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DENVER BOARD OF ETHICS DIGEST OF SELECTED OPINIONS July 1– December 31, 2011

PLEASE NOTE: This is a selected set of summarized opinions given by the Denver Board of Ethics between July 1 and December 31, 2011 in response to fact-specific requests for advisory opinions or complaints.

These opinions should not be used as conclusive guidance for situations where the facts may differ. Please contact the Board of Ethics to discuss any specific issues you may have.

Case 11-27 (conflict of interest)

A citizen who owns property within a local maintenance district filed a complaint concerning a member of the board of the local maintenance district.

The complaining party claims that the board member had a conflict of interest because he serves on the board of the local maintenance district and he also owns property, a portion of which has been leased by the private contractor that provides maintenance and management services to the district. The space is used primarily for storage of maintenance equipment and supplies. The district board member was also a board member of the maintenance contractor in the 1990s until 2006.

The board member, as landlord, signed a lease with the maintenance contractor in January 2007 and a lease extension in January 2009, with an expiration date of December 31, 2011. The district contracted with the maintenance contractor, which then contracted with the board member's real estate entity. The district did not contract directly with the board member's real estate entity.

The board member indicated that the lease between his real estate entity and the maintenance company is fair and comparable for other properties in the vicinity and that he always told other board members that he was the maintenance contractor's landlord.

When the complaint was filed, the district board was in the process of preparing a request for proposals (RFP) to help it decide whether to contract again with the current maintenance contractor or with another maintenance company.

Board members of local maintenance districts (defined as "officials" in the Denver Code of Ethics) must comply with the conflict of interest section of the Code of Ethics:

Sec. 2-61. Conflict of interest while employed

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,

(a) Except when advised by the city attorney that the rule of necessity applies, **an officer, official, or employee shall not take direct official action on a matter before the city** if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter...

(f) Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest to his or her colleagues on a board or commission or to his or her supervisor or appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests.

(g) No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city. (emphasis added).

In addition all board members of local maintenance districts must comply with:

Sec. 2-67. Use of public office for private gain.

No officer, official or employee shall use his or her public office or position or disclose or use confidential information in order to obtain private gain for himself or herself, for his or her immediate family, for any business entity with which he or she is affiliated or for any person or entity with whom the officer, official or employee is negotiating or has any arrangement concerning prospective employment. (emphasis

added).

It should be noted that a local maintenance district is not the “the city.” Local maintenance districts are not required to comply with all of the contracting and purchasing rules, personnel policies, etc. that the city must follow. However, as noted above, board members must comply with the Denver Code of Ethics.

The Board of Ethics determined that the board member did not violate the Code of Ethics because:

- The board of the local maintenance district did not contract directly with the board member’s real estate company and
- The local maintenance district is not “the city.”

Even if the board member had violated the Code of Ethics, the Board of Ethics cannot recommend discipline for “actions that took place more than two years prior to the date of filing” (Section 2-56(3)).

However, the Board of Ethics strongly recommended that the board member should avoid the appearance of impropriety in the future by:

- Not participating any further in the development of the current RFP or any future RFP for a maintenance and management contractor, because his real estate company will likely profit from a continuance of the lease if the same maintenance contractor is selected again;
- Abstaining from voting on the selection of the maintenance contractor, because his real estate company will likely profit from a continuance of the lease if the same maintenance contractor is selected again.

The Board of Ethics stated that it recognizes that all members of local maintenance district boards serve as unpaid volunteers for the benefit of their districts, that such work is often difficult and thankless and that no evidence has been presented that the board member unfairly profited or concealed information regarding his status as a landlord for the maintenance contractor. However, all board members of local maintenance districts must recognize that their primary obligation is to serve the interest of all of the property owners and users of the districts and not their own private interests and that it is important to maintain the public trust by avoiding the appearance of impropriety.

Case 11 – 29 (use of public office for private gain)

A city employee filed a complaint concerning another city employee in her department. The two employees stipulated that the subject of the complaint borrowed or attempted to borrow funds on numerous occasions from 15 department employees from 2007 through early 2011, including the employee who filed the complaint. Five of those employees were supervised by the subject of the complaint. Some of those loans were repaid and some were not. Some of the loans paid or requested were large amounts and some were small amounts.

The Board of Ethics concluded, as it previously found in Case 09 – 35, that borrowing funds from subordinate employees is a use of public office for private gain, in violation of Section 2-67 of the Denver Code of Ethics, which is exacerbated in those instances when the loans are not repaid. Section 2-67 provides:

Sec. 2-67. Use of public office for private gain. No officer, official or employee shall use his or her public office or position or disclose or use confidential information in order to obtain private gain for himself or herself, for his or her immediate family, for any business entity with which he or she is affiliated or for any person or entity with whom the officer, official or employee is negotiating or has any arrangement concerning prospective employment.

The Board also said that it strongly believes, as it stated in case 04-42, that:

It is a poor employment practice for a supervisor to solicit or to accept loans of any amount from an employee under her or his supervision. Such loans may lead to the appearance of impropriety, even if no intimidation of the employee is intended by the supervisor. Few employees would feel comfortable in refusing a loan to or requesting repayment of a loan from a supervisor. A supervisor often has a position of authority over the employee, namely the power to reprimand, transfer to a less desirable assignment, suspend or terminate. Even if a supervisor is not the appointing authority with power to take such personnel actions, a supervisor has the power, at a minimum, to recommend such actions to the final decision-maker.

The Board also indicated, as it found in Case 09-35, that it is a violation of Section 2-67 to borrow from employees that are not direct-reporting subordinates, if the borrower may be asked to have input on the evaluation of subordinates who are not their direct reports.

