P.2d 1222, 1226 (Kan. Ct. App. 1993) ("Executive orders have the force and effect of law, and are effective beyond the expiration of the term of the governor who issued it." (cleaned up)); *Baxter v. State*, 214 S.E.2d 578, 582 (Ga. Ct. App. 1975) ("The Executive Order issued pursuant to this statutory provision, until rescinded or superseded, is effective beyond the expiration of the term of the Governor who issued it. The executive power is one of continuing effect never ending, and unbroken by succession."); *Karen E. v. Kijakazi*, No. 21-cv-3015, 2022 WL 17548642, at *12 (N.D. Iowa Sep. 15, 2022) ("Executive orders, another form of presidential directive, remain in effect through different presidencies (until they are replaced, modified, or revoked or they lapse by their terms).").

II. The Board May Not Properly Enforce Part 3 of EO 2011-2.

Since the Board "is a statutory creature, its powers are dependent thereon, and it must find within the statute the authority which it claims." *City of Chicago v. Fair Emp. Pracs. Comm'n*, 357 N.E.2d 1154, 1155 (Ill. 1976). As an administrative agency, the Board "exercises purely statutory powers and possess[es] no inherent or common law powers." *Nolan v. Hillard*, 722 N.E.2d 736, 747 (Ill. App. Ct. 1999). The Board's "powers are limited to those granted by an express provision of the law it administers, or found by fair implication or intendment from the agency's express authority to be incident to accomplishing the objectives for which the agency was created." *Id.* Its "express grant[s] of power … include[] the authority to do all that is reasonably necessary to execute that power[s] or to perform the dut[ies] specifically conferred." *O'Grady v. Cook Cnty. Sheriff's Merit Bd.*, 632 N.E.2d 87, 91 (Ill. App. Ct. 1994). It "cannot extend its statutory authority by enacting administrative rules." *Id.* As such, the Board's ability to refuse lobbyist registration statements submitted by individuals found to have violated EO 2011-2 turns on whether such action is reasonably necessary to execute one of the Board's enumerated duties. *See, e.g.*, *id.*

Through the Governmental Ethics Ordinance ("Ordinance"), the City Council both created the Board, Chi. Mun. Code § 2-156-310(a), and limited its authority: the Board "shall have" 19 enumerated powers and duties "[i]n addition to other powers and duties specifically mentioned in [the Ordinance]." *See id.* § 2-156-380(a)–(o). The Board cannot, "by fair implication or intendment" from the Board's express authority, infer the power to refuse to accept lobbyist registration statements from certain lobbyists who make certain political contributions.

On the one hand, the City has broad authority to issue ethics rules that govern lobbyists. As the City's "corporate authorities," the mayor and City Council share a plenary authority to "make all rules and regulations proper or necessary to carry into effect the powers granted to municipalities, with such fines and penalties as may be deemed proper." 65 ILCS 5/1-2-1; *see also Smith v. Daley*, No. 94-C-920, 1994 WL 325749, at *3 (N.D. Ill. July 5, 1994) (citing 65 ILCS 5/1-2-1(2)). One such power (extended to municipalities with populations over 500,000) is that to regulate lobbyist activity in a manner inconsistent with state ethics laws. *See* 25 ILCS 170/11.2. And Mayor Emanuel's issuance of EO 2011-2 "carr[ied] into effect" the City's statutory authority to regulate lobbyist activity, *see* 65 ILCS 5/1-2-1, comporting with his statutory mandate to "take care that … laws and ordinances are faithfully executed." 65 ILCS 5/3.1-35-5.

But because the Board is not a "corporate authority," I have to infer its power from the Ordinance, and I see no adequate legislative directive from which the Board could infer the unenumerated power to enforce conditions on lobbying registrations that are not contained therein.

Unlike other municipal entities that may have broader rulemaking power, *cf. Hillard*, 722 N.E.2d at 748 ("The Municipal Code therefore contemplates that the [Chicago Police] Department would develop rules that, with a certain degree of detail, touch upon these matters."), the Board's rulemaking authority appears limited to those activities that relate to merits hearings. *See* Chi. Mun. Code § 2-156-380(h). Where it desires "[t]o effect the policy of [the Ordinance]," the Board may "recommend such legislative action as it may deem appropriate to effect the policy of [the Ordinance]." *Id.* § 2-156-380(h). Similarly, "to ensure compliance with any federal, state or local law or regulation," the Board may "recommend policies, procedures and practices." *See id.* § 2-156-380(o). With respect to lobbying registrations, the Board is only directly authorized to refuse to accept them while fines for certain violations of the Ordinance remain outstanding. *See id.* § 2-156-245 (failure to register); *id.* § 2-156-270 (failure to file reports). EO 2011-2 may further the policies underlying the Ordinance, but the Board's enforcement thereof would exceed its statutory mandate—and "[w]here an administrative agency acts outside its specific statutory authority, … it acts without jurisdiction." *Daniels v. Indus. Comm'n*, 775 N.E.2d 936, 940 (Ill. 2002), *as modified on denial of reh'g* (Aug. 29, 2002).[2]

Nor can a mayor unilaterally direct the Board, by executive order, to exceed the scope of its statutory authority. To be sure, the City "need not follow the pattern of separated powers in the national Constitution." *Ciseneroz v. City of Chicago*, No. 21-CV-5818, 2021 WL 5630778, at *4 (N.D. Ill. Dec. 1, 2021) (quoting *Auriemma v. Rice*, 957 F.2d 397, 399 (7th Cir. 1992)). But here, "where a statutory scheme delineates clear spheres of activity" for different municipal actors, the mayor cannot commandeer the Board to carry out his executive order. *Cf. City Council of Springfield v. Mayor of Springfield*, 181 N.E.3d 496, 503 (Mass. 2022). The Board is an independent agency whose members do not serve at the mayor's pleasure. *See* Chi. Mun. Code § 2-156-340. It must enforce the Ordinance (imposing certain prerequisites on lobbyist registration), which the mayor cannot unilaterally amend by executive order. *See City of Chicago v. Roman*, 705 N.E.2d 81, 86 (Ill. 1998) ("A municipal ordinance has the force of law over the community in which it is adopted and, within the corporate limits, operates as effectively as a law

[2] While the Board has long exercised a general authority to oversee and control lobbyist registrations, it has always done so in a manner incident to accomplishing its enumerated powers to require certain *information* from lobbyists. *See, e.g.*, Case No. 87063.A (announcing modified policy with respect to associate attorneys); Case No. 01033.A (determining what information registered lobbyists must provide about written and oral retention agreements); Case No. 10041.36-LOB (observing that the Board "has first and foremost always attempted, in a delinquent lobbyist matter, to obtain the required filings from the lobbyist").

passed by the legislature."); *Ad-Ex, Inc. v. City of Chicago*, 565 N.E.2d 669, 673 (Ill. App. Ct. 1990) ("A municipality must follow its own valid ordinances.").[3]

III. Conclusion

I conclude that EO 2011-2 remains in force as issued but that its selection of the Board as the means of enforcement for Part 3 exceeds the limits of the mayor's, and the Board's, authority.

Very truly yours,

Bethany K. Biesenthal

Bethany K. Biesenthal

cc: Mary Richardson-Lowry, Corporation Counsel
John Hendricks, Managing Deputy Corporation Counsel

[3] To permit the mayor to unilaterally alter or add to the Ordinance (effectively amending it) could undermine the Board's independence, contravening the policies and purposes undergirding its enactment.