Agenda

December 2, 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 November 4, 2010
V. Processed Advisory Opinions
   a. RQO 10-033-OE
   b. RQO 10-034
   c. RQO 10-037-OE
VI. Proposed Advisory Opinions
   a. RQO 10-032
VII. Workshop Items
   a. Processing Complaints (p/c and final hearings)
   b. Press Releases/Releasing Documents to the Press
   c. Consideration of Code Revision to 2-443(a) *Misuse of Public Office or Employment*
   d. Definition of Lobbyist
VIII. Executive Director Compensation Discussion (Commissioner Reinhart)
IX. Public Comments
X. Executive Director Comments
   a. Referendum Update
XI. Board Comments
XII. Adjournment

MEETING: PALM BEACH COUNTY COMMISSION ON ETHICS

I. CALL TO ORDER: November 4, 2010, at 4:04 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. – Absent

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 stated that Bruce Reinhart would be appearing telephonically as he was participating in a trial. He disclosed that he would be leaving at 5:30 p.m. due to a prior commitment, and that vice chair Manuel Farach would facilitate the remainder of the meeting. He reminded everyone to either turn off or silence their cell phones.

IV. APPROVAL OF MINUTES FROM OCTOBER 7, 2010

Judge Rodgers asked that the corrections of the October 7, 2010, minutes be facilitated by Alan Johnson, Commission on Ethics (COE) Executive Director (ED).

Mr. Johnson read the following corrections:

- Page 4, top of page, first bullet, the wording, “Mr. Johnson had no knowledge…” was changed to, “He had no knowledge…”

IV. – CONTINUED

- Page 12, top of page, first bullet, the wording, “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 interest in the outcome” was changed to, “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.”

- Page 12, bottom of page, last bullet, the wording, “The issue with 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” was changed to, “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.”

- Page 13, bottom of page, last paragraph, the wording, “Mr. Fiore asked whether the response to the advisory opinion…” was changed to, “Dr. Fiore asked whether the response to the advisory opinion…”

- Page 24, bottom of page, third paragraph, the word “Dr. Reinhart” was changed to “Mr. Reinhart.”

- Page 31, fourth paragraph, middle of page, the wording, “Judge Rodgers clarified that the request would be to direct Mr. Johnson to investigate further and ask Ms. Baker whether she would state under oath the nature of her complaint” was changed to, “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.”

- Page 31, seventh paragraph/second to last paragraph, bottom of page, the wording, “Judge Rodgers stated that the motion was related to Ms. Baker’s statements. Should that conversation produce further leads, then they could be explored, he stated” was changed to, “Judge Rodgers stated that the motion was related to Ms. Baker’s statements. Should that conversation produce further leads, and they could be explored, he stated.”

IV. – CONTINUED

MOTION to approve the minutes of October 7, 2010, with the changes read by Alan Johnson. Motion by Dr. Robin Fiore, seconded by Manuel Farach, and carried 4-0. Bruce Reinhart absent.

Mr. Farach stated that on page 6, his first name was cited as Manual and should be spelled with an "e," Manuel.

MOTION to approve the minutes of October 7, 2010, to reflect the proposed change by Manuel Farach. Motion by Ronald Harbison, seconded by Dr. Robin Fiore, and carried 4-0. Bruce Reinhart absent.

Judge Rodgers stated that public comment cards were submitted for Complaint (C) C 10-004. Mr. Johnson added that the complaint corresponded with item VII. on the COE meeting agenda.

V. PROCESSED ADVISORY OPINIONS

Mr. Johnson stated that:

- Rule 2.5 of the Code addressed processing advisory opinions (AO). Some AO could be directly answered by the Code while others had to be interpreted.

- Currently, several AO and outside employment (OE) requests had been received. It was anticipated that the number of requests would increase significantly once the municipalities signed the interlocal agreement with the COE. The rules of procedure stipulated that the COE chair or vice chair was authorized to release the AO without the opinion being discussed before the entire COE.

- Direction was needed from the COE whether to omit the AO from the agenda, or group the AO into a consent agenda item, and discuss only sections that were pulled by the COE or members of the public.

Dr. Robin Fiore stated that:

- She was concerned that the Code would be used to directly answer requests. In the past, COE members based their responses to requests on the interpretation of facts. The Code only answered the question formulated, and the correct question was not always posed.

V. – CONTINUED

- The consent package could be provided to the COE before the information became official, and if there were no objections, the COE could approve the package.

Mr. Johnson said that currently, AO packages were compiled and published to the COE Web site a week before a meeting. A specific consent agenda item could be compiled and published as well; however, the AO were not being provided to the media, the League of Cities, or any other entity at this time, he stated.

Mr. Farach stated that if a consent agenda process were implemented to preserve time during COE meetings, staff could recommend a procedure where sufficient disclosure was received in advance of the meeting by direct release, as opposed to compelling the public to access the COE Web site for the information. He believed that the release of information process should be informal and expedited, he added.

Mr. Johnson explained that AO were processed until the Friday before the COE meeting.

Judge Rodgers recommended that the consent agenda be published in advance so that interested parties could prepare to comment at the next COE meeting.

Mr. Johnson stated that:

- Consent agenda items would be published in the same format as the proposed AO, and the procedure for reviewing and voting on the item would occur in one vote.

- The issue of press releases was on today's COE agenda and could be tabled until item IX.b. was discussed later in the meeting.

- Consent agenda items could be discussed individually by the COE or by members of the public.

- Direction was sought from the COE as to whether the consent agenda format was suitable for reviewing proposed AO.

Dr. Fiore requested that the AO be categorized according to other employment, gifts, and other topics.

V. – CONTINUED

Mr. Johnson explained that outside employment would be categorized as OE, which would be placed at the end of the RQO number, and would serve to differentiate that item. Other issues could be catalogued in content order, he added.

MOTION to table the issue of press releases until agenda item IX.b. was discussed. Motion by Manuel Farach, seconded by Dr. Robin Fiore, and carried 4-0. Bruce Reinhart absent.

Mr. Johnson requested that the COE consider voting on item V. in its entirety because AO were reviewed by the chair, Judge Rodgers, and would be distributed to the respective parties pending today's meeting.

MOTION to approve accepting items V.a. RQO 10-027-OE, V.b. RQO 10-028-OE, V.c. RQO 10-029-OE, and V.d. RQO 10-031-OE, as discussed. Motion by Dr. Robin Fiore, seconded by Ronald Harbison, and carried 4-0. Bruce Reinhart absent.

VI. PROPOSED ADVISORY OPINIONS

VI.a. RQO 10-030

Mr. Johnson stated that one AO was new while another was a revised opinion. He reported that:

- Item RQO 10-030 involved Rachel Ondrus, Executive Director of the Palm Beach County Legislative Delegation, who relocated to the county. While searching for a home to purchase, she temporarily rented a condominium that was owned by a woman whose husband was a lobbyist for the State legislature.

- The rental price of $1,100 was the average cost for the size and location, as per www.rentometer.com, a Web site purporting to calculate fair market values for local rentals.

- In comparison, a slightly larger condominium with an extra bathroom was in the same building as Ms. Ondrus' rental that was being leased for the same amount. Although it was owned by the non-lobbyist spouse, the property owner and her husband, a lobbyist, shared equally in the asset.

VI.a. – CONTINUED

- The issues presented in this inquiry correlated with section 2.444 of the Code of Ethics (Code) – prohibition from accepting a gift from a lobbyist at greater than $100. One of the questions posed was whether the Code would prohibit a gift by a lobbyist who did not lobby an employee's governmental entity.

- Ms. Ondrus later decided not to rent the apartment, and she removed herself from the process. However, as per the rules of the COE once submitted, AO requests could not be withdrawn.

- The second issue was, if a gift was given to Ms. Ondrus, would the person giving the gift be the wife, or her husband, or both parties.

- The third issue was the fair market value of the rental in relation to Florida State Statute (F.S.S.) 121.3148. In a prior AO, the Code and the COE used F.S.S. 121.3148 as a guide to determine the value of a gift and the offset for receiving that gift. Any increment in excess of $100 would be considered a gift. A determination would need to be made as to the offset of the rental property's worth, had it been assessed at $1,500. If that was the case, then Ms. Ondrus would have received a net gain of $400, which would have constituted a prohibited gift from a lobbyist.

