# *Agenda*

November 4, 2010 – 4:00 p.m.
Governmental Center,
301 North Olive Avenue, 6th Floor
Commissioners Chambers


**Palm Beach County**

**Commission on Ethics**

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I. Call to Order
II. Roll Call
III. Introductory Remarks
IV. Approval of Minutes from October 7, 2010
V. Processed Advisory Opinions
   a. RQO 10-027
   b. RQO 10-028-OE
   c. RQO 10-029-OE
   d. RQO 10-031
VI. Proposed Advisory Opinions
   a. RQO 10-030
   b. ROQ 10-020 (Revised)
VII. Complaints
   a. C 10-004 (Continued)
VIII. Public Comments
IX. Workshop Items
   a. Email Domain Names/IT Security Issues
   b. Press Releases/Releasing Documents to the Press
   c. Consideration of Code Revision to 2-443(a)
   d. Definition of Lobbyist
X. Executive Director Comments
   a. BCC Waivers
   b. Website update
   c. Municipalities update
XI. Adjournment

**MEETING: PALM BEACH COUNTY COMMISSION ON ETHICS**

**I. CALL TO ORDER:** October 7, 2010, at 4:07 p.m., in the Commission Chambers, 6th Floor, Governmental Center, West Palm Beach, Florida.

**II. ROLL CALL**

MEMBERS:

Judge Edward Rodgers, Chair
Manuel Farach, Esq., Vice Chair
Dr. Robin Fiore
Ronald E. Harbison
Bruce Reinhart, Esq.

STAFF:

Alan S. Johnson, Esq., Commission on Ethics (COE) Executive Director
Gina A. Levesque, COE Administrative Assistant
Mark Bannon, COE Investigator
Sydone Thompson, Deputy Clerk

**III. INTRODUCTORY REMARKS**

Judge Edward Rodgers reminded everyone to turn off their cell phones, and he added that public comments would be accepted.

**PUBLIC COMMENT:** Andy Schaller.

Judge Rodgers stated that the COE was bound by rules other than the State of Florida (State) or the federal government, and could act only within the State's jurisdiction. He suggested that Mr. Schaller contact the State with any further inquiries.

Judge Rodgers introduced the new COE Investigator, Mark Bannon, and introduced a summary of Mr. Bannon's professional experience and academic achievements.

**IV. APPROVAL OF MINUTES FROM SEPTEMBER 2, 2010**

**MOTION to approve the September 2, 2010, minutes. Motion by Ronald Harbison, seconded by Dr. Robin Fiore, and carried 5-0.**

## V. PROCESSED ADVISORY OPINIONS

Judge Rodgers suggested reordering the agenda since Mr. Schaller was in attendance at the meeting.

(CLERK'S NOTE: The agenda was taken out of sequence and item VII.b. was discussed at this time.)

## VII.b. C (Complaint) 10-005

Alan S. Johnson, Esq., the COE's executive director stated that Mr. Schaller's complaint against Commissioner Santamaria consisted of 10 exhibits that were processed as 10 counts, and that each allegation was investigated individually. He said that:

- Count one alleged violations including Florida Statute s. 106.15(3) relating to election law violations. It was determined that Commissioner Santamaria's actions were within the purview of the State's elections commission.
    - Two emails were sent by administrative assistant Johnnie Easton and secretary Dennis Lipp. Both employees used County time, computers, email accounts, and facilities to execute County-related activities, and transmitted documents that included the Palm Beach County Glades area project funding report for fiscal year 2007-201. The report was a public record sent from a public office, and was not deemed a sufficient violation of s. 2-443(a) – misuse of office for financial gain.
    - It was believed that Mr. Easton and Mr. Lipp were not being paid by an election campaign while on County payroll. However, no investigation had taken place to that fact, and he was not comfortable with providing an answer to the COE without making further inquiries. Any violations of election laws would be prosecuted by the elections commission.
    - The allegations contained in count one would not support a violation of the Code of Ethics (Code). The opinion and recommendation was that the COE was without jurisdiction to investigate the matter, and that count one should be dismissed without legal sufficiency.

**VII.b. – CONTINUED**

**MOTION to approve accepting staff's recommendation on count one for C 10-005. Motion by Ronald Harbison, seconded by Manuel Farach, and carried 5-0.**

Mr. Johnson stated the following:

- Count two of the complainant alleged that on July 27, 2010, Commissioner Santamaria was hosting an open public forum. There was an altercation involving a fire truck owned by Mr. Schaller with political advertisements. The police were called to the scene and Commissioner Santamaria asked that Mr. Schaller be removed from the premises because Commissioner Santamaria was the owner of the mall in the City of Wellington where the forum was being held.

- An offense report was filed and Commissioner Santamaria never used his title when addressing the police. However, he argued with police and said that he knew the Palm Beach County Sheriff Ric Bradshaw. The officer asked Commissioner Santamaria whether he was trying to use Mr. Bradshaw's name, at which time the commissioner walked away.

- The alleged violation of Florida Statute, chapter 112, part III, s.112.313 (6) classified a misuse of public position to secure a special privilege, benefit, or exemption for himself, herself, or others without the need for financial gain. The Code had no such language.

- Staff had to determine whether a financial benefit existed and whether Commissioner Santamaria used his official position. Based on the facts provided in a sworn police report, the recommendation was that count two be dismissed as legally insufficient.

- It was believed that someone affiliated with Commissioner Santamaria had called the police to the mall where the forum was held.

Mr. Schaller interjected and stated that he wanted to provide assistance on the issue.

Judge Rodgers advised Mr. Schaller that the committee had given him an opportunity to speak at the beginning of the meeting.

**VII.b. – CONTINUED**

Mr. Schaller added that he could assist the COE with getting a correct record because he disputed some of the comments made by Mr. Johnson. Judge Rodgers stated that the COE would ask for his input if the need arose.

Mr. Johnson stated that:

- He had no knowledge that Commissioner Santamaria's name was used in the call to the police. Whether or not Commissioner Santamaria used his official title in calling the police, the commissioner had the right as landlord of the mall to secure his property.

- In the opinion of the staff, there would be insufficient financial nexus to warrant further investigation.

- There were differences in the State regulations and the Code as they related to s. 2-443(a), misuse of office or financial gain. Throughout the Code, financial gain determined whether a violation had occurred.

- Violations involving abuse of authority could be substantiated only when the element of financial gain was present.

**MOTION to approve accepting staff's recommendation on count two for C 10-005. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.**

Manuel Farach suggested that the Ethics Implementation Committee be asked to consider modifying the language of the ethics ordinance to include instances where an official violated the Code but had not received financial gain. This would allow the COE to have jurisdiction in the future.

Mr. Johnson said that the language in the State statute addressed securing a special privilege, benefit or exemption, and had not specifically addressed financial gain. Once the referendum was passed in November 2010, he would recommend that the drafting committee make modifications to the language of the ordinance, he said. He suggested that jurisdictional issues be discussed later in the meeting with agenda item IX.

(CLERK'S NOTE: After a brief discussion, it was the consensus of the board to table the discussion until agenda item IX.)

**VII.b. – CONTINUED**

Mr. Johnson said that:

- Count three of the complaint involved a public records request that was made by the complainant in reference to State statute 119.07 (1), the public records requirement statute.

- The justification of the complaint was not in the jurisdiction of the COE. Therefore, staff recommended that the complaint be dismissed, lacking legal sufficiency.

- Every recommendation of dismissal would be sent to the State's Commission on Ethics and the State Attorney's Office.

**MOTION to approve accepting staff's recommendation on count three for C 10-005. Motion by Dr. Robin Fiore, seconded by Bruce Reinhart, and carried 5-0.**

Mr. Johnson stated the following:

- Count four of the complaint involved a campaign sign that could have been in violation of State statute 106.143, which was within the jurisdiction of the elections commission, and not the COE.

- It was recommended that there was no legal sufficiency.

**MOTION to approve accepting staff's recommendation on count four for C 10-005. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.**

Mr. Johnson explained that:

- Count five of the complaint involved a 2007 zoning hearing, and it was alleged that the respondent, Commissioner Santamaria, violated County rules and procedures in a quasi-judicial hearing involving a Callery-Judge Grove zoning application.

- Pursuant to Chapter 2, Article V, Division 8, Section 2-260.6 of the Palm Beach County Code, the COE had jurisdiction only after the effective date of the Code which was May 1, 2010. Count five, therefore, was deemed legally insufficient.

**MOTION to approve accepting staff's recommendation on count five for C 10-005. Motion by Ronald Harbison, and seconded by Dr. Robin Fiore.**

Mr. Farach asked whether it was an ex post facto problem to review items that occurred prior to the adoption of the Code.

Mr. Johnson replied affirmatively and added that the allegations would be sent to the State.

**UPON CALL FOR A VOTE, the motion carried 5-0.**

Mr. Johnson said that:

- Count six of the complaint was divided into two parts relating to allegations of improper procurement in violation of a County policy and included:
    - The first part pertained to business cards and the allegations predated May 1, 2010. Subsequently, there was a recommendation of dismissal as legally insufficient that predated the Code, and it was noted in count five of the complaint.
    - The second part pertained to locks that were changed in the City of Belle Glade. It was alleged that the actions were not vetted through the procurement process. Staff reviewed the facts that were presented, and the recommendation of staff was that the allegations could not substantiate a violation of the Code. There was no allegation that financial benefit had occurred. The actions surrounding the lock change were transparent through emails that were sent to the Palm Beach County Sheriff's Office, staff, and County Administrator Robert Weisman.
    - A violation of a County policy was not synonymous with an ethics violation. Regardless of the facts in the complaint, there was no validity to the allegations.

**MOTION to approve accepting staff's recommendation on count six for C 10-005. Motion by Manuel Farach, seconded by Bruce Reinhart, and carried 5-0.**

**VII.b. – CONTINUED**

Mr. Johnson stated that:

- Count seven of the complaint alleged that Commissioner Santamaria was a convicted felon, and the supporting documentation was one page of a judgment in the name of Jesus R. Santamaria from 1991 with no other information provided.

- The complaint stated that Commissioner Santamaria "is," not, "was," a convicted felon. Staff found the allegations disingenuous and frivolous, and recommended that the count be dismissed as not legally sufficient.

**MOTION to approve accepting staff's recommendation on count seven for C 10-005. Motion by Ronald Harbison, seconded by Bruce Reinhart, and carried 5-0.**

Mr. Johnson said that:

- Count eight of the complaint involved signature petitions that were distributed at a public forum.

- The complaint noted that Assistant County Administrator Brad Merriman and the COE's executive director (ED) were at the forum at the mall owned by Commissioner Santamaria. The forum took place monthly and had been an ongoing event for the past four years. He believed that the last forum took place in April 2010 at 7:00 p.m. The allegation did not allege that the County's time was being used, and there was no sufficient nexus of financial gain to move forward with an investigation. Staff recommended dismissal of the complaint.

Bruce Reinhart stated that the incident date predated the ordinance. Mr. Johnson responded affirmatively and stated that the incident date of April 21, 2010, predated the ordinance. He said that the memorandum would be amended to reflect a lack of legal sufficiency because the incident occurred prior to the Code of Ethics enactment on May 1, 2010.

**MOTION to approve accepting staff's recommendation on count eight for C 10-005 as amended to include the changes as discussed. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.**

**VII.b. – CONTINUED**

Mr. Johnson explained that count nine of the complaint restated count one with the addition of a third email. He said that staff recommended that the complaint be dismissed as legally insufficient.

**MOTION to approve accepting staff's recommendation on count nine for C 10-005. Motion by Ronald Harbison, seconded by Bruce Reinhart, and carried 5-0.**

Mr. Johnson stated that:

- Count 10 of the complaint involved Mr. Lipp, and not Commissioner Santamaria.

- Staff reviewed the information that was alleged to determine whether a violation of the Code had occurred, and to advise the complainant on filing another complaint.

- The Code was examined with respect to dual employment, in which an individual worked for another government and the County at the same time. A conflict of interest would exist if Mr. Lipp received a financial benefit.

- The recommendation of no legal sufficiency was based on the fact that the complaint involved a third party respondent that was not Commissioner Santamaria.

Dr. Robin Fiore suggested that:

- The complaint should be referred to the Inspector General (IG) Sheryl Steckler because there could be systematic issues that needed to be addressed with respect to dual employment.

- The IG could investigate whether the email sent at 12:01 p.m. by Mr. Lipp was an appropriate action. She recommended that as a matter of standard, similar complaints should be forwarded to the IG and the State Ethics Committee.

**MOTION to approve accepting staff's recommendation on count ten for C 10-005. Motion by Dr. Robin Fiore, seconded by Ronald Harbison, and carried 5-0.**

**VII.b. – CONTINUED**

**MOTION to approve forwarding a copy of C 10-005 to the Inspector General. Motion by Dr. Robin Fiore, seconded by Manuel Farach, and carried 5-0.**

Mr. Johnson stated that:

- He was certain that the IG had received the complaints as well. He stated that he would ensure that the IG would be made aware that the COE wanted further investigation into the complaint.

- The complaints were made under oath and the complaints would be held liable for making false statements.

Dr. Fiore recommended fast-tracking complaints that occurred prior to May 1, 2010, the effective date of the Ethics Ordinance, as it would reduce the number of complaints that the COE reviewed. She said that the tracking would prevent the committee from being used as a forum for posting accusations.

Judge Rodgers recommended that when the ED gave lectures he could educate the public about the ex post facto law. He said that the ED could convey that retroactive punishments could not be imposed when actions were not illegal prior to a law's enactment.

Mr. Johnson stated that:

- All complaints had to be provided to the COE to be considered for dismissal. Advisory opinions could be reviewed with the chair, and they would not need to be presented before the COE.

- During election campaigns, frivolous complaints could be made.

- The Code would be reviewed to determine whether the rules of procedure could be modified to authorize the ED to write a response letter for complaints that occurred before the COE was formed.

(CLERK'S NOTE: Item V. was discussed.)

## V. PROCESSED ADVISORY OPINIONS

### V.a. RQO (Request for Opinion) 10-016

Mr. Johnson stated that:

- The advisory opinion requested was whether Angelo DiPierro, a manager at the Office of Financial Management and Budget (OFMB), could seek part-time employment as an adjunct professor at Palm Beach State College.

- The vendor had no contracts involving the OFMB, and it was recommended that his request for outside employment be granted.

**MOTION to approve the recommendation on processed advisory opinion RQO 10-016. Motion by Ronald Harbison, seconded by Bruce Reinhart, and carried 5-0.**

### V.b. RQO 10-022

Mr. Johnson stated that:

- Pursuant to the rules of procedure, Section B 2.4(f), an advisory opinion request could not be withdrawn once it was submitted.

- Mr. Shawn Wilson was employed with Housing Trust, L.L.C, and served as a member of the Palm Beach County Emergency Shelter Grant Program Advisory Board. His company initially had no contracts with the County; however, at some point his company became involved with the sale of the Westgate Community Redevelopment Agency property, and a conflict of interest was presented.

- The recommendation would have been to instruct Mr. Wilson to obtain a waiver from the Board of County Commissioners; however, he resigned before the matter could be brought before the COE.

Mr. Reinhart suggested that the third full paragraph in RQO 10-022 which began, "In SUM, according to the facts and circumstances you submitted, once your outside employee entered into a contract," that the word, "employee," be changed to, "employer."

**V.b. – CONTINUED**

Mr. Johnson stated that the published copy of the advisory opinion would reflect "employer."

Judge Rodgers expressed his objection to parties not being allowed to withdraw advisory opinions.

Mr. Johnson stated that to his recollection, Mr. Wilson resigned after he asked additional questions relating to the advisory opinion.

**MOTION to approve the recommendation on processed advisory opinion RQO 10-022. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.**

**V. PROPOSED ADVISORY OPINIONS**

**VI.a. RQO 10-013**

Mr. Johnson stated that:

- This advisory opinion had been brought before the COE in September 2010. The Palm Beach International Airport maintained operations with revenue generated from services, rentals, surcharges, and taxes.

- There were 585 stationed and itinerant aircrafts making approximately 250,000 flights annually. An indeterminate number of aircraft types that used fuel services at the airport.

- Airports Deputy Director of Business Affairs, Ms. Laura Bebe, disclosed that Herbert Kahlert, a member of the Aviation and Airports Advisory Board (AAAB) had obtained approximately 300-400 gallons of fuel monthly for a personal aircraft. The fuel usage was insignificant when compared to the average aircraft that used 80,000 gallons of fuel per month.

- Staff decided that no conflict of interest existed because Mr. Kahlert had not benefited out of proportion to the other aircrafts owners.

**VI.a. – CONTINUED**

Mr. Reinhart stated that:

- He was troubled because the person whose conduct was in question had not requested the advisory opinion; and the third-party who made the request had no stake in the outcome.

- Allowance of such inquires could open the door for any member of the public to request an opinion on the behavior of another party.

- The main objection with the advisory opinion was not the analysis given to the ordinance, but to the fact that Ms. Bebe was provided with an opinion based on Mr. Kahlert's actions.

Mr. Johnson stated that:

- The Code allowed anyone within its jurisdiction to make requests for advisory opinions. Given Ms. Bebe's position as Airports Deputy Director of Business Affairs, she was qualified to make the request under the Code.

- Initially, it appeared that the request pertained to multiple members of the AAAB. The finding was that no unique circumstances were limited to the facts presented in the request.

- The COE could set a threshold for jurisdiction issues relating to advisory opinions. Most requests were being made by supervisors on behalf of their staffs.

