

**OFFICIAL MEETING MINUTES
OF THE
PALM BEACH COUNTY COMMISSION ON ETHICS
PALM BEACH COUNTY, FLORIDA**

FEBRUARY 2, 2012

**WEDNESDAY
1:45 P.M.**

**COMMISSION CHAMBERS
GOVERNMENTAL CENTER**

- I. CALL TO ORDER**
- II. ROLL CALL**

MEMBERS:

Judge Edward Rodgers, Chair
Manuel Farach, Esq., Vice Chair
Robin N. Fiore, Ph.D.
Ronald E. Harbison, CPA
Bruce E. Reinhart, Esq. – Arrived later

STAFF:

Mark E. Bannon, Commission on Ethics (COE) Senior Investigator
Alan S. Johnson, Esq., COE Executive Director
Gina A. Levesque, COE Executive Assistant
James A. Poag, COE Investigator
Megan C. Rogers, Esq., COE Staff Counsel

ADMINISTRATIVE STAFF:

Latoya Osborne, Deputy Clerk, Clerk & Comptroller's Office

III. INTRODUCTORY REMARKS

Judge Edward Rodgers requested that all cellphones be silenced. He stated that anyone wishing to speak should submit a public comment card with the agenda item included. All public comments would be limited to three minutes and should be relevant to items on the agenda, he added.

IV. APPROVAL OF MINUTES FROM JANUARY 4, 2011

Commissioner Manuel Farach stated that on page 9 of the January 4, 2011, meeting minutes, the bullet point that read, "Sufficient procedural safeguards were in place as Chief Yanuzzi testified," should include the word, "stated," instead of the word, "testified," since Chief Yanuzzi was not under oath at the time. Judge Rodgers requested that the correction be made.

Commissioner Farach stated that he believed that the February 7, 2012, date included in the last bullet point on page 18 was incorrect.

Commission on Ethics (COE) Executive Director Alan S. Johnson replied that the correct date was February 9, 2012; however, the date was incorrectly stated at the meeting. He added that a motion could not be made to amend the minutes to include the correct date since it was not stated as such.

Judge Rodgers suggested that the committee make a motion to correct the scrivener's error. Commissioner Farach said that the correct date could be included in brackets within the minutes, or that a clerk's note with the correct date could be added.

MOTION to approve the minutes as amended. Motion by Robin Fiore, seconded by Ronald Harbison, and carried 4-0. Bruce Reinhart absent.

RECESS

At 1:50 p.m., the chair declared the meeting recessed for an executive session.

RECONVENE

At 4:02 p.m., the meeting reconvened. At the chair's request for a roll call, Judge Edward Rodgers, Manuel Farach, Robin Fiore, Ronald Harbison, and Bruce Reinhart were present.

V. EXECUTIVE SESSION

V.a. C12-001

Commissioner Farach read the public report and finding of no probable cause as follows:

Complainant, Alan S. Johnson, Executive Director of Commission on Ethics, filed the above-referenced complaint on January 4, 2012, alleging a possible ethics violation involving respondent Kimberly Mitchell, a West Palm Beach City Commissioner.

Count 1 of the complaint alleges that on November 25, 2011, respondent misused her official position by using resources of an on-duty City employee and City telephone equipment to resolve an issue concerning her personal, residential Comcast service, and knew or should have known through the exercise of reasonable care that these resources provide a financial benefit to herself, her spouse, or household members that was not available to the general public.

Count 2 of the complaint further alleges that her acts or omissions were done with wrongful intent and for the purpose of obtaining a benefit in a manner that was inconsistent with the proper performance of her public duties. Count 2 alleges Kimberly Mitchell encouraged the improper use of City personnel and resources in her telephone discussions with the on-duty employee, and in particular by the accolades she expressed to this employee when the repair appointment was changed to an earlier date through the efforts of the employee.

