

FILE 2687 – January 11, 2017

CONFLICT OF INTEREST

BOARD MEMBERS OF CITY EMPLOYEES' RETIREMENT PLAN ALSO CITY EMPLOYEES AND PLAN MEMBERS

To: *Mark Herron, Tallahassee*

SUMMARY:

No prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes, would be created if members of the Board of Trustees for a City employees' retirement Plan also were employees of the City and members of the Plan. Under Section 112.313(7)(b), Florida Statutes, the Board members could be employed by the City and members of the Plan without conflict, because a City ordinance requires members of the Board to be members of the Plan. Depending on the circumstances, the Board members may be prohibited by Section 112.3143(3), Florida Statutes, from voting on matters that come before the Board. CEO 91-13, CEO 86-10, CEO 84-63, and CEO 80-59 are referenced.¹

QUESTION:

Would members of the Board of Trustees of a City employees' retirement Plan have prohibited conflicts of interest if they were employees of the City and members of the Plan?

Under the circumstances presented, your question is answered in the negative.

In your letter, you state that you write on behalf of the City Manager of the City of Sunrise.

¹Opinions, statutes, and forms of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

You specifically ask whether there would be a conflict of interest under the Code of Ethics for Public Officers and Employees if three appointed members of the Board of Trustees of the City's General Employees' Retirement Plan also were to be employed by the City as Director of Finance and Administrative Services, Assistant City Manager, and Director of Human Resources. Under a City ordinance, the Plan is administered by a Board serving without compensation and consisting of seven members and one alternate member, none of whom are elected officials and all of whom must be members of the Plan. You state that the three appointed Board members hold City positions with responsibilities that might overlap with their Board duties. The four remaining Board members and the alternate member are chosen as set forth in the ordinance. We address the question as to whether any of the Board members or the alternate member would have conflicting employment or contractual relationships while also being employed by the City and being members of the Plan.

This scenario implicates Section 112.313(7)(a), Florida Statutes, which states:

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.-No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of Section 112.313(7)(a) prohibits a public officer from having an employment or contractual relationship with a business entity or agency that is regulated by or is doing business with the officer's agency. The second part of Section 112.313(7)(a) prohibits a public officer from having an employment or contractual relationship which will create a continuing or recurring conflict between the officer's private interests and the performance of the officer's public duties or which would impede the full and faithful discharge of his or her public duties. Section 112.313(7)(a) is

applicable to the Board members since they are public officers of a public agency.

However, Section 112.313(7)(b) provides:

This subsection shall not prohibit a public officer or employee from practicing in a particular profession or occupation when such practice by persons holding such public office or employment is required or permitted by law or ordinance.

Any conflict of interest for the three appointed Board members—or the four chosen Board members or alternate Board member—under the first part or second part of Section 112.313(7)(a) would be negated by Section 112.313(7)(b), a statutory provision stating that no conflict exists under Section 112.313(7)(a) where a particular employment is required or permitted by law or ordinance. The City ordinance which establishes the City Employees' General Retirement Plan, provides in pertinent part:

The board for the general employees' retirement plan shall consist of seven (7) members, none of whom shall be elected officials, all of whom shall be members of the general employees' retirement plan [Sunrise, Fla., Code art. II, Section 11-11(b).]

Under the facts presented, a City ordinance requires the seven Board members and the alternate member to also be Plan members, and Plan members are, by definition, City employees. Therefore, service on the Board by City employees who are members of the Plan is allowed under Section 112.313(7)(b). CEO 91-13, CEO 86-10, CEO 84-63, and CEO 80-59.

As to a potential voting conflict, if a measure were to come before the Board that would inure to the special private gain or loss of one of the Board members, as an appointed public officer that Board member would be presented with a voting conflict under Section 112.3143(3)(a), Florida Statutes, and, therefore, would be required to abstain from voting on the measure after adhering to the procedure set forth in Section 112.3143(4), which requires disclosure of the nature of the conflict on a conflict memorandum (CE Form 8B) prior to participating in a meeting where such vote is to occur.

Accordingly, we find that, under Section 112.313(7)(b), Florida Statutes, the seven Board members and the alternate Board member may also be employees of the City and members of the

Plan because they are required by ordinance to be members of the Plan in order to serve on the Board. If a measure were to come before the Board that would inure to the special private gain or loss of one of the Board members, that member would be required to comply with the voting conflicts procedures set forth in Section 112.3143, Florida Statutes.

cc: Mr. Mark Herron

MFC/bd/dw

Daley, Betsy

From: Mark Herron <mherron@lawfla.com>
Sent: Tuesday, December 27, 2016 9:59 AM
To: Daley, Betsy
Subject: RE: City of Sunrise opinion

The opinion request does seek advice at to all members of the Retirement Plan Board because it seems well settled that Section 112.313(7)(b) would permit service of the other city employee members as required by the ordinance establishing the Board, who did not have any potential conflicting responsibilities. In addition, the other four employee members are elected to the Board as provided in the ordinance.

I trust that this is responsive to your inquiry.

Mark Herron
Messer Caparello
Telephone: (850) 222-0720
Email: mherron@lawfla.com

From: Daley, Betsy [mailto:DALEY.BETSY@leg.state.fl.us]
Sent: Thursday, December 22, 2016 9:52 AM
To: Mark Herron <mherron@lawfla.com>
Subject: Re: City of Sunrise opinion

Mark,

In drafting the opinion you requested on behalf of three Sunrise employees/Board members, I've been asked why four of the seven Retirement Plan Board members are omitted from the opinion request -- since the ordinance apparently requires all Board members to be City employees.