Mr. Reinhart stated that:

- He had no objections to a supervisor asking whether they could allow a subordinate to perform a particular duty. Once a supervisor allowed a subordinate to engage in unethical behavior, then the supervisor could be held liable.

- The issue was that Mr. Kahlert was a third-party advisory board member who had not worked for Ms. Bebe, and she had no authority to stop his actions.

**VI.a. – CONTINUED**

Mr. Reinhart asked whether any person within the jurisdiction of the COE could request an opinion on anyone else.

Mr. Johnson said that Ms. Bebe was the County staff member who administered the AAAB, and there was a nexus between her and the officials on the board. He had processed advisory opinions where there was a connection between the person making the request and an advisory board, he explained; and, it was determined that there was a sufficient link in this instance to warrant that a decision be made on the opinion.

Mr. Reinhart reiterated his previous objection on the matter. He suggested that the COE not process third-party requests because the accused party could be adjudicated without getting an opportunity to respond to the allegation.

Mr. Johnson stated that since the September 2010 COE meeting, the party whom the inquiry related to was asked to submit the request for an advisory opinion. He said that the recommendation on RQO 10-013 was approved with a change; and that requests for advisory opinions were not sworn statements.

Mr. Reinhart stated that if Mr. Kahlert wanted to come forward and adopt the question that Ms. Bebe tendered, then he would be willing to respond. Otherwise, he was uncomfortable with giving an answer to Ms. Bebe about Mr. Kahlert's behavior, he added.

Mr. Johnson said that:

- Mr. Reinhart was correct in referencing the Code's language that stipulated that any person within the jurisdiction of the COE, when in doubt about the applicability or interpretation of any provision within the COE jurisdiction to himself/herself in a particular context ,may submit a written statement of facts to the COE.

- The request was processed because staff could be affected by the actions of other parties that violated the Code if they knowingly allowed unethical actions to take place.

Dr. Fiore asked whether the response to the advisory opinion could be generalized so that it would have nothing to do with Mr. Kahlert. Mr. Reinhart reiterated his objections.

**VI.a. – CONTINUED**

Mr. Johnson suggested that the following language could be changed to RQO 10-013:

> YOU ASKED in your capacity as Deputy Director, Airports Business Affairs, and on behalf of Aviation Airports Advisory Board (AAAB) members whether a conflict of interest exists on the part of members voting on fuel flowage fee.

Dr. Fiore and Mr. Reinhart suggested adding language to reflect that Ms. Bebe was authorized by the AAAB members to make the request.

Dr. Fiore suggested that only authorized individuals should make requests in the future.

Mr. Johnson stated that:

- Dr. Fiore's suggestion could be taken as a directive for future requests and that the COE was not required to vote on the directive.

- The language revision to RQO 10-013 would read:

> YOU ASKED in your capacity as Deputy Director, Airports Business Affairs on behalf of Aviation and Airports Advisory Board (AAAB) members in your email of August 4, 2010, whether a conflict of interest exists on the part of AAAB members voting on a fuel flowage fee at General Aviation (GA) Airports when board members own aircraft and purchase fuel at these airports.

(THIS SPACE LEFT BLANK INTENTIONALLY.)

**VI.a. – CONTINUED**

- On August 4, 2010, an email was sent by Ms. Bebe to Assistant County Attorney Leonard Berger, who forwarded the email to the ED. The email read:

  > I am sure that you've received the message but we have a question. We have a question regarding a potential voting conflict. We are proposing increasing fuel flowage fees at our three general aviation airports. We had planned to have the Aviations Airports Advisory Board take up the matter at your meeting today. However, the issue came up whether or not there is a voting conflict because some of the members own aircraft and purchase fuel at the GA airports. I would appreciate it if you could let me know whether or not you believe these members would be precluded from voting on the matter.

- His interpretation of the email was that the AAAB had a discussion at their board meeting and did not vote on the fuel fees because they were concerned about a possible violation, and that the members asked Ms. Bebe to get some advice on the matter.

Mr. Reinhart asked that the ED clarify that his interpretation was accurate and that it was not County staff that had the initial concern and had not presented the information to the COE.

Mr. Johnson stated that before the opinion letter was sent, he would include an email in the file to explain how the original request originated. If it was determined that County staff was aware of the circumstances, then the opinion letter would not be forwarded, he concluded.

Dr. Fiore suggested that the position on the opinion letter would be that Mr. Johnson would revise it and ensure that Mr. Reinhart's concerns were addressed.

**MOTION to approve the proposed opinion letter as amended to include the changes as discussed for RQO 10-013. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.**

**VI.a. – CONTINUED**

Mr. Johnson explained that:

- On August 18, 2010, and August 19, 2010, Dr. Virginia Sayre contacted the COE and that she provided additional information on August 23, 2010, August 24, 2010, and August 31, 2010.

- Dr. Sayre was a veterinarian who worked for Palm Beach Animal Care and Control (PBACC). During off-duty hours, she worked at Paws Plus and Luv-A-Pet. Both companies had no contracts with the County, and provided that she had merit rule approval, there was no issue.

- Dr. Sayre had an outside business called Pet Wellness Station, and she used the utilized the premises of the Red Barn, an entity that had transactions with the County. the Red Barn provided emergency services for penicillin, hay or exotic pet food, and its total contract amount was approximately $1,300 annually, from October 2009 to present.

- Dr. Sayre provided low-cost vaccinations for animals and aided the County in saving revenue on the service; the Red Barn also yielded a profit from the rabies tags that she issued.

- Dr. Sayre was not a paid employee, contractor, consultant or vendor of the company, and not an outside business as defined by the Code in section 2-442; therefore, the contract would not be prohibited.

Mr. Johnson said that he was in agreement with Mr. Harbison's assessment that perceived economic value existed to the Red Barn for Dr. Sayre's services for which she gained business by occupying space there.

Mr. Harbison remarked that it could be perceived that Red Barn's motivation in providing Dr. Sayer with complimentary space was to secure a larger annual contract with the County; and that other conclusions could also be drawn from the affiliation.

Mr. Reinhart stated that, assuming that Dr. Sayre received free rent as a gift, it did not suggest that it was given in return for any official conduct or act that she could perform that would benefit the Red Barn.

Mr. Johnson commented that there was no nexus between Dr. Sayre and the Red Barn's $1,300 purchase order.

**VI.a. – CONTINUED**

Mr. Reinhart suggested that language be added to RQO 10-015 stating that although the free rent could be perceived as a gift, it would not necessarily implicate an ethical violation. It might implicate a reporting requirement depending on the value that Dr. Sayre gave to the gift, he said.

Mr. Johnson stated that:

- By adding the gift paragraph, the Code could apply to the extent that Dr. Sayre was receiving value of more than $100. the Red Barn could not be a lobbyist and the gift would have to be reported.

- Dr. Sayre advertised her business with flyers and with local newspapers in the Western communities. She had not used her status as a veterinarian with PBACC to promote her personal business.

- In the event that Dr. Sayre had received a gift, she would not be required to file a report by November 2011. Whatever value she received, if it was not as an employee, it would have to be reported as a gift.

Mr. Reinhart stated that Dr. Sayre's receiving free rent could be construed as a gift; she should decide whether she benefited, and report it as a gift.

Dr. Fiore asked whether it was necessary for the County to lose money. She suggested that the proposed language in the opinion be clarified to denote that the information was not essential.

**MOTION to approve the proposed opinion letter as amended to include acknowledgement of a possible gift relating to free rent by Dr. Sayre for RQO 10-015. Motion by Ronald Harbison, seconded by Bruce Reinhart, and carried 5-0.**

(CLERK'S NOTE: Items VI.c. and VI.d. were discussed in tandem.)

**VI.c. RQO 10-018 version 1**

**VI.d. RQO 10-018 version 2**

Mr. Johnson stated that:

- Version 1 of the proposed opinion letter did not discuss indirect expenditure as opposed to direct expenditure, and an exception was carved out. Dr. Fiore had suggested that the opinion be clarified.

- A reportable expenditure or a gift to an individual or entity, whether whole or in part, could be deemed an indirect expenditure. A determination would be needed as to whether a gift was given with the intent to benefit the employee.

- Regarding a condolence gift, an exception could be drafted that a gift to the family of the deceased was deemed to be a reasonable exception as an indirect expenditure, and not specifically with the intent to benefit the employee.

Judge Rodgers suggested that a special section pertaining to condolences could be added to the Code. He expressed the opinion that receipt of a gift after an individual's death could not benefit the deceased party.

Mr. Johnson explained that if the family of a deceased employee received $5,000 after the employee's death that the amount of the gift could be scrutinized and suspicions could be raised.

Dr. Fiore stated that carving out an exception for condolences had no basis. She expressed discomfort with the judgment that condolences were somehow an acceptable exception.

Mr. Johnson explained that:

- The issue was reporting, and not a gift law violation. Section C of the Code stipulated that no gift of any amount could be accepted if it were used to influence an official's behavior. Section 2-443 (a) addressed misuse of office for financial benefit.

**VI.c. and VI.d. – CONTINUED**

- If a gift were given to ingratiate an official or employee, it would be a violation of the Code.

- If a gift were found to be a direct benefit to the employee, any lobbyist or vendor issuing one would be limited to $100. Any excluded gift worth more than $100 that was received from non-family members was reportable.

- To his knowledge, no opinions were found in the State Code of Ethics regarding condolences.

Mr. Reinhart suggested crafting of the opinion letter more narrowly so that it would read, "A condolence gift from a co-worker or a condolence gift from a joint employee fund." Then, perhaps the concerns of some COE members could be addressed, he said.

Mr. Johnson said that condolence gift were different from birthday gifts because they would be given directly to an employee and not to the family.

Judge Rodgers reiterated his earlier point that a condolence gift was of no benefit to the deceased. Dr. Fiore responded that a cash gift to an employee for reasons of bereavement would still constitute a gift to an employee.

Mr. Farach stated that caution should be taken to ensure that unscrupulous individuals could not use someone's death to take advantage of any exceptions to the Code.

Mr. Johnson said that if the COE voted by majority on the proposed opinion, a letter could be drafted indicating that gifts of less than $100 would have no reporting requirements; however, any gifts of more than $100, be it for value, personal use, or bereavement, would constitute a reportable gift by a County employee. Mr. Johnson said that that the revised opinion letter would be drafted once the COE gave the directive.

**MOTION to amend the proposed opinion letter to indicate that gifts of more than $100 would be reportable for RQO 10-018. Motion by Dr. Robin Fiore.**

**VI.c. and VI.d. – CONTINUED**

Mr. Johnson expressed the following opinions:

- There was no urgency to report gifts at this time because the rule would go into effect on October 1, 2010, and would end on September 30, 2011. Once the COE voted, the letter could be drafted during the week of October 18, 2010.

- The lobbyist expenditure report was recently posted to the ED's web site. The gift reporting component would be added to the web site shortly.

- Presently, there were no concerns with condolence gifts. In looking at the broader picture, if a general exception for bereavement gifts were carved out, then an individual could give $100,000 to the family of a deceased commissioner or other well-connected employee. Regardless of whether the gift was well meaning, that gift would not be reportable even if it were from a lobbyist as an indirect expenditure.

Mr. Farach suggested revisiting the gift issue at some point in the future to determine whether the families of deceased employees could receive support while maintaining the integrity of the Code.

Mr. Johnson suggested that as previously mentioned, the $100 gift limit could be raised for bereavement gifts to an amount that was deemed appropriate, such as $500; and that the proposed increase could be an amendment to the Code.

Mr. Johnson stated that third-party family member gifts were not reportable. He said that if a condolence gift were to be given to the family of the deceased employee, then the employee would be a part of that gift. However, the circumstances would be different if a gift were given to an employee's spouse, he concluded.

**RESTATED MOTION to approve the proposed opinion letter as amended and rely on the gift limit, irrespective of the cause of the gift for RQO 10-018. Motion by Dr. Robin Fiore, seconded by Manuel Farach, and carried 4-1. Judge Edward Rodgers opposed.**

**VI.e. RQO 10-020**

Mr. Johnson said that:

- The request was received from Ruth Moguillansky-DeRose, a principal planner for the County's Office of Community Revitalization (OCR). She served on the board of directors for Rebuilding Together (RT), a local affiliate of a national non-profit organization. She asked whether she could represent OCR on the board of directors for a (RT) that received grants and program funding from the County, and from national and local sponsors such as Home Depot and Sears.

- The issue in this instance was misuse of position as stipulated in section 2-443(a) (7) of the Code, an organization could not benefit from the use of an official position for which one was an officer or director. An employee would not be excluded from that prohibition.

- An employee who handled the procurement of grants to be on the board for RT, and obtained funds for that non-profit organization would violate the Code.

- Solicitations of donations from vendors who were lobbyists would not be permitted unless the gifts were valued at $100 or less.

- Staff recommended that Ms. Moguillansky-DeRose work for the County without serving on a board of directors. Even if she were a board member, she could not solicit funds for a nonprofit from lobbyists or from employers of lobbyists.

- In summary, there was no prohibition against Ms. Moguillansky-DeRose, in her official position as principal planner at OCR, from participating in meetings or otherwise being involved with RT and the activities and programs it provided to County residents. One cannot do so as an officer or director of that organization, and additionally if one is a County employee, one may not solicit donations from County vendors who employed lobbyists, unless it was done on behalf of the County in the performance of one's official duties for use solely by the County in conducting official business.

**VI.e. – CONTINUED**

- The basis for the opinion in allowing Ms. Moguillansky-DeRose to be on the board as a representative of the County was her supervisor's directives. If she did not have a vote or a voice on if she were directed or approved by the County to be involved with that board, then that would not be a violation of the Code. In some instances, such as audit committees, an employee's duties could create conflicts. In this instance, her supervisor and her job required that she work in the community.

Mr. Farach stated that as a monitor, Ms. Moguillansky-DeRose would not be the best candidate for that role because someone who was not involved in the process would be objective and could create a structural barrier against fraud within the system. He said that his vote was to not allow her to serve as a monitor, and that an independent person could do so in her place as opposed to someone within the department. He said that he applauded her desire to remain involved in the community. He added that her involvement with an organization that received funding from the County concerned him.

Mr. Harbison remarked that:

- He agreed with the opinion and viewed the other arguments for permitting Ms. Moguillansky-DeRose to remain on the board as advocacy.

- While this individual wanted to be an observer of how allocated funds were being used, he did not believe that to allow the individual to be a monitor of the program would be beyond the scope of the opinion.

Mr. Reinhart stated that Mr. Johnson's analysis of the Code was accurate, and that he agreed with Mr. Farach's evaluation that the issue was management-related. He suggested that the opinion be referred to the IG, who could review this case from a programmatic analysis standpoint. He concluded that the role of the COE was to apply the Code as written, which the ED had done, in his opinion.

**MOTION to approve the recommendation on proposed advisory opinion RQO 10-020. Motion by Bruce Reinhart, seconded by Ronald Harbison, and carried 5-0.**

**VI.f. RQO 10-021**

Mr. Johnson said that:

- Ms. Vianey Yurkovich, a senior aide program coordinator for the Palm Beach County Division of Senior Services, filed the request for an opinion. The County operated several senior centers and permitted non-profit organizations and vendors to provide services at open houses.

- The opinion was reversed because the division informed the seniors that they could host raffles in the facilities, after which, the ED's office was contacted for an opinion to determine whether the Code had been violated by allowing the raffles in County facilities.

- There was no language in the Code relating to raffles, and the ED could only advise them about the Code. Florida State Statute 849.0935 prohibited lotteries from taking place unless operated by the State or a 501(c)(3) non-profit organization.

- The opinion letter issued by the ED said, "You are not afoul of the Code by denying them."

Dr. Fiore asked for clarity on the conclusion paragraph of the opinion which stated, "to the extent that a raffle is permitted on County property." She said that it was an unusual lead-in since there were only two cases mentioned in which a raffle would be permitted.

Mr. Johnson recommended deleting the language noted by Dr. Fiore and replacing it with the language:

> In conclusion, County employees may not benefit by permitting a lottery, nor may County employees accept gifts from vendors in exchange for any official public action, legal duty performed or legal duty violated by the employee. In addition, for-profit vendor lotteries are prohibited by State law. Lastly, limited vendor marketing on County property does not violate the Palm Beach County Code of Ethics or related ordinances.

**MOTION to approve the proposed opinion letter as amended to include the changes as discussed for RQO 10-021. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.**

**VI.g. RQO 10-023**

Mr. Johnson stated that:

- The opinion involved Dennis Koehler and his position as general counsel on the Westgate/Belvedere Homes Community Redevelopment Agency (Westgate CRA), and benefits that were being held on his behalf.

- The letter confirmed that the Code could not be changed for any cause or person. It stated that it was a violation to receive donations in excess of $100 from vendors, lobbyists or their employers who lobbied the Westgate CRA and any related department.

- Mr. Koehler subsequently resigned from the Westgate CRA, rendering the decision moot. Pursuant to the rule of procedure, Section B 2.4 (f) stipulated that once submitted, an advisory opinion request could not be withdrawn by the submitting party.

Dr. Fiore stated that:

- She disagreed with the characterization of the proposed opinion as moot because Mr. Koehler's resignation followed the ED's response to the opinion with the attorney.

- Officials such as Commissioner Karen Marcus had advertised events and had used political titles.

- The opinion letter was important because it would address similar acts by officials.

Mr. Reinhart commented that Dr. Fiore was correct in her analysis because it clearly outlined that individuals who chose to serve on boards could not take money from a lobbyist, or host a fundraiser, or accept gifts in excess of $100, or accept any donation from a lobbyist. Instead they would be required to step down from their public positions.