- Based on the facts given, the sufficiency of the evidence indicated that the rental price was at fair market value based on comparables, and it appeared that no residual gift had been received.

- The letter contained an additional admonishment that if at any time the rent was reduced or the value of the property increased, the employee would have an ongoing responsibility to comport with the Code.

Judge Rodgers commented that the COE reviewed a scenario that did not exist He recommended that in response to the request, Mr. Johnson could respond that the request was withdrawn due to that fact.

Dr. Fiore said that it was worth noting that Ms. Ondrus withdrew the request in the middle of the process because of the information that was being developed; and that a review of the request had fulfilled an educational purpose.

Ronald Harbison concurred and added that the review would also provide guidance on similar future requests.

VI.a. – CONTINUED

Mr. Johnson stated that Ms. Ondrus was cooperative and provided further information even after withdrawing her request for AO. He said her actions were not inappropriate.

MOTION to approve accepting staff's recommendation for RQO 10-030. Motion by Dr. Robin Fiore, seconded by Manuel Farach, and carried 4-0. Bruce Reinhart absent.

VI.b. RQO 10-020 (Revised)

Mr. Johnson stated that:

- The complaint involved Ruth Moguillansky-DeRose, a County employee who worked as a Principal Planner for the Office of Community Revitalization (OCR). She volunteered for Rebuilding Together of Palm Beaches (RT), a non-profit organization that rehabilitated houses for low-income families, the disabled and elderly citizens.

- During the processing and posing of the questions received from Assistant County Attorney Leonard Berger regarding the AO it was believed that Ms. Moguillansky-DeRose had already been appointed to the RT board.

- When the opinion letter was published after the last COE meeting, Ms. Moguillansky-DeRose responded through her supervisor that the opinion portrayed her as violating the Code by being on the RT board. She said that the request had been sent to determine whether she could serve on the RT board.

- While the actual opinion of the request was not changed, the revised version of the opinion underscored that Ms. Moguillansky-DeRose had come forward before taking the step to join the RT board.

MOTION to approve accepting staff's revised recommendation for RQO 10-020. Motion by Dr. Robin Fiore, seconded by Ronald Harbison, and carried 4-0. Bruce Reinhart absent.

VII. COMPLAINTS

VII.a. C 10-004 (Continued)

Mr. Johnson explained that the amended letter would replace the initial letter, and the word "revised" would be stamped on the new version. He said that a hard copy of the original letter would be kept for public records purposes, and that the revised letter would be reflected on the COE Web site.

Mr. Johnson suggested that the chair take public comment on the item once the presentation by COE investigator Mark Bannon was completed. He said that:

- The complaint resulted in legal sufficiency and a motion to dismiss was recommended by staff due to a lack of probable-cause. It was the determination of the COE that additional information be requested from Deputy County Administrator Verdenia Baker, as well as her sworn testimony.

- After conferring with Mr. Bannon, a thorough investigation was conducted and sworn statements were taken from a number of persons who were present at the event in question. The parties included respondent Commissioner Priscilla Taylor, District 6 secretary Dennis Lipp, Director of Human Resources (HR) Wayne Condry, OCR Director Houston Tate, Palm Beach State College professor Dr. Jay Matteson, and Commissioner Shelly Vana.

Judge Rodgers recommended that public comments be made following the presentation of the ED's findings.

In presenting the investigative report, Mr. Bannon disclosed that:

- Seven people were interviewed, but only six of them sat at the same table during the County function with Commissioner Taylor, Mr. Tate, and Ms. Baker.

- Of those interviewed, Commissioner Vana, Mr. Lipp, and Dr. Matteson denied seeing any political writing or literature, and did not hear any conversation in that regard. Their statements were of little value to the investigation.

- Mr. Tate's sworn statement was previously taken by Mr. Johnson, and the details of that interview were reviewed.

VII.a. – CONTINUED

- Ms. Baker's statement taken under oath conveyed that:

    - While seated at the table, Commissioner Taylor asked Ms. Baker whether political literature was permitted at County functions. Ms. Baker looked at the literature from Vincent Goodman, who was a candidate running for Commissioner Taylor's seat on the board. Ms. Baker asked Mr. Tate to take care of the matter because she expected directors under her charge to handle the administration of their County departments.

    - Ms. Baker later received a draft copy of Mr. Tate's summary about the incident. At a subsequent meeting, Ms. Baker stated that Mr. Tate had processed the matter through the County's human resources department and had followed appropriate guidelines for policy and merit rules.

- During Commissioner Taylor's interview she disclosed seeing political advertisements on several tables upon entering the room at the County. It was at her table that political literature was found. She handed it to Ms. Baker, and asked, "Is this allowed?" Ms. Baker then gave the literature to Mr. Tate.

- Commissioner Taylor further reported that the only other conversation about the incident occurred when she asked Ms. Baker whether the situation had been resolved. Commissioner Taylor explained that since the policy had been violated at a County function during an election campaign, she wanted to make sure that the party who distributed the literature had not created an unfair advantage.

- Mr. Condry was not at the table, and as human resources director, he met with Mr. Tate to discuss whether the reprimand fell within the guidelines of the merit rules.

- At no time did the parties interviewed indicate that Commissioner Taylor or anyone else directed them how to handle the situation or dictated the punishment to be administered.

- It was not within the scope of the investigation to determine whether the punishment was correct because the evidence determined that Commissioner Taylor had not interfered with the process.

VII.a. – CONTINUED

- Mr. Tate was sworn in when he gave a statement to Mr. Johnson. Every other party interviewed provided a sworn statement with the exception of Dr. Matteson who was interviewed telephonically due to time constraints.

Mr. Johnson stated that:

- Staff's recommendation remained that the complaint be dismissed for lack of probable-cause. Throughout the investigative process, there was no conflicting evidence regarding the manner in which the information was brought to the attention of Ms. Baker or Mr. Tate. Based on the weight of the evidence, Commissioner Taylor had not committed an act of misconduct.

- The complaint was made by Chrystal Mathews, OCR Senior Planner. The incident took place at a hotel where the County Resident Education Action Program (REAP) held a graduation luncheon. OCR and Ms. Mathews planned the event where political literature was seen on one table.

- An internal investigation by the County determined that Ms. Mathews had violated a County policy regarding election campaigning at County functions.

- A memorandum issued by Mr. Tate stated that he did not believe Ms. Mathews intentionally placed the literature. However, she allowed it to be placed. As the designee in charge of the function, it was her duty to notify her father, who was running for political office, that distributing political literature at the function was prohibited.

- The County's rules and policy regarding campaign literature were vague, and this was an internal matter that the County would adjudicate.

- The nexus was that by securing political office, the associated salary would yield a financial benefit.

- In Ms. Mathews' complaint:

    - She never stated that she heard Commissioner Taylor direct anyone to act, and responded to Mr. Tate's verbal reprimand; and,

VII.a. – CONTINUED

- She assumed that the statements made were by Commissioner Taylor. However, the investigation revealed Ms. Baker had directed Mr. Tate to, “take care of,” or, “look into the situation.”

Mr. Harbison stated that he was not comfortable with the financial nexus relating to salary loss.

Dr. Fiore underscored that salary was not the only issue, because an elected official would receive significant benefits such as civil service credit, pension, and health benefits by maintaining their offices.

Judge Rodgers stated that public comment would be taken at this time.

VIII. PUBLIC COMMENT

a. DISCUSSED: C 10-004

PUBLIC COMMENT: Chrystal Mathews.

Ms. Mathews commented that:

- The COE should reconsider the ED’s recommendation of no probable-cause, because she believed that the actions of the respondent Commissioner Taylor were politically motivated. Ms. Mathews opposed the insinuation that she was acting as her father’s campaign manager, although the COE later determined that information to be false.

- A thorough investigation was not conducted and there were several inconsistencies in the sworn statements taken. The complaint was categorized as politically motivated, it was not taken seriously, and therefore condoned unethical behavior in County government.

