

Sanchez, Rodzandra (COE)

From: Turay, Radia (COE)
Sent: Friday, July 13, 2018 2:36 PM
To: Diaz-Greco, Gilma M. (COE)
Cc: Perez, Martha D. (COE); Sanchez, Rodzandra (COE)
Subject: FW: INQ 18-169, Brian Borenstein, Compliance Officer 1, Building/Zoning Code Enforcement Division, RER (outside employment)
Attachments: AO7-2.pdf

From: Turay, Radia (COE)
Sent: Friday, July 13, 2018 2:33 PM
To: Borenstein, Brian (RER) <Brian.Borenstein@miamidade.gov>; Rivera, Ed (RER) <Edwin.Rivera@miamidade.gov>
Cc: Centorino, Joseph (COE) <Joseph.Centorino@miamidade.gov>; Smith, Terrence (CAO) <Terrence.Smith@miamidade.gov>; Rosenthal, Oren (CAO) <Oren.Rosenthal@miamidade.gov>
Subject: INQ 18-169, Brian Borenstein, Compliance Officer 1, Building/Zoning Code Enforcement Division, RER (outside employment)

Dear Mr. Borenstein,

You have inquired whether a conflict of interest exists where you, a County employee, were to become a board member of your neighborhood community development district, Hemingway Point Community Development District.

Background

You are a Compliance Officer 1, in the Building/Zoning Code Enforcement Division of the Miami Dade Department of Regulatory & Economic Resources (RER). Your current job responsibilities include performing field inspections; interpreting technical legal provisions and administrative directives pertaining to code enforcement; and preparing criminal case documents and case summaries for civil actions.

You are seeking to become a board member of the Hemingway Point Community Development District (HPCDD). CDDs are independent special districts-not subject to the County Ethics Code. See INQ 11-58. They are created under Fla. Stat. 190.011, which conveys many powers to the CDDs that indicate their independence from the County, e.g., CDDs can sue and be sued, acquire property, borrow money, issue bonds, and impose district ad valorem taxes. See INQ 11-58.

We have spoken to Ms. Jennifer McConell, who works for the company that manages the HPCDD, Governmental Management Services. We have also spoken to Mr. Michael J. Pawelczyk, Esq., who serves as the HPCDD's attorney. It is our understanding from our discussions with both these individuals that there are a total of five seats on the HPCDD board. As the HPCDD has been in existence for over 6 years and has over 250,000 residents, the seats on the board will be filled through a rotating general elections calendar. 2 seats were up to be filled through general election this year, 2018; 2 other seats face general election in 2020, and 1 seat would be filled through general election in 2022.

For the two seats that were to be placed on the November 2018 general election ballot, candidates were to submit their qualification paperwork to Miami-Dade County Elections Department by June 22. As the deadline is over, and no one qualified, individuals can submit their names and information to the current HPCDD board. The current HPCDD can then appoint an individual of their choosing to fill the open seats on the board.

Board members are paid \$250 per month for their service on the HPCDD board.

Analysis

There is a threshold question regarding whether you, a County employee, can become a candidate or board member of a CDD. Pursuant to Section 1.05 of the Miami-Dade County Home Rule Amendment and Charter, a County employee who qualifies as a candidate for election to any federal, state, or municipal office, must immediately take a leave of absence from his or her County position. If elected, the employee forfeits his or her County position. If not elected, the employee is eligible for immediate reinstatement of his or her former position. As it is not sufficiently clear whether becoming a board member of your neighborhood CDD will cause you to forfeit your County position, we strongly suggest that, prior to going forward as a candidate or member of the CDD, you discuss this matter with your Department supervisor, the County Attorney's Office, or the Mayor's Office. See also AO 7-2 attached.

Please note also that, CDDs are independent special districts, created under State law. Other provisions in State law not discussed in this opinion may apply to its board members. For additional information on State law, you may contact the Florida Ethics Commission at www.ethics.state.fl.us.

As to the secondary issue, whether a conflict of interest exists under the County Ethics Code where you, a County employee, were to become a board member of HPCDD, section 2-11 of the Miami-Dade County Code requires that a full-time County employee must obtain approval in writing from his/her department head before engaging in outside employment. In previous opinions, the Ethics Commission has generally defined outside employment as a non-County employment or business relationship in which the County employee provides services to the non-County employer that is compensated or customarily compensated. See RQO 15-01 and RQO 17-01.

The COE "Outside Employment Guidelines" memorandum (November 2017) provides examples of the types of activities that the Ethics Commission has generally found to constitute outside employment. The guidelines specifically state that, "compensated employment with any person, firm, corporation or entity (including a non-profit entity) is considered outside employment. (RQO 08-36, RQO 07-24, RQO 98-17 and INQ12-131, INQ 11-161)"

Based on the information that you have provided to us at this time, it appears that you are seeking to engage in outside employment requiring the completion of the outside employment paperwork on a yearly basis, as you will be compensated for your service as a member of the HPCDD board.

Please note that the County Ethics Code at Section 2-11.1(j), prohibits a County employee from accepting outside employment that would impair his or her independence of judgment in the performance of his or her public duties. The intent of this ordinance is reflected in the County's Administrative Order No. 7-1, which states, in part, that, "[i]t is essential... that public employees avoid any and all situations that represent, or appear to represent, conflicts between their personal interests and their public duties.... Under no circumstance shall a County employee accept outside employment or render other than official services to a private interest ...where a real or apparent conflict of interest with one's official or public duties is possible." Consequently, AO 7-1 gives a County Department Director the discretion to deny outside employment if he or she finds that it is contrary to the interests of the County.