Mr. Farach remarked that Mr. Koehler had served the County for many years and had done so with a great deal of honor and integrity. Even now, he still acted with honor and integrity by complying with the rules and not requesting special exceptions for his case, he stated. Mr. Harbison concurred with Mr. Farach's statement.

**VI.g. – CONTINUED**

Dr. Fiore suggested amending the wording in the opinion letter on the last page which read, “We recognize the longstanding commitment and contribution,” and that the following words be stricken, “and the appropriateness of the fundraiser,” because the COE had no idea whether it was appropriate or in what sense it would have been appropriate or inappropriate. She said the sentence would read, “The ethics commission wishes every success to Mr. Koehler.” Mr. Reinhart concurred with the changes proposed by Dr. Fiore.

**MOTION to approve the proposed opinion letter as amended to include the changes as discussed for RQO 10-023. Motion by Dr. Robin Fiore, seconded by Bruce Reinhart, and carried 5-0.**

**VI.h. RQO 10-024**

Mr. Johnson stated that:

- The request was received by Bob Nichols, Chief Executive Officer and Executive Director for the Grassy Waters Preserve. He inquired that the appropriateness of a fundraiser, “gala and golf classic,“ and asked whether vendor sponsors could invite County employees or officials as guests without violating the Code’s gift prohibitions.

- The Code required that the donation and gift limit was $100 from any: lobbyist; employer or employee of a lobbyist; or principal who lobbied the official’s commission, board, or any department that was connected in any way within the authority of the board.

- The value of the gift was calculated based on the cost of the event to the public, and not the cost for hosting the event. Each table of 10 persons that was purchased by a vendor or lobbyist would cost $1500, which meant that one seat cost $150. The gala dinner cost $75, but if another ticket were provided for a spouse or other guest, it would constitute an indirect benefit, as both seats would cost $150.

**VI.h. – CONTINUED**

- The opinion letter cited s.112.3148, and the Florida Administrative Code, Rule 34-12.190 that provided guidance on indirect expenditures, and stated:

  > Where an expenditure is made to a person other than the agency official or employee by a lobbyist or principal, where the expenditure or benefit of the expenditure ultimately is received by the official, and where the expenditure is provided with the intent to benefit the official or employee, such expenditure will be considered a prohibited indirect expenditure to the agency official or employee.

- In summary, the advice of the commission would be that a $75 ticket could be given as long as there was no benefit or violation of another section of the Code.

- There existed a Grassy Waters Preserve, a non-profit organization that administered the actual preserve; and a Grassy Waters Preserve that was operated by the County.

- It was not specifically disclosed that the sponsor was a lobbyist or other governmental entity. Some business entities were not required to register as lobbyists, so opinions served to cover all scenarios as applicable to the Code.

**MOTION to approve the proposed opinion letter for RQO 10-024. Motion by Manuel Farach, seconded by Dr. Robin Fiore, and carried 5-0.**

**VI.i. RQO 10-026**

(CLERK'S NOTE: Judge Edward Rodgers recused himself from the discussion and left the meeting due to a conflict of interest which involved his daughter-in-law.)

Mr. Johnson stated that:

- Mrs. Rodgers took care of property that was owned and titled in her sister's name, and she did not receive compensation for managing the family property. A prospective tenant had received grant funding for rental and utility assistance from the Resident Education Action Program (REAP). Mrs. Rogers asked whether she could sign paperwork for the REAP grant.

**VI.i. – CONTINUED**

- Mrs. Rodgers' sister worked with the Palm Beach County Division of Human Services which administered and operated the grant. Mrs. Rodgers worked for the Department of Community Services, which was not in the department that monitored the REAP. Mrs. Rodgers asked whether she could fill out the paperwork for her sister.

- The conduct component of the opinion would mean that Mrs. Rodgers could not be involved or get a benefit for herself or a family member. Since she was not involved with obtaining the grant or selecting the individual for the grant, the ruling was that she was in compliance with the Code and could complete the application.

Mr. Reinhart asked whether the analysis was in terms of the contract, and not the grant, since her sister would have the contract with the County, Mrs. Rodgers was not employed by her sister because she was not receiving compensation, so therefore Section 2-443 (c) would not apply.

Mr. Johnson remarked that had Mrs. Rodgers received compensation from her sister for managing the property, then her sister would be her outside employer; or, if she were in business with her sister, they would be considered as vendors with the County. He concurred with Mr. Reinhart that the absence of a compensation arrangement meant that there was no employee-employer relationship.

Dr. Fiore asked whether the REAP application would be approved by the division in which Mrs. Rodgers was an employee.

Mr. Johnson clarified that:

- The grant approval was in the department, but not the division in which Mrs. Rodgers worked.

- The first full paragraph on the second page of the opinion letter stated that if at any point Mrs. Rodgers became a personal party to the contract by signing the application, or if she started getting compensation and the REAP contract was ongoing, then she would be required to terminate employment with her sister.

**VI.i. – CONTINUED**

**MOTION to approve the proposed opinion letter for RQO 10-026. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 4-0. Judge Rodgers abstained from the vote.**

(CLERK'S NOTE: Judge Edward Rodgers rejoined the meeting.)

**VII. COMPLAINTS**

**VII.a. C 10-004**

Mr. Johnson stated that:

- A complaint was filed by a County employee who worked for the OCR. An off-site County event was held that involved graduates from the REAP. Elected officials, County staff, and the public were invited to the luncheon.

- Commissioner Priscilla Taylor's election opponent, Vincent Goodman, was also present at the function. His daughter, Crystal Matthews, was the complainant. She considered being his campaign chairperson, but changed her mind later.

- Commissioner Taylor and Houston Tate, the director for the Office of Community Revitalization, and Deputy County Administrator Verdenia Baker were seated at the same table. Ms. Matthews was reprimanded at the function by her supervisor, Mr. Tate. He told her that political literature was found at the table, and he was told to "take care of this."

- Ms. Matthews interpreted Mr. Tate's comment to mean that Commissioner Taylor directed Mr. Tate to address the matter with her. This could be an inappropriate use of her official position, she thought.

- An investigation was conducted. Mr. Tate was interviewed, and he said he could not remember who told him to do something about the literature. He said that no one told him to do anything, but that they just said to either take care of, or look into, the situation. Mr. Tate independently looked into the situation. He believed that Ms. Matthews should be reprimanded because she had a duty as per County policy to prevent campaigning at a County function. Further, she had a duty to tell her father to refrain from handing out his literature.

**VII.a. – CONTINUED**

- Ms. Baker was interviewed, and she recalled that Commissioner Taylor gave her the campaign brochure and asked whether it was permitted. Ms. Baker responded that it was not permitted, and stated that she would take care of it. There was directive from Commissioner Taylor, and the complainant had no knowledge of how the complaint originated.

- Staff recommended that the COE find no probable cause in this matter.

- It was proposed that the probable cause definition used by Miami-Dade Assistant Advocate Miriam Ramos be adopted into this opinion. The definition stated that:

  > Probable cause exists where there are reasonably trustworthy facts and circumstances for the Commission on Ethics to conclude that the respondent should be charged with violating the Palm Beach County Code of Ethics.

- After conducting the investigation, no reasonably trustworthy facts and circumstances were found. Therefore, it was requested that the claim be dismissed for lack of probable cause.

Mr. Reinhart suggested that the language, "the respondent attended the luncheon and was sitting at the table containing the offensive literature," and that the word "offensive" be stricken from the recommendation memorandum, because the characterization of the literature was not appropriate.

Mr. Johnson stated that:

- He would modify the memorandum in response to Mr. Reinhart's remarks.

- The complaint was made under oath and the complaint form was submitted with supporting materials that were used during the investigation. The complainant stated that she had not heard Commissioner Taylor direct Mr. Tate to speak with her regarding the election literature. However, given that the phrase, "look into it", was used, it was determined that the matter should be investigated and statements taken.

**VII.a. – CONTINUED**

Mr. Farach stated that:

- Issues existed that related to the presence of sufficiency and probable cause. The matter should be investigated further, and a hearing held with the complainant in order to inform her that her statements would be taken under oath.

- If the complainant, without sufficient facts, delivered testimony that Commissioner Taylor directed Mr. Tate's actions, then the complainant's statements could be considered perjury.

- The allegations were sufficiently serious and needed to be advanced to the next level. The complainant should be notified that no one should use the COE for extracting political points or furthering political agendas.

Mr. Johnson remarked that:

- He respectfully disagreed with Mr. Farach's suggestion to hold a hearing on the matter because the complainant provided a memo that said:

  > Mr. Tate stated that if this was a major offense then she would have been suspended. He stated this was not something planned or intentional on my behalf or that of my father, but he was instructed to "take care of the situation."

- Mr. Tate agreed with the statement made by the complainant, but what he meant was that Ms. Baker asked him to look into the situation. He felt that he was following a directive from his supervisor, and not Commissioner Taylor. The complainant had no way of knowing the source of the directive.

Mr. Farach commented that unless public officials admitted that they made improper statements, the COE would not proceed on the matter. However, this situation warranted further investigation because it involved a sitting politician and an opponent, and this could be construed in several ways, he said. He stated that if a legal sufficiency test could be passed in such a high profile case, then the COE should look closely at holding a hearing.

**VII.a. – CONTINUED**

Mr. Johnson reiterated his earlier objection for not calling a hearing and added that:

- There was no probable cause to go forward, and there were only a few other persons at the table that were not interviewed.

- The statements made by Ms. Baker were not taken under oath.

- Assuming that Commissioner Taylor violated the Code, she would have had to actively instruct someone else to act on her behalf. This would constitute a misuse of office because of the financial benefit associated with her salary by retaining her job.

Mr. Reinhart stated that even if a hearing were held, a Code violation may not be determined in this instance.

Dr. Fiore suggested that Mr. Johnson ask that Ms. Baker's comments be made under oath.

Judge Rodgers clarified that the request would be to direct Mr. Johnson to investigate further and ask Ms. Baker whether she would make her statements regarding the incident under oath. He suggested that the matter be tabled prior to the COE's final determination.

**MOTION to table the matter and that Mr. Johnson request Ms. Baker's statement in the complaint to be made under oath. Motion by Dr. Robin Fiore, seconded by Manuel Farach, and carried 5-0.**

Mr. Johnson stated that there may have been other persons sitting at the table with Commissioner Taylor, and he asked the COE whether additional persons should also be interviewed.

Judge Rodgers stated that the motion was related to Ms. Baker's statements. Should that conversation produce further leads, and then they could be explored, he stated.

Mr. Farach asked whether there were agenda items that could not be tabled until the next meeting.

**VII.a. – CONTINUED**

Mr. Johnson stated that the remainder of the agenda could be tabled as non-critical. He suggested that public comments be entertained prior to the meeting's adjournment.

(CLERK'S NOTE: After a brief discussion, it was the consensus of the committee to table the remainder of the agenda with the exception of item VIII.)

**VII.b.** **C 10-005** – Page 2-9

**VIII.** **PUBLIC COMMENTS**

**VIII. A.** **DISCUSSED:** Complaint C 10-005

**PUBLIC COMMENT:** Andrew Schaller.

Mr. Reinhart stated that the COE did not enforce the first amendment, and that the first amendment would not necessarily apply to an event that occurred at a private shopping mall. He asked Mr. Schaller to cite the provision of the Code that he wanted the COE to enforce against Commissioner Santamaria; and he asked Mr. Schaller if his intent was to make a political speech. He added that a personal financial benefit would need to be evidenced in order to justify a violation of the Code.

Mr. Farach remarked that to his knowledge, Commissioner Santamaria had waived his salary.

Mr. Johnson stated that he would include a copy of the sworn law enforcement officer's report read by Mr. Schaller into the complaint.

Mr. Reinhart stated that the public needed to be educated that the COE was a body that was charged with enforcing the Ethics Ordinance that was passed by the Board of County Commissioners. Although members of the public disagreed with actions taken by some elected officials, acts perceived as inappropriate would not necessarily constitute a violation of the Code, he concluded.

Mr. Harbison suggested that complainants be asked to indicate which section of the Code supported their claims.

**IX.** **WORKSHOP ITEMS** – Not discussed

**IX.a.** **Email Domain Names** – Not discussed

**IX.b.** **Press Releases/Releasing Documents to the Press** – Not discussed

**X.** **EXECUTIVE DIRECTOR COMMENTS** – Not discussed

**X.a.** **BCC Waivers** – Not discussed

**X.b.** **Consideration of Code Revision** – Not discussed

**X.c.** **Staff Update** – Not discussed

**XI.** **ADJOURNMENT**

**MOTION to adjourn the meeting. Motion by Bruce Reinhart, seconded by Ronald Harbison, and carried 5-0.**

**At 7:05 p.m., the chairman declared that the meeting was adjourned.**

APPROVED:

_____
Chair/Vice Chair

# Palm Beach County Commission on Ethics

**Commissioners**
Edward Rodgers, *Chair*
Manuel Farach, *Vice Chair*
Robin N. Fiore
Ronald E. Harbison
Bruce E. Reinhart

**Executive Director**
Alan S. Johnson


October 26, 2010

Jean Matthews, Senior Planner
Palm Beach County Parks and Recreation Department
2700 6th Avenue South
Lake Worth, FL 33461

Re: RQO 10-027
Public-private partnerships/grants

Dear Ms. Matthews,

Your request for advisory opinion to the Palm Beach County Commission on Ethics has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in your e-mail of September 30, and October 1, 2010, whether you or other members of the Palm Beach County Parks and Recreation Department, may facilitate an application for private grant money between the Special Olympics of Palm Beach County and the Lost Tree Village Charitable Foundation in order to construct a shade structure over a portion of the John Prince Memorial Park Therapeutic Recreation Center swimming pool. Additional information was provided in your e-mail and attachment of October 4, 2010.

IN SUM, in your official capacity as a Palm Beach County employee, you may assist a non-profit organization in obtaining improvements to county facilities utilized by the organization, by identifying and facilitating grants from private charitable organizations, provided that you or any other person or entity as described in sec. 2-443(a)(1)-(7) do not personally benefit financially from the transaction.

THE FACTS as we understand them are as follows:

In 2007, the Palm Beach County Parks and Recreation Department dedicated the Club Managers Association of America Therapeutic Recreation Complex at John Prince Memorial Park. The complex features among other amenities, a 9,750 square foot aquatic center. The Therapeutic Recreation Center is the premier training facility for over 1,000 local Special Olympics athletes.

In August, 2010, Dennis Eshleman, Parks and Recreation Department Director, contacted the Lost Tree Charitable Foundation in support of the grant application and in "partnership with the Palm Beach County Special Olympics." This was a jointly supported application for a $65,000.00 grant to cover the cost of a 35' x 35' shade structure for the western end of the facility swimming pool. The intended purpose of the structure was to "protect participants from overexposure to the sun's harmful rays."

As part of your official duties, you research potential grants and pass them along to non-profit entities for application. You found this specific grant and forwarded the information to Special Olympics. You also serve as the Development Review Officer (DRO) for Parks and Recreation. As DRO you review proposed land use

and zoning changes to assure applications comply with the Parks and Recreation Department provision of the Unified Land Development Code (UDLC). Your involvement in the grant application process was to assist in the production of graphics (cover, photos, map, etc.), assist in the grant cover letter, and proof read the application. All assistance was in your capacity as a Palm Beach County employee. You are not an officer or board member of either non-profit organization, nor will you benefit personally from the process.

THE LEGAL BASIS for allowing county employees to utilize public/private partnerships to benefit the public can in part be found in sec. 2-443(c). The prohibited contractual relationships section does "not apply to employees who enter into contracts with Palm Beach County as part of their official duties with the county." Insofar as your assistance with this project, any relationship with the donor non-profit organization would be within your official capacity. Likewise, although the grant application is in partnership with Special Olympics of Palm Beach County, you are not acting directly or indirectly through a prohibited outside employer or business.

Additionally, based upon the facts you have submitted, you have not benefited personally from this transaction, nor has there been a financial benefit, "not shared with similarly situated members of the general public" to any persons or entities listed in sec. 2-443(a)(1)-(7). Most notably, you are not an officer or board member of either non-profit organization. Lastly, sec. 2-444(c), prohibiting acceptance of a gift in exchange for an official act, is inapplicable pursuant to section (e). For the purposes of the gift law, "gifts solicited by county employees on behalf of the county in performance of their official duties for use solely by the county in conducting official business" are excluded as gifts under sec. 2-444(e)(1)e.

IN SUMMARY, your participation and facilitation of private donations for public use is not a violation of the Palm Beach County Code of Ethics, notwithstanding the fact that the grant money is given for the benefit of a non-profit organization utilizing public facilities, so long as you are not an officer or board member of the affected organizations and do not financially benefit directly or indirectly in violation of sec. 2-443(a)(1)-(7).

This opinion construes the Palm Beach County Code of Ethics and is based upon the facts and circumstances that you have submitted. It is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

# Palm Beach County Commission on Ethics

October 26, 2010

Charles R. Suits, Administrative Assistant
Palm Beach County Board of County Commissioners
P.O. Box 1989
West Palm Beach, FL 33402

Re: RQO 10-028-OE
Outside employment with Florida Atlantic University

Dear Mr. Suits,

Your request for advisory opinion to the Palm Beach County Commission on Ethics has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in your memorandum of October 6, 2010, whether as a Palm Beach County employee, you were able to serve as an adjunct professor at Florida Atlantic University (FAU). Attached to your request were a number of e-mails and documents reflecting contracts and interlocal agreements maintained between FAU and Palm Beach County.

