

# *City of Detroit Board of Ethics*

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## **REQUEST FOR ADVISORY OPINION NO. 2016-02**

Issued: February 23, 2016

**Advisory Opinion No. 2016-02:** A public servant may accept a personal services contract with a City department upon leaving employment with the City. Such engagement does not violate the 2012 Detroit City Charter. A public servant may also accept sub-contractor employment with a City contractor so long as the public servant was not involved in the subject matter of the work or the development of the contract during her employment with the City. Based on the facts as described in the Request, the Requestor's contemplated post-employment engagements do not violate the Ordinance. The Requestor is cautioned however, that if she accepts the personal services contract with the City, she remains subject to all the Ordinance's provisions governing disclosure and conduct.

### **I. PROCEDURAL BACKGROUND**

Request for Advisory Opinion No. 2016-02 (the "Request"), is dated January 12, 2016, and was received by the Board of Ethics (the "Board"), on January 14, 2016. The Request was submitted by a current Public Servant as that term is defined by Section 2-6-3, 1984 Detroit City Code, the Detroit Ethics Ordinance (the "Ordinance").

At its meeting on February 18, 2016, the Board determined that the request met the basic requirements for a Request for an Advisory Opinion under 2-6-101 of the Ordinance. The Board then received and considered a Preliminary Analysis of the Request and voted to issue this Advisory Opinion pursuant to Section 2-6-104(b)(4) of the Ordinance.

## II. FACTS STATED IN THE REQUEST

The Requestor, a current employee of the City of Detroit's [REDACTED], submitted a request for an advisory opinion regarding two potential post-employment opportunities. One of the opportunities under consideration is employment as a part-time administrative hearing officer for [REDACTED]. The hearings are mandated for the establishment of medical marijuana dispensaries.

The other post-employment question concerns her proposed retention as a sub-contractor in preparing amendments to the City's zoning ordinance as part of the City's [REDACTED]. The contractor has been hired by the City to develop its [REDACTED], including amendments to the zoning ordinance. As a [REDACTED] employee, the requestor attended training sponsored by the contractor. The training focused on stormwater engineering and featured no discussion of zoning issues. The Requestor had no role in developing, awarding or managing the contract. In fact, the contracting department was the City's [REDACTED], not [REDACTED].

The Requestor has been employed as a land-use manager with [REDACTED] for four years. Prior to this employment, the Requestor was a [REDACTED].

## III. APPLICABLE LAW AND DISCUSSION

Currently post-employment restrictions are stated as follows in the Ordinance:

### **Sec. 2-6-72. - One year post-employment prohibition.**

(a) Subject to state law, for one (1) year after employment with the city, a public servant shall not lobby or appear before the city council or any city department, agency, board, commission or body, or receive compensation for any services in connection with any matter in which he or she was directly concerned, personally participated, actively considered or acquired knowledge while working for the city.

(b) Subject to state law, for one (1) year after employment with the city a public servant shall not accept employment

with any person who, or entity which, did business with the city during the former public servant's tenure where the public servant was in any way involved in the award or management of the contract, or the employment would require the sharing of confidential information.

On November 6, 2012, however, the electorate approved an amendment to the 2012 Detroit City Charter's provisions governing post-employment restrictions. The charter amendment states as follows:

Sec. 2-106.5. - One Year Post-Employment Prohibition.

Subject to state law **and except for personal services contracts as defined in Section 2-105**, for one (1) year after employment with the City, a public servant shall not lobby or appear before the City Council or any City department, agency, board, commission or body or receive compensation for any services in connection with any matter in which he or she was directly concerned, personally participated, actively considered or acquired knowledge while working for the City.

Subject to state law, for a period of one (1) year after employment with the City, a public servant shall not accept employment with any person or company that did business with the City during the former public servant's tenure if that public servant was in any way involved in the award or management of that contract or the employment would require the sharing of confidential information.

