

ADVISORY OPINION
CASE NO. 01042.A
Outside Employment

To: John
Re: Case No., 01042.A, Outside Employment
Date: November 14, 2001

You are currently employed [] with the City [in a capacity unrelated to the matter at issue]. In a letter dated September 13, 2001, you requested an advisory opinion from the Board of Ethics regarding whether you could accept full-time City employment [] with the Department [] and continue to own and operate a [private business]. You stated that you contacted the Board of Ethics on the advice of [] the Department []. You also stated that you consent to the Board of Ethics sending a copy of this opinion to the Department [].

After careful consideration of the information that you submitted and the relevant law, the Board concludes that, although the Governmental Ethics Ordinance does not prohibit your proposed outside employment, the Ethics Ordinance does impose certain restrictions on your conduct, both in your position with the City and in the operation of your [] business. Due to these restrictions (which are discussed in detail below), and to the appearance of impropriety that may result from your dual employment, the Board strongly recommends that you restrict the operation of your private [] business to locations outside City limits.

FACTS: You are currently the owner and operator of a private business, [the Company], that performs [services for private clients]. You are the sole proprietor of [the Company]. [The Company] currently employs you and your wife, who serves as an office assistant. On occasion, [the Company] contracts with [Michael], sole proprietor of [another private company] to perform [services] that you are unable to perform. You envision restructuring [the Company] such that [a part of the business] will be in a separate corporate entity that would be jointly owned by [the Company] and [Michael]. However, this corporate structure is still in initial planning stages.

You said that [the Company] is retained by [private clients] to determine [defects in properties]. []

]. You are not familiar with local [] requirements and do not render an opinion with respect to compliance with the municipal [] code of any jurisdiction in which you perform [services]. If you encounter a property that does not meet national standards, you often recommend that the [client] contact the regulatory authority for the jurisdiction in which the property is located so that an inspector for that jurisdiction can assess whether the property is in compliance with the relevant [] codes.

In connection with [the other part of the] business, you [perform services for clients

.] You are not aware of any jurisdiction that legislates [this subject matter], with the exception of New York and California. Neither you nor the [outside contractor you use] renders an opinion as to whether a particular property complies with City requirements.

You have applied for and have been interviewed for a position [with the] Department[]. As a City [employee] you would be assigned a district and would be responsible for inspecting [] properties within your district to ensure that [] each property[is] in compliance with the City's [] Code. In the course of your duties as a City [employee] you would [fulfill your obligations in accordance with your job description

]. Finally, you said that, currently, approximately half of the customers of your [] business are located within the City limits.

LAW, ANALYSIS, AND CONCLUSIONS: While the Ethics Ordinance does not prohibit you from having outside employment, it does contain provisions that impose restrictions on you as a City [employee] who has a private [] business.

Improper Influence/Conflicts of Interest: The Ordinance sections pertaining to improper influence and conflicts of interest are Sections 2-156-030, "Improper Influence," and 2-156-080, "Conflicts of Interest." These provisions state, respectively:

Section 2-156-030(a): 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.

Section 2-156-080(a): 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.

These sections prohibit City employees from making, participating in or in any way attempting to use their City positions to influence, a governmental decision or action in a matter in which they have an "economic interest" that is distinguishable from that of the public. An economic interest, as defined in Section 2-156-010(i), is any interest valued or capable of valuation in monetary terms and includes compensation received from your outside employment (Case No. 98062.A). The Board has concluded that "if [a City] employee ... receives an economic interest by virtue of his or her outside employment, and that economic interest is affected by virtue of his or her government decision, then a conflict of interest arises." (Case No. 91059.A, p.3.) By virtue of your ownership interest in [the Company] as well as your employment with it, you would have, within the meaning of the Ordinance, an economic interest in that firm that is distinguishable from that of the general public. Therefore, you are prohibited from making, or using your City position to influence, any governmental decisions that would affect that interest, including decisions that would affect the firm or its clients.

While the Board has analyzed the "Improper Influence" and "Conflict of Interest" provisions of the Ordinance in the context of a present or existing economic interest in one's outside employment (*see* Cases 98062.A; 94009.A; and 92044.A), the Board cautions you that the potential for an appearance of impropriety arises even after the relationship between [the Company] and a particular client has ended. For example, if, as a City [employee], you were called upon to inspect a property previously inspected by [the Company], or owned by [one of its] former client[s], it might appear that your City decisions with respect to that property would be influenced by your firm's past relationship with the property or its owner. Therefore, should you, as a City [employee], be asked to inspect a property under such circumstances, we advise you to disclose your firm's relationship with the property or its owner to the [supervisory] (for your district) to

determine if you should recuse yourself from that inspection. Furthermore, to minimize such situations in the future, we recommend that, should you accept employment as a City [employee], [the Company] cease inspecting any properties located within the City.

