

Corrected Copy
Signed by J.D
MEH

November 28, 1988



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Board of Ethics
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Suite 530
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[REDACTED]

CONFIDENTIAL

Re: Case No. 88144.A

Dear [REDACTED]

The Board of Ethics has reviewed your request for an advisory opinion to determine whether the Ethics Ordinance would prohibit your serving as a trustee of M [REDACTED]

In your request you stated that, although M will face issues in your field in the future, you believe that you would be able to avoid any conflict of interest. Based on the information that you have provided and assuming its accuracy, the Board has determined that, within certain limitations, your service as a trustee would not violate the Ethics Ordinance.

FACTS

Through materials and statements provided to the Board, you have informed us that your responsibility as a City employee is to direct and manage the Department of A. [REDACTED]

[REDACTED]

[REDACTED]

You informed us that M is involved in 2 projects [REDACTED]

[REDACTED]



[REDACTED] Either situation would require the involvement of the Department of A. [REDACTED]

You stated that you recognize such a situation as a potential conflict. To avoid the conflict and any appearance of impropriety, you said you would not participate in or even be present for any discussions or deliberations regarding M, [REDACTED]

You also said you would abstain from voting on and recuse yourself from decisions on M [REDACTED] if the City of Chicago were involved. You mentioned that M's officials are aware of your concern to avoid conflicts and will cooperate in your effort to do so.

Regarding contracts with your department, [REDACTED] you said they are awarded on a bid basis and in accordance with the procedures established by [REDACTED] Department B. A step in those procedures is your recommendation for the award. However, you stated that you usually follow the recommendation of your staff who have done technical analysis of contract proposals.

In response to the Board's inquiry into contracts between M and your department, [REDACTED] you submitted three contracts which were awarded to M. [REDACTED] You stated that you did not know of any pending proposals from or contracts with M.

To inform the Board of the duties and powers of a trustee of M [REDACTED], you submitted a portion of the Bylaws of M [REDACTED] and a letter from M's secretary, [REDACTED]

According to these documents, M is a not-for-profit corporation, organized under the laws of the state of Illinois. Sixty regularly elected trustees serve for a term of five years as the directors of the corporation and are responsible for its control and management. Thirty-five percent of the regularly elected trustees constitute a quorum for the transaction of business. Annual meetings of the trustees are held twice a year. However, special meetings may be called at any time. During intervals between meetings of the Board of Trustees, the Executive Committee, composed of twelve trustees, can exercise all the powers vested in the Board of Trustees for the management of property and the business affairs of M.

According to the Bylaws, each trustee will serve on one of five Development Councils: Trustee, Business and Industry, Alumni, Public Affairs, and Foundations. The documents submitted to the Board do not disclose the function or powers of these councils. The Bylaws also provide for seven standing committees which advise the trustees and M's administration on various areas of operation: [REDACTED] Liaison, M's Center, Finance, Audit, Trusteeship, [REDACTED] Resources and [REDACTED] Affairs.

Special committees of trustees are also established as needed. A letter to you from the Assistant Secretary to the Board of Trustees stated that there are also subcommittees and boards, but participation in any of these would be optional. You stated that you would avoid any committee that might bring you into conflict with your duties to the City. You said that you would probably be interested in committees

[REDACTED]

Trustees are not compensated, and you knew of no perquisites of the position. The Board has no evidence that you have any economic interest in anything related to M that is distinguishable from the interest of the general public.

In response to the Board's inquiry regarding your relationship with or connection to M in the past, you said that you had come to know persons on the Board of Trustees in the course of your work as a city employee.

You stated that, other than these acquaintances, you have no personal or professional connections to M and, at this time, do not anticipate any such connection in the future. You believe that major reasons for M's interest in you are your years of experience in

ANALYSIS

Three sections of the Ethics Ordinance control the Board's opinion that, on the facts presented and within certain limitations, you may be a trustee of M without violating the ordinance. Section 26.2-2 deals with the fiduciary duty of City officials and employees. Section 26.2-7 governs the use or disclosure of confidential information. Section 26.2-9(a) concerns the representation of a person other than the City before any City agency by a City employee.