IN SUM, FAU is included in the State University System and established by state statute as a part of the executive branch of state government. The code of ethics prohibits contracts between county employees or their outside business or employer and Palm Beach County. Specifically, sec. 2-442 exempts other governmental entities from the definition of outside employer or business. Therefore, there is no prohibition under sec. 2-443(c) of your employment by FAU. Notwithstanding, you cannot use your official position as a county employee to obtain a financial benefit for yourself, a relative, household member or non-profit organization of which you are an officer or director as that would violate sec. 2-443(a) *misuse of public office or employment*.

THE FACTS you submitted are as follows:

You are the administrative assistant to County Commissioner Jess Santamaria. For the past 10 years you have been employed as an adjunct professor at FAU teaching two courses; Mass Media Law & Regulation, and Public Relations and Community Relations. In 2009 you were hired in your current position within the Palm Beach County Government. You have arranged your teaching schedule so as not to conflict with your working hours for the county.

According to the information you have submitted, in the previous eight years Palm Beach County has maintained a number of contractual relationships with FAU which are currently expired. There is one ongoing interlocal agreement between the FAU Campus Police Department and the County Facilities Development & Operations Department relating to radio system access.

THE LEGAL BASIS for this opinion relies on the statutory designation of FAU as a governmental entity as well as the code of ethics definition of *"outside employer or business"* as contained in s. 2-442, which specifically excludes *"...the county, the state, or any other regional, local or municipal government entity."*

s. 1001.705, Florida Statutes, states as follows:

> Responsibility for the State University System under s. 7, Art. IX of the State Constitution
> (1) DEFINITIONS. – For purposes of this act, the term:
> (d) "State University" or "State Universities" as used in the State Constitution and the Florida Statutes are agencies of the state which belong to and are part of the executive branch of state government..."

The State University System of Florida, Board of Governors official website lists FAU as a state university.

The Palm Beach County code of ethics sec. 2-442 states as follows:

> Outside employer or business includes:
> (1) Any entity, *other than the county, the state, or any other regional, local, or municipal government entity*, of which the official or employee is a member, official, director, or employee, and from which he or she receives compensation..." (emphasis addd)

Section 2-443(c) prohibits officials and employees from entering into "any contract or other transaction for goods or services with the county" through the official or employee's outside employer or business. There are enumerated waivers and exceptions to sec. 2-443(c), however, in this case you are not subject to the prohibition as your outside employer is a state governmental entity.

The code of ethics also prohibits you from using your official position with the county to benefit yourself, a relative, household member or civic or religious organization if you are an officer or director. Sec. 2-443(a) essentially prohibits you or the above persons or entities from benefiting financially, in a manner not shared with similarly situated members of the general public. You have an ongoing responsibility not to use your official position or office with the county to gain such a financial benefit.

IN SUMMARY, you are not prohibited from maintaining part-time employment with another governmental entity under sec. 2-443(c).

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

# Palm Beach County Commission on Ethics

October 26, 2010

Todd Broadlick, Manager
Palm Beach County Surplus Disposal Program
2455 Vista Parkway
West Palm Beach, FL 33411

Re: RQO 10-029-OE
Part-time outside employment

Dear Mr. Broadlick,

Your request for advisory opinion to the Palm Beach County Commission on Ethics has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in your letter of October 14, 2010, whether you, as surplus disposal manager for Palm Beach County, may continue your part time employment as a sales associate with West Marine Products, Inc., a retail supplier of boating products, without violating the prohibited contracts section of the Palm Beach County Code of Ethics, sec. 2-443(c).

IN SUM, based upon the facts you have submitted, your outside employment is in compliance with the exceptions and waiver provisions of sec. 2-443(d)(5) and therefore is permissible under the prohibited contracts section of the code. You also have an ongoing responsibility to avoid any official action that would benefit your outside employer. Using your official position or office to benefit your outside employer would be in violation of sec. 2-443(a) and a misuse of public office or employment.

THE FACTS as you submitted are as follows:

As Surplus Disposal Manager for Palm Beach County you receive surplus assets from County Departments and prepare them for sale or disposal. In this capacity you do not make any contract or vendor decisions. For the past thirteen years you have held various positions with West Marine Products, Inc., which is a retail supplier of boating products. Currently you work part time as a sales associate assisting retail customers.

Palm Beach County utilizes West Marine as a vendor for Road & Bridge, Ocean Rescue and Parks and Recreation Departments. West Marine has no contracts with the Surplus Disposal Department. You have no connection whatsoever with contracts or pricing arrangements within West Marine.

In your request for advisory opinion you verified that you do not work in a department that enforces, oversees, or administers any contracts with West Marine. You have also verified that there is no contract in place with either the financial or purchasing departments within Palm Beach County. You

have not participated in any way with the vendor and pricing arrangements between the county and West Marine and have obtained merit rule approval of your supervisor. Lastly, your job responsibilities do not require you to be involved with West Marine in your official capacity.

THE LEGAL BASIS for this opinion relies on the prohibited conduct waiver provisions of sec. 2-433(d)(5) which states as follows:

(5) Notwithstanding any provision to the contrary, subsection (c) shall not be construed to prevent an employee from seeking part-time employment with an outside employer who has entered into a contract for goods or services with the county provided that:

> (a) The employee or relative of the employee does not work in the county department which will enforce, oversee or administer the subject contract; and
> (b) The outside employment would not interfere with or otherwise impair his or her independence of judgment or otherwise interfere with the full and faithful performance of his or her public duties to the contrary; and
> (c) The employee or relative of the employee has not participated in determining the subject contract requirements or awarding the contract; and
> (d) The employee's job responsibilities and job description will not require him or her to be involved in the outside employer's contract in any way including, but not limited to, its enforcement, oversight, administration, amendment, extension, termination or forbearance; and
> (e) The employee demonstrates compliance with applicable merit rules regarding outside employment and obtains written permission from his or her supervisor; and
> (f) The employee has obtained a conflict of interest opinion from the Commission on Ethics finding no conflict exists regarding the subject contract. The request for advisory opinion must be made in writing and set forth and include all pertinent facts and relevant documents.

According to the facts you have submitted to the ethics commission, you have complied with each requirement as set forth in subsection (5) above.

IN SUMMARY, as you have submitted sufficient pertinent facts and circumstances that you have complied with all requirements as set forth in subsection (5)(a)-(e) above, including merit rule approval by your supervisor, the Commission on Ethics finds that your part-time employment with West Marine Products, Inc. does not violate the prohibited contracts section of the code of ethics. Your responsibility to comply with the code is ongoing. Should there be any change in circumstance with regard to your compliance with the requirements of subsection (5) above, you will need to either terminate your part-time employment or seek an advisory opinion from this commission reflecting the change in circumstance.

# Palm Beach County Commission on Ethics

**Commissioners**
Edward Rodgers, *Chair*
Manuel Farach, *Vice Chair*
Robin N. Fiore
Ronald E. Harbison
Bruce E. Reinhart

**Executive Director**
Alan S. Johnson


This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

# Palm Beach County Commission on Ethics



October 28, 2010

Christian Davenport
County Historic Preservation Officer/Archaeologist
2300 North Jog Road
West Palm Beach, FL 33411

Re: RQO 10-031
Gift Acceptance

Dear Mr. Davenport,

Your request for advisory opinion to the Palm Beach County Commission on Ethics has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in your email of October 20, 2010, whether you could accept two tickets to a play, valued at $40.00 each, in appreciation for helping the playwright understand the Everglades and archaeological procedures in Palm Beach County.

IN SUM, Section 2-444(c) of the Palm Beach County Code of Ethics specifically prohibits an employee from accepting a gift because of "an official action taken" or "duty performed". The assistance you provided was in your official capacity as a Palm Beach County employee, therefore you are prohibited from accepting the gift.

THE FACTS as we understand them are as follows:

You are the county historic preservation officer/archaeologist. Your general duties include identifying, protecting and promoting historic resources within Palm Beach County. Through your training, knowledge and experience you have a great deal of expertise regarding archeological conservation, historic preservation and related issues within Palm Beach County and the State of Florida.

You were contacted in your official capacity by a playwright who requested information regarding the Everglades and how archeology is performed in Palm Beach County. The contact was unsolicited and was treated by you as a basic request for information. In that public outreach and education are part of your official duties with the county, you provided the requested information including an explanation as to procedures in dealing with human remains when discovered and a discussion of the historic resources of the Everglades. You met with the playwright on one occasion and have not seen him since that day. As this was merely a request for information from a citizen, you have no idea whether he is a vendor with the county or has any relationship ongoing with your department. Your only subsequent contact with the playwright was receiving two tickets for his play as a thank you for providing the information. The face value of the tickets is $40.00 each.

THE LEGAL BASIS for this opinion relies on the following section of the Palm Beach County Code of Ethics.

Article XIII, Sec. 2-444. Gift Law.

(c) No person or entity shall offer, give, or agree to give an official or employee a gift, and no official or employee shall accept or agree to accept a gift from a person or entity, because of:
(1) An official public action taken or to be taken, or which could be taken;
(2) A legal duty performed or to be performed or which could be performed; or
(3) A legal duty violated or to be violated, or which could be violated by any official or employee.

The Code of Ethics specifically prohibits an employee from accepting a gift because of "an official act taken" or "duty performed". Regardless of whether or not a gesture of thanks from the playwright was given with ulterior motive or intent, it is still a gratuity tied to your official act in helping him with information. This is discouraged and specifically prohibited under the code.

IN SUMMARY, you may not accept theater tickets of any value as a thank you for an official public action taken or legal duty performed by helping the playwright obtain the requested information.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

November 5, 2010

Rachael Ondrus, Executive Director
Palm Beach County Legislative Delegation
301 North Olive Avenue, Suite 1101.11
West Palm Beach, FL 33401

Re: RQO 10-030
Gift Valuation

Dear Ms. Ondrus,

The Commission on Ethics considered your request and rendered its opinion at a public meeting held on November 4, 2010.

YOU ASKED in your email of October 15, 2010, whether as a county employee you were permitted to rent a condominium unit, while looking to purchase a home in Palm Beach County, from a person whose spouse is a Lobbyist. Additional information was provided in emails of October 18 and 25, 2010 as well as by a telephone conversation of October 28, 2010. In a subsequent email, you indicated that you are no longer looking to rent the subject property. Pursuant to the Commission on Ethics Rules and Procedures, Section B 2.4(f), once submitted, an advisory opinion request may not be withdrawn by the submitting party. Therefore, please find the following response to your original request.

IN SUM, as a Palm Beach County Employee, you are prohibited from accepting a gift greater than $100 from a lobbyist, principal or employer of a lobbyist. To the extent that the fair market value of the rental exceeds the actual rental you would pay, that excess amount would be considered a gift and subject to the gift law prohibitions and requirements of the Palm Beach County Code of Ethics. The Code of Ethics does not limit the application of this prohibition to lobbyists who lobby your specific governmental entity. The plain language of the code extends these gift prohibitions to all lobbyists and all county employees.

THE FACTS as we understand them are as follows:

While looking into relocating to West Palm Beach, friends of yours have offered to rent you a condominium unit on a month-to-month basis while you look to purchase a home. The owner of the condominium unit is the wife of a lobbyist. The condominium is a two bedroom, one bathroom with 995 sq ft. of living area.

According to your research, the proposed month-to-month rental price of $1,100.00 plus utilities constitute fair market value as compared to similar rentals in the area. First, you found an apartment in the same building and similarly situated, which was being rented for $1,100.00 and which offered

greater square footage and an extra bathroom. In addition, you obtained information from www.rentometer.com, a website that purports to calculate fair market value for rental properties by location, square footage and amenities. According to this website, the proposed apartment rental was slightly below the median price for similarly situated condominium/apartments.

According to additional information provided, the lobbyist is married to the owner of the condominium. The lobbyist is registered with the State of Florida. He does not lobby any department, board or commission of the Palm Beach County government, which is your employer.

THE LEGAL BASIS for this opinion relies on the following sections of the Palm Beach County Code of Ethics.

Sec. 2-442. Definitions.

*Lobbyist* shall mean any person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying on behalf of a principal, and shall include an employee whose principal or most significant responsibilities to the employer is overseeing the employer's various relationships with government or representing the employer in its contacts with government.

Sec. 2-444. Gift Law.

(a) No county commissioner or employee, or any other person or business entity on his or her behalf, shall knowingly solicit or accept directly or indirectly, any gift with a value of greater than one hundred dollars ($100.00) from any person or business entity that the recipient knows is a lobbyist or any principal or employer of a lobbyist.

(e) For the purposes of this section, "gift" shall refer to the transfer of anything of economic value, whether in the form of money, service, loan, travel, entertainment, hospitality, item or promise, or in any other form, *without adequate and lawful consideration*. (Emphasis added)

This commission has previously opined that, since the Palm Beach County Code of Ethics is silent as to the matter of valuing and reporting gifts other than to refer to s.112.3148, Florida Statutes, the State valuation statute would be consulted in these matters.[1]

Using this matrix, the fair market value of the rental would be offset by timely payment of rent. Any excess value over rent would be considered a gift. The burden is upon the public employee to show with clear and convincing evidence the fair market value of the rental in determining the amount, if any, that remains as a gift.

[1] RQO 10-005 – According to s.112.3148(7)(b), "compensation provided by the donee to the donor, if provided within 90 days of receipt of the gift, shall be deducted from the value of the gift in determining the value of the gift".

The facts you have given indicate that although the property is owned by the spouse of the lobbyist, both benefit equally in any proceeds or enjoyment of the condominium unit. Therefore, any benefit that you receive from the transaction is attributable to both the lobbyist and spouse.

IN SUMMARY, any excess benefit to you that results from a rental price below fair market value must be considered a gift and subject to the prohibitions and requirements of section 2-444. Had you gone forward with this rental arrangement, you would have had the burden of demonstrating that fair market value and rental payments do not result in a prohibited gift in excess of $100.

Based on the facts and circumstances you have submitted, you have sufficiently demonstrated that the difference between cost and fair market value would not have resulted in an excess benefit to you at this time. You have decided not to enter into this rental agreement. Had you done so, you would have had an ongoing responsibility to maintain a rental payment commensurate with the fair market value of that rental.

This opinion construes the Palm Beach County Code of Ethics Ordinance and State Statutes by reference; however, it is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

November 5, 2010

Ruth Moguillansky-DeRose
Palm Beach County Office of Community Revitalization
2300 Jog Road
West Palm Beach, FL 33411

Re: RQO 10-020 (revised)
County employee on non-profit board of directors

Dear Ms. Moguillansky-DeRose,

The Commission on Ethics considered your request and rendered its revised opinion at a public meeting held on November 4, 2010.

YOU ASKED in your e-mail and attachment of September 3, 2010, whether you may represent your county department on the board of directors of a non-profit entity that receives grants and program funding from the county and, more specifically, with your department. Additional information regarding the specific relationship between the non-profit entity and the county programs administered by the Office of Community Revitalization, as well as documents relating to the structure of Rebuilding Together of the Palm Beaches, was received on September 15 and 20, 2010.

IN SUM, sec. 2-443(a)(7) specifically prohibits you, as a county employee, from using your official position or office to obtain a financial benefit for a charitable organization of which you are an officer or director.

THE FACTS as we understand them are as follows:

You are the principal planner for the Office of Community Revitalization (OCR), a county department established to serve as the main point of contact on issues related to neighborhood revitalization and community outreach and development. As part of its mission, OCR assists neighborhood groups and residents in effectively accessing and using county services and other community resources. In addition, OCR provides education, technical and financial assistance to help residents plan and implement sustainable neighborhood improvements.

Rebuilding Together of the Palm Beaches (RT) is a local affiliate of a national nonprofit volunteer association whose focus is to repair, rehabilitate and improve the houses of low income families, disabled and elderly citizens of the county. Funding for RT is provided by national and local corporate sponsors. The national RT offices, located in Washington, DC, recruit companies such as Home Depot, Lowes and Sears for sponsorships. Additional funding is obtained by way of local government grants and programs. Examples of grants include, the Resident Education to Action Program (REAP) and

Neighborhood Partnership Grants (NPG) which have been awarded to RT through the OCR and the Countywide Community Revitalization Team (CCRT), an advisory board established by the Board of County Commissioners to coordinate activities under the umbrella of OCR. The current grant implementation process includes a formal steering review committee to review applications and make recommendations to the OCR director regarding the forwarding of grants to the BCC for approval.

OCR is unaware of any organization other than RT that performs like services for the community. Habitat for Humanities comes closest; however, that organization builds homes as opposed to focusing on repair of existing properties. Notwithstanding, there are other applicants for both the county REAP and NPG grants. They mostly include formal or informal neighborhood groups representing specific communities. Habitat for Humanity also submitted a competing application for and obtained an NPG grant on behalf of Westgate Village.

You have been offered a position on the local RT Board of Directors. Representing OCR on the RT board is not part of your job description, however, you indicated that you had consulted with the OCR director and your participation was a directive of the department. This decision reflected the belief that your presence on the board would be beneficial to OCR. It should be noted that you currently participate in RT projects as a volunteer working during off duty hours and not as an officer or director.

Should you become a member of the RT board, your position would involve "requests for donations, services and/or assistance from other county departments and outside organizations for the benefit of the communities" OCR serves. In addition, your responsibilities with OCR include oversight of grants and/or contracts with RT within the umbrella of OCR responsibility.

THE LEGAL BASIS for avoidance of misuse of public office is found in sec. 2-443(a) of the code of ethics:

> Sec. 2-443. Prohibited conduct.
> (a) *Misuse of public office or employment*. An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities: (7) A nongovernmental civic group, union, social, charitable, or religious organization of which he or she ...is an officer or director.