Receipt of Money for Advice or Assistance: Section 2-156-050, "Solicitation or Receipt of Money for Advice or Assistance," states:

No official or employee . . . shall solicit or accept any money or other thing of value including, but not limited to, gifts, favors, services or promises of future employment, in return for advice or assistance on matters concerning the operation or business of the City; provided, however, that nothing in this section shall prevent an official or employee from accepting compensation for services wholly unrelated to the official's or employee's City duties and responsibilities and rendered as a part of his or her non-City employment, occupation or profession.
(Emphasis added.)

This provision would prohibit you, as a City [employee], from accepting payment or anything of value in return for advice or assistance on the operation or business of the City; specifically, you are prohibited from accepting money from anyone other than the City in exchange for advice on complying with the City's [] code. This prohibition applies even though, as a City [employee] [], you would have the training and ability to make such determinations.

Representation of Other Persons: Similarly, Subsection (a) of § 2-156-090 prohibits you, as a City employee, except in the performance of your City duties, from representing or having an economic interest in the representation of any person other than the City in a transaction before a City agency where the agency's action is of a non-ministerial nature or involves discretion. As used in this subsection, representation encompasses "any activity in which a person acts as a spokesperson for some party or seeks to communicate and promote the interests of one party to another." (Case No. 90035.A)

Other Restrictions: In addition, several other provisions of the Governmental Ethics Ordinance may restrict certain aspects of your outside employment. Section 2-156-020, "Fiduciary Duty," states: "Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City." Pursuant to this provision you owe your primary loyalty to the City. This 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 or clients. (Case No. 99009.A) The fiduciary duty provision of the Ordinance also prohibits you from using your City position to obtain private benefits, such as to use your City employment to solicit clients for your [private] business or to promote the interests of your [private] business or of the clients of that business. (Case No. 99009.A) For example, your fiduciary duty under the Ordinance would prohibit you from using your City position to recommend

the services of your [private] business to property owners whose buildings you inspect on behalf of the City. In addition, if your obligations as a City [employee] conflict with any of your obligations as a [business owner], the fiduciary duty provision requires you to place your duties to the City above any duties you may have to your company or its clients. (Case No. 99018.A).

Section 2-156-070, "Use or Disclosure of Confidential Information," prohibits you from disclosing any confidential information obtained through your City employment in connection with your private [] business. Confidential information, for purposes of this section, means any information that may not be obtained pursuant to the Illinois Freedom of Information Act, as amended. You indicated that, since you have not yet begun working for the Department [] you do not know to what extent you would have access to confidential information through that employment. However, if confidential information becomes available to you, you are prohibited from using such information in the conduct of your private [] business. This prohibition extends to any information not available to the public that would allow you to identify potential clients for your [private] business.

Section 2-156-060, "City-Owned Property," prohibits you from using any City property or resources in your non-City position, or for any private benefit, without authorization.

Section 2-156-110 "Interest in City Business" would prohibit you from having a financial interest in any contract, work or business of the City whenever the expense, price or consideration of the contract, work, business or sale is paid with funds belonging to or administered by the City, or is authorized by ordinance. By your account, you will not seek as a client for your business any City Department or agency.

DETERMINATION: The Board determines that while the Governmental Ethics Ordinance would not *per se* prohibit you, as a City [employee], from operating a business that performs [services], it would severely limit your conduct. These limitations prohibit you from doing any of the following:

- making (or using your position to influence) any City governmental decision or action in which you have an economic interest distinguishable from its effect on the public generally (§ 2-156-030; § 2-156-080);
- soliciting or accepting money in return for advice or assistance on matters concerning the City's operation or business (§ 2-156-050);
- representing or having an economic interest in the representation of any person other than the City in a transaction before a City agency (§ 2-156-090);

- using your City position or City resources to obtain a personal benefit or to promote a purely private interest (§ 2-156-020; Case No. 92014.A);
- using confidential information to benefit your private business (§ 2-156-070; Case No. 92014.A);
- using your City title or identifying yourself as a City employee when soliciting business (§ 2-156-020; Case No. 88168.A);
- using or permitting the unauthorized use of any City property or resources for any private benefit, including your non-City employment (§ 2-156-060).

Accordingly, although no provision in the Ordinance specifically prohibits you from owning and operating a [private] business concurrent with employment as a City [employee], to avoid the appearance of impropriety, we strongly recommend that [Company], and all of its agents and employees, cease [operating] within City limits if you accept employment [with the Department].

Our determination is not necessarily dispositive 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 determination. Other laws or rules also may apply to this situation. 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.

Darryl L. DePriest
Chair

cc: Mara Georges, Esq., Corporation Counsel
Department []