


MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Honorable Marleine Bastien
County Commissioner for District 2

FROM: Jose J. Arrojo, Esq. 
Executive Director

SUBJECT: INQ 2022-158, Sections 2-11.1 (j), (d), (g), (e), (m)(1), County Ethics Code

DATE: December 2, 2022

CC: COE Legal Staff

Congratulations on your recent election to the Board of County Commissioners (BCC) and thank you for seeking ethics guidance regarding the application of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance (“County Ethics Code”) to your outside employment.

Facts:

Commissioner Marleine Bastien is the recently elected Miami-Dade County (“County”) Commissioner for District 2. She is a licensed clinical social worker and the compensated Executive Director of the Family Action Network Movement, Inc. (“FANM”). FANM is a Florida not-for-profit corporation. FANM describes itself as an advocate for lower income and marginalized residents that provides “wrap-around services such as mental health, crisis and domestic violence intervention, counseling, health care access, job training, financial literacy, adult education, and afterschool programs.” FANM also advocates and organizes its members around issues of “affordable housing, comprehensive immigration reform, and climate gentrification and equity.”

FANM is County grant recipient and as such is a county contractor or vendor legally obligated via a grantor/grantee contract with Miami-Dade County.

In her role as Executive Director for FANM, Commissioner Bastien may be engaged in fundraising, charitable solicitations, and grant applications on behalf of the not-for-profit corporation.

Commissioner Bastien is also the Executive Director of FANM in Action, Inc., a Florida not-for-profit corporation, Treasurer of FLIC Votes, Inc., a Florida not-for-profit corporation, and the Vice Director of the Haitian American Grassroots Coalition, Inc., an inactive Florida not-for profit corporation, pending reinstatement. ¹

Issue:

Whether Commissioner Bastien’s employment as the compensated Executive Director of FANM, Inc., a County grant recipient, constitutes prohibited outside employment that would impair her independence of judgment in the performance of her public duties.

Brief Answer:

Commissioner Bastien may serve as the compensated Executive Director of FANM, Inc., a County grant recipient, provided she abides by the significant limitations imposed by County Ethics Code.

Discussion:

Section 2-11.1(j), of the County Ethics Code, prohibits a County Commissioner from accepting outside employment that would impair his or her independence of judgment in the performance of his or her public duties. That section provides as follows:

Conflicting employment prohibited. No person included in the terms defined in subsections (b)(1) through (6) and (b)(13) [including Commissioners] shall accept other employment which would impair his or her independence of judgment in the performance of his or her official duties.

Elected officials may engage in employment consistent with their public duties and where not otherwise inconsistent with the County Ethics Code, and there is no *per se* prohibition on an elected official also being employed as the Executive Director of a not-for-profit entity. *See generally* RQO 08-24.

Moreover, the County Ethics Code does not prohibit a public official from employment with a County contractor or vendor. *See* RQO 2021-01; RQO 12-05; INQ 09-195; INQ 08-166. ²

¹ This opinion only addresses the application of the County Ethics Code to the elected official’s employment with the Family Action Network Movement, Inc. (“FANM”). The Commissioner is encouraged to seek further guidance if any of the other entities that she serves as an officer are engaged with the County.

² *But see* Code of Ethics for Public Officers and Employees (“State Ethics Code”) Section 112.313(3), Florida Statutes, providing that no public officer acting in a private capacity may sell any services to the officer’s own agency if he or she is serving as an officer or employee of that political subdivision.

However, Section 2-11.1(m)(1) of the County Ethics Code, consistent with provisions contained in the State Ethics Code at Section 112.313(15), Florida Statutes, prohibits an elected County official from receiving any compensation, directly or indirectly, for services rendered to a third party that has applied for or received a grant from the County, in connection with the grant application.

Section 2-11.1(m)(1) of the County Ethics Code provides, in relevant part, as follows:

Certain appearances and payment prohibited. (1) No person included in the terms defined in subsections (b)(1), (5), (6) and (13) [Commissioners, the Mayor, departmental personnel, employees and contract staff] shall appear before any County Board or agency and make a presentation on behalf of a third person with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise, or other benefit sought by the third person. Nor shall such person receive compensation, directly or indirectly or in any form, for services rendered to a third person, who has applied for or is seeking some benefit from the County or a County agency, in connection with the particular benefit sought by the third person.

