

Meyers, Robert (COE)

INQ 08-147

From: Meyers, Robert (COE)
Sent: Tuesday, September 02, 2008 4:51 PM
To: Meyers, Robert (COE)
Subject: Inquiry

Richard Weiss, Bal Harbour Village Attorney, called me in August 2008 (I can't recall the exact date), but it was prior to our Ethics Commission meeting of August 28th and he asked whether any provisions of the county ethics code would prohibit the Bal Harbour Police Department from entering into a lease agreement with the Bal Harbour Shops (BHS). The Police Department currently has a license agreement with BHS to occupy space at the mall for its VIN Unit. The Police Department is in need of additional space and BHS is willing to donate to the Village approximately 2,300 square feet for use by the Police Department. Mr. Weiss explained that the space would be used in part to store the department's communications equipment – the space in the mall will not be on the ground floor and it addresses the concerns the department has if the police department in its current location is flooded. Another important disclosure is that Randy Whitman is the Managing Owner and Partner of the Bal Harbour Shops and sits on Bal Harbour's Resort Tax Committee.

There are several questions to consider and I conferred with Victoria Frigo and Chairman Rosenthal before communicating with Mr. Weiss. The opinion which I provided Mr. Weiss was a verbal one.

One question to address was whether the gift rules restricted the Village from accepting a gift from BHS. As I explained to Mr. Weiss, the applicable gift rules in effect apply to individuals and do not have any relevance in this case. Assuming the free rental space is considered a gift, it is a gift to a governmental entity. As such, no individual has an obligation to report a gift that does not directly benefit him or her. Generally gifts to governments can be accepted as long as a valid public purpose can be demonstrated. Having greater police presence at the commercial hub of Bal Harbour and protecting police department equipment from possible damages are valid public purposes. It is illogical to claim that Mr. Whitman would have a gift to declare, as he is the donor of the gift to the Village. Furthermore, he is willing to enter into a lease with the Village for seven years at no charge to the Village. One could assume that such space has significant value to it and BHS could probably find other tenants who would be willing to pay for said space. There is no doubt that BHS enjoys some benefit by having the Police Department located there, but it is more of a general benefit to the public at large than any special benefit to Mr. Whitman.

Rather than restricting this analysis to gift law, the other dimension to consider was whether the Village may enter into a contract with a Village official; namely, Mr. Whitman who sits on the Resort Tax Committee and is the Managing Owner and Partner of BHS. Under the county's ethics code, advisory personnel who hold a controlling financial interest in a firm, corporation or other business organization are not permitted to contract with any agency or department in their municipality subject to the regulation, oversight, management, policy-setting or quasi-judicial authority of the board of which the person is a member. A lease between the parties clearly meets the definition of transacting business with government and I am assuming for purposes of this analysis that Mr. Whitman holds a controlling financial interest (defined in the code as 10% or more) in BHS. Lastly, I conclude that the Resort Tax Committee's recommendations concerning the spending of tax dollars does affect BHS. Therefore, BHS would be prohibited from transacting business with the Village due to Mr. Whitman's position with the municipality unless the Village Council takes action consistent with Section 2-11.1(c)(6) of the Miami-Dade County Code. This section enables the governing body by a 2/3 vote to waive the conflict. The Ethics Commission takes no position with respect to the granting of the waiver.

I have also including one opinion from the Florida Commission on Ethics and a one of our previous opinions (RQO 05-119) for the file.

Robert Meyers

9/2/2008

CEO 85-69 -- October 3, 1985

CONFLICT OF INTEREST

COUNTY FIRE/RESCUE SERVICE USING CAR WASHING FACILITY OF CAR RENTAL FIRM

To: *Mr. Richard A. Graddock, Assistant County Attorney, Palm Beach County*

SUMMARY:

No prohibited conflict of interest would be created under the Code of Ethics were a county fire/rescue department to accept an offer of free use of a car rental firm's car washing facility, where the department inspects the firm for fire code enforcement. CEO's 83-51 and 83-79 are referenced.

QUESTION:

Would a prohibited conflict of interest be created were a county fire/rescue department to accept an offer of free use of a car rental firm's car washing facility, where the department inspects the firm for fire code enforcement?

Your question is answered in the negative.

