

ADVISORY OPINION
CASE NO. 02030.A
Post Employment

To: [Jane]

Date: October 16, 2002

You are the former [Administrator] of the [Section Z] in the City's [Department 1]. You left City service effective [Date X]. On [Date Y], you asked the Board for an advisory opinion addressing your post-City employment. You are an attorney, and wish to represent [type 1 individuals] before the [Department 2] and the [Commission A]. You also wish to represent buyers and sellers in the sale of [type 1 permits].

After careful consideration of the facts, the purpose of the Ordinance, and prior Board opinion, the Board has determined:

- 1) because you left City service more than a year ago, the restrictions imposed by the Ordinance's one-year prohibition no longer apply to you;
- 2) the Ordinance permanently prohibits you from assisting or representing any [type 1 individual], or any other person, in any proceeding before the [Department 2] or the [Commission A] in which you were counsel of record, or participated as a witness, while in City service (Should you, in the future, wish to represent a party in a proceeding that was pending during your City service, in which you had some involvement other than serving as a witness or appearing as counsel of record, we advise you to seek specific guidance from the Board as to whether you are prohibited from undertaking such representation); and
- 3) the Ordinance permanently prohibits you from assisting or representing any person in the sale of a [type1 permit] if the application for sale was made while you were [Administrator] of the [Section Z]; however, you are not prohibited from assisting or representing any person in the sale of a [type 1 permit] if the application for sale was made after you left City service.

FACTS

I. City Employment. You served as [Administrator] of the [Section Z] of the [Department 1] from 1996 through [Date X]. Prior to serving as [Administrator] of the [Section Z], you served, from 1994, as the [Administrator] for the [Division X] of the [Department 1].

In your [Date Y], letter to the Board, and in subsequent conversations with Board staff, you described your duties as [Administrator]. Generally, you stated that you were "... in charge of [public matters] including [type 1 and 2 individuals]." Your responsibilities included reviewing and approving the issuance and sale of [type 1 permits], the issuance of [type 2] licenses, and regulating the holders of [permits] and licenses.¹

1) [Type 1 permits].

The [Section Z] of the [Department 1] is responsible for issuing and regulating the sale of [type 1 permits]. According to [John], the current [Administrator] in the [Section Z], there are approximately [n1] licensed [type 1s]—i.e., [type 1s with permits]—in the City. [permits] must be renewed every year; currently, the cost is [\$n2] per year. Pursuant to the Municipal Code, [n3] new [permits]—plus any additional [permits] that become available due to the holders' not renewing or having their licenses revoked—are auctioned off by the City each year. The auction is publicly announced and usually takes place in December. The licenses are awarded to the high bidders, who must undergo a background check by the [Department 1] before they are approved. [permits] that have already been issued may be sold to any person; however, before a sale becomes effective, the seller and buyer must apply to the [Department 1], who will determine if the transferee is

¹You stated that, during your tenure as [Administrator], you participated in the negotiation of a City contract for the rental of property to be used as a parking lot for tour buses in the downtown area. You also stated that you do not foresee any circumstances under which you might be involved with that contract in your post-City employment. For that reason, the Board, in this opinion, will not address whether your involvement with that contract constituted "contract management authority" and whether you would be permanently prohibited under the Ordinance from assisting or representing any person other than the City with respect to that contract. Should circumstances change, however, we advise you to contact the Board for specific guidance.

qualified.² [John] stated that the price of [permits] is market driven; he estimated the current price at [\$n4-\$n5].

You estimated that approximately [n6] [permits], including those newly issued by the City and those sold in private transactions by their owners, were sold during your five years as [Administrator]. As noted in Footnote 2, the background check into the prospective purchaser of a [permit] is conducted by staff of the [Section Z], and the decision to approve or disapprove a sale is made by the staff members conducting the check. You stated that you did not personally conduct any background checks, although your final authorization was necessary in order for a [permit] sale to be officially approved by the Commissioner of the [Department 1].

2) [Type 2] licenses.

