

Advisory Opinion
[Jane Doe]
Case No. 03051.A, Employment of Relatives
November 20, 2003

You are a [Deputy Commissioner] in the City's Department of [U]. On September 17, 2003, you asked the Board for an advisory opinion addressing whether the City's Governmental Ethics Ordinance requires you to exempt or recuse yourself from managing a City contract with [G] , Inc., given that your nephew recently began working full-time for [G] in an entry-level position.

The Board has considered your situation under the relevant provisions of the Ordinance. As explained in this opinion, we have determined that the Ordinance does not require you to recuse yourself from your work on this [G] contract. Our analysis follows.

FACTS: You have been a Deputy [in Dept. U] since 1996. You began your City service in October 1975, working first in the [Y] Department for 10 years, then moving to the City's Department of [U] in 1985. You said that the City contracted in 1996 with [OA] , Inc., located in [S.E. State], to develop permit software for the Department of [P] . In 1997, the contract was amended to include more software development, and [U] took over the contract's management. [G] Inc. acquired [OA] in July 2000, and when the original [OA] contract expired in 2001, the City entered into a new contract with [G] for even more software development.¹ Software applications developed and serviced through these two [OA/G] contracts include the [] System, the []System, the [] Management System and the []Services [] System.

From 1997 to the present, you said, you have managed the [OA/R] contract (and its predecessor). You have worked with company personnel (originally [OA] , now [G]) in [S.E. State] (programmers, mostly), and also, since the [G] acquisition, with senior management from [G] Government Solutions [Unit] [GSU] , of which the [S.E. State] group is part.

[GSU] is one of six divisions (officially called "sectors" or "segments") of [G] , Inc. [GSU]

1. Publicly available records from the City's Department of Procurement Services indicate that the current contract, #Txxxxx, was awarded on December 18, 200X (start date August 31, 200X) and will end on August 31, 2004. It is for "Computer and information processing system hardware and software," with a price term of up to \$x.xx million. The vendor is identified as "[C] Inc. fka OA []". The City also has 3 other contracts with [G] entities, two with "[C] C & E, Inc." and the third with "[C] System Group]." You said that your work on [C] contracts has been limited to #TXXXXX (and its predecessor), with [C] fka OA] , and that you have done no work on the others, do not know which [G] divisions have them, and have no contact with [G] personnel with respect to them.

managers are located in [City] , [M.W. State], and in the [southeastern U.S.] Its customers are governments and private companies. It is a leading provider of integrated software products] , with approximately 14,000 employees. [G] , Inc. itself has approximately 97,000 employees, and had 2002 revenues of \$XX billion.² Each of its six business sectors has its own President, CEO, home offices, hiring procedures, budgets, and compensation and bonus systems. A [GSU] Vice President with whom staff spoke said there are “few synergies” between [C]’s six segments, which operate with a fairly high level of independence and are responsible only to “corporate” level management in [M.W. State]. Moreover, he said, it is uncommon for employees to move from one segment to another. When that occurs, it is typically a “hand-picked” transfer of someone at the mid- to high-level executive level.

You said that you discovered recently at a family gathering that your nephew, [Jim Smith] , just began working in an entry-level position in [C]’s Global Technology Unit [GTU] . [GTU] based in [] [M.W. State], employs about 18,000 people and is a leading provider of infrastructure/hardware and software to [large private customers] . Your nephew graduated from the University of Illinois in May 2003 with a Finance major, and interviewed for his position through the University. His work, you said, involves financial analysis of transactions with [GTU] customers like [Z and P] (all non-government), and he works in [GTU’s] main office in [M.W. State] . You told staff that you have had no interaction with personnel from [GTU], and do not anticipate that your work would require it. Moreover, you believe that the [G] personnel with whom you do interact have no knowledge that your nephew is working for the company.

LAW AND ANALYSIS:

1. Section 2-156-130(b). The main question your situation presents arises under § 2-156-130(b) of the Ordinance, entitled “Employment of Relatives.” It states:

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.

This section prohibits you, as a City employee, from having or exercising “contract management authority”³ over City work done by any “person”⁴ that employs a relative of yours, such as your nephew (a nephew is a “relative” for purposes of the Ordinance⁵). Based on your explanation to

2. *Crain’s Chicago Business*, Vol. [X] No. [X], May , 200X, p. 15.

