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CONFIDENTIAL

2009

Re: Case No. 09014.Q

Dear \_\_\_\_\_

\_\_\_\_\_ you wrote to me requesting guidance about your participation in a \_\_\_\_\_ matter involving \_\_\_\_\_ an organization called \_\_\_\_\_ a non-profit entity, \_\_\_\_\_

As explained in your letter, you have been reviewing a case involving \_\_\_\_\_

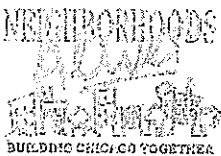
You point out that \_\_\_\_\_

\_\_\_\_\_ until your department receives more information and conducts an inspection, no final decision will be made.

\_\_\_\_\_ forwarded \_\_\_\_\_ a letter addressed to him by a \_\_\_\_\_ which you attached to your letter to me. You said that you do not know Mr. \_\_\_\_\_. He writes that "in our research we found that \_\_\_\_\_ may have an agenda that is keeping \_\_\_\_\_ from doing \_\_\_\_\_ job objectively." He lists two items that he claims support his statement: 1) you and your domestic partner (he name \_\_\_\_\_ but does not refer to \_\_\_\_\_ directly as your domestic partner) "is listed as a donor [sic] contributing to a group called \_\_\_\_\_ which, as part their mission statement is [sic] "Our \_\_\_\_\_ program aims to help over 190 people find \_\_\_\_\_, so they can maintain their medication regimens and work toward self-sufficiency"; and 2) you are listed as a donor to \_\_\_\_\_ which, he writes, "has grown to become the largest \_\_\_\_\_ program in \_\_\_\_\_ County." Then, he concludes: "[i]t seems pretty clear that \_\_\_\_\_ is very involved in \_\_\_\_\_ programs, which may be why \_\_\_\_\_ was so quick to misclassify \_\_\_\_\_ and thus avoid the due process that we are entitled to residents [sic] ... Perhaps another, more objective \_\_\_\_\_ person might be better qualified to make fair a judgement [sic] in this issue."

As your letter to me makes clear, and as you told me personally, you have no doubt about your ability to make a fair, objective and impartial decision in this matter, despite your philanthropic choices and sexual preference.

I have reviewed and studied both the City's Governmental Ethics Ordinance—the law to which you are subject as a City employee (and Board opinions



interpreting that law)—as well as other ethical canons, rules and interpretative opinions to which you are not subject. I conclude that, notwithstanding the assertions notwithstanding, there is nothing in the facts presented that would suggest that you are unable to make a professional, impartial decision in this matter, and that the City's Governmental Ethics thus does not restrict you from participating in any way in or deciding this matter. Moreover, I have found no other non-City rule, standard, canon, opinion or case that would require you to or even suggest that you recuse or disqualify yourself from this matter. Please note that I intend to present this matter to the full membership of the Board of Ethics at its next meeting, scheduled for [redacted], and to recommend that they approve the conclusions in this letter and adopt them as the Board's opinion.

Chicago's Governmental Ethics Ordinance. The relevant section of the City's Governmental Ethics Ordinance is § 2-156-020, "Fiduciary Duty." It states simply that "Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City." As the Board of Ethics has interpreted it, this provision requires City employees and officials to use their City positions responsibly and in the best interest of the City. See Case Nos. 91090.A; 04009.A. In the 1991 case, appointed Commissioners of a City Board asked whether this provision would allow them to hear, deliberate on and adjudicate a complaint filed against a third party by one of their fellow Commissioners, or require them to recuse themselves from hearing it. The Board established the standard for recusal or disqualification, explaining that their fiduciary duty:

does not prohibit them from participating in good faith in proceedings concerning a fellow Commission member. Rather, it requires that [they] put the best interests of the City before any personal feelings they may have for the complainant ... Any commissioners who cannot exercise unbiased judgment [sic] and, therefore, would not properly perform their duties as City commissioners, should recuse themselves.

Case No. 91090.A, at 4. That opinion and holding is not only binding precedent in your situation, but also serves as an appropriate guide to your participation in this matter. As long as you believe that you can make an objective and impartial decision regarding [redacted] in which, the record shows, you have no economic interest, and to or of which are not a donor, Board member, or volunteer—then you are charged by the Ordinance to fulfill your duty and make this decision in the City's best interests. Nothing in the record here would lead to or warrant a different conclusion—neither your sexual preference, to which [redacted] appears to obliquely refer in his letter, nor your and your partner's charitable contributions, suggest that you would serve as anything other than a professional, impartial and unbiased arbiter in this [redacted] matter, or render a decision that is not fair or in the City's best interests but instead in accordance with some pre-existing bias (which nothing in the record indicates you have).<sup>1</sup>

Judicial Ethics Canons and Standards. Your situation is most analogous to that of a judge facing a motion to have him or her disqualified on the basis of bias stemming from factors other than a pre-

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1. See also Case No. 04009.A, in which the Board recognized that an employee's fiduciary duty does not require that she recuse herself from decisions involving her prior employer, in which she has no current economic interest. Rather, it requires that she consider whether she can, in good faith, put the City's interests before any personal feelings she may have regarding any particular company or respondent to a Request for Proposals, including a pre-City employer. The Board found nothing in the record of case that would have led it to conclude that the employee was unable to put aside any such feelings or unable to exercise unbiased judgment in her decisions and properly perform her City duties with respect to matters involving a pre-City employer.

existing relationship with the parties or their attorneys (i.e., stemming from something in the judge's "background" or extra-judicial activities). Thus, I researched relevant Canons of Judicial Ethics and accompanying commentary and cases—laws and standards to which you are not subject. The research confirms my conclusions under the City's Governmental Ethics Ordinance.