The Board of Ethics sent its decision to the appointing authority in the department with the recommendation that discipline should be imposed which recognizes that the employee had engaged in a pattern of misconduct instead of a single isolated incident.

Case 11-33 (conflict of interest)

A recent appointee to the Career Service Authority Board requested an advisory opinion. She had worked for the city for a number of years and then she was hired to work for one of the companies which currently provide health insurance to Denver city employees and retirees. She advised the Board of Ethics that she will abstain from voting on any issues related to health insurance on the CSA Board.

The conflict of interest section of the Denver Code of Ethics applies to “officials” – board and commission members - as well as to officers and employees:

Sec. 2-61. Conflict of interest while employed.

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,

(a) Except when advised by the city attorney that the rule of necessity applies, an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter. A substantial interest shall be deemed to exist if:

(1) He or she or a member of the immediate family, a business associate **or an employer other than the city** is the other party in the matter...

(f) Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest to his or her colleagues on a board or commission or to his or her supervisor or appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests...(emphasis added).

“Direct official action” is defined in Section 2-52(b) of the Code of Ethics as:

2-52(b) *Direct official action* means any action which involves:

(1) Negotiating, approving, disapproving, administering, enforcing, or **recommending for or against a contract**, purchase order, lease, concession, franchise, grant, or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making...(emphasis added)

Section 18-181 of the Denver Charter establishes a separate-from-CSA Employee Health Insurance Committee and one of its duties is to “**advise the career service board** and the career service personnel director of the needs of persons in the employ of the City and County of Denver for medical, life, dental and long-term disability insurance financed, in whole or in part by the city and **shall make recommendations** for instituting, altering, implementing, financing or terminating such an insurance program” (emphasis added). The decision to approve a contract for health insurance for employees and others rests with the Mayor and City Council and not the CSA Board. However, the CSA Board may have a role in recommending such to the Career Service Personnel Director.

The Board of Ethics found that, if the CSA Board or a committee of the Board wishes to make any recommendations whatsoever regarding health insurance contracts to the CSA Personnel Director, the Mayor or City Council, the appointee will be required by Section 2-61 to abstain from voting, as she has already agreed to do, due to the conflict of interest with her employer. This includes development of requests for proposals or criteria relating to contracts for health insurance. She should also “refrain from attempting to influence the decisions of others in acting

or voting on the matter,” as required by Section 2-61(f) and comply with the other provisions of 2-61(f).

The Board also strongly recommended that, if the CSA Board or a committee is discussing contracts for health insurance, she should disclose the potential conflict on the record and excuse herself from the room in order to avoid the appearance of impropriety. She may, however, participate in general discussions about health insurance issues which are not related to specific contracts or requests for proposals, particularly since she has expertise in implementation of federal healthcare reform.

Case 11-34 (gifts)

A Technician in the Denver Police Department requested an advisory opinion. He and his family were recently camping in the mountains, when they saw that a gentleman had fallen into a ravine and injured himself. He and his wife helped to carry him out of the ravine and administered medical assistance with their first-aid kit and used their blankets to keep him warm. The gentleman’s son-in-law asked for the officer’s business card. A few days later, the officer received from the gentleman and his son-in-law \$100 in cash and thank-you letters in the mail.

His question to the Board of Ethics was:

How should I handle this and what should I do so that I do not put myself into a position where I may be thought to be acting unethically?

The Board of Ethics determined that the officer was not prohibited by Section 2-60(a) of the Code of Ethics from accepting a gift from the gentleman and his son-in-law because he was not in a position to take any direct official action concerning them. In addition, their motivation was to express gratitude, after the fact, for his Good Samaritan actions.

The Board also determined that acceptance of the gift is not prohibited by Section 1.2.12 of the Denver City Charter, which provides:

No official or employee shall solicit or receive any pay, commission, money or anything of value, or derive any benefit, profit or advantage, directly or indirectly for the performance of official duties except lawful compensation or salary as such officer or employee...

because the Board determined that rescuing and assisting the gentleman was not part of his “official duties” and was also outside of the Denver city limits.

Case 11- 35 (conflict of interest, subsequent employment, use of public office for private gain)

A city employee filed a complaint concerning a former Career Service Authority board member. In 2009, the employee filed departmental complaints alleging age-discrimination and retaliation. The agency hired the former CSA board member as an outside investigator to review the complaints and also other complaints filed by another employee of the agency.

The employee alleged that the former CSA board member may have violated the Denver Code of Ethics:

- Through a conflict of interest because she was a former member of the CSA Board and/or
- Through violating the subsequent employment rule in the Code of Ethics by accepting a contract to investigate the complaints following her service on the CSA Board and/or
- Through use of her city public office as a CSA Board member for private gain.

The former board member served on the CSA Board from 2002 through April 2008. She issued her investigative report in October 2009 regarding the complaints. She found all of the complaints to be without merit.

She sent a bill for her investigation and was paid by the agency. The agency then denied the complaints. The employee appealed to the CSA Hearings Office, which conducted a hearing and dismissed the complaints. The employee also filed an age-discrimination complaint with the Equal Employment Opportunity Commission.

The employee believed that the former board member had a **conflict of interest** because the CSA Board approved the reorganization of certain agency jobs, which she then had to interpret as part of her investigation. Conflicts of interest for city board members, officers and employees (but not independent contractors) are regulated by Section 2-61 of the Code of Ethics. The Board of Ethics could not find any conflict of interest while the former board member was on the CSA Board that is described in Section 2-61.

Subsequent employment, which would include part-time investigative contracts, is regulated by Section 2-64 of the Code of Ethics:

Sec. 2-64. Subsequent employment.

The purpose of this section is to avoid the actuality or appearance that employers who hire former city officers or employees may get special treatment.

