

Advisory Opinion
Case No. 04021.A, Post-employment

To: [Employee]
Date: August 25, 2004

You are a former employee of the City's [Department 1]. You worked as a [Position 1] at [Department 1's] [Location 1]. Shortly before you retired on [End Date], you requested an advisory opinion from the Board of Ethics on how the Governmental Ethics Ordinance would affect your post-City employment activities. Specifically, you have asked whether you may now work as a contract [Position 1] at the [Location 1], or other [Department 1] facilities, pursuant to a "Depends Upon Requirements" (DUR) contract the City has with [Company 1] to provide tradesmen, including [Position 1]s, to City departments on an as-needed basis.

After careful consideration of the facts presented, the relevant law, and the purpose and intent of the Ordinance's post-employment provisions, the Board has determined that you are not prohibited from working as a contract [Position 1] at the [Location 1] or other [Department 1] facilities because performing that work, under the circumstances described below, does not fall within the intended meaning of the one-year prohibition contained in the post-employment provisions of the Governmental Ethics Ordinance.

FACTS:¹ City Employment. You were hired by the City as a [Position 1] in [Start Date] From that time, until you retired on [End Date], you worked exclusively for the [Department 1]. Throughout your [Years] of service, you were assigned to the [Department 1's] [Location 1].

[Department 1]. The City's [Department 1] currently employs approximately [Number 1] people, about [Number 2] of whom are tradesmen. Among those tradesmen are [Number 3] [Position 1]s: [Number 4] foremen, [Number 5] subforemen, [Number 6] [Position 1]s and [Number 7] [Type 1] [Position 1]s. These [Number 3] [Position 1]s are distributed among the [Department 1's] [Number 8] [Location 2], [Number 9] [Location 3], [Location 4] and [Location 5].

[Location 1]. [Location 1] is one of the [Department 1's] [Number 8] [Location 2].² It [Job Function]. It is staffed by a permanent workforce of approximately [Number 10] City employees with various trade skills --[Trade 1]s, [Trade 2]s, [Position 1]s, etc.--, all of whom report to the station's [Head Position 1] or one of his assistants. You were one of [Number 4] City or "house" [Position 1]s assigned

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Unless otherwise noted, the facts, as recited in this opinion, are a synthesis of information provided to Board staff by you and [Deputy Commissioner 1].

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Eight of the stations are [Type 2]; the other four, including [Location 1], are [Type 3].

to [Location 1]. Although [Location 1] operates continuously, it is not staffed by tradesmen 24 hours a day. Instead, absent special or emergent circumstances, the trades staff work from 7:00 a.m. until 3:30 p.m, Monday through Friday.

Contract Tradesmen. [Location 1]'s "house" workforce, as well as that of other Department facilities, is supplemented, on an as-needed basis, with contract personnel supplied to [Department 1] under a DUR contract between the City and [Company 1].³ In the case of [Position 1]s, [Company 1] provides personnel through a sub-contract with [Company 2].⁴

[Department 1] (like other City departments⁵) accesses [Company 1]'s services under the DUR contract by means of the task order process. Typically, [Department 1] requests to [Company 1] for [Position 1]s or other contract tradesmen are initiated at the level of the [Head Position 2] at the [Department 1's] various facilities. Such requests are then forwarded to the [Department 1]'s Deputy Commissioner for review and approval. When a request for contract personnel is submitted to [Company 1], it is not [Department 1] policy to request a particular tradesman by name⁶; rather, [Department 1] specifies the number and type of tradesmen needed, e.g., 2 [Position 3]s and 3 [Position 1]s. The hourly rate which the City pays to [Company 1] for each category of tradesman is a fixed term of the DUR contract.

The number of contract [Position 1]s or other contract tradesmen working at the [Location 1] or other [Department 1] facilities varies on any given day. It might be as few as none or as many as twenty, depending upon the need. For example, the number tends to increase in the autumn and winter ([Reason 1] and [Department 1] [Reason 2]) or when [Department 1] undertakes a capital

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On June 21, 2004 Board staff reviewed (via the City's website) certain publicly available disclosure documents pertaining to City contracts. Those documents indicate that [Company] has a Depends Upon Requirements (DUR) contract with the City to provide "tradesmen services" to the City. The contract has a start date of [Start Date 2]; an end date of [End Date 2]; and a ceiling of approximately [Dollars].

