

ADVISORY OPINION
CASE NO. 00009.A
Outside Employment

To: [Mary]
Training Coordinator, [Department 1]

Date: May 17, 2000

You are the Training Coordinator in the [Department 1]. In a letter of April 3, 2000 you asked the Board of Ethics if you could accept a paid, part-time consulting position with [Alpha Corp.] without violating the City of Chicago Governmental Ethics Ordinance. You deal with [Alpha] products, specifically, the [Alpha] [product], as the Project Coordinator of the Department's Chicago [Life] Program. The Board has concluded that if you accept this offer of employment with [Alpha] and continue in your duties discussed below as the Project Coordinator of the Department's [Life] Program, you will be in violation of the Ordinance. Our analysis and determination follow.

FACTS:

Your City Employment: You have served as the Training Coordinator at the [Department 1] for 3 years. Your primary responsibility is managing the training for the [Place's] 911 center. In addition, you are the Project Coordinator of the Chicago [Place] System's life saving initiative, entitled the Chicago [Life] Program. The program, you said, puts into effect a new concept in life saving, called [M]; you said that it is the first of its kind in the world. The program was officially launched in June 1999 when the Department went from using and owning one [product] to using and owning seventy-one [products], located throughout [Places 1 & 2]. You said that the program has been very successful, saving nine lives in the past eight months.

Your immediate supervisor, [John], [Assistant] in the [Department 1], said that you have been the Project Coordinator for the [Life] Program from its inception. You conceived the original idea of increasing the use of [products] and making them more accessible to the public and you pursued the details – you estimated the number of [products] needed, determined the optimal locations for the [products], researched the different models on the market, and wrote the specifications of the original Request for Proposals (RFP) that resulted in the Department's purchase of seventy [products]. However, [John] said that he negotiated the terms and made all final decisions on the contracts for purchasing and installing the [products].

You said that all of the [products] purchased in the spring of 1999 were manufactured by [Alpha]. The official name of the product is the [Saver]. You also said that [Alpha] has two main competitors, [Beta] and [Theta]. Speaking of the Department's initial purchase of seventy [products], [John] said that you advised the Department that the [Alpha] [Saver] [product] would best suit the Department's needs due to the unit's size, the fact that it was designed for use in public settings, the fact that [User 1 & 2

] [staff] are trained to use it, and its excellent performance record. You added that the [Saver] is the only model with certain features: an Electrocardiogram (EKG) display; the ability to measure arrest impediments in heart rates, which allows the user to recognize and identify different levels of fibrillation, only some of which should be responded to with jolts of electricity; and operation at low-energy, meaning that it does not escalate the amount of energy administered in shocks, therefore avoiding damage to the heart muscle.

According to [John], the [products] purchased in the spring of 1999 are under a five-year warranty and City employees perform the minimal maintenance that the units require. You said that the cabinets in which the [products] are kept require maintenance, and that the only maintenance that has ever been required on a [product] has been the replacement of pads after they are used, and the annual replacement of batteries. You said that none of the [products] purchased by the [Department 1] have ever malfunctioned. [John] said that he recently issued an RFP for the purchase of replacement batteries and [product] pads, and said that you wrote the specifications for the size and the quantity of the batteries and pads. You said the Department did not intend to purchase more [products]. According to both you and [John], your participation in decisions about the purchase of [Alpha] products was a one-time occurrence, and neither of you anticipate that the Department will be making purchasing decisions about [Alpha] in the future. In the event that a [product] is defective and needs to be replaced by the manufacturer, [John] said that he would be in charge of those dealings. You did say, however, that other City departments are considering purchasing and using [products]. You also said that the [Department 2] had recently purchased approximately 50 [products] made by [Beta], and that you had advised them about your experience with the [Alpha] [Saver] and other matters related to setting up their program.

Since the [Life] program began, you have managed the training for it and its day-to-day operation. You estimated that you and your three assistants have trained close to 2,500 City and [place] employees on the proper use of [products] and cardiopulmonary resuscitation. You have written the standard operating procedures and created the training curriculum, work that has brought you into contact with the Chicago Emergency Medical Services and the American Heart Association. You said that you sometimes speak at national and international [place] conferences on behalf of the Department and the City of Chicago in order to promote [M] programs. You also mentioned that during your vacation time, compensatory time and days off, you sometimes speak at conferences such as the American Heart Association's national conference on behalf of organizations such as the American Heart Association and the Red Cross, in order to promote [M].