(a) During six (6) months following termination of office or employment, no former officer, official, or employee shall obtain employment outside of the city government in which he or she will take direct advantage, unavailable to others, of matters with which he or she took direct official action during his or her service with the city.

(b) For one (1) year following termination of service with the city, no former officer, official, or employee shall engage in any action or litigation in which the city is involved, on behalf of any other person or entity, when the action or litigation involves an issue on which the person took direct official action while in the service of the city.

Since the former board member did not begin to work on any of her investigations for the city until more than a year had passed since the conclusion of her service as a CSA Board member, the Board of Ethics found that she did not violate either 2-64(a) or (b). She performed her investigation approximately 18 months after she left the CSA Board.

The employee also alleged that the former board member violated section 2-67, **use of public office for private gain:**

Sec. 2-67. Use of public office for private gain.

No officer, official or employee shall use his or her public office or position or disclose or use confidential information in order to obtain private gain for himself or herself, for his or her immediate family, for any business entity with which he or she is affiliated or for any person or entity with whom the officer, official or employee is negotiating or has any arrangement concerning prospective employment.

The Board of Ethics concluded that it did not have any information or evidence that the former board member violated Section 2-67 or otherwise acted unfairly or unethically in order to obtain her contracts with the city departments more than a year after she left the CSA Board. In addition, the Board of Ethics concluded that the issues regarding age-discrimination and retaliation by the agency are personnel matters and the Board of Ethics is not able to serve as an appeal board to consider personnel matters. The Board of Ethics dismissed the complaint because the facts do not show that a violation of the Denver Code of Ethics can be proven.

Cases 11- 36, 11-37 and 11-38 (no jurisdiction)

A probationary employee filed three complaints concerning human-resources employees after his employment with the city had been terminated. The Board of Ethics dismissed the complaints because the issues alleged did not involve any sections of the Code of Ethics and the Board is not an appeals board for personnel issues.

Cases 11-39, 11-40, 11-45 and 11-46 (no jurisdiction)

A citizen filed these complaints against four city employees that the citizen stated had all failed to respond or communicate with his requests for information and documents. The Board of Ethics dismissed the complaints as being outside of its jurisdiction.

Cases 11 - 41 and 11 - 42 (no jurisdiction)

A city supervisor filed complaints against a department Manager and a human resource supervisor. The supervisor believed that two employees bullied an employee under his supervision and told the employee that she would not pass probation and that one of those employees deliberately entered errors in financial reporting figures to make the employee that he supervised look bad.

The supervisor complained that no serious discipline was recommended by the HR supervisor or imposed by the Manager for such an offense and stated that “this gives the wrong message to staff that they can do what they want and not be accountable for their actions.”

Citizens and fellow city personnel should be able to expect that personnel complaints about serious allegations should be fairly and effectively investigated and that, if proven, such allegations should result in appropriate discipline. However, the Board of Ethics did not

independently investigate the underlying details of this case and does not have the jurisdiction to do so, since the issue does not relate to the Code of Ethics. (There was no implication that the employee(s) falsified records for personal gain.) Neither does the Board of Ethics have jurisdiction to impose discipline on city employees or alter discipline already imposed. Therefore, the Board of Ethics dismissed these complaints.

Case 11-43 (conflict of interest)

The employee that requested an earlier advisory opinion in Case 11-14 asked the Board of Ethics to give him an updated opinion due to the fact that the consulting firm that employs his wife was awarded the contract to prepare the environmental impact statement (EIS) in question and the company selected the employee's wife to be part of its team. The employee requested that the Board give him "an opinion regarding my future role on this project, including any restrictions that the board might recommend to ensure that my role is appropriate."

The Board of Ethics concluded that the employee may continue to serve on the Executive Oversight Committee (EOC); however, pursuant to Section 2-61(a)(6) of the Denver Code of Ethics, he may not take direct official action regarding the EIS, because his wife has a substantial employment interest in the EIS. Direct official action is defined in Section 2-52(b) of the Code of Ethics as follows:

- 2-52(b) *Direct official action* means any action which involves:
- (1) Negotiating, approving, disapproving, administering, enforcing, or recommending for or against a contract, purchase order, lease, concession, franchise, grant, or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making.
 - (2) Enforcing laws or regulations or issuing, enforcing, or regulating permits, licenses, benefits or payments;
 - (3) Selecting or recommending vendors, concessionaires, or other types of entities to do business with the city;
 - (4) Appointing and terminating employees, temporary workers, and independent contractors.
 - (5) Doing research for, representing, or scheduling appointments for an officer, official, or employee, provided that these activities are provided in connection with that officer's, official's or employee's performance of (1) through (4) above.

In addition, the Board stated that there is a strong potential for the appearance of impropriety if the employee continues to serve as a member of the EOC. In order to minimize that possibility, the Board strongly recommended to the employee:

1. He should not be the project manager or supervisor for the EIS project. (This was part of the Board's earlier advisory opinion to him.)
2. He should not be involved in the day to day management of the project.
3. He should not be involved with paying invoices or negotiating change orders with the consultant team.
4. He should not be involved in any way in the negotiation, scope of work development, or contract administration of the contract with the consulting company, nor should anyone who reports to him be involved in these activities.

The Board cautioned the employee to be guided solely by the best interests of the city and encouraged him to seek the Board's advice again if his duties change or expand in ways not originally planned.

Case 11-44 (conflict of interest)

A recently-appointed Deputy Chief of Staff in the Mayor's Office requested an advisory opinion. Her father is the CEO of a consulting firm that specializes in working with mayors and city officials to build and finance hotel and convention centers and downtown economic projects and represents two clients that are directly or indirectly connected to ongoing business considerations with the City and County of Denver.

