

CONFIDENTIAL

[Date], 2011

ADVISORY OPINION

[John Smith], [Title]

Department of [X]

121 N. LaSalle Street, Suite [Number]

Chicago IL 60602

Re: Case No. 11004.A

Dear Mr. [Smith]:

On [Date], 2011 the Board received your memorandum dated [similar Date], 2011 requesting an advisory opinion as to whether a City contractor had violated the gifts prohibitions in the City's Governmental Ethics Ordinance (§2-156-040 thereof), or any other applicable City ethics ordinances, under the set of facts presented in your memorandum. To supplement those facts, you also sent the Board a copy of the Summary Report of the City's Inspector General's Office (IGO) in Case #[Year]-[Number], dated [Date], 2010.

Based upon our review of the facts presented in the IGO's Report and your memo, and making no independent findings of fact, the Board has determined that this contractor did violate § 2-156-040(c) of the Ordinance by providing a gift of [personal services] to the [Chief Officer] of the City's Office of [Y], to which the contractor was providing services under a City contract. Because the Governmental Ethics Ordinance itself does not authorize a debarment for 6 months (or for any length of time, for that matter), the Board of Ethics cannot address the IGO's recommendation that [Vendor] or [Individual] be debarred. That decision would need to be based upon the City's debarment rules, which the Board has no authority to interpret or administer.

Facts:

According to the IGO's Report, the contractor, [Vendor], is owned by [Individual], an auditor. [Vendor] is a subcontractor on a City contract with [City Contractor]. From [Date], 2008 through [Date], 2009, the relevant time period in the IGO's Report, [Vendor] performed City work pursuant to several City contracts for auditing services provided to the City's Office of [Y]: (i) consulting work for the City's [Special] Division in the Department of [Z] (this division was, during this time, transferred to the City's Office of [Y] ("Y")); (ii) Confidential Engagement #[Letters]-[Year]-[Number] awarded [Date], 2008; and (iii) three agreements, dated respectively [Date 1], [Date 2] and [Date 3], 2008.¹

During the relevant period, [Y]'s [Chief Officer] was [Ms. [Jones]] ([Jones] resigned from City service, effective [Date], 2010). [Jones] executed

1. The IGO's Report also recites an agreement under which [Vendor] was working for [Y], Confidential Agreement #[Letters]-[Year]-[Number], but that agreement was awarded on [Date], 2009, after the relevant period covered in the IGO's Report.

agreement #[Letters]-[Year]-[Number]. The IGO's Report states that, under #[Letters]-[Year]-[Number], [Vendor] was to work at [Jones]'s direction. The Report also states that, during the relevant time period (and beyond it), [Jones] approved payment vouchers submitted by [City Contractor] for [Vendor]'s work for the Office of [Y].

The Report also states that [Individual] and [Jones] both told the IGO that, between [Date A] (or possibly [Date B]) 2008 and mid-[Date C] 2009, [Individual] gave [Jones] unpaid [personal services] (the Report states that [Jones] disputed the characterization of these [services] as "[personal;]" [services], claiming that they covered [Special services] generally). The Report states that the IGO's estimated value of these [personal services] ranges from \$20.00 to \$70.00 per hour. It also states that the [personal services] were given in [Jones]'s City office during regular City hours; it states that during the [personal services] [Jones]'s door was closed. The Report also cites evidence that [Jones] and [Individual] tried to establish a regular schedule for these [personal services], and, that for some of them, [Individual] provided [Jones] with printed [service] materials pertinent to [personal services]. It also states that [Individual] told the IGO that, during the relevant period, he gave [Jones] 15-30 [personal services] lasting 15-20 minutes each; [Jones] stated that he received 15-25 [personal services] lasting 5-15 minutes each, but occasionally as long as 25 minutes. The Report cites other facts, derived from other witnesses and records, that, in at least one account, more [personal services] were given for longer durations than stated by either [Individual] or [Jones]. The Report also states that, during the relevant time period, [Individual] refused payment from [Jones] for the [personal services].

Law and Analysis: The applicable law is §2-156-040(c) of the Ordinance, which states in relevant part:

No person who has an economic interest in specific City business, service or regulatory transaction shall give, directly or indirectly, to any City official or employee whose decision or action may substantially affect such transaction...and [that employee] shall [not] accept, any gift of...(ii) an item or service other than a gift with a value of less than \$50.00, as long as the items or services from any one source do not exceed a cumulative value of \$100.00 during any calendar year.

Under §2-156-010(i), economic interest means, in pertinent part, "any interest valued or capable of valuation in monetary terms." Under §2-156-010(m), gift means "any thing of value given without consideration or expectation of return."

Under these provisions, then, any person (or entity) with an economic interest in a specific City contract, such as [Vendor] or [Individual] (its owner) may not give a gift to a City employee who may substantially affect the donor's transaction (such as [Jones]), unless the gift is worth less than \$50.00 and all such gifts given in a calendar year do not exceed a value of \$100.

