

**CITY OF CHICAGO**

**BOARD OF ETHICS**

**740 North Sedgwick Street, Suite 500**

**Chicago, Illinois 60654-8488**

**CONFIDENTIAL**

[date] 2016

Chicago, Illinois 606

Re: Case No. 16015.Q

Dear Mr. K:

You requested guidance on whether any provisions in the City’s Governmental Ethics Ordinance (“Ethics Ordinance”) address the information and facts that you provided, stated below. After we discussed your request, we determined that you sought direction on two separate, but related, matters, and we address both.

I. First, you would like to know whether the actions of an employee of the City’s Department of D (“D”), as described herein, violate any provisions of the Ethics Ordinance, as you are considering possible disciplinary action against the employee.

**FACTS.** First, we stress that the Board of Ethics does not have the authority to conduct investigations of potential violations of the Ethics Ordinance, or of any other provision of the Municipal Code. Hence, we have performed no independent verification of the information or facts you have provided us. Our conclusions and advice are based on our application of past Board cases to the information and facts you provided, and our belief as to how the Board of Ethics would adjudicate this matter, if a full investigation were completed by the Office of the Inspector General, and the facts you provided substantiated by such investigation.

To summarize the facts you provided, the employee is a [title] , whose duties include, in part, processing applications, and performing assessments and court advocacy, and making referrals. You said that she processes applications for emergency assistance to help victims flee from [social problem] . You explained that this work is performed under a federal program with specific qualifying criteria for its applicants. Once a D employee, like the employee you ask about, processes an application, he or she forwards it to a D manager for approval.

The employee’s [immediate family member] applied for this type of service through one of your D centers (“Center A”) - a different center from where the employee [relative] works (she works at “Center B”). However, the employee [relative] contacted the Center A advocate handling the matter, asked her to help her [immediate family member], and sent her a copy of her [immediate family member’s] application folder (you are currently unaware of how the employee [relative] obtained a copy of the folder, or discovered the advocate handling her [immediate family member’s] matter). You said that the employee [relative] instructed that advocate not to send the emergency funds check to her [immediate family member’s] just yet, because her [immediate family member] was moving. You said that this Center A advocate later recommended approval and submitted it to her D manager at Center A, who denied approval because the [immediate family member] did not meet the program’s criteria. Because of the circumstances, the Center A manager forwarded the application to you, and you then forwarded it to Center C for an independent review. A manager at Center C also denied the application. The [immediate family member’s] subsequently sent a letter to D ’s [high-ranking officials] , which stated in part, that her [relative] works at D and that they denied her application because D management does not like her [relative] and that your [supervisor] then instructed you to approve the application on the basis that the applicant was a victim of [social problem] . However, you declined to because the applicant had already been determined “not qualified” for this service by two other managers, and being a victim is not the only criteria for approval. Your [supervisor] indicated that he would handle the matter directly.

**APPLICABLE LAW.** There are several provisions in the Ethics Ordinance that the actions described above may violate.

1. “Fiduciary Duty.” Section 2-156-020 states:

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

This provision prohibits a City employee from placing her personal private interests ahead of the City’s interests. This provision obligates City employees to “use their City position responsibly and in the best interest of the public.” See Case Nos. 09034.A, 12072.A and 92014.A. The Board has held that this “provision … prohibits a City employee from … using their City positions or City resources to obtain a private benefit. To use City resources, such as internal departmental records--to which you have access only by virtue of your City position … violates the fiduciary duty provision.” Case Nos. 92014.A, 12060.I, and, 12072.A. The Board has also held 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.” (*See* Case No. 12072.A, in which a City employee was terminated after contacting other City employees to intercede on her mother’s behalf regarding an application for services from the same City Department where she worked, and which action was not performed in the course of her City duties.)

If the facts occurred as described, we believe that our Board would conclude that the employee [relative] placed her private interest (that of helping her [immediate family member] obtain this service), ahead of her duty to the City to ensure that all applicants meet the established federal criteria.

2.   “City-Owned Property.”  Section 2-156-060 states:

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

This provision prohibits a City employee from using City time or City-owned property or resources for any unauthorized purpose. This includes, but is not limited to, accessing department records, making telephone calls, or writing emails while working on City time or using City property without authorization. We do not have sufficient information available to us to conclude that the employee [relative] may have been violated this provision. However, if the employee [relative] used City phones, email, databases or her work time (if she was not on break or lunch) to contact the Center A advocate regarding her [immediate family member’s] application, then we believe that our Board would conclude that her actions would constitute a violation of this provision.

3.        “Confidential Information.” Section 2-156-070(a) states, in relevant part:

*Except as otherwise provided in subsection (b) or (c) of this section, no current or former official or employee, including any current or former official or employee of the board or the inspector general, shall use or disclose, other than in the performance of his official duties and responsibilities, or as may be required by law, confidential information or any non-public information…*.