She advised the Board of Ethics that "it is my intent to refrain from participating in any work, associated discussions, or decisions that involve these entities." She also indicated that the Mayor's Chief of Staff has assigned matters related to the Denver Office of Economic Development to the other Deputy Chief of Staff and not to her. She requested an advisory opinion from the Board to address any real or perceived conflicts of interest.

Section 2-61 of the Denver Code of Ethics provides:

Sec. 2-61. Conflict of interest while employed.

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,

(a) Except when advised by the city attorney that the rule of necessity applies, an officer, official, or employee **shall not take direct official action on a matter before the city if he or she or a member of the immediate family**, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter. A substantial interest shall be deemed to exist if:...

- (6) **He or she or a member of his or her immediate family participated personally in providing legal representation or lobbying for another party in the matter** or owns five (5) percent or more of a law firm or lobbying firm representing another party in the matter. (emphasis added)

Therefore, the Board concluded that she would be prohibited from taking any direct official action as Deputy Chief of Staff regarding any entity or person represented by her father or his consulting firm or attempting to influence the decisions of others in city government regarding such clients.

The definition of “direct official action” in Section 2-52(b) includes:

- (1) Negotiating, approving, disapproving, administering, enforcing, or recommending for or against a contract, purchase order, lease, concession, franchise, grant, or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making.
- (2) Enforcing laws or regulations or issuing, enforcing, or regulating permits, licenses, benefits or payments;
- (3) Selecting or recommending vendors, concessionaires, or other types of entities to do business with the city;

In order to avoid the appearance of impropriety, the Board also recommended that 1) she request her father to inform her of any additional clients that her father is representing concerning any matters with the City and County of Denver; 2) she notify the Chief of Staff in the Mayor’s Office that she will not be able to handle or deal in any way with matters in which her father has any connection and that any such matters need to be assigned to others in the Mayor’s Office and 3) if any matters relating to her father’s clients are being discussed by city government personnel, she should leave the location of the discussion and not participate in the discussion in any way.

Case 11-47 (gifts)

The Controller for the City and County of Denver requested an advisory opinion in connection with her effort to prepare a fiscal accountability rule for managers, supervisors and employees regarding gifts, prizes and awards. She advised the Board of Ethics that “our goal is to ensure that the city is adhering to both the IRS requirements and the ethics ordinance while still being able to reward employees.”

The Board of Ethics is aware that many city departments and agencies are looking for ways to offer incentives, prizes, awards or bonuses to motivate or reward good performance and are confused about how the gift section of the Code of Ethics applies or does not apply. The Board has received a number of requests for official and unofficial advice on this subject in the last few years. The Board stated that it understands the purpose of the gift section (2-60) of the Code of Ethics is to apply to gifts to city personnel from non-city persons or entities, although this is not clearly stated.

In Case 11-15 the Board of Ethics decided that it would violate Section 1.2.12 of the Denver Charter for Forestry Division employees to accept \$25 checks from a grateful citizen for their work in removing a tree that had caused her problems. Section 1.2.12 of the Charter provides:

No official or employee shall solicit or receive any pay, commission, money or anything of value, or derive any benefit, profit or advantage, directly or indirectly for the performance of official duties except lawful compensation or salary as such officer or employee...

The Board stated that it believes that the incentives or awards that the Controller is concerned with are included in the term “lawful compensation.” As the Board understands it, they are fringe benefits and will be paid for and given by the city and not by outside parties. The Board believes that such incentives, prizes, awards and bonuses are appropriate tools for a city agency or department to motivate or reward good performance by city employees and do not violate the Code of Ethics. The Board suggested that the Controller or a department or agency can also consult the City Attorney’s Office regarding how an employee awards program can be developed consistent with the Charter, ordinances, and the IRS Code.

Case 11- 48 (gifts)

A supervisor in the Environmental Quality Division of the Department of Environmental Health (DEH) requested an advisory opinion as to whether it would violate the Code of Ethics for his division to offer \$25 gift cards to city employees in different departments as “a good motivator for line staff” to encourage various types of environmental-protection activities, such as, for example, safe storage of solvents. He stated that:

Experience has shown that employees respond to a variety of methods to encourage good behavior. While not the only approach used, gift cards tend to make staff pay attention to improving their behavior... gift cards can be a powerful motivator for people to do the right thing.

The Board of Ethics concluded that incentives of the type described are appropriate tools for a city agency or department to motivate or reward good performance by city employees and do not violate the Denver Code of Ethics.

The Board also reviewed Section 1.2.12 of the Denver Charter, which provides:

No official or employee shall solicit or receive any pay, commission, money or anything of value, or derive any benefit, profit or advantage, directly or indirectly for the performance of official duties except lawful compensation or salary as such officer or employee...

The Board of Ethics concluded that incentives such as the employee described are included in the term “lawful compensation,” since they are given by a city department or agency for a work-related purpose and are, therefore, not prohibited by Section 1.2.12 of the Charter.

The Board recommended that, in order to avoid the appearance of impropriety in such incentive programs:

1. Such incentives should be modest in value.
2. If such incentives are to be solicited as donations from third-parties, they should not be solicited from entities which the department regulates.

3. The method for selecting the recipients of the incentives should be transparent and the recipients should be disclosed.

Case 11 - 49 (gifts)

A representative of the Police Department requested an advisory opinion regarding whether it would violate the Denver Code of Ethics for police officers to accept free tickets for the Colorado Rockies game on September 11, 2011 as part of the Rockies' effort to honor police, firefighters, other first responders and military on the 10th anniversary of the bombing of the World Trade Center. The Rockies also offered reduced-price tickets for family members. Some police officers work at Rockies games on-duty and others work off-duty.