Your position on the board of directors of RT would be in direct conflict with this prohibition if you use your official position to assist RT in obtaining any financial benefit, including grants and program benefits. The fact that you have oversight authority within the OCR creates a direct conflict where your authority extends to OCR grants and programs. Grants outside the authority of OCR still present the appearance of conflict. This is underscored by the fact that other nonprofit entities may be competing with RT for the same county dollars.

Another concern is solicitation of donations that are related to RT and not OCR. Sec. 2-444(a) prohibits a county employee from soliciting or accepting, directly or indirectly, any gift with a value in excess of $100.00 from any person or business entity that is a lobbyist, principal or employer of a lobbyist. Some of the entities you had mentioned as donating materials or services to RT include vendors who employ lobbyists. Gifts solicited in your capacity as a county employee "on behalf of the county" in the "performance of your official duties for use solely by the county in conducting official business" are exempt. Gifts solicited for a non-profit organization are not.

IN SUMMARY, while there is no prohibition against you, in your official position as principal planner at OCR, from participating in meetings or otherwise being involved with RT and the activities and programs it provides to county residents, you cannot do so as an "officer or director" of that organization without effectively violating sec. 2-443(a) of the code of ethics as you are intricately involved in the ongoing financial relationship RT maintains with the county. Additionally, in any capacity, you may not solicit donations from county vendors who employ lobbyists, unless it is done on behalf of the county, in the performance of your official duties, and for use solely by the county in conducting official business.

This opinion construes the Palm Beach County Code of Ethics and is based upon the facts and circumstances that you and staff at ACC have submitted. It is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

# INVESTIGATIVE REPORT

To: Alan Johnson, Executive Director

From: Mark E. Bannon, Investigator

Date: October 27, 2010

Re: Complaint C10-004

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- **Background**

  As stated in the Director's Memorandum of Legal Sufficiency to the Commission, Complainant, Crystal Mathews, a county employee, filed the above referenced complaint against Respondent Commissioner Priscilla Taylor. The Complainant is the daughter of Vincent Goodman, who is running against Respondent for the position of Palm Beach County Commissioner, District 7. On June 12, 2010, Office of Community Revitalization hosted a luncheon honoring graduates from a five week Resident Education to Action Program (REAP). The function took place at an area hotel. Members of the community attended as well as county commissioners and county staff.

  County policy and procedure prohibits employees from participating in campaign activities during working hours or on public property. During the luncheon, a political advertisement was found on one of the tables promoting Mr. Goodman for county commission. According to the allegations submitted by Complainant, she was never accused of personally engaging in political activity at the luncheon but was nonetheless disciplined by written reprimand for allowing the activity to take place. Respondent attended the luncheon and was sitting at the table containing the literature. Complainant alleges that upon being disciplined, she asked her supervisor, also present at the event, who had directed the disciplinary action be taken against her and was told that he was instructed to "take care of the situation." The Complainant did not personally hear this directive but believed it was given by Respondent.

  The Commission determined that further investigation should be conducted in this case on October 7, 2010. The case was assigned to me on October 21, 2010 for follow-up investigation.

- **Persons Interviewed**
  1. **Houston Tate**, Director of Office of Community Revitalization (by Director Johnson)
  2. **Verdenia Baker**, Deputy County Administrator, Palm Beach County
  3. **Dennis Lipp**, Executive Assistant to Palm Beach County Commissioner Jess Santamaria
  4. **Priscilla Taylor,** Palm Beach County Commissioner, District 7
  5. **Wayne Condry,** Director of Human Resources, Palm Beach County
  6. **Dr. Jay Matteson,** Palm Beach State College
  7. **Shelly Vana,** Palm Beach County Commissioner, District 3

- **Documents Submitted**
  1. Notification and Acknowledgment of Violation of Rules and Regulations form
  2. Memorandum of Disciplinary Action
  3. Palm Beach County Grievance Form
  4. Memorandum of Rebuttal to Disciplinary Actions by Crystal Matthews, dated August 2, 2010
  5. Memo by Vincent R. Goodman, Sr., dated August 8, 2010
  6. PB County Policy (PPM) CW-P-012, Political Activities of County Employees
  7. Section 2-443(a), (Prohibited Conduct, Misuse of public office or employment), Palm Beach County Code of Ethics
  8. Palm Beach County Charter (Section 2.5, Noninterference Clause, Page 8-9)
  9. Article IV, Section 7(a), Florida Constitution, Suspensions; filling office during suspensions
  10. Memorandum of Ethics Complaint by Crystal Matthews, dated September 12, 2010
  11. Program agenda and seating chart, June 12, 2010 REAP graduation luncheon
  12. Four (4) photographs taken at the REAP luncheon of June 12, 2010.

- **Investigation**

The sworn statement of Houston Tate taken by Director Alan Johnson on September 27, 2010 was reviewed. During this interview Mr. Tate stated that at the REAP graduation luncheon held on June 12, 2010 at the Airport Hilton Hotel, there were materials discovered on at least one guest table. This literature endorsed Vincent Goodman, Candidate for PB County Commission, District 7. These materials were observed by current District 7 County Commissioner Priscilla Taylor, who is also a candidate to retain her seat, and who pointed them out to Deputy County Administrator Verdenia Baker, Houston Tate's direct supervisor. Tate stated that Ms. Baker told him to handle the issue, but did not direct him to take any specific action. Tate is aware that County policy (specifically, CW-P-012), prohibits employees from engaging in any political activities while working, or the use of any County property, equipment or funds for political activities. Tate was also aware that Vincent Goodman was the father of his employee, Senior Planner Crystal Matthews, who was the coordinator of the REAP program, and of this particular luncheon, and that this luncheon was attended by her father. Mr. Tate knew that Ms. Matthews' father, Vincent Goodman, was a current candidate for County Commission, and that she had considered managing his campaign on a part-time volunteer basis. Although he does not have direct knowledge as to who actually placed the literature on the table, he felt that Ms. Matthews had a duty to make sure that no campaign activities occurred at a County sponsored event she was responsible for overseeing. After conferring with County Human Resource Director Wayne Condry, it was decided by him that Ms. Matthews would be given a *Notification and Acknowledgment of Violation of Rules and Regulations* form, including a written reprimand. Tate maintains that this course of action was his decision, after discussion with Wayne Condry, and that neither his supervisor or anyone else made this determination.

**Interview**: Deputy County Administrator Verdenia Baker

On October 22, 2010 I met with Deputy County Administrator Verdenia Baker at my office and took a sworn, taped statement as to her knowledge of the events that occurred at the luncheon. Ms. Baker has been employed by Palm Beach County for twenty-three years, and has served as Deputy County Administrator of nearly ten years. Houston Tate, as Direction of the Office of Community Revitalization, reports directly to her as Deputy County Administrator. Ms. Baker was seated at the same table as Houston Tate, Commissioner Taylor and County Commissioner Shelly Vana. Ms. Baker advised that Tate was speaking at the dais, when Commissioner Taylor touched her on the arm and showed her some paperwork she found on the table. Ms. Baker then read the literature, and observed that it was a political advertisement for PB County Commission candidate Vincent Goodman. Ms. Baker is aware that Mr. Goodman is seeking the same Commission seat currently occupied by Commissioner Taylor.

Ms. Baker then stated that Commissioner Taylor then asked her, "Do we allow this?" showing her the literature that had been on the table. Ms. Baker examined the literature, and seeing that it was political in nature, replied "no, we don't, we don't allow it." Ms. Baker then said, "I'll take care of it." When Houston Tate returned to the table after speaking, Ms. Baker leaned over to Mr. Tate and showed him the literature. She then told him, "Please handle this" which she stated is what she would normally say in this situation, or words to that effect, to indicate to her subordinate that he was to deal with the issue of the political literature being at a department event. Ms. Baker advised that no further conversation concerning the literature with anyone, including Commissioner Taylor occurred, and that she was never asked to take any action concerning this literature.

Ms. Baker stated that she did not direct Mr. Tate to take any specific action in reference to this incident, determining that it was his responsibility to take appropriate action if any were necessary as the Director of that department. Ms. Baker advised that her policy is to have any proposed disciplinary action reviewed by Human Resources. She received a draft of Mr. Tate's Memorandum concerning disciplinary action against the Complainant some time later. At a regularly scheduled meeting with Houston Tate, she was told that he had worked with Human Resources, and she was satisfied that the action taken was decided after discussions with Human Resources. Ms. Baker told me that unless she feels a discipline is excessive, she does not involve herself directly in the discipline issues within departments. She reiterated that Commissioner Taylor did not direct her to take any action, but even if she had, Ms. Baker said she would not have taken any action based on this because there are policies in place to prevent Commissioners from directing County staff.

**Interview**: Mr. Dennis Lipp, Executive Assistant to County Commissioner Jess Samntamaria

On October 22, 2010 at approximately 2:00PM, I interviewed Dennis Lipp, Executive Assistant to County Commissioner Jess Santamaria at our office. Mr. Lipp gave a tape recorded sworn statement, and advised the following. Mr. Lipp was present at the REAP luncheon on behalf of Commissioner Santamaria, who was unavailable to attend. He was seated at the same table as Tate, Baker, Commissioner Taylor and Commissioner Vana. Mr. Lipp did not recall seeing any political literature on the table, advising that it was a large, round table with a large centerpiece. He stated he believed there was some paperwork on the table, but he did not look at it so could not advise the subject of the materials. He was seated across the table from Deputy Administrator Baker, Director Tate and Commissioner Taylor, and so was unaware of the topic of any conversations they may have been having.

**Interview**: Palm Beach County Commissioner Priscilla Taylor

On October 25, 2010, at approximately 8:30 AM, I interviewed Commissioner Priscilla Taylor at her office in the Palm Beach County Governmental Center, 301 N. Olive Ave., West Palm Beach, FL. Commissioner Taylor was placed under oath, and gave a tape recorded statement. Commissioner Taylor stated that she attended the REAP graduation luncheon on June 12, 2010 at the Airport Hilton Hotel. Upon entering the room, she observed what she described as "Mr. Goodman's literature" on several tables. She also found that this literature was on the table she was assigned to for this function. Commissioner Taylor stated that the literature was in support of Mr. Vincent Goodman, who was running for the County Commission seat she currently occupies. Mr. Goodman called Commissioner Taylor over to his table to introduce her to his wife and the people at his table. She was introduced to them, and then went to her table, directly beside Mr. Goodman's table. Upon going to her table she pick-up the literature on her table and asked Deputy County Administrator Verdenia Baker, sitting to her right, if the County had any policy on distribution of political literature at county functions. Ms. Baker replied that they did, and that they would be looking into it. Commissioner Taylor described the literature a "card" supporting Vincent Goodman.

Commissioner Taylor states that she did not suggest or direct Ms. Baker on what, if any, action should be taken, but merely inquired into the policy. She had no further involvement in the incident except to advise that some time later she asked Ms. Baker in passing what had happened in reference to the literature, and Ms. Baker replied that they were still looking into it. She had no other conversations with Ms. Baker, or anyone within County Administration about the incident or any resulting action taken. Commissioner Taylor stated she does not know who placed the literature on the tables. Commissioner Taylor also advised that she was aware that she was not allowed to direct the actions of any County employee under the Palm Beach County Charter, but that she was allowed to make inquiries for information, which was what she did in this case.

The section of the Palm Beach County Charter that Commissioner Taylor was referring to is Section 2.5 of the Palm Beach County Charter, "Noninterference Clause," Ordinance 86-27, § 2, 8-26-86 and attached as a document to this memorandum. Section 2.5 of the Palm Beach County Charter states:

> ***Sec. 2.5 Noninterference Clause***
> *Except for the purposes of inquiry and information, the members of the Board of County Commissioners are expressly prohibited from interfering with the performance of the duties of any employee who is under the direct or indirect supervision of the county administrator. Such action shall be malfeasance within the meaning of Article IV, Section 7(a) of the Florida Constitution.*
> (Article IV, Section 7(a) of the Florida Constitution allows the Governor, by executive order, to suspend any county officer from office, and to fill the office by appointment for the period of suspension, for "malfeasance.")

Commissioner Taylor reiterated that she at no time did any more than inquire as to the policy about political literature at County events, and her concern was that if someone is not aware of this policy, the behavior is more likely to be repeated. She was confident that Ms. Baker would deal with this issue appropriately so as not to have a re-occurrence, and never involved herself in the situation beyond the listed inquires for information.

**Interview**: Mr. Wayne O. Condry, Palm Beach County Director of Human Resources

I met with Wayne Condry, Palm Beach County Director of Human Resources at his office on October 26, 2010 at approximately 10:15 AM. Mr. Condry gave a recorded statement under oath. Mr. Condry was not present at the REAP luncheon on June 12th, and has no personal knowledge of what occurred at that event beyond what was relayed to him by Houston Tate and Complainant. In his role as Director of Human Resources, he met with Mr. Tate to discuss the disciplinary alternatives available in regard to Crystal Matthews, concerning the inappropriate political literature found at the luncheon. Mr. Condry was unsure as to the date of the meeting, but believed it occurred approximately a week before the formal discipline was disseminated to Complainant. I asked him about who else was present at this meeting, and Mr. Condry advised that only Mr. Tate and himself were present. When I asked about the statement by Complainant that she was told this decision was based on a "discussion with a panel," Mr. Condry stated that this was incorrect. He further advised that he has spoken with Ms. Matthews, who requested some assistance in filing a grievance, and at that time he took her through the grievance process, including that a committee would meet to determine the merits of her grievance. Mr. Condry felt that this may have led to some confusion on the part of Complainant as to how the disciplinary process worked, and her belief that it was the decision to implement disciplinary action that was made by a "panel."

The purpose of the meeting between Mr. Condry and Mr. Tate was to discuss what options were available to Mr. Tate. However, Mr. Condry's role was to advise Mr. Tate, and to make sure that the discipline Mr. Tate wished to use was appropriate under the County policies. Mr. Condry did not make recommendations as to the discipline proposed other than ensuring it was within policy. He has since assigned Human Resource staff member Sheila Woodbury to assist Complainant in her grievance efforts.

Mr. Condry advised he has not been contacted by County Commissioner Taylor or any County Commission member or staff representative about this matter, and stated that Mr. Tate never indicated to him that he had been contacted by anyone who might attempt to influence his disciplinary decision.

**Interview**: Dr. Jay Matteson, Institute for Energy and Environmental Sustainability,P.B. State College

Dr. Matteson was interviewed by telephone on October 27, 2010 at approximately 9:30 AM, due to his unavailability until mid November for a personnel meeting. Dr. Matteson attended the June 12th REAP luncheon with his wife, Karen. He was seated at the same table as Houston Tate, Deputy County Administrator Verdenia Baker, and County Commissioners Taylor and Vana. Photographs taken at the luncheon appear to show Dr. Matteson's wife on the left side of Commissioner Vana, with Dr. Matteson directly to his wife's left. This would place them on the other side of the table from Mr. Tate, Ms. Baker and Commissioner Taylor. Dr. Matteson stated that he did not see any "political literature" on his table, but was concentrating on the awards ceremony and his notes for his speech. Dr. Matteson was invited to speak at the luncheon by Mr. Tate due to his position as Director of an organization that promotes employment with environmentally friendly employers. He also does not recall hearing any conversations that were not directly involving the awards ceremony itself and the graduation.

**Interview**: Palm Beach County Commissioner Shelly Vana

On October 27, 2010, at approximately 10:40 AM, I interviewed Commissioner Shelly Vana at her office in the Palm Beach County Governmental Center, 301 N. Olive Ave., West Palm Beach, FL. Commissioner Vana was placed under oath, and gave a tape recorded statement. Commissioner Vana stated that she did attend a REAP luncheon on June 12, 2010 at the Airport Hilton Hotel. She sated her memory of the event was "blurry" because she attends many similar events and county functions in her role as a County commissioner, and that she has attended several REAP luncheons. She did not remember who was present at this particular event. Commissioner Vana does not recall seeing any "political materials" located on the table, but emphasized that sine the event was in June, her memory of it is sketchy. She also does not remember hearing any conversations about such material being on the tables, nor hearing Commissioner Taylor discuss the issue with either Deputy Administrator Baker or Director Tate. She has met the young woman named "Crystal" (Crystal Matthews) who coordinates the REAP events at these events, but was unaware that she was related to County Commission Candidate Vincent Goodman until she read it in a newspaper. She does know Mr. Goodman because they were both teachers in Palm Beach Public Schools several years ago. Commissioner Vana stated that she usually is concentrating on what she is going to say at such events, because as with this one, she is often asked to speak at such events. Commissioner Vana could provide no other relevant information related to this investigation.

- **Analysis of Findings**

  After interviews of several persons who attended the REAP luncheon on June 12, 2010, and were seated at table #8, and an interview with Director of Human Resources, Wayne Condry, I have been unable to establish any evidence or proper factual basis for Complainant's allegation that her disciplinary action was the result of improper interference or influence by Respondent.

  Respondent first observed the political materials at the June 12th Reap graduation luncheon, and did point them out to Deputy County Administrator Verdenia Baker. Respondent also made an initial inquiry of Ms. Baker as to whether this material was allowed at a County sponsored event, and was told it was not allowed. There is no indication that she attempted to direct Deputy Administrator Baker, Director Tate, or any County employee concerning possible disciplinary action to be taken. Respondent had the right to make this inquiry for informational purposes under the Palm Beach County Charter.

