**ADVISORY OPINION**

**Case No. 17003.A, Alderman [A] and City Council employee [CCE]/ Money for Advice**

Date: February 24, 2017

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You are the Alderman of the City’s Ward. In a letter you addressed to our Executive Director on , you wrote that [CCE] is working for your Ward office on a “contractor” basis, and described a situation in which [CCE] is the recipient or beneficiary of a “GoFundMe” campaign (“GFM”) created by a citizen for certain work he performs. You requested an advisory opinion asking what ethics conflicts, if any, exist when a private citizen creates one of these GFM campaigns for a contractor of the City when the fund is for “similar but unrelated activities,” and for general advice in the future with respect to these funding campaigns.

The Board has carefully considered your request, and we explain our legal conclusions, determinations, and advice for you in this opinion. As to whether there has been an ethics conflict or violation of the City’s Governmental Ethics Ordinance (the “Ordinance”) by [CCE] based on the facts presented, the Board cannot render an opinion, since we do not have all the facts needed to make that assessment.

The Board also sets out, generally, the restrictions and conditions imposed by the Ordinance whenever City employees or officials wish to become, or would become, beneficiaries of GFM or other on-line funding mechanisms, which take many forms and are proliferating in the marketplace. These types of “funding” sources require, and will receive, careful scrutiny by the Board. You are reminded that the Board’s core concern --regardless of the process used -- is compliance with the gift restrictions imposed on City employees and officials in the City Ethics Ordinance.

**Facts**. According to your letter, [CCE] is “working for the Ward office on a city ‘contractor’ basis.” Further, you write, a citizen created this GFM for [CCE] “for other work he does outside of his contractor work for the City, on his own time, and as a citizen or as President of the X Organization.” Your letter gave the website address for this GFM campaign. Our staff’s check of that GFM campaign shows that it raised just over $ in funds, and that the campaign was closed out before 2016 ended.

We do not know the precise nature of the services [CCE] renders to your office through his “contractor” status. We also do not know the precise nature of the services he has rendered in his capacity as the President of the X Organization, nor do we know how much, if any, of the funds raised through this GFM campaign were remitted to him, nor do we know what he may have spent it on, for example, whether all of these funds may have gone toward purchasing equipment.

**Law and Analysis.**

I. [CCE’s] Legal Status under the Ordinance. We first address whether [CCE] is subject to the Ordinance, and if so, in what capacity (as a City contractor? as an employee?). Under amendments made to the Ordinance effective March 16, 2016, [CCE] is a “City Council employee.” This term is defined in §2-156-010(d-1) of the Ordinance as:

“… an individual employed by an alderman or a city council committee, or bureau or other service agency of the city council, whether part-time or full-time, including an individual retained as an independent contractor by any of them.”

What is the legal effect of [CCE] being a “City Council employee?” Does his status as a City Council employee mean that he is subject *as an “employee”* to Article II of the Ordinance, the “Substantive Code of Conduct?” Article II contains substantive “conflict of interest” restrictions and prohibitions imposed on City officials and employees. These include provisions we will discuss below, such as §2-156-142(f), the “Money for Advice” provision, and the Fiduciary Duty and Use of City-owned property provisions (§§2-156-020 and -060, respectively). These provisions – like every other provision in Article II – are worded to apply to “employees,” and do not mention “City Council employees.” For example, §2-156-142(f), the Money for Advice provision, states that:

“no official or employee … shall solicit or accept any money or other thing of value … in return for advice or assistance concerning the operation or business of the City; provided, however, 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.”

If these provisions do not apply to “City Council employees,” but only to “City employees,” then a person like [CCE] is not subject to any of the provisions cited above.

For the reasons discussed below, we conclude that these substantive provisions *do* apply to “City Council employees” like [CCE].

It could be argued that “City council employees,” as distinct from “employees,” are not subject to Article II of the Ordinance, because they are City contractors, not City employees. The Ordinance’s definition of “employee,” in §2-156-010(j), explicitly excludes “City contractors.” “City contractor,” defined in §2-156-010(e), in turn means any person who is paid from the City treasury or pursuant to City ordinance for services to any City “agency,” and the term “agency” means “the City Council, any committee or other subdivision thereof …” but, “City contractor explicitly excludes employees,” thus, one might conclude, City council employees are City contractors.

However, we reject this argument. Section 2-156-385(6), part of the provision entitled “Probable Cause Finding” reads, in relevant part:

The inspector general may request the board to issue a finding as to whether evidence shows that there is probable cause to believe that the subject of an investigation (for purposes of this section, “subject”) has violated this chapter, as follows…  (6)   If the subject is a current employee and the board determines to pursue an action for discipline instead of a fine, within 40 days of such determination, the board shall submit a written recommendation, with all the evidence and documents supporting the board's recommendation: (i) to the mayor, if the employee is a department head or an appointed official; (ii) to the chairman of the city council committee or to the alderman for whom the employee works, *if the employee is a city council employee* … (emphasis added.)