First, judicial ethical standards contemplate that judges will make charitable contributions, but caution them not to contribute to organizations likely to appear before them.<sup>2</sup> Canon 5 of Illinois Supreme Court Rule 65, which governs Illinois state judges, provides that "A judge should regulate her ... extrajudicial activities to minimize the risk of conflict with the judge's judicial duties." Part B states: "a judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of ... judicial duties. A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members..."

Second, I searched for authority addressing when, if ever, a judge should or must recuse herself from a matter because of charitable contributions she has made. The canons, rules and their many commentaries do not directly address this. The American Bar Association's Model Code of Judicial Ethics (2007), Rule 2.11(A), provides that "a judge shall disqualify ... herself in any proceeding in which the judge's impartiality might reasonably be questioned ..." This 2007 ABA Code embodies an "objective" test of when impartiality might be questioned, i.e., when a "reasonable person" might question it. By contrast, as the Board of Ethics has interpreted it, our Governmental Ethics Ordinance embodies a "subjective" test, i.e., the decision of whether a City employee or official can be impartial in a given matter is left to that employee's or official's own judgment.<sup>3</sup> Nonetheless, regardless which test applies, I have found no materials, cases, opinions or commentaries even suggesting that a judge should disqualify himself or herself either on the basis that the judge has made charitable contributions to an entity that is not a litigant or a likely litigant. On the contrary, I found several cases *denying* motions to disqualify judges who had made charitable contributions to organizations that were not litigants, but which, analogous to your situation, seemed to share social or policy goals perceived by parties to be relevant to the litigation and somehow contrary to their interests.<sup>4</sup>

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2. See, e.g., Judicial Ethics Advisory Panel Ethics Opinion JE 143, Supreme Court of Kansas (2006).

3 The "objective" test is embodied in the standard for Federal judges too. 28 U.S.C. §455. Under it, the decision-maker must make an objective, fact-based inquiry as to what a "reasonable person" would likely conclude, rather than simply inquire as to what may be in his or her own mind or that of the litigants. "The statute requires a judge to step down only if the charge against him is supported by a factual foundation and the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *In re Student v. Wachusett Regional School District, Massachusetts Bureau of Special Education Appeals* (2008), citing *Cigna Fire Underwriters v. MacDonald & Johnson*, 86 F3d 1260 (1<sup>st</sup> Cir. 1996). Note also that the decision-maker is given wide discretion: reversal on appeal of an order denying a motion to disqualify or recuse occurs only upon a showing that the decision-maker abused his discretion. *Wachusett*, at 4. The abuse of discretion standard is one of the most stringent in the law.

4. See *U.S. v. Arena*, 918 F.Supp. 561 (N.D.N.Y. 1996) (judge was not required to recuse himself from hearing case involving two people accused of chemical attacks on Planned Parenthood even though his wife had made charitable contributions to Planned Parenthood, the court noting that since Planned Parenthood was not a party to the action, it "could not fathom how [the court's] impartiality might reasonably be questioned"); *Dickerson v. State of Georgia*, 241 Ga. App. 593 (1999) (in a case involving a defendant convicted of rape, appeals court upheld the trial court's denial of defendant's motion to disqualify the trial judge because he had made contributions to a Rape Crisis Center, stating that defendant's allegations were "bare conclusions and opinions" and "failed to show that the "alleged bias was of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court's prejudice"; and see also New York State Judicial Ethics Commission Opinion 04-140 (2005) (a judge may contribute to a non-profit legal services organization that regularly appears in court, and need not disclose that contribution nor recuse him- or herself, provided that the judge believes he or she can fairly and impartially fulfill all judicial duties.)

Third, I searched for but—not surprisingly—found no material even remotely suggesting that a judge should recuse him- or herself from a matter because of his or her sexual preference or orientation, or that a judge's sexual preference or orientation is an indication of bias or partiality, either taken by itself or in conjunction with the judge's charitable donations. Without discussing in any detail the ramifications of the assertion that a judge's sexual preference or orientation is an indication of bias or partiality (or its repugnance in public policy or law), I can report that the only material I could find that was at all pertinent is ABA Model Code Rule 2.4(B). It states simply that "a judge shall not permit family, social political financial or other interests or relationships to influence the judge's conduct or judgment." The standard embodied in this Rule is consistent with the City's Governmental Ethics Ordinance's fiduciary duty standard, addressed above.

In summary then, I conclude that there is nothing in the record here that would suggest that you are unable to make a professional, impartial decision in this matter, and thus the City's Governmental Ethics Ordinance does not restrict you from participating in any way in or deciding this matter. Moreover, I have found no other non-City rule, standard, canon, opinion or commentary that would require you to or even suggest that you recuse or disqualify yourself from this matter. I would, however, advise you, in the interest of prudence, to disclose on the record (written and/or oral) of any deliberations or decisions in this matter which you make or in which you participate, that you and your domestic partner have made charitable contributions to the organizations named above (which are not parties in this matter, and in which you have no economic interest, and to or of which are not a donor, Board member, or volunteer), but that this does not affect your ability or responsibility to make an impartial decision in the City's best interests, in accordance with your duties under the City's and the City's Governmental Ethics Ordinance.

While the conclusions in this letter are based solely on and apply only the City's Governmental Ethics Ordinance—the law to you which *are* subject—to the facts summarized in this letter, those conclusions have been examined in light of analogous prevailing standards in another field of law to which you *are not* subject, leading to the same conclusion. If the facts stated in this letter are incorrect or incomplete, please notify me immediately, as any change may alter those conclusions. Please note again that I intend to present this matter and letter to the full Board at its next meeting, and recommend to them that they adopt this letter as its opinion.

I sincerely appreciate your bringing this matter to my attention, and your conscientiousness and professionalism as a public servant. Please contact me if you have further questions.

Yours very truly,



Steven I. Berlin,  
Executive Director