Our Board has determined that this provision prohibits a City employee from accessing and using business records that *would not* be available through a Freedom of Information (“FOIA”) request for her private interest. The Board has also determined that this section also prohibits a City employee from accessing and using information that *would* be available through the FOIA, but for which the employee did not submit a formal FOIA request. *See* Case Nos. 92014.A and 12060.I.

Assuming that these applications contain sensitive and personal information that is not subject to a FOIA request, and regardless of whether the employee is also the applicant’s [relative], it is confidential information within the meaning of the FOIA and the Ethics Ordinance. See 5 ILCS 140/1, *et seq.* If the employee [relative]did not access this information in the course of her regular job duties, then we believe that our Board would conclude that she violated this section of the Ethics Ordinance.

4. “Representation of Other Persons.”  Section 2-156-090(a) states, in relevant part:

*No elected official or employee may represent, or derive any income or compensation from 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 a City employee from representing a third party (such as a [immediate family member]) in a City transaction, unless the employee is performing the duties of her employment (or, as not relevant here, representing a relative in the same way that any citizen might). *See* Case No. 93007.A. If the facts as you describe them occurred, when the employee [relative]called the Center A advocate to help her [immediate family member], and to also tell her how to handle the funds (which had not been approved), she “represented” her [immediate family member] (a third party) in a *formal transaction before a City agency* (her own department) whose action is of a nonministerial nature: these applications are not just “rubber-stamped,” there are criteria that D personnel must consider and be weighed (in this case, by one of her own coworkers) before a determination is made. Moreover, this employee [relative] appears to have gone “out of her way” to assist her [immediate family member], which does not appear to have been in the course of her official duties as a D advocate. This conduct would, we believe, be held to constitute a violation of the Ethics Ordinance.

5. Aspirational “Code of Conduct.” Section 2-156-005 states, in relevant part:

(a) The code of conduct set forth in this section shall be aspirational and shall guide the conduct of every official and employee of the city. All officials and employees of the city shall:

(1) remember that they are public servants who must place loyalty to the federal and Illinois constitutions, laws, and ethical principles above their private gain or interest.

(5) act impartially in the performance of their duties, so that no private organization or individual is given preferential treatment.

(7) never use any nonpublic information obtained through the performance of city work for private gain.

(8) engage in no business or financial transaction with any individual, organization or business that is inconsistent with the performance of their city duties.

(9) protect and conserve city property and resources, and use city property and resources only for authorized purposes or activities.

(b) At the time of employment …, every city … employee shall sign … a commitment to follow the city’s code of conduct set forth in this section.

Although this last Ethics Ordinance section is *aspirational*, and does not create any enforceable substantive or procedural right or benefit, all City employees and officials commit to adhering to the Code of Conduct at the time of employment. There appear to be potential breaches of the aspirational code sections cited above.

6. “Employment of Relatives or domestic partners.” Section 2-156-130(b) states, in part:

*No official or employee shall exercise contract management authority where any relative or the domestic partner of the official or employee is employed by or has contracts with persons doing city work over which the city official or employee has or exercises contract management authority*.

For the point of thoroughness and clarification, this provision prohibits a City employee from exercising “contract management authority,” (a term that is defined the Ethics Ordinance) with respect to any contract with a person that employs or contracts with the employee’s relative. Nothing in the information you provided leads us to believe that this employee [relative] exercised contract management authority with respect to her [immediate family member’s] application. Thus, we conclude, this section does not apply to these circumstances.

The above cites are from the Ethics Ordinance. However, based on our discussion, we are also providing you with general information on the City’s Personnel Rules, as this employee’s actions may well constitute one or more violations of these Rules. Please note, though, that the Board of Ethics has the authority to interpret and administer only the provisions of the Ethics Ordinance, and therefore, this is intended for informational purposes only.

**POTENTIAL VIOLATIONS OF OTHER CITY RULES AND REGULATIONS**

**Personnel Rules XVIII, Section 1, subsections:** Disciplinary Actions and Procedures for Career Service Employees

Section 1 - Causes for Disciplinary Action

The City of Chicago has an interest in the promotion of order and general welfare of all employees, as well as the general public. The City of Chicago, a public employer, requires that its employees perform their duties in a manner which furthers the efficiency and best interests of the City, and which results in the highest level of public trust and confidence in municipal government.

Criminal or Improper Conduct

(15): Engaging in any act or conduct prohibited by the Municipal Code of the City of Chicago, the Illinois Compiled Statutes, applicable laws of other states, or federal statutes.

(17): Misappropriating any funds of the City or any other public or private organization.

(19): Theft or unauthorized possession of City of Chicago or other public property, or use of such property for unauthorized purposes; having other City employees perform services or directing other City employees to perform services for unauthorized purposes or accepting the benefits of such performance.

(27): Giving preferential treatment in the course of employment to any organization or person unless authorized by law.

