

CITY OF BIRMINGHAM
ETHICS BOARD ADVISORY OPINION
2003 - 03
NOVEMBER 4, 2003

Peter Root, a volunteer member of the City of Birmingham's General Investment Committee ("Committee") has requested an advisory opinion relative to his private sector employment situation having a potential conflict of interest with his Committee activities.

ISSUE

May Mr. Root, as a member of the General Investment Committee and employee of a financial concern which has a sub-advisory relationship with the City of Birmingham, continue to participate on the Committee and, if so, with what restrictions and/or requirements, if any, in relation thereto?

OPINION

Mr. Root may continue to participate on the Committee and he may participate in discussions of the City's investments and the asset allocation of the portfolio, provided that: (a) at the time of the discussion, he informs the other Committee members of his involvement with his employer and its participation relative to the Fund, (b) he abstains from any vote and/or otherwise participating in debate on any issue regarding the continuation or operation of the Fund or its role in the portfolio, and (c) at the time of such vote, he explains the reason for his abstention.

ANALYSIS

The Board has been asked to consider Mr. Root's stated concern. As a member of the Committee, Mr. Root is a "City official" within the meaning of the Ethics Ordinance. See Section 2-322 I. Therefore, he must comply with the ethical standards set forth therein. Mr. Root recently became aware of significant monies kept in a Comerica pooled investment fund, which has a sub-advisory relationship with his firm, Munder Capital Management. He is Vice President and CIO of Fixed Income.

The City of Birmingham's portfolio currently invests 20-25 Million Dollars in Comerica's pooled investment "J" Fund ("Fund"). Comerica charges approximately 20 basis points (.2%), and shares with Munder Capital Management 1 basis point (.01%) for sub-advising the investments. Munder Capital Management will earn \$2,000 - \$2,500 annually should the balance in the Fund remain constant at current levels. A change in the current amount invested in the Fund will have a proportional impact on the revenues of Munder Capital Management.

Mr. Root has volunteered to (a) continue to offer advice given the amount of the annual revenue, or (b) excuse himself from any decisions involving a change in the invested amount in the Fund, or (c) step down from the Committee.

The Board reviewed the City's Resolution for the creation of the Committee. The Committee was created as the City Commission's desire to (1) create a citizens advisory committee to provide technical investment assistance to the City Treasurer, (2) provide an additional periodic professional review of the City's general investment portfolio, and (3) to assist the City Treasurer in determining the types of investments which are most appropriate within the investment policy approved by the City Commission. The Committee consists of only three members at any one time. The Resolution further provides in part that: "Members may not be employed by a firm or institution conducting business with the City in any capacity which will cause a conflict of interest."

The Board also reviewed sub-section 6.0 of the City's General Investment Policy, which pertains to Ethics and Conflicts of Interest, as follows:

"Officers and employees involved in the investment process shall refrain from personal business activity that could conflict with proper execution of the investment program, or which could impair their ability to make impartial investment decisions. Employees and investment officials shall disclose to the chief executive officer any material financial interests in financial institutions that conduct business within this city, and they shall further disclose any large personal financial/investment positions that could be related to the performance of the City of Birmingham portfolio. Employees and officers shall subordinate their personal investment transactions to those of the city particularly with regard to the timing of purchases and sales."

City Treasurer, Thelma K. Golden, appeared before the Board at the subject hearing. She gave the Board further background on the Committee. Ms. Golden stated that since Birmingham is a small city, there is a high likelihood that a member of this Committee would have occasion to do business with the City. She offered that Mr. Root brings a great deal of expertise to, and is a valued member of, this Committee. She confirmed that the Committee is an advisory board to the Treasurer for investments.

Ms. Golden further stated that the Fund is 40-50% of the portfolio, which is unusually high, but that they are in the process of changing that to 5-10%. The Board questioned if Mr. Root could function effectively on this Committee if he excused himself from decisions involving a change in the invested amount in the Fund. Ms. Golden stated that he could. She further stated that she does not receive advice on this particular Fund from the Committee. Ms. Golden further stated that she felt Mr. Root should recuse himself from voting on any issue regarding the continuation or operation of the Fund or its role in the portfolio. She also opined that Mr. Root should refrain from

providing information about the Fund to the other members of the Committee, as she sees that as her role.