Section 2-11.1(g) of the County Ethics Code prohibits an elected official from using or attempting to use his or her official position to secure special privileges or exemptions for himself, herself, or others. That section provides as follows:

Exploitation of official position prohibited. No person included in the terms defined in subsection (b)(1) through (6) and (b)(13) shall use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself or others except as may be specifically permitted by other ordinances and resolutions previously ordained or adopted or hereafter to be ordained or adopted by the Board of County Commissioners.

Consequently, the County Ethics Code prohibits a public official from using or attempting to use his or her official position to secure special privileges or exemptions for his or her employer and the official may not engage in his or her official position on any matter involving the employing entity.

See also Section 112.313(7)(a), Florida Statutes, prohibiting a public officer from having or holding any employment or contractual relationship with any business entity or any agency which is doing business with any agency of which he or she is an officer or employee.

See also the Florida Ethics Code's exemption for not-for-profit employment, Section 112.313(15), Florida Statutes, providing that no elected public officer is in violation of the conflicting employment prohibition when employed by a tax-exempt organization contracting with his or her agency so long as the officer is not directly or indirectly compensated as a result of the contract, does not participate in any way in the decision to enter into the contract, and abstains from voting on any matter involving the employer.

If an elected official's employer should decide to apply for a grant from the County and the receipt of the grant is conditioned on a grantor/grantee contract, then neither the official nor any member of his or her staff may be involved in the initial grant application or award, or its subsequent supervision, oversight, compliance, or enforcement.

The elected official may not sign any documents or grant applications which will be presented to the County. Also, should any issues or disputes arise between the County and the nonprofit agency, the official would not be permitted to participate in meetings or discussions regarding the same. *See generally* INQ 2021-89; INQ 2021-25; INQ 2021-70.

The County Ethics Commission has interpreted this prohibition very expansively to include any communications, in any form, intended to influence an individual within the County to take an official action regarding funding from the County. *See In re: Commissioner Dorrin Rolle, COE Enforcement Case No. 10-14; INQ 16-48, 16-22, INQ 14-170, INQ 12-13, INQ 11-01, and INQ 10-201.*

Moreover, the elected official may not use County staff or resources in support of his or her outside employment, including but not limited to phones, copiers, computers, fax machines, County computer programs, computer licenses purchased by the County, or County vehicles. *See generally* INQ 19-123; INQ 20-43.

With respect to fundraising on behalf of a not-for-profit, the County Ethics Code prohibits County elected officials from soliciting or accepting gifts if there is a nexus between the gifting transaction and official duties.

Specifically, Section 2- 11.1(e)(3), of the County Ethics Code provides, in relevant part, as follows:

(3) a. General prohibition on solicitation and giving of gifts. A person described in subsection (b)(1) through (6) shall neither solicit nor demand any gift. It is also unlawful for any person or entity to offer, give or agree to give to any person included in the term defined in subsection (b)(1) through (6) or for any person included in the term defined in subsection (b)(1) through (6) to accept or agree to accept from another person or entity, any gift for or because of:

- i. An official public action taken, or to be taken, or which could be taken;
- ii. A legal duty performed or to be performed, or which could be performed; or
- iii. A legal duty violated or to be violated, or which could be violated by any person included in the term defined in subsection (b)(1).

This means that an elected official may not solicit or accept a gift on behalf of his or her employer in exchange for any official action that may be taken, or not taken, in an official capacity. However, outside of a prohibited *quid pro quo* scenario, solicitation of gifts on behalf of a nonprofit organization is not generally prohibited.

Solicitations by elected officials on behalf of charitable organizations are a permissible exception to the general prohibitions cited above, as long as the Commissioner is not receiving any compensation related to the solicitation.

The exception is described in subsection (e) of the County Ethics Code as follows:

(2) g. Gifts solicited by Commissioners, or their staff members, on behalf of any nonprofit organization for use solely by that organization where neither the Commissioner, nor his or her staff receives any compensation as a result of the solicitation.