  Respondent made a second inquiry of Deputy Administrator Baker sometime later concerning whether the matter had been resolved. According to Respondent, the second inquiry was made "in passing" to Ms. Baker simply to verify that whoever was responsible was now aware that the political materials found at the luncheon were "inappropriate" at a County sponsored function, so that it would not be repeated at some future County event. There is no indication that she attempted to direct Deputy Administrator Baker to take any action, and her concern that any County employee know the information about the inappropriateness of such political materials at a County sponsored event is reasonable, since this policy had been previously violated at the REAP luncheon on June 12th.

- **Conclusion**

  Based on the investigation and interviews conducted, I have found no evidence that Respondent personally or through her staff, made any contact with County staff personnel regarding any attempt to influence or interfere with the disciplinary process surrounding this incident. The only contact by Respondent with any County staff member concerning the incident appears to be limited to the two inquiries made of Deputy Administrator Baker. The first was when Respondent initially pointed out the political materials to Ms. Baker at the luncheon, followed by a question concerning whether such materials were allowed at such a function. The second inquiry can reasonably be termed a request that was made by Respondent to verify that the inappropriate literature would not reappear at any future County sponsored functions. Both inquiries appear to fall under the umbrella of "informational," and neither appears to violate Palm Beach County Code of Ethics, which is the scope of this investigation.

  Therefore, there is insufficient evidence to establish that Respondent misused her official position by attempting to direct, influence or interfere with the disciplinary process to be employed in this matter regarding County employee and Complainant, Crystal Matthews, as determined and instituted by her direct supervisor, Houston Tate, in violation of §2-443(a) of the Palm Beach County Code of Ethics.

  A finding of "No Probable Cause" is recommended in this case.

Mark E. Bannon, Investigator
PB County Commission on Ethics

10/22/2010
Date

# MEMORANDUM OF NO PROBABLE CAUSE

To: Commission on Ethics

From: Alan S. Johnson, Executive Director

Date: October 28, 2010

Re: Complaint C10-004

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- **Recommendation**

  A finding of NO PROBABLE CAUSE should be entered in the above captioned matter as to the allegations made in the Complaint. Probable Cause exists where there are reasonably trustworthy facts and circumstances for the Commission on Ethics (COE) to conclude that the Respondent, Priscilla Taylor, should be charged with violating the Palm Beach County Code of Ethics.

- **Jurisdiction**

  COE has jurisdiction pursuant to Chapter 2, Article V, Division 8, section 2-258(a) of the Palm Beach County Commission on Ethics Ordinance which states in pertinent part:

  Article V, Division 8, section 2-258. Powers and duties. (a) The commission on ethics shall be authorized to exercise such powers and shall be required to perform such duties as are hereinafter provided. The commission on ethics shall be empowered to review, interpret, render advisory opinions and enforce the;

  (1) County Code of Ethics;
  (2) County Post-Employment Ordinance, and
  (3) County Lobbyist Registration Ordinance.

  Article XIII, sec. 2-443(a) prohibits a public official from using his or her office to "...take or fail to take any action, ***or influence others to take or fail to take any action***..." that will result in a financial benefit to "himself or herself".

- **Background**

  The instant Complaint was filed by county employee Crystal Mathews on September 13, 2010. The Complaint alleges that during a county function on June 12, 2010, campaign literature was distributed by her father, a candidate for county commission. The function was not on county property. Complainant was in charge of the function. Complainant was ultimately reprimanded for allowing inappropriate campaign material to be distributed at a county function in violation of county rules. When Complainant objected to her supervisor, he allegedly said that he knew her actions were not planned or intentional but that he was "instructed" to "take care of the situation." Complainant did not personally hear the directive. She believed that Respondent, present at the function and running against Complainant's father for county commission, misused her official position by instructing county staff to reprimand Complainant.

- **Facts**

On June 12, 2010, the Office of Community Revitalization hosted a luncheon honoring graduates from the Resident Education to Action Program (REAP) at a local hotel. In attendance were participants, guests, county employees and officials. Among the attendees were Respondent and her political opponent who is the father of Complainant. It is uncontroverted that campaign literature featuring Complainant's father was found on a table. Guests at that table included Respondent, and several other officials and employees including County Commissioner Shelly Vana, Complainant's supervisor, Houston Tate, his supervisor, Assistant County Administrator, Verdenia Baker, Executive Assistant to Commissioner Jess Santamaria, Dennis Lipp, and Dr. Jay Matteson.

Pursuant to an investigation, Houston Tate gave a sworn statement on September 27, 2010. At the luncheon, he was made aware of the literature but did not recall by whom. He personally felt that the literature was a violation of county rules and that Complainant, who was in charge of the event and knew her father was present, had a duty to prevent him from engaging in political activity during the county event. At no time was he ordered, pressured or otherwise advised to reprimand the Complainant by the Respondent. He did not recall speaking with Respondent about the issue.

On September 29, 2010, Verdenia Baker was briefly interviewed. At that time, the interview was not recorded or under oath or affirmation. She recalled being shown a political circular at the luncheon while sitting at her table. It was brought to her attention by the Respondent who asked her if such political material was permitted at a county function. Ms. Baker told Respondent that it was not. At no time did Respondent instruct Ms. Baker or ask her to take any action regarding the material. Ms. Baker stated that she independently requested that Mr. Tate look into the matter.

This matter was originally before the Commission on Ethics on September 7, 2010. At that time additional investigation was requested.

The subsequent investigation was assigned to the Commission on Ethics' Investigator Mark Bannon. Commissioners Taylor and Vana were interviewed as was Dr. Jay Matteson, Director of Human Resources Wayne Condry and Executive Assistant Dennis Lipp. Verdenia Baker was reinterviewed. All witness statements were recorded and under oath or affirmation except Dr. Matteson, who was interviewed by telephone.

Commissioner Vana, Dr. Matteson and Dennis Lipp were all speaking at the luncheon event and have no substantive recollection of the issue involving political literature. Commissioner Taylor indicated that she inquired of Ms. Baker as to the appropriateness of the literature but at no time did she direct or request that action be taken against the Complainant. Subsequently she asked Ms. Baker for a status update but again maintains that at no time did she direct or request specific action be taken. Her testimony is corroborated by the statements of both Mr. Tate and Ms. Baker.

Mr. Condry was consulted by Mr. Tate in his capacity as Human Resources Director before any action was taken in the mater. This is in accord with County policy. Mr. Condry testified that at no time was he approached or instructed to take or approve any particular action against the Complainant. His role is to discuss disciplinary alternatives and to later assist an employee through the grievance process if there is an appeal.

- **Conclusion**

There is no probable cause to believe that Respondent has violated sec. 2-443(a) of the Palm Beach County Code of Ethics. The complainant herself has no direct knowledge of any involvement by the Respondent. All known witnesses with direct knowledge corroborate the Respondent's claim that she had no direct role in the process other than to inquire as to the appropriateness of the political literature. The facts obtained during the investigation are uncontroverted that Respondent did not order staff to reprimand the daughter of her political opponent. Therefore, there are no reasonably trustworthy facts and circumstances for the COE to conclude that Respondent should be charged with violating sec. 2-443(a) of the Palm Beach County Code of Ethics.

By: _____

Alan S. Johnson
Executive Director
Florida Bar # 223352
Commission on Ethics
2633 Vista Parkway
West Palm Beach, FL 33411
561-233-0720

# Agenda item IX(a) E-mail domain names

Discussion:

1- Whether to change the COE designation for e-mails from @pbcgov.org to an address not affiliated with Palm Beach County Government on its face. The cost to register a domain name is $115.00 for 5 years.

Available domain names are as follows:

**We currently own palmbeachcountyethics.com**

Palmbeachcountyethics.org
Palmbeachcountyethics.net
Pbc-ethics.org
Ethicsforpbc.com
Ethicsforpbc.org
Ethicsingov.com
Ethicsingov.org
Ethicscommission.org
Ethicscommissionpbc.com
Ethicscommissionpbc.org
Coepbc.com
Coepbc.net
Pbccoe.com
Pbccoe.net

2- The Inspector General intends to hire an IT staff employee to maintain the IG applications and databases. She has offered at no cost to maintain the applications and databases of the COE as well. The systems will be separately housed from the county and a separate domain will be "virtualized." This process will result in no additional cost to the IG and COE and in addition to maintaining a separate, securitized domain, we will have the ability to receive daily back-up services and disaster recovery. Any persons with access to the system will sign an independence statement and security agreement.

# Agenda item IX(b) Press Releases/Releasing documents to the press

Discussion:

1- To what extent should staff issue press releases on behalf of the COE for advisory opinions, public reports and final orders (dismissal, finding of p/c and final orders finding violation)? Currently, all advisory letters and public orders are published on the COE website.

2- Complaints: procedure for executive session prior to dismissal or probable cause finding by the Commission/ public release of investigative reports

Pursuant to Art. V, Division 8, sec. 2-260(f), all records related to a preliminary investigation are confidential and exempt from disclosure until the investigation is complete and a probable cause determination is made unless released by written request of the respondent.

Staff recommendation: That the Commission on Ethics Rules of Procedure be amended as follows:

SECTION E. PROBABLE CAUSE DETERMINATION

5.4 Exemption from Public Hearing Requirements of 286.11

A probable cause hearing is not subject to section 286.11, Florida Statutes. Pursuant to Section 112.324, Florida Statutes, complaints of a local ethics violation remain confidential as a part of the investigatory process until such time as a probable cause determination is made, unless the alleged ~~violator~~ Respondent requests in writing that said proceeding be public.

5.41 Procedure for Release of Public Records Upon Probable Cause Determination

When called upon to make a probable cause determination upon the receipt of a legally sufficient complaint, the Commission shall adjourn the public meeting and reconvene in executive session. Upon determination of probable cause or dismissal the Commission shall reconvene the public hearing and announce its decision. At that time, all investigative information is subject to disclosure. If the Commission determines that further investigation is required the investigative information will remain exempt from disclosure until such time as the Commission receives sufficient information and renders a probable cause determination.

# Agenda item IX(c) Consideration of Code Revision to 2-443(a)

Analysis:

1- Currently, the county code prohibition against misuse of public office or employment prohibits only acts or omissions resulting in a financial benefit to specified individuals or entities. There is no current prohibition that deals with misuse of position for other than financial gain. The state version of misuse of public office (s.112.313(6)) includes using an official position to "...secure a special privilege, benefit, or exemption for himself, herself, or others."

2- Staff has reviewed decisional case law and is concerned with the potential for constitutional attack of violations, other than those specifically resulting in financial benefit to the public employee or official, on the grounds that 2-443(a) does not "convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice" without the inclusion of a requirement that the act be done "corruptly." This is especially necessary because a violation subjects a person to criminal prosecution. Tenney v. Commission on Ethics, 395 So.2d 1244 (2nd DCA 1981). The Tenney case has been cited and followed by other Florida appellate courts.

Staff Recommendation: Consider the following revisions to Art. XIII, sec. 2-443(a)

Sec. 2-443. Prohibited conduct.

(a) Misuse of public office or employment. An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a financial benefit, not shared with similarly situated members of the general public, or to corruptly secure or attempt to secure a special privilege, benefit, or exemption for any of the following persons or entities:

Sec. 2-442. Definitions.

"Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of an official or employee which is inconsistent with the proper performance of his or her public duties.

439 So.2d 894
**(Cite as: 439 So.2d 894)**

H

District Court of Appeal of Florida,
Second District.

Ambrose GARNER, Appellant,
v.
STATE of Florida COMMISSION ON ETHICS, Appellee.
**No. 82-2619.**

Sept. 14, 1983.
Rehearing Denied Oct. 31, 1983.

Charges against public official for using or attempting to use his official position to obtain sexual favors from female employees were sustained by the Commission of Ethics, and the official appealed. The District Court of Appeal, Lehan, J., held that: (1) for statute barring corrupt use of official position to be violated, benefit obtained by official need not be economic; (2) statute gave adequate notice that sexual harassment of employees was prohibited and thus was not unconstitutionally vague as applied; and (3) Commission's findings were supported by competent substantial evidence.

Affirmed.

West Headnotes

**[1] Officers and Public Employees 283 61**

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(G) Resignation, Suspension, or Removal
283k61 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 92k82(4))
Statute prohibiting public officer or employee of an agency from corruptly using or attempting to use his official position to secure special privilege or benefit for himself gave adequate notice that sexual harassment was prohibited, and was not unconstitutionally vague as applied to community college president charged with sexual harassment of female employees. U.S.C.A. Const.Amend. 5; West's F.S.A. § 112.313(6, 7).

**[2] Officers and Public Employees 283 110**

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k110 k. Duties and Performance Thereof in General. Most Cited Cases
As regards statute barring public officer from corrupt use of his position to secure benefit for himself, there was no legislative intent to restrict reach of statute to economic benefit. West's F.S.A. § 112.313(6).

**[3] Officers and Public Employees 283 110**

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k110 k. Duties and Performance Thereof in General. Most Cited Cases
Corrupt use by official of his position to secure benefit for himself from employee need not have any particular impact on employee for there to be violation of statute. West's F.S.A. § 112.313(6, 7).

**[4] Colleges and Universities 81 8.1(4.1)**

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(4) Proceedings
81k8.1(4.1) k. In General. Most Cited Cases
(Formerly 81k8.1(4))
Findings of Commission of Ethics that community college president had violated statute prohibiting use of official position to obtain benefits for himself by sexually harassing female employees was supported by competent substantial evidence. West's F.S.A. §§ 112.313(6), 120.68.

***894** Joseph C. Jacobs and Dean Bunch of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, for appellant.

Jim Smith, Atty. Gen., Patricia R. Gleason, Asst. Atty. Gen., Tallahassee, and Philip C. Claypool, Staff Atty., Com'n on Ethics, Tallahassee, for appellee.

439 So.2d 894
**(Cite as: 439 So.2d 894)**

***895** LEHAN, Judge.

Complaints were filed with the Florida Commission on Ethics (the "Commission") against appellant alleging that he corruptly used or attempted to use his official position as president of Hillsborough Community College to sexually harass or obtain sexual favors from various female subordinate personnel and that such behavior constituted a violation of section 112.313(6), Florida Statutes (1981). After finding that the complaints were legally sufficient, conducting an investigation, finding probable cause to proceed, and charging appellant with five instances of the foregoing conduct, the Commission conducted an extensive hearing. Following that hearing, the Commission entered a final order which contained findings of fact and law sustaining the charges and which recommended that appellant be suspended from office for three months. *In re Ambrose Garner,* 5 F.A.L.R. 105-A (Jan. 24, 1983). Appellant appeals that order of the Commission. We affirm.

[1] One of appellant's contentions on appeal is that section 112.313(6) is unconstitutional as applied in this case. Appellant previously raised the issue of the constitutionality of that section by reason of asserted vagueness when he sought injunctive relief to prevent the Commission from proceeding on the complaints filed against him. The Circuit Court of the Second Judicial Circuit denied injunctive relief, and the First District Court of Appeal affirmed. The First District found that the allegations against appellant were within the jurisdiction of the Commission under section 112.313(6) and that section 112.313(6) is not unconstitutionally vague. *Garner v. Florida Commission on Ethics,* 415 So.2d 67 (Fla. 1st DCA 1982), *pet. for review denied,* 424 So.2d 761 (Fla.1983). We have carefully considered appellant's arguments to the contrary but believe that that determination by the First District, which became the law of this case, is not incorrect and that section 112.313(6) was not unconstitutional as applied.

Section 112.313(6) provides that "No public officer or employee of an agency shall corruptly use or attempt to use his official position ... to secure a special privilege, benefit, or exemption for himself or others." Section 112.313(7) defines "corruptly" as "done with a wrongful intent and for the purpose of obtaining ... any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties."

[2][3] Appellant contends that the statute did not give adequate notice that sexual harassment, with which he was charged, was prohibited; that the statute is intended to cover only economic benefit; and that, since there were no adverse job-related effects upon employees who were allegedly subjected to Appellant's conduct, a requisite nexus between the alleged conduct and such effects was not shown. However, the charges included the obtaining of sexual favors, which we cannot say are not "any benefit" within the generally understood meaning of the term and the receipt of which was, in this context within the foregoing definition of "corruptly," inconsistent with the performance of official duties. Also, no legislative intent to restrict the reach of the statute to economic benefits appears. *See Tenney v. Commission on Ethics,* 395 So.2d 1244 (Fla. 2d DCA 1981). In addition, the statute does not specifically require that as a result of a public officer's efforts to obtain a benefit from an employee, that employee will necessarily be impacted in any particular way. In any event, appellant's conduct was shown to have been incident to appellant's official position; as to one of the incidents there was evidence which, while strongly contested, could have supported a finding that the uncooperative recipient of sexual advances lost her job as the result of that lack of cooperation.

[4] Pursuant to section 120.68, Florida Statutes (1981), we have reviewed the record and the Commission's order which found that the alleged conduct occurred in the five alleged instances and that various other instances of that type of conduct had previously occurred. We cannot hold that there was not competent substantial evidence***896** in the record to support the findings of the Commission, specifically the finding that the alleged acts constituted use of appellant's official position to obtain benefits inconsistent with the proper performance of his official duties.

We have also considered appellant's other contentions and find them to be without merit.

AFFIRMED.

DANAHY, A.C.J., and CAMPBELL, J., concur.
Fla.App. 2 Dist.,1983.
Garner v. State Com'n on Ethics
439 So.2d 894

439 So.2d 894
**(Cite as: 439 So.2d 894)**

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395 So.2d 1244
**(Cite as: 395 So.2d 1244)**

C

District Court of Appeal of Florida, Second District.
Richard TENNEY, Appellant,
v.
STATE of Florida, COMMISSION ON ETHICS, Appellee.
STATE of Florida, COMMISSION ON ETHICS, Appellant,
v.
Richard TENNEY, Appellee.
**Nos. 80-1296, 80-1415.**

March 25, 1981.