- It was believed that any complaint with legal sufficiency and motive would be dismissed to the favor of the elected official. The complaint was made to correct an injustice that affected her professional career. The COE should also review the County’s policy and procedure manual (PPM).

VIII. – CONTINUED

Judge Rodgers asked whether it was proper for political advertisements to be placed on tables during County functions.

Ms. Mathews stated that:

- Political information was not placed on any tables at the function. Had the investigation been conducted appropriately, the investigator would have asked her or Mr. Goodman whether they had distributed literature to any individuals at the meeting.

- It was believed that Mr. Goodman handed one or two pieces of literature to a few individuals sitting at a table, and that these individuals were responsible for placing the information on the table at the function.

- A written reprimand was given to Ms. Mathews on July 29, 2010, which was approximately one-and-a-half-month after the event was held on June 12, 2010.

- Commissioner Taylor exercised her power by asking at a later date whether the issue had been handled, and this constituted a directive.

- The REAP was a civic engagement program that taught residents how to become active in County government. In the past, participants had engaged in mock commission meetings to learn about the process.

- For the last six years, the County commissioners and candidates who ran for elected offices were encouraged to attend REAP functions. Additionally, members of the board also signed certificates for program participants.

- It was impossible to dictate another individual's actions. In a room containing 200 people, it was unclear how only three people saw political literature. Seating charts and pictures had been submitted with the complaint as supplementary aids.

VIII. – CONTINUED

Mr. Harbison stated that:

- The question before the COE was whether Commissioner Taylor abused her power, which was a different issue than the reprimand that was given to Ms. Mathews.

- The issue hinged on whether a directive had been given by Commissioner Taylor. In reading the investigative report and applying the Code, it did not appear that Commissioner Taylor had violated the Code because she had made an inquiry and not a directive.

- Even if Commissioner Taylor had made a directive, it was questionable that there were grounds under the Code for dealing with such a directive. Otherwise, the Code would require that a nexus exist between a financial gain and the actions taken by Commissioner Taylor. Therefore, he was not prepared to make that assumption based on the grounds presented.

Ms. Mathews stated that the actions taken by the commissioner were politically motivated. She said that in the six years with the County as an exemplary employee, she was never reprimanded; and, her excellent work performance was even noted in the written reprimand. She said she believed that because Commissioner Taylor and Ms. Baker socialized outside of the office, then that relationship influenced the manner in which the situation was handled.

Mr. Harbison stated that he did not believe the evidence demonstrated that a directive had been given.

Dr. Fiore asked Ms. Mathews whether she believed the reprimand would have otherwise occurred.

Ms. Mathews responded that Mr. Tate said to her, “I don’t have any facts, but I was told to take care of this.”

VIII. – CONTINUED

Dr. Fiore stated that:

- From the COE's viewpoint, if there was literature on the table at the function that was not supposed to be there, it was within reason for personnel action to be taken. Even if no one had said anything about the literature, something in error reasonably should have been addressed.

- A different issue was being posed by Ms. Mathews' objection to the reprimand, but the COE could not insert itself into the County's personnel process unless there was some evidence that an ethics violation was implicated or explicit.

- The investigation did not establish that Commissioner Taylor misused her political office, nor did evidence exist that her actions resulted in Ms. Mathews' reprimand. It was likely that the reprimand resulted from the campaign literature being placed on the table at the function.

- The County had an established rule which stated that political literature should not be distributed at County functions. Ms. Mathews should win her personnel grievance because the County's policy was unclear, and did not correlate to the COE's determination that Commissioner Taylor had not violated the Code.

Mr. Farach asked Ms. Mathews to identify the inconsistencies she recognized in the sworn statements.

Ms. Mathews communicated the following:

- There was an instance where Ms. Baker stated that Commissioner Taylor asked once about the literature. However, in the statement that Ms. Baker made, Commissioner Taylor asked about the literature twice. The first instance was at the function, and the second inquiry was made a few weeks later in passing. Ms. Mathews could not recall any other inconsistencies but felt that more discrepancies could be found in the statements made by the other interviewees.

- She was unaware of any public policy set forth by County Administrator Robert Weisman in 2005 that prohibited politicking at County events.

VIII. – CONTINUED

- She had in her possession a copy of PPM CW-012, and stated that, "It is the policy of Palm Beach County Commissioners that all County officers and employees are citizens, and as such are afforded all the rights and privileges with respect to this nation's democratic process as are enjoyed by citizens not in County employment. At no time may any County employee engage in any political activities during normal working hours, nor shall any public property equipment or funds be utilized in the conduct of such activities."

- The event took place on a Saturday at the Airport Hilton Centre. The policy did not state anything about County events. She was a County employee but her father Mr. Goodman was not.

Mr. Farach communicated the following:

- Ms. Mathews' objections were that sworn statements were not taken, and that when sworn statements were taken, there were inconsistencies.

- He asked whether the reprimand was improper because the County event was not held within normal working hours.

- The reprimand was a County personnel issue rather than an ethical one, because it involved Commissioner Taylor's misuse of her office.

- In asking Ms. Mathews whether she had direct evidence that Commissioner Taylor misused her office, Mr. Farach said that he respectfully disagreed with Mr. Harbison's opinion that no financial component existed.

Ms. Mathews concurred that the reprimand was personnel related, but she stated that a cause and effect issue presented itself. By Commissioner Taylor initially pointing out the information, directing staff to take care of the situation, and at a later date readdressing the issue, those actions constituted a misuse of office, she stated.

Mr. Farach and Mr. Harbison noted that Commissioner Taylor had not given a directive.

Dr. Fiore clarified that Ms. Baker had made the statement, "I'll take care of it."

VIII. – CONTINUED

Mr. Farach stated that Commissioner Taylor's statement, "was this proper," was in relation to the political literature.

Dr. Fiore stated that as the daughter of Commissioner Taylor's opponent Ms. Mathews' statements gave the impression that she was untouchable. She asked Ms. Mathews to explain whether there was anything improper about Commissioner Taylor's inquiry.

Ms. Mathews stated that it was evident that Commissioner Taylor's influence caused an action to occur. She said the reprimand was received on July 29, 2010, and the timeline was in sequence with the ethics process.

In response to Mr. Farach's inquiry, Mr. Johnson stated that according to section 2-260.8 of the Code, the statute of limitation for filing an ethics complaint was two years.

Mr. Farach commented that the complaint could have been made after the election had concluded.

Judge Rodgers asked whether any other parties had comments that were different from Ms. Mathews' statements. He said that the basis of the complaint stemmed from allegations that Commissioner Taylor abused her office. He asked the next public commentator whether she had been interviewed previously, and whether her statements could be sworn in.

PUBLIC COMMENT: Sylvia Sharps.

(CLERK'S NOTE: Judge Rodgers swore in Ms. Sharps at this time.)

Ms. Sharps stated that:

- For the past three years, she was the REAP master of ceremonies. In the past two years she had been asked to acknowledge politicians and people running for office. This year, however, she was told to acknowledge only the politicians whom she knew.

- She did not see anyone place political advertisements on the tables at the function. Those who were acknowledged included Commissioner Taylor, Commissioner Vana, Mr. Mathews, Mr. Tate, and others in positions of authority who were in attendance.

VIII. – CONTINUED

- Mr. Goodman was not acknowledged because Ms. Sharps did not know him. Ms. Mathews had not introduced him to her, and she was not informed that Mr. Goodman was running for office.

Judge Rodgers interjected by asking Ms. Sharps if she had any information pertaining to the complaint against Commissioner Taylor.

Ms. Sharps said that she did not hear Commissioner Taylor make any comments or say anything about political data, because she was on the podium.

PUBLIC COMMENTS: Antonio Mathews.

Mr. Mathews stated that:

- The event was held on June 12, 2010, and seven weeks later, Commissioner Taylor in passing inquired a second time of Ms. Baker if the problem had been addressed. It was then that Mr. Tate decided to write a reprimand for Ms. Mathews, which in his opinion should not have taken seven weeks.

- He did not see anything unusual occur at the event.

