

Sanchez, Rodzandra (COE)

From: Diaz-Greco, Gilma M. (COE)
Sent: Tuesday, February 12, 2019 10:29 AM
To: n@normanpowell.com; info@normanpowell.com
Cc: Arrojo, Jose (COE); Sanchez, Rodzandra (COE)
Subject: INQ 19-13, Norman C. Powell, City Attorney , Village of El Portal (Elected Official Reimbursement of Legal Fees, 2-1.1(d))
Attachments: INQ 19-13 Powell.pdf

Dear Mr. Powell:

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance. Attached is INQ 19-13 addressing your question. Please do not hesitate to contact us if you have any questions or if we may be of further assistance.

Cordially,

Gilma (Mimi) Diaz-Greco
Staff Attorney
On behalf of

Jose J. Arrojo
Executive Director



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MEMORANDUM

TO: Norman C. Powell, Esq.
Village Attorney, North Bay Village & El Portal

FROM: Jose Arrojo, Executive Director
Commission on Ethics

SUBJECT: INQ 19-13, Elected Official Reimbursement of Legal Fees
Section 2-11.1(d), County Ethics Code

DATE: February 11, 2019

CC: All COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding the following proposed transaction.

Facts: An ethics complaint was filed against an elected official. At that time, the elected official asked the municipality to assist in the selection and retainer of counsel to represent her. The Village Attorney considered the transaction that gave rise to the complaint and determined that it arose out of official duties. He then recommended an attorney to represent the official and negotiated an hourly fee. The Village Attorney and the Village Manager consulted on the recommendation and fee and there was concurrence. The ethics complaint was successfully defended. The elected official has requested reimbursement of attorney's fees incurred in the defense of the matter. Non-elected Village officials have the authority to approve a fee reimbursement if it is a lesser amount and within the spending authority afforded them, alternatively, greater amounts require action of the elected body.

Issue: May the official request that non-elected municipal staff reimburse the attorney that represented her in the ethics matter after it has been resolved in her favor? Additionally, if the amount of reimbursement exceeds the spending authority afforded to employees and requires instead a vote of the elected body, may the elected official participate in and vote on the matter?

Discussion: Section 112.313(5), Florida Statutes allows an elected official to vote on a matter affecting his or her salary, expenses, or other compensation as a public officer, as provided by law.

The State of Florida Ethics Commission issued opinion CEO 88-46 which interpreted that section to permit an elected official to vote on the reimbursement of legal fees incurred in the successful defense of an ethics complaint official arising from performance of official duties.

While the Florida statute permits an elected official to vote on matters affecting salary, expenses or other compensation, as provided by law, it does not impose a duty upon the public official to participate and vote on a matter which may constitute a voting conflict under a County ordinance which prohibits an elected official from voting in instances where he or she "would or might, directly or indirectly, profit or be enhanced by the action of the [board]."

Section 2-11.1 (d), of the Miami-Dade Conflict of Interest and Code of Ethics Ordinance (Ethics Code) prohibits an elected official from voting or participating in any way on a matter if he or she would or might, directly or indirectly, profit or be enhanced by the action of the elected body and requires the elected official to absent himself or herself from the meeting during the discussion of item.

In interpreting the Ethics Code, the Miami-Dade Commission on Ethics has distinguished between an official voting to *obtain* up-front legal fees to defend an action as opposed to voting to be *reimbursed* for defending an action that has been concluded and resolved in the official's favor.

We have opined that Section 2-11.1 (d) relating to voting conflicts for elected officials would preclude the official from voting to secure up-front for fees because he or she would personally gain from the agenda item or "would be affected in a manner distinct from the manner in which it would affect the public generally" inasmuch as the elected official would benefit from up-front fees irrespective of the ultimate outcome of the case. (*See* INQ 06-111)

Conversely, relying on the persuasive logic relied upon by the State in CEO 88-46, if the elected body had determined that the official has acted in his or her official capacity and the attorney's fee bill is submitted to be paid in full after successful defense without negotiation between the official and the city, then the official could vote on the item. However, if there is any discretion that rests with the board in terms of paying a portion of the bill or the total bill, then the official should not participate or vote.

The same analysis regarding a Section 2-11.1(d) voting conflict would apply if instead of voting on the matter, the elected official could instead request reimbursement of fees incurred in successful defense of an ethics complaint from a non-elected employee with sufficient spending authority

Conclusion: The elected official may request reimbursement from a municipal official for fees incurred in the successful defense of an ethics complaint and may vote on the matter if it requires action by the elected body, if in either instance there is no debate regarding the amount at issue or negotiation over payment of a portion as opposed to the total bill.

This opinion is limited to the facts as you presented them to the Commission on Ethics and is limited to an interpretation of the County Ethics Code only and is not intended to interpret state laws. Questions regarding state ethics laws should be addressed to the Florida Commission on Ethics.

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Ethics Commission or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.