Pursuant to Chapter 8, Article XIII, Section 2-443(a), Misuse of public office of employment, prohibits a public official or employee from using their official position to take any action, or to influence others to take any action, in a manner which he or she knows or should know, will result in a special financial benefit, not shared by members of the general public, for any person or entity listed in Section 2-443(a)(1-7), which includes the official or employee and their spouse, domestic partner, or household member.

V.a. – CONTINUED

Article XIII, Section 2-443(b), Corrupt misuse of official position, prohibits any official or employee from using his or her official position or office, or any property or resource which may be within his or her trust, to corruptly secure or attempt to secure a special privilege, benefit, or exemption for himself, herself, or others. For the purposes of this subsection, “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 for his or her public duties.

Pursuant to Chapter 2, Article V, Division 8, Section 2-258(a) of the Palm Beach County Code of Ethics, the Commission on Ethics, is empowered to enforce the County code of ethics.

On December 30, 2012, the complaint was determined by staff to be legally sufficient. The matter had been brought to the attention of the Commission on Ethics staff by an anonymous complainant and pursuant to Commission on Ethics Rule of Procedure 4.1.3, a preliminary inquiry was commenced. After obtaining sworn statements from material witnesses and documentary evidence sufficient to warrant a legally sufficient finding a Memorandum of Legal Sufficiency was filed and an investigation commenced pursuant to Article V, Division 8, Section 2-260(d). Information obtained during the inquiry was adopted into the investigation and presented to the Commission on Ethics on February 2, 2012, with a staff recommendation that probable cause exists that a code of ethics violation occurred. Thereafter, the Commission conducted a Probable Cause hearing.

The Commission reviewed and considered the investigative report, documentary submissions, recommendation of staff, written response of the respondent, as well as oral statements of the respondent and of the advocate. At the conclusion of the hearing, the Commission on Ethics determines that no probable cause exists in this matter.

Accordingly, we find that there are insufficient reasonably trustworthy facts and circumstances for the Commission on Ethics to believe that the respondent violated section 2-443(a) or (b) of the Palm Beach County Code of Ethics.

V.a. – CONTINUED

Therefore it is ordered and adjudged that no probable cause exists and the complaint against respondent, Kimberly Mitchell, is hereby dismissed.

Done and ordered by the Palm Beach County Commission on Ethics (COE) in public session on February 2, 2012. Signed: Edward Rodgers, chair.

VI. REVISION TO RULES OF PROCEDURE, SECTION 2

Mr. Johnson requested that this item be tabled to the March 2012 COE meeting.

Commissioner Harbison said that he wanted to comment regarding the public report and finding, but that he would waive those comments until the item was rescheduled.

VII. PROCESSED ADVISORY OPINIONS (CONSENT AGENDA)

VII.a. Request for Advisory Opinions (RQO) 12-005

VII.b. RQO 12-006

MOTION to approve the consent agenda. Motion by Robin Fiore, seconded by Bruce Reinhart, and carried 5-0.

VIII. ITEMS PULLED FROM THE CONSENT AGENDA – None

IX. PROPOSED ADVISORY OPINION

IX.a. RQO 12-001

The COE Staff Counsel Megan C. Rogers, Esq. stated the following:

- City of West Palm Beach (City) Fire Chief Carlos Cabrera submitted the following request for an advisory opinion.
 - In 1997, the City Fire Rescue Department sought new software for tracking Emergency Medical Services reports. After a product search, Code 3 Software (Code 3), a company that was partially owned by Carlos Cabrera, was chosen.