Judge Rodgers asked Mr. Bannon whether he asked during the course of the investigation, why the written reprimand was issued seven weeks later.

Mr. Bannon stated that:

- He was told by Ms. Baker that Mr. Tate had been on vacation for two weeks, and that she required her staff to go through a process with HR. He had not inquired about the length of the HR process.

- A timeline for the second comment made by Commissioner Taylor could not be confirmed. The commissioner stated only that she had inquired of Ms. Baker a second time. Commissioner Taylor was interviewed after Ms. Baker so the question of the timeline was not posed.

VIII. – CONTINUED

Mr. Mathews interjected that:

- From the date of the event, June 12, 2010, until July 29, 2010, when Ms. Mathews received a written reprimand, Mr. Tate had not addressed the matter.

- Commissioner Taylor's second comment could have been an inquiry or an act of influence, and no actions transpired from June 12, 2010, until Commissioner Taylor initiated action by her comment that was made in passing.

- The investigator never interviewed Mr. Goodman to determine whether he had handed the political literature to Ms. Baker or Mr. Tate who, it was believed, had placed it on the table.

- The complaint was generated by an email that Ms. Mathews sent on May 26, 2010, to Assistant County Attorney Leonard Berger, who forwarded the email to Mr. Johnson, but Mr. Johnson never gave a response.

Mr. Johnson replied that his understanding was that Ms. Mathews withdrew her request, which was not formal. He said that Ms. Mathews had inquired whether she could work as a campaign manager for her father, but she had not made a formal request for an AO.

Judge Rodgers stated that the request had nothing to do with the current incident involving Commissioner Taylor.

Mr. Johnson recollected that he had started working on Ms. Mathews' request and was later informed that she had withdrawn her request because there was no conflict as long as she was not paid to work on the campaign. It was believed that the parameters of the request were reviewed during a previous COE meeting, he stated.

Judge Rodgers asked Mr. Bannon whether Mr. Tate had been asked why the written reprimand took so long to process. Mr. Bannon replied that he had not interviewed Mr. Tate.

VIII. – CONTINUED

Mr. Farach stated that the COE's role was not to sit as an appellate body for the County's personnel decisions, and that its focus had to be narrow to determine whether the Code had been violated. Although there was a six-week timeframe leading up to reprimand, it did not mean that Commissioner Taylor misused her office, he stated.

Judge Rodgers said that the complaint as presented did not address Ms. Mathews' punishment, and the question was whether Commissioner Taylor should be punished for some wrongdoing.

Mr. Mathews commented that the investigative conclusion could state, that seven weeks went by before Mr. Tate decided to document the incident, and it was not until after the, "in passing," that Mr. Tate decided to issue the written reprimand.

Mr. Harbison stated that the conclusions being drawn by Mr. Mathews were based on timeframe, and were a matter of speculation. He said that other assumptions could have easily been made regarding this matter.

Judge Rodgers inquired about any further comments bearing different information.

PUBLIC COMMENT: Vincent Goodman.

Mr. Goodman stated that:

- He telephoned Mr. Weisman and asked that his family be left out of the issue because the campaign was between him and Commissioner Taylor. Mr. Weisman agreed to look into the matter and get in touch with him.

- At the event, Ms. Baker greeted him, and he gave her a campaign card one of which he also handed to Mr. Tate. He did not place campaign cards on the tables at the event. He saw Ms. Baker take the card out of her purse and hand it to Commissioner Taylor.

- Subsequent to Ms. Mathews receiving her reprimand, he eventually canceled all election appearances and debates to protect his daughter.

Judge Rodgers said he thought the issue stemmed from a misunderstanding, but that Commissioner Taylor held a valid position that it was wrong to distribute campaign cards at County events.

VIII. – CONTINUED

Dr. Fiore stated that the grievance would likely be overturned when all the information contained in the investigation was revealed, and it appeared that the campaign cards were placed on the table by the persons who issued the reprimand.

Mr. Johnson said that:

- The issue of releasing documents would be discussed further in agenda item IX.b. A request would be made for the COE to amend the rules of procedure and add the release of documents.

- Normally the release of information process warranted that the COE call an executive session since information included in dismissal hearings and the investigation was not a part of the public record, unless the respondent released or agreed to release the investigative materials.

- In this instance, Commissioner Taylor waived any confidentiality from the statute, which was the reason that the matter could be discussed in public.

- A probable-cause hearing would not include the respondent. The complainant would be given an opportunity to make a statement. Witness statements would not be permitted.

Mr. Harbison commented that the Florida ethics commission adhered to the same procedures as found in probable-cause hearings. He said that executive sessions were confidential and would not be open to the public.

Mr. Johnson stated that the Code allowed the complaint to be included in the public record.

MOTION to approve accepting staff's recommendation for C 10-004. Motion by Dr. Robin Fiore, seconded by Ronald Harbison, and carried 4-0. Bruce Reinhart absent.

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

IX. WORKSHOP ITEMS

IX.a. Email Domain Names/IT Security Issues

Mr. Johnson stated that:

- Mr. Farach requested that staff research non-governmental email domain names for the COE's review.

- Staff recommended using the same domain name as the COE Web site, www.palmbeachcountyethics.com. Other domain name options on the domain name list did not mention the County.

- The COE currently owned www.palmbeachcountyethics.com at a cost of $20 annually. Plans were in place to purchase the www.palmbeachcountyethics.org domain name.

Mr. Farach recommended that domain names www.palmbeachcountyethics.net and www.palmbeachcountyethics.org be purchased in order to prevent misuse. He said that by purchasing other domain names, public funds would be put to good use.

Mr. Johnson suggested that the COE vote on using the domain name www.palmbeachcountyethics.com. He added that the COE's business cards and letterheads would be changed when the ED's office moved to another location.

MOTION to approve accepting staff's recommendation on COE domain names. Motion by Manuel Farach, seconded by Ronald Harbison, and carried 3-0. Bruce Reinhart and Judge Edward Rodgers absent.

Mr. Johnson said that Sheryl Steckler, Inspector General (IG) intended to hire information technology staff, and offered to allow her employee to maintain the COE database. He explained that the COE database would be virtualized as a separate domain from the County's, and would not incur any additional expenditures. While awaiting additional information from the IG, he would proceed as authorized by the COE, he stated.

IX.b. Press Releases/ Releasing Documents to the Press

Mr. Johnson recommended that the COE decide on when a release should be provided to the press since press releases generally reported the hiring of staff, the training of advocates, or community events. He said that no press releases had been sent out for AO or complaints, because neither type of request had progressed to a final hearing.

Dr. Fiore suggested that the COE should wait until Judge Rodgers and Mr. Reinhart were present to discuss press releases.

Mr. Johnson commented that:

- Probable-cause and dismissal-hearing procedures could be drafted and discussed at the next COE meeting.

- A procedure that mirrored the COE's rules of procedure and the Code should be developed because the probable-cause determination was based on the investigation.

- As the respondent, Commissioner Taylor signed a waiver authorizing the public release of information in the complaint. Ordinarily, the respondent had a right to prohibit that release of information until a determination was made on a complaint. The COE would then hold an executive session, but would not publicize the disclosure until the executive session was concluded.

- The Code cited the policy for a release of information, but no written procedure existed where a meeting would be held without the public present. The details of the executive session would be confidential unless probable-cause was substantiated.

- The State's COE procedure prohibited the details of a complaint as opposed to the County's Code.

- Staff interpreted the plain language of the Code. Information would remain confidential until a determination was made by the COE in an executive session even if the language of the Code differed from the rules of procedure.

IX.b. – CONTINUED

Mr. Farach suggested that at the next COE meeting, staff should prepare proposed language for the rules of procedure. He said that bringing the COE in line with the State's COE through the amendment process could also be discussed.

Mr. Johnson stated that the ordinance drafting committee would be responsible for writing Code revisions.

Dr. Fiore commented that the State's COE was not a good model for revisions. She suggested that other resources be researched.

IX.c. Consideration of Code Revision to 2-443(a)

Mr. Johnson reported that:

- Code revisions were not urgent since they would be vetted by the ordinance drafting committee.