**Proposed Contract With** 

Although the Ordinance prohibits the immediate contracting with former city employees, the charter amendment differs. The charter amendment specifically excludes personal service contracts with the City from the prohibition. Any conflict between the charter and an ordinance must be resolved in favor of the charter. *Brady v City of Detroit*, 353 Mich 243 (1958). In general, "where an ordinance and a charter conflict, the express terms of the charter take precedence." *Wayne County v Wayne County Retirement Comm*, 267 Mich App 230, 251 (2005).

The rules of statutory construction apply to municipal charters and ordinances. *Wayne County v Wayne County Retirement Comm, supra*, p 244. Where “the language employed in a statute is plain, certain, and unambiguous, the statute must be applied as written without interpretation.” *Portelli v I R Construction*, 218 Mich App 591, 607 (1996). The plain intent of the charter amendment is to permit former employees to enter into personal services contracts with the City immediately upon their departure from City employment.

Thus, a former city employee is free to enter into a personal services contract with the City. This is so even if the contract involves matters that the employee was responsible for during the employee’s time with the City. The Requestor may accept a personal services contract with [REDACTED] without violating the Ordinance’s post-employment restrictions.

### **Proposed Contract With Municipal Contractor**

The prospective sub-contracting with a contractor with responsibility for developing zoning amendments is clearly outside the personal services contract exception to the post-employment restrictions. Section 2-6-72(a) and the 2012 Charter still bar an employee from receiving compensation “for any services in connection with any matter in which he or she was directly concerned, personally participated, actively considered, or acquired knowledge while working for the city.”

The Requestor attended workshops sponsored by the contractor while employed by the City. The workshops concerned [REDACTED]. The contractor would like to retain the Requestor as a sub-contractor for services in developing zoning amendments. The Requestor maintains these are separate areas, although they share a common focus on [REDACTED]. Assuming she has acquired no knowledge regarding the contemplated zoning changes in the course of her duties at [REDACTED] and the areas are indeed distinct, her retention by the contractor would not run afoul of Section 2-6-72(a) of the Ordinance.

The Charter amendment made no changes to Section 2-6-72(b) of the Ordinance. That section provides that for a period of one year, former employees may not accept employment with an employer who did business with the City during the employee’s city employment if the employee “was in any way involved” in the management or award of the contract or if the new employment would entail the sharing of confidential information.

The Board of Ethics recently applied Section 2-6-72(b) to a situation involving a former public servant who had participated in the actual awarding of a contract. The Board there stated:

Award or management requires some exercise of discretion. Thus, an employee who is merely issuing checks in accordance with approved procedures cannot be deemed to have a role in “the award or management” of the contract. (Board of Ethics Decision 2014-06, August 20, 2015, p 4.)

The Requestor’s previous contact with the contractor involved only attending [REDACTED] workshops. She played no role in developing or managing this contract with the City which was actually contracted by the [REDACTED]. No action or exercise of discretion involving this contract was undertaken by the Requestor during her tenure with the City. So long as the Requestor’s future services to the contractor do not involve the sharing of confidential information, her retention by the contractor is not directly barred by the language of the Ordinance.

### **Additional Concerns Raised by the Requestor’s Status As a Public Servant**

Viewing each situation in isolation, the answers to both segments of the request are in favor of the potential post-employment engagements. In tandem however, additional concerns are raised.

The Ordinance’s definition of the term “public servant,” includes an individual who provides services to the city pursuant to a personal services contract. Section 2-6-3, 1984 Detroit City Code. Accordingly, a personal services contractor is subject to the same disclosure and conduct standards as a city employee. Should the Requestor accept a personal services contract with [REDACTED], she would be subject to all restrictions pertaining to public servants. This status requires careful consideration of any additional employment or compensated services.