Nevertheless, elected officials are encouraged, to avoid direct, targeted solicitations of County vendors and lobbyists on behalf of non-for-profits, even if the solicitation is not prohibited, in order to avoid situations where a County vendor or contractor would accede to a request for contribution in exchange for its continued business relationship with the County. *See* 2021-66; INQ 16-275.

Solicitations by an elected official on behalf of his or her outside employer are problematic, even if the employer is a nonprofit. While it would be most advisable to avoid any charitable solicitation on behalf of the outside employer, if the elected official nevertheless engages in these activities, he or she should not use his or her official title or any references to Miami-Dade County in these activities. *See* INQ 17-34.

Section 2-11.1(d) of the Ethics Code, relating to voting conflicts, prohibits elected officials from voting on or participating in any matter presented, if the official would or might, directly or indirectly, profit or be enhanced by the action.

That section provides, in relevant part, as follows:

[No] person included in the term defined in subsection (b)(1) shall vote on or participate in any way in any matter presented to the Board of County Commissioners 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...

This voting conflict prohibition is stricter than the state law standard codified in section 112.3143 (3)(a), Florida Statutes, which provides that “No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained...” INQ 14-86.

Given the enhanced conflict voting prohibition in the subsection (d) of County 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 would or 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 may apply where there is a reasonable possibility or expectation of such an effect.

Also, under subsection (d) of the County Ethics Code, an automatic voting conflict arises if the voting member has an enumerated relationship with an entity affected by the vote. “Employee” and “director” are both enumerated relationships. *See generally* RQO 15-04.

Accordingly, the Commission on Ethics has opined that a County Commissioner’s employment with a nonprofit that receives funding from the County as a community-based organization (CBO) created an automatic voting conflict of interest under subsection (d) of the Ethics Code for the voting member on matters before the BCC which directly or indirectly affected the CBO. This is primarily because as a paid employee of the CBO, it was deemed that the member might profit or be enhanced by action of the BCC affecting the CBO. *See* INQ 2020-123; INQ 18-126; INQ 17-235.

An exception to this rule has been carved out for an elected official voting on an overall budget allocation. In this instance, the voting member that serves in a primary enumerated position with a nonprofit entity, may vote on an overall budget item when the budget provides funding to entity, if the funding allocation is very minor compared to the overall budget. RQO 19-04; *See also* INQ 14-212.

However, as has been the past practice with similarly situated Commissioners on the BCC, the preferred and recommended practice is to separate the line-item allocation that funds the affected entity so that the elected official can vote on the overall budget item, minus that line item. RQO 19-04.

Opinion:

On the facts provided, there does not appear to be a conflict of interest between Commissioner Bastien’s role as an elected County Commissioner for District 2 and her employment as the compensated Executive Director for FANM, Inc., a Florida not-for-profit corporation that serves as an advocate for lower income and marginalized residents that provides a myriad of services to this community.

Consequently, as long as Commissioner Bastien’s terms of employment with FANM are analogous to those afforded similarly situated employees in comparable scenarios, and she does not receive compensation directly or indirectly from County grants awarded to FANM, for any work that she may have performed in connection with securing the grants, then she may be employed by the County grants recipient.

She may not continue her employment with FANM, if she will be compensated, directly or indirectly, from County grants awarded to the nonprofit organization.

Neither Commissioner Bastien, nor any of her staff members, may be involved in their public capacities in any grant applications sought by FANM. More generally, neither she, nor any of her staff members, may be involved in their public roles with any manner involving FANM and no County resources may be used in the discharge of her private employment duties.

Commissioner Bastien is encouraged to refrain from any charitable solicitation activities on behalf of her employer. If she does, then she may not use her official title, County resources, or any other accoutrement of public office in these activities. She should also refrain from any direct or targeted solicitations of County vendors, lobbyists, or persons or parties seeking some benefit from the County. She may not be compensated by the employer as a result of the solicitation.

Finally, Commissioner Bastien should not participate or vote on any matter before the BCC that may affect her employer.

We hope this opinion is of assistance and we remain available to discuss any matters addressed herein. Also, 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. It is not intended to interpret state laws. Questions regarding state ethics laws noted herein, 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.