A. Fiduciary Duty Of City Employees

Section 26.2-2 of the Ethics Ordinance provides: "Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City." This section requires a City employee, within lawful limits, to give undivided loyalty to the City of Chicago in the discharge of her public duties. An employee must be able to exercise professional judgment, free from outside influence or conflicting duties. A City employee is bound in the discharge of her public duties to act in the best interests of the City and never to take advantage of the trust that the City places in the employee. A director of a not-for-profit corporation owes a similar fiduciary duty to that corporation. If a City employee is at the same time the director of a not-for-profit corporation and if the interests of

the City and the corporation compete, the employee may find herself in a conflict of interest and in danger of violating her fiduciary duty to the City and to the corporation.

The fiduciary duty of Section 26.2-2 requires not only that a city employee do no actual harm to the City, but also that the employee not even give the appearance of impropriety in the discharge of her public duties. The preamble of the ordinance states the reason for this requirement: "...it is essential to the function of democratic government that the public have confidence in the fair and honest administration of government...and that confidence can best be engendered and preserved by the avoidance of conflicts of interest, impropriety, or the appearance of impropriety...."

A City employee could serve as the uncompensated director of a not-for-profit corporation if, in discharging her duties for both the City and the corporation, she could remove herself from deliberations and decisions on issues in which the interests of the City and the corporation may clash. Such recusal, along with full disclosure of the potential conflict to both City and corporation, could prevent not only actual conflicts, but also the appearance of impropriety.

In your case, you are a City employee who wishes to serve as a trustee of M. As a trustee, you would be the director of a not-for-profit corporation and, thus, owe M a fiduciary duty when acting as a trustee. You, along with other members of the Board of Trustees, would be responsible for the control and management of M. Through service on committees and boards you would provide advice and guidance to M on issues facing the institution.

You have informed the Board that your field is an important issue which M will face in the future and that you as a City employee can exert great influence over City decisions regarding your field. This situation creates a potential conflict of interest which, in turn, could give an appearance of impropriety. For example, if M wanted to you would decide whether supporting M's plan would be in the best interests of the City. Your fiduciary duty to the City would require your decision to advance City interests and implement City policy, whether or not that decision was advantageous to M. If your decision were advantageous to M or even merely perceived by some persons to be advantageous, the suspicion could arise that because you were a trustee, had received preferential treatment from the Department of A. Thus, your action as a City employee even when completely proper, could give the appearance of impropriety.

Nonetheless, Section 26.2-2 does not necessarily bar you from serving as a trustee. As the information you provided to the Board shows, a trustee can serve M in many areas and easily

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stay clear of areas of conflict. Addressing specifically the potential problem raised by M's concern about your field's, the Board's opinion is that you would avoid a violation of Section 26.2-2 if you (1) disclosed the potential conflict both to M and the City; (2) neither participated in nor were present at deliberations on or discussions of your field's issues that involve the City and M and (3) did not participate in, make recommendations on, vote on or otherwise influence the resolution of any your field's issues involving the City and M.

B. Use and Disclosure of Confidential Information

Section 26.2-7 provides:

"No current or former official or employee shall use or disclose, other than in the performance of his official duties and responsibilities, or as may be required by law, confidential information gained in the course of or by reason of his position or employment. For purposes of this section, 'confidential information' means any information that may not be obtained pursuant to the Illinois Freedom of Information Act."

This prohibition speaks for itself. For your information a copy of the Freedom of Information Act is attached to this letter. ¹

C. Representation Of Persons Other Than The City

Section 26.2-9(a) of the Ethics Ordinance provides:

"No elected official or employee may represent, or have an economic interest in 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 non-ministerial nature; provided that nothing in this subsection shall preclude any

¹ The Board would like to comment briefly on the confidentiality requirement. The Board realizes that information which is generally available to the public or knowledge, expertise or skill gained through years of work are different from confidential information. However, the distinction is not always easily drawn nor readily apparent. A shifting gray area between public information and confidential information exists, and often a person's distinctive expertise resides in this gray area. Not only can an inadvertent disclosure or use of confidential information easily occur, but even an innocent disclosure or use of nonconfidential information can easily give the appearance of impropriety. Therefore, great caution should be exercised in disclosing or using information that falls into this gray area bordering confidentiality.