The [Section Z] of the [Department 1] is also responsible for issuing [type 2] licenses in the City of Chicago.³ A [type 2] license is required to [perform type 1, type 2, type 3 or type 4 activity] in Chicago. There are approximately [n7] licensed [type 2s] in the City. As with the sale of [permits], the background check into applicants for [type 2] licenses is conducted by staff of the [Section Z], and the decision to issue a license is made by the staff members conducting the check. As [Administrator], you supervised these staff members, but were not required to approve their decisions to issue licenses. In fact, you stated that the decision to issue licenses is based solely on the ability of the applicant to pass the test, clear the background check, and pass the drug test. If these criteria are met, the applicant is issued a license. Licenses must be renewed yearly; you described this as a routine procedure, similar to renewing a regular [] license.

²Pursuant to [Section B] of the Municipal Code of Chicago, [type 1 permits] are freely transferrable to any qualified person. Prior to such a sale, the transferor and transferee must apply to the [Department 1], who shall approve the sale if the transferee is qualified. Before a sale is approved, staff of the [Section Z] of the [Department 1] conduct a background check of the prospective purchaser. If this check discloses a criminal record, a history of excessive [] violations, or serious complaints filed against the individual with the [Department 1] or other City agencies, the sale of the [permit] will not be approved. If the applicant passes the background check, the staff recommends that [Administrator] of the [Section Z] authorize the sale.

³[

You also stated that you sat on the committee that evaluated applications from: 1) health clinics that sought to provide drug testing services to applicants for [type 2] licenses; and 2) [schools] that wanted to provide training services to [persons]. The City did not enter into contracts with these entities; those clinics and the one school⁴ whose applications were approved were put on a list, issued to prospective [persons], of City-approved facilities.

3) Regulatory Activities. The [Department 1] is also responsible for regulating some of the activities of [type 1 companies], as well as other [persons] with [type 2] licenses. The [Division Q] of the [Department 2] hears cases initiated from the [Department 1]. Generally, the hearings involve [violations and complaints] filed by [the public].⁵ Most of the regulatory functions of the [Department 1] did not fall under your authority as [Administrator]. As noted in footnote 5, while the [Section Z] receives initial complaints from the public, the investigation of the complaint is carried out by a separate division of the Department, and the cases are prosecuted by [Department 1] attorneys before the [Department 2].⁶ You stated that you appeared as a witness at approximately five of these hearings and on one occasion, filled in for a [Department 1] attorney for one day. You never appeared in any proceeding before the [Commission A].

II. Post-City Employment. You are currently in private practice as [Jane], Attorney at Law. Your practice consists of general civil litigation, real estate, and divorce matters. You stated that the [Department 1] requires that buyers and sellers of [type 1

⁴The only City-approved [] training class is at Harold Washington College.

⁵[Department 1] staff is responsible for bringing charges against [individuals] for [violations] or for revocation of their licenses. After the initial complaint is filed with the [Section Z], it is forwarded to the Complaint Section of the [Department 1]. If an investigation by Complaint Section staff reveals that the complaint has merit, charges will be filed before the [Department 2] for prosecution by [Department 1] attorneys assigned to the [Department 2].

⁶In situations where a [type 2] or holder of a [permit] is convicted of a particularly egregious violation, or, more often, when convicted of a large amount of lesser violations, the [Commission A], which functions as regulatory authority for business licenses issued by the City of Chicago, may initiate proceedings to revoke the individual's license. These hearings are conducted before that Commission, and prosecuted by the Commission's attorneys. In the event that you are asked to represent the holder of a [type 2] license or [type 1 permit] who acquired such license or [permit] during your tenure as [Administrator] of the [Section Z], in a license revocation proceeding, we advise you to contact the Board for specific guidance.

permits] have legal representation at the sale.⁷ You would like to expand your practice to include representing both buyers and sellers in these transactions. Such representation would consist of assisting prospective purchasers in incorporating, negotiating the terms of the sale, and assisting buyers or sellers with the process of applying for a transfer of license. You intend to represent both individual owners and [companies] in these transactions. As noted above, approximately [n6] [permits], including those newly issued by the City and those sold in private transactions by their owners, were sold during your five years as [Administrator]. While you cannot predict how many of these individual [permits] might be resold, you stated that some certainly will be, and you hope to represent buyers and sellers in these sales.

