



City of Chicago
Harold Washington, Mayor

Board of Ethics

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To: [REDACTED]

From: Janet Malone Morrow *JMM*
Vice-Chair
Board of Ethics

Date: September 2, 1986

I. STATEMENT OF FACTS

You have requested an advisory opinion of the Board of Ethics, interpreting and applying Executive Order 86-1 to the following set of facts:

A former employee (hereinafter referred to as "Y") of the City's Office of Cable Communications is now employed by a cable franchisee. Y first came to work in the Office of Cable Communications in about January, 1983. While employed in the Office, Y was engaged in such activities as legislative review and research; drafting of Cable Commission by-laws; monitoring of franchisees' compliance with franchise agreements, especially with those provisions relating to participation of minority-owned and women-owned businesses (M/WBE), affirmative action and equal employment opportunity; staff discussion of strategy and tactics, including sanctions for breach of the franchise agreements.

As an employee of the Office of Cable Communications, Y participated in monitoring the performance of the franchisee by whom Y is now employed. The monitoring included evaluation of the franchisee's M/WBE, affirmative action and equal employment opportunity efforts; and the development of enforcement strategies and tactics, including discussion of sanctions.

Y left the City's work force in March, 1986, and has been employed by a cable franchisee since that time. In the course of this new employment, Y has represented this franchisee in on-site review of the franchisee's activities by staff of the Office of Cable Communications and in meetings with Office staff. The review and meetings were for the specific purpose of collecting and verifying information needed to assess the franchisee's compliance with the M/WBE, affirmative action and equal employment opportunity provisions of the franchise agreement.

Section 11(a) of Executive Order 86-1 directs the Commissioner of Personnel and other department heads to "consider the adoption and implementation of [a rule] to effectuate the following" policy:

That former officials or employees shall not for a period of one year represent any person other than the City, before any City agency or in any administrative agency or court of law, in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation or other particular matter involving a specific party or parties, in which the City is a party or has a direct and substantial interest, and in which such official or employee participated personally and substantially during his term of office or employment.

In accordance with Section 26(d) of Executive Order 86-1, you have requested the advisory opinion of this Board as to whether any of the following

activities of Y, evaluated in light of the facts described above, would be contrary to the policy defined in Section 11(a) of the Order:

Discussions and meetings with staff of the Office of Cable communications concerning the franchisee's compliance or non-compliance with the franchise agreement, filing deadlines, and other directives, rules and regulations of the Office and the Chicago Cable Commission;

Discussions and meetings with employees of other city departments and agencies concerning construction of the franchisee's cable system, including permits, street repairs and cable installation in municipal buildings;

Presentations to and appearances before the Chicago Cable Commission.

In the event that the Board of Ethics determines that any such activity is inappropriate, you have also requested the advice of the Board as to what steps may be taken to avoid or correct the situation in the future.

II. CONCLUSIONS

Our review of this situation leads us to the following conclusions:

1. Y's representation of a cable franchisee before the Cable Commission and the Office of Cable Communications, in matters in which Y was personally and substantially involved while employed in the Office of Cable Communications, is contrary to the policy

enunciated in Section 11(a) of the Executive Order. This includes specifically matters concerning compliance with M/WBE, affirmative action and equal employment opportunity provisions of the cable franchise, and matters concerning construction and implementation of the franchisee's cable system.

2. Nothing in Section 11(a) of Executive Order 86-1 precludes current City employees in departments or agencies other than the Office of Cable Communication and the Cable Commission from conferring with Y, or accepting Y as the franchisee's representative in such matters as applications for permits necessary for construction and implementation of the franchisee's cable system, or discussions relating thereto.

Our reasons for these conclusions follow.

III. ANALYSIS

A. Employee's Participation in Evaluative Activity of the Office of Cable Communications.

The Office of Cable Communications and the Cable Commission qualify as "agencies of City government" as defined in Section 2(b) of Executive Order 86-1. Representation of any person other than the City, before either agency, is therefore within the scope of Section 11(a) of the Order.

The policy announced in Section 11(a) does not preclude a former employee from representing a person other the City before a City agency in all

circumstances, but only when all three of the following conditions are met: (1) the representation occurs within one year after the employee's separation from City employment; and (2) the City is either a party or has a direct and substantial interest in the proceeding or agency activity in question; and (3) the employee "participated personally and substantially" in the matter during the term of his employment. "personal and substantial participation" is defined in Section 2(o) of the Executive Order as "greater than minimal participation ... through which the person acquired information, special knowledge or other special advantage not generally available to the public or experts in the field."

All of Y's conduct in behalf of the cable franchisee has occurred within one year after Y's separation from City employment. There can be no doubt that the City has a direct and substantial interest in the installation and operation of cable television systems in the City: no such system may be installed except pursuant to a franchise (see Municipal Code Ch. 113.1); the franchises generate revenues for the City (see Franchise Agreements, §4), and cable television systems provide information and entertainment to City residents; construction and implementation of the systems provide employment and business opportunities to local residents and entrepreneurs (see Franchise

Agreements, §§24, 25); during the term of the franchise, the franchisee is regulated by the City, acting through its Office of Cable Communications and Cable Commission (see Franchise Agreements, §§8-23, 26-30). The first two criteria of Section 11(a) of the Executive Order have obviously been met, therefore, with regard to all of Y's activities as a representative of the cable franchisee. The only question remaining, therefore, is whether Y's activities on behalf of Y's new employer also reflect matters in which Y "participated personally and substantially," as defined above, while an employee of the Office of Cable Communications. We do not believe that all of Y's current activities reflect "personal and substantial participation" by Y in the same matters while a City employee.