Section 2-60(a) of the Code of Ethics prohibits acceptance of gifts, including tickets to sporting events if "1) the officer, official or employee is in a position to take direct official action with regard to the donor and 2) the city has an existing, ongoing or pending contract, business or regulatory relationship with the donor." Since the definition of "direct official action" includes "enforcing laws," and since police officers are considered to be on duty 24 hours per day if emergencies arise, police officers are in a position to take direct official action regarding the Colorado Rockies. In addition, the Colorado Rockies, as a major business in Denver, have a regulatory relationship with the city. Therefore, acceptance of tickets would be prohibited by Section 2-60(a) for police officers. Firefighters, on the other hand, do not "enforce laws" (unless they are assigned as fire inspectors) concerning the Rockies and they would not be prohibited from accepting the tickets.

Section 2-60(b)(4), however, provides an exception which would allow police officers to accept tickets, even if they would violate 2-60(a). Section 2-60(b)(4) allows the acceptance of up to 4 free or reduced-price admissions per calendar year so long as "attendance must be reasonably related to the official or ceremonial duties of the officer, official or employee." The Board of Ethics decided that recognition of police officers on the 10th anniversary of September 11, 2001 is a valid and appropriate recognition of their official or ceremonial duties and that acceptance of such tickets on this special event is not prohibited by the Code of Ethics. The Board also decided that Denver firefighters or other first responders are also able to accept these tickets.

Case 11-52 (gifts)

A Senior Engineer at a major department requested an advisory opinion. He is involved in energy management. He recently attended a facilities management conference in Denver and placed his name in a drawing conducted by a company that manufactures and markets energy-saving bulbs, lamps and other lighting equipment. The solicitation of names and the drawing was at the company's booth. The employee did not observe the drawing. Shortly after the conference, the employee received an e-mail advising that his name had been drawn and that he had won a television set.

The employee advised the Board of Ethics that he is not directly able to approve or negotiate purchases of items from the company or other vendors; however, he acknowledged that "I have

in the past and will surely in the future have significant input into purchasing decisions for lighting equipment.”

The gift section of the Denver Code of Ethics provides as follows:

Sec. 2-60. Gifts to officers, officials, and employees.

The purpose of this section is to avoid special influence by those who give gifts to city officers, employees or officials.

(a) Except when acceptance is permitted by paragraph (b) below, it shall be a violation of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items if (1) the officer, official, or employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, business, or regulatory relationship with the donor:

- (1) Any money, property, service, or thing of value that is given to a person without adequate and lawful compensation;...

The definition of “direct official action” in Section 2-52(b) is as follows:

(b) *Direct official action* means any action which involves:

- (1) Negotiating, approving, disapproving, administering, enforcing, or **recommending for or against a contract, purchase order, lease, concession, franchise, grant, or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making...**
- (3) **Selecting or recommending vendors, concessionaires, or other types of entities to do business with the city;...(emphasis added)**

The Board concluded that, although the employee does not have the authority to negotiate, approve or disapprove a contract or purchase order with the company, he does have the authority to “recommend for or against such a contract or purchase order” and may have the authority to “administer” such a contract or purchase order. Therefore, he is “in a position to take direct official action” regarding the company. In addition, the company has an “existing or pending business relationship” with the city. Therefore, the employee would be prohibited from accepting the television unless one of the exceptions in Section 2-60(b) would apply. The only possible exception would be:

- (12) Items which are similarly available to all employees of the city or the general public on the same terms and conditions.

In 2004, in Case 04-12 the Board of Ethics indicated that a City Council member could accept a free airline ticket donated by a company that he won in a random drawing at a dinner, even though City Council must approve contracts and/or leases with that company. That advisory opinion was requested by the then-chief staff person for City Council, who had also had a major

role in drafting the Code of Ethics in 2000-2001, who stated in his request:

That the member won is a matter of chance; the airline ticket was not a gift to him, but rather a prize that anyone in attendance could have won...When we drafted the Code, we never intended to prohibit acceptance of anything when the item is the result of pure chance.

In that case, the Board of Ethics decided as follows:

The Board has determined that Section 2-60 was not intended and should not be interpreted to prohibit acceptance of prizes awarded by chance, so long as the prizes are not targeted to officials, officers or employees who are in a position to take direct official action with respect to the donor. In other words, the prizes must legitimately be awarded on a random or chance basis. Assuming this to be true, in this case, acceptance...is not prohibited by the Code of Ethics.

However, in this case, from the circumstances described, the Board was not convinced that this was a truly random drawing and it could give the appearance that the company might have targeted those in a position to take direct official action concerning the company to be winners of the drawing. Therefore, the Board concluded that it would be a violation of Section 2-60(a) of the Code of Ethics for the employee to accept the television set for himself or to direct it to any other person or organization. The public and other vendors should have confidence that product selections and ordering are based on merit and performance and have nothing to do with prizes.

Case 11-53 (gifts –travel expenses)

A captain in the Fire Department requested an advisory opinion. He is responsible for providing clothing and equipment for the department, including the coats and pants used by firefighters at fires.

He had been invited to attend a seminar at a company's headquarters in Maryland entitled "Safety, Performance and Value in Protective Fire Fighting Fabrics." The company proposed to pay for the captain's lodging, travel and meal expenses. The captain advised the Board that there have been recent problems with the vapor barriers (one of 3 layers in the gear, which are manufactured by the company) in Denver's gear which have caused injuries to some Denver firefighters. The seminar would address how to deal with those problems.

The captain does not have the ability to negotiate or approve purchase orders for the Fire Department; however, he will most likely be able to recommend whether or not purchase orders should be approved. Therefore, he is "in a position to take direct official action."

Travel and lodging expenses are addressed in the Code of Ethics as follows:

Sec. 2-60. Gifts to officers, officials, and employees.

The purpose of this section is to avoid special influence by those who give gifts to city officers, employees or officials.

