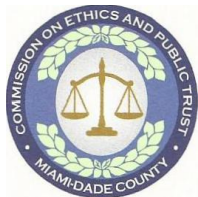


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August 25, 2020

Via U.S. & Electronic Mail

Honorable William Tudor, Commissioner
Village of Biscayne Park
640 Northeast 114th Street
Biscayne Park, Florida 33161

Re: Ethics Inquiry Request, INQ 20-87, Biscayne Park Commissioner William Tudor, Voting Conflict, Section 2-11.1 (d) of the County Ethics Code

Dear Commissioner Tudor:

Thank you for engaging with the Miami-Dade Commission on Ethics and Public Trust and seeking ethics guidance regarding the application of the voting conflict provision of the Miami-Dade County Code of Ethics and Conflict of Interest Ordinance (“Ethics Code”).

We respond as follows:

Facts:

The Village is in the process of hiring a permanent Village Attorney. One of the applicants is the current interim attorney, John Herrin of the Fox Rothschild law firm. That firm is currently involved in litigation involving the United States Securities and Exchange Commission (“SEC”). Mr. Herrin is not involved in the litigation (“the litigation”).

The voting member is employed with the SEC as a Securities Compliance Examiner. The SEC self-reports that it employs over 4,200 employees at work sites across the United States. Mr. Tudor is not involved in the litigation in any capacity. Moreover, his section at the SEC, that conducts Internal Affairs examinations is not involved in the litigation. Rather, the SEC’s enforcement section is engaged in the litigation.

Issue:

Whether Commissioner Tudor’s employment with the SEC as a Securities Compliance Examiner, creates a prohibited voting conflict that would preclude his consideration and vote on the selection

of a Village Attorney, when one of applicants is employed by a firm involved in litigation involving the SEC, when neither the Village Attorney candidate or the voting member are involved in the litigation.

Discussion:

The County Ethics Code is applicable to County and municipal elected and appointed officials, employees, board members, their family members, and certain persons that transact with local government.

As regards Commissioner Tudor's consideration and vote on the Village Attorney selection, he is covered party under Section 2-11.1 (b) (1) of the Ethics Code that applies to members of County and municipal elected legislative bodies.¹

Because he is a covered party under the Ethics Code, then Section 2-11.1 (d) of the Code likewise applies to him. Section 2-11.1 (d) of the Ethics Code provides that a Councilwoman shall not:

(b)(1) ... vote on or participate in any way in any matter presented to the Board of County Commissioners [Village Commission] if said person has any of the following relationships with any of the persons or entities which would be or might be directly or indirectly affected by any action of the Board of County Commissioners: (i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or (ii) stockholder, bondholder, debtor, or creditor, if in any instance the transaction or matter would affect the person defined in subsection (b)(1) in a manner distinct from the manner in which it would affect the public generally. Any person included in the term defined in subsection (b)(1) who has any of the above relationships *or* who would or might, directly or indirectly, profit or be enhanced by the action of the Board of County Commissioners shall absent himself or herself from the Commission meeting during the discussion of the subject item and shall not vote on or participate in any way in said matter.

Section 2-11.1(d) is stricter than the State Ethics Code in providing for a voting conflict where the official "would or might, directly or indirectly, profit or be enhanced by the action..." as opposed to the State standard contained in Section 112.3134 (3) (a), Florida Statutes, (3)(a) that limits the county or municipal public officer from voting upon any measure "which would inure to his or her special private gain or loss." (*See* INQ 14-86)

Given the enhanced conflict voting prohibition in the Ethics Code, circumstances that do not meet the State standard for a voting conflict could still create a voting conflict under the County ordinance in circumstances where an official might, directly or indirectly, profit or be enhanced by a vote. The County standard does not require a definite or measurable private gain or loss and

¹ The Ethics Code constitutes the minimum standard of ethical conduct and behavior for all municipal officials and officers. *See* Section 2-11.1 (2), Ethics Code.

may apply where there is a reasonable possibility or expectation of such an effect. (*See* RQO 15-04)

In RQO 15-04, the Ethics Commission established a framework for evaluating whether local elected officials have a prohibited voting conflict under Subsection 2-11.1 (d) of the Ethics Code. In that case, the Ethics Commission opined that the voting conflict section creates three separate categories for potential conflicts:

An “automatic prohibited conflict” if the voting member has one of the following relationships with an entity "affected" by the vote before the board: officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; and

A “contingent prohibited conflict” if the voting member has one of the following relationships with an entity "affected" by the vote AND the matter would affect the person in a manner distinct from the manner in which it would affect the public generally: stockholder, bondholder, debtor, or creditor; and

A “broad prohibited conflict” if the voting member "would or might, directly or indirectly, profit or be enhanced by the action" of the board in-question.

In this case, the persons or entities that would be affected by the Council’s consideration and vote on the selection of the Village Attorney would include John Herrin and the Fox Rothschild law firm. Commissioner Tudor does not have any of the enumerated employment, financial, or legal relationships contained in Section 2-11.1 (d) with Mr. Herrin or the law firm. As such, there is no automatic or prohibited conflict that would prohibit his consideration or vote on the matter.

In considering whether the third or broadest prong of the voting conflict section would apply to the voting member’s consideration and vote on the matter, there must be some reasonable probability beyond remote or speculative, that Commissioner Tudor, would be enhanced by a measurable financial profit, or some professional or social enhancement. (*See* RQO 15-04)

In order to find a voting conflict, one would have to conclude that a vote on the selection of the Village Attorney, or in support or opposition of Mr. Herrin or the Fox Rothschild firm, might somehow directly or indirectly impact William Tudor financially, professionally, or socially.

The possibility that Commissioner Tudor’s standing with the SEC may be impacted, as one of over 4,200 employees, in a section uninvolved in the litigation, is simply too remote or speculative to create a prohibited voting conflict.

To be clear, the County’s Conflict of Interest and Code of Ethics provides a minimum standard of conduct for public officials. It does not directly address “appearance of impropriety” issues that should guide the actions of all public servants, nor does it address the subjective mindset of a public official who, for reasons outside of the Code, does not feel capable of being fair or objective in a particular matter, due to personal considerations or recent financial arrangements. Any public official under such circumstances must use his or her own judgment in determining the proper course of action when conducting public business. (*See generally* INQ 13-148 and RQO 12-03)

Conclusion:

Commissioner Tudor does not have any of the enumerated employment, financial, or legal relationships contained in Section 2-11.1 (d) with any of the persons or entities that may be affected by the Commission's action. It is only at best a remote or speculative possibility that a vote in support or opposition to the selection of John Herrin or the Fox Rothschild law firm as the Village Attorney, may impact his standing with the SEC as one of over 4,200 employees, in a section uninvolved in the litigation.

This opinion is based on the facts as provided by the requesting party and only interprets the County Ethics Code. For opinions regarding the application of state voting conflict laws, please contact the Florida Commission on Ethics.

We hope that this opinion is of assistance and we remain available to discuss any matters addressed in this letter, if necessary, at your convenience.

Sincerely,

Jose J. Arrojo /s/

Jose J. Arrojo
Executive Director

cc: All Commission on Ethics Attorneys

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.