

**ADVISORY OPINION
CASE NO. 98021.A
Financial Interest in City Business**

To: [John]

Date: October 21, 1998

On May 8, 1998, you, together with your accountant, [Michael], requested a Board advisory opinion on whether you are in violation of the Governmental Ethics Ordinance because of your wife's ownership of a company that has contracts with the City. This opinion is based on a review of the facts presented by you and [Michael], as well as staff's review of City Comptroller vendor payment records. No further independent investigation has been conducted. Having reviewed the information made available, the Board determines that you do not have a prohibited financial interest in City business by virtue of the company's City contracts with the Departments [1 and 2]. However, your negotiation of a contract on behalf of the company constitutes participation in company management, and creates an appearance that your wife's interest in the company may not be wholly independent of you, and we accordingly advise you to cease such activity.

FACTS:

The following facts were obtained from [Michael's] initial letter of May 8, 1998; your June 23, 1998 response to a staff request for additional information; your September 15, 1998 response to another staff request for additional information; and a staff review of payments to City vendors.

You are employed by the City of Chicago Department [3] as a [] Specialist. You have worked for the City since 1978. On September 11, 1986, you and [James], who is not a City employee, founded a company called [Company Alpha], a [] firm. Each of you held a 50% ownership interest in the company. On October 1, 1992, you said, you transferred your ownership interest in [Company Alpha] to your wife, [Mary], and relinquished all control over the business. In a letter dated September 15, 1998, you stated that you transferred ownership for a number of reasons, including your loss of interest and your lack of time to devote to the business, as well as [Mary's] skill at administrative duties, contract preparation, and accounting. You further stated that, at the time of the transfer of interest, [Mary] was playing a more active role in the company than you, and you both felt that she should have the same status as the other shareholder, [James].

[Mary] and [James] continue to serve as the sole owners and managers of [Company Alpha]. [James] is responsible for the on-the-job operations of the company, including maintenance and employee supervision. [Mary] manages the office and is responsible for administrative matters, such as contract administration and accounting. Although she has no formal training in these areas, she has a considerable amount of on-the-job experience and has worked closely with accountants and attorneys in these areas. You stated that you currently have no ownership interest in [Company Alpha] and have not received any checks or other compensation since 1992.

[Company Alpha] is organized as a single legal entity with two physically distinct divisions: [Blue and Green]. The [Blue] division is located in [], IL, while the [Green] division is located in the [] neighborhood of Chicago. The company has five employees, including [Mary] and [James]. Of the three non-management workers, two employees work solely for the [Green] division as [], while one works only for the [Blue] division. [Mary] and [James] perform management and supervisory roles for both divisions.

You reported that you are not a shareholder, officer, manager, employee, or advisor to [Company Alpha]. You stated, however, that you continue to perform occasional, unpaid services for the company's [Blue] division. Approximately three or four times a year you may be asked to respond to a customer complaint, gathering the facts and suggesting a resolution subject to the approval of [Mary] and [James]. You are also involved in one account where you personally know the property manager who has a [] contract with [Company Alpha]. You stated that you have maintained personal contact with this customer "for business relationship reasons"—you have known this client for a number of years and the client feels more comfortable dealing with you. Although you have negotiated some contract terms for this account, [Mary] or [James] approve the final contract. Since your transfer of ownership to [Mary], you have not held yourself out as a corporate officer, shareholder or employee of the company. You have never performed services for the [Green] division of the company.

In 1994 [Company Alpha] learned of the opportunity to bid on City [] contracts from another City contractor []. [Mary] pursued these City contracts by persistently calling and filing applications between 1994 and 1997. In 1997 the Department of [1] awarded [Company Alpha] a contract for work by the [Green] division. The company has never had any contracts with the City for work by the [Blue] division, nor has the company ever made any efforts to bid on any City [] contracts.

The company currently has contracts with the City of Chicago Departments [1 and 2] to supply []. The City pays the company for hours of use []. Staff review of City Comptroller vendor payment records indicates that in 1997 [Company Alpha] received two payments from the Department of

[1] totaling \$25,054.62. To date in 1998, [Company Alpha] has received six payments from the Department of [1] and three payments from the Department of [2] totaling \$51,432.01.

You state that [Company Alpha], first learned of the City contracts in 1994, two years after you transferred your ownership to your wife. The contracts were not awarded until 1997. According to the facts you present, [Mary] alone pursued the City contracts—you had no involvement with the application for, the awarding of, or the performance of the City contracts.

LAW:

The City of Chicago Governmental Ethics Ordinance Provision at issue is Section 2-156-110, "Interest in City Business," which states in relevant part:

No elected official or employee shall have a financial interest in his own name or in the name of any other person in any contract, work or business of the City...

