CITY OF CHICAGO

BOARD OF ETHICS

November 14, 2023

MEMORANDUM FROM THE CITY OF CHICAGO'S BOARD OF ETHICS REGARDING
CASE NO. 23041.IG
Fiduciary Duty; City-Owned Property; Prohibited Political Activities;
Solicitation of Political Contributions

Introduction: By a 4 to 0 vote the Board of Ethics hereby dismisses this matter on the basis that there is insufficient evidence to find that the Respondent violated the Governmental Ethics Ordinance as alleged by the Inspector General. Pursuant to Board Rules[1] we issue this Memorandum.

Part I – Background

This matter was referred to the Board of Ethics ("Board") by the Chicago Office of Inspector General ("IG") on May 1, 2023. It involves allegations that a City official ("respondent") was responsible for the unauthorized use of City property, for intentionally using City property and resources for prohibited political activity, and for soliciting political contributions in violation of several sections of the Governmental Ethics Ordinance ("Ordinance"),[2] including §§2-156-020, -060, -135(b), and -140(a). The IG's investigation concluded that the respondent was personally responsible for the dissemination of electioneering emails, which improperly solicited campaign contributions from City employees and were sent to their City of Chicago email addresses, and emails in which the respondent's title and office were improperly used. The IG recommended that the Board issue a finding that there is probable cause to believe that the respondent violated the Ordinance and impose appropriate sanctions.[3]

At its May 22, 2023, meeting, the Board analyzed the evidence before it, provided by the IG, and voted unanimously to find probable cause that the respondent violated these sections of the Ordinance. Notice was then sent to the respondent. The respondent and respondent's counsel then met with the Board at both its September and October 2023 meetings to provide evidence to attempt to rebut the IG's Report and the Board's probable cause finding.[4] The Board needed time to analyze the large amount of evidence submitted by both the IG and the

[1] Board Rule 4-4 states, "All conclusions...with respect to violations of the Ordinance...including identities, the record...and knowledge, shall be treated by the Board as confidential...; provided, that without identifying the person complained against or the specific transaction, the Board may: (i) comment publicly on the general disposition of its requests and recommendations..." See: Rules-Reg-2014.pdf (chicago.gov)

[2] *See* https://www.chicago.gov/content/dam/city/depts/ethics/general/Ordinances/GEO-2019-color%20through%20August%202022.pdf, effective October 1, 2022.

[3] Pursuant to §§2-156-385 and -465 of the Ordinance.

[4] Pursuant to §2-156-385(3) of the Ordinance.

respondent and continued the matter to the Board's November 2023 meeting. At the November 2023 meeting the Board voted unanimously to dismiss the case.[5]

Part II – The Factual Record Before the Board Does Not Support a Finding that the Respondent Violated the Ordinance

Relevant Law

§2-156-020. Fiduciary duty. Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City.

§2-156-060. Unauthorized use of real or personal City-owned property. No official, employee, or candidate for City office shall engage in or permit the unauthorized use of any City property[6]…

§2-156-135(b). Prohibited political activities. No official, employee, or candidate for City office shall intentionally use any City property or resources of the City in connection with any prohibited political activity…

§2-156-140(a). Solicitation or acceptance of political contributions and membership on political fundraising committees. No official or employee shall compel, coerce, or intimidate any city official or employee to make, refrain from making or solicit any political contribution. No official or employee shall knowingly solicit any political contribution from any other employee or official over whom he or she has supervisory authority…

The Board thoroughly considered the evidence before it, which included evidence presented by the IG as well as rebuttal evidence presented by the respondent. The Board has determined that the evidence does not support a finding that the respondent violated the Ordinance. The evidence does not show that the respondent was involved in the creation or dissemination of the emails at issue. Instead, the evidence shows that the respondent's political fundraising committee was solely responsible for the emails at issue. The evidence shows that the respondent is not a member or director of the political fundraising committee. There was no evidence presented to the Board that showed the respondent was involved in drafting, disseminating, or approving the emails at issue that were sent by the political fundraising committee, nor that the respondent had knowledge of these emails at the time they were sent to cityofchicago.org email addressees. The respondent was in neither actual nor *de facto* control of the process used for the dissemination of the offending e-mails. That responsibility rests with the fundraising committee and its officers, directors, and staff.

Regrettably, the relevant sections of the Ordinance do not allow for the Board to find a political fundraising committee liable for violations of these sections of the Ordinance.[7] Instead, it allows for the Board to find violations only against City officials, employees, and candidates for City office for violations of §§2-156-060 and

[5] Pursuant to §2-156-385(4) of the Ordinance.

