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EMWS

ADVISORY OPINION
Case No. 98007.A
Employment of Relatives

To:

Date: July 8, 1998

You asked the Board of Ethics for an advisory opinion on how the Governmental Ethics Ordinance applies to you, given that your husband works for a consulting firm that prepares [redacted] plans used by contractors when applying for permits issued by your office, [redacted] Bureau A in [redacted] Dept. X. You asked the Board to address both how the Ordinance applies to you in your present City position and how it would affect you if you were promoted to [redacted] (position) within the Department. Also, in the course of conversations with Board staff, you indicated that in two previous positions with the City, you exercised decision-making authority over three City contracts with the firm that employed your husband.

In this opinion, we set forth the facts and our analysis as they pertain to (A) your current position, (B) your City decisions in two previous situations, and (C) your possible promotion.

FACTS: A. Current position. You are Assistant [redacted] (position) in [redacted] Dept. X. Since July 1994, you have served as head of [redacted] Bureau A, which issues all permits for [redacted] in Chicago and responds to inquiries about proposed [redacted] work in the City.

Your husband, [redacted], has been employed for 12 years by [redacted] [redacted] (company), a [redacted] consulting firm that provides consulting services to private and public developers (including the City's X, Y, and Z [redacted] Departments) on all aspects of civil engineering design. [redacted] also provides construction management services, in which it oversees the daily management of a developer's construction project. [redacted] Co. does not do any actual construction. [redacted] (husband) is a project manager; among other tasks, he prepares design plans, serves as the contact person between [redacted] (co.) and the client on whose project he works, and organizes the appropriate [redacted] (co.) personnel to perform the work.

Your question about your current situation arises because [redacted] (co.) prepares civil engineering design plans that are used in applications for [redacted] permits. This process is described in more detail below.



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You supervise the work of all staff members in Bureau A. These staff members, who are civil engineers, perform two kinds of duties relevant to this case: (1) they issue permits to licensed contractors for construction and related work; and (2) they respond to inquiries from Bureau B (in Dept. Y) about proposed construction. Both kinds of duties require Bureau A staff to review plans prepared by design engineers, such as [co].

(1) ISSUING PERMITS. You explained [co]'s part in the development and permit process as follows: a project developer, whether public (like the City) or private, is the entity that contracts with the civil engineering firm (like [co]) to provide the engineering design plans for the project. The developer then hires the prime contractors, and the prime contractors hire subcontractors, who do the actual construction, based on those design plans. (The developer also may hire a construction management firm to oversee the daily management of the project.) The design plans drawn by the civil engineering firm--whether for a housing, transportation, aviation, or other project--will contain provisions for any necessary facilities, including . These are the plans that must be submitted to Bureau A in Dept. X with the application for the permit. For the construction or repair of , only contractors licensed by the City's Dept. X are qualified to do the work. These licensed individuals, with whom the prime contractor (or a higher-level subcontractor) has contracted to perform the work, are the ones who appear before Bureau A to apply for the permit. The application is based on the accompanying design plans prepared by the civil engineering firm. The permits, then, are issued to these same licensed subcontractors who will do the work. The permits refer to the address or location at which the work is to be done, but they are issued in the name of the subcontractor. The permits are not issued to, or in the name of, the developer, the prime contractor, or the engineering consulting firm that prepared the design plans.

You said you do not normally participate in the process by which permits are issued. Your staff members review applications on a first-come, first-served basis, you said, and they authorize the permits and sign the applications. You explained that you become personally involved only when problems or questions arise, or when variations or special permits are required. You do not approve or sign permit applications. You are not aware of individual applications or of approved permits. You see only a monthly list that reflects the total number of permits granted (approximately 800 per month) and the total amount of permit fees collected. You do not see the names of subcontractors to whom the permits are issued, nor the names of the engineering firms whose design plans accompany the applications. In instances where applications are rejected, however, you are the person responsible for making that decision, and you authorize the rejection on behalf of Bureau A.

You said you participated personally in reviewing plans prepared by [co] only one time as head of Bureau A. You explained that, about one and a half years ago, one of your staff members alerted you to the fact that a construction subcontractor had submitted an application based

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on plans that had not been stamped as required. (The design engineer or architect responsible for the project design and plans must affix their stamp to all plans before the application is submitted to Bureau A) You said the plans in that instance had been prepared by [Co.], and you personally contacted the construction manager at [Co.], who was responsible for the proposed project to inform him of the oversight, which was then corrected.

