



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Thomas Pepe, Counsel, South Miami CRA

FROM: Martha D. Perez, COE, General Counsel

SUBJECT: INQ 20-34

DATE: April 7, 2020

CC: COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding the applicability of the County and/or City of South Miami Ethics Code to the Executive Director (ED) of the South Miami Community Redevelopment Agency (SMCRA).

Background

The SMCRA is a dependent special district created by the City of South Miami to improve documented slum and blighted conditions in the city. It was established in 1998 through the approval of the SMCRA's Plan pursuant to Resolution No. R-99-100.

Generally, a CRA will appoint city employees to serve as CRA staff. In this instance, pursuant to Resolution CRA 04-18-1045, the SMCRA employed an independent provider to be the Executive Director (ED) of the SMCRA. ¹ The ED is charged with the overall operational objectives of the SMCRA, including: personnel management; preparation of annual budget; execution of contracts on behalf of and as authorized by the SMCRA; submittal of monthly "budget to actual" reports to the SMCRA and the city commission; and, submittal of an annual financial report. ²

¹ See also Section 163.356(3)(c), Fla. Stats., providing for the appointment of an executive director to CRAs.

² See Employment Agreement between SMCRA and Evan Fancher and Reso. No. Unlknown, 12/10/2018, regarding amended ED's duties.

The SMCRA is due to expire on May 31, 2020. ³ You inquire on behalf of the ED whether Section 2-11.1(q) of the County Ethics Code [and its municipal counterpart, Section 8A-1(p)], commonly referred to as the Two-Year Rule, applies to the ED.

Issue

Whether the post-employment restriction found in Section 2-11.1(q) of the County Ethics Code, and/or Section 8A-1 (p) of the South Miami Ethics Code, applies to the Executive Director (ED) of the South Miami Community Redevelopment Agency (SMCRA) who was hired by the SMCRA pursuant to an employment agreement.

Discussion

The SMCRA, a dependent taxing district, was created by the City of South Miami through the enactment of Ordinance No. 12-97-1633. ⁴ Generally, CRAs are considered independent agencies that function outside of the local ethics codes (RQO 09-158) unless their members, staff or both are subject to the applicability of the County Ethics Code through ordinance, resolution, bylaws, policies or agreements. ⁵

The SMCRA is considered by the City to be a City agency/board, whose *members* are bound by applicable provisions of the County/City Ethics Codes affecting autonomous personnel. *See* INQs 13-90, 13-102 and 14-107 ⁶

Whether the agency's ED, an independent provider hired by the SMCRA, is also bound by the Ethics Code depends on whether he is deemed a city employee or he is under the Ethics Commission's jurisdiction pursuant to an ordinance, resolution, policy, bylaw or agreement. Although the South Miami Code includes SMCRA employees in Chapter

³ *See* CRA Resolution Unknown No., approving severance payments to the ED as per the Agreement.

⁴ The powers of the SMCRA are delegated by the BCC to the City of South Miami Commission in accordance with Chapter 163, Fla. Stat.

⁵ For example, The Children's Trust, an agency established pursuant to Florida statute and Home Rule Charter, has a Conflict of Interest and Code of Ethics Policy which entrusts the COE with jurisdiction over its board members, *employees*, committees, lobbyists, contractors, grantees and other persons doing business with or acting on behalf of the Trust. *See* RQO 19-06 Similarly, this office has opined that the County Ethics Code does not apply to UM medical doctors working for Miami-Dade County's Public Health Trust (PHT) *except* in circumstances prescribed by their agreement or the PHT Conflict of Interest Policy. *See* RQO 06-46

⁶ Section 8A-1 (2), SM Ethics Code: The term "autonomous personnel" shall refer to members of autonomous agencies, boards, and authorities, such as *the community redevelopment agency*, the police officers' retirement funds, the pension plan and the health facilities authority.

19⁷ and Chapter 16,⁸ its express inclusion in these two code sections would arguably suggest its exclusion in all other sections of the Code affecting city employees.

While this office is not the appropriate entity to determine the worker classification of CRA staff,⁹ our analysis is strictly confined to applicability of the Ethics Code's Two-Year Rule and not to other determinations of employee classification pertaining to CRA staff. Accordingly, if the ED is considered an employee of the City, then he would be bound by the Two-Year Rule. If, however, he is considered to be an independent party hired by the SMCRA board and not required to abide by the Two-Year Rule pursuant to the bylaws or the terms of his agreement, then he would not be prohibited from lobbying city officials upon ceasing CRA employment.

One way other jurisdictions have clarified the status of CRA staff is in a CRA resolution, its bylaws or employment agreements. By way of example, West Palm Beach CRA Resolution 20-15, specifies that its Executive Director is a city employee: "The CRA wishes to do a search and hire an individual *to be an employee of the City* who shall be hired and serve as Executive Director of the CRA at the pleasure of the CRA..." Unfortunately, neither the SMCRA's Bylaws nor the ED's Agreement provide clarity on the ED's worker classification.