"Financial interest" is defined in Section 2-156-010(l) of the Ordinance, which states in relevant part:

"Financial interest" means (i) any interest as a result of which the owner currently receives or is entitled to receive in the future more than \$2,500.00 per year; (ii) any interest with a cost or present value of \$5,000.00 or more; or (iii) any interest representing more than 10 percent of a corporation, partnership, sole proprietorship, firm, enterprise, franchise, organization, holding company, joint stock company, receivership, trust, or any legal entity organized for profit; provided, however, financial interest shall not include (a) any interest of the spouse of an official or employee which interest is related to the spouse's independent occupation, profession or employment...

ANALYSIS AND CONCLUSIONS:

Under Sec. 2-156-010(l) of the Ordinance, a financial interest means any interest as a result of which the owner currently receives or is entitled to receive in the future more than \$2,500.00 per year, or any interest with a cost or present value of \$5,000.00 or more. City records indicate that in 1997 [Company Alpha] received two payments from the City totaling \$25,054.62 for services rendered to the Department of [1]. As of the end of July 1998, records show the company received nine payments from the City totaling \$51,432.01 in 1998 for services rendered to the Departments of [1 and 2]. As one- half owner of [Company Alpha], your spouse, [Mary], clearly has—and in 1997 had— a financial interest in City business.

The Board has focused its analysis on whether your spouse's financial interest in City business is attributable to you— as an interest held in the name of another— or instead is related to your spouse's independent occupation, profession or employment.

The Spouse's Independent Occupation Exception. In several previous decisions, the Board has outlined the requirements for a business to fall under the spouse's independent occupation exception. Case Nos. 88069.A and 91052.A together establish a four-part test for determining whether the exception applies:

- 1) the City employee may not have an ownership interest in the business;
- 2) the City employee may not have any legal or financial control over the business;
- 3) the business may not be of a type which could reasonably be construed as relying upon expertise and experience related to the employee's City responsibilities; and
- 4) the City employee may not participate in the management of, or be employed by, the business.

An application of these criteria to the facts you have presented establishes the following:

1) Ownership interest: You have no ownership interest in [Company Alpha]. Although you, along with [James], were one of the founders of the company, you said you transferred your 50% interest on October 1, 1992 to your spouse, [Mary], relinquishing all ownership.

2) Legal or financial control: With the transfer of ownership to [Mary] in 1992, you said, you relinquished all legal and financial control over [Company Alpha]. According to the facts you provided, all company decisions are made by [Mary] and [James], and only they are authorized to vote on corporate resolutions. You said that you are not, and do not hold yourself out as, a corporate officer, shareholder or employee, nor do you sign any contracts on behalf of [Company Alpha]. Under the facts you presented, you do not exert legal or financial control over the company.

3) Reliance upon expertise and experience related to employee's City responsibilities: Your expertise and experience as a [] specialist for the Department of [3] is wholly unrelated to [Company Alpha]'s [] business. [Company Alpha] is not the type of business which could reasonably be construed as relying upon your expertise and experience as a [] specialist for the City's Department of [3].

4) Employee or management role: You are not an employee of [Company Alpha] Occasionally—about three to four times per year during periods of peak workload— you are asked to respond to a [] customer complaint. You said you gather the facts and propose a resolution, subject to the approval of Mary and/or James. Under Board precedent, your infrequent, irregular and uncompensated efforts to resolve [] customer complaints does not confer upon you the status of employee for the purposes of determining whether the company is your wife's independent business. *See* Case No. 88069.A (City employee's participation in franchise training program, in order to prepare to help in emergencies, did not prevent the franchise from being his wife's independent occupation).

The management of [Company Alpha] is comprised of [Mary] and [James]: [Mary] is responsible for managing the administrative aspects of the company, while [James] is responsible for operations. However, you continue to be involved in one [] account. Although [Mary] or [James] approve final acceptance of that account's annual contract, you negotiate contract terms with the customer on behalf of [Company Alpha]. Your regular negotiation of contract terms on behalf of [Company Alpha] does constitute participation in the management of the company. As this involvement in management is narrowly limited—to one customer once a year—it does not alone, in the context of the other facts you have presented, give you an interest in the company and its contracts for the purposes of Sec. 2-156-110. However, because your negotiation of contract terms constitutes participation in company management and creates an appearance that your wife's interest in the company may not be wholly independent of you, the Board accordingly advises that you cease such activity.

DETERMINATION:

The Board concludes from the facts you presented and without independent investigation that, under the totality of the circumstances, [Company Alpha] is the independent occupation, profession or employment of your spouse, [Mary], within the meaning of Section 2-156-010(l)(a) of the Ordinance. Therefore, the Board determines that you do not have a financial interest in City business by virtue of [Company Alpha]'s contracts with the City's Departments of [1 and 2]. However, the Board advises that you withdraw from all aspects of the management of [Company Alpha]; this includes the negotiation of contract terms.

Our determination is based on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. Please take careful note that if the facts stated are inaccurate or incomplete, the Board's conclusion may be different. If the facts here are incorrect or incomplete, please notify the Board immediately, as any change may alter our determination. Other laws or rules may also apply to this situation.

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

Case No. 98021.A
October 21, 1998
Page 6

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

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