- (a) Except when acceptance is permitted by paragraph (b) below, **it shall be a**

violation of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items if (1) the officer, official, or employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, business, or regulatory relationship with the donor:

- (1) Any money, property, service, or thing of value that is given to a person without adequate and lawful compensation;...
- (6) Travel expenses and lodging;...
- (b) Officers, officials, and employees and the members of their immediate family may accept the following even if the officer, official, or employee is in a position to take direct official action with regard to the donor, or, if the donor is a lobbyist or representative, the donor's client:...
- (7) Reasonable expenses paid by **non-profit organizations** or other governments for attendance at a convention, fact finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the city; (emphasis added)

Since the company is a for-profit corporation and since both subsections of 2-60(a) apply to this situation, it would violate the Code for the captain to accept the travel expenses from the company, unless the Board grants him a waiver. Section 2-54(f) empowers the Board to grant a waiver “if it finds that the waiver will serve the best interests of the city.”

In 2002 in a series of similar cases presented by the Fire Department (Cases 2-24, 2-28 and 2-29), the Board of Ethics developed a policy that it did not wish to grant waivers regarding travel expenses unless “emergency, unusual or exigent circumstances” exist and stated that “the fact that a City department is not able to pay for travel and lodging expenses is not sufficient justification for a waiver.”

After careful consideration, the majority of the Board of Ethics concluded that it was in the best interests of the city to allow the captain to accept travel and lodging expenses from the company to enable him to learn how to improve the safety of firefighting apparel for firefighters. The Board, therefore, granted him a waiver to accept the expenses for this trip from the company. The Board of Ethics emphasized that this opinion is based on the serious safety issues raised by this specific request and that waivers will not be granted lightly in future cases.

Case 11-54 (outside employment)

An employee in the Auditor’s Office requested an advisory opinion regarding his desire to run for a seat on the Town Council in the municipality in which he lives in the April 2012 election. The Auditor indicated that he will approve the outside employment request; however, he would like to hear from the Board of Ethics.

If the employee were to be elected, he would be paid \$600 per month. The Council meets once a week and members also serve on at least one committee that meets weekly.

The Board of Ethics concluded that, because the position on the Town Council is paid, the employee must comply with Section 2-63 of the Code of Ethics:

Sec. 2-63. Contemporaneous or outside employment.

The purpose of this section is to avoid possible conflicts of interest and time conflicts between city jobs and outside employment or business activity.

(a) All officers other than elective officers and all employees shall report existing or proposed outside employment (excluding unpaid volunteer activity) or other outside business activity annually in writing to their appointing authorities and obtain his or her appointing authority's approval thereof prior to accepting initial employment or outside business activity. All officials shall immediately report any change in employment status to their appointing authorities which could give rise to a conflict of interest.

(b) If the appointing authority or the officer, official or employee believes that there is a potential conflict of interest between the person's public responsibility and his or her possible outside employment or outside business activity, he, she or they are encouraged to consult the board of ethics.

(c) An officer or employee who has received the written permission of the appointing authority may engage in outside employment or other outside business activity.

(d) Copies of documents arising from this section shall be placed in each officer's or employee's departmental personnel file.

(e) City resources may not be used for any outside employment or outside business activity.

Therefore, the Board of Ethics concluded that the employee must obtain written permission from the Auditor before he could serve on the Town Council. He also must not use any Denver city resources (including time, computers or other equipment or supplies) for his work on the Town Council. State law also prohibits all governments from using government resources to benefit election campaigns (Colorado Revised Statutes 1-45-117).

The request should also be analyzed in light of Section 2-61 of the Code of Ethics regarding conflicts of interest:

Sec. 2-61. Conflict of interest while employed.

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests.

(a) Except when advised by the city attorney that the rule of necessity applies, an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter....

(f) Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest to his or her colleagues on a board or commission or to his or her supervisor or appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests.

(g) No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city.

The Board of Ethics determined that neither the Denver Auditor's Office nor the employee are in a position to take "direct official action" concerning the municipality. Therefore, the only applicable provision of Section 2-61 is 2-61(f). The Board of Ethics cannot foresee a situation of incompatibility between the interests of the City and County of Denver and the municipality. However, if such a situation arose, (such as a dispute over water rights or highway funding), the employee should abstain from voting in any situation "that adversely affects the interests of" the City and County of Denver.

In summary, the Board advised the employee that it will not violate the Denver Code of Ethics if he runs for a position on the Town Council and/or serves on the Town Council, so long as he:

- Obtains his appointing authority's written approval for the outside employment on an annual basis;
- Does not use any Denver city resources for his campaign or his Town Council work;
- Abstains from voting on any Town Council issues that could "adversely affect" the interests of the City and County of Denver.

In addition, in order to avoid any appearance of impropriety, the Board recommended that:

- If elected, he should devise a system to keep track of any Denver city time that he spends on work for the Town Council, so that he will not be paid his Denver salary for non-Denver work;
- He set time outside Denver work hours when he would be available to take telephone calls or other contacts by his constituents.
- He should not attempt to raise or accept campaign funds from any Auditor's Office employees who report to him.

Case 11- 55 (conflict of interest)

A senior employee of the Denver Recycles Division requested an advisory opinion. The employee was asked to serve on the board of directors of a Political Action Committee (PAC) related to recycling interests. The employee advised the Board of Ethics that:

It is a PAC with statewide interests around recycling. The board's primary job will be to identify candidates to receive campaign contributions from money raised from interested individuals around the state. Directors may also support events in their area by providing contacts & attending. Directors will also have input on any events and their orchestration. ...Directors need to be individual citizens and not representatives of public or private agencies.

The employee will not be paid anything for her services on the board.