Mr. Root has expertise in finance, especially fixed income, and he also works for a financial concern that advises at least one financial institution that does business with the City of Birmingham. This raises a potential ethics issue.

Section 2-324 of the Ethics Ordinance prohibits conflicts of interest. Ethics Ordinance Section 2-324.A.VI provides:

“No official or employee of the City of Birmingham shall engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his or her official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of his or her official duties.

This section shall not prohibit a part-time elected or appointed City official from engaging in private employment or business on his or her own time as a private citizen and where City business is not involved, subject to his or her disclosing such private employment or business on the public record for any matter on which he or she may be called upon to act in his or her official capacity, in accordance with Section 5B below. He or she shall refrain from voting upon or otherwise participating in debate on any such matter.”

The composition of boards and commissions is unique in that City ordinances often require members to be appointed from certain groups or represent certain interests. In recognition of that fact the Ethics Ordinance Section 2-324.A.VI had the addition of the aforesaid second paragraph. Furthermore, in this case, the Resolution creating the Committee requires appointment to the Committee individuals with expertise in technical investment. Nothing in the Ethics Ordinance shall be interpreted to prevent a member of a board, committee or other body required or permitted by ordinance to be appointed from any identifiable group or interest, from serving on such body in accordance with the intent of the City Commission in establishing such body.

Pursuant to Section 2.324.A.IX.A, a conflict of interest exists if:

“The City official or employee has any financial or personal interest, beyond ownership of his or her place of residence, in the outcome of a matter currently before that City official or employee, or is associated as owner, member, partner, officer, employee, broker or stockholder in an enterprise that will be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of said official’s or employee’s governmental duties.”

While Mr. Root probably has no direct “financial or personal interest” in the investment contract(s) or the outcome of the investments associated therewith, presumably Mr. Root’s employer has a financial interest in the outcome of the Fund investment.

The Ethics Ordinance requires full disclosure, in providing in part at Section 2.324.B.I:

“It shall be the responsibility of the official or employee to disclose the full nature and extent of his or her direct or indirect financial or personal interest in a matter before him or her.

No official or employee of the City of Birmingham shall participate, as an agent or representative of the City, in approving, disapproving, voting, abstaining from voting, recommending or otherwise acting upon any matter in which he or she has directly or indirectly a financial or personal interest. The official or employee shall, in such circumstances, recuse himself or herself from the matter before him or her.”

Accordingly, in consideration of the Ethics Ordinance, General Investment Policy, the Resolution for creation of the Committee, and representations of the City Treasurer, Mr. Root may continue to participate on the Committee and he may participate in a discussions of the City’s investments and the asset allocation of the portfolio. However, at the time of such discussion of the Fund, he must inform the other members of the Committee of his involvement with his employer and its participation relative thereto. He should also abstain from any vote and/or otherwise participate in debate on any issue regarding the continuation or operation of the Fund or its role in the portfolio. In the event of such a vote, he should explain the reason for his abstention. The Board cautions, however, that recusal may be incompatible with the performance of public duties if the participation of a member is required for action, and the effect of the recusal is to enhance a future business opportunity.

The Board also interprets the Ethics Ordinance as intending and including a prohibition against Mr. Root, or any other similarly situated member or City official, attempting to influence other members from casting votes that would benefit the abstaining member’s employer. The Board will distinguish such influence, which should be prohibited, from using one’s general expertise to influence other members with regard to the general kinds of transactions and/or advice the Committee engages in.

It is intended that this Opinion serve Mr. Root and others as an effective means of balancing a board or committee member’s obligations under the City’s Ethics Ordinance, and allowing the member to use his or her general expertise to make informed decisions and/or recommendations on behalf of the public. Our determination is not necessarily dispositive of all issues relevant to this situation, but is based solely on the application of the City’s Ethics Ordinance to the facts stated in this Opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any

change may alter our determination. Other laws or rules also may apply to this situation.

Approved by the Ethics Board this 11th day of November, 2003.