- Case law research was conducted regarding the addition of non-financial violations to the Code for misuse of office. Staff recommended that:

    - The standard of intent must be corrupt intent.

    - The definition for corruptly needed to be inserted in the definition section of the Code.

- Misuse of office prohibitions were criminal offenses in the Code. In the State's Code, none of those offenses were criminal if not for the word corruptly whose absence would make the prohibition unconstitutionally vague.

IX.d. Definition of Lobbyist

Mr. Johnson stated that:

- The definition of lobbyist only stated government and had not identified to which government the law had applied.

IX.d. – CONTINUED

- The lobbyist registration ordinance defined lobbyist as a governmental entity for which an employee or official worked, or elected. If the COE interpreted lobbyist in line with lobbying, then the issue would be simplified.

- The issue was whether an individual who was a State or federal lobbyist would be permitted to make a $150 gift to a County employee since the employee was not a lobbyist before the County.

- Staff recommended amending the Code to include corrupt gifts given with the intent of influencing an individual being lobbied, and exclude lobbyists from other jurisdictions who were not lobbying the County although they were identified lobbyists.

Dr. Fiore asked David Baker, IG Implementation Committee chair, for his interpretation.

Mr. Baker commented that Mr. Johnson interpreted what was in the mind of the ordinance drafting committee. He said that the issue of countywide lobbying would present itself later when redefining the jurisdictional definition in the Code, but not necessarily in the lobbying ordinance.

Mr. Johnson stated that:

- The Code would need to be reworded to include the municipalities, but the concept was that governmental entities would be lobbied.

- If someone lobbied before five municipalities, the County and the City of West Palm Beach (City) were essentially not the direct entities being lobbied; therefore, a City employee would not be conflicted to engage in those relations.

- The jurisdiction of the COE was finite. The municipalities that voted for the referendum would likely be subject to the jurisdiction of the COE within 90 days of January 1, 2011.

- Once the ordinance drafting committee met, they could vet the intent in the final referendum ordinances. At this time, AO would continue to be used and guidance would be sought on the definition of lobbyist with the gift prohibition as a key component.

IX.d. – CONTINUED

Dr. Fiore underscored that:

- The interpretation of lobbyist included any lobbyist irrespective of State or County.

- It was understood that the intent of the lobbyist definition was to prevent a climate in which corruption took place within the County; however, municipal lobbyists were a part of the system because they were interwoven into the business of the County. A need therefore was present to redefine the term lobbyist.

- The issue with receiving gifts from lobbyists was their intent to influence a current or future client in return for future favoritism.

Mr. Johnson stated that another issue involving lobbyists was an exception for families or demonstrated friendships with lobbyists.

Dr. Fiore said that as public officials, certain benefits would need to be forfeited even if they were warranted by long relationships. Public officials were required to meet a higher standard, she stated.

Mr. Johnson explained that under the current Code, a lobbyist was considered as such if they had affiliations with any governmental entity. He concluded that the matter would be readdressed when the entire COE was in attendance as Mr. Farach suggested.

X. EXECUTIVE DIRECTOR COMMENTS

X.a. BCC Waivers

Mr. Johnson commented that:

- At the recent Board of County Commissioners (board) workshop, the board proposed that waivers be eliminated.

- The board recommended that the COE vet the waiver requests before they were presented to the board. Currently, County staff made recommendations to the board for waivers.

X.a. – CONTINUED

Dr. Fiore highlighted that board members who were paid employees wanted to offload their responsibilities onto the COE's unpaid volunteers.

Mr. Johnson stated it was not believed that the COE had the time in a volunteer setting to execute the board's proposal, especially when the board had been advised by the COE not to change the waiver limits.

Mr. Harbison disclosed that he shared Dr. Fiore's opinion on the matter and added that the COE did not have the time or resources to provide assistance to the board.

Mr. Johnson stated that he would communicate the COE's position to the board.

Dr. Fiore suggested that the board appoint a special master who would fall under the ED's jurisdiction to review waivers.

Mr. Harbison stated that the issue could be addressed further when the COE was in full attendance.

X.b. Website Update

Mr. Johnson reported that:

- The COE's forms were now becoming available on the COE Web site and materials were being updated to ensure that public records were accessible.

- Training for employees and officials could now be accessed online at the ED's Web site. Many of the municipalities such as the City of Boynton Beach and the Town of Lantana had received live training. Their staff had also been directed to review ethics trainings online.

X.c. Municipalities Update

Mr. Johnson stated that:

- The ordinance drafting committee would develop the charter amendment ordinances for the COE and IG. While staff did not anticipate major substantive changes, the COE would be made aware of any changes so that they could make recommendations before the ordinances were approved.

X.c. – CONTINUED

- The ordinance drafting committee would consist of seven members. Two would be appointed by the board, two by the League of Cities (LOC), one by the County Attorney, the general counsel for the LOC or its designee, the ED or his designee, and the IG or her designee, for the IG ordinance. The initial ordinance drafting committee would determine by majority vote whether three additional members representing other governmental entities would be added to the ordinance drafting committee.

- The recommendation of COE staff was to maintain a seven-member ordinance drafting committee.

- The special taxing districts were not under the jurisdiction of the COE or the IG and would not be required to hold a seat on the ordinance drafting committee unless they signed the interlocal agreement. Currently, the Solid Waste Authority was the only taxing authority that had signed the agreement.

- Once the referendum became effective, the ordinance drafting committee was required to complete the final ordinances within 90 days. Otherwise the board could adopt the completed documents by majority vote. The board would also be required to ratify the ordinances at a regular meeting. It had different timeframes in which to process the ordinances.

- Although the public voted on the referendum on November 2, 2010, the COE had no legal sufficiency until the ordinance drafting committee crafted the Codes and presented them to the board for adoption.

Mr. Harbison stated that David Baker and Marty Rogol were ideal candidates for appointments to the ordinance drafting committee. Mr. Farach and Dr. Fiore said that they concurred.

MOTION to approve recommending the appointment of David Baker and Marty Rogol to the ordinance drafting committee. Motion by Ronald Harbison, seconded by Dr. Robin Fiore, and carried 3-0. Bruce Reinhart and Judge Edward Rodgers absent.

XI. ADJOURNMENT

MOTION to adjourn the meeting. Motion by Dr. Robin Fiore, seconded by Ronald Harbison, and carried 3-0. Bruce Reinhart and Judge Edward Rodgers absent.

At 6:19 p.m., the vice chair declared that the meeting adjourned.

APPROVED:

_____
Chair/Vice Chair

Palm Beach County Commission on Ethics

November 17, 2010

Ritesh Pahwa
Information Systems Services Department
301 N. Olive Ave.
West Palm Beach, FL 33401

RE: RQO 10-033-OE
Outside Employment/Business

Dear Mr. Pahwa,

Your request for an 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 dated October 27, 2010, whether you, as an employee of Palm Beach County, may operate an outside web based business. You advised that your outside business has not entered into any contract or other transaction for goods or services with Palm Beach County. You also submitted to your supervisor on October 15, 2010, a Notification of Outside Employment form, that stated your work for this business would be completed, "outside of county business hours," and that it would not conflict with your employment with Palm Beach County.

IN SUM, based on the facts you have submitted, as long as your outside business does not enter into any contract with or other transaction for goods or services with Palm Beach County, you are not in violation of §2-443(c) *Prohibited contractual relationships,* by operating this business outside of county business hours. Notwithstanding, you cannot use your official position as a county employee to obtain a financial benefit for yourself, a relative, household member, outside employer or business, customer or client, or non-profit organization of which you are an officer or director as defined in §2-444(a) *misuse of public office or employment.*

THE FACTS you submitted are as follows:

You are employed with Palm Beach County in the Information Systems Services (ISS) Department. You operate a small web based business from home, "outside of county business hours." You and your wife are officers of this business corporation, and the sole owners. You list the purpose of this business as "educating people on how to shop online." You do not have any contractual relationships with Palm Beach County through this business, and have no other transactions for goods or services with the county under this business. Lastly, you have obtained merit rule approval from your Department Supervisor.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

The Palm Beach County Code of Ethics Section 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 added)

(2) Any entity located in the county or which does business with or is regulated by the county, in which the official or employee has an ownership interest. For purposes of this definition, *an "ownership interest" shall mean at least five (5) percent of the total assets or common stock owned by the official or employee or any combination of the members of the official or employee's household or relatives*. (emphasis added)

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 §2-443(c), however in this case you have advised that you have no such contracts or transactions for goods or services with the county, so at this time this section does not apply to you.