The Board of Ethics determined that neither the Denver Code of Ethics nor other city law nor state law prevent government employees from being involved in a PAC or other political activity, so long as no government resources are used. In addition, a PAC that is supportive of recycling efforts is not adverse to or incompatible with the interests of the City and County of Denver, which is supportive of recycling efforts.

The Board also recommended, in order to avoid the appearance of impropriety, that:

- The employee not have any involvement in the fundraising tasks of the PAC (which could be seen as pressure to contribute if any organizations might have contracts with Denver Recycles);
- The employee not use her city title in connection with the PAC.

Case 11-56 (no jurisdiction)

A citizen filed a complaint concerning a tax collector who allegedly did not file accounting documents properly, resulting in improper tax bills. The Board of Ethics dismissed the complaint because it had no jurisdiction and informed the citizen how she could appeal to the County Board of Equalization.

Case 11-57 (conflict of interest, subsequent employment)

A former Director of the Office of Economic Development (OED) requested an advisory opinion. He had been Director of OED from July 2003 through March 2007. During that time, OED encouraged the redevelopment of a long-vacant historic building into a retail, restaurant and entertainment complex by a private developer. In 2004 OED agreed to make a number of loans in order for the developer to acquire the property.

In September 2007 (more than 6 months after the Director left OED) OED approved an agreement which subordinated the city's loans to permanent private financing for the project. In late August 2011, the former Director was asked by the developer if he could assist the developer in restructuring the financing of the project and additional real estate projects. The developer was able to obtain buyers for all but one of the six loans. The one remaining loan involved tax-increment financing. The former Director made an offer to purchase the senior tax-increment financing loan himself on August 30, 2011; however, he urged the developer to "shop" his offer to see if he could obtain better terms, which he did to at least six other potential purchasers. The former director, the developer and the bank closed on the purchase of the loan in October 2011.

The modification of the developer's loan had to be approved by City Council. During briefings by OED staff of members of City Council regarding the modification of the loan agreement, some members of Council wanted to know whether the former Director's involvement would violate the Denver Code of Ethics, due to his prior involvement with OED.

There are two sections of the Denver Code of Ethics that may relate to this transaction.

Section 2-61 pertains to conflicts of interest. However, when the former Director took direct official action by approving loans to the project in 2004 and 2006, he had no connection with the development company or the project. He did not discuss purchasing one of the loans with the developer until late August 2011.

Section 2-64(a) provides as follows:

Sec. 2-64. Subsequent employment.

(a) During six (6) months following termination of office or employment, no former officer, official, or employee shall obtain employment outside of the city government in which he or she will take direct advantage, unavailable to others, of matters with which he or she took direct official action during his or her service with the city.

However, the former Director was never "employed" by the developer. In addition, the transaction with the developer took place almost 4 ½ years after the former director left his job with the city. In addition, his encouragement of the developer to try to find other buyers (without success) indicates that he was not acting on any inside information to benefit himself.

Therefore, the Board of Ethics concluded that the former Director's purchase of the loan did not violate any portion of the Denver Code of Ethics or the provisions of the Denver Charter relating to conflicts of interest.

Case 11-58 (conflict of interest)

A homeowner filed a complaint concerning an architect who is a member of the Landmark Preservation Commission (LPC). One of the functions of the LPC is to review and approve or disapprove plans for proposed additions to structures which are designated individual Denver landmarks or structures within a Denver historic district in order to ensure compatibility with the historic structure or landmark district.

A homeowner who lives next door to the complaining homeowner hired the LPC member's architectural firm (a 2-person firm with his wife) to prepare plans for a second-story addition to the house, which is within a historic district. The complaining homeowner opposed the plans because she said the addition to the next-door home would "block my view."

The LPC considered the proposed addition at one of its meetings. The complaining homeowner did not attend the meeting because she says she was not informed of when the meeting would occur. According to the director of the LPC staff, the architect-member said that he was recusing himself from the discussion and went to sit in the back of the room, while his wife/partner made the presentation to the LPC and answered questions from the members. The minutes of the

meeting indicate that the architect-member was in attendance at the meeting and the vote to approve the addition in question was “unanimous in favor, motion carries.” The minutes do not mention any recusal by the architect-member; however, an index of the recording of the meeting indicates that the architect-member “recused.” The LPC staff had recommended approval of the addition.

The complaining homeowner says that she was “disheartened” by the outcome because “the Landmark Preservation Commission should be protecting all of us” and not just clients of Commission members. The architect-member advised the Board of Ethics that “I fully, completely recused myself from the project in question at the meeting where it was approved. Therefore I cast no vote for the project.”

Section 2-61 of the Code of Ethics relating to conflicts of interest provides:

Sec. 2-61. Conflict of interest while employed.

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,

(a) Except when advised by the city attorney that the rule of necessity applies, **an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter...**

(f) **Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest to his or her colleagues on a board or commission or to his or her supervisor or appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests.** (emphasis added)

The members of the LPC are in a position to take direct official action (which includes “enforcing laws or regulations or issuing, enforcing or regulating permits...”) concerning additions to buildings in historic districts. As one of the two members of the firm which designed the proposed addition for the home in question, the architect had a “substantial employment, contractual, or financial interest in that matter” and was, therefore, prohibited from taking direct official action. Although the meeting minutes reflect otherwise, the preponderance of the evidence indicates that the architect-member did not vote on the matter and, therefore, he did not take direct official action and, thus, did not violate Section 2-61 of the Code of Ethics.

The Board dismissed the complaint. However, the Board recommended that, in the future, in order to avoid the appearance of impropriety:

1. All Denver board and commission members should, whenever they abstain from any vote or discussion due to a conflict of interest, verbalize the abstention clearly and state for the record the reason for such abstention.

