

ADVISORY OPINION
Case No. 98053.A, Post-Employment

To: [John]

Date: December 16, 1998

On October 27, 1998, you and [Michael, a manager of Bureau 1,] asked the Board of Ethics for guidance on how the City's Governmental Ethics Ordinance applies to you in your post-City employment. Prior to your retirement from City service on July 1, 1998, you were [the manager of Program Beta, within Bureau 1, Department C

]. After retiring, you accepted a position as a consultant with [a consulting firm] that has contracts with [Department C]. You have asked whether the post-employment restrictions of the Ethics Ordinance prohibit you from working as a consultant for [the consulting firm] on its contracts to assist in [Department D's Alpha projects with Department C].

Based on the facts presented by you and [Michael], it is the Board's opinion that the Ethics Ordinance prohibits you, for one year from the date you left City service, from assisting or representing [the consulting firm] on any [Alpha] project on which you worked as a City employee. However, the Ethics Ordinance does not prohibit you from assisting or representing [the consulting firm] on [Alpha] projects on which you did not work as a [Department C] employee. A statement of the facts, the relevant provisions of the Ethics Ordinance and the Board's analysis follow.

FACTS: First, we describe your responsibilities when you were a City employee; second, we discuss the [Alpha] program; third, we outline [the consulting firm's] contract with [Department C]; finally, we explain your responsibilities with [the consulting firm].

Your responsibilities as a City employee: In a meeting with Board staff on October 27, 1998, you explained that as the [manager of Program Beta], you were responsible for implementing the program until you retired from City service on July 1, 1998. [Program Beta] provides residents of the City with [certain infrastructure improvements

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The [Alpha] Program: The [Alpha program] was created by [Department D]. Under the program, [Department D] solicits applications for infrastructure improvements from owners of commercial, retail and industrial buildings. [

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[Department D] coordinates the [Alpha] application process, soliciting, reviewing, approving or rejecting all applications. All City funds for [Alpha] projects come from [Department D's] budget.

Both you and [Michael] stated that you did not participate in the creation of the [Alpha] program; nor were you involved in the application process. Instead, your involvement with the [Alpha] program was limited, comprising only a very small part of your responsibilities. Approximately eight times during 1997 and 1998, [Department D] asked that [Department C's Bureau 1] assist it by performing field studies on [Alpha] applications [

]. In response to [Department D's] request, you were directed by [Michael] to dispatch either a City engineer from [Program Beta] or a private engineering contractor working for [Department C] to perform an engineering field study and cost estimate on the [Alpha] application.² After you or [Michael] reviewed the field study, it was sent to [Department D]. [Department D] would then decide whether to approve the request.

If [Department D] elected to proceed on [an Alpha] application on which [Program Beta] had performed a field study, you were responsible for assigning an engineer — either a City employee or an engineering contractor — to oversee the project. These engineers directly supervised the work and reported to you. The actual construction was performed by private construction firms on contract with [Department C]. Because [Department C] has divided the City into 11 areas and assigns one contractor to each area, neither you nor [Michael] had the authority to select among the various contractors. Instead, contractors were assigned according to the geographic location of the site. [Department C] field supervisors completed the paperwork allowing private contractors to be paid. You approved private contractors' payment vouchers. You and [Michael] stated that [the consulting firm] was not involved in the [Alpha] projects on which you worked as a City employee.

¹In 1997, private contractors conducted the field study of [Department D]-selected sites. As a cost-saving measure, [Department D] asked [Department C] to use engineers from its [Program Beta] to conduct these field studies in 1998.

²The field study typically included the site's measurements, grade, elevation and drainage. If appropriate, diagonal parking and feasibility issues were also addressed in the field report.

[The consulting firm's] contract with [Department C]: [The consulting firm], is an engineering consulting firm. In June 1998, [the consulting firm] and [Department C] entered into a three-year contract allowing [Department C] to use [the consulting firm] on an as-needed basis. This kind of contract, sometimes referred to as a D.U.R. (depending on requirements), allows [Department C] to assign [the consulting firm's] personnel to various projects operating in any of [Department C's bureaus]. This contract was negotiated by the City's Law and Purchasing Departments and [Michael]. [Michael] stated that you had no input in formulating this contract.