This raises the question as to why include a provision in the Ordinance for the Board to recommend discipline based on Inspector General (“IG”) investigations of “City Council employees” if such individuals are not subject to the Ordinance’s substantive Code of Conduct? Clearly, these individuals must file annual Statements of Financial Interests, per §2-156-150(a)(v), unless they are solely clerical, but enforcement of *that* requirement does *not* involve the IG and is done by the Board’s Executive Director internally, pursuant to §2-156-505 of the Ordinance. Section 2-156-385(6) makes sense *only* if City Council employees are, in effect, treated as employees for purposes of the Substantive Code of Conduct in Article II of the Ordinance. This is also consistent with §§2-56-025 and -030 of the IG’s own enabling ordinance, which define the term “City employee” to include “any individual employed or appointed by … any member of the city council, whether part-time or full-time, including an individual retained as an independent contractor”; and which grant the IG the power and duty to “investigate the performance of governmental … employees …”

For the foregoing reasons, we conclude that all “City Council employees,” such as [CCE], are subject not only to the provisions of Article III of the Ordinance (financial disclosure) and to the enforcement and adjudicative provisions of Article V, but also to the Substantive Code of Conduct in Article II, as “employees.”

II. [CCE’s]Conduct. Among the provisions in Article II is the Money for Advice provision, §2-156-142(f). As noted above, it prohibits a City employee from soliciting or accepting money or any other thing of value in return for giving advice or assistance concerning City business, but does not prohibit an employee from “accepting compensation for services wholly unrelated” to the employee’s City duties, and rendered as part of his or her non-City employment, occupation or profession. [CCE] could be held to have violated this provision if an investigation were to show that: (i) he solicited or received any thing of value through the GFM for performing services that were not “wholly unrelated” to the City work he has done and may still do for the Ward, and; (ii) that were not rendered as part of his non-City employment, occupation or profession as the President of the X Organization. Similarly, he could be held to have violated the Ordinance’s the Fiduciary Duty and City-owned Property provisions if an investigation were to show that he used his City title or his affiliation with the Ward or with you to provide, or imply that he could or would provide, favorable treatment to GFM contributors, or the opposite with respect to non-contributors. *See* Case No. 09034.A.

Your letter does not provide enough information for the Board to draw a conclusion or make a determination with respect to [CCE’s] past conduct. You write that the GFM was for “private funding of *similar work”* (we note that this is not evident from the webpages for this GFM campaign), which, you also write, [CCE] does “*outside of contractor work for the City*, on his own time as a citizen or as President of the X Organization.” You also write that:

“[these funds were for his effort in his community … to assist [him] in paying for work he does on his own time. *None of the work is related to the Ward office.* For instance he spends his evenings doing a neighborhood watch and the GFM is related to those types of activities ... As Alderman, I do not dictate or decide what he does regarding his hours outside of the contractor hours … My office has asked him *to keep separation* [sic] *between the work he does for us, and any other activities he undertakes as the X President or neighborhood work he does*.”

Near the end of your letter, you ask what ethics conflict, if any, exists when a private citizen creates one of these funds for a contractor of the City when the fund is for *similar but unrelated* activity? (emphasis added.) In order to make a determination as to whether there have been one or more violations of the Ordinance based on this past conduct of [CCE], this Board would need to know, at a minimum: (i) what does [CCE] do for the Ward? does he have a written contract? what does it provide?; (ii) what has or will [CCE] do with the $ in proceeds from the GFM? is he using the funds or any part thereof to compensate himself, or solely to purchase equipment or supplies for whatever work he is doing?; (iii) are services he performs with the GFM proceeds services that the Ward provides, or that the City provides?; and (iv) are these services “wholly unrelated?”

Again, the answers to these questions would require gathering facts and information regarding [CCE’s] past conduct, and thus an investigation. However, this Board has no authority under current law to investigate, and therefore we cannot ferret these questions out. Only an investigation by the IG could do this.

III. GFM or other similar on-line funding campaigns and City employees. You ask in your letter for “input on the issue… [of] what ethics conflict, if any, exists when a private citizen creates one of these [GFM] funds for a contractor of the City when the fund is for similar but unrelated activities?”

Nothing in the Ordinance *per se* prohibits City council employees – and, by extension, all City officials or employees – from being the beneficiaries of GFMs or other similar “crowd-funding” monies. However, the Ordinance imposes several severe restrictions.