[6] §2-156-010(e-1) "City property" means: (i) the official corporate City seal, as authorized in Chapter 1-8-010 et seq., as amended; (ii) any building or portion thereof owned or exclusively leased by the City or any City agency; or (iii) any intellectual property or personal property, equipment, machinery, or tangible items owned or used by the City for City business purposes. "City property" does not, however, include any portion of a building that is rented or leased from the City or any City agency by a private person or entity.

[7] The Board will soon recommend to the City Council and the Mayor that the Ordinance be amended so that "political fundraising committees" (a term defined in §2-156-010(u) of the Ordinance) will be prohibited from engaging in or permit the use of any City property except as authorized, and from intentionally using City property or resources of the City in connection with political activity.

-135(b). Hence, in effect, there is no way for the Board to hold the responsible party here--the fundraising committee--accountable under current law. We urge the City Council to step in and regulate these fundraising operations by giving the Board of Ethics and IG jurisdiction over political fundraising committees involved in City of Chicago municipal elections.

Part III – Board's Recommendation to Amend the Ordinance

As noted above, the Board will call upon City Council to amend the Ordinance. The Board will recommend that §2-156-060, -135(b) and -140(a) of the Ordinance include any political fundraising committees so that there is accountability in the future for this type of conduct.

Please direct all inquiries to Board staff at (312) 744-9660. Thank you.

William F. Conlon, Chair
David L. Daskal, Board Member
Hon. Barbara A. McDonald, Board Member

Separate Memorandum from Board Member Ryan Z. Cortazar

I join the Board's disposition of this matter because the City of Chicago email blasts at issue did not violate the relevant provisions of the Ethics Ordinance. I write separately because I disagree with the implication that the failure to find a violation here turns on the omission of political fundraising committees from the relevant provisions. In my view, the lack of any violation here is more substantive: the facts do not establish that either the respondent or the committee acted with the required state of mind. Simply adding committees to those provisions would not change that result.

The relevant provisions require a person "knowingly" or "intentionally" to engage in the prohibited conduct. This matter involves the sending of email blasts to massive email lists and the failure to scrub those lists to exclude City of Chicago email addresses—not solicitations sent to email addresses of Chicago Public Schools or City Colleges employees that were only a peripheral aspect of the investigation. The facts surrounding the City of Chicago email blasts may establish negligent or even reckless conduct, but they fail to show knowing or intentional misconduct. Because the Ordinance does not ban the solicitation of those agencies' employees and because investigative responsibility for those agencies lies elsewhere, there is no occasion to determine whether those separate solicitations were sent knowingly or intentionally.

I. Improper Political Solicitation

The Ordinance section most relevant to this matter is the political solicitation provision. That section has two separate prohibitions. The first creates a violation where a City official or employee would "compel, coerce or intimidate any city official or employee to make, refrain from making or solicit any political contribution." CHI. MUN. CODE § 2-156-140(a). The second creates a violation where a City official or employee would "knowingly solicit any political contribution from any other employee or official over whom he or she has supervisory authority." *Id.*

Neither the respondent nor the committee violated the first prohibition. The generic blast emails sent to city email addresses do not amount to compulsion, coercion, or intimidation. They include no threats, warnings, or insinuations about the consequences of failing to donate. Neither do they promise or suggest any personal benefits for donors. Because there was no compulsion, coercion, or intimidation here, it would not matter if the Ordinance regulated committees alongside City officials and employees. And where an alleged solicitation would amount to compulsion, coercion, or intimidation, the current Ordinance may permit the Board to hold political candidates responsible for improper communications sent in their names, with their signatures, and by their official candidate committees under Illinois agency principles.

Nor was there any violation of the second prohibition governing solicitations from supervisors to subordinates. That section does not require compulsion, coercion, or intimidation, but it does require the supervisor to "knowingly solicit" the political contribution. In order for persons to violate this provision, they must be consciously aware that they are soliciting contributions from subordinates. *Cf.* 720 Ill. Comp. Stat. Ann. 5/4-5 (a person "acts knowingly . . . when he or she is consciously aware that his or her conduct is of that nature" defining the offense). The investigation in this case does not establish a knowing violation by the respondent. And even

if the Ordinance were amended to forbid committees from soliciting contributions from a candidate's subordinates, the facts here still would not establish that the committee or its employees knowingly solicited contributions from the respondent's subordinates.

The Inspector General points to several facts that purportedly establish the respondent's knowledge of improper solicitations or at least willful blindness to them. According to the Inspector General, the committee continued to send blast emails to cityofchicago.org email addresses even after the Board and the Inspector General warned the respondent and the committee about the solicitations. The problem with this argument is that the Inspector General also identifies evidence reflecting the committee's efforts to apply a protocol to stop mass solicitation emails from being sent to cityofchicago.org addresses. The fact that this effort failed repeatedly to prevent the City employee email addresses from receiving solicitations does not establish that the respondent or the committee (1) designed this effort to fail in such a way that would establish knowing misconduct or (2) was aware of facts that would lead it to conclude that its efforts would fail in a way that would satisfy the willful blindness standard.