IX.a. – CONTINUED

- Since acquisition, Code 3 had provided software and support to the City.
- The City renewed its licensing contract with Code 3 in 2006; however, the support contract automatically renewed annually.
- In late 2012, the City would transition to County-based software and would no longer receive software or support from Code 3.
- Staff had submitted the following for COE approval:
 - The Code of Ethics (Code) prohibited an employee or his/her outside business from entering into a contract with a public employer, unless one of several exceptions applied.
 - Based on the facts submitted, the employee's outside business was not prohibited from fulfilling the terms of its licensing agreement with the City if it was entered into prior to the Code's effective date. However, all agreements, specifically the software agreement, entered into or renewed after June 1, 2001, were subject to the Code's contractual relationships prohibition. However, an exception to the prohibition existed if an employee's company was the only source of supply within a city, provided that the employee fully disclosed his or her interest in the outside company to the City and the COE.
 - Chief Cabrera disclosed that he was a partial owner, the software creator, and that Code 3 was the sole servicer of the software.
 - An employee was not prohibited from entering into or maintaining a contract with his/her public employer as its sole provider; however, the employee may not use his/her official position to give or influence others to give his/her outside business a special financial benefit.

MOTION to approve the proposed advisory opinion letter RQO 12-001. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.

IX.b. RQO 12-002

Ms. Rogers stated the following:

- City Ethics Officer Norm Ostrau asked whether municipal employees may accept scholarship dollars from a local nonprofit organization, Prime Time Palm Beach County (Prime Time), to attend professional certification programs at Palm Beach State College (PBSC).
- Staff had submitted the following for COE approval:
 - Public employees and officials were not prohibited from accepting those scholarship dollars, provided there was no quid pro quo, special treatment, or privilege given to the nonprofit organization in exchange for offering these scholarships.
 - Neither PBSC nor Prime Time was a vendor or City lobbyist.
 - According to the Code, the awarded scholarships were not reportable gifts as long as they were related to an employee's educational training costs.

MOTION to approve the proposed advisory opinion letter RQO 12-002. Motion by Robin Fiore, seconded by Ronald Harbison, and carried 5-0.

IX.c. RQO 12-003

Ms. Rogers stated the following:

- County employee and board liaison Carol Langford asked whether the Code prohibited a County lobbyist from being appointed to a County advisory board, namely, the Commission of Affordable Housing Advisory Board (CAHAB).
- Staff had prepared a supplemental memorandum regarding the nature of the CAHAB, its duties, its role, and the lobbyist's role.

IX.c. – CONTINUED

- By Florida statute, jurisdictions that received State Housing Initiative Partnership (SHIP) funds were required to establish community housing boards or committees. A minimum of 11 members with specific housing-related experience was required to serve on each board or committee. The CAHAB's primary objective was to make program and funding recommendations to the Board of County Commissioners (BCC) for SHIP and private income development trust funds.
- The CAHAB reviewed the bid's compliance; however, it did not determine who would be the project's eventual developer.
- The first potential advisory board member that had been suggested to sit on CAHAB was an executive of the Gold Coast Builder's Association (GCBA), and was a registered County lobbyist. The GCBA members represented the overarching interest of county homebuilders as compared to individual homebuilders who could come before the CAHAB in some capacity.
- The second potential advisory board member was not a registered County lobbyist, but was a registered State lobbyist, and worked for the East Coast Chapter of Associated General Contractors of America. She also generally represented the overarching interest of contractors and developers rather than a specific developer.
- Staff had submitted the following for COE approval:
 - The Code did not prohibit lobbyists from serving on County or municipal advisory boards.
 - An advisory board member was prohibited from using his/her official position to give themselves, his/her outside employer, or a customer or client of his/her outside employer, a special financial benefit not shared with similarly situated members of the general public.
 - Voting on a client's proposal, participating in conversations, or attempting to influence fellow board members or County staff would constitute a misuse of office.

IX.c. – CONTINUED

- The prohibition extended to advisory board members, or someone using the members' official positions on his/her behalf.

Commissioner Robin Fiore stated that she was satisfied with Ms. Rogers' research since she was concerned with a BCC lobbyist sitting on a board that advised the BCC. She said that she had concerns regarding the broad wording of the proposed opinion letter. She suggested verbiage explaining that no problem existed in the current situation since the potential board members represented associations and not particular individuals.