The code of ethics also prohibits you from using your official position with the county to benefit yourself, a relative, household member, outside employer or business, customer or client, or non-profit organization of which you are an officer or director. Section 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, based on the information you provided, you are not prohibited from engaging in your business under §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

Palm Beach County Commission on Ethics

November 8, 2010

Bill Schall, Commercial Horticulture Extension Agent IV
Environmental Horticulture Program Leader
Palm Beach County Extension
Cooperative Extension Service Department
559 N. Military Trail
West Palm Beach, FL 33415

RE: RQO 10-034
Registration fees for ISA workshop

Dear Mr. Schall,

Your request for an 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 dated November 3, 2010, whether five (5) employees of the Palm Beach County Cooperative Extension Service (CES) are permitted to accept free registration and attend a training workshop being held in Palm Beach County at a CES facility. The workshop is being offered by CES in collaboration with the non-profit International Society of Arboriculture (ISA), on November 12, 2010. In a follow-up email on November 4, 2010, you further advised that ISA is a not-for-profit corporation, is not a county contractor, vendor, service provider, bidder or proposer, and does not employ a lobbyist. The cost for government employees to attend would normally be $155.00 each.

IN SUM, based on the facts you have submitted, the five (5) CES employees are not prohibited from accepting this cost free attendance at the ISS workshop, and this attendance is neither a prohibited nor reportable gift under the code.

THE FACTS as we understand them are as follows:

The Palm Beach County Cooperative Extension Service (CES), a government entity, in collaboration with the Florida Chapter of the International Society of Arboriculture (ISA), a private, not-for-profit organization, is holding a training workshop at a county facility in November, 2010. You are the CES facilitator for this workshop. The purpose of this workshop is to improve the skills and knowledge of persons working in the tree trimming and arboriculture field.

No employees of CES currently serve as officers or directors for ISA. According to the information you have provided, ISA is not a county contractor, vendor, service provider, bidder or proposer, and employs no lobbyists. The five (5) county employees from CES have been offered the opportunity to attend this workshop at no cost. The cost to attend the workshop for government employees would normally be

$155.00 each. This fee includes lunch and refreshments. Attendance at this workshop would be directly related to improvement of these employees' skills and knowledge in the performance of their official duties for the county.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

The Palm Beach County Code of Ethics Section 2-443(e), *Travel expenses* states as follows:

> No official or employee shall accept. Directly or indirectly, any travel expenses including, but not limited to, transportation, lodging, meals, registration fees and incidentals from any *county contractor, vendor, service provider, bidder or proposer*. (emphasis added)

Since you have indicated that ISA is not a county contractor, vendor, service provider, bidder or proposer, this section of the Palm Beach County Code of Ethics does not prohibit employees from accepting a waiver of registration fees to the workshop.

Section 2-444, *Gift Law*, states as follows:

> §2-444(a), No county commissioner or employee...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. (emphasis added)
>
> §2-444(d), *Gift reports*. Any official or employee who receives a gift in excess of one hundred dollars ($100.00) shall report that gift.
>
> §2-444(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. Food and beverages consumed at a single setting or a meal shall be considered a single gift, and the value of the food and beverage provided at that sitting or meal shall be considered the value of the gift.
>
> (1) *Exceptions*. The provisions of subsection (e) shall not apply to:
>
> (e) 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.

According to the facts you have submitted, ISA is not and does not employ a lobbyist. Therefore, the registration fee for attendance at this workshop is not a prohibited gift under this section of the code. CES is a co-sponsor of the event and will supply the facilities. You have also indicated that this workshop

is directly related to improvement of these employees' skills and knowledge in the performance of their official duties for the county. Therefore, attendance falls under an exception to the reporting requirement of §2-444 of the code, even though the value of the registration fee is greater than one hundred dollars ($100.00).

IN SUMMARY, based on the facts and circumstances submitted, CES employees may accept free registration and attend the November 12th CES/ISA training workshop.

This opinion construes the Palm Beach County Code of Ethics ordinance, but is not applicable to any conflict under state law. Inquires 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

Palm Beach County Commission on Ethics

November 17, 2010

Keith Carson, FPEM
Special Projects Coordinator
Palm Beach County Division of Emergency Management
20 South Military Trail
West Palm Beach, FL 33415

Re: RQO 10-037-OE
Outside employment with Palm Beach State College

Dear Mr. Carson,

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 November 15, 2010, whether as a Palm Beach County employee, you would be able to continue to serve as an adjunct instructor at Palm Beach State College.

IN SUM, Palm Beach State College is included in the Florida College 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 of your employment by Palm Beach State College. 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 have served as an adjunct instructor at Palm Beach State College since 1989. In this regard, it has been your responsibility to teach the Community Emergency Response Team (CERT) Program. Palm Beach County provides funds to the college for this program. You are currently the Special Projects Coordinator of the Palm Beach County Division of Emergency Management. CERT is a program under the authority of the Division of Emergency Management.

THE LEGAL BASIS for this opinion relies on the statutory designation of Palm Beach State College 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. 1001.60, Florida Statutes, establishes the Florida College System, governed by the Department of Education, under the State Board of Education as established in accordance with s. 2, Art. IX of the constitution, s. 20.15(3) and 1001.02, Florida Statutes. There are 28 public colleges in the Florida College System. The Department of Education is part of the executive branch.

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

The Palm Beach County code of ethics, sec. 2-442 excludes "the County, the State, or any other regional, local, or municipal government entity, from the definition of outside employer or business.

This issue was addressed previously by the Commission on Ethics regarding Florida Atlantic University.[1]

Although Palm Beach State College maintains contracts with Palm Beach County, the provisions of sec. 2-443(c) prohibited contracts do not apply to your employment as an instructor due to the fact that the college is a state governmental entity and is excluded from the definition of outside business or employer.

Sec. 2-443(a) does prohibit 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. You must be mindful of this prohibition against obtaining a financial benefit based on your official position with the county. Based on the facts you have presented, you were an adjunct instructor teaching for the CERT program for approximately 21 years before becoming a Palm Beach County employee. While this would indicate that your status as an instructor was obtained independently of your position, the responsibility is ongoing. Any future use of your official position to financially benefit either yourself of any entity enumerated in Sec. 2-443(a) 1-7 would be a violation of the Palm Beach County Code of Ethics.

IN SUMMARY, you are not prohibited from maintaining part-time employment with another governmental entity under sec. 2-443(c). You have an ongoing responsibility to not use your official position for financial benefit as defined in sec. 2-443(a).

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

[1] RQO 10-028-OE

December 6, 2010

Bill Johnson, Director
Palm Beach County Emergency Management
Department of Public Safety
20 South Military Trail
West Palm Beach, FL 33415-3130

RE: RQO 10-032
Reimbursement of Travel Expenses

Dear Director Johnson:

The Commission on Ethics has considered your request for an advisory opinion, and rendered its opinion at a public meeting held on December 2, 2010.

YOU ASKED in your email dated October 22, 2010, whether the Palm Beach County Emergency Management Department (EMD) employees should consider the reimbursement of travel expenses by a state governmental entity as a gift? You also requested that the opinion cover acceptance of future travel expenses from other governmental, as well as non-governmental entities, and gave several examples of past reimbursement occurring prior to the adoption of the Palm Beach County Code of Ethics. Additional information was provided in a telephone conversation with you on October 29, 2010.

IN SUM, since your questions are general in nature and involve future speculative facts and circumstances based upon past events, the Commission cannot opine other than to offer general guidelines under the Code.

- So long as the travel is on behalf of the county and in the performance of your official duties, reimbursement of travel expenses by "other governmental entities or by organizations of which the county is a member" may be accepted "if the travel is related to that membership." These reimbursements are not considered gifts under the Palm Beach County Code of Ethics.

