

## ADVISORY OPINION

To: [Sam Smith]  
[title], Department of Aviation

Re: Case No. 08010.A, Post-Employment

Date: May 14, 2008

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**Facts:** You are [title] [at] Midway Airport. On April 4, you asked whether you would be restricted by the City's Governmental Ethics Ordinance were you to leave your City position and accept employment with the company/consortium that wins the "privatization" contract to administer Midway Airport. You said that you would perform essentially the same or similar functions and would assume the same or similar responsibilities as you do and have currently as a City employee. The Request for Qualifications ("RFQ") for this project was to be announced on Monday, April 7.

You also informed Board staff that you believe there is a state law that in effect permits you to work with whatever company wins this contract, performing the same or similar responsibilities, the Ordinance's post-employment restrictions notwithstanding. For the reasons explained in this opinion, the Board has determined that Illinois Public Act 094-0750 preempts the application of the Governmental Ethics Ordinance to you, and therefore that the Ordinance does not prohibit or restrict you from accepting employment with the company/consortium that is awarded the contract to administer Midway Airport, performing the same or similar functions and assuming the same or similar responsibilities as you currently have in your City position.

**Analysis:** As staff explained to you, the Ordinance has two post-employment restrictions, in § 2-156-100(b), and, in § 2-156-070, a permanent prohibition on using or disclosing confidential information, except in the performance of one's official duties and responsibilities or as may be required by law. These prohibitions would certainly restrict you

from

assisting [the] respondent on matters pertaining to the operation of Midway airport, and in performing [its] contract, and from using or divulging confidential information you gained through your City position.

However, on May 9, 2006, the Governor signed Public Act 094-0750, and it became effective that day. The short title of that Act is the "Local Government Facility Lease Act." The Act provides, among other things, that Chicago Midway International Airport is subject to its provisions. (See 65 ILCS 5/11-102-15.) The two provisions of the Act specifically relevant to the Board's determination are Sections 40 and 50. The former, entitled "Required offers of employment," states, in relevant part:

**“As part of any transaction to lease facility property that is used for airport purposes: (1) the lessee must offer employment, under substantially similar terms and conditions, to the employees of the municipality who are employed, at the time of the lease, with respect to the facility property used for airport purposes [.]”**

Section 50 of the Act, entitled “Home rule preemption; exemption from State Mandates Act,” states, in relevant part:

**(a) a home rule unit may not exercise its home rule powers and functions in a manner that is inconsistent with the Act. This subsection is a limitation under (i) of Section 6 of Article VII of the Illinois Constitution on the concurrent exercise by home rule units of powers and functions exercised by the State.”**

It is clear that the language cited above requires the successful respondent to the RFQ to lease and administer Midway Airport to offer you (and other similarly situated Department of Aviation employees) employment, with compensation and other terms similar to those of your current City position, and that the Act’s effect to is “preempt” the City, as a home rule unit, from applying its Governmental Ethics Ordinance, and any other laws or Ordinances, that would be inconsistent with the Act’s provisions. Our research into the legislative intention behind this Act confirms that, indeed, this was precisely the legislature’s purpose.<sup>1</sup> The Board notes that, in previous cases, we have considered or taken “judicial notice” of preemption of the Ordinance’s application to certain specific situations by state law. See Case No. 90035.A, in which the Board recognized that the state law, as embodied by the Illinois Supreme Court’s decision in *In Re Vrdolyak*, 137 Ill. 2d 407, 560 N.E.2d 840 (1990) effectively pre-empted application of § 2-156-090(b), the Board affirming that it is “required to follow the law as set forth by the Illinois Supreme Court, and the Ethics Ordinance may be applied only to the extent it does not conflict with that Court’s decisions[.]”; and Case No. 99029.A, in which the Board determined that § 2-156-320, limiting the rights of Board employees to engage in political activity, was inconsistent with the Illinois Local Governmental Employees’ Political Rights Act, 50 ILCS 135/1 et seq., and could not be enforced in a manner inconsistent with that state law.<sup>2</sup> This case involves neither an Illinois Supreme Court decision nor a state statute, but a Public Law, which itself amends certain state statutes. Nonetheless, this Public Law is still the law of the State of Illinois, and, as the Board has recognized, we are required to follow it and may apply the Ordinance only to the extent that our application is not inconsistent with state law.

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1. Board staff consulted with the office of one the sponsors of the legislation, Rep. Barbara Flynn Currie, as well as with the City’s own Office of Intergovernmental Affairs, which was involved in drafting this Act. Both confirmed that the intention behind and effect of Sections 40 and 50 of the Act are to preempt the City’s application of its Governmental Ethics Ordinance. See also 94<sup>th</sup> General Assembly House of Representatives Transcription Debate, at p. 114.

2. The Board also notes that the Ordinance itself contemplates that, in any given circumstance, its application may be effectively invalidated by the state or federal Constitution, or by some other law. §§ 2-156-450, entitled ‘Relationship to Other Laws,’ and -480, entitled “Severability,” provide, in effect, that should this occur, that invalidity does not affect the application of other provisions of the Ordinance to the situation. That is, the Board is authorized to “blue pencil” the Ordinance, and not enforce those parts of it that are invalid in a given case, as here.

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**Determination:** For these reasons, the Board determines that Illinois Public Act 094-0750 preempts the application of the Governmental Ethics Ordinance to you, and therefore that the Ordinance does not prohibit or restrict you from accepting employment with the company/consortium that is awarded the contract to administer Midway Airport, performing the same or similar functions and assuming the same or similar responsibilities as you currently have in your City position.

The Board's determination does not necessarily dispose of all issues relevant to this situation, but are based solely on the application of the City's Governmental 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 opinion. Other laws or rules may also apply to this situation.

**Reliance:** This opinion may be relied upon only by persons involved in the specific transaction or activity with respect to which this opinion is rendered.

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Miguel Ruiz, Chair