In your letter of inquiry you advise that the Palm Beach County Fire/Rescue Department serves the unincorporated area of the County as well as thirteen municipalities within the County which receive service pursuant to contracts and interlocal agreements. You also advise that a national car rental firm which has facilities at the local airport has offered to the County, and in particular the Fire/Rescue Department, free use of its car washing facility when not being used by the car rental firm. The service is being offered to the County and not to any individuals for use of their personal automobiles. Finally, you advise that the car rental firm is subject to routine governmental inspections, which include fire code enforcement by the Fire/Rescue Department.

In CEO 83-51 we advised that the Code of Ethics for Public Officers and Employees prohibits certain conflicts of interest on the part of individual public officers and employees, but would not prohibit a governmental agency from contracting with another agency to exchange or provide services. To similar effect is CEO 83-79, in which we advised that the Code of Ethics would permit a city police chief to solicit donations of funds for the police department to establish a mounted police patrol. As the use of the car washing facility would benefit the County and not any individual officer or employee of the County, we conclude that the rationale of these opinions applies equally to the situation you have described.

Accordingly, we find that no prohibited conflict of interest would be created under the Code of Ethics were the County Fire/Rescue Department to accept the car rental firm's offer of free use of its car washing facility for Department vehicles.

November 16, 2005

Luis Figueredo, Village Attorney
Village of Palmetto Bay
18001 Old Cutler Road, Suite 556
Miami, FL 33157

Via First Class Mail and e-mail at eboutsis@ngf-law.com

RE: REQUEST FOR ADVISORY OPINION
Voting Conflicts of Interest
RQO 05-119

Dear Mr. Figueredo:

On November 15, 2005, the Commission on Ethics & Public Trust considered your request and rendered its opinion at a public meeting, based on facts stated in your letter of September 30, 2005.

You requested an opinion regarding any ethical constraints that might prohibit the Village of Palmetto Bay from entering into a real estate contract with a corporation that is likely to be asking the Village to change its future land-use map and/or applying for zoning variances.

THE APPLICABLE SECTION of the Conflict of Interest and Code of Ethics Ordinance is Section 2-11.1 (e)(3), ***Gift exemptions***, which prohibits anyone to influence government officials with gifts and for government officials to solicit gifts because of—

- (a) an official public action taken or to be taken, or which could be taken;
- (b) a legal duty performed or to be performed, or which could be performed; or
- (c) a legal duty violated or to be violated, or which could be violated by [elected officials].

THE FACTS as presented by you state that the newly incorporated Village of Palmetto Bay is interested in purchasing a Village Hall and Village Chambers. A property identified as Building "C," located on a portion of the former Burger King World Headquarters, is particularly well suited to the needs of the Village and is also the most affordable.

The former Burger King World Headquarters, now known as the Palmetto Bay Village Center (PBVC), is owned by a corporation represented by Scott Silver. Mr. Silver sought to sell Building "C" to the Village previously, under certain conditions, and has lobbied the Village Council on several occasions to modify the mixed-use designation of the former Burger King property. The Village's newly approved comprehensive plan includes one, but not all, of the modifications Mr. Silver had been seeking.

Mr. Silver is now offering Building "C" to the Village at a cost of \$3 to \$9 million less than other comparable properties. The current offer does not include any conditions. However, Mr. Silver is very likely to be coming before the Village Council in the near future on several matters, including the same future land-use requests he has raised in the past.

You state that each Village Council member has indicated that s/he could vote fairly and without bias on applications presented by Mr. Silver, irrespective of any real estate transactions the Village might enter into with him. Additionally, other safeguards are in place to ensure fairness. First, deed restrictions require that 75% of the neighbors approve future land-use changes to the PBVC. And subsequent requests for zoning changes would trigger a number of procedural steps, including public hearings.

OUR ANALYSIS under the Section 2-11.1 (e)(3) finds that gifts to the Village for a public purpose are not prohibited, as long as no *quid pro quo* activity takes place or is anticipated in the transaction.

IN CONCLUSION, as long as no *quid pro quo* activity has occurred or is planned and all future exchanges take place at arm's length, no voting conflict of interest exists under the circumstances described by you regarding the purchase of Building "C" by the Village of Palmetto Bay.

This opinion construes the Miami-Dade Conflict of Interest and Code of Ethics Ordinance only and is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

If you wish to discuss this opinion in greater detail, please call me at (305) 579-2594 or Victoria Frigo at (305) 350-0601.

Sincerely yours,

ROBERT MEYERS
Executive Director

Copy: Eve Boutsis, Esq.