

**ADVISORY OPINION**  
**CASE NO. 99010.A**  
**Post-Employment**

To: [Mary]

Date: April 13, 1999

---

You are an operational research analyst in the [ ] Department. You intend to retire from your City position and form a professional services corporation, of which you would be the sole shareholder, officer, and employee. On February 4, 1999, you requested an advisory opinion on whether, following your retirement from City service, the post-employment provisions of the Governmental Ethics Ordinance would prohibit this corporation from entering into a consulting agreement with your former Department under which you, as the corporation's sole employee, would perform duties that are the same as, or substantially similar to, those that you currently perform in City service.

After careful consideration of the facts presented, the purpose and language of the post-employment provisions, and prior Board opinions, the Board finds that the Ordinance does not prohibit consulting agreements between the City and its former employees or officials for services that are the same as, or substantially similar to, those that they performed while in City service when the following four conditions are present: 1) the City seeks the services of the former employee and stands to substantially benefit by hiring the former employee as a consultant; 2) the former employee does not represent the interests of any other entity in connection with his or her consulting responsibilities to the City; 3) the consulting agreement is in writing; and 4) the consulting agreement contains language obligating the former employee or official to at all times act in the best interests of the City. In your situation, as described by the facts presented in this opinion, the Ordinance does not prohibit you, as an individual, from entering into a consulting agreement under which you would provide services to your former Department that are the same as or substantially similar to those you performed as a Department employee. However, the Ordinance does prohibit your corporation—for one year from the date of your retirement— from entering into a consulting agreement with your former department to provide these services.

**FACTS:** You are currently employed by the City as a “principal operational research analyst” in the [ ] Department, and are contemplating retiring from City service. During the past two years, you have been responsible for the development and maintenance of the [ ] Department's timekeeping system. You stated that the Department is planning to convert from its current timekeeping system to a new one sometime within the next year, and that you

have played a significant role in preparing for this conversion. You also stated that because of your technical knowledge of the Department's time-keeping system, as well as your "institutional knowledge," the Department is interested in retaining your services to assist it in the conversion process, if you retire. Your immediate supervisor has discussed your situation with your Commissioner, and said the Commissioner would like the Department to retain you as a consultant.

You state that the consulting contract would last for approximately one year. The services you would provide to the Department would be the same as, or substantially similar to, your current duties, and you would be working on the same project, under your current supervisor. You also state that, if you were to consult with the [ ] Department, you would prefer to do so not as an individual, but as a professional services corporation, of which you would be the sole shareholder, owner, officer, and employee. Prior to requesting this opinion you received a redacted copy of Case 93018.A from Board staff.

**ISSUE:** The issue for the Board is whether your corporation may enter into a contract with your former Department, within one year of your retirement from City service, under which you would personally perform the same or substantially similar work as you performed while employed by the Department.

**LAW AND ANALYSIS:** Section 2-156-100 of the Governmental Ethics Ordinance, entitled "Post-Employment Restrictions," states in relevant part:

**(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.**

This section of the Ordinance imposes both a one-year and a permanent prohibition on former City employees' post-employment activities. Under these sections, a former City official or employee is prohibited for one year after leaving City service from assisting or representing any person in a business transaction involving the City if while a City employee he or she participated personally and substantially in the subject matter of that transaction. The one-year period of prohibition under Section 2-156-100(b) begins on the date the employee's or official's City employment or term of office terminates, not on the date he or she stopped performing particular tasks. Additionally, a former City employee is permanently prohibited from assisting or representing any person in a contract if while a City employee, he or she exercised "contract management authority" with respect

to that contract.

In this opinion we analyze your situation under the one-year prohibition, as the facts as presented do not indicate that the permanent prohibition is relevant.

**I) The One-Year Prohibition.**

For one year after leaving City service, you are prohibited from assisting or representing any person in a business transaction involving the City if, while a City employee, you participated personally and substantially in the subject matter of that transaction. If your personal services corporation contracts with the City to assist the [ ] Department, the corporation will clearly be engaged in a business transaction involving the City. You will therefore be prohibited for one year from assisting or representing a person if, in your City job, you participated personally and substantially in the subject matter of the transaction.

Your duties as a consultant will be almost identical to those you perform as a City employee. For the past two years, you said, you have worked primarily on the [ ] Department's time-keeping system. You have been involved in the operation and maintenance of the system, and have been closely involved in the Department's upcoming conversion to a new system. On the basis of the facts as you have presented them, the Board finds that the work you performed as principal operational research analyst in connection with the [ ] Department's time-keeping system, constitutes personal and substantial participation in the subject matter of the transaction on which you would work as a consultant; namely, the development, operation, and maintenance of the [ ] Department's time-keeping system. Thus, you would be prohibited, for one year after you leave City employment, from assisting or representing any person in a business transaction whose subject matter is this project.

However, the Board has found, in certain situations, that a former employee may perform services for his or her former Department which are the same as, or substantially similar to, those performed while in City service, provided that certain criteria are met.

**II) The Exception to the One-Year Prohibition.**

In Case No. 93018.A the Board found that a former City employee may contract with his or her former City Department to work on projects in which the individual was personally and substantially involved while in City service, when 1) the City seeks the services of the former employee and stands to substantially benefit by hiring the former employee as a consultant; and 2) the former employee does not represent the interests of any other entity in connection with his or her consulting responsibilities to the City. The Board utilized this two-pronged test to allow the City to take advantage of the skills and inside knowledge of the former employee, while preventing what the Board saw as the major harm contemplated by the post-employment provisions—the exposure of

the former employee to dual loyalties. The result, it found, was consistent with the Ordinance language. Implicit in the Board's determination in Case No. 93018.A was a requirement that an agreement between the City and a former employee be in writing, and that it recite the latter's fiduciary duty to the City. Applying the two-pronged test in that case, the Board observed that "All of these conditions apply to the proposed consulting agreement between you and the City. Moreover, the proposed contract itself obligates you to act at all times in the best interests of the City, so the City's interests are further protected."