The Report shows facts sufficient for the Board to conclude that, during the relevant time period: i) [Individual] had an economic interest in several specific City contracts that involved his company, [Vendor]; ii) [Individual] gave (and thus [Individual] indirectly gave), and [Jones], the head of the City department under which [Vendor] was contractually obligated to provides services, accepted, the gift of [personal services], and that these [personal services] were given without payment (although, the Report states, [Jones] did offer to pay for them in 2010). The Report also shows facts sufficient for the Board to conclude that: iii) these meetings truly were [personal services] (although [Jones] disputes that characterization); iv) [Jones]

recognized they were valuable; v) [Jones]'s City decisions or actions could substantially affect [Vendor]'s agreements (or subcontracts) to perform City work for [Jones]'s department, [Y]; and vi) [Jones] did sign vouchers authorizing payment to [City Contractor] and [Vendor], and vii) that, on one of the relevant contracts, [Vendor] was "to work at the direction of [Y]'s [Chief Officer]." (IGO Report page 1.) The Report also shows that the IGO surveyed the value of [personal services], and concluded that their value ranged from \$20.00-\$70.00 per hour. The Report also shows that [Individual] and [Jones] both testified that the number of [personal services] actually given during the relevant time period was 20, and these [personal services] averaged about 15 minutes each. As the relevant time period covers an uneven portion of two calendar years, an allocation of the 20 [personal services] is required. In 2008, 6+ months are included in the relevant period, and in 2009, 9+ months are. Therefore, the [personal services] can reasonably be split between the calendar years: 35% of the [personal services] in 2008 and 65% in 2009. Based on our close reading of the IGO's Report, we can conclude that it provides facts sufficient to warrant a finding that the [personal services] were together worth more than \$100 in 2009.² Accordingly, the Board concludes that the Vendor gave a prohibited gift because all elements of a violation of the Ordinance have been met by the Vendor for the calendar year 2009.

Determinations:

The Board determines, based upon the facts in the Report and your Memorandum, and having made no independent findings of fact, that [Vendor] did violate § 2-156-040(c) of the Ordinance by indirectly (through its principal, [Individual]) providing, in 2009, gifts ([personal services]) worth more than \$100 to [Jones], the [Chief Officer] of the Office of [Y], the City department to which [Vendor] was providing services pursuant to various City contracts.

The IGO determines in its Report that both [Jones] and [Individual] "engaged in conduct in violation of the City ethics ordinance and contracting rules." The IGO then recommends that, "as a result of our findings," [Individual] and [Vendor] be "debarred from any City consulting or contracting work for a period of six months." Because the Governmental Ethics Ordinance itself does not authorize a debarment for 6 months (or for any length of time, for that matter), the Board of Ethics cannot address the IGO's recommendation

2. The Report assembles documentary evidence showing and verifying scheduled and canceled [personal services], and testimonial evidence from [Jones]'s assistant confirming the scheduling evidence. But the Report does not provide a basis for the assistant's knowledge of the number or duration of [personal services] actually given. Instead, her testimony provides uncorroborated estimates based on [personal services] scheduling and cancellation records, but not any direct information about [personal services] that were actually [provided]. There are some testimonial statements as to the [personal services] by a former [employee of Y], [Mr. Green], but the Report does not explain how he would know of the actual number or duration of the [personal services], or the nature of office meetings between [Individual] and [Jones] in any particular instance (other than having an office next to [Jones]'s), especially since the [personal services] were conducted in [Jones]'s office with the door closed. Report, page 6. In addition, the Report states that [Green] "was fired by [Jones] on [Date], 2009" (Report page 7), which eliminates [Green]'s knowledge of [Jones]'s activities after that date, and also, as the Report states, [Green] "might therefore have a retaliatory animus" (Report page 14). Finally, though the Report concludes that [Green]'s and [Jones]'s assistant's estimate of the number of [personal services] is much higher than the numbers stated by [Jones] and [Individual], the Report does not state that the estimates that [Green] and the assistant provided cover the same period of time. Thus, The Board is required to "dig deeper" into [Jones]'s and [Individual]'s testimony.

Unlike the documentary evidence or the assistant's or [Green]'s testimony (from which the Report sets forth a conjecture, not a firm conclusion, of the number and duration of these [personal services]), the IGO's survey of the value of [personal services] is something on which we can rely. Though there is a range of values per hour (\$20-\$70), it is reasonable to split that range in order to set a fair value for the gift--therefore, for our analysis, we will value the lesson at \$45 per hour. See Case No. 89097.A (City employees may purchase contractor's used cars but only at the *fair market value*) (emphasis supplied). In the Report, [Individual] and [Jones] agree, approximately, that, during the relevant period: (i) there were 20 [personal services] [provided]; and (ii) of about 15 minutes per [the personal service]. There is, however, no evidence directly establishing how many [personal services] were actually conducted in 2008 and in 2009. Thus, given the totality of the evidence in the IGO's Report, we conclude: i) that, in 2008: 35% x 20 x \$11.25 (a 15 minute [personal service]) yields a yearly gift of \$78.75; and ii) in 2009: 65% x 20 x \$11.25 yields a yearly gift of \$146.25. This latter figure exceeds the allowed limit under the Ordinance.

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that [Vendor] or [Individual] be debarred. That decision would need to be based upon the City's debarment rules, which the Board has no authority to interpret or administer.

Our determination is based upon the facts as stated in this advisory opinion, and is limited to our application of these facts to the City's Governmental Ethics Ordinance. If these facts are incorrect or incomplete, please notify us immediately, as any change may alter our determinations.

Reliance:

This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

Miguel A. Ruiz
Chair