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employee from performing the duties of his employment, or any elected official from appearing without compensation before any city agency on behalf of his constituents in the course of his duties as an elected official."

Under the Ethics Ordinance, a not-for-profit corporation is considered a "person" other than the City. "City agency" includes executive departments; the Office of the Mayor; and the City Council, its committees and subcommittees. A "nonministerial" action involves the exercise of discretion or judgment by the agency, in contrast to a ministerial action which is done in a prescribed manner in obedience to the mandate of legal authority, with no exercise of discretion, when a certain set of circumstances exists. "To represent" is to function as the official or authorized delegate for a person or to act as a spokesperson.

Section 26.2-9(a) prohibits a City employee from functioning as the delegate or spokesperson for any person other than the City, including a not-for-profit corporation, in any proceeding or transaction before any City agency. The prohibition is not contingent upon the City employee's receiving any economic benefit for her acts on behalf of the person, nor is the prohibition limited only to representation before the employee's own City agency.

Representation of a person under Section 26.2-9(a) can take many forms, depending upon the nature of the proceeding or transaction and its degree of formality. Acts of representation could include a formal, personal appearance at a hearing before a City agency; a telephone call to an agency employee to advocate the person's position; or discussions or correspondence on behalf of the person with the City agency. In a transaction carried out completely on paper, for example, through submission of written applications or proposals, a City employee's signature on an application or proposal, identifying the employee as the person authorized to submit the document on behalf of the person, could also be an act of representation.

This prohibition promotes equal access to government and public confidence in the fairness and integrity of governmental deliberations and decisions. It does so by preventing actual abuses of power and position, as well as the appearance of impropriety. Moreover, it assists officials and employees in avoidance of actual and potential conflicts of interest.

With respect to your service as a trustee of M. Section 26.2-9(a) prohibits you from representing the interests of M. before any City agency in any formal or informal proceeding or transaction that will result in discretionary action by that agency on the interests of M. As stated above, acts of representation can range from a formal appearance in a hearing to

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a telephone call to the City agency regarding a proceeding or transaction. Therefore, it would be advisable to exercise discretion in any communications with City agencies regarding any matter involving M and the City of Chicago.²

SUMMARY

Based on the facts provided to the Board, our opinion is that, within certain limitations, you may serve as a trustee of M without violating the Ethics Ordinance. Section 26.2-2 imposes upon you a fiduciary duty to the City in the performance of your public duties. If M faces your field's issues that involve the City of Chicago, in order to avoid a conflict of interest and a possible breach of fiduciary duty, you should: (1) disclose the potential conflict to both M and the City; (2) neither participate in nor be present at deliberations on or discussions of your field's issues involving M and the City; and (3) not participate in, make recommendations or vote on, or otherwise influence the resolution of any your field's issues involving M and the City.

The opinion of the Board discusses Section 26.2-7, which requires you neither to use nor disclose confidential information gained in the course of your employment with the City, and Section 26.2-9(a), which prohibits City employees from representing persons other than the City before City agencies. The Board calls these provisions to your attention so that you can exercise discretion in these areas.

Please inform us if any of the facts upon which we based our opinion are inaccurate. We appreciate your inquiry and hope that this letter adequately answered your questions regarding service as a trustee of M. Should you have further questions concerning this or related matters, please do not hesitate to contact the Board.

Sincerely,

Mary Milano *MSD*

Mary Milano
Vice Chair

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² Section 26.2-9(a) does not restrict the right of City employees and officials, in their capacity as private citizens, to express their opinions on matters pending before City agencies, nor should it have a chilling effect on their participation in community organizations and institutions. It merely forbids them to represent a person other than the City and promote that person's interests in any formal or informal proceeding or transaction before a City agency.