A related duty of your City position is offering consultation to people interested in establishing a [M] program similar to the Department's – you mentioned recent consultations with the Salt Lake City [Place], the San Francisco [Place], the City of Dallas, and the [Department 2] of the City of Chicago. Finally, as the Project Coordinator, you supervise the weekly security checks done on all [products], and stay abreast of maintenance, which in the past has meant being paged along with a technical support team when one of the cabinets that stores a [product] unit malfunctions. Also, whenever a [product] is used you debrief all the rescuers, follow up on the patient's status in the Emergency Room and document the events surrounding the incident -- the initial EKG readout, the time from collapse, to dispatch, to ambulance arrival, to first shock. With respect to the operation of the [product], you said that when its EKG display shows a lethal heart rhythm, it either fires or does not, and all of the [Alpha] [products] that the Department owns have always fired when they should.

Your Proposed Outside Employment: In your proposed outside employment with [Alpha] you would speak at conferences in order to promote [M] programs and provide consultation to [Alpha]. Your employment would be governed by a "Profession Services Agreement" between you and [Alpha], a copy of which you forwarded to the Board. Although you already speak at [place] conferences on behalf of the City and also occasionally speak at other conferences on behalf of groups such as the American Heart Association, you said that the opportunity to work with [Alpha] would allow you to reach a much wider audience. You said that you would be speaking at conferences such as the European Resuscitation Committee's conference. Although [Alpha] would purchase the speaking time for you to speak at these conferences, and pay you for your time, and thus you would be acting as a paid employee of [Alpha], you said that you would not be accompanied by [Alpha] representatives, you would not be handing out [Alpha] literature, and you would not have a business card with [Alpha]'s name on it. If asked about particular products, however, you said that you would provide facts about the differences between products, mention which products had passed which critical laboratory tests, and so forth. These facts, in your opinion, would present [Alpha] in a favorable light because, in your opinion, [Alpha]'s [Saver] is the best [product] on the market.

In addition to speaking at conferences, the proposed consulting agreement between you and [Alpha] stipulates that you will provide consultation to [Alpha]. More precisely, the agreement states that you will have the duty "to receive calls and provide consultation to potential customers interested in initiating [M] Programs within the domestic United States, keeping [Alpha]-[Saver] personnel advised of those discussions." Furthermore, the agreement contains a clause on confidential information, stating that "Other than in the performance of this Agreement, neither Contractor nor Contractor's agents... shall use or disclose to any person or entity any confidential information of [Alpha]... which is obtained from [Alpha] or otherwise prepared or discovered... in the performance of this Agreement."

Your superiors in the [Department 1] have indicated that if the Board of Ethics does not object to your outside employment, it will approve your acceptance of [Alpha]'s offer. [John] said that the Department considers your public speaking about [M] and the Department's program to be a valuable contribution to the reputation of the City. He also said you have been very careful to prevent your speaking engagements with organizations such as the American Heart Association, undertaken on your vacation time, from interfering with your City work. He said that in several past instances you had declined invitations from such organizations, when the Department said it needed you in Chicago.

LAW AND ANALYSIS: As in all outside employment cases, several sections of the Ordinance are relevant to your situation. Section 2-156-030, "Improper Influence" states:

No official or employee shall make, participate in making or in any way attempt to use his position to influence any City governmental decision or action in which he knows or has reason to know that he has any economic interest distinguishable from its effect on the public generally.

and 2-156-080(a), "Conflicts of Interest" states:

No official or employee shall make or participate in the making of any governmental decision with respect to any matter in which he has any economic interest distinguishable from that of the general public.

Section 2-156-010(i) defines "economic interest" as "any interest valued or capable of valuation in monetary terms...."

These sections prohibit City employees from participating in or influencing governmental decisions or actions in which they have an "economic interest" (as defined) that is distinguishable from that of the public. Interpreting these sections, the Board has concluded that a City employee has an economic interest by virtue of outside, paid employment. *See, e.g.*, Case Nos. 98062.A, 94009.A, 92053.I, and 92044.A. If that economic interest will be affected by the City employee's governmental decisions, then a conflict of interest arises and the employee is prohibited from making such decisions.