You also wish to represent [type 1 individuals] in hearings before the [Department 2] and the [Commission A]. This representation would generally be in cases involving [violations, complaints] and other City-regulated [] violations. You stated that you do not intend, in your post-City employment, to represent any person in a hearing that was pending at the time you left office, whether you participated in that hearing or not.

LAW AND ANALYSIS

Section 2-156-100 of the Ethics Ordinance, which deals with Post-Employment Restrictions, is divided into two sections, (a) and (b):

(a) No former official or employee shall assist or represent any person other than the City in any judicial or administrative proceeding involving the City or any of its agencies, if the official or employee was counsel of record or participated personally and substantially in the proceeding during his term of office or employment.

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

“Assisting” and “representing” encompass helping a person seek a contract, as well as perform a contract. In Section 2-156-010(g), the Ordinance defines “Contract management authority” as

⁷Holders of [type 1 permits] run the gamut from individuals with [property] to large companies such as [Alpha or Beta Inc.] with thousands []. This requirement is largely designed to ensure that a buyer of a license is not taken advantage of by a seller (or vice versa). The sale and transfer of license does not take place at the [Department 1], and there is no requirement that a representative of the City be present at the sale.

personal involvement in or direct supervisory responsibility or 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.

As you left City service on September 1, 2001, the restrictions imposed by the one-year prohibition no longer apply to your post-City employment. The Board addresses, below, the permanent prohibitions imposed by Sec. 2-156-100(a) and (b).

1) Subsection (a): Permanent Prohibition. In your post-City employment, you wish to represent [type 1s] in hearings before the [Department 2] and the [Commission A]. Such hearings constitute “administrative proceeding(s) involving the City” within the meaning of the Ordinance. Thus, you are prohibited under Sec. 2-156-100(a) from assisting or representing any person other than the City in such proceedings if you were counsel of record⁸ or if you participated personally and substantially in those proceedings during your City service.

While employed by the City, you appeared in a proceeding before the [Department 2] on one occasion as counsel representing the City. You also appeared as a witness in proceedings before that Department on approximately five occasions. Under Section 2-156-100(a), then, you are permanently prohibited from assisting or representing any [type 1 individual] in any proceeding before the [Department 2] or the [Commission A] in which you were counsel of record, or participated as a witness, while in City service.

In addition, you have stated that many of the cases that are heard before the [Department 2] result from complaints that were initially filed with the [Section Z] of the [Department 1], although the investigation of these complaints was (and is) carried out by a separate division of the Department. Should you, in the future, wish to represent a party in a proceeding that was pending during your City service, in which you had some involvement other than serving as a witness or appearing as counsel of record, we advise you to seek specific guidance from the Board as to whether you are prohibited from undertaking such representation.

2) Subsection (b): Permanent Prohibition. The second clause of Section 2-156-100 (b) permanently prohibits you from assisting or representing any person other than the City with respect to any City contract if you exercised “contract management authority” over that contract during your City employment.

A. [type 1 permits]. As [Administrator] of the [Section Z] of the [Department 1], you supervised the staff responsible for processing and reviewing applications for [type 1 permits]. In addition, your final authorization was necessary in

⁸ “Counsel of record” is defined in Black’s Law Dictionary as the attorney whose appearance has been filed with the court papers.

order for a [permit] sale to be officially approved. The Board has previously determined that this permanent prohibition applies not only to contracts, but also to transactions involving the City, such as the review of applications for City permits and licenses. In Case No. 92010.A, the Board addressed the issue of a former City employee who had served as the head of a City Department's permit division for a number of years. In that capacity, he had supervisory authority over the staff responsible for reviewing and approving permit applications submitted to the Department. For the most part, the former employee was not directly involved in this review and approval process, although he played a more active role in exceptionally large or complex projects. Stating that "...the term 'contract management authority' includes not only personal involvement in the City transaction, but also direct supervisory responsibility for the formulation and execution of the City transaction" the Board concluded that the former employee had direct supervisory responsibility over the review and approval of all permit applications pending before the Division while he was employed by the City. The Board therefore determined that the former employee was permanently prohibited from assisting or representing any person on a project that was submitted to the Permit Division for approval while the former employee was the division's supervisor.