Your responsibilities with [the consulting firm]: You began working as a [consultant for the consulting firm] on July 13, 1998. You said that [the consulting firm] assigned you to work under its contract with [Department C] conducting field surveys and preparing construction cost estimates for [Alpha] projects. On any given [Alpha] project, you may also be asked to secure approval from [Department C's Bureau 2] for a proposed [change _____], or to seek City Council approval of any necessary amendment to a City ordinance to allow [change _____].

LAW, ANALYSIS, AND DETERMINATIONS:

Post-Employment Restrictions: Former City employees are not prohibited by the City's Governmental Ethics Ordinance from working for any particular new employer, but the Ordinance does restrict the activities which former City employees may perform for their new employers. Section 2-156-100(b) of the Ordinance provision governing post-employment restrictions states:

No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or employee participated personally and substantially in the subject matter of the transaction during his term of office or employment; provided, that if the official or employee exercised contract management authority with the respect to a contract this prohibition shall be permanent as to that contract.

Under this provision, former City employees are subject to both a one-year prohibition and a permanent prohibition after leaving City service. For one year after leaving City employment, former employees are prohibited from assisting or representing any person in a business transaction involving the City or any of its agencies if they participated personally and substantially in the subject matter of that transaction during their City employment. The one-year prohibition begins the day an employee leaves City employment, not on the date the employee stops performing a particular task. Former City employees are also permanently prohibited from assisting or representing any person in any contract if, as a City employee, they exercised "contract management authority" over that contract. We will analyze each prohibition in turn.

One-year prohibition: Section 2-156-100(b) of the Ethics Ordinance prohibits you, through June 30, 1999, from assisting or representing [the consulting firm], or any other person, in a business transaction involving the City if you participated personally and substantially in the subject matter of that transaction during your City employment.

“Assisting” and “representing” includes helping a person perform a contract. As a consultant working for [the consulting firm], you are assisting [the consulting firm] perform its contract — a kind of business transaction — with the City. The Ethics Ordinance defines “person” to include corporations, partnerships, firms and associations. § 2-156-010(r). You stated that [the consulting firm] is a corporation. Therefore, under the Ordinance, [the consulting firm] is a “person” whom you are assisting in a business transaction involving the City.

Subject matter of the transaction: To determine how the one-year prohibition applies to you, the Board must first ascertain the subject matter of the business transactions on which [the consulting firm] has asked you to work. In some recent cases involving construction or development of real property, the Board has analyzed subject matter as the application of a City program to particular sites.

For example, in Case No. 98020.A, the Board held that a former employee who coordinated the supervision of field construction for City development projects was prohibited for one year from assisting or representing any person in a business transaction involving the City if the subject matter of the transaction was the application of the particular City construction program to any site on which he had worked with that program as a City employee. (See also Case Nos. 96001.A, 96015.A, 96024.A.)

By contrast, in Case No. 93038.A, the Director of a City program asked the Board for general guidance on the restrictions imposed by the Governmental Ethics Ordinance on the work he could undertake upon leaving City employ. Noting that the Director of the City program established the program’s policies, coordinated each stage of the program and was substantially involved in all areas of the program, the Board determined that the Ethics Ordinance prohibited the Director for one year after leaving City employment from assisting or representing any person in any matter involving that program.

In your case, unlike the director of the City program who established the program’s policies, coordinated each stage of the City program and was substantially involved in all areas of the program, you were not the director of [Department D’s Alpha] program. You did not develop or implement the application, screening or selection process. You did not have authority to approve design or cost estimates for the program or any specific [Alpha] project. Instead, you were responsible for the execution of specific aspects of the [Alpha] program at sites selected by [Department D]. Therefore, in analyzing how the Ordinance’s one-year prohibition applies to you, the Board concludes that each [Alpha] project constitutes a distinct subject matter.