To ensure that City employees do not make decisions that relate to their outside employment, the Board has looked with great care at any situation in which a City employee's outside employer seeks to do or does business with that employee's Department. In a recent case, the Board ruled that an employee possesses an economic interest in his or her outside employment. Therefore, a conflict of interest arises when an employee, in his or her City job, participates in decisions that are related to or may enhance his or her outside employment. Case No. 98062.A.

With respect to your particular situation, if you accept the consulting position with [Alpha], you will have an economic interest in that position. You indicated that, in the past, you have engaged in activities for the City such as researching the different models of [products] on the market, using this research to write specifications for the Department's RFPs, and advising the [Department 2] on their implementation of a [M] system. Your immediate supervisor, [Assistant] [John], noted that your activity in the initial Department purchase of [products] was a one-time occurrence, since the Department did not anticipate purchasing more [products]. He said that it was possible that the maintenance of the City's [products] would require future contact with [Alpha]; however, he indicated you would not have a role in this contact. He also stated that he believed that it would be possible for you to avoid making decisions about [Alpha] in your job.

However, the facts presented indicate that as the Project Coordinator of the Department's [Life] Program you continue to be responsible for the day-to-day operation of the [M] program, which relies on [Alpha]'s [products]; your duties revolve around the [Alpha] [Name 2]. You are required to stay abreast of [product] maintenance and you are responsible for documenting events on each use of a [product]. Each report on the use of a [product] entails an evaluation, if implicit, of the [Alpha] [product] – whether a rescuer was able to use it, whether it was effective, and if not, what went wrong. Furthermore, although you have stated that none of the Department's [products] have ever malfunctioned, the possibility that some kind of difficulty surrounding the use of a [product] could arise does not seem implausible. If, for example, there were litigation relating to the use of a [product] at a City [place], it is likely that you would be a key witness for the City. Your effectiveness as a witness for the City would be compromised by your outside employment with [Alpha]. Finally, in the course of your City employment, you have accumulated a significant amount of experience and expertise that has been and may continue to be valuable to other departments or other agencies that the [Department 1] would like to assist.

In sum, your City position obliges you to assess the [Alpha] [product] -- in the context of continuing maintenance, in reports on incidents in which a [product] was used, in advising your superiors or other departments. In carrying out your duties for the City you engage in actions and make or participate in the making of decisions that affect the reputation of [Alpha] and the [Saver]. Therefore the Board concludes that your City responsibilities, which include evaluating [Alpha] [products], relate to your proposed employment with [Alpha]. Your City assessments of the [Alpha] [product] could be affected by your paid position with [Alpha], and your impartiality (or certainly the appearance of your impartiality) could be impaired. Although it may be possible to exclude you from some of these activities, such as advising other departments, it seems disadvantageous to the interests of the City that someone with your expertise and experience be excluded from sharing it on behalf of the City. Furthermore, your duties for the City and [Alpha] overlap; for the City, you consult with parties interested in establishing a [M] program, and [Alpha] is asking you to do the same for it; the parties with whom you consult for each employer could even, on occasion, be the same. Thus your City duties are clearly related to your proposed outside employment.

Conclusion on Sections 2-156-030 and 2-156-080:

From the facts presented, the Board concludes that if you accept this offer of employment with [Alpha] and continue in your duties discussed here as the Project Coordinator of the Department's [Saver] Program, you will be in violation of Sections 2-156-030 and 2-156-080 of the Ordinance. If you accept the [Alpha] position, these sections will prohibit you from making, participating in, or using your City position to influence any City decisions or actions that entail evaluating [Alpha] [products] -- therefore you will be prohibited from such activities as preparing reports on each use of a [product], participating in or advising on maintenance, and consulting with other departments or any other person or agency on behalf of the City about [M] programs, when the consultation involves any consideration of the qualities and merits of [products].

The other provisions of the Ethics Ordinance that most directly apply to your situation concern fiduciary duty and the use of confidential information. Section 2-156-020 states:

Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City.

Section 2-156-070 states:

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.

Confidential information means information that cannot be obtained through the state's Freedom of Information Act. Section 2-156-070.

The fiduciary duty provision obliges you to use your City position responsibly and in the best interests of the public, and to exercise your professional judgment and City responsibilities free from conflicting duties to outside entities. If you were to perform your responsibilities under the proposed consulting agreement, you could find yourself in situations in which your ability to adhere to your fiduciary duty to the City could be compromised.