Ms. Rogers suggested and the COE agreed that staff could include the language: based upon these facts and circumstances that are before the commission at this point in time.

Mr. Johnson suggested adding the language, "based on the specific facts and circumstances submitted," after the words, "In summary," and before the words, "the Code of Ethics does not prohibit a registered lobbyist."

Commissioner Reinhart suggested that the proposed opinion letter specifically state the words: this lobbyist. Mr. Johnson replied that the language should be, these lobbyists, since two individuals were discussed.

MOTION to approve proposed advisory opinion RQO 12-003 as amended to include the suggested language. Motion by Robin Fiore, seconded by Ronald Harbison, and carried 5-0.

IX.d. RQO 12-004

Ms. Rogers stated the following:

- A law-firm partner who was part of a County quasi-judicial board asked whether he must abstain and not participate in voting when someone appearing before his board was represented by the nonprofit Legal Aid Society (LAS) where two law-firm partners served as an officer and the other as a board director.

IX.d. – CONTINUED

- Staff had submitted the following for COE approval:
 - The Code's misuse of office and voting conflicts section was construed in the desire to limit potential misuse of a public duty to treat all citizens and entities on an equal footing where the official had a financial conflict.
 - The Code directly prohibited only those persons, or their spouses or domestic partners, serving as a nonprofit officer or director, from participating and voting on issues that may specifically financially benefit that nonprofit.
 - Under the circumstance submitted, the official was not required to abstain from voting.
 - Legal Aid Society representation by licensed attorneys was pro bono, and did not result in a financial benefit to an individual lawyer or his/her firm. However, if a law-firm associate appeared before the official's advisory board on behalf of a law firm client, the official must abstain and not participate in the matter.
 - Should a law-firm associate appear before the official's advisory board on behalf of a pro bono LAS client, and the law firm would not benefit financially, the official was not prohibited from hearing and participating in the matter under the Code; however, the attorney should consult the Florida Bar's Rules of Professional Conduct (Rules).
- Donated dollars for pro bono hours of LAS representation was not a Code violation.

MOTION to approve proposed advisory opinion letter RQO 12-004. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.

Commissioner Fiore suggested that the proposed opinion letter remain consistent when referencing the law firm by uppercasing the word, firm, specifically on page 2, last paragraph.

Mr. Johnson clarified that the word, Firm, was uppercased when referring to the law firm itself, and was lowercased when referring to any qualified firm.

IX.d. – CONTINUED

Referencing page 2, the second paragraph, Ms. Rogers stated that the Code referred to a person(s) who was known to work for the outside employer.

Mr. Johnson clarified that the words, the firm, referenced twice in lowercase, should be revised to read, the Firm, in uppercase.

Ms. Rogers clarified that the letter's reference to Rule 4-6.1(b) of the Florida Rules regarding pro bono services was aspirational, and not a requirement, and that staff would revise the language to reflect the clarification.

Staff agreed to include the changes as discussed.

X. BOCA RATON VOTING CONFLICTS

Mr. Johnson stated that RQO 11-116 and RQO 11-120 were related only by jurisdiction and should be voted on separately. He said that both RQOs were submitted by City of Boca Raton Attorney Diana Grub-Frieser.

X.a. RQO 11-116

Mr. Johnson read the following synopsis as follows:

The City Attorney asked how the \$10,000 threshold value of goods or services provided to a customer or client of an official or employee's outside employer is calculated when the employer is a large national financial institution. Secondly, in the event that an official and employee's outside employer is divided into operational departments and/or divisions, should all goods and services for all departments be included in the calculation of the threshold amount.

Lastly, does the reference in the Code to the "previous 24-month period" suggest that each time a matter comes before a governing body, an official recalculate the aggregate value of goods or services provided to a customer or client of his/her outside business or employer to ascertain whether \$10,000 has been reached.