(2) RESPONDING TO Bureau B [redacted] INQUIRIES. Bureau A [redacted] also responds to inquiries from Bureau B [redacted] about proposed [redacted] construction. You explained that whenever any developer proposes construction or rehabilitation work in, or connecting to, the public way (such as [redacted], or providing natural gas, telephone, cable television, or other utility services), those proposals are funneled from the City department handling the project to Bureau B [redacted] for preliminary approval. [redacted] Bureau B [redacted] forwards the relevant design plans to Bureau A [redacted], where they are reviewed by staff engineers. The sole purpose of the Bureau A [redacted] review is to make sure the plans in question do not present a problem or conflict in relation to the existing [redacted] system. You said these are preliminary reviews, and do not involve issuing permits at this stage. Any [redacted] permit applications related to those projects would be submitted later, in the standard permit procedure described above. You said you sign the letters of response that communicate to Bureau B [redacted] the results of the staff's review; otherwise, you participate personally only when problems or questions arise, or when special projects are involved. Bureau B [redacted] then returns the plans to the City department in which they originated.

You told us you have never personally reviewed plans prepared by [Co.] in the context of this [redacted] inquiry process because no questions or problems have arisen during your staff's review of such plans.

You stated that [Co.] still has design contracts with the City, but that you have no involvement with these (or any City contracts) in your current job other than your supervisory responsibilities over Bureau A [redacted], described above.

You said you did participate personally in City contracts in your previous City positions, however, and that you may do so again if you are promoted. Your description of each of these situations follows:

B. Previous situations. In 1993, 1994, and 1996, you said, you were directly involved in City contracts with Dept. X [redacted], including contracts held by [Co.]. In 1993 and 1994 (before beginning your current position), you were Assistant [position], serving as head of Bureau C [redacted] of Dept. X [redacted]. For the first half of 1996, you served as Acting [position] for the Department. You told us that, during these periods, you served on the Department's contract selection committee, and were involved extensively in construction

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management contracts--retainer contracts¹ with firms that provide engineers to perform the daily management and supervision of the projects the Department had contracted out.

During this time, from 1993 through 1996, [co.] had three retainer contracts with Dept. X [redacted]--one for construction management and two for [redacted] design--and you worked on all of them. The first, [co.]'s professional services contract for construction management, had already been awarded; that is, [co.] was already on retainer to the [redacted] Department. You said that the Department Commissioner then assigned particular City projects to [co.]. Once the projects had been assigned, you said you personally supervised [co.]'s work: you selected the engineers from [co.] to perform the daily management of the field work on the projects assigned to [co.]; you supervised [co.]'s performance indirectly through an intermediate supervisor in the [redacted] Department; and you approved and signed all the daily work reports, payment invoices, and other correspondence relevant to [co.]'s work.

On the other two retainer contracts, professional services contracts for the design of [redacted], you said you were "the point person" on both contracts. You prepared the Requests for Qualifications ("RFQs"), to which [co.], among others, responded; you organized and participated in the meetings in which the contractors who answered the RFQs were reviewed and selected; and you prepared the Department's recommendations of several firms (including [co.]) to the Department Commissioner for her final approval on the contract awards.

You said these particular City contracts with [co.] have expired. [co.] now has new contracts with the City, but you said you have had nothing to do with them.

C. Possible promotion. There is a possibility, you said, that at some point in the near future, you may be promoted to the position of [redacted] in the Department [redacted], the same position you filled in an "acting" capacity in 1996. You asked us how the Ethics Ordinance would pertain to you in that position. As [redacted], you would be responsible for supervising all of the engineering divisions of the Department, which include [redacted] Bureaus A, C, + D [redacted]. You said you would supervise staff members in all these sections who would report to you in detail about all aspects of any City contract that related to [redacted] and [redacted] work. You said you also would participate personally in formulating RFQs for Department projects, selecting design consultants and construction management contractors to be used by the Department, assigning projects to Department contractors (jointly with the Department Commissioner and Deputy Commissioner), directing the civil engineering consultants' design decisions, directing the decisions of the construction contractors in their performance of the work, signing invoices for work orders and payments, and deciding a range of departmental policy issues.