2. Whenever a board or commission member abstains from participation in a matter because of a conflict of interest, he or she should leave the meeting room for the entire time of the presentation, discussion and voting on the matter.
3. Such abstaining board or commission member should review the minutes from any meeting where he or she abstained due to a conflict of interest and verify that the minutes correctly reflect the abstention and the reason.
4. Staff members who keep minutes for boards and commission should be trained to record abstentions and reasons in their minutes and whether the member leaves the room so that the public can be aware that city board and commission members understand conflicts of interest and abstain when necessary.
5. Board and commission members or their firms who provide professional services for a livelihood, such as, but not limited to, lawyers, architects, real estate agents, engineers, consultants, and lobbyists should not personally or through their firms represent clients with matters before the board or commission on which they serve or, at least, limit such representation to rare occasions. This would alleviate the public impression that those who hire firms of board and commission members to represent their interests might get a special advantage or the public impression that board and commission members may be using their public office for private gain.

Case 11-59 (conflict of interest, subsequent employment)

Contract administrators in the Office of Economic Development (OED) filed a request for an advisory opinion. OED issued a request for proposals (RFP) in October 2011 to 66 contacts from various organizations that provide workforce services to Denver youth. The RFP sought proposals to provide 6 months of employment and training services to youth in northeast Denver. Only one organization submitted a proposal by the deadline date.

The contract administrators requested an advisory opinion as to whether there would be an impermissible conflict of interest if the contract were awarded to that organization due to the following facts stated in the request:

- I. The organization's manager was the manager of OED's Contracts and Performance Management unit prior to her retirement in August 2010.
- II. The organization's 7-person board of directors includes two current city employees, one of whom works for the Public Works Department and the other works for OED.
- III. The organization's board also includes a former OED employee.

In addition, the executive director of the organization is the child of two of the persons mentioned above.

Section 2-61 of the Denver Code of Ethics, which regulates conflicts of interest, provides as follows:

Sec. 2-61. Conflict of interest while employed.

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,

(a) Except when advised by the city attorney that the rule of necessity applies, an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter....

(f) Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest to his or her colleagues on a board or commission or to his or her supervisor or appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests.

(g) No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city.

Any direct official action regarding any city contract with the organization (negotiating, approving or administering the contract) will not be done by anyone connected with the organization, including the current OED employee on the organization's board, who has nothing to do with the contract or any funding decisions.

The former manager of OED's Contracts and Performance Management unit prior to her retirement in August 2010 would not violate Section 2-64(a) because more than 6 months have elapsed since her retirement from the city. That section provides:

Sec. 2-64. Subsequent employment.

The purpose of this section is to avoid the actuality or appearance that employers who hire former city officers or employees may get special treatment.

(a) During six (6) months following termination of office or employment, no former officer, official, or employee shall obtain employment outside of the city government in which he or she will take direct advantage, unavailable to others, of matters with which he or she took direct official action during his or her service with the city.

The Board of Ethics determined that neither the former OED manager nor anyone currently at OED will violate the Code of Ethics if a contract is awarded to the organization. However, the Board of Ethics stated that the fact that 1) the organization has two current city employees (one of whom works for OED) and one former OED employee on its 7-person board; 2) its manager is the former manager of OED's Contracts and Performance Management unit and 3) its executive director is the former manager's daughter may cause the appearance of impropriety,

even if it does not violate the Code of Ethics. The public, including possible competitors for OED contracts, could perceive that the organization is so well-connected with OED that it would be futile for anyone else to submit a competing proposal. That perception could diminish public confidence that the selection and administration processes will be fair, unbiased, arm's-length and will not be influenced by friendships and former associations when considering who gets a contract and how performance is evaluated.

Since the city needs to enter into a contract quickly for workforce youth services in northeast Denver and there were no competing proposals, these reservations should not be understood to recommend that the city not contract with the organization for this proposal. The Board of Ethics, however, recommended that OED suggest to the organization that having so many current or former city or OED employees on its board or as employees can cause the appearance of impropriety.

Case 11-60 (conflict of interest)

The current Office of Economic Development employee who serves on the board of directors for the organization discussed in Case 11-59 above requested her own advisory opinion regarding a potential conflict of interest.

The employee is the Acting Economic Development Supervisor of the OED Workforce Development Assessment and Training Division. She agreed to join the board of a non-profit organization discussed above in Case 11-59 in October 2010. The organization has a contract to administer some Temporary Aid to Needy Families (TANF) program funds from OED and also was under consideration to be given a contract by OED to provide workforce employment and training services to youth in northeast Denver. The employee advised the Board of Ethics that she did not have any direct official action role (defined in Section 2-52(b) of the Denver Code of Ethics as “negotiating, approving...administering or recommending for or against...a contract, grant or similar instrument...”) in either the TANF contract or the workforce employment and training contract.

Section 2-61 of the Denver Code of Ethics, which regulates conflicts of interest, provides as follows:

Sec. 2-61. Conflict of interest while employed.

The purpose of this section is to avoid influence on the official actions of city officers, employees or officials by their private or family interests,

(a) Except when advised by the city attorney that the rule of necessity applies, **an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer,** official or employee has any substantial employment, contractual, or financial interest in that matter...

(f) **Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest to his or her colleagues on a board or commission or to his or her supervisor or**

appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests (emphasis added).

The Board of Ethics concluded that, since the employee did not have any “direct official action” power regarding TANF funding or the potential workforce employment and training contract, she would not be prohibited by the Code of Ethics from serving on the organization’s board. However, the Board recommended that she should abstain from any discussions or decisions or votes at OED that would benefit the organization and also from any discussions or decisions or votes at the organization relating to any contract or grant from OED, in order to avoid the appearance of a conflict of interest.