Because she would retain her status as a public servant if she accepts the contract position with [REDACTED], the Requestor’s proposed retention by the contractor implicates other sections of the Ethics Ordinance. The incompatible employment section states as follows:

#### **Sec. 2-6-65. - Incompatible employment or rendering services prohibited.**

Except as otherwise provided for by applicable law, a public servant shall not knowingly engage in or accept employment, or knowingly render services, for a private or public interest where such employment or service is in conflict or incompatible with the proper discharge of the public servant's official duties for the city, or where such employment or service is reasonably expected to impair the public servant's

independence of judgment or action in the performance of his or her official duties for the city.

The contractor's proposed retention of the Requestor, at least as described in the request, would not breach the Ordinance's incompatible employment provision. Marihuana regulation appears to have no relationship with [REDACTED] and regulation. Based on the facts as stated in the request, it would appear that the Requestor's future duties with the contractor would not create a conflict of interest with the [REDACTED] position.

The provisions regarding representation of another party are also implicated in this this request. That section provides as follows:

**Sec. 2-6-66. - Representation of private person, business or organization prohibited; exceptions.**

A public servant shall not act as an agent, attorney, or representative for another person, business or organization in any matter that is pending before a city agency, except that:

(1)A public servant may represent another person, business, or organization before a city agency where such representation is a required part of the public servant's official duties; or

(2)A public servant who is an uncompensated member of a city board, commission, or other voting body may act as an agent, attorney, or representative for another person, business or organization in a manner that is pending before a city agency, other than the board, commission, or other voting body on which he or she is a member; or

(3)A public servant who is compensated by the city may act as an agent, attorney or representative for another person, business, or organization in a matter that is pending before a city board, commission or other voting body, other than the board, commission or other voting body on which he or she serves as an appointee or as an employee, or under a personal services contract, as long as he or she does so:

- a. Without compensation; and
- b. On his or her leave time; and
- c. For appointees, in accordance with Chapter 13, Article V, of this Code; or

- d. For non-union employees, in accordance with Chapter 13, Article V, of this Code and the City's Civil Service Rules; or
- e. For union employees, in accordance with his or her respective union contract and the city's civil service rules; or
- f. For individuals who provide services to the City of Detroit pursuant to a personal services contract, in accordance with the applicable provisions of the contract.

The Ordinance disapproves of a public servant acting as an “agent, attorney or representative for another person, business or organization in any matter pending before a city agency.” The Requestor indicates that the contractor intends to retain her services for development of amendments to the City’s zoning ordinance.

Merriam Webster supplies the following definition of the term representation:

1. one that represents: *asa*: an artistic likeness or image *b (1)*: **a statement or account made to influence opinion or action** *(2)*: an incidental or collateral statement of fact on the faith of which a contract is entered into *c*: a dramatic production or performance *d (1)*: a usually formal statement made against something or to effect a change *(2)*: a usually formal protest
2. the act or action of representing: the state of being represented: *asa*: representationalism *2b (1)*: the action or fact of one person standing for another so as to have the rights and obligations of the person represented *(2)*: the substitution of an individual or class in place of a person (as a child for a deceased parent) *c*: the action of representing or the fact of being represented especially in a legislative body

The definition of representation seems to focus on advocacy or influencing decisions. If the development of changes to the zoning ordinance entails representing the contractor before any city agency, the Requestor may not accept such employment unless it falls within one of the exceptions outlined in Section 2-6-66. Those exceptions only permit such representation if the public servant is required to do so in the course of the employee’s official duties (Section 2-6-66 (1)); the public servant is an uncompensated member of a board or commission in which case he or she may represent an individual

before other boards or commissions but not the board or commission of which he or she is a member (Section 2-6-66(2)); or the public servant's representation is performed without compensation (Section 2-6-66(3)). None of these exceptions apply here.

#### **v. Recommendation**

The Requestor may accept both the personal services contract with the City and the engagement offered by the contractor. Should the Requestor accept the personal services contract with the City, the Requestor will retain the status of public servant as defined in the Ordinance. As a public servant, the Requestor will be subject to all the standards of conduct and disclosure that govern the City's public servants. Consequently, any additional employment or compensated engagement of her services should be very carefully scrutinized in light of the restrictions of the Ordinance.

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