



AM

February 6, 1989

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[REDACTED]
Chicago, Illinois [REDACTED]

[REDACTED]
Chicago, Illinois [REDACTED]

Re: Case No. 88138.A

CONFIDENTIAL

Dear [REDACTED] and [REDACTED]

This is the response to your concurrent requests for an advisory opinion regarding alleged violations of the Governmental Ethics Ordinance, Chapter 26.2 of the Municipal Code of Chicago. According to documents submitted to the Board of Ethics and information received by staff during interviews, the [REDACTED] relevant de

[REDACTED] has notified [REDACTED] that it is considering [REDACTED] discharge, in part because of alleged violations of Sections 26.2-2, 26.2-3 and 26.2-8 of the Governmental Ethics Ordinance.

Staff interviewed [REDACTED]
[REDACTED]
[REDACTED]. Staff also reviewed documents submitted by [REDACTED] and [REDACTED]

Basing its opinion solely on the available, competent evidence the Board finds that [REDACTED] did not violate the Governmental Ethics Ordinance. However, the Board also finds that [REDACTED] conduct showed insensitivity to possible conflicts of interest and created the appearance of impropriety. This advisory letter will review the evidence upon which the Board made its findings and the pertinent provisions of the



Ordinance. The Board's opinion is based upon and limited to the facts as presented to the Board. If they are inaccurate or incomplete, the opinion of the Board may change.

FACTS

The allegation of violations of the Governmental Ethics Ordinance ("the Ordinance") arose from the following facts. [REDACTED], a contract compliance officer ("CCO")¹ in the [REDACTED], [REDACTED], had signed, as "paid preparer," the 1986 tax return of Co. x [REDACTED]. Co. x was a company that was seeking recertification from [REDACTED] as a minority business enterprise.² [REDACTED] signed the tax return in

¹ According to the job description provided by Personnel, the major duties of a contract compliance officer are to review and confirm the accuracy of information on applications for certification as Minority Business Enterprises, reporting to the Certification Committee in [REDACTED], making recommendations regarding certification, explaining the MBE program guidelines and city purchasing policies and procedures, assisting in recruiting MBE participants, monitoring contract compliance with applicable laws and working with other city departments to expedite payment to MBE participants. [REDACTED] and [REDACTED] confirmed that this description was accurate in most respects. However, [REDACTED] stated that CCOs do not make "recommendations" regarding certification. [REDACTED] said that CCOs do not officially make recommendations for or against certification, but, in practice, such recommendations are sometimes made, and the weight accorded to them by the Certification Committee varies from case to case.

² The Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) Program of the City of Chicago was established under Executive Order 85-2. The program promotes participation of MBEs and WBEs in City business by "setting aside" certain percentages of City contracts for such enterprises. In order to be considered for the set-asides, a business must be certified as a MBE or WBE by [REDACTED]. Applicants for certification submit to [REDACTED] an application and supporting documents, such as leases, tax returns, financial statements, articles of incorporation, corporate minutes, and statements regarding the participation of minorities and women in the business. A contract compliance officer (CCO) is assigned to the certification file. The CCO must review and verify the information in the application, sometimes make site visits, and, (Footnote #2 continued from previous page) when the application is completed, prepare a report to the Certification Committee. The Certification Committee makes the final decision on granting certification. Certification is granted for one year. To remain in the program MBEs and WBEs must be recertified each year.

question in July 1987. At that time, Co. X had already been certified as a MBE since [redacted] 1986.

In the fall of 1987, Co. X had to apply for recertification. One of the documents the company had to submit to [redacted] to complete the recertification file was its 1986 tax return. [redacted] was the CCO responsible for reviewing and verifying information in the Co. X recertification file and reporting to the Certification Committee on the file.³ [redacted] did not inform Purchasing that [redacted] had prepared the tax return of Co. X

In July 1988, [redacted], [redacted], while reviewing files in preparation for a Certification Committee meeting, discovered that [redacted] had signed the Co. X tax return as "paid preparer" and was also the CCO responsible for evaluating the recertification file of which the tax return was a part. [redacted], believing that [redacted] had indeed been paid for his services as an accountant and knowing that the information in tax returns was extremely important in evaluating recertification files, told [redacted] superiors of [redacted] possible conflict of interest.