3. The Ordinance defines “contract management authority” 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).

4. “Person” means any individual, entity, corporation, partnership, firm, association, union, trust, estate, as well as any parent or subsidiary of any of the foregoing, whether or not operated for profit. §2-156-010(r).

5. “Relative” is defined as a person who is related to an official or 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, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather or stepmother, stepson or stepdaughter, stepbrother or stepsister, half-brother or half-sister.

Board staff about your work on contract TXXXXX with [G] fka [OA], the Board is able to conclude that you exercise contract management authority over it. Therefore, the question is whether you exercise contract management authority over City work being performed by the person that employs your nephew—a situation the Ordinance prohibits.

Under the most literal, restrictive interpretation of §130(b),⁶ the Board could answer this question by concluding simply that [G], Inc. is the “person” over whose City work you exercise contract management authority and the “person” that employs your relative, and that therefore you are prohibited from having or exercising contract management authority over contract TXXXXX. However, as explained below, the Board believes that it is appropriate to use a fact-specific, case-by-case approach, rather than a literal, restrictive one, in answering this question. With a case-by-case approach, issue becomes whether, considering the totality of facts presented here, there is sufficient basis to warrant the conclusion that, for purposes of §130 of the Ordinance, [GSU] is the “person” performing the City work over which you exercise contract management authority and [GTU] is the “person” employing your nephew, and that they are “persons” distinct from each other and from [G], Inc.

In two previous cases where the issue was whether the person “employing” or “contracting with” a City employee’s relative was the same person doing the City work managed by the employee (Nos. 00021.A and 01015.A), the Board likewise applied a case-by-case approach. In those cases, a City employee’s wife was employed by and had a 10% ownership in a firm contracting on non-City business with companies over whose City work her husband exercised management authority. The husband would have been prohibited from exercising this authority if the Board had concluded simply that these companies “employed” or “contracted with” his wife, rather than her firm. Recognizing a basic corporate law principle that corporations are legal persons distinct from their owners and employees, the Board instead deemed it relevant to use a case-by-case approach and consider the facts specific to his wife’s situation to see if that distinction was being preserved. Examining those facts, the Board concluded that they were insufficient to warrant the conclusion that the corporate structure should be disregarded. It determined that the person employing (or contracting with) the wife was her firm, not the companies over whose City work the husband exercised management authority. The result was that the husband was not prohibited from exercising management authority over their City work. The Board noted that, in future situations, if the facts were sufficient for it to draw the inference that the corporate structure was being used to circumvent the Ordinance, the fact-specific approach would grant the Board the flexibility to disregard the corporate entity and look directly at the individuals and the corporate arrangement involved. Case No. 00021.A, at 5, n. 2. And, importantly for your case, the Board recognized that this fact-specific approach should apply not only to situations involving spouses, but also to those involving other relatives employed by (or contracting with) business corporations. The opinion says, on pp. 5-6:

6. The Board’s research of other cities’ and states’ governmental ethics laws indicates that §130(b) appears to be the only anti-nepotism provision that explicitly prohibits government personnel from exercising authority or making decisions over persons employing or contracting with their relatives. More typical are provisions prohibiting government employees from using or attempting to use their positions to influence or make decisions in official matters in which their relatives have some financial interest, or to obtain some advantage for their relatives. See, e.g., New York City Charter § 2604(b)(3); Massachusetts General Laws § 268A:6.

“We believe that the intent expressed in Section 2-156-010(l) of the Ordinance [the definition of ‘financial interest’] bolsters a reading of the ‘Employment of Relatives’ section that would respect the independent character of a corporation not formed or used by a spouse (*or other relative*) to avoid the prohibitions of the Governmental Ethics Ordinance, and that would not result in the most extremely restrictive interpretation of [the ‘Employment of Relatives’] provision.” (Emphasis added.)