- You may not accept, directly or indirectly, payment of travel expenses by a "county contractor, vendor, service provider, bidder or proposer" that is not a governmental entity or organization of which the county is a member unless the prohibition is specifically waived by the Board of County Commissioners (BCC). Therefore, you may not accept reimbursement from WebEOC, a county vendor, without a waiver.

- Notwithstanding any waiver by the Board of County Commissioners, you may not accept a reimbursement in excess of $100.00 from a lobbyist, principal or employer of a lobbyist unless the reimbursement is for travel expenses directly related to the performance of your official duties in conducting official business.

THE FACTS as we understand them are as follows:

In the past, EMD personnel have been reimbursed for travel expenses by the Federal Emergency Management Agency (FEMA) and the Florida Division of Emergency Management (FDEM) for training and other official functions. Both FEMA and FDEM are governmental entities. The travel to be reimbursed or paid by these entities is EMD business related.

Likewise, in the past, EMD personnel have been reimbursed for travel expenses by "Volunteer Florida" for a conference related to their official duties. Volunteer Florida is a non-profit, non-governmental agency. The travel paid for by Volunteer Florida is EMD business related. Volunteer Florida is a non-profit organization funded in part by the State of Florida and *has provided services to Palm Beach County* during hurricane and other emergencies in the past. You further identified Volunteer Florida as a "coalition" of various volunteer groups that also provide emergency services, and stated that the county is not a member of Volunteer Florida.

In addition, EMD personnel have been reimbursed for travel expenses in the past by WebEOC. WebEOC is a private, for-profit business, and is a vendor of Palm Beach County.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

§ 2-443(e) ***Accepting Travel Expenses***.

> No official or employee shall accept, directly or indirectly, any travel expenses including, but not limited to, transportation, lodging, meals, registration fees and incidentals *from any county contractor, vendor, service provider, bidder or proposer*. The board of county commissioners may waive the requirements of this subsection by a majority vote of the board. The provisions of this subsection do not apply to travel expenses paid by other governmental entities or by organizations of which the county is a member if the travel is related to that membership. (Emphasis added)

This section does not apply another governmental entity, or organization of which the county is a member and the expenses are related to the membership. Therefore, the FEMA and FDEM functions are excluded from the prohibition against accepting travel expenses.

Volunteer Florida is not a governmental entity and the county is not a member of the organization. In addition, based on the facts you have provided, it would appear that Volunteer Florida is a service provider to the county. The prohibition therefore applies and may be waived by the Board of County Commissioners (BCC).

WebEOC is a private vendor doing business with the county, therefore the prohibition applies. You may not accept, directly or indirectly, any reimbursement for travel expenses without a waiver. In addition, any reimbursement must be connected to the performance of your official duties or it would be considered a gift and potentially violate lobbyist gift limitations (see below).

§ 2-444 ***Gift Law***

> §2-444(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.
>
> §2-444(d) ***Gift Reports***. Any official or employee who receives a gift in excess of one hundred dollars ($100.00) shall report that gift.
>
> §2-444 (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. Food and beverages consumed at a single setting or a meal shall be considered a single gift, and the values of the food and beverage provided at that sitting or meal shall be considered the value of the gift.
>
> § 2-444(e)(1) ***Exceptions***. The provisions of subsection (e) shall not apply to:
>
> e. Gifts solicited by county employees on behalf of the county in performance of their official duties for the sole use by the county in conducting official business.

As previously indicated, any reimbursement that is not specifically related to the performance of your "...official duties for use solely by the county in conducting its official business" would be considered a gift and subject to the prohibitions and reporting requirements as set forth in the code.

IN SUMMARY, based upon the facts and circumstances you submitted, you may be reimbursed for travel expenses "paid by other governmental entities" such as FEMA and FDEM. You may also be reimbursed for travel expenses by organizations where the county is a member and your travel is related to that membership.

You may not be reimbursed by any "county contractor, vendor, service provider, bidder or proposer" unless you obtain a waiver from a majority of the BCC. This would apply to WebEOC, a county vendor, and to Volunteer Florida, as your facts indicate that they provide services to the county.

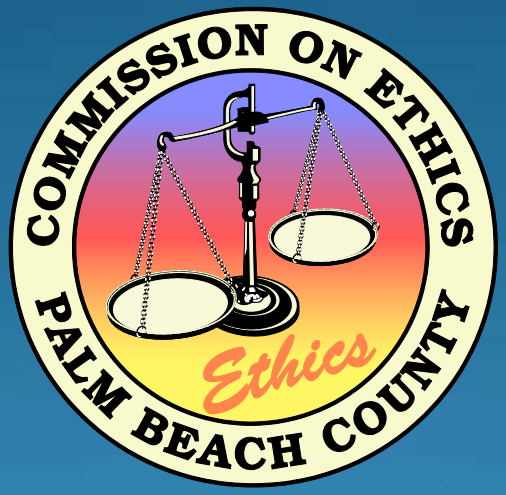
Notwithstanding any waiver, if the reimbursement is from a lobbyist, principal or employer of a lobbyist who lobbies any part of the county government, you may not accept reimbursement in excess of $100.00 unless the expense was generated by you in your official capacity and for the performance of your official duties for the county. Lastly, if the reimbursement is not from a lobbyist, principal or employer of a lobbyist, is waived or does not involve a "county contractor, vendor, service provider, bidder or proposer" and your participation is not "on behalf of the county in performance of" your official duty, then the reimbursement would constitute a gift and if in excess of $100.00 must be reported.

This opinion construes the Palm Beach County Code of Ethics ordinance, but is not applicable to any conflict under state law. Inquires 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



Commission on Ethics Complaint Procedures:

Reference

- Code of ethics: Art. XIII, sec. 2-441 through 2-448
- Commission on Ethics: Art. V, Division 8, sec. 2-254 though 2-260.10
- State Statutes:

  Whistleblower –s. 112.3188, Florida Statutes

  Sunshine law – s. 286.011, Florida Statutes

  Complaint procedures – F.S. 112.324, Florida Statutes
- Commission on Ethics Rules of Procedure:

  Rules 3.1 – 10.7

Legal sufficiency

1- Upon receipt of a complaint, the executive director makes a legal sufficiency finding. **Sec. 2-260(a), Rule 4.1(b), 4.2(a)**

2- "Upon a finding of legal sufficiency by the executive director, the commission on ethics shall initiate a preliminary investigation" **Sec. 2-260(b), Rule 4.4(a)**

3- The executive director prepares a memorandum regarding legal sufficiency of all complaints. If not legally sufficient, a recommendation to dismiss "must" be presented to the COE. **Rule4.2(d)**

Public Records Exemption Sec. 2-260(f), Rule 3.3

"With the exception of the initial complaint filed in a matter, all records held by the commission on ethics and its staff related to an active preliminary investigation are confidential and exempt from disclosure in a manner consistent with the provisions in Florida Statutes s. 112.3188(2), Florida Statutes. Once a preliminary investigation is complete and a probable cause determination is made, all other proceedings conducted pursuant to this subsection shall be public meetings...and all other documents made or received by the commission on ethics shall be public records..."

Sec. 112.324, Florida Statutes

(2)(a)"The complaint and records relating to the complaint or to any preliminary investigation held by the commission or its agents, by a Commission on Ethics and Public Trust established by any county... or by any municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements...are confidential and exempt from the provisions of s. 119.07(1), Florida Statutes, and s. 24(a), Art. I of the state constitution."

Sec. 112.324, Florida Statutes

(2)(b) "Any proceeding conducted by the commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process, pursuant to a complaint or preliminary investigation, is exempt from the provisions of s. 286.011, s. 24(b), Art. I of the state constitution, and s. 120.525."

Also, see **Rule 5.4**

Sec. 112.324, Florida Statutes

(2)(c) "The exemptions in paragraphs (a) and (b) apply until the complaint is dismissed as legally insufficient, until the alleged violator requests in writing that such records and proceedings be made public, or until the commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory power determines, based on such investigation, whether probable cause exists to believe that a violation has occurred."