You have indicated in your request that the ED is employed through an employment agreement negotiated with the CRA; he answers only to the CRA board; the CRA sets his salary and benefits (which are accounted for in the CRA budget, not the City's); and, he is administratively paid by the City.

This office makes the following additional observations which suggest the ED is not considered a city employee for purposes of the Two-Year Rule:

1) The Agreement between the SMCRA and the ED: The ED is an Independent Director employed by the CRA board, not the City; his appointment is subject to the SMCRA board approval, not the City;¹⁰ he must comply with all SMCRA policies, rules and ordinances (s.2); his compensation derives from SMCRA budget; but is set by the SMCRA board, payable at the same time that the City employees are paid; and, any salary adjustments will be the same as applied to City department directors. (s.3); he may be terminated by the SMCRA Board; he shall not endorse candidates, sign or circulate

⁷ For purposes of domestic partnerships, Chapter 19 of the Code, a city employee means any employee of the City, *including employees of the SMCRA*.

⁸ Section 16-12 of the City Code, City Pension Plan, includes the CRA director as one of the members of the City's administration management service class.

⁹ Whether the CRA's executive director (or other staff member) is considered a city employee or independent contractor/provider is a determination to be made by the SMCRA board and the City, entities which are familiar with the ordinances, resolutions, policies, and procedures of their respective entities.

petitions, or financially participate in fund-raising activities for individuals seeking or holding elected office in the city, nor seek or accept any personal enrichment or profit derived from confidential information or misuse of public time. (s. 14); and, he is permitted to hold outside employment provided it does not “constitute interference with nor a conflict of interest with his or her responsibilities under this Agreement.” (s. 15)

2) The SMCRA Budget Report FY 2019-2020 provides that CRA staff will be encouraged to seek other (employment) opportunities within the City or outside the City. (p.14-Administration)¹¹

3) City Administration has no supervisory jurisdiction over the ED; in fact, according to City Administration, the ED is not classified as a city employee (although CRA employees generally comply with the City’s Personnel Manual).

4) At the January 3, 2019 SMCRA Meeting, you (as CRA counsel) stated that you did not think the Personnel Rules applied to CRA employees while asserting that the CRA is an *independent body- independent of the City*, which can hire and fire anybody it wanted to. *With regard to the ED, you advised the CRA members that the ED reported to the CRA board and was governed by the contract.* (In contrast, the ED stated at the meeting that he operated with the City’s Personnel Manual and directed CRA).

5) Moreover, while the Agreement between the SMCRA and the ED implicitly requires adherence to applicable state and local ethics codes such that, a violation would constitute *grounds for termination*.¹²

The County’s Two-Year Rule prohibits the County’s (City’s) elected officials and their staff, department personnel and *its employees*, from lobbying any officer, departmental personnel or employee for two years after his or her County [City] service or employment, on any matter in connection with a judicial or other proceeding, application, RFP, RFQ, bid, request for ruling, or other determination, contract, claim controversy, charge, accusation, arrest or other matter in which the County [City] has an interest. Section 2-11.1(q), County Ethics Code; *See* RQO 99-41 (concluding that Section 2-11.1(q) applied to former municipal employees but it only restricts their lobbying activity in regard to the municipal government *that employs them*).

Consequently, in order to be bound by the Two-Year Rule restrictions, the ED must be considered to be an employee of the City. In the absence of clear designation, we are bound by the County Ethics Code’s definition of “employee,” to wit, “ all other personnel employed *by the city*.” Section 2-11.1(b)(6), County Ethics Code.¹³ An

¹¹ Generally, a CRA staff member working who is also a city employee would be automatically reassigned to another city position.

¹² Section 9 (C)-Termination for Cause: The SMCRA board may terminate for cause if the Director is found to have violated the City, County or state ethics code. Logically, the ED cannot be terminated for violating the Two-Year Rule after he has ceased employment.

¹³ In general, Florida law defines a public employee as person who performs services for and is under the control and direction of, or contracts with, an agency for wages or other remuneration. *See* Section 112.3187, Fla. Stat. (“The Whistleblower Act”).

employee includes all individuals *hired directly by the County [City]*, including those hired on a part-time and full-time basis, regardless of the terms of compensation, but equally subject to the provisions of the County Ethics Code. *See* RQO 04-48. Consequently, the ED does not meet the definition of “employee” for purposes of application of the Two-Year Rule.

Conclusion

Lacking any affirmative designation of “city employee” classification by the SMCRA board or the City, and considering that the Agreement between the SMCRA board and the ED confers authority and oversight of the ED on the SMCRA board, not the City, the ED is not a city employee as contemplated by the plain meaning in Section 2-11.1(b) of the County Ethics Code and past opinions, because he is not *directly employed* by the City: he is an independent director, whose appointment was made and approved by the SMCRA who answers to the SMCRA and whose salary, albeit administered by the City, is derived from the SMCRA’s budget. Consequently, the Two-Year Rule does not apply to the ED of the SMCRA.

Notwithstanding, all officers, commissioners and *employees* of a community redevelopment agency are subject to Part III of Chapter 112, the Florida Code of Ethics. Section 163.367, Fla. Stat. (2019)

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| 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. |
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