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PARALEGAL
Ryan M. Riley

MEMORANDUM

TO: Ethics Board

FROM: City Attorney Michael Haas

DATE: October 13, 2022

RE: Solicitation Ordinances and Guidance

The City Attorney's Office is seeking and feedback and guidance from the Ethics Board regarding the interpretation and application of provisions of the Ethics Code related to City officials soliciting funds on behalf of other organizations. Solicitation questions are the most common inquiries that our office receives from elected officials and City staff. In providing informal advice to City officials and staff, our Office tends to err on the safe side and cautions against alders making solicitations on behalf of third parties. We also inform the requestor that they may seek advice from the Ethics Board.

Given the number of similar requests, as well as some perceived ambiguity in the ordinance language, we believe it will be useful to determine whether the Ethics Board agrees with our typical interpretation of the solicitation ordinances, and whether it believes any amendments to the Ethics Code should be recommended to the Common Council.

Ethics Code Provisions

There are several relevant provisions of the Ethics Code. I have added the emphasis below in order to direct the Board's attention on the language which most often is the focus of our interpretation related to solicitations. MGO § 3.35(5) states as follows:

(5) Standards of Conduct.

- (a) 1. Use of Office or Position. **No incumbent may use or attempt to use her or his position or office to obtain financial gain or anything of value or any advantage, privilege or treatment for the private benefit** of herself or himself or her or his immediate family, **or for an organization with which she or he is**

associated. This paragraph does not prohibit an incumbent from using the title or prestige of her or his office to obtain campaign contributions that are permitted and reported as required by Wis. Stat. [ch. 11](#).

2. Influence and Reward. No person or entity may offer or give to an incumbent or member of an incumbent's immediate family, directly or indirectly, and no incumbent may solicit or accept from any person or entity, directly or indirectly, anything of value if it could reasonably be expected to influence the incumbent's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on her or his part.

This subsection 2. does not prohibit an incumbent from soliciting donations from third parties provided that:

- a. **The funds are to be used for a City project or for a conference to be held within the City;**
 - b. **The solicitation has been approved by a resolution of the Common Council;**
 - c. The entity receiving the funds is not an entity with which the incumbent is associated; and
 - d. A report of the amount and date of contribution and contributor for all donations for the project or conference is filed with the City Clerk within six (6) months of the receipt of the donation.
3. Limitations on Actions. Except as otherwise provided in paragraph 4, **no incumbent may:**
 - a. Take any official action affecting, directly or indirectly, a matter in which she or he, a member of her or his immediate family, or an organization with which she or he is associated has a financial or personal interest;
 - b. Use her or his office or position in a way that produces or assists in the production of a benefit, direct or indirect, for her or him, a member of her or his immediate family either separately or together, or **an organization with which the incumbent or her or his immediate family member is associated.**
 4. Paragraph 3. does not prohibit an incumbent from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit an incumbent from taking official action with respect to any proposal to create, modify, or repeal a City ordinance, resolution or matter benefitting the public.

(b) Privilege and Advantage .

1. **No incumbent shall request or permit the use of City-owned vehicles, equipment, materials, or property for personal convenience or profit, or for that of another, except when the same are available to the public generally or except where otherwise authorized by the Common Council. No incumbent shall grant any privilege, anything of value, special consideration, treatment or advantage to any person beyond that which is available to every other person except as may be specifically provided for by law.**

There are two basic policy goals underlying these provisions. First is the idea that neither public resources nor the prestige of a public position should be used to financially benefit specific private organizations and not others. Second is the goal of avoiding situations where individuals or organizations feel pressured to contribute to an organization supported by a City official in order to curry favor with the official, seek preferential treatment, or avoid negative consequences.

Analysis

A. Associated Organizations

As a starting point in our analysis, the ordinances seem clear that City officials are restricted in what actions they can take with regard to organizations with which they are associated. The term “associated” refers to organizations in which the individual or a member of their immediate family is a director or officer or owns or controls at least 2% of the outstanding equity. MGO § 3.35(2)(b). Both § 3.35(5)(a)1. and (5)(a)3. prohibit incumbents from using their office or position to benefit an organization with which they are associated. These sections specifically prohibit the use of office or position to obtain for such organization:

- 1) a financial gain
- 2) anything of value
- 3) any advantage
- 3) any privilege
- 4) any treatment
- 5) any benefit, direct or indirect.

Based on these provisions, our first inquiry regarding solicitation matters is whether the City officials or staff is associated with the organization that would benefit from the solicitation. If so, the ordinances prohibit the use of office or position to benefit the organization. However, what is less clear is whether it is possible to make such solicitations for an associated organization without the individual using their City office or position. Clearly City resources such as laptops, printers, or meeting time cannot be used to solicit contributions for an associated organization. But can an alder or the Mayor or a Department Head solicit contributions for an organization for which they serve on the board if it is done on their own time and without using City resources?

One school of thought is that all solicitations on behalf of an associated organization are prohibited, even when City resources are not used, because it is difficult or impossible to separate the individual from their City office or position. For example, in most cases, an individual or organization being solicited will recognize that the person asking is an Alder, the Mayor, or a prominent City official, for instance. Is that a prohibited “use of office or position?”

But the ordinances do not clearly prohibit all solicitations by City officials, only those made by using an office or position or City resources. In interpreting similar provisions of Wisconsin Statutes, the Wisconsin Ethics Commission concluded that:

LETTERHEAD AND LETTERS OF SUPPORT. An official affiliated with a private organization may permit the appearance of their name and title within the private organization, but not their public office, on the organization’s letterhead in the same style and prominence in which others similarly affiliated with the organization are identified. An official may also write a letter of endorsement for an organization that the organization may include in a fundraising solicitation, even if it is sent to a lobbyist or lobbying principal, as long as the endorsement letter does not solicit, urge, or endorse contributing to the organization. See 1991 Wis Eth Bd 06.