We have discussed this matter with Mr. Edwin Rivera, Neighborhood Compliance Supervisor, RER, who indicated that code enforcement officers, such as yourself, are generally not assigned to work the area where they live. Therefore, in this case, as you live in Hemingway Point, you would not be assigned to work, nor should you supervise anyone that works, in the area covered by the HPCDD.

While it does not appear likely that your proposed outside employment would impair your independence of judgment in the performance of your public duties, you should be attentive to a possible conflict in the event that a matter with which you are involved in your County position may have a special impact on the CDD or its members.

Additionally, the following limitations under the Miami-Dade County Code at Section 2-11.1 will also apply:

- You shall not engage in activities that relate in any way to your outside employment during regular business hours, including phone calls, or any other communication and/or use of County resources including but not limited to phones, copiers, computers, fax machines, County vehicles, in connection with your outside employment, even after work. See § 2-11.1 (j) and (g), County Ethics Code; AO 5-5, AO 7-1; INQ 05-29, and INQ 15-240.
- You shall not lobby the County on behalf of HPCDD; nor may you appear before any County Board or agency and make a presentation on behalf of HPCDD with respect to any contract, certificate, ruling, decision, opinion, application for grant funding or other benefit sought by HPCDD. See §2-11.1(s); §2-11.1(m)(1), County Ethics Code. Please note, that this prohibition has been interpreted very broadly by the Ethics Commission as it relates to current county or municipal officers and employees. In RQO 12-10, the Ethics Commission stated that “individuals serving in County positions may *not engage in any discussions whatsoever* with officials, directors or staff of County government on behalf of third parties.” See RQO 12-10. Further, various opinions from the Ethics Commission have stated, that a County employee may not engage in any interaction with County staff on behalf of third parties, even if the interaction is for a perfunctory meeting involving ministerial/clerical issues, or information requests. See RQO 12-10; INQ 15-240. Therefore, in order to avoid the prohibition against appearances and presentation, you may not participate in *any face-to-face meeting, or any discussion whatsoever* with County staff regarding HPCDD See RQO 04-168; RQO 08-29; RQO 08-45; RQO 12-10.
- You are prohibited from using any confidential information acquired as a result of your County employment to derive a personal benefit. See Miami-Dade Code § 2-11.1(h).
- You may not exploit your County position to secure special privileges or exemptions for yourself or HPCDD. See §2-11.1(g).

We also recommend that, in order to avoid the appearance of impropriety, you refrain from any involvement regarding your office/department and HPCDD. Although you may not appear before any County board or agency to seek any benefit on behalf of HPCDD, *it is also advisable*, in your role as board member of HPCDD, to recuse yourself from voting or participating in discussions and/or votes relating to County applications for funding, contracts, or any other HPCDD initiatives involving the County.

This opinion is based on the facts presented and is limited to an interpretation of the County Ethics Code. It does not address other state and/or local laws or policies that may be applicable.

Please contact me if you have any further questions.

Sincerely,

RADIA TURAY

Staff Attorney
Miami-Dade Commission on Ethics and Public Trust
19 W. Flagler Street, Suite 820
Miami, FL 33130
Tel: (305) 350-0601
Fax: (305) 579-0273
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From: Borenstein, Brian (RER)
Sent: Tuesday, July 10, 2018 7:06 AM
To: Turay, Radia (COE) <Radia.Turay@miamidade.gov>
Subject: RE: Opinion Assignment

Here you go =)

From: Turay, Radia (COE)
Sent: Monday, July 09, 2018 5:04 PM
To: Borenstein, Brian (RER) <Brian.Borenstein@miamidade.gov>
Subject: RE: Opinion Assignment

Please send me a copy of your outside employment request form when you get a chance.

From: Turay, Radia (COE)
Sent: Monday, July 09, 2018 4:06 PM
To: Borenstein, Brian (RER) <Brian.Borenstein@miamidade.gov>
Subject: RE: Opinion Assignment

It appears from the thread from your last email that it this is a paid position. You would probably need to fill out the outside employment request form if it is indeed a paid position. Please provide the name of your supervisor at RER as we will need to run this by them.

Thank.

From: Borenstein, Brian (RER)
Sent: Monday, July 09, 2018 12:03 PM
To: Turay, Radia (COE) <Radia.Turay@miamidade.gov>
Subject: RE: Opinion Assignment

Yea that was funny! I am hoping on being appointed to the CDD for my neighborhood, Hemingway Point in Homestead

From: Turay, Radia (COE)
Sent: Monday, July 09, 2018 11:57 AM
To: Borenstein, Brian (RER) <Brian.Borenstein@miamidade.gov>
Subject: RE: Opinion Assignment

Ha, seems like we were emailing each other at the same time. Please let me know which one of the CDD's you are hoping to be appointed to.

Thanks,
Radia.

From: Borenstein, Brian (RER)
Sent: Monday, July 09, 2018 11:54 AM
To: Turay, Radia (COE) <Radia.Turay@miamidade.gov>
Subject: Opinion Assignment

Good Morning Ms. Turay,

I was told that my submitted request was assigned to you and just wanted to touch base with you to see if you had any questions or needed an clarification on anything.

Please feel free to call me @ 305-215-6754 anytime.

Thanks in Advance,

Brian Borenstein

RER Compliance Officer

Miami Dade County - Department of Regulatory and Economic Resources

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