In [redacted] opinion it is inappropriate for a CCO to prepare documents for a certification file even if the CCO is not compensated for [redacted] services and even if the CCO is not assigned to that particular file. In [redacted] opinion it is a conflict of interest for a CCO to handle a certification file for which [redacted] has prepared supporting documents such as a tax return. [redacted] stated that such a situation presents the possibility of manipulation of information in an application for the benefit of an applicant and the possibility that a CCO could use [redacted] position to influence decisions on recertification.

[redacted] is an accountant. [redacted] told staff that [redacted] does outside accounting work, but [redacted] maintains that [redacted] does it outside of regular working hours at [redacted] home. [redacted] admits that [redacted] prepared the tax return, but contends that, although [redacted] signed it

³ [redacted] said that certification files are assigned randomly to CCOs by a clerk. [redacted] said that certification files are usually assigned randomly to CCOs. However, occasionally, a CCO may ask to be assigned to a certification file or an applicant may request a certain CCO. Sometimes this comes about because the applicant was recruited for the Program by a CCO at a community outreach or because the CCO and the applicant have worked together on certification before. [redacted] believes that the Co. X file was randomly assigned to [redacted] [redacted] did not know how the file for Co. X recertification had been assigned.

as "paid preparer," [redacted] received no pay for [redacted] services.⁴ In support of [redacted] contention, [redacted] submitted a letter dated October 7, 1988, from [redacted], [redacted] Co.x, which stated that [redacted] "did not receive any compensation for the 1986 U.S. corporate tax return signed July 10, 1987 and used in the processing of the certification application."⁵

When [redacted] signed the 1986 tax return, on the return [redacted] listed [redacted] firm as [redacted]. [redacted] said that [redacted] and some friends who were also accountants had intended to found this firm as a "not-for-profit" accounting firm which would help minority businesses. However, [redacted] said, the idea never took shape, and they never took formal steps to become a "not-for-profit" or a charitable organization of any sort. [redacted] contends, nonetheless, that [redacted] is not paid for any services that are rendered.

[redacted] maintains that, although [redacted] had prepared the tax return needed for recertification of Co.x in 1987, [redacted] gave Co.x no other assistance or advice. [redacted] also said that [redacted] gave Co.x no special treatment.⁶ Staff asked [redacted] about the circumstances in which [redacted] came to prepare Co.x tax return. [redacted] statements regarding [redacted] initial meeting with [redacted] and [redacted] decision to prepare the tax return showed some confusion on dates and presented some inconsistencies.⁷

⁴ In interviews and in the Board's discussion, the question was raised: Why would an accountant sign a tax return as a paid preparer and assume the liability imposed by that action if [redacted] were not a paid preparer? It would have been possible to assist [redacted] in preparing the tax return without signing as the paid preparer.

⁵ [redacted] also submitted a second letter from [redacted], president of [redacted], who stated that [redacted] had assisted [redacted] in preparing an income statement and balance sheet at no charge.

⁶ [redacted], [redacted], also stated that [redacted] had no evidence that [redacted] had handled the Co.x file in any biased way.

⁷ [redacted] gave a detailed account of [redacted] first meeting with [redacted]. [redacted] said that [redacted] was applying for certification as a MBE, came into Purchasing looking for [redacted], the CCO who was handling the certification file. [redacted] was not available, so [redacted] offered to help [redacted]. [redacted] wanted to retrieve some documents from [redacted] file and add others. [redacted] chatted with [redacted] as [redacted] was helping [redacted]. [redacted] told [redacted] that [redacted] had just moved to Chicago from [redacted] and that [redacted] was having a difficult time getting all [redacted] documents together for certification. [redacted] said that [redacted] accountant was in [redacted], and Co.x

On September 30, 1988, Co.x was recertified as a minority business enterprise. On October 4, 1988, [redacted] received notice that [redacted] discharge was under consideration because of alleged violations of personnel rules, Executive Order 86-1 and the Ordinance.