Under this approach, even when an official is affiliated with an organization, their name may appear on the organization’s letterhead as long as it does not cite their position with the City. And the official may endorse an organization that may be used in a solicitation provided the endorsement letter itself does not solicit contributions to the organization.

With this background, we invite the Ethics Board to consider the following questions and hypotheticals involving City officials who are associated with an organization:

1. May a City official solicit funds for an associated organization if they do not use their title or position or City resources in doing so? Is there a distinction based on the position of the City official?
2. May an official’s name appear on letterhead of an associated organization if their City position is not used?
3. May a City official sell admission tickets to a fundraising event of an associated organization if they do not use City resources or time to do so?

B. Other Organizations

Beyond associated organizations, our Office regularly fields inquiries about making solicitations on behalf of organizations with which the City official is not associated. There is no shortage of non-profit organizations doing good works in Madison. Particularly given the challenges during the height of the COVID-19 pandemic and other societal challenges, City officials have been interested in promoting and assisting those efforts of organizations they are not associated with but which they support. For instance, alders often wish to assist organizations that are either

important to their districts or are active in an area of interest to the alder.

MGO § 5.05(b)2. specifically authorizes solicitations for City projects or conferences when the solicitation is authorized by the Common Council. This authorization is framed as an exception to the prohibition on City officials receiving anything of value for themselves “if it could reasonably be expected to influence the incumbent's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on her or his part.”

This framework is curious given that solicitations on behalf of a City project or conference would not personally benefit the City official financially. It is also unclear whether the authorization to solicit contributions for a City project or conference necessarily equates to a prohibition on other solicitations on behalf of non-associated organizations or if that section is merely silent on the issue. Or if such solicitations are prohibited only if they could reasonably be expected to influence the incumbent's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on her or his part.

These questions are complicated by the “privilege or advantage” language of Section 3.35(5)(b)1. No incumbent may use City equipment or property for the profit of another except when the same is available to the public generally or when authorized by the Common Council. Also, no City official “shall grant any privilege, anything of value, special consideration, treatment or advantage to any person beyond that which is available to every other person except as may be specifically provided for by law.”

This “privilege or advantage” language goes beyond the provisions of the ethics code established by Wisconsin Statutes. The ethics codes in the Statutes are focused on prohibiting public officials from using their position to financially benefit themselves or an affiliated organization. The question arises as to whether this language constitutes a separate prohibition on solicitations as a profit to the organization that is not available to the public generally, or whether it is a privilege, anything of value, special consideration, treatment or advantage beyond that which is available to others. Because these provisions do not exist in the Statutes, we cannot benefit from any guidelines or analysis by the Wisconsin Ethics Commission.

Given these provisions, we invite the Ethics Board to consider the following additional questions and hypotheticals involving City officials who are associated with an organization:

1. May a City official, in their private capacity, solicit contributions to a non-associated organization if they do not use City resources? Does it matter if they note their public position in doing so?
2. Is a solicitation considered a prohibited profit, privilege, thing of value, special consideration, treatment or advantage that is not available to others? Or does this “privilege or advantage” language only apply to official actions of a public official, such as approval of a license application or an unauthorized reduction in a fee?

C. Targets of Solicitations

Finally, the question arises whether there is a restriction on the parties that may be solicited when solicitations are permitted. MGO § 3.35(5)(a)2 prohibits incumbents from soliciting or accepting anything of value if it could reasonably be expected to influence the incumbent's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the official's part. In 2010, the City Attorney advised that the Mayor's solicitations of funds from entities that are regulated by the City or regularly do business with the City would violate the then-existing provisions of the Ethics Code because it could reasonably be expected to influence the Mayor's judgment, even though there was no financial benefit to the Mayor or the Mayor's family.

Subsequently the Ethics Code was amended to include the provisions related to City projects and conferences and Common Council approval. That amendment seems to permit solicitations of organizations regardless of any affiliation with the City when the Common Council has authorized the solicitations. The answer is less clear when an incumbent solicits contributions for an organization from individuals or other organizations that may do business with the City or are regulated by the City.

On one hand, the official is not receiving anything of value themselves. On the other hand, the incumbent may be in a position to make decisions that affect the party being solicited. Therefore, it may be reasonable to believe that the official's attitude towards an organization and their official judgment may be affected by whether or not the solicited party agrees to make a contribution to the official's preferred organization. It is important to note that the standard here is whether it "could reasonably be expected" to influence the incumbent's official actions or judgment, not whether it actually does so.

The final set of questions we ask the Ethics Board to consider are:

1. If incumbents are permitted to make solicitations on behalf of organizations, other than for a City project or conference, does the incumbent need to consider whether solicitation of specific individuals or organizations could reasonably be expected to influence their official actions or judgment, or be considered a reward for some official action or inaction?
2. Are all solicitations of individuals or entities that are regulated by the City or that do business with the City prohibited or does it depend on the specific facts? For instance, is the position of the incumbent relevant in terms of what authority they have to influence actions that may affect the solicited individual or organization?

The Ethics Board may wish to discuss these issues and questions, and provide any feedback to the City Attorney's Office, either at its meeting of October 13, 2022 or at a subsequent meeting. In addition, if the Board determines that the relevant ordinances would benefit from clarifying or substantive amendments, it may certainly recommend changes to the Common Council.