City commissioner filed complaint for declaratory and injunctive relief, challenging constitutionality of statute which prohibited misuse of public position and seeking to prevent Commission on Ethics from pursuing its case against him. The Circuit Court, Pinellas County, Charles M. Phillips, J., found that statute was constitutional but that Commission on Ethics' procedure was unconstitutional denial of due process, and both parties appealed. The District Court of Appeal, Grimes, J., held that: (1) statute prohibiting misuse of public position was not impermissibly vague, in view of fact that violation of statute was not criminal offense and in view of inclusion of term “corruptly” in statute, and (2) Commission did not deny city commissioner due process in reaching determination of probable cause to believe that city commissioner had violated statute, even though Commission had not held adversary hearing prior to its initial determination of probable cause.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Officers and Public Employees 283 2**

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(A) Officers and Employments, and Power to Appoint and Remove
283k2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statute prohibiting misuse of public position was not impermissibly vague but was constitutional, in view of fact that violation of statute was not a criminal offense and in view of inclusion in statute of the word “corruptly.” West's F.S.A. §§ 112.312(7), 112.313, 112.313(6).

**[2] Statutes 361 47**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
When there is a vagueness challenge to a statute, court must impose higher standard of definiteness where violation of statute would bring about criminal penalty as contrasted to a civil one.

**[3] Officers and Public Employees 283 2**

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(A) Officers and Employments, and Power to Appoint and Remove
283k2 k. Constitutional and Statutory Provisions. Most Cited Cases
Fact that statute prohibiting misuse of public position did not specifically list every “special privilege, benefit, or exemption” public officers were prevented from securing did not render statute unconstitutionally vague. West's F.S.A. §§ 112.313, 112.313(6).

**[4] Constitutional Law 92 4172(7)**

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)7 Labor, Employment, and Public Officials
92k4163 Public Employment Relationships
92k4172 Notice and Hearing; Proceedings and Review
92k4172(7) k. Other Particular Proceedings. Most Cited Cases

395 So.2d 1244
**(Cite as: 395 So.2d 1244)**

(Formerly 92k278.4(3))
Commission on Ethics did not deprive city commissioner of his due process rights in finding probable cause to believe that city commissioner had violated provisions of statute prohibiting misuse of public position, even though there was no adversary hearing prior to initial determination of probable cause, where Commission followed statutory procedures in reaching determination and where city commissioner was entitled by statute, at his request, to receive public hearing following determination of probable cause. West's F.S.A. §§ 112.313(6), 112.324, 112.324(2); U.S.C.A.Const. Amend. 14.

***1244** John T. Blakely of Johnson, Blakely, Pope, Bokor & Ruppel, P. A., Clearwater, for Richard Tenney.

Jim Smith, Atty. Gen., A. S. Johnston, Asst. Atty. Gen., and Philip C. Claypool, Staff Atty., Commission on Ethics, Tallahassee, for State of Florida Commission on Ethics.

GRIMES, Judge.

Richard Tenney appeals from an order of the trial court upholding the constitutionality of section 112.313(6), Florida Statutes (1979). By cross-appeal, the State of Florida***1245** Commission on Ethics challenges another part of the same order which struck its finding of probable cause.

Mr. Tenney was an elected public official serving as a city commissioner in Clearwater. On February 18, 1980, a complaint was filed with the Commission on Ethics which charged that Tenney had violated the following provision of section 112.313, Florida Statutes (1979):

> (6) MISUSE OF PUBLIC POSITION. No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31.

After its staff had conducted an investigation into the complaint, the Commission on Ethics met in executive session on June 18, 1980, and determined that there was probable cause to believe that Mr. Tenney had violated the provisions of section 112.313(6). On June 24, the commission issued a written finding of probable cause which read, in pertinent part:

> Based upon the preliminary investigation of this complaint, the Commission on Ethics finds that there is probable cause to believe that Respondent, a member of the Clearwater City Commission, violated Part III of Chapter 112, Florida Statutes, and more specifically, Section 112.313(6), Florida Statutes, by Respondent's use of his position as Clearwater City Commissioner to obtain a meeting with Congressman "Tip" O'Neill and obtain removal of political signs of his electoral opponents and other special privileges and benefits from others.

That same day, Tenney filed a complaint for declaratory and injunctive relief, challenging the constitutionality of section 112.313(6) and seeking to prevent the commission from pursuing its case against him.

Subsequently, Mr. Tenney filed a motion for temporary injunction. After a hearing, the court issued an opinion in which it found that section 112.313(6) was constitutional. However, despite the fact that Mr. Tenney himself did not make such a claim, the court ruled that the Commission on Ethics' procedure whereby it reached its finding of probable cause in an ex parte proceeding was an unconstitutional denial of due process. The court struck the finding of probable cause and ordered the commission to appoint an administrative hearing officer to conduct a preliminary hearing on the complaint against Tenney. Both parties filed appeals from the court's order, and we have consolidated them for the purposes of our consideration.

(1) In the trial court and here, Mr. Tenney has based his argument that section 112.313(6) is unconstitutional on the fact that the Supreme Court of Florida declared its predecessor statute, section 112.313(3), Florida Statutes (1973), unconstitutional in State v. Rou, 366 So.2d 385 (Fla.1979) (England, C. J., and Sundberg and Alderman, JJ., dissenting). Section 112.313(3) stated that:

> No officer or employee of a state agency, or of a county, city or other political subdivision of the state, or any legislator or legislative employee shall

> use, or attempt to use, his official position to secure special privileges or exemptions for himself or others, except as may be otherwise provided by law.

In finding that statute to be impermissibly vague, the supreme court said:

> The statute is unconstitutionally vague and leaves its enforcement to the whims of prosecutors. It does not "convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." State v. Lindsay, 284 So.2d 377, 379 (Fla.1973). The terms "special privileges or exemptions" afford one no guidelines, no "ascertainable standard of guilt," Locklin v. Pridgeon, 158 Fla. 737, 30 So.2d 102 (1947), no barometer by which a public official may measure his specific conduct.

366 So.2d at 385. While section 112.313(6) is similar to former section 112.313(3), there have been two notable changes which, when considered together, have removed the taint ***1246** of impermissible vagueness found by the supreme court. Accordingly, we hold that section 112.313(6) is constitutional.

(2) The first change is not in section 112.313(6) itself but arises from the fact that the legislature has repealed that part of section 112.317, Florida Statutes (1973), which made a violation of section 112.313 a criminal offense punishable as a first-degree misdemeanor. When there is a vagueness challenge to a statute, a court must impose a higher standard of definiteness where a violation of the statute would bring about a criminal penalty as contrasted to a civil one. Thus, the supreme court, in considering a challenge to a criminal statute concerning malpractice in office, said in State v. Wershow, 343 So.2d 605, 610 n.1 (Fla.1977), "(W)e perceive the test to be much less severe where the maximum penalty is loss of an office or position. Penal statutes must meet a higher test of specificity." This being the case, we can now look at the second change knowing that we need not hold section 112.313(6) to the same standard that the supreme court held its predecessor.

The second change comes in the addition of the word "corruptly" to section 112.313(6). Corruptly is defined in section 112.312(7), Florida Statutes (1979), to mean "done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his public duties." We believe that the word "corruptly" as thus defined so limits the term "special privileges or exemptions," which the Rou court found overly vague, that the statute now conveys the sufficiently definite warning of forbidden conduct to a person of common understanding which our notions of due process require. Similar reasoning was employed to reject the challenge to the extortion statute in Carricarte v. State, 384 So.2d 1261 (Fla.), cert. denied, -- U.S. --, 101 S.Ct. 215, 66 L.Ed.2d 95 (1980). There the supreme court stated that, "Just as the elements of malice and intent prevent overbroad application of the statute, they lend sufficient clarity to provide adequate notice of the proscribed activity to persons of ordinary intelligence and understanding." 384 So.2d at 1263. Accord, Adderley v. Florida, 385 U.S. 39, 42-43, 87 S.Ct. 242, 244-45, 17 L.Ed.2d 149, 153 (1966); Sandstrom v. Leader, 370 So.2d 3, 6 (Fla.1979).

(3) Were we to find the statute unconstitutional as it is presently worded, we would effectively be saying that in order to prohibit the type of conduct which the legislature has sought to prohibit, it would have to specifically list every "special privilege, benefit, or exemption" it wished to prevent a public officer from securing. Such a requirement would be impossible, and our constitutions do not demand it.

> To deny to the Legislature the power to use generic descriptions if pressed to its logical conclusion would practically nullify legislative authority by making it essential for the Legislature to define all the specific instances to be brought within the statute. As the United States Supreme Court said in Smith v. Goguen, 415 U.S. 566, 581, 94 S.Ct. 1242, 1251, 39 L.Ed.2d 605 (1974):
>
> > There are areas of human conduct where by the nature of the problems presented legislatures simply cannot establish standards with great precision.

State v. Dye, 346 So.2d 538, 542 (Fla.1977).

(4) We must now deal with the commission's contention that the court erred in ruling that its procedure for determining probable cause was inadequate to provide Mr. Tenney with due process of law and that an adversary hearing on the complaint was necessary prior

to a finding of probable cause. We hold that the court erred in so ruling. The commission followed the procedure prescribed in section 112.324, Florida Statutes (1979). The court cited no authority for the proposition that this section is constitutionally deficient, and we can find none. What appeared to worry the court was that the commission would be in a position to rubberstamp frivolous complaints against public officials. The court said:

> ***1247** The Petitioner herein had an absolute right to be present at the preliminary consideration of the complaint against him, and to be heard and to present witnesses at that time and place. Without that opportunity to hear the public official's version, and being presented only with a written complaint buttressed by the verbal acknowledgment of the same complainant, the Commission would have no alternative except to find probable cause. This would subject every well-intended public official to the whim of every misinformed malcontent loose in the land. It is greatly unfair to require every public official to walk the middle of the street in the full light of public view, but allow him to be fired upon from ambush.

We do not believe the court's concern to be a valid one. In the first place, section 112.324 requires that the complaint be sworn. Moreover, it requires that the commission inform the public official of the complaint, and it mandates that the commission undertake an investigation before deciding the question of probable cause. This is what happened here. The commission's investigators interviewed many witnesses, including Mr. Tenney himself, and its staff put together a report thoroughly detailing the evidence and the conclusions which could be drawn from that evidence.

In Haines v. Askew, 368 F.Supp. 369 (M.D.Fla.1973), aff'd., 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974), a school teacher sought declaratory and injunctive relief against the state board of education contending that a rule which set forth the parameters of a probable cause hearing deprived him of due process under the fourteenth amendment to the United States Constitution. The three judge federal court held that a civil accusatory hearing is not per se tantamount to an adjudicatory hearing and that an investigatory hearing need not supply an individual with the right of apprisal, confrontation, and cross-examination in order to avoid a due process violation.

The fact that the Commission on Ethics does not hold a hearing, as such, in the course of determining probable cause does not diminish the fact that its proceedings directed toward deciding whether probable cause exists are investigatory in nature and not adjudicatory. To impose the requirement to hold an adversary hearing prior to its initial determination of probable cause would add a useless layer of procedure since a defendant in any proceeding before the commission may, at his request, receive a public hearing following a determination of probable cause. s 112.324(2), Fla.Stat. (1979). In its rules the commission has prudently acknowledged the adjudicatory character of the public hearing by according the defendant the customary due process rights associated with hearings of this nature. Fla.Admin.Code Rules 34-10.19 to . 22.

There is some similarity in the procedure followed by the commission in making its finding of probable cause and that used by a state attorney in preparing to file an information or a grand jury in determining whether or not to return an indictment. No one would suggest that these officials should be required to hold an adversary hearing before filing an information or indictment. Cf. Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960), in which the court analogized the proceedings of a grand jury to those of the Civil Rights Commission in rejecting the contention of persons who were the subjects of the commission's investigation that they were entitled to the due process rights available in adjudicatory proceedings.

Accordingly, while we affirm the trial court's ruling that section 112.313(6) is constitutional, we reverse that part of the court's order striking the commission's finding of probable cause. We remand the case for further proceedings consistent with this opinion.

BOARDMAN, Acting C. J., and CAMPBELL, J., concur.

Fla.App., 1981.
Tenney v. State Commission on Ethics
395 So.2d 1244

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677 So.2d 254, 21 Fla. L. Weekly S193
**(Cite as: 677 So.2d 254)**

H

Supreme Court of Florida.
COMMISSION ON ETHICS, Appellant,
v.
James BARKER, Appellee.
**No. 85860.**

May 2, 1996.
Rehearing Denied July 23, 1996.

City commissioner appealed final order and public report issued by Commission on Ethics, finding that he violated code of ethics for public officers and employees by accepting complementary country club memberships. The District Court of Appeal, 654 So.2d 646, declared code provision void for vagueness, reversed decision and remanded. Commission appealed. The Supreme Court, Grimes, C.J., held that: (1) provision of Code of Ethics for Public Officers and Employees prohibiting receipt of gift official knows, or, with exercise of reasonable care, should know, was given to influence vote or other action in which official was expected to participate was facially constitutional, and (2) city commissioner preserved issue of whether decision by hearing officer of Commission on Ethics was supported by competent, substantial evidence by filing exemptions to hearing officer's recommended order for appellate review.

Remanded.

Kogan, J., filed dissenting opinion.

Anstead, J., filed separate dissenting opinion in which Kogan, J., concurred.

West Headnotes

**[1] Statutes 361 47**

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
Statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice of exactly what conduct it proscribes.

**[2] Officers and Public Employees 283 110**

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k110 k. Duties and Performance Thereof in General. Most Cited Cases
Provision of Code of Ethics for Public Officers and Employees prohibiting receipt of gift official knows, or, with exercise of reasonable care, should know, was given to influence vote or other action in which official was expected to participate was facially constitutional; statute provided reasonable persons with adequate notice of types of conduct proscribed. West's F.S.A. § 112.313(4).

**[3] Appeal and Error 30 181**

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k181 k. Necessity of Objections in General. Most Cited Cases

**Appeal and Error 30 248**

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(C) Exceptions
30k248 k. Necessity in General. Most Cited Cases
Party cannot argue on appeal matters which were not properly excepted to or challenged below, and, thus, were not preserved for appellate review.

**[4] Administrative Law and Procedure 15A 669.1**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General

15Ak669 Preservation of Questions Before Administrative Agency
15Ak669.1 k. In General. Most Cited Cases

**Municipal Corporations 268 170**

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(A) Municipal Officers in General
268k170 k. Duties and Liabilities. Most Cited Cases
City commissioner preserved issue of whether decision by hearing officer of Commission on Ethics was supported by competent, substantial evidence by filing exceptions to hearing officer's recommended order for appellate review.

***254** An Appeal from the District Court of Appeal, Statutory or Constitutional Invalidity, Third District, Case No. 94-1062.C. Christopher Anderson III, Staff Attorney and Philip C. Claypool, General Counsel, Commission on Ethics, Tallahassee, for Appellant.

Stuart R. Michelson of the Law Office of Stuart R. Michelson, Bay Harbour Islands, for Appellee.

GRIMES, Chief Justice.

We review *Barker v. Florida Commission on Ethics*, 654 So.2d 646 (Fla. 3d DCA 1995), wherein the district court of appeal declared section 112.313(4), Florida Statutes (1993), facially unconstitutional. We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

James Barker is a city commissioner for the City of Coral Gables. While serving as a city commissioner, Barker accepted complimentary memberships from the Coral Gables Country Club and the Coral Gables Executive Club. The State filed a complaint against Barker with the Florida Commission on Ethics (the "Commission"), alleging that Barker had accepted the complimentary ***255** memberships in violation of section 112.313(4). Section 112.313(4) provides:

No public officer or employee of an agency or his spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer or employee knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer or employee was expected to participate in his official capacity.

The Commission found probable cause to believe that Barker had accepted the complimentary memberships in violation of section 112.313(4) and ordered a public hearing to ascertain whether Barker knew or should have known that the memberships were given to influence his vote or other official action.

The hearing officer concluded that no reasonable person could believe that the complimentary memberships were given to Barker for any reason except to influence him and recommended that the Commission find that Barker had violated section 112.313(4) by accepting the free memberships. Barker filed exceptions to the hearing officer's recommended order. The Commission rejected Barker's exceptions and approved the hearing officer's recommended order. However, relying upon this Court's decision in *D'Alemberte v. Anderson*, 349 So.2d 164 (Fla.1977), the district court of appeal held the statute to be unconstitutionally vague and reversed the Commission's order.

[1] A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice of exactly what conduct it proscribes. *Brown v. State*, 629 So.2d 841, 842 (Fla.1994); *State v. Bussey*, 463 So.2d 1141, 1144 (Fla.1985); *Zachary v. State*, 269 So.2d 669, 670 (Fla.1972); *Brock v. Hardie*, 114 Fla. 670, 678-79, 154 So. 690, 694 (1934). In *D'Alemberte*, we invalidated an earlier version of section 112.313(4) as unconstitutionally vague. That version of the statute provided that:

No officer or employee of a state agency or of a county, city, or other political subdivision of the state, legislator, or legislative employee shall accept any gift, favor, or service, of value to the recipient, *that would cause a reasonably prudent person to be influenced* in the discharge of official duties.