In summary, [redacted] admits that [redacted] prepared the Co.x tax return, but [redacted] denies receiving payment for the service. [redacted] submitted a letter from [redacted] to corroborate [redacted] denial. The only evidence to support the contention that [redacted] was compensated for preparation of the tax return was [redacted] signature on the return as "paid preparer."

[redacted] served as CCO on the Co.x recertification file and reviewed a tax return that [redacted] had prepared for the company. [redacted] also did not inform Purchasing that [redacted] had done this work for Co.x. The Board finds that [redacted] conduct created the appearance of impropriety. However, no evidence was presented to show actual impropriety, e.g., that [redacted] decisions regarding Co.x recertification had been influenced in any way by [redacted] having prepared the tax return.

DISCUSSION

needed to get a corporate tax return and corporate minutes in shape for the application. [redacted] said that [redacted] referred [redacted] to a friend [redacted], an accountant with [redacted] [redacted] and [redacted] conferred after [redacted] asked [redacted] for accounting services. [redacted] said that [redacted] and [redacted] got together one weekend and did all the work, but received no pay. [redacted] said that [redacted] papers were actually in very good order; otherwise, [redacted] and [redacted] would not have taken on the task. [redacted] fixed the date of this first meeting as about May 1986, figuring that the tax return was done in July.

Staff questioned [redacted] about the date of the first meeting, since the tax return in question was signed on July [redacted] 1987, not 1986. [redacted] said [redacted] must have been mistaken, that the meeting must have occurred in May 1987. Staff asked how the first meeting might have occurred in May 1987 as [redacted] had described it in detail, since Co.x had been a certified MBE since [redacted] 1986. [redacted] answer was not clear on this point. [redacted] said that, if the meeting occurred in May 1986, [redacted] referred [redacted] to the MBE/WBE Directory for accounting services. [redacted] said that in the year between the first meeting, when Co.x was first applying for certification, and the time when [redacted] asked [redacted] to prepare the tax return, [redacted] had no contact with [redacted] or Co.x.

Four provisions of the Ethics Ordinance must be considered in regard to this case: Section 26.2-8(a) (Conflicts of Interest), Section 26.2-3 (Improper Influence), Section 26.2-5 (Solicitation or Receipt of Money for Advice or Assistance), Section 26.2-2 (Fiduciary Duty). In order to find a violation of the first three provisions, the Board must find that [REDACTED] had an economic interest in a governmental decision or in [REDACTED] assistance to Co. x.

Section 26.2-8(a) provides:

"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."

As a CCO, [REDACTED] participated in the recertification decision by reviewing the Co. x recertification file and presenting [REDACTED] findings to the Certification Committee. [REDACTED] also prepared the tax return of Co. x which was used in the recertification decision. Because of [REDACTED] preparation of the tax return, [REDACTED] had at least a professional interest in deciding that the tax return in the file was accurate and in order. Possibly if [REDACTED] was paid for the preparation of the tax return and certainly if [REDACTED] was Co. x's regular accountant, [REDACTED] had an economic interest in deciding that the tax return was accurate and supported Co. x's recertification. However, the evidence available to the Board does not show either that [REDACTED] received payment for [REDACTED] services or that [REDACTED] was Co. x's accountant. Therefore, on this evidence the Board does not find a violation of Section 26.2-8(a).

Section 26.2-3 provides:

"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."

As a CCO, [REDACTED] participated in making the recertification decision on Co. x. As a CCO, [REDACTED] was in a position to influence the decision on recertification through [REDACTED] evaluation of the application and supporting documents and [REDACTED] report to the Certification Committee.

If [REDACTED] was paid for preparation of the [REDACTED] tax return or if [REDACTED] was Co. x's regular accountant, [REDACTED] had an economic interest in the accuracy of the tax return and possibly in the approval of Co. x's recertification. The evidence presented does not show that [REDACTED] was paid or was Co. x's accountant, nor that [REDACTED] had any other possible economic interest

in the verification of the tax return or in Co.x's recertification.

Therefore, on the evidence presented, the Board cannot find a violation of Section 26.2-3.

Section 26.2-5 provides:

"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...."