Personal and substantial involvement: You stated that you supervised the engineers who performed the initial field studies of particular [Alpha] project sites. Both [Department C] field supervisors and private contractors working as field supervisors who managed the [Alpha] projects reported to you. You approved the vouchers which allowed private contractors to be paid for their work on [Alpha] projects. On these facts, the Board concludes that you participated personally and substantially in the [Alpha] projects on which you worked as a City employee. Therefore, the Board concludes that the Ordinance prohibits you, for one-year, from assisting or representing any person, including [the consulting firm], in any [Alpha] project you worked on as a City employee. In contrast, the Board concludes that the one-year prohibition does not prohibit you from working for [the consulting firm] on [Alpha] projects with which you were not involved as a City employee.

Permanent prohibition: Section 2-156-100(b) of the Ethics Ordinance permanently prohibits you from assisting or representing [the consulting firm], or any other person, in performing its contract with the City if, during the course of your City employment, you exercised "contract management authority" over that contract. Contract management authority is defined by the Ethics Ordinance 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. § 2-156-010(g).

Both [the consulting firm's] contract with [Department C] and the contracts which [Department C] entered into to complete the eight [Alpha] projects on which you worked are at issue.

[The consulting firm] contract with Department C: As explained above, [the consulting firm] has an D.U.R. contract with [Department C] which it entered into in June 1998. Both you and [Michael] stated that when you were a City employee you did not select, participate in contract preparations or negotiations or execute [the consulting firm] contract. From these facts, the Board concludes that you did not exercise contract management authority over the D.U.R. contract between [Department C] and [the consulting firm]. Therefore, under the Ordinance's permanent prohibition, you are not prohibited from working on [the consulting firm's] D.U.R. contract with [Department C] provided, that as [the consulting firm] consultant, you do not assist or represent [the consulting firm] on any [Alpha] project you worked on as a City employee.

[Alpha] project site contracts: The individual [Alpha] projects with which you were involved in your City job do not require analysis under the permanent prohibition. Since these projects do not last for more than one year, and since the one-year prohibition already applies to any project with which you were involved in your City job, the Board does not find it necessary to address at this time whether you exercised contract management authority over any of those projects, and whether you thus might be prohibited from assisting or representing any person with respect to them following the one-year period after your retirement from City service. If, however, one of those projects does last for

more than a year after your retirement from City employment, and you are requested as a non-City employee to assist on such a project, we advise you to contact the Board for further guidance.

Confidential Information: Finally, we also advise that Section 2-156-070 of the Ethics Ordinance, "Use or Disclosure of Confidential Information," prohibits all current and former employees from using and disclosing any confidential information gained in the course of their City employment. Confidential information is defined by the Ethics Ordinance as any information that may not be obtained pursuant to the Illinois Freedom of Information Act, as amended.

DETERMINATIONS: The Board determines that:

1. in analyzing how the Ordinance's one-year prohibition applies to you, each [Alpha] project constitutes a distinct subject matter;
2. you participated personally and substantially in the [Alpha] projects on which you worked as a City employee and, therefore, the Ordinance prohibits you, for one year, from assisting or representing any person, including [the consulting firm], in any [Alpha] project you worked on as a City employee;
3. the Ordinance's one-year prohibition does not prohibit you from working for [the consulting firm] on [Alpha] projects with which you were not involved as a City employee; and
4. the Ordinance's permanent prohibition does not prohibit you from working on [the consulting firm's] D.U.R. contract with [Department C] provided that, as [the consulting firm consultant], you do not assist or represent [the consulting firm] on any [Alpha] project you worked on as a City employee.

Our determinations in this case 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. Additionally, other laws or rules also may apply to this situation.

RELIANCE: This opinion may be relied on by any person involved in the specific transaction or activity discussed above or any person involved in a transaction or activity that is indistinguishable in all material aspects from the above-described transaction or activity.