

ADVISORY OPINION

CONFIDENTIAL

August 18, 2010

[Mary Jones]
Executive Director
[Company]
[345] E. [xx]rd St.
Chicago, IL 606[xx]

RE: Case No. 10033.A

Dear Ms. [Jones]:

You provided to Board staff the material facts contained in this advisory opinion. You were a [management-level employee] of the [geographic] Region in the [City Department ("CD")] formerly the [different City Department], a position you held from 200[x] until you resigned effective February 28, 20[xx]. On June 23, 2010, you asked for an advisory opinion addressing whether the City's Governmental Ethics Ordinance restricts your service on the Advisory Board of the [non-profit agency] ("NPA").

Based on the facts presented, the Board determines that: the Ordinance's post-employment provisions do not prohibit you from serving on the NPA's Advisory Board. The Board's analysis follows.

FACTS:

Your City Employment: As a [management-level employee] in the [Division] of [CD], you oversaw [certain tasks relating to] City-owned land within the [geographic] Region. You said that you supervised a staff of seven, including six [City Department employees], who were primarily responsible for [defined tasks]. You said that in your City work, you were responsible for [certain tasks] in the [geographic] Region for the City of Chicago.

You said that you did not participate in reviewing [contracts] or in selecting companies to be awarded [contracts]. You told Board staff that you had no role whatsoever with the funding of the projects that your staff worked on, and that you do not know how decisions were made as to who received funding. You said that those tasks were done by employees in [other] divisions of [CD]. In sum, in your City work, you oversaw [certain tasks relating to] City-owned land within the [geographic] Region.

The [Not-for-Profit Agency ("NPA")]: According to [NPA]'s website, the [NPA], founded in July 2005, is a non-profit organization whose organizational mission is to provide capital to qualifying projects and businesses in low-income areas of

Case No. 10033.A

August 18, 2010

Page 2

the City of Chicago through the use of NMTCs¹. The activities of the [NPA] are governed by a two-board structure – a Board of Directors and an Advisory Board. Day-to-day operations at [NPA] are managed by [CD] staff with the support of [an independent consultant].

[NPA] will use 100% of its allocation of NMTCs to provide capital at below-market terms to industrial, commercial, institutional and mixed-use real estate projects meeting federal NMTC criteria located in significantly underserved areas, designated by [a federal government Fund] as Low-Income Communities (“LICs”)², within the City of Chicago. [NPA]’s organizational mission is to provide capital as described.

The [NPA] Advisory Board: The [NPA] Establishment Ordinance also provided for the establishment of an Advisory Board, to serve as the mechanism by which [NPA] maintains accountability to LICs that are to benefit from the NMTC program. It is controlled by a nine member Board of Directors (“Advisory Directors”); is not funded by the City; and its stated purposes are to: (i) maintain accountability to residents of Low Income Communities served by the [NPA]; and (ii) advise the [NPA] respecting the Fund’s primary purposes and such other matters as the [federal government Fund] might request.

In Board Case No. 05046.A, the Board of Ethics determined that the Advisory Board of the [NPA] is a City agency, but that it is not a “working” Board and, as such, is solely advisory with §2-156-150(a) of the Governmental Ethics Ordinance.

Your proposed service as a board member on the [NPA] Advisory Board: You said you were asked to serve on the [NPA]’s Advisory Board as a “low-income community representative.” You said that in that role, you would maintain accountability to low-income communities in Chicago and advise [NPA]’s investment activities in relation to the [NPA]’s organizational mission. It is your understanding that at all times, at least 20% of the Advisory Board’s members must be representatives of LICs, as defined by the [federal government Fund]. As a purely consultative body, the Advisory Board does not have the authority to make management decisions or enter into binding decisions on behalf the [NPA].

Relationship between the [NPA] and the City: [CD] will make the following resources available to [NPA] and its Advisory Board: assistance by certain City personnel; assistance by certain City subcontractors; and use of City office

¹New Market Tax Credits is a federal program which encourages private sector investment and job creation in the nation’s low income communities. NMTC uses federal income tax credits to encourage individual and corporate taxpayers to invest in businesses and real estate located in low-income communities.

²The [federal government Fund] defines “Areas of Greater Economic Distress” as areas which tend to exhibit multiple distress factors, including unemployment or income levels that are well below the metropolitan average and poverty levels that are well above the metropolitan average.