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The disclosure documents, referred to in footnote 3 above, also indicate that "[Company 2] is one of 6 identified subcontractors on the contract, 5 of whom, including [Company 2], are MBE, WBE or DBE-certified entities. [Deputy Commissioner 1] noted that, although [Company 1] may utilize [Company 2] or other subcontractors to provide tradesmen to [Department 1], [Department 1] "considers them all to be [Company 1] personnel and deals directly with [Company 1], not with any subcontractor."

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Other City departments to which [Company 1] routinely provides contract tradesmen under the DUR contract are [Department 2] and [Department 3].

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On the other hand, if a particular contract tradesman previously supplied by [Company 1] proved unsatisfactory, [Department 1] may specifically request that [Company 1] not dispatch that individual again.

improvement project.

[Position 1] Duties. Although the equipment at the City's [Number 8] [Location 2] vary in size, age and make, the mechanics of the equipment-- that is, how they operate and what one must do to maintain and repair them --are basically the same. Duties as a house [Position 1] at the [Location 1] or other [Department 1] facilities essentially consist of the following: maintaining and repairing [Part 1], [Part 2], [Part 3] and [Part 4]. Typical repairs of these mechanicals involve [Malfunction 1], [Malfunction 2], [Malfunction 3], [Malfunction 4] and [Malfunction 5]. Maintenance of these mechanicals consist of periodic [Repair 1]. As necessary, [Department 1] [Position 1]s disassemble the machinery and fabricate new [Part 5], [Part 6] and [Part 7] (on a lathe) as well as [Part 8] (on a drill press) from steel or brass machine stock. In addition, [Department 1] [Position 1]s are responsible for maintaining other equipment, not involved in the [Process 1], used at the various Department facilities, e.g., grass cutting equipment and cranes.

The duties of a contract [Position 1] at the [Location 1] or other [Department 1] facilities are basically the same as those of house [Position 1]s, described above. Although [Department 1] does orient contract personnel as to certain departmental rules and procedures (relating, for example, to safety, security and emergency protocols) and provide contract personnel with direction (via work order or house staff) as to specific tasks to be performed, contract personnel are not *per se* trained by [Department 1] (for example, as to City-specific [Position 1] standards or regulations) before commencing work. Instead, the [Department 1's] expectation is that they are already trained and practiced in their particular trade and will adhere to industry standards.

[Union]. As noted above, [Company 1] provides [Position 1]s to the City through a subcontractor, [Company 2]. [Company 2], you explained, procures the [Position 1]s it provides to [Company 1] through an arrangement with the [Union], of which you are a member. You stated that, to your understanding, the process is as follows. Union members who are available to work "sign up" on a registry maintained at the [Union].⁷ As needed, [Company 2] contacts the [Union] and requests a certain number of [Position 1]s for a particular location, date and time. The business manager of the [Union] then consults the registry and proceeds to contact the listed [Position 1]s to offer them the job. To your understanding, neither the seniority of the union member, nor the length of time his name has been on the registry, determines the order in which the [Union]'s business manager contacts the listed members; instead, the order is at the discretion of the business manager. To your understanding, contract [Position 1]s provided to [Company 1] through [Company 2] via [Union]

are paid by [Company 2] at an hourly wage established by union contract.⁸ Contract [Position 1]s, however, have no permanent status vis-a-vis either [Company 1] or [Company 2]; instead, their status is akin to that of a day laborer.

Contract Management Authority. You stated that, as a City employee, you had no involvement in any aspect of the award, negotiation or formulation of [Company 1]'s DUR contract with the City, or [Company 1]'s subcontract with [Company 2]. You also stated that, as a City employee, you had no involvement in the decision to utilize contract [Position 1]s; you were not responsible for supervising them; and you played no role in authorizing payment to them.

Post-City Employment. You have asked whether you may now work as a contract [Position 1] at the [Location 1], or other [Department 1] facilities, pursuant to [Company 1]'s DUR contract with the City. You have stated that, to the best of your belief, your job duties as a contract [Position 1] at the [Department 1's] facilities would essentially be the same as those you performed while a City or "house" [Position 1].

STATEMENT OF THE LAW: The primary section of the Governmental Ethics Ordinance at issue in this case is Section 2-156-100, entitled "Post-Employment Restrictions," specifically part (b), which states:

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.

Section 2-156-010(g) defines "contract management authority" as follows:

"Contract management authority" means personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance.