X.a. – CONTINUED

Mr. Johnson read staff's recommendation in summary as follows:

A customer or client is defined as a person or entity to which an official's outside employer or business has provided at least \$10,000 worth of goods or services during the past 24 months. With respect to a banking institution, \$10,000 means the value of the total goods or services provided –

Mr. Johnson clarified that the term, value, was not based on the receipts, but the actual value of the goods or services provided. He continued:

– to a customer or client over the course of a 24-month period whether in the form of goods, fees, financial services –

Mr. Johnson clarified that the term, financial services, could include mortgage interest costs. He continued:

– if the mortgage is serviced by the bank itself. There is no bright line regarding actual or constructive knowledge of that status of the customer or client –

Mr. Johnson said that the bright line determination in RQO 11-009 had established who a customer or client was, and that a customer or client's status would be actual or constructive knowledge. He continued:

– and that includes the existence and the amount of goods and services provided.

Mr. Johnson said that someone could ascertain that an individual was a customer or client, but would be unable to reasonably ascertain if that individual exceeded the threshold since it was a fact-sensitive determination. He concluded:

Lastly, the existence of a conflict is determined at the time an official is required to act in his or her official capacity.

Commissioner Fiore asked whether staff's recommendation adequately addressed Ms. Grub-Frieser's concerns regarding the calculation of the aggregate value of goods or services. Mr. Johnson replied that although RQO 11-116's synopsis did not address the aggregate concerns, the proposed opinion letter did.

X.a. – CONTINUED

MOTION to approve proposed opinion letter RQO 11-116. Motion by Robin Fiore.

MOTION DIED FOR LACK OF A SECOND.

Commissioner Reinhart stated that his concern was that the letter's language insinuated that the COE would need to evaluate the application of the Code's Section 2-443 based on whether an individual appearing before a governing body or official was similarly situated to all Citibank customers, or that all Citibank customers were similarly situated to the general public. He said that the determination should be based on whether the customer was receiving a special benefit, compared to a wide variety of people versus a small variety of people.

Mr. Johnson replied that:

- Any customer or client appearing before a governing body or official would be receiving a financial benefit.
- The issue was the determination of whether the relationship between the customer or client and the employee eliminated the conflict or the perception of a conflict.
- The COE should discuss RQO 11-120 first, since its approval would help to determine RQO 11-116's language.

X.b. RQO 11-120

Judge Rodgers said that he would allow public comment at this time.

Palm Beach County League of Cities (LOC) Assistant General Counsel Jennifer Ashton, Esq. said that she supported staff's recommendation; however, she said that the COE should be cautious and the language should be broader since no two situations were the same. She said that the Code's misuse of office section did not adequately address situations involving customers or clients of large corporations. She suggested changing the language, are not similarly situated, to, may not be similarly situated; and changing the language, would present a conflict, to, may present a conflict.

X.b. – CONTINUED

Commissioner Fiore said that the COE had been repeatedly asked to include bright lines in its language approval, which was different from Ms. Ashton's suggestion of including broader language. Ms. Ashton replied that she was suggesting cautiousness, since situations could have different circumstances that could change overall determinations.

Commissioner Harbison said that each case would be judged on its particular facts and circumstances. Judge Rodgers stated that the letter included language that a conflict's existence would be determined by the facts at the time that the act was committed.

Ms. Ashton stated that she preferred softer, rather than absolute language. Commissioner Harbison replied that he supported softening the language.

Mr. Johnson stated that Ms. Ashton's suggested revisions on page 4 of RQO 11-120 were as follows:

- The second line in the first and second paragraphs which read, are not similarly situated, would read, may not be similarly situated.
- The next to last line in the second paragraph which read, would present a conflict, would read, may present a conflict.

Commissioner Farach stated that the COE members should not draw a bright line since they did not believe that an automatic Code violation would be present.

Commissioner Reinhart reiterated that the COE members should concern themselves with what special benefit a particular individual would be receiving compared to a large class of similarly situated individuals, rather than the employer of that particular individual.