Advice or assistance in the preparation of a tax return for a recertification applicant might constitute advice or assistance on matters concerning the operation or business of the City. As a CCO, [REDACTED] knows the certification process well and is in a position to give advice and assistance regarding the favorable presentation of information to a CCO and, ultimately, the Certification Committee. If [REDACTED] advised or assisted Co.x in the recertification process in any way other than the mere preparation of the tax return, he might have violated Section 26.2-5.

To violate this section, in addition to giving such advice or assistance, [REDACTED] would have had to solicit or accept (1) payment for the preparation of the tax return or (2) some other thing of value, e.g., such as the promise of future employment as an accountant.⁸ As stated before, the evidence presented to the Board does not establish that [REDACTED] was paid for the

⁸ Compensated employment outside City employment is not necessarily prohibited by the Ethics Ordinance. Section 26.2-5 provides 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 part of his or her non-City employment, occupation or profession." Thus, the Ethics Ordinance would not necessarily prohibit [REDACTED] practice of working as an accountant on [REDACTED] own time at [REDACTED] home.

However, Personnel and Purchasing can adopt their own, more restrictive rules to regulate outside employment and conflicts of interest. Section 26.2-44 provides: "The procedures and penalties provided in this chapter are supplemental and do not limit...the power of any...City agency to otherwise discipline officials or employees or take appropriate administrative action or to adopt more restrictive administrative rules...." Among other requirements of the Personnel rules on outside employment, employees must disclose outside employment to their supervisors and obtain approval before starting work.

preparation of the tax return or for rendering any other service to Co.x. Therefore, based on the evidence, the Board finds no violation of Section 26.2-5.

Section 26.2-2 provides: "Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City." Inherent in fulfilling the fiduciary duty to the City is the employee's obligation to avoid not only impropriety, but also the appearance of impropriety. The mere appearance of impropriety in the actions of a City employee damages public confidence in the fair and honest administration of government as effectively as actual impropriety.

The very existence of this case proves the dangers of the appearance of impropriety. [REDACTED] acting as CCO on the Co.x recertification after [REDACTED] had prepared the company's tax return alarmed [REDACTED] and other superiors because of the possibility of [REDACTED] manipulating the recertification process to benefit [REDACTED] and Co.x. If other City employees or MBE applicants learned of [REDACTED] conduct, they, like [REDACTED] superiors, could easily and reasonably suspect a conflict of interest. Public confidence in the fair administration of the MBE/WBE Program could be undermined. When employees believe that other employees are breaking rules and profiting from it, even if their belief is incorrect, the corrupting attitude that "everyone does it and gets away with it" is fostered.

If there was no conflict of interest or impropriety in [REDACTED] actions, [REDACTED] could have avoided the damaging appearance of impropriety easily by (1) informing Purchasing of [REDACTED] outside employment and seeking their approval, as Personnel rules require; and (2) recusing [REDACTED] from participation in the recertification of Co.x. On the evidence presented, the Board has not determined that [REDACTED] breached [REDACTED] fiduciary duty to the City, but it does find that [REDACTED] conduct showed considerable insensitivity to possible conflicts of interest and created the appearance of impropriety.

SUMMARY

The evidence presented in this case, consisting of interviews with persons related to this case and documents submitted by [REDACTED] and [REDACTED], does not establish that [REDACTED] violated the Governmental Ethics Ordinance. However, while not finding a violation of the Ordinance, the Board finds that [REDACTED] acting as CCO for the Co.x recertification after [REDACTED] had prepared a tax return for that file, coupled with [REDACTED] failure to notify [REDACTED] supervisors of [REDACTED] relationship to Co.x, created the appearance of impropriety. The Board recommends that in the future [REDACTED] (1) disclose to [REDACTED] employer [REDACTED] outside employment and (2) recuse [REDACTED] from participation in the recertification process of any MBE if [REDACTED] has any personal or

professional connection to that MBE.

The preceding opinion is based solely on the evidence available to the Board. Please inform us promptly if there is any significant factual inaccuracy. If you have any questions about this matter, please call the Board of Ethics at 744-9660.

Sincerely,



S. Brandzel
Chairman