Accordingly, the totality of facts presented here, including the following: 1) [G] , Inc. has more than 95,000 people working for its six operating segments, including [GTU] and [GSU]; 2) each [G] operating segment is separately managed; 3) each operating segment has its own budget, hiring, compensation and bonus systems, locations, customers, business and product lines; 4) there appears to be little relevant connection between the segment performing the City work over which you exercise management authority [GSU] , and the segment in which your nephew works [GSU] ; and 5) you have had no matters involving or interaction with personnel from [GTU](your work on [G] contracts has been limited to contracts with [G/OA] , and has not involved [GSU]), provide a sufficient basis to warrant the conclusion—and the Board therefore concludes—that, for purposes of §130 of the Ordinance⁷, [GSU] is the “person” doing the City work over which you exercise contract management authority, [GTU] is the “person” that employs your nephew, and they are “persons” distinct from each other and from [G] , Inc., and therefore, the Ordinance does not require you to recuse yourself from your work on this [G] contract.

2. Other Prohibitions.

Section 130(c) of the Ordinance prohibits City employees, such as you, from using their City positions to help their relatives gain employment or contracts with persons over whom they exercise contract management authority. It also provides that the employment of or contracting with a relative by a person over whom a City employee exercises contract management authority in effect creates a rebuttable presumption that the employment was obtained in violation of the Ordinance.⁸ Here, the Board notes, there is no indication in the factual record presented that you used your City position or otherwise assisted your nephew in securing his employment. Thus, notwithstanding the Board’s conclusion that [GSU], [GTU] and [G] , Inc. are distinct “persons” for purposes of §130 (and, therefore, §130(c) does not strictly apply here), there would still be a sufficient factual basis to find that this presumption would be rebutted. For these reasons, the Board concludes that

7. The Board emphasizes here that this conclusion is limited to §130 of the Governmental Ethics Ordinance—it does not imply, and should not be understood to imply, that the Board is addressing whether, or concluding that, operating divisions or segments of [G] or other companies are the same or separate “persons” for other purposes, such as the City’s Campaign Financing Ordinance. Stated conversely, were the Board to determine that two divisions of a company were the same “person” for purposes of the campaign contribution limitations, that conclusion would not dictate the result in this case or others involving the employment of relatives. That is because the language in §2-164-040(b) of the Campaign Financing Ordinance, which treats an “entity and its subsidiaries or otherwise affiliated companies” as a “single person,” applies expressly “for purposes of subsection (a) above” (namely, the \$1,500 per person contribution limitation); there is no such express identification of entities and their subsidiaries or affiliates elsewhere in the Governmental Ethics or Campaign Financing Ordinances. Applying the principle of statutory construction *expressio unius est exclusio alterius*, the Board takes this as an indication that, in these two Ordinances, for purposes other than identifying a “single person” in the provision limiting campaign contributions, there is no presumption that entities and their subsidiaries and affiliates are or are not the same “person”; such determinations are to be made on a case-by-case basis.

8. §130(c) states: “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.”

§130(c) of the Ordinance does not prohibit you from exercising management authority with respect to [G] contract TXXXXX. Cf. Case No. 93032.A.

The Board also reminds you that your fiduciary duty to the City, which is set forth in §2-156-020 of the Ordinance, prohibits you from using or permitting the use of your City position to assist your nephew in any way, e.g., using your City position or contacts with [G] personnel to help him gain promotions within [G]. Case No. 00021.A, p. 6. Finally, §2-156-070, "Use or Disclosure of Confidential Information," prohibits you from using or disclosing confidential information gained in the course of your City employment, whether to aid your nephew or for any other reason. "Confidential Information" means any information that may not be obtained pursuant to the [M.W. state] Freedom of Information Act. *Id.*

DETERMINATION: The Board determines, based on the totality of the facts presented, that, for purposes of §130 of the Ordinance, [GSU] and [GTU] are "persons" distinct from each other and from [G], Inc., and, therefore, that the Ordinance does not require you to recuse yourself from your work on this [G] contract. Our determination does not necessarily dispose of all the issues relevant to your situation, but is based solely on the application of the City Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incomplete or incorrect, please notify the Board immediately, as any change in the facts may alter our opinion. Other laws or rules may also apply to your situation. We note that any City department may adopt restrictions that are more stringent than those imposed by the Governmental 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 this opinion is rendered.

The Board sincerely appreciates your willingness to abide by the standards embodied in the City's Governmental Ethics Ordinance, and commends you for recognizing this situation as a potential issue and bringing it to us for resolution.

Darryl L. DePriest
Chair