Violations of City Policy and Rules

(44): Violation of confidentiality of personnel records of City employees or other municipal records.

(45): Any act or conduct in violation of, or failing to perform any duty required by, the Ethics Ordinance, Chapter 2-156 of the Municipal Code of Chicago, as amended.

(48): Violating any departmental regulations, rules or procedures.

(50): Conduct unbecoming an officer or public employee.

II. The second, and related issue, is that you would like to establish a standard operating procedure and policy for your division to address potential conflicts of interest between an employee and his or her relatives, friends, or acquaintances that apply for your department’s services. You wish to restrict D employees from handling, advocating for, or in any way getting involved in those matters.

Each City department may create rules that are stricter than those in the Ethics Ordinance. Should you draft a new stricter policy, we can review it to ensure there are no inconsistencies with the Ethics Ordinance.

*For guidance purposes only*, and in addition to the Ethics Ordinance provisions cited above, I add the following:

From our definitions section, 2-156-010:

-010(f-1) “Confidential information” *means any information that is exempt from disclosure under the Illinois Freedom of Information Act*, codified at 5 ILCS 140/1, et seq.

-010(g-1) “Covered relative” means the spouse or domestic partner of any … employee, or the immediate family, and relatives residing in the same residence with the … employee.

-010(j) “Employee” means an individual employed by the City of Chicago, whether part-time or full-time.

-010(w) “Relative” means a person who is related to an … employee as spouse or as any of the following, whether by blood or by adoption: parent, child, brother or sister, aunt or uncle, niece or nephew, grandparent, grandchild, “in-laws,” stepparents, stepson/daughter/brother/sister, half-brother/sister.

 Note this section does not include “cousin,” but there is nothing in the Ethics Ordinance to preclude you from adding it to your own definition. There is no definition for friend or acquaintance in the Ethics Ordinance.

The Ethics Ordinance does have a provision entitled, “Conflicts of Interest; Appearance of Impropriety,” but for this provision to apply, the employee must have either a “financial interest” in the matter, or derive or expect to derive compensation from the matter. This provision, §2-156-080(a), 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 a financial interest distinguishable from that of the general public, or from which he has derived any income or compensation during the preceding twelve months or from which he reasonably expects to derive any income or compensation in the following twelve months.*

We would expect that D employees, including this employee [relative], neither have a financial interest in nor would receive or expect any compensation from matters, applications, or other D business they consider. Nonetheless, the underlying rationale of this provision could easily be extended to City employees who might, in the normal course of business, be presented with a matter involving a “covered relative” of theirs. Such a potential “conflict of interest” is curable by ensuring that the City employee does not participate in, influence, consider, or decide the matter in any way.

Therefore, we recommend that your department have a policy that makes it incumbent on any D employee, who has discovered that a covered relative of theirs has a matter pending before the department, to report it to his or her manager immediately. We further recommend that the manager (and others, as applicable) then ensure that the employee is completely screened off from any formal or informal communication, consideration, or decision regarding the covered relative’s matter, by assigning the matter to another employee, and instructing them that any discussion of the matter with the applicable employee relative is prohibited. You may tailor the language to your needs for the purpose of an internal violation.

**ADVICE.**

I. Although you and D are currently handling this matter internally, we strongly advise you, consistent with §2-156-018(a) of the Ethics Ordinance, to report the matter to the Inspector General’s office for possible investigation. That office may conclude that an examination is not warranted, or they may decide to investigate the matter, or to assist in in some other way. Frankly, however, without having knowledge of all of the facts, we are concerned about your statement that you were instructed to approve the [immediate family member’s] application after two D managers had already disapproved it. Moreover, if an employee faces potential discipline for violations of the Ethics Ordinance, the matter should be thoroughly investigated before any sanctions are imposed.

If you do file a complaint with the Inspector General’s Office, know that there is a Whistleblower Protection provision in the Ethics Ordinance, §2-156-019. Although the Inspector General’s office is to keep your identity confidential, your Department may, for example, speculate that you were the complainant. The Whistleblower Protection provision prohibits them from taking “any retaliatory action against” you for filing a complaint, if all the conditions set forth in that provision are met. We advise you to discuss this provision with representative from the Inspector General’s Office, and/or with your own private counsel.

II. Additionally, we would be happy to assist in the drafting of a “Conflicts of Interest” policy for your division and/or for the entire D , to ensure that it is consistent with the Ethics Ordinance. At this preliminary stage, however, we advise you to contact the City’s Law Department for guidance. The Department of O , for example, may have a policy that is analogous to the one you are contemplating, in that it prohibits its [employees] inspectors from [performing services vis-a-vis their] relatives, and provides a procedure for them to notify the department and the have the matters reassigned to another [employee]. .

If you have any questions or need additional information, please contact us. We sincerely appreciate your conscientiousness.