¹ In a retainer contract, the City enters into an agreement for a certain time period with a company that is then used for various projects as needed.

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You told us that, in this position, you normally would be expected to perform these duties in relation to Co.'s City contracts--as you did while you were Acting --not only on its possible design and/or construction management contracts with the Department, but also on its work for other City departments that involves design. Co.'s work for the Departments of Y and Z, for example, would require Bureau D of Dept. X to review Co.'s design plans for facilities and potentially suggest changes to those plans.

You stated that the Department has not instituted any formal procedures for Department employees to recuse themselves from City decisions in circumstances that present a real or potential conflict of interests. However, you said you could arrange to recuse yourself from any City decisions involving Co., and that the supervisor, First Deputy Commissioner, would be able to make decisions and sign documents in your place.

LAW AND ANALYSIS: EMPLOYMENT OF RELATIVES. The primary Ethics Ordinance provision relevant here is Section 2-156-130, "Employment of Relatives," which states in relevant part:

(b) No official or employee shall exercise contract management authority where any relative 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.

(c) No official or employee shall use or permit the use of his position to assist any relative in securing employment or contracts with persons over whom the employee or official exercises contract management authority. The employment of or contracting with a relative of such a city official or employee by such a person within six months prior to, during the term of, or six months subsequent to the period of a City contract shall be evidence that said employment or contract was obtained in violation of this chapter.

The term "contract management authority" is defined in section 2-156-010(g) as:

personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance.

The term "relative" as defined in Section 2-156-010(w) includes a spouse.

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Under these provisions, City employees are prohibited from exercising contract management authority (as defined above) over any City work if any person doing that work either employs or contracts with the City employee's relatives (§ 2-156-130(b)), and from using their City position to help relatives in gaining employment or contracts with persons over whom they exercise contract management authority (§ 2-156-130(c)).

A. Your current position. In your current position as head of Bureau A [redacted], you supervise the work of staff engineers who (1) issue permits to licensed [redacted] contractors for [redacted] construction and other [redacted] work, and (2) respond to inquiries from Bureau B [redacted] about proposed [redacted] construction. Your husband is employed by [Co.], which prepares civil engineering design plans that (1) may be used by construction subcontractors in support of their [redacted] permit applications, and (2) may come before Bureau A [redacted] as part of the staff's review of Bureau B [redacted] inquiries. Under the Employment of Relatives provision, the issue is whether you exercise "contract management authority" in relation to these activities, and if so, whether you exercise that authority over City work performed by [Co.]

(1) ISSUING PERMITS. In a previous opinion, the Board held that "contract management authority" as used in the Ethics Ordinance pertains not only to City contracts but also to the issuance of City permits (Case No. 92010.A). Because you have direct supervisory responsibility over all Bureau A [redacted] engineers in their issuance of permits, you have contract management authority, for purposes of the Ethics Ordinance, over the issuance of [redacted] permits in your current City position.

Under Section 2-156-130(b) then, you are prohibited from exercising contract management authority over the issuance of [redacted] permits if any applicant either employs or contracts with your husband. In this case, the persons doing the work over which you have management authority are the construction subcontractors to whom permits are issued. You explained that [redacted] permits are issued to the construction subcontractors (the licensed [redacted]), not to the engineering design firms, like [Co.], or any other entity involved in the development project. These construction subcontractors use plans prepared by the engineering design firm in support of their [redacted] permit applications, but they neither "employ" nor "contract with" the design firm. (The subcontractors contract with the prime construction contractor or a higher-level subcontractor; [Co.]'s contract is with the developer of the project who also hires the prime contractor.)

Given the facts as described to us, therefore, it is our determination that your involvement in issuing [redacted] permits on projects with plans prepared by [Co.] while your husband is employed by [Co.] is not prohibited by Section 2-156-130(b) of the Ethics Ordinance.²

² Under this analysis, your personal involvement in contacting [Co.] on one occasion to correct an oversight in a construction subcontractor's permit application (which was submitted without the prerequisite design engineer's stamp) should likewise be considered an aspect of the issuance of a permit to a construction subcontractor. In other words, your activity in this instance constitutes management authority over the permit application of the construction subcontractor, but that subcontractor neither employed nor contracted with your husband.