Case No. 10033.A

August 18, 2010

Page 3

space and equipment. City personnel involved in the operation of [NPA] will be drawn primarily from [CD], [another City Department], and the Special [Division] of the City [Office]. The City's Department of Law provid[es] legal counsel to the City on matters relating to [NPA] and [NPA]-sponsored NMTC transactions. *Ibid.*

LAW AND ANALYSIS:

To advise you, we will consider the facts you have presented and apply those facts to § 2-156-100(b) of the Ordinance, entitled "Post-Employment Restrictions." It states, in relevant part:

No former...employee shall, for a period of one year after the termination of the employee's 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...employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

This section contains two post-employment restrictions: a one-year and a permanent. We analyze each in turn.

One Year Prohibition: Under the first clause of §2-156-100(b), you are, as a former City employee, prohibited for one year after leaving City service from assisting or representing any person (including the [NPA], or its parent, subsidiaries and affiliates) in any business transaction involving the City if you participated personally and substantially in the subject matter of that transaction as a City employee. You will be prohibited from assisting or representing any person in those transactions for one year, i.e., until February 28, 20[xx], if they involve the City and you participated personally and substantially in their subject matter.

The issue is whether the one-year prohibition in §100(b) limits your ability to assist the Advisory Board of the [NPA]. First, the Board concludes that this is a business transaction involving the City, because the [NPA]: provides capital to qualifying projects and businesses in low-income areas of the City of Chicago through the use of NMTCs; its day-to-day operations are managed by [CD] staff; and its NMTC program will be used to provide capital to real estate projects located in LICs within the City of Chicago.

But the key question here is the next one: whether you participated personally and substantially in the "subject matter" of your position at the [NPA] Advisory

Case No. 10033.A

August 18, 2010

Page 4

Board during your City service. As a [management-level employee] in the [geographic] Division of [CD], you were responsible for the management of [certain tasks] in the [geographic] Region for the City of Chicago. You explained that as a [management-level employee], you oversaw [certain tasks relating to] City-owned land within the [geographic] Region.

The [NPA] is a non-profit organization that provides capital to qualifying projects and businesses in LICs in the City of Chicago through the use of NMTCs. Its Advisory Board serves as the mechanism by which [NPA] maintains accountability to low-income communities that are to benefit from the NMTC program. You were asked to serve on the [NPA]'s Advisory Board as a "low-income community representative." You said that in that role, you would maintain accountability to low-income communities in Chicago and advise [NPA]'s investment activities in relation to the [NPA]'s organizational mission, which is to provide capital through the use of NMTCs.

The subject matter of your position at the Advisory Board of the [NPA] is to advise the [NPA] in implementing its organizational mission of providing capital to qualifying projects and businesses in LICs in the City of Chicago through the use of NMTCs. Your City job did not involve providing funding or advising thereon; instead, it involved overseeing [certain tasks relating to] City-owned land within the [geographic] Region. Accordingly, the Board concludes that as a City employee, you did not participate personally and substantially in the subject matter of the work in which you would be engaged as a member of the [NPA] Advisory Board.

Permanent Prohibition: Under the Ordinance, you are, as a former City employee, permanently prohibited from assisting or representing any person on a contract if you exercised "contract management authority" over that contract while employed by the City. "Contract management authority," defined in Section 2-156-010(g):

means 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.

Based on its review of your City career, and prior Board cases (See Case No. 93032.A), the Board advises you that you may have exercised that authority with respect to many contracts, including some which may have involved [NPA]. We advise you that, if you serve on [NPA]'s Advisory Board, and you are asked to assist or represent [NPA] on any of the matters not specifically addressed in this opinion, you should consult with the Board, as the Ordinance's permanent prohibition may well apply.

DETERMINATION: Based on the Board's analysis of the facts presented in this opinion under the Governmental Ethics Ordinance, the Board determines that

Case No. 10033.A

August 18, 2010

Page 5

the Ordinance's post-employment provisions do not prohibit you from serving on the Advisory Board of the [NPA].

Our determination does not necessarily dispose of all the issues relevant to your situation, but is based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incomplete or incorrect, please notify us immediately, as any change may alter our opinion. Other rules or laws may also apply to your situation. We also note that any City department may adopt restrictions that are more stringent than those imposed by the Governmental Ethics Ordinance.

RELIANCE: This opinion may only be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

Miguel A. Ruiz, Chair