

January 8, 2025

**To: Mayor and Members of Council**

202500013

**From: Sheryl M. M. Long, City Manager** 

**Subject: Report on Appointing Representatives to the Board of Directors of Organizations Receiving City Funding**

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**REFERENCE DOCUMENT # 202401578**

At its session on June 12, 2024, Council referred the following for review and report:

MOTION, submitted by Councilmembers Jeffreys, Walsh, Albi, Owens and Harris, WE MOVE that the Administration report back to Council within sixty (60) days, recommendations for requiring organizations that receive funds from the City to allow the City the option of appointing a representative to those organizations' board of directors. The report should consider a funding threshold for the requirement, term length, voting abilities, and the process for appointment.

**INTRODUCTION**

The City routinely provides substantial funding to organizations that it believes serve the public good. The City reviews the organizations requesting public funds and creates requirements for those organizations to achieve specified goals before funding them. Despite this process, it is difficult to ensure the success of the program being funded or the organization's success long term.

This issue was highlighted by the decision of Cincinnati Red Bike's board of directors to cease operations due to funding concerns, despite having received over \$2,000,000 from the City in the past decade. In order to allow Red Bike to continue services, Council passed Ordinance No. 116-2024, appropriating an additional \$197,197.76 to Red Bike. The additional funding was a one-time allocation to allow Red Bike to continue to operate while creating a sustainable long-term plan for the program. As part of this process, the City would like Red Bike to restructure its board to include Red Bike's stakeholders, including the City, as members. Council also would like to explore the City's ability to appoint a member to the boards of directors of

organizations that receive funding from the City to allow greater oversight of such organizations and help protect the City's investment in the organizations.

## ANALYSIS

Due to restrictions in Ohio's ethics laws, the best way for a City appointee to the board of an organization receiving City funding is to have the organization amend its relevant bylaws or articles to have a board member be a City official serving in that person's official City capacity. The City could require this as a condition of City funding, but if the organization refuses, the City's recourse would be to not fund the organization. Each organization may have its own restrictions or process to create or amend its bylaws, and it is possible that they have other restrictions (from other sources of funding) that could conflict with the City's condition. Implementing this policy more broadly could raise other practical concerns outlined below.

### *1. Ethics and Fiduciary Concerns*

An ethics law issue arises if a City employee or City official is appointed to the board of an organization that receives City funds. First, in many situations the City appointee would have an unlawful interest in a public contract in violation of R.C. 2921.42. The Ohio Attorney General has held that a board of county commissioners cannot participate in the management or control of a non-profit with which the county contracts. 1979 Ohio Op. Atty Gen. No. 55. Whether the board of directors is participating in the management or control of the organization is fact specific. Thus, the analysis to determine whether a City employee or official would violate R.C. 2921.42 by serving on the board of an organization that receives funding from the City can be complicated as it requires review of the articles of incorporation, bylaws, and regulations of the organization. This analysis would have to be done for each organization the City funds. Violations of Ohio ethics laws can result in criminal penalties for the public employee or official who is appointed to the board. Additionally, such violations detract from public confidence in City government.

Second, the City appointee would have conflicting duties to the board and the City. R.C. Section 1702.30 requires that the appointee act in the best interest of the organization with the care that an ordinarily prudent person in a like position would use under similar circumstances. Conversely, if the appointee is a City employee or City official, the appointee owes a duty to the City to act in the City's interest. This would place the appointee in the untenable position of choosing between the City and the organization being funded whenever their interests diverge and breaching the appointee's duty to one of the entities. Failure to comply with R.C. Section 1702.30 can result in a civil action for damages against the appointee for action taken with a reckless disregard for the best interests of the organization. An organization can opt out of allowing an action against a director by having a provision in its articles or regulations specifically referring to the provisions of R.C. 1702.30(E) and stating that they do not apply to the organization. Hence a review of each organization's articles

and regulations would be necessary to determine the personal liability risk to the members of the board.

There are two possible solutions that could address these concerns if the organization agreed to allow the City to appoint a member of its board. First, Council could appoint someone who is not a City official or City employee to the organization's board of directors. This means that a third party over whom the City does not have direct authority and who does not owe any duty to the City would be appointed.