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(2) RESPONDING TO Bureau B [REDACTED] INQUIRIES. You explained that staff engineers also review design plans for [REDACTED] work related to various proposed projects forwarded from the Bureau B [REDACTED]. You said the sole purpose of this review is to make sure the proposed plans do not present a problem or conflict in relation to the existing [REDACTED] system. You stated that you sign the letters of response to Bur. B [REDACTED] communicating the results of the staff review. You participate personally in the review of plans only when problems or questions arise, or when special projects are involved. You said you have never participated personally in reviewing plans prepared by [CO.] in the context of this [REDACTED] process.

The term "contract management authority" as used in the Ordinance refers to "personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance" (§ 2-156-010(g)). These are actions that involve decision-making authority. In our opinion, your participation in responding to Bureau B [REDACTED] inquiries does not entail such decision-making. Carrying out a preliminary review of a proposed project's [REDACTED] design plans to avert a conflict with the existing [REDACTED] system, and advising another City department of the results of that review, are actions performed in a clearly prescribed manner that do not involve discretionary judgments. Such actions cannot reasonably be considered "the formulation or execution of a City contract." Thus, we determine that you do not exercise "contract management authority" for purposes of the Ordinance with respect to the Bureau A [REDACTED] responses to Bureau B [REDACTED] inquiries and, therefore, that the Ordinance does not prohibit you from carrying out your current duties with respect to those inquiries.

You have assured us that, in your current City position, you have no involvement with any City contracts--including those of [CO.]--other than in your role as supervisor over Bureau A [REDACTED]. Based on the facts presented, we determine that your exercise of your current duties as Assistant [Position] in the Dept. X Bureau A [REDACTED] does not constitute a violation of Section 2-156-130(b) in relation to your husband's employment with [CO.] We bring to your attention, however, that the Ethics Ordinance was designed to prevent not only actual improprieties by City officials and employees, but the appearances of such improprieties. In the interest of promoting the high standards of fairness and accountability in City government that are embodied in the Ordinance, we advise you to recuse yourself from any matters involving your spouse's employer--either in the context of permit applications or reviews of Bureau B [REDACTED] requests--in order to avoid even the appearance of impropriety under this Section.

B. Your previous situations. In your previous positions as head of Bureau C [REDACTED], and Acting [REDACTED] in Dept. X [REDACTED], you were directly involved in three retainer contracts between [CO.] and the Department [REDACTED]. With regard to the construction management contract, you selected the [CO.] engineers to manage the field work; supervised [CO.]'s performance indirectly through an intermediate supervisor in the [REDACTED] Department; and approved and signed all the daily work reports, as well as the payment invoices, relating to [CO.]'s

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work. On the two [redacted] design contracts, you prepared the RFQs (to which [redacted], among others, responded); organized and participated in the review of RFQs and contractor selections; and prepared the Department's recommendations of several firms (including [redacted]) to the Department Commissioner for final contract approval.

Applying the Ordinance definition of "contract management authority" (§ 2-156-010(g)) to these duties and activities, we conclude that, in your previous positions as head of Bureau C [redacted] and Acting [redacted] of the Department [redacted], you had, and exercised, such authority over all three retainer contracts between the Department [redacted] and [redacted]. Given that your spouse was employed by [redacted] during the same period, your exercise of that authority constitutes a violation of Section 2-156-130(b) of the Ethics Ordinance.

We note that the circumstances in which these violations occurred are not ongoing: you have not occupied those City positions since 1996, and the contracts under which the violations arose have expired. Nevertheless, we alert you to the gravity of these violations, and caution you that, in any City work you undertake, the Ordinance requires you to avoid exercising management authority if any person doing that work either employs or contracts with your husband or another of your relatives. If you have any questions about potential problems under this provision, we advise you to contact our office immediately.

C. Your possible promotion. There is a possibility, you said, that you may be promoted in the near future to the position of [redacted] in the Department [redacted], the same position you filled in an acting capacity in 1996. As [redacted], you would be responsible for supervising all of the [redacted] divisions of the Department, which include Bureaus A, C, + D [redacted]. You would supervise staff members in all these Bureaus who would report to you in detail about all aspects of any City contract relating to [redacted] and [redacted] work. You also would personally be involved in formulating RFQs for Department projects, selecting design consultants and construction management contractors to be used by the Department, assigning projects to Department contractors, directing the civil engineering consultants' design decisions, directing decisions of the construction contractors in regard to their performance of the work, signing invoices for work orders and payments, and deciding a range of departmental policy issues.