§ 112.313(1), Fla.Stat. (Supp.1974) (emphasis added). In striking down this statute, we reasoned that "the reasonably prudent man test is an inapposite tool to determine whether a particular official would be influenced in the discharge of his duties by a gift. The statutory language denies [public officials] due

process because the objective standard enunciated in the act is inapplicably related to the subjective mental process which the statute seeks to ure." *D'Alemberte*, 349 So.2d at 168.

In holding the current statute unconstitutional, the court below concluded that the phrase "should know" requires a public official to divine the subjective intent of a donor and that "[b]y imposing a constructive knowledge requirement as to the intent of a third person on public officials, the statute is unconstitutionally vague and susceptible to the inherent dangers of arbitrary and discriminatory enforcement." *Barker*, 654 So.2d at 649. The court stated:

[W]hen the Florida Legislature enacted the current Section 112.313(4), it used language prohibiting receipt of gifts the official knows, or, "with the exercise of reasonable care, should know," was given to influence. We find that this language in effect equates to the "reasonably prudent person" language of the prior statute, and is thus too imprecise to provide public officials with fair warning of what conduct is forbidden. *See D'Alemberte v. Anderson*, 349 So.2d at 166.

*Barker*, 654 So.2d at 648.

Coincidentally, the First District Court of Appeal reached a contrary conclusion less than three months later. *Goin v. Commission on Ethics*, 658 So.2d 1131 (Fla. 1st DCA 1995). In upholding section 112.313(4) against an attack for vagueness, the court said:

The *D'Alemberte* court nullified a statute that tested the public official's behavior against the standards of a "reasonably prudent man." We find that the present statute,***256** including the language "with the exercise of reasonable care, should know," does not perpetrate the same evil. Instead, the present statute merely allows proof of an ethical violation by demonstrating the public employee's actual or constructive knowledge of the donor's illegal intent.

*Goin*, 658 So.2d at 1135.

[2] We agree that the version of section 112.313(4) at issue focuses upon whether the actual public official against whom the complaint was filed knew or should have known that the gift was given to influence that public official-not whether a hypothetical public official, "a reasonably prudent person," would be influenced by the gift. Stated otherwise, this statute asks whether a public official had actual or constructive knowledge of a donor's intent to influence that public official's vote or other official action.

Neither the court below nor any of the parties have suggested, nor do we find, that section 112.313(4) would be unconstitutionally vague if it simply prohibited a public official from accepting a gift if that public official *knew* that the donor had given the gift in order to influence that public official's vote or other official action. Consequently, we need only address the question of whether the constructive knowledge component of section 112.313(4) renders the section unconstitutionally vague.

This Court previously rejected a void for vagueness challenge to a criminal statute which included constructive knowledge as an element of the offense proscribed. In *State v. Dickinson*, 370 So.2d 762, 762-63 (Fla.1979), we concluded that "Sections 812.012 to 812.028, Florida Statutes (1977), are constitutionally sound because reasonable persons have adequate notice of the types of conduct proscribed by these statutes." Dickinson was charged with dealing in stolen property in violation of section 812.019. Section 812.019 provided that "[a]ny person who traffics in, or endeavors to traffic in, property that he *knows or should know* was stolen shall be guilty of a felony of the second degree." § 812.019, Fla.Stat. (1977) (emphasis added).

We also know that criminal statutes are subject to a more stringent examination as to vagueness than are noncriminal statutes. *D'Alemberte*, 349 So.2d at 168. Therefore, if the constructive knowledge component of section 812.019-a criminal statute-gives adequate notice of the conduct proscribed, then the constructive knowledge component of section 112.313(4) must certainly pass constitutional muster. We conclude, therefore, that section 112.313(4) is facially constitutional.[FN1] At the same time, however, we note that proof that something of value was given to a public official who might be in a position to help the donor one day, without more, would not establish a violation of section 112.313(4).

FN1. We also reject Barker's alternative argument that the statute creates an unconsti-

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tutional delegation of legislative authority to the Commission.

[3][4] Having determined that section 112.313(4) is facially constitutional, there remains the question of whether the hearing officer's findings are supported by competent, substantial evidence. The Commission contends that Barker failed to preserve this issue for appellate review. A party "cannot argue on appeal matters which were not properly excepted to or challenged before the Commission and thus were not preserved for appellate review." *Couch v. Commission on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993). However, in this case, Barker filed exceptions to the hearing officer's recommended order. While he did not employ the words "competent, substantial evidence," Barker did argue that the hearing officer rejected certain proposed findings of fact even though they were based on undisputed evidence and that the hearing officer failed to include other proposed findings of fact even though they had been accepted as true. Barker further argued that the hearing officer's conclusion that Barker should have known that the memberships were given to influence his vote or other official action was not supported by the evidence. In adopting the hearing officer's findings of fact and conclusions of law, the Commission expressly rejected Barker's exceptions, concluding that the hearing officer's findings of fact and conclusions***257** of law were supported by competent, substantial evidence. Considering the exceptions as a whole, we conclude that Barker sufficiently preserved the issue for appellate review.

In holding the statute unconstitutional, the district court of appeal did not address the issue of whether the hearing officer's findings are supported by competent, substantial evidence. Therefore, we remand the case for the determination of this question.

It is so ordered.

OVERTON, SHAW, HARDING and WELLS, JJ., concur.
KOGAN, J., dissents with an opinion.
ANSTEAD, J., dissents with an opinion, in which KOGAN, J., concurs.

KOGAN, Justice, dissenting.

I dissent. I agree with the well-reasoned opinion of the district court that this statute is unconstitutionally vague.

ANSTEAD, Justice, dissenting.

We are fortunate to have two thoughtful and thorough analyses of the issue from the district courts, even though the courts reach different conclusions. These opinions, however, demonstrate the difficulty of interpreting this broad statute.

In the *Goin* opinion, for example, the danger inherent in the statute is made clear by a portion of the analysis upholding the statute:

We find merit in the argument advanced by the Commission on this point:

The statute here simply requires a responsible public servant to ask one question when offered anything of value: "Why is this person offering this to me?" If the answer is that it is being given because the donor has an interest in matters expected to come before the public servant and the donor would like to affect the public servant's judgment in those matters, then the statute prohibits its acceptance. *There is nothing particularly difficult or obscure about determining the motivation of another, especially when, as here, one knows that the others are involved in building a multi-million dollar facility for which one has the authority to initiate change orders and arrange for funding.*

*Goin v. Commission on Ethics*, 658 So.2d 1131, 1137 (Fla. 1st DCA 1995) (emphasis added). The district court opinion makes clear the danger in this vague statute by noting, in essence, that athletic director Goin obviously should have known that the good deal he received on his roof was given to influence him. In other words, the district court, while directing that the hearing officer's finding of innocence should be reinstated, suggests that Goin should have known that he was violating the statute when he accepted the roof deal.

This "obvious" conclusion about the roof deal in *Goin* is much like the hearing officer's conclusion in this case, as noted by the majority, that "no reasonable person could believe that the complimentary memberships were given to Barker for any reason except to influence him." Majority op. at 255. Indeed, it is not illogical to conclude under the "should know" standard of this statute that any gift made to a public official after the official assumes office could reasonably

be assumed to have been given to influence the official. Such a sweeping inference is the precise danger that led to our ruling in *D'Alemberte v. Anderson*, 349 So.2d 164 (Fla.1977).

In an attempt to curb this danger, the majority cautions: "[P]roof that something of value was given to a public official who might be in a position to help the donor one day, without more, would not establish a violation of section 112.313(4)." Majority op. at 256. In reality, this is simply a concession as to the broad and vague reach of the statute. Despite this conscientious effort to restrict an expansive reading of the statute, it is apparent that the "should know" portion of the statute is far too vague and cannot be saved. As the Third District opinion correctly concludes:

The result is likely to be arbitrary and discriminatory enforcement, because the imposition of penalties is based on the subjective view of the hearing officer, as to the subjective view of the public official, as ***258** to the subjective view of the donor. Absent an admission by the donor that a gift was intended to influence official conduct, the public official can only guess as to what the donor intended.

*Barker*, 654 So.2d at 649.

The current statute, much like the earlier flawed version in *D'Alemberte*, still relies on "the reasonably prudent person" standard we found fatal there. The "should know" standard in the statute is simply a restatement of the negligence standard that is contemplated by the use of the words "or, with the exercise of reasonable care, should know." Under that standard, the question is whether a reasonable person in the same circumstances would have known that the gift was given to influence the official. No one disputes that is what a "should know" standard means, and considering the difficulties the parties and the courts at all levels have had with the facts in *Goin* and *Barker*, no one can dispute that we have been unable to give concrete meaning to the provisions of section 112.313(4). We should adhere to our prior ruling in *D'Alemberte*.

KOGAN, J., concurs.

Fla.,1996.
Commission on Ethics v. Barker
677 So.2d 254, 21 Fla. L. Weekly S193

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871 So.2d 924, 29 Fla. L. Weekly D671
**(Cite as: 871 So.2d 924)**

H

District Court of Appeal of Florida,
Fifth District.
Samuel G.S. BENNETT, Appellant,
v.
COMMISSION ON ETHICS, Appellee.
**No. 5D03-1669.**

March 19, 2004.
Rehearing Denied May 5, 2004.

**Background:** Town council chairman appealed determination of the Commission on Ethics that he corruptly used his position as chairman to obtain a special benefit.

**Holding:** The District Court of Appeal, Torpy, J., held that evidence was insufficient to support finding that town council chairman corruptly used his position as chairman to obtain special benefit.
Reversed.

Griffin, J., dissented without opinion.

West Headnotes

**Municipal Corporations 268 170**

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(A) Municipal Officers in General
268k170 k. Duties and liabilities. Most Cited Cases
Evidence was insufficient to support finding that town council chairman's conduct in making changes to zoning map that would have increased value of his property was inconsistent with proper performance of his public duties, as required to establish that he corruptly used his position as chairman to obtain special benefit; chairman was invited by land planner to make changes to map, his purpose in marking map was to suggest zoning changes, and town commission acknowledged that elected member of town council could suggest zoning changes on his own property provided that disclosure and recusal from voting occurred, but chairman did not vote on suggestions or fail to disclose his interest in parcels. West's F.S.A. §§ 112.312(9), 112.313(6).

***924** C. Allen Watts and Ty Harris, of Cobb & Cole, Daytona Beach, for Appellant.

Charles J. Crist, Jr., Attorney General, and James H. Peterson, III, Assistant Attorney General, Tallahassee, for Appellee.

TORPY, J.

Samuel Bennett ("Appellant") challenges the determination by Appellee, Commission on Ethics ("the Commission") that he corruptly used his position as Chairman of the Council of the Town of Pierson, Florida, to obtain a special benefit in violation of ***925**section 112.313(6), Florida Statutes (1999). Because we conclude that the evidence does not support a finding of corrupt intent by Appellant, we reverse.

At the center of this dispute is the allegation that Appellant made, or caused to be made, changes to the official zoning map of Pierson, Florida. The map had been created and adopted by the Pierson Town Council in 1994. Although it was an improvement over the Town's prior method of accounting for zoning designations, the map was inaccurate and not comprehensive. Moreover, the vellum-like document had become tattered and difficult to read. As a result, at the suggestion of Mr. Keeth, a land planner commissioned by the Town, the Pierson Town Council considered replacing the map with a computer-created digital map that would be more complete and easier to read, maintain, and update. Keeth told the council that, as a part of the process of creating a new map, individual council members and members of the public could suggest zoning changes. The suggested changes, if approved after appropriate public workshops and hearings, could then be incorporated into the final map. The council requested that Keeth work with Appellant in preparing a new map for consideration by the council.

In November of 1999, Keeth met with Appellant to discuss the map. Appellant retrieved the map from the Town Clerk so that he and Keeth could review it as an initial step for the project. The clerk was hesitant to release what was the only copy of the map to Appel-

lant because she was responsible for it and Appellant, in her words, had a history of losing things. She testified that it was the "policy" to never permit the zoning map to leave the town hall and the clerk's supervision. Despite her reluctance, the clerk acknowledged that she ceded to the request of Appellant.

Thereafter, Keeth and Appellant spent time reviewing the map in Appellant's home. In addition, the two drove around Pierson to check for discrepancies between the actual zoning use of the land and the zoning classification identified on the map. During the drive, pencil notations were apparently made on the map. Although the evidence was in dispute as to the origin of the marks, the administrative law judge found that the marks had been made either by Appellant or by Keeth at Appellant's direction, for the purpose of indicating "suggested" zoning changes.

Keeth and Appellant returned to the town hall around lunch time and returned the map to the town clerk. The clerk did not examine the map at that time. However, she noted the pencil markings on the map later that afternoon when she retrieved the map to assist another individual. The pencil notations could clearly be distinguished from the official markings on the map and did not eviscerate the official marks in whole or in part. Apparently, these were not the only such marks on the map. A prior clerk testified that she too had at one time placed some marks on the map. Some of the suggested zoning changes made by Appellant, or at his behest, had they been approved, would have positively affected property owned by Appellant.

Subsequently, Keeth forwarded a draft map to Appellant that incorporated Appellant's suggested changes. A memorandum that accompanied the draft reflected that the proposed map included changes that had been suggested by Appellant. Throughout the following months Keeth prepared many drafts of the map, some of which included changes that were also suggested by citizens of the Town. Ultimately, after appropriate public hearings, a map was adopted, but none of the suggested zoning changes affecting Appellant's property were adopted. Throughout this process, Appellant's actions in having marked ***926** the original map came under scrutiny, culminating in an investigation and the instant action.

The statutory provision at issue here is section 112.313(6), Florida Statutes, which provides, in pertinent part as follows:

> Misuse of public position.-No public officer, employee of an agency, or local government attorney shall [1] corruptly use or attempt to use his or her [2] official position or any property or resource which may be within his or her trust, or perform his or her official duties, [3] to secure a special privilege, benefit, or exemption for himself, herself, or others.

§ 112.313(6), Fla. Stat. (1999) (enumeration added).

Appellant contends that he did not act in the corrupt manner required under the statute and that the evidence does not support an attempt by him to procure a special benefit by his actions. The Commission argues that Appellant not only acted with a wrongful intent, but that such conduct was inconsistent with the proper performance of his official duties. This, the Commission asserts, meets the "corrupt" standard required under section 112.313(6), Florida Statutes. Furthermore, the Commission contends that had Appellant's changes been adopted, Appellant would have received a special benefit through an increase in the value of his property.

Turning first to the question of whether Appellant acted corruptly, we note that the legislature has defined "corruptly" as "done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties." § 112.312(9), Fla. Stat. (1999). To satisfy this statutory element, proof must be adduced that Appellant acted "with reasonable notice that [his or] her conduct was inconsistent with the proper performance of [his or] her public duties and would be a violation of the law or the code of ethics." *Blackburn v. State, Comm'n on Ethics*, 589 So.2d 431, 434 (Fla. 1st DCA 1991).

Here, the factual findings of the administrative law judge, which were adopted by the Commission, contradict the conclusion that Appellant acted corruptly. After having been invited by Keeth to make suggested changes to the map, Appellant did just that. Appellant's purpose in marking the map, therefore, was to "suggest" that the zoning be changed, which belies the Commission's conclusion that Appellant's acts were corrupt. The Commission readily acknowledges that

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an elected member of a Town Council may suggest that zoning be changed on property owned by the member provided that disclosure and recusal from voting occurs, but no allegation is made here that Appellant voted on these suggestions or failed to disclose his interest in the parcels. Furthermore, the Commission points to no law that prohibited Appellant from possessing or marking the map. The conclusion that Appellant acted corruptly under these facts, therefore, is erroneous.[FN1]

> FN1. Certainly, had Appellant secretly altered the map with the intent to *effect* a zoning change without proper public hearing, a different case would be made, but the evidence here fails to support any such scenario.

Based on our conclusion that the corruption element was not satisfied, Appellant's other arguments are not considered.

**REVERSED.**

***927** PLEUS, J., concurs.
GRIFFIN, J., dissents without opinion.
Fla.App. 5 Dist.,2004.
Bennett v. Commission on Ethics
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# Agenda item IX(d) definition of lobbyist

Currently, the definition of lobbyist is not specifically limited to the governmental body being lobbied. References include, “relationships with government”, “contacts with government”, “on behalf of government” but only limits the term “government” in the context of public officials lobbying on behalf of the “governmental agency which the official serves...or...by which the staff member is employed.”

The gift law prohibition found in sec. 2-444(a) prohibits acceptance of a gift valued at greater than $100.00 from a lobbyist. This section does not further define lobbyist as to limit the application to the governmental entity that is lobbied. Therefore, a strict construction would prohibit gifts from lobbyists, their principals or employers, no matter where they lobby, even if they do not lobby the government of the employee (see, RQO 10-030 Rachael Ondrus). It should be noted that sec. 2-444(b) does limit the applicability of the prohibition to “...a lobbyist, who lobbies the recipient’s advisory board, or any county department that is subject in any way to the advisory board’s authority.”

The COE first will need to interpret the code as to whether or not a strict application is to be applied to sec. 2-444(a). If the construction is strict, then the COE will need to consider whether this is an unintended or unwanted consequence of the present code.

Staff Recommendation:

That the COE interpret sec. 2-444(a) in conjunction with section (b) to apply only to lobbyists who lobby the government of the employee (county or municipal).

In the alternative, staff recommends that sec. 2-444(a) be amended to read:

No county commissioner or employee, or any other person or business entity on his or her behalf, shall knowingly solicit or accept directly or indirectly, any gift with a value of greater than one hundred dollars ($100.00) from any person or business entity that the recipient knows is a lobbyist, or any principal or employer of a lobbyist, <u>who lobbies the county</u>.