COE Rules of Procedure, Rule 4.2(e)

"Pursuant to Section 112.324, Florida Statutes, the Commission may meet in executive session at any time prior to a finding of probable cause and may find the complaint to be insufficient; dismiss it, and notify the complainant that no investigation will be made or may take such other action as may be appropriate..."

Assignment of advocate

Rule 4.3

"Upon a finding of legal sufficiency the Executive Director will assign an Advocate with the responsibility to oversee the investigation and to present cases to the Commission on Ethics."

Probable Cause Determination

Rule 5.1

Advocate's Recommendation

The advocate shall review the investigator's report and shall make a written recommendation to the Commission for the disposition of the complaint. If the advocate recommends a public hearing (final hearing) be held, the recommendation shall include a statement of what charges shall be at issue at the hearing

Probable Cause Determination

Rule 5.2 Recommendation provided to the Respondent (10 days), ability to file response to the advocate's recommendation

Rule 5.3 Notice of probable cause hearing and respondent's right to attend

Rule 5.4 Probable cause hearing not subject to s. 286.11, Florida Statutes (sunshine law)

Probable Cause Hearing

Rule 5.5 Scope of Probable Cause Determination

"The Respondent and the Advocate shall be permitted to make brief oral statements in the nature of oral argument to the Commission, based upon the investigator's report and recommendation of the Advocate, before the probable cause determination."

Probable Cause Determination

Rule 5.6 Probable Cause Determination

"At a hearing to determine probable cause, the Commission: may continue its determination to allow further investigation; may order the issuance of a public report of its investigation if it finds no probable cause to believe that a violation…occurred; may order a public hearing in the matter; or may enter into such stipulations and settlements as it finds to be just…In making the determination, the Commission may consider:

1. The sufficiency of the evidence…as contained in the complaint and the Advocate's probable cause determination;
2. The admissions and other stipulations of the Respondent, if any;
3. The nature and circumstances of the Respondent's actions;
4. The expense of further proceedings and
5. Such other factors as it deems material…

See also, **sec. 2-260(c)**

Finding of Probable Cause

Rule 5.8

Upon written request within 30 days, Respondent may request a final hearing. The Commission may set a final hearing on its own motion.

Rule 5.9

Upon request by Respondent or motion by the COE the final hearing must be held within 90 days of the probable cause determination unless extended for good cause.

See, **sec. 2-260(c)**

Pre-hearing matters Sec. 2-260(g)-(l)

(g) Subpoenas- investigative & to compel attendance

(h) Subpoenas- for discovery/depositions, documents (upon written request of advocate or respondent)

(i) Subpoenas- for public hearing (advocate and respondent list of witnesses)

(j) Pre hearing motions -The chair, or member of the commission designated by the chair, conducts proceedings and issues orders as are deemed necessary to dispose of issues raised by motions – no hearing is required for motions.)

(k) Pre hearing conferences –The chair, or member designated by the chair, may conduct prehearing conferences to clarify the issues, dispose of motions, discuss settlement, examine exhibits and documents, exchanging witness lists, and resolving other matters

See, also **Rules of Procedure 6.6-6.16**

Motion to dismiss filed by Advocate

"After probable cause is found and a public hearing is ordered…and after further investigation or discovery is made by the Advocate, the advocate may move to dismiss the proceeding if the advocate concludes that there is insufficient evidence to proceed to public hearing in good faith…The motion shall be heard by the commission on ethics…"

Sec. 2-260.1(f), Rule of Procedure 6.13

Public Hearings

Rule 6.1

Public Hearings may be conducted by the full commission or by a three member panel of commissioners designated by the chair or his or her designee.

Rule 6.2

"The person accused of a violation of an ordinance under the Commission's jurisdiction shall be the *only* party…"

Public Hearing Procedures

Sec. 2-260.1, also see Rules 7.1-7.3

(a) Presentation of the case. The advocate shall present his or her case first. Respondent may then present his or her case. Rebuttal evidence may be permitted in the discretion of the commission on ethics.

(b) Opening and closing statements. Opening and closing statements may be presented by the advocate and the respondent.

(c) **Sec. 2-260.1(3)** The respondent and the advocate shall have the right: to present evidence relevant to the issue; to cross-examine opposing witnesses on any matter relevant to the issue; and to impeach any witness

Public Hearing Procedures

Sec. 2-260.1(c)(4), also see Rule 7.3(d)

"The hearing shall not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence may be admitted. Hearsay evidence may be used to supplement or explain other evidence, but shall not be sufficient itself to support a finding. The rules of privilege shall be effective to the same extent that they are…recognized in civil actions. Irrelevant and unduly repetitious evidence shall be excluded. The commission on ethics shall not allow the introduction into evidence of an affidavit of a person when that person can be called to testify; this shall not preclude the admission of a deposition of such a person, however, for any reason permissible…under the Florida Rules of Civil Procedure."

Dismissal

At any time the commission **may**:

a) Dismiss a complaint should it determine that the public interest would not be served by proceeding further;

b) Dismiss a complaint and issue a "letter of instruction to the respondent" when the violation was inadvertent, unintentional or insubstantial.

Sec. 2-260.3

Public order imposing penalty

Upon completion of the hearing, the COE "shall make a finding and public report as to whether any provision within its jurisdiction has been violated." A violation must be based on "competent substantial evidence in the record." Final order must be rendered within 12 months unless good cause shown. Additionally, the public report contains:

1-The appropriate penalty

2-Determination as to whether violation was intentional or unintentional

Sec. 2-260.1(g), Rules 7.5, 8.1-8.2

Settlements

Rule 6.16 a): The COE may enter into a settlement agreement with the Respondent "as it finds to be just and in the best interest of the citizens of Palm Beach County

Rule 6.16 b): The Advocate may enter into settlement negotiations but must present all settlement proposals to the COE for consideration and approval

Rule 10.5: The Advocate may enter into settlement negotiations for restitution prior to a restitution hearing. All proposals must be presented to the COE for consideration and approval.

Appeals

Sec. 2-260.10

(a) Any final order may be appealed to the circuit court. COE shall provide the index and record according to Florida Rules of Appellate Procedure. COE may charge Respondent for transmission of the record (fee may be waived if Respondent is indigent)

(b) Costs or fees may not be assessed against the COE

(c) A final order may not be suspended or stayed unless by order of the COE or appellate court.

Also, see **Rules 9.1, 9.2 & 9.3**

Agenda item VII(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 Article 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 VII(c) Consideration of Code Revision to 2-443(a): Misuse of Public Office or Employment

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 on violation determinations, 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-

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

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

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

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
871 So.2d 924, 29 Fla. L. Weekly D671

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Agenda item VII(d) definition of lobbyist

In the code of ethics, 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." There is no definition of "lobbying" contained in the code of ethics.

The lobbyist registration ordinance contains definitions of both 'lobbyist" and "lobbying." The definition of "lobbying" refers to influencing "...the decision of any county commissioner, any advisory board member, or any employee with respect to the passage, defeat or modification or any item which may foreseeably be presented for consideration..."

The gift law prohibition found in sec. 2-444(a) of the code of ethics prohibits acceptance of a gift valued at greater than $100.00 from a "...lobbyist or any principal or employer of a lobbyist." This section applies to county commissioners or employees and does not further define lobbyist so as to limit its application to the governmental entity that is lobbied. Therefore, for county commissioners and employees only, a strict construction would prohibit gifts in excess of $100.00 from lobbyists, their principals or employers, no matter where they lobby, even if they do not lobby the county government. (see, RQO 10-030 Rachael Ondrus). On the other hand sec. 2-444(b) is inconsistent with section (a), as it applies only to gifts to advisory board members from "...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 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, inconsistent or unwanted consequence of the present code.

Staff Recommendation:

That the COE interpret code of ethics sec. 2-444(a) in context with the definitions as contained in the related lobbyist registration ordinance, as well as sec. 2-444(b), to apply only to lobbyists who lobby the county government.

Alternative Staff Recommendation 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 any county department, advisory board or board of county commissioners.</u>