First, the Ordinance’s gift restrictions, contained in §2-156-142, prohibit City employees and officials from receiving cash or cash equivalents unless these gifts are from either (i) personal friends;[[1]](#footnote-1) or (ii) a “covered relative;”[[2]](#footnote-2) or (iii) that results from the outside (that is, non-City) business, employment or community activities of the City person, provided such benefits have not been offered or enhanced because of the recipient’s City position, and are customarily provided to others in similar circumstances (*see* §2-156-142(d)(11); or (iv) constitute compensation for services wholly unrelated to the City person’s City duties and responsibilities and rendered as part of his or her non-City employment, occupation, or profession (see §2-156-142(f). In other words, a City employee or City council employee like [CCE] could receive cash through a GFM or other similar on-line campaign as long as it is part of his non-City employment, and is wholly unrelated to his City responsibilities.[[3]](#footnote-3) However, a City employee could not, for example, receive cash (or cash equivalents) through a GFM to raise funds for a new car or European vacation, unless all the donors to the GFM were the employee’s covered relatives or personal friends.

Second, pursuant to §2-156-142(a)(1)(ii), any City employee or official who does receive money through an acceptable GFM (or other, similar funding mechanism) may still not accept funds donated anonymously (the name of the GFM donor would need to be discovered, something that is possible through the GFM business model).

Third, no money or other thing of value could be accepted by a City employee or official through a GFM (or other, similar funding mechanism) or any GFM donor based on any mutual understanding, whether explicit or implicit, that the City employee’s or official’s actions, decisions or judgments concerning City business would be influenced thereby. *See* §2-156-142(e).

IV. Advice to You, as Alderman. Finally, we advise you, and by extension, your 49 aldermanic colleagues, and City department heads, to make best efforts to ensure that you remain apprised of any GFMs (or other, similar funding mechanisms) formed for which your City Council employees would be “beneficiaries,” and that any services to be performed by the City Council employees thereunder are wholly unrelated to the work of your aldermanic office and to services provided by the City. We stress that a violation of the Money for Advice provision would be your employee’s, not yours, but it would not reflect well on your office. We remind you that our agency is available to consult with any City official or employee *before* he or she partakes as a beneficiary of a GFM or other, similar funding campaign, and strongly urge both you and your employees to request specific advice from us before forming or accepting any money from a GFM or other, similar funding mechanisms.

**Determinations**. For the foregoing reasons, we determine that:

(i) “City council employees” paid under an independent contract (like [CCE]) are subject to the Ordinance’s substantive code of conduct as “employees,” including the Ordinance’s gift restrictions, Fiduciary Duty obligation, and restrictions on the use of City-owned property;

(ii) The Board does not have sufficient information available to it to determine whether there has been a violation of the Ordinance based on [CCE’s] past conduct, though we advise you both that there exists enough confusion in the facts we do have such that an appearance of impropriety was created by [CCE] being the beneficiary of a GFM campaign that, on its face, could be related to the work he performs for the Ward Office; and

(iii) While the Ordinance does not prohibit City employees or officials from being beneficiaries of GFM or other, similar fundraising campaigns, these are severely circumscribed by the gift restrictions in the City’s Governmental Ethics Ordinance, and (except in circumstances of family tragedy, as explained in companion Case No. 17004.A) must be either from personal friends or covered relatives, *or* that result from the outside employment or work or community activity of the employee or official, which work or activity must be wholly unrelated to their City positions and responsibilities.

Our determinations are based on the facts presented in this opinion, and cover only the application of the City’s Governmental Ethics Ordinance to these facts. If the facts change, please advise us, as that could change the Board’s determinations and advice. As required by our Rules and Regulations, we are also sending a copy of this advisory opinion to [CCE]. We also remind you that other laws and concerns may apply here.

**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, and either of you may rely on the advice given in this advisory opinion in the event of an investigation. Should you desire a reconsideration of the Board’s determination, please notify us in writing within 14 business days, that is, no later than March 15, 2017, explaining any material facts or circumstances that were not before the Board when it deliberated on this opinion.

We appreciate your conscientiousness in requesting this opinion.

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William F. Conlon, Chair

1. We recently issued Case No. 17004.A, in which we discuss exactly what constitutes a “personal friend.” [↑](#footnote-ref-1)
2. “Covered relative,” defined in §2-156-010(g-1), means a spouse or domestic partner, or the immediate family, or relatives residing in the same residence as the City employee or official. [↑](#footnote-ref-2)
3. In Case No. 17004.A, which we are also issuing today, we have determined that, in an extraordinary family emergency, involving the tragic death of a City employee’s spouse, the Ordinance does allow the employee to receive cash through a GFM. But situations like that are rare, and we would need to consider them on a case-by-case basis. [↑](#footnote-ref-3)