In this case, the two-pronged analysis articulated above is used as a threshold test to determine whether the consulting arrangement you propose is permissible. If the facts as presented satisfy both prongs of the test, the consulting agreement will be permissible, provided that the two implicit conditions contained in 93018.A are met. That is, the contract must be in writing and must contain language obligating you to act in the best interests of the City.

#### Consulting Agreement as a Corporation

*1) The City Seeks Your Services and Stands to Benefit From Your Skills.* A demonstration that the City has sought the services of a former employee and stands to substantially benefit by hiring the former employee as a consultant is required to meet the first prong of the test. You have stated, and Board staff has confirmed, that your Department seeks your services as a consultant. Your supervisor has spoken to your Department's Commissioner, who has stated that your services should be retained by the City. Your Department has stated that your technical knowledge as a principal operations research analyst, as well as your "institutional knowledge" of the [ ] Department's existing system, would be of great assistance to the Department in its transition to a newer, more efficient time-keeping system. The situation as you have described it meets the first prong of the test.

*2) You Would Represent the Interests of Your Corporation.* The second prong of the test outlined above requires that the former employee not represent the interests of any other entity in connection with his or her consulting responsibilities to the City. You have stated that if you were to consult with the [ ] Department, you would prefer to do so not as an individual, but as a professional services corporation, of which you would be the sole officer, shareholder and employee. If you were to consult with the City in your capacity as an employee of your own professional services corporation, however, you would be assisting or representing a third party—the corporation—and, as such, would be confronted with a situation in which you would owe loyalties to both the City and to your corporation—a situation the Board viewed in Case No. 93018.A as the major harm contemplated by the post-employment provisions. The fact that you would be the sole owner, shareholder, officer, and employee of the corporation does not change the Board's conclusion. A corporation is a separate entity. If your corporation were to enter into a consulting agreement under which you would personally provide services to your former Department, you would owe a fiduciary duty to the corporation. Therefore, if you seek to enter into this agreement as a corporation, the second prong of the test is not met. Thus, we conclude that the Governmental Ethics Ordinance

prohibits, for one year following your retirement from City service, a contract between your corporation and the City under which you would perform the same or substantially similar services as those you performed while in City service.

Consulting Agreement as an Individual.

Although the Ethics Ordinance imposes a year-long prohibition on a contract between your corporation and the City under which you would personally perform the same or substantially similar services as those you performed while in City service, you may be able to enter into such a contract as an individual. Again, the Board applies the two-pronged test from Case No. 93018.A.

*1) The City Seeks Your Services and Stands to Benefit From Your Skills.* As described above, the [ ] Department seeks your services and stands to substantially benefit by hiring you as a consultant. Thus, the first prong of the test is satisfied.

*2) You Would Not Represent the Interests of Another Entity.* In Case No. 93018.A, the Board found that the terms “assist or represent”, as used in the post-employment provisions of the Ordinance, anticipated the presence of a third party. When no third party exists—that is, when the contract is directly between the former employee and the City—the post-employment provisions do not apply, as the employee “assists or represents” no one but himself and the City. If you were to enter this consulting agreement as an individual, and not as a corporation, you would not be representing or assisting another person in any business transaction with the City. The consulting agreement would be between you and the City, thereby avoiding the problem of competing loyalties. The second prong of the test in Case No. 93018.A, therefore, would be satisfied: you would not represent the interests of any other entity in connection with your consulting responsibilities to the City. Therefore, the Ordinance would not prohibit you, as an individual, from entering into a consulting agreement to personally provide services to your former Department which are the same as or substantially similar to those you provided while in City service.

Implicit in the Board’s determination in Case No. 93018.A was the requirement that the proposed consulting agreement between the City and the former employee be reduced to writing, and that it contain specific language obligating the former employee to act in the best interests of the City. Applying the two-pronged test in that case, the Board stated: “All of these conditions apply to the proposed consulting agreement between you and the City. Moreover, the proposed contract itself obligates you to act at all times in the best interests of the City, so the City’s interests are further protected.” The requirement that the consulting agreement between the City and the former employee or official be in writing, and contain language that obligates the employee or official to act at all times in the best interests of the City, is intended to protect the City by having the former employee consider the problem of dual loyalties and expressly affirm that his or her primary obligation is to the City. Therefore, we conclude that if you choose to enter into this consulting agreement as an individual, a written contract will be required. Moreover, this contract must contain

language obligating you to at all times act in the best interests of the City.

**DETERMINATION:** The Board determines that the Ordinance does not prohibit consulting agreements between the City and its former employees or officials for services that are the same as, or substantially similar to, those that they performed while in City service when the following four conditions are present: 1) the City seeks the services of the former employee and stands to substantially benefit by hiring the former employee as a consultant; 2) the former employee does not represent the interests of any other entity in connection with his or her consulting responsibilities to the City; 3) the consulting agreement is in writing; and 4) the consulting agreement contains language obligating the former employee or official to at all times act in the best interests of the City. Therefore, based on the facts presented, you are not prohibited, as an individual, from entering into a consulting agreement with the [ ] Department under which you would provide services to the Department that are the same as or substantially similar to those you currently perform as a Department employee. The Ordinance does prohibit your corporation—for one year from the date of your retirement—from entering into a consulting agreement with your former Department to provide these services.

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