More likely this evidence suggests negligence and perhaps even recklessness. But it does not suggest knowing misconduct or even willful blindness because we should "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011); *accord Grundies v. Reid*, 107 Ill. 304, 312 (1883) (distinguishing "want of caution" from "willful blindness"); *cf. Metzger v. Brotman*, 2021 IL App (1st) 201218, ¶ 13 (comparing actions that are "intentionally false, willfully blind to the truth, or was in reckless disregard for the truth"). The failure of the respondent's committee to prevent solicitation emails from reaching City of Chicago employees may be negligent—even reckless—but it is not knowing misconduct or willful blindness.

II. Unauthorized Use of City Property

The Ordinance has two separate bans on the unauthorized use of City property. First, there is a general ban in § 2-156-060 that prohibits any unauthorized use of City property but excuses certain incidental uses. Second, there is a specific political ban where a person "shall intentionally use any City property or resources of the City in connection with any prohibited political activity," § 2-156-135(b), which includes political solicitation, *see* § 2-156-010(v-1).

This case implicates only the specific ban on using City property or resources for prohibited political activity. Where two separate statutory provisions seem to cover the same conduct, "the specific governs the general." *Kloeppel v. Champaign Cnty. Bd.*, 2022 IL 127997, ¶ 22. Applying the general ban to the facts of this case would also violate the "basic rule of statutory interpretation" that requires interpreting "statutes so that no part is rendered a nullity." *Eads v. Heritage Enterprises, Inc.*, 204 Ill. 2d 92, 105 (2003). This case implicates prohibited political conduct and the misuse of City resources, so applying the general ban that lacks the specific ban's requirement that the violator act "intentionally" would make the specific ban a dead letter.

This matter does not satisfy the specific political ban's requirement that a person "intentionally" misuse City property or resources for prohibited political purposes. Persons act "intentionally" when their objective or purpose is to engage in the proscribed conduct. *Cf.* 720 Ill.

Comp. Stat. Ann. 5/4-4 ("A person . . . acts intentionally . . . when his conscious objective or purpose is to accomplish that result or engage in that conduct."). As described above, the evidence establishes negligent or at most reckless conduct—not knowing or intentional violations.

The Inspector General also alleges that the respondent improperly used City property by using the respondent's elected title in campaign literature. I doubt that the City's titles constitute City property. Could the City successfully sue a writer who created a fictional elected Chicago official as a character in a literary work? Certainly not. The City may have an interest in preventing fraud or other concrete harm from the misuse of its titles, but this limited interest cannot create a broad property right that prevents candidates from using elected titles when campaigning.

III. Breach of Fiduciary Duty

I also find no merit in the argument that the respondent breached a fiduciary duty to the City, *see* § 2-156-020, by using an elected City title in electioneering. The Inspector General argues that the Ordinance's fiduciary duty provision requires public officials to give an undivided loyalty to the City in their performance of public duties and forbids the use of City titles and authority for personal or private interests. But the alleged misconduct here does not involve the "performance of [respondent's] public duties," § 2-156-020—it involves the respondent's private electioneering behavior. Nor do I see how the use of the public title in this matter compromised or conflicted with the respondent's performance of public duties.

This case provides a poor setting for the fiduciary duty provision because it is hard to imagine how one might determine that an official's personal interest in election might be contrary or even orthogonal to the interests of the body politic they seek to serve. A benign assumption of candidates running for City office is the belief that their personal stewardship will best advance the City's interests. As I see it, resolving the fiduciary duty question in a case like this presents two unpalatable options for precisely defining the City's interests: a freestanding interpretation and a relational interpretation. The freestanding interpretation invites blobby, undisciplined reasoning destined to change with every fact pattern. But the relational option is worse because it necessarily requires improper political considerations, color-matching the City's interests against one's beliefs about a particular candidate's record, platform, and personality. Perhaps a third, neutral path could be discerned by defining a narrow interest in projecting that the City's titles are "above politics." Without considering the merit of this interest as it relates unelected officials and employees, it is futile and foolish to attempt to inoculate *elected* positions from political perception.

* * *

The investigation in this case failed to establish that the respondent or the committee acted intentionally, knowingly, or with willful blindness when sending the blast emails. Consequently, I do not believe that amending the Ordinance to cover fundraising committees would lead to a different result here. Nevertheless, the proposed amendment would provide prudent regulation of these committees, and I join the Board's call to amend the Ordinance. In perfecting the Ordinance, the City Council should also consider what appropriate limits might be imposed on soliciting sister agency employees.