



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Eugene Shy
Assistant County Attorney, JHS/PHT

FROM: Martha D. Perez
Staff Attorney

SUBJECT: INQ 20-01, Conflict of Interest, Jackson Health Systems Pension Plan Sub-Committee (Conflict of Interest) Section 25A Miami-Dade County Code, Public Health Trust Bylaws, Sections 2-11.1 (j), (v), Miami-Dade County Conflict of Interest and Code of Ethics Ordinance

DATE: January 6, 2020

CC: COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding conflict of interest provisions affecting a prospective board member of the PHT Pension Plan Sub-Committee (PPSC).

Background

Ms. Mojdeh Khaghan was the Vice-Chair of the Public Health Trust Board (PHT) until the expiration of her term in May 2019. Shortly thereafter, she was appointed to the Board of Directors of Nicklaus Children's Hospital Foundation (Foundation). The Foundation, a 501(c)(3) organization, is charged with generating funds for the operation of Nicklaus Children's Hospital (NCH) and support of its programs. It is undisputed that NCH is a competitor to Miami Children's Hospital and Jackson's Holtz Children's Hospital – facilities affiliated with and/or managed by the PHT.

The PHT Board is considering appointing Ms. Khaghan to serve as a Member at Large of the PPSC, a sub-committee of the PHT Fiscal Committee, created under Article VI, Section 2 of the PHT Bylaws.¹

¹ The PHT Fiscal Committee, in part, assists the Treasurer in performing the duties of the office; advises the PHT regarding compliance with its financial duties; prepares annual (and supplemental) PHT budget requests and financial reports; and, makes recommendations on financial objectives and other issues impacting the financial state of JHS-PHT.

The enabling document that creates the PPSC is the Public Health Trust Investment Policy Statement for the Defined Benefit Retirement Plan.² The sub-committee is comprised of PHT Board members, the CEO/President of JHS, a union representative and community members (such as Ms. Khaghan), appointed by the PHT Board via Resolution (approving committee and sub-committee assignments). The PPSC is advisory to the PHT Board of Trustees and all its actions and recommendations are submitted to the PHT Board of Trustees for ultimate approval.³

Ms. Khaghan has expressed her willingness to resign from the Foundation upon her appointment to the Committee.

Discussion

Members of the PHT Board of Trustees are covered by the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance (Ethics Code). *See* Section 25A-9, MDC Code and Art. III Section 2 of the Bylaws of PHT. While the Ethics Code is intended to address those instances where a board member may be perceived as having conflicting loyalties that may interfere with his or her independence of judgment in making decisions or recommendations connected to his or her official duties, the PHT Bylaws provide for a stricter conflict of interest standard which applies to all current and prospective PHT Board members, to wit, a heightened conflict of interest standard.

The heightened conflict of interest found in Article III Section 3 of the PHT Bylaws states, in pertinent part, that, “[b]oard members shall have no conflicts of interest for one year before [service] or after serving, personally or as stakeholders, in the outcome of their decisions.” An example of an instance where a perceived conflict of interest may arise is where a PHT Board nominee holds or has held a position with a PHT competitor as an employee, officer, owner, partner of board member. *See* County Attorney’s Memorandum for County Resolution R 392-11. Additionally, the Ethics Commission has opined that a “perceived conflict of interest is created when a reasonable person could believe that a board member acted with disloyalty or divided loyalties, whether an actual conflict exists.” *See* Section 2-11.1(j), County Ethics Code; RQO 12-01

The heightened conflict of interest standard emphasizes the absence of actual and perceived conflicts of interest *in the governing body* (emphasis added); hence, the nomination and appointment of members of the governing board must be scrutinized to avoid perceived conflicting loyalties affecting their service, such that, a *PHT Board nominee/appointee/ member* must be void of any potential conflict of interest, for example, any affiliation with a competitor, for one year before nomination/appointment and one year after service (if the County is considering re-appointment of the member *to the PHT Board*).

² Resolution No. PHT 05/2018- 029

³ The PPSC is charged with the responsibility for the investment of the assets of the Plan.

Whereas our ethics opinions have properly analyzed the heightened conflict of interest standard as it applies to Trustee appointments to the governing body of the PHT,⁴ the issue presented herein is whether the heightened conflict of interest standard in Article III Section 3 of the PHT Bylaws may be applied to the prospective appointment of a former PHT member to a PHT sub-committee. Our analysis suggests that it does not.

The PHT Board is charged with the operation, governance and maintenance of JHS facilities. In carrying out its function, Section 25A-3 of the Code provides for the establishment of various committees and sub-committees to assist the Board. Some committees are created by ordinance (i.e., JHS General Obligation Bond Citizen's Advisory Committee) and some are established by the Board's Bylaws or Resolutions. These committees are *generally* formed to monitor PHT programs, review and advise the PHT Board on matters pertinent to the operation and management of JHS. Their authority is purely advisory.

Sub-committee members who are not otherwise PHT Board of Trustees nominees, appointees or current members are, at a glance, not subject to the heightened conflict of interest standard found in Article III, Section 3 of the PHT Bylaws. They do not exercise governing body authority for the PHT. They are however, subject to the County Ethics Code. *See* Section 2-11.1(b). To that end, this office has issued guidance in connection to service as a voting member of a PHT advisory committee. *See* INQ 15-283; INQ 19-35

While the entire County Ethics Code applies to PHT board members, the following sections are implicated in most situations involving service in an advisory board or committee:

In so far as the Foundation may be competing with the JHS Pension Plan in some manner, Section 2-11.1(j) of the Ethics Code may be implicated. This provision prohibits a board member from any service which would impair his or her independence of judgment in the performance of the member's public duties. Ms. Khaghan's prior service as a member of the Foundation and her prospective service as a member of the PPSC yield no potential conflict of interest issues.

Section 2-11.1(v) of the County Ethics Code prohibits a board member from voting on a matter if the member will be directly affected by the board action and if the member has a prohibited relationship⁵ with a person or entity appearing before his or her board/ committee. As a PPSC member, Ms. Khaghan would be participating and voting on recommendations related to the JHS pension plan. It is also noted that she will no longer be serving the Foundation. Therefore, at a glance, it does not appear that she would have any recurring conflicts preventing her service in the sub-committee. If circumstances arise on a specific voting issue, she should seek an ethics opinion from this agency.

⁴ The standard extends to the service of PHT Board members. *See* Memo from COE to Financial Recovery Board Members, 5/18/2011

⁵ Prohibited relationships include: officer, director, partner, of counsel, consultant, employee, fiduciary, beneficiary, stockholder, bondholder, debtor or creditor.

Section 2-11.1(n) of the County Ethics Code prohibits a board member from participating in any official action, directly or indirectly, affecting a business where the board member has a direct or indirect financial interest. No information has been provided to this office to suggest that Ms. Khaghan has a financial interest on any matter coming before the PPSC for consideration and vote.

Consequently, while conflict of interest standards and appearance of impropriety considerations are essential to the review process of any prospective appointment to a PHT committee or sub-committee, the heightened conflict of interest contained in the PHT Bylaws and designed to address actual and perceived conflicts of interests in the appointment or service of Trustees to the PHT Board, does not apply to situations where a former PHT board member is seeking appointment as a Member at Large to a PHT sub-committee which serves in an advisory capacity and does not assume any of the powers and duties exercised by the PHT governing board.

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.