Like the employee in Case No. 92010.A, you had supervisory authority over the staff responsible for processing and reviewing applications for a City license (the [permit]) submitted to your Department, although you were not directly involved in processing the applications or conducting the background check. Furthermore, your final authorization of the application was necessary in order for a [permit] sale to be officially approved. As it did in Case No. 92010.A, the Board concludes that these activities constitute direct supervisory responsibility for the formulation and execution of a transaction involving the City (i.e., the processing, review and approval of applications for the sale of [type 1 permits]). Therefore, consistent with the determination in Case No. 92010.A, we determine that you are permanently prohibited from assisting or representing any person in the sale of a [type 1 permit] if the application for sale was made while you were [Administrator] of the [Section Z].

However, you stated that it is highly unlikely that there are any [permit] sales that are still pending from your time in City service, and further stated that you would not represent buyers or sellers in these transactions if they were still pending. Therefore, the issue before the Board is whether you may represent buyers or sellers of [permits] in sales that were initiated after you left City service. In some cases, these transactions will involve the sale of [permits] by parties whose purchase of the [permit] occurred during your tenure as [Administrator].

While the Board has never directly addressed a similar fact pattern, its determination in Case No. 90012.A is instructive. In that case, the Board determined that a City employee who had evaluated bids for City contracts had exercised contract management authority, and was therefore prohibited from assisting or representing any person in a business transaction with the City involving these contracts. Noting, however, that some of these contracts were re-bid annually, and thus go through a new evaluation process, the Board concluded that these re-bid contracts should be considered new

contracts for the purposes of the Ordinance, and determined that the former employee was not prohibited from bidding on them. While the re-bidding of a contract in that case is not identical to

the sale or resale of a [type 1 permit], the Board notes that there are similarities; the sale of a [permit] involves a new contract with a different party, a different application, and an evaluation (background check) using different information. Supported by its rationale in Case No. 90012.A, the Board concludes in this case that the resale of a [type 1 permit] is a distinct transaction from the original sale. The Board determines, therefore, that you are not prohibited from assisting or representing any person in the sale of a [type 1 permit] if the application for sale was made after you left City service.

2) Confidential Information. The Board further notes that Section 2-156-070, "Use or Disclosure of Confidential Information", prohibits you from using or revealing any confidential information that you acquired through your City employment. This section defines confidential information as ". . . any information that may not be obtained pursuant to the Illinois Freedom of Information Act, as amended."

DETERMINATIONS:

For the reasons set forth above, the Board determines:

- 1) because you left City service more than a year ago, the restrictions imposed by the Ordinance's one-year prohibition no longer apply to you;
- 2) the Ordinance permanently prohibits you from assisting or representing any [type 1 individual], or any other person, in any proceeding before the [Department 2] or the [Commission A] in which you were counsel of record, or participated as a witness, while in City service (Should you, in the future, wish to represent a party in a proceeding that was pending during your City service, in which you had some involvement other than serving as a witness or appearing as counsel of record, we advise you to seek specific guidance from the Board as to whether you are prohibited from undertaking that representation); and
- 3) the Ordinance permanently prohibits you from assisting or representing any person in the sale of a [type 1 permit] if the application for sale was made while you were [Administrator] of the [Section Z]; however, you are not prohibited from assisting or representing any person in the sale of a [type 1 permit] if the application for sale was made after you left City service.

Our determinations are not necessarily dispositive of all issues relevant to this situation, but are 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.

[Signature]

Darryl L. DePriest
Chair