APPLICATION OF THE LAW TO THE FACTS: Ordinance Section 2-156-100(b) prohibits a former City employee from assisting or representing any person, other than the City, in any

business transaction involving the City for one year after leaving City service, if he or she “participated personally and substantially in the subject matter of the transaction” while a City employee. That section further provides that if the employee “exercised contract management authority” with respect to a contract, the prohibition shall be permanent as to that contract.

1. The Permanent Prohibition: Contract Management Authority. As noted above, contract management authority means “*personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance.*”

You stated that, as a City employee, you had no involvement in any aspect of the award, negotiation or formulation of [Company 1]’s DUR contract with the City, or [Company 1]’s subcontract with [Company 2]. You also stated that, as a City employee, you had no involvement in the decision to utilize contract [Position 1]s; you were not responsible for supervising them; and you played no role in authorizing payment to them. Based on your representations, the Board finds that analysis of the instant facts under the permanent prohibition contained in Ordinance Section 2-156-100(b) is not indicated.

2. The One Year Prohibition. Clearly, [Company 1]’s contract with the City, under which you would be providing [Position 1] services to the [Department 1] (albeit as a day laborer of [Company 1] subcontractor [Company 2]) constitutes a business transaction involving the City. The issue in this case is whether you participated personally and substantially in the subject matter of that transaction while a City employee, within the meaning of the one year prohibition contained in Ordinance Section 100(b).

In Case No. 89119.A, decided by the Board of Ethics on September 11, 1989, the Board began its analysis by citing the post-employment provisions of the Governmental Ethics Ordinance. Immediately after citing those provisions, the Board made the following statement:

“The intent of post-employment restrictions is to impede the operation of the ‘revolving door’ through which government employees move from their employment in government agencies to representation of private interests having business before those agencies. By preventing both the actual abuse of influence as well as its appearance, the restriction promotes public confidence in the fairness of governmental decisions. It limits a former employee’s ability to reap improper benefits for himself or new clients by using his influence with government agencies and personnel that he worked with while in public service. Post-employment restrictions also ensure that City employees will not

be influenced in the performance of their public duties by the thought of later reaping a benefit from a private individual. In addition, the restriction reduces the possibility of a former employee's [sic] intentionally or inadvertently disclosing or using confidential government information for private gain." Id. at p.7.

In the instant case, the Board has considered the tradesman nature of the [Position 1] services in issue; the absence of any specialized knowledge of City-specific [Position 1] standards or regulations which contract [Position 1]s must possess; the relative lack of discretion or authority exercised by both house and contract [Position 1]s in the performance of their jobs; the process by which the [Department 1] requests contract [Position 1]s; the process by which contract [Position 1]s are supplied to the City, including, specifically, the roles of City contractor [Company 1], sub-contractor [Company 2] and [Union]; the day laborer-like status of contract [Position 1]s vis-a-vis sub-contractor [Company 2]; and the intent of post-employment provisions, as articulated in Case No. 89119.A. The Board concludes that prohibiting you from working as a contract [Position 1] at the [Location 1] or other [Department 1] facilities, under the circumstances described above, would not further the purpose and intent of the Ordinance's post-employment provisions.

DETERMINATIONS: After careful consideration of the facts presented, the relevant law, and the purpose and intent of the Ordinance's post-employment provisions, the Board has determined that you are not prohibited from working as a contract [Position 1] at [Location 1] or other [Department 1] facilities because performing that work, under the circumstances described above, does not fall within the intended meaning of the one-year prohibition contained in the post-employment provisions of the Governmental Ethics Ordinance.

Our determinations do not necessarily dispose of all the issues relevant to your situation, but are based solely on the application of the City Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incomplete or incorrect, please notify the Board immediately, as any change in the facts may alter our opinion. Other laws or rules may also apply to your situation. We note that any City department may adopt restrictions that are more stringent than those imposed by the Governmental Ethics Ordinance.

CONFIDENTIAL INFORMATION: We also bring to your attention Section 2-156-070 of the Governmental Ethics Ordinance, "Use or Disclosure of Confidential Information." This section prohibits you, as a former City employee, from using or revealing confidential information you acquired through your City employment. Confidential information, for purposes of this section, means any information that may not be obtained under the Illinois Freedom of Information Act, as amended.

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 that is indistinguishable in all its material aspects from the transaction or

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activity with respect to which this opinion is rendered.

Darryl L. DePriest
Chair

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