



Memorandum No: 16-260

City Attorney's Office

To: Honorable Mayor and Commissioners

Through: Cynthia A. Everett, City Attorney *CJE*

From: Candace R. Duff, Esquire *CRD*

Date: October 6, 2016

Re: Overview on Advisory Board Conflicts of Interest

We received a request from Commissioner Rogers for a general memorandum providing an overview of the state ethics rules pertaining to advisory board member conflicts of interest.¹ This Office issued a previous opinion to the Commissioners in Memorandum No: 16-141, dated June 7, 2016, regarding advisory board conflicts of interest (see attached), dealing with a conflict of interest arising from an advisory board member's membership in a nonprofit foundation that had submitted an application to the board for grant funding.

Section 112.313(7)(a), Florida Statutes (2016) provides that: "No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, . . ."

Advisory board members are "public officers" (§112.313(1), Fla. Stat. 2016) and "business entities" include both for profit and nonprofit corporations within the meaning of the statute (§112.312(5), Fla. Stat. 2016). Both the advisory board and the appointing body (in this case the City Commission) would be considered to be their agency.

"Employment" within the meaning of this provision requires that one be compensated or receive some consideration from the business entity or agency with which one has the relationship. Commission on Ethics Opinion (hereinafter "CEO") 76-21; CEO 80-29. The term "employment" is not limited to a master-servant relationship, but also includes being an owner, partner or sole proprietor of the business entity (CEO 84-95), being a compensated director of a nonprofit entity (CEO 85-89) and "hanging" a real estate salesperson license with a broker (CEO 12-15).

Law firm partners, shareholders and associates (but not of counsel) have contractual relationships with firm clients whether they worked on that particular client's matter or not (CEO 80-79, CEO 94-5, CEO 96-1, CEO 03-7, CEO 04-9, CEO 10-20, CEO 10-24); accountants, on the other hand, do not have firm based contractual relationships. (CEO 11-15).

A "contractual relationship" within the meaning of this provision can include the sale of goods or realty, the provision of services for compensation, owning shares of stock in a corporation (CEO 99-13, CEO 11-05), holding stock options (CEO 05-18, n. 8) and hanging a real estate license with a broker (CEO 12-15).

One does not hold a contractual or business relationship with a company that is doing business with his or her agency merely because he or she is an officer of a company that subcontracts with the company doing business with their agency. (CEO 88-43, CEO 07-2, CEO 11-12, CEO 11-18, CEO 12-8). Similarly, one does not hold a contractual relationship with a company merely because one's corporation holds a contractual relationship with a company. (CEO 08-23; CEO 14-27).

Past or possible future contractual relationships are not encompassed within this provision – the contractual relationship or employment must exist simultaneously with the other elements of this provision. (CEO 88-11; CEO 08-14; CEO 12-3).

Uncompensated service has been found not to constitute a contractual relationship (CEO 06-26); however, the fact that someone did not receive monetary compensation is not controlling if other consideration or services under a professional licensure is involved (CEO 95-28, CEO 08-7, CEO 08-8, CEO 11-6).

One can still have a conflicting contractual relationship with uncompensated service under certain circumstances. For example, a president, officer or director of a voluntary association can have a conflicting contractual relationship if, for example, their duties in that capacity would include seeking funding from or doing business with their agency. (CEO 06-12, CEO 08-7, Question 2).

Being a member of a nonprofit corporation can create a prohibited "contractual relationship" within the meaning of the statute. In CEO 06-12, the Ethics Commission explained the rationale behind finding a contractual relationship to exist between a nonprofit corporation and its members:

"[W]e have recognized that "[m]embership in a voluntary, unincorporated association rests on contract; the constitution and by-laws of a voluntary association become a contract between each member and the association. 4 Fla. Jur. 2d Associations and Clubs, Sections 5 and 7." CEO 82-14. Thus, in that opinion, we found that an airport authority official had a contractual relationship with an association of tenants of the authority as a member of the association. . . . Although we have not specifically addressed membership in a voluntary incorporated association

in any of our opinions, we find that under the general law of contract, the same principal applies. The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association." (citation omitted). *Elbadramany v. Stanley*, 490 So. 2d 964, 966 (Fla. 5th DCA 1986).

A business entity is considered "doing business with" an agency where the parties have entered into a lease, contract, or other type of arrangement where one party would have a cause of action against the other in the event of a breach or default (CEO 86-24, CEO 07-11, CEO 11-14, CEO 11-15, CEO 12-15). Obtaining grant funding can constitute "doing business" with a board or agency – especially if there is an agreement with the City pertaining to the funding or obligations otherwise attached to the receipt of the funding.

Section 112.313(7), Florida Statutes (2016) also prohibits a public officer from having a contractual relationship or employment that will create a "continuing or frequently recurring" conflict of interest, or that would "impede the full and faithful discharge" of public duties. This section is based upon the principle that one cannot serve two masters; it is preventative in nature and intended to prevent situations where private considerations might tempt one. Representing a client before the board on which one serves, for example, would impede one's full and faithful discharge of one's duties and, if it occurred on a continuing basis, create a continuing or frequently recurring conflict (CEO 77-126, 78-86). Another example would be situations in which a board member may be tempted to disclose or use information not generally available to the public and gained by reason of one's official position. (CEO 92-18; CEO 11-14).

A Board member could also run into voting conflicts by virtue of his or her conflicting employment and contractual relationships. Pursuant to Section 112.3143(3)(a) of the state ethics code, "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 or to the parent organization or subsidiary of a corporate principal by which he or she is retained . . ."

Even if a Board member does not technically have a voting conflict under Section 112.3143(3)(a), we recommend that he or she follow the Ethics Commission's advice:

"[W]e suggest a better course for the Commissioner than adherence to the letter of the law alone. Assuming that she becomes an unpaid director, we suggest that she declare that relationship, abstain from voting, and

timely file CE Form 8B (memorandum of voting conflict) regarding votes/measures of the County Commission concerning the corporation. Such conduct would foster public confidence in government and apparently would be in accord with Section 286.012, Florida Statutes, which provides, with emphasis supplied:

No member of any state, county, or municipal governmental board, commission or agency who is present at any meeting of such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.211, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143.”

Pursuant to §112.313(12), advisory board member conflicts of interest arising under §112.313(3) (which prohibits a public officer from doing business with his or her own agency) and §112.313(7) (which prohibits conflicting employment and contractual relationships) may be waived by a two thirds vote of the City Commission as the appointing body.

Please do not hesitate to contact me if you have any questions.

cc: Lee R. Feldman, City Manager
Jeffrey A. Modarelli, City Clerk
John Herbst, City Auditor

CRD/grb

ⁱ Much of the material in this memorandum takes liberally from continuing legal education materials prepared by C. Christopher Anderson III, Esq., General Counsel Deputy Executive Director of the Florida Commission on Ethics, dated December 8, 2015.