Under the proposed agreement, your responsibilities for [Alpha] would include receiving calls and providing consultation to potential customers interested in [M] Programs, and keeping [Alpha] personnel advised of your discussions. Furthermore, the agreement includes a confidential information clause, which would prohibit you from using or disclosing any confidential information of [Alpha] obtained from [Alpha] or discovered in the performance of your agreement with [Alpha]. By your own account, you receive calls and provide consultation to parties interested in [M] as part of your City employment.

Accepting a consulting position with [Alpha], therefore, creates a situation where you could have information about potential clients by virtue of your City job that would be economically useful to [Alpha]. However, the fiduciary duty provision of the Ordinance prohibits use of one's City position for a private benefit. Case No. 92014.A (A City employee was prohibited from using, to sell insurance, City traffic citation records to which he had special access because of his City position, even though the information on the records was available to the public, but through the more cumbersome procedure of the Freedom of Information Act). This provision would prohibit you from communicating to [Alpha] the identity of any party who informed you, in your capacity as a City employee, that it was interested in setting up a [M] program, or from relaying to [Alpha] any information that may be of economic use to [Alpha], if you received that information as a result of your City position. It would also prohibit you from using that information while acting as an [Alpha] employee.

Accepting a consulting position with [Alpha] also creates a situation in which you could be contacted by the same interested party in your capacity as a City employee and in your capacity as an employee of [Alpha]. This is problematic on several counts. First, if you had spoken with a potential client and informed [Alpha] about this discussion, on your own time and as part of your outside employment with [Alpha], this would prevent you from providing impartial consultation to that client on behalf of the City, as part of your City job. Second, you might have information derived from your City position that you could not relay to [Alpha], and at the same time possess information derived from your [Alpha] position that, under your agreement, could not be relayed to the City. This would place you in the untenable position of trying to maintain two separate roles in your interactions with the same party. The exercise of your City responsibilities would not be free from conflicting duties to an outside entity, as your fiduciary duty to the City mandates. Further, City information you have might well be confidential as defined in Section 2-156-070, and the circumstances, by their nature, create a danger that you could inadvertently reveal that information, in violation of the confidentiality provision of the Ordinance.

Conclusion on Sections 2-156-020 and 2-156-070: Accordingly, the Board concludes that if you accept the consulting position with [Alpha] and perform your responsibilities stipulated by the proposed consulting agreement, you will be placed in continual jeopardy of violating your fiduciary duty to the City, as well as the confidentiality provision of the Ordinance.

DETERMINATION: From the facts presented, the Board concludes that if you accept this offer of employment with [Alpha] and continue in your duties discussed here as the Project Coordinator of the Department's [Life] Program, you will be in violation of Sections 2-156-030 and 2-156-080 of the Ordinance. If you accept the [Alpha] position, these sections will prohibit you from making, participating in, or using your City position to influence any City decisions or actions that entail evaluating [Alpha] [products] -- therefore you will be prohibited from such activities as preparing reports on each use of a [product], participating in or advising on maintenance, and consulting with other departments or any other person or agency on behalf of the City about [M] programs, when the

consultation involves any consideration of the qualities and merits of [products]. From the facts stated, the Board further concludes that if you carry out your responsibilities stipulated by the proposed consulting agreement, you will be placed in jeopardy of violating your fiduciary duty to the City, as well as the confidentiality provision of the Ordinance.

Our determination does not necessarily dispose of all issues relevant to this 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 stated are incorrect or incomplete, please notify the Board immediately, as any change may alter our opinion. Other laws or rules also may apply to this situation. For example, Personnel Rule XVIII requires that employees perform their duties in a manner that furthers the efficiency and best interest of the City, and which results in the highest level of public trust and confidence in municipal government. Be advised that City departments have the authority to adopt and enforce rules of conduct that may be more restrictive than the limitations imposed by the 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 indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

RECONSIDERATION: This advisory opinion is based on the facts outlined in this opinion. If there are additional material facts or circumstances that were not available to the Board when it considered this case, you may request reconsideration of the opinion. A request for reconsideration must (1) be submitted in writing, (2) explain the material facts and circumstances that are the basis of the request, and (3) be received by the Board within fifteen days of the date of this opinion.

[Signature]

Darryl L. DePriest
Chair