The facts presented in your request indicate that as recently as January of this year Y, as an employee of the Office of Cable Communications, was engaged in staff reviews of a franchisee's (Y's soon-to-be employer's) compliance with several aspects of the franchise agreement, including M/WBE, affirmative action and equal employment opportunity commitments made by the franchisee therein. These reviews included much more than a tally of technical, objective data. Part of the procedure was review of the franchisee's efforts to honor its commitments to M/WBE

participation, affirmative action and equal employment opportunity, and an evaluation of those efforts as being in good faith or not. These staff reviews also included development of strategies and tactics to obtain the franchisee's compliance; among the strategies considered were sanctions available under the franchise agreement (see Franchise Agreements, §29). Monetary sanctions under the Franchise Agreements are fixed by the Cable Commission, based on several discretionary factors (see §29.6), and may be as high as \$750 per day. In the course of these staff reviews, a participating employee can be expected to learn the extent to which the Office of Cable Communications and the Cable Commission would consider the imposition of sanctions to be appropriate; whether the threat to impose sanctions would be made in earnest; and whether sanctions should be imposed for punitive or deterrent effect. This is the type of "special knowledge or special advantage" to which Section 11(a) of the Order is addressed: it is certainly not available to the public, because it is confidential; and it is not available to experts in the field of cable communications, because it consists of the mental impressions and judgments of staff. It is clearly the type of information that a regulated entity would value.

The same analysis and result apply to evaluations of construction and implementation progress. The amounts of liquidated damages that may be assessed for material failure to comply with the technical aspects of the Franchise Agreements are fixed (see §29.5), but imposition of the damages first requires evaluation by City employees that any failure is "material." Such evaluations necessarily involve discretionary activity and an element of subjectivity. Information from within a regulatory agency, indicating the internal thought processes of agency staff and the manner in which material failures are separated from immaterial deviations from plans, is the "special knowledge" which forms the basis for a finding of "personal and substantial participation." Because Y participated in staff evaluations of a franchisee's compliance with a franchise agreement, it is inappropriate for current employees to meet with Y as a representative of that franchisee.

B. Former Employee's Participation
in Other Agency Activity.

Your request for this advisory opinion indicates that Y was involved in establishing the procedures and record-keeping systems of the Office of Cable Communications and the Cable Commission, as those agencies came to full operation. Y was also involved

in research for the Commission. In your request for this opinion, you indicated an impression that participation in such activity, fundamental to the operation of a regulatory agency, should preclude Y from any cable-related activity for one year after separation from City employment, we do not agree. Having reviewed these other activities and having considered them in light of Y's current role as a representative of a franchisee, we do not conclude that awareness of the record-keeping systems and procedures of an agency constitutes "special knowledge or other special advantages not available to the public or experts in the field" of cable communications. Public access to agency records (with limited exception) is assured under the Illinois Freedom of Information Act (Ill. Rev. Stat. 1985, ch. 116, par. 201 et seq.). Knowledge of *public information* as it relates to a regulated industry is available to anyone willing to perform the necessary research, and is certainly available to industry experts. Accordingly, we conclude that Y's participation in the institutional activities of the Office of Cable Communication and the Cable Commission should not preclude Y from representing a cable franchisee in such matters as applications to other City agencies for permits, licenses or other government evidences of permission, necessary to construct and implement the franchisee's cable television system. We

believe that this reading of the policy contained in Section 11(a) of the Executive Order is appropriate: Section 1(b), (c) and (e) of the Order repeatedly state that the purpose of the Order is to impose only those restrictions necessary to prevent conflicts of interest.

IV. CORRECTIVE ACTION RECOMMENDED

Your inquiry addresses the conduct and activities of a former employee. An executive order does not have the force of law, and cannot impose standards of conduct on non-employees. There is no sanction or penalty that this Board may impose on a non-employee for violation of Executive Order 86-1. This does not mean, however, that nothing can be done to implement the policies expressed in the Order. Rather, implementation must come through the education of current employees and their subsequent conduct in accordance with the Order. Accordingly, the Board of Ethics recommends the following measures to prevent recurrence of activities and contacts which, while not illegal, are contrary to the announced policy of the City of Chicago:

The employees of the Office of Cable Communications and of the Cable Commission should avoid dealing with the former employee as the franchisee's representative in the following matters:

- a. questions of compliance with the M/WBE, affirmative action and equal employment opportunity provisions of the franchise agreement, including evaluation of the franchisee's efforts and discussions of

such matters as schedules, timetables, enhancement or modification of efforts or goals, and penalties or sanctions for non-compliance.

- b. discussions or negotiations concerning modification of construction or implementation schedules or standards.