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DEPARTMENT OF STATE CIVIL SERVICE
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November 9, 2020

Thomas S. Schneidau
Office of the City Attorney
City of Slidell
P.O. Box 828
Slidell, Louisiana 70459-0828

Re: Board Docket No. 2020-708

Dear Mr. Schneidau:

The Louisiana Board of Ethics, at its November 6, 2020 meeting, considered your request for an advisory opinion regarding any issues presented by the Code of Governmental Ethics ("Code") in connection with the City of Slidell's decision to contract with a private entity to provide water and wastewater systems and facilities.

FACTS PROVIDED

Adopted in 1978, the City of Slidell ("City") operates under a Home Rule Charter which requires the City to provide a full range of services, including water and wastewater/sewer systems. The City currently provides the services under the Office of Public Utilities and the Office of Wastewater Treatment. The City employs twenty-five people in the Office of Public Utilities and twelve in the Office of Wastewater Treatment.

The City is considering entering into a contractual agreement with respect to the management, operations, and general maintenance of the City's water and wastewater systems and facilities. The contemplated contractual arrangement would involve a ten-year initial term with opportunities for renewal. The private entity would be responsible for providing all necessary personnel to fill the contract. To this end, the private entity would agree to hire current employees of the City's office of public utilities and office of wastewater treatment who wished to work for the new entity under the contract. You anticipate that thirty-three of the City's thirty-seven employees in the public utilities and wastewater treatment departments will be offered employment with the private contractor. You stated that none of the City's employees who may agree to work for the private entity participated in the City's decision to hire a private entity to provide water and wastewater systems and facilities.

AN EQUAL OPPORTUNITY EMPLOYER

For its part, the City would retain a limited number of employees in the subject service areas to provide managerial oversight of its contractual relationship with the private entity. You contemplate that the City's chief operator for wastewater treatment and assistant superintendent over sewer will both remain employed by the City to serve as the public/private project coordinators over the respective services. Additionally, the City's superintendent over public utilities will serve as the public/private project coordinator over water issues. Finally, you anticipate that one administrative assistant will remain employed by the City. These City employees would not conduct day-to-day operations of the City's water and wastewater systems and facilities. You further anticipate that, for a period of no more than three years, the City would hope to retain a limited number of employees who the City would contractually "lease" to the private entity to perform services under the contract on behalf of the private entity.

You ask whether the proposed privatization decision would pose any issues under the Code. Additionally, you ask whether any of the private entity's employees performing under the contract with the City would be considered a "public employee" for purposes of the Code.

POST-EMPLOYMENT ISSUES

Generally, La. R.S. 42:1121B(1) provides that no former public employee shall, for a period of two years following termination of his public employment, assist another person, for compensation, in a transaction, or in an appearance in connection with a transaction in which such former public employee participated at any time during his public employment and involving the governmental entity by which he was formerly employed, or for a period of two years following termination of his public employment, render, any service which such former public employee had rendered to the agency during the term of his public employment on a contractual basis, regardless of the parties to the contract, to for, or on behalf of the agency with which he was formerly employed.

However, prior Board opinions have considered the unique issue of privatization and determined that public employees who are laid off due to a privatization decision do not have to wait the two-year period, provided that they did not participate in the decision to privatize the services. *See Docket Nos. 2018-1021, 2017-219, 2014-945, 2012-1707, 2012-1596, 2010-352, 2010-341, 2010-080, 2009-934, and 2004-759.*

The Board concluded, and instructed me to inform you, that under the unique circumstances of the proposed privatization of the City's water and wastewater systems and facilities, the Code would not prohibit a City employee whose position is privatized from being employed by the City's private contractor to provide the same services, as long as the City employee did not participate in the privatization decision.

The Board further cautioned that the privatization decision does not apply to any City employee who would be considered an agency head over the City's water and wastewater systems and facilities, or to anyone who participated in the decision to privatize the City's services.

LEASING OF EMPLOYEES TO PRIVATE CONTRACTOR

For a period of no more than three years, the City would also hope to retain a limited number of employees who the City would contractually "lease" to the private entities to perform services under the contract on behalf of the private entity. You stated that these employees are governed by civil service rules and that no aspect of their compensation and benefits would be affected by any decision of the private entity. All compensation would be paid by the City. You further stated that these employees will still perform services for the public.

La. R.S. 42:1111A(1)(a): No public servant shall receive anything of economic value, other than compensation and benefits from the governmental entity to which he is duly entitled, for the performance of the duties and responsibilities of his office or position.

The Board concluded, and instructed me to inform you, that the City employees are prohibited by Section 1111A(1)(a) from receiving payments, to which they are not duly entitled, for the performance of their public duties, if the payments would be from a private entity. However, based on the unique circumstances presented, the Board determined that the City would not be prohibited by the Code from leasing employees to the private entity in this situation, since all aspects of the employees' compensation and benefits would be paid by the City.

The Board further discussed that the leased employees may be prohibited by the Code from being employed by the private entity following their retirement from the City. The Board suggests that any City employee who may be leased to the private entity under these circumstances seek a separate advisory opinion as to any post-employment restrictions following their retirement.

APPLICATION OF CODE TO PRIVATE CONTRACTOR EMPLOYEE

You ask whether any of the private entity's employees performing services under the contract with the City would be considered a "public employee" for purposes of the Code. La. R.S. 42:1102(18) and (19) define "public servant" and "public employee" to include anyone, whether compensated or not, who is engaged in the performance of a governmental function or is under the supervision or authority of an elected official or another employee of the governmental entity. Since the provision of water and sewer services is a basic governmental function of the City as provided in the Home Rule Charter, any employee of the private entity who is engaged in the performance of water and sewer services under the contract with the City would be a public servant subject to the provisions of the Code.

This advisory opinion is based solely on the facts as set forth herein. Changes to the facts as presented may result in a different application of the provisions of the Code of Governmental Ethics. The Board issues no opinion as to past conduct or as to laws other than the Code of Governmental Ethics, the Campaign Finance Disclosure Act, the Lobbyist Disclosure Act, and conflict of interest provisions in the gaming laws.

If you have any questions, please contact me at (800) 842-6630 or (225) 219-5600.

Sincerely,

LOUISIANA BOARD OF ETHICS

David M. Bordelon
For the Board