In this position, you projected you would be expected to perform such duties in relation to [redacted]'s City contracts (as you did while you were Acting [redacted]), both on its possible design and/or construction management contracts with the Department [redacted], and on its work for other City departments that entails [redacted] design.

It is our opinion that your projected duties and responsibilities, as you have described them, would constitute "contract management authority" as defined in Section 2-156-010(g), both in regard to contracts with the Department [redacted] and to contracts with other City departments that involve [redacted] design. Therefore, under Section 2-156-130(b), you would be prohibited from

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exercising that authority if your husband (or other relative) were employed by, or had contracts with persons, such as [co.] doing the City work over which you had such authority.

Although you believe that, as [position], you would be able to recuse yourself from decisions involving [co.], we are not convinced that recusal would avoid actual violations in every instance. Your serving as [redacted] of the [redacted] Department while your husband is employed by [co.] would create a situation of inherent conflict under this Section of the Ordinance because [co.] would be doing and seeking business with your Department--business over which you would have management authority by virtue of your City position. For example, the duties for which you would be responsible would not be limited to working with Department contractors once contracts had been awarded and projects assigned. Your responsibilities also would include helping to formulate RFQs for retainer agreements (which specify the criteria by which contractors are judged to be qualified for contract awards in the first place), and participating in design and construction decisions that may affect which contractors on retainer are selected to perform the work on any given project. For you to remove yourself at these early stages from exercising contract management authority over City work performed by [co.] would require you to recuse yourself from participating in the formulation of any RFQs to which [co.] might respond, and from participating in preliminary phases of Department projects to which [co.] might be assigned under one of its retainer contracts. In addition, if you were to serve as [redacted] in the [redacted] Department while your husband was employed by a person doing City work over which you would have management authority by virtue of your position, we believe it would create an appearance of impropriety that would have a negative impact on your ability to serve effectively in your City job.

In the context of your possible promotion, we also bring to your attention the provisions of Section 2-156-130(c) under Employment of Relatives. This Section prohibits you from using, or permitting the use of your position, to assist your husband or other relatives in securing employment or contracts with any person over whom you exercise contract management authority. If any person doing City work over which you exercise such authority employs or contracts with your spouse or another of your relatives within six months prior to, during the term of, or six months subsequent to the period of that person's City contract, that would be evidence of a violation of this Section of the Ordinance.

FINANCIAL DISCLOSURE. Finally, you should be aware that the December 1997 amendments to the financial disclosure requirements of the Ethics Ordinance (§ 2-156-160(b)) also are relevant to your circumstances because you are a "reporting individual" under Section 2-156-150(a) of the Ordinance and must file annual Statements of Financial Interests with this office. As a result of these amendments, you are required to disclose on your annual statements certain information pertaining not only to your own professional services rendered to persons other than the City, but also information pertaining to such services rendered by your spouse and by any entity in which either

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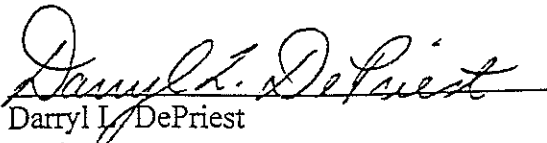
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you or your spouse has a "financial interest."³ Under Board precedent, your husband has such an interest in [Co.] by virtue of his employment with [Co.] (see Case No. 97063.A, which is attached to this opinion).

Our determinations are based on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incorrect or incomplete, please notify the Board immediately, as any change in the facts may alter our opinion. Other laws or rules also may apply to your situation. We note that a City department may adopt restrictions that are more stringent than those imposed by the Ethics Ordinance.

RELIANCE: This opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.


Darryl L. DePriest
Chair

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³ "Financial interest" is defined, in relevant part, as (1) any interest as a result of which the owner currently receives or is entitled to receive in the future more than \$2,500 per year, (2) any interest with a cost or present value of \$5,000 or more, or (3) any interest representing more than 10% of an entity" (§ 2-156-010(1)).