(CLERK'S NOTE: Time was allowed for the COE members to read the final determination for RQO 11-099 regarding Florida Power and Light customers.)

Commissioner Reinhart stated that he disagreed with the conclusion of the previous RQO, 11-099; however, he said that it was consistent with the staff recommendation for RQO 11-120.

MOTION to approve proposed opinion letter RQO 11-120 as amended to include the changes as discussed. Motion by Ronald Harbison.

X.b. – CONTINUED

Commissioner Fiore suggested adding a sentence to address Commissioner Reinhart's concerns.

Mr. Johnson suggested voting on RQO 11-120 before RQO 11-116 since RQO 11-120's language was embedded in RQO 11-116.

MOTION WITHDRAWN.

Commissioner Reinhart stated that he did not believe that the RQO 11-120's vague language answered Ms. Grub-Frieser's question.

Mr. Johnson stated that:

- Staff fashioned questions based on the general content of the request.
- Staff rarely received requests for advisory opinions that specifically laid out a series of facts.
- Ms. Grub-Frieser requested general guidance on RQO 11-120, and the letter explained that the proper action would depend on each case's specific facts.

Commissioner Farach said that if the question was whether an automatic conflict would arise, the answer would be no; however, since it was a general question, the answer could go either way based on a case's specific facts.

City of West Palm Beach Ethics Officer Norman Ostrau stated that the Code's disclosure voting conflict section did not require knowledge or include the language, similarly situated members of the general public; therefore, the Code's language was flawed.

MOTION to table the discussion on RQOs 11-116 and 11-120. Motion by Manuel Farach.

Commissioner Farach suggested that staff work to shorten both RQO's language to provide guidance to the LOC and the Boca City Commission. He said that he volunteered to work with staff.

MOTION SECONDED by Robin Fiore.

X.b. – CONTINUED

Commissioner Harbison stated that he agreed with Commissioner Farach that the RQO's language should be revised so that more guidance could be given.

Mr. Johnson reminded the COE members that they could not discuss COE matters with one another outside of advertised meeting times. Commissioner Farach clarified that his suggestion was for one commissioner to work with staff to revise the language.

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

XI. EXECUTIVE DIRECTOR COMMENTS

XI.a.

DISCUSSED: Term Limits and Reappointment.

Mr. Johnson stated that Commissioner Farach had been reappointed for an additional four-year term. He said that Commissioner Reinhart had reached the end of his COE term; however, he was unsure who the replacement would be. The Swearing-In ceremony of Commissioner Farach and the new commissioner would take place at the March 2012 meeting, he added.

XI.b.

DISCUSSED: Congratulations and Thanks.

Commissioner Fiore thanked Commissioner Reinhart for his service.

Commissioner Harbison said that he appreciated Commissioner Reinhart's contributions and intellect throughout his term. He congratulated Commissioner Farach on his reappointment.

Commissioner Farach commented that the COE members and staff would miss Commissioner Reinhart.

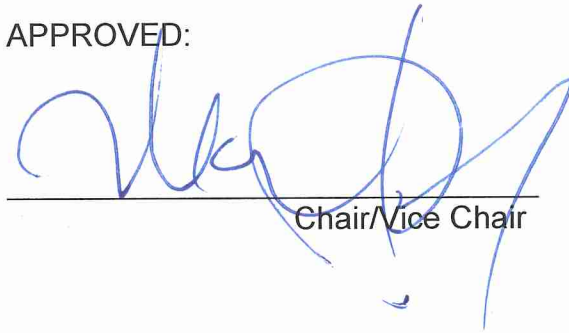
Commissioner Reinhart said that he was grateful to have met and worked with his fellow COE members and staff. He thanked the staff members for their hard work.

XII. PUBLIC COMMENTS – None

XIII. ADJOURNMENT

At 5:36 p.m., the chair declared the meeting adjourned.

APPROVED:



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, is written over a horizontal line.

Chair/Vice Chair