As an alternative, the City could use the "official capacity" exception in making the appointment. That exception specifically requires:

- (1) Organizations to enact bylaws that a City appointee to their board represents the interests only of the City; and,
- (2) For the City to formally instruct City appointees to represent the City's interests as part of their appointment.

Having the bylaws of the organization reflect that the role of the City appointee is to represent the City and not the organization removes the conflict of interest concerns because the appointee is not obliged to act in the best interests of the organization, but rather to protect the interests of the City. It is important to note that if the decision is to appoint City employees to the boards of organizations in their official capacity that this could result in significant additional time commitments for the employee, and so close coordination with the City Manager and examination of priorities is recommended.

## *2. Concerns of the Funded Organizations*

Organizations establish bylaws to govern their operation and are required to follow their bylaws, which typically set out the number, term length and limits, voting, and appointment or election requirements for the board, as well as any particular characteristics required of board members. The City cannot legally force an organization to change their bylaws to permit the City to appoint a member of the board of directors. It is possible the City could condition the City's funding on the organization's permitting the City to appoint a board member, but if the organization refused, the City's sole recourse would be to not fund the organization.

Absent a change in an organization's bylaws, anyone appointed by the City would be required to follow the bylaws in all regards. Similarly, if the City appointee is a City official or employee who is acting in their official capacity and in the interest of the City, a bylaw change would be needed to reflect that.

Even if the organization agreed to amend its bylaws, doing so likely raises a number of concerns for the organization:

- 1) An organization is unlikely to undertake amending its bylaws for just one year of funding from the City without a guarantee of funding beyond that one year, yet Council cannot bind a future Council to such an agreement.
- 2) An organization likely will not want a City appointed board member to remain on the Board once it no longer receives funding from the City. To remove the City appointee would require that the organization amend its bylaws again to remove the provisions regarding the City appointee.
- 3) The processes and governance structures of the organization may not lend themselves to having a City appointed board member with different term lengths, voting abilities, or processes for appointment or election than other board members.

Organizations may have to invest significant time, money, and work in negotiating these terms and amending their bylaws, which may have the unintended effect of organizations not applying for funding unless they believe that they will receive a substantial amount of funding to offset the burden of changing their bylaws and processes.

### 3. Funding Thresholds, Term Length, Voting Abilities, and Appointment Process

Decisions regarding appropriate funding thresholds, term length, voting abilities, and appointment process in the event Council implements a requirement of City appointments to boards of funded organizations are generally business decisions rather than legal ones. The Administration recommends that Council consider some additional items when establishing these parameters.

Given the complexities in having organizations amend bylaws, a high funding threshold likely makes the most sense. Looking at the leveraged funding support for this fiscal year, a \$200,000 yearly threshold would capture nine different organizations: Cincy Tech, Cintrifuse, KCB, REDI, African American Chamber, Shelterhouse, Center for Closing the Health Gap, Red Bike, and Cincinnati Works. There will be some increased administrative burden on the City to begin tracking the amounts given to organizations each year to know when an organization has hit the funding threshold and needs to amend its bylaws to permit a City appointee on its board. This will delay the City's disbursement of funds until the organization amends its bylaws and the City makes its appointment.

For term lengths, the simplest approach would be to follow the term lengths and limits of the organization, unless those term lengths are unusually long. However, this would not address concerns of the organization about having a City appointed

board member on the board after City funding of the organization ends. In order to address that concern, the term could be limited to the time period of City funding, or the time period of the specific program that the City is funding. This approach would likely require a change in the organization's bylaws.

In terms of voting abilities, if the City's goal is to help ensure the success of the organization, then having the City appointee be a voting member of the board is essential. Without a vote, the appointee's ability to guide the organization is far more limited. The appointment process could mirror any of the processes currently being utilized to appoint members to other boards and commissions. Council could elect to have approval authority over appointee recommendations made by the Mayor or the City Manager, and in the event that the appointee is not a Councilmember, set reporting timelines to Council for the appointee.

### **RECOMMENDATION**

There are ethical and fiduciary concerns with requiring an organization receiving City funds to allow the City to appoint a member to the organization's board. These concerns can be addressed but would either require the City to appoint a non-City official or employee or require the receiving organization to amend its bylaws to eliminate the ethical concerns. This can be accomplished but will place an additional burden on the organizations receiving funding.

cc: Emily Smart Woerner, City Solicitor  
Ann Schooley, Senior Assistant City Solicitor