

Notes to Case 10042.CNS:

1) In August 2010, the Board of Ethics adopted the following Memorandum as its Advisory Opinion in the matter. The Board's opinion is based on the facts set out in the Memorandum.

As with all Board opinions, the Board's opinion in this case is confidential in accordance with the provisions of the City's Governmental Ethics Ordinance ("the Ordinance"). This means that the Board and its staff cannot discuss this opinion or the underlying request for it unless it has the requestor's express waiver of this confidentiality.

2) Reliance: The opinion in the following Memorandum may be relied upon by any person involved in the specific transaction or activity with respect to which it is rendered.

3) This opinion addresses solicitation by City employees and officials on behalf of City-sponsored charities, or in connection with City-sponsored charitable drives. This opinion does **not** address solicitation of political contributions, which are covered by other provisions in the Ordinance. Since the time the Board issued this opinion, an additional section was added to the Ordinance, §2-156-142(h). This provision prohibits City employees and officials and employees from "solicit[ing] any gift on behalf of a third party, if: (i) that official or employee knows that the prospective donor is seeking administrative or legislative action from the city, and (ii) the official or employee is in a position to directly affect the outcome of that action."



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MEMORANDUM

FROM: Courtney L.D. Kimble
Courtney L.D. Kimble
Attorney/Investigator

Steven I. Berlin
Steven I. Berlin
Executive Director

DATE: August 6, 2010

**RE: Board Case No. 10042.CNS, Fundraising/
Solicitation**

This memorandum is provided in response to inquiries from departments for help in guiding their employees about the relevant sections of the Governmental Ethics Ordinance ("GEO") which apply to fundraising and solicitation by City employees, particularly for a City-approved effort, such as the _____ campaign. This memorandum is in no way intended to constitute specific legal advice, or replace or supplant any other applicable City rules or policies, or to interpret any City policies or laws other than the GEO, the only pertinent section of the Municipal Code which the Board of Ethics has authority to interpret. In the past, the Board has rendered guidance similar to that contained below in this memorandum. Departments may have rules and policies which are more stringent than those contained in the Board of Ethics' GEO or suggested guidance in this memorandum, and the Board reminds employees that the approval of the Mayor's Office and the Department of Law should be secured before engaging in fundraising activities, even if the fundraising is part of a City-approved effort or campaign, such as the _____. Board of Ethics is not promulgating--and has no authority to promulgate-- a policy in this area, including in this memorandum.

The following points are important to note:

The Board officially advises that, although the GEO does not expressly prohibit solicitation of City vendors or other businesses or City employees for City-approved charitable campaigns, extreme care must be taken to ensure that this is done impartially, so that a reasonable employee/vendor/business would not feel coerced or compelled to either contribute or not: contribution is entirely voluntary. No one person or entity should be singled out; all persons or entities in a similar group should be treated equally. There can be no express or implied representation that there is any advantage to contributing, or a penalty for not contributing. City employees and officials at all times owe a fiduciary duty to the City, and if an employee does not perform solicitations in accordance with these

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guidelines, the employee could violate the fiduciary duty section of the GEO.

Section 2-156-040(f) of the GEO provides that a City employee or official may accept a gift on behalf of the City, provided that the employee or the department send the Board of Ethics a letter (with a copy to the Comptroller's Office), and the items will in turn be given to the . The Board of Ethics has generally strongly discouraged this; however, it is not prohibited by the GEO. It is in the best interests of both the City and that companies make any donations, particularly cash/check contributions, directly to so as to both protect the City, and preserve any tax advantage with respect to the donation.

With respect to charitable donations, while the Board of Ethics does not have case law directly on point, the Board has determined that an employee violates his fiduciary duty when he solicits departmental vendors for ads in a union fundraising book. While that case did not address "City-approved" charitable fundraising, the factors which should be considered when determining if a City employee violated his or her fiduciary duty to the City under a set of facts in which the employee solicits City contractors, remain the same:

(i) whether the employee's activity was in furtherance of, or a part of, an approved or official City initiative; (ii) whether the employee personally and directly solicited the City contractor; (iii) whether the employee was in a position of direct authority over the City contractor; and (iv) whether a reasonable person assessing these circumstances could reasonably infer that the contractor's relationship would be positively affected by agreeing to the solicitation, or negatively impacted by refusing it.

The Board of Ethics strongly discourages departments from "competing" with each other, explicitly or implicitly, over who can generate the highest contributions. The Ordinance does not prohibit celebrations or ceremonies when fundraising goals are met. It cannot be stressed enough: contributions, volunteering, etc., should all be voluntary--no promises or representations, explicit or implicit, should be made as to any consequences, positive or negative, of contributing or volunteering.

The Board strongly recommends that official letterhead be used for any solicitations or related correspondence, and that no City letterhead or postage be used under any circumstances for these purposes. Any questions regarding whether City property may be used for this campaign purposes must be addressed to the Mayor's Office and/or the Law Department. While a department head may authorize reasonable use of City property generally, it is important that approval be secured from the Mayor's Office before any City time or property is used for any charitable fundraising purposes.

This is not intended to be considered, nor does this constitute, official City policy, nor legal advice for any particular situation. Persons with questions about whether specific activities or conduct is permissible under the GEO are advised to contact the Board of Ethics for guidance.