Please respond via email at your earliest convenience.

Thanks,

Betsy Daley
Senior Attorney

Florida Commission on Ethics
P. O. Drawer 15709
Tallahassee, FL 32317-5709
(850) 488-7864
(850) 488-3077 (fax)
daley.betsy@leg.state.fl.us
www.ethics.state.fl.us

HAND DELIVERED

2687



Mark Herron
Also Admitted in Georgia
Email: mherron@lawfla.com

2618 Centennial Place
Tallahassee, Florida 32308

December 1, 2016

FLORIDA
COMMISSION ON ETHICS

DEC 01 2016

RECEIVED

The Honorable Matt Carlucci
Chairman, Commission on Ethics
325 John Knox Road
Building E, Suite 200
Tallahassee, FL 32303

ORIGINAL

RE: Request for Advisory Opinion

Dear Mr. Carlucci:

This correspondence is written on behalf of Richard Salamon, City Manager of the City of Sunrise. The purpose of this correspondence is to request an advisory opinion, pursuant to Section 112.322(3)(a), Florida Statutes,¹ as to whether simultaneous service as a trustee of the City's General Employees' Retirement Plan by employees of the City would be conflicting under the Code of Ethics for Public Officers and Employees.

The City of Sunrise has established, by ordinance, a General Employees' Retirement Plan. See Chapter 11, Sunrise Code of Ordinances, a copy of which is submitted with this request for an advisory opinion. The General Employees' Retirement Plan is administered by a Board "of seven members, none of which shall be elected officials, all of who shall be members of the general employees' retirement plan..." See Section 11-11(b), Sunrise Code of Ordinances. By definition, members of the Plan must be active employees of the City.

¹ Section 112.322(3)(a), Florida Statutes, provides as follows:

Every public officer, candidate for public office, or public employee, when in doubt about the applicability and interpretation of this part or s. 8, Art. II of the State Constitution to himself or herself in a particular context, may submit in writing the facts of the situation to the Commission on Ethics with a request for an advisory opinion to establish the standard of public duty. Any public officer or employee who has the power to hire or terminate employees may likewise seek an advisory opinion from the commission as to the application of the provisions of this part or s. 8, Art. II of the State Constitution to any such employee or applicant for employment. An advisory opinion shall be rendered by the commission, and each such opinion shall be numbered, dated, and published without naming the person making the request, unless such person consents to the use of his or her name.

Members of the Board are selected in the following manner:

(1) Three (3) members shall be elected in the manner provided in subsection (f) of this section by the members of the general employees' retirement plan.

(2) Three (3) members shall be appointed by the city commission. All city commission appointees shall serve two-year terms, subject to removal under the same conditions as other city commission appointees to city boards.

(3) One (1) member (the "seventh member") shall be selected by majority vote of the six (6) other members. Within sixty (60) days of April 26, 2000, and, subsequently, within sixty (60) days of the board's last meeting in March in even numbered years, or within sixty (60) days of a vacancy occurring in the seat of the seventh member, the board, by affirmative vote of at least four (4) members, must select a seventh member. In making the selection, the board must first consider any plan members whose names appeared on the ballot in the last pension board election, but who were not elected as one (1) of the three (3) voting members of the board. The board may then consider any other plan members for the seat. If at least four (4) board members are unable to agree on the selection of the seventh member, the members shall each state on the record why they believe an individual, or group of individuals, under consideration is not acceptable to them. If the board has not selected a seventh member within sixty (60) days, the city commission shall select a plan member as the seventh member.

(4) One (1) alternate member shall be elected by the members of the general employees' retirement plan at the time when the other three (3) employee members are elected. The alternate member shall assume the position of any of the elected members upon a vacancy occurring in an elected member's position. The alternate member shall not serve merely on the absence or disability of an elected member. At the time an alternate member assumes the position of any elected member, the person who received the next highest number of votes in the most recent election and is willing to serve shall become the alternate member.

Section 11-11(b)(1)-(4), Sunrise Code of Ordinances.

The City Commission has appointed the following City employees to the Board: an Assistant City Manager; the Director of Finance and Administrative Services; and the Director of Human Resources. The Assistant City Manager supervises both the Director of Finance and the Director of Human Resources.

Members of the Board are fiduciaries of the retirement plan. The Board is required to submit certain financial information to the City Manager, which includes a certification of the amount of appropriation necessary to pay the normal costs and unfunded liability contributions to the plan for the next fiscal year and the amount of appropriation requested to pay the noninvestment expenses of the plan for the next fiscal year. The Board also has the authority to appoint its own legal counsel, accountants, actuaries, auditors, trustees, financial advisors and other professional consultants to assist the board in the performance of its trust duties.

The contributions to be made by each member of the Plan as well as by the City are set forth in the Ordinance. See Section 11-26, Sunrise Code of Ordinances. The Ordinance also describes the manner in which the City's contribution for normal costs is made. The Ordinance describes the circumstances under which a member of the Plan receives benefits. The Board performs certain ministerial functions, such as processing and certifying applications for retirement plan benefits. The Board approves pensions and provides for calculation of benefits in accordance with the provisions of the Ordinance. However, the Board does not have a role in negotiating retirement benefits. See Section 11-31, Sunrise Code of Ordinances. The Ordinance grants the Board some discretion to determine whether to grant an ordinary, accidental, or service-incurred disability retirement. The establishment of a cost-of-living allowance, the amount of contributions to be made by both the City and members into the allowance fund, and the priority of certain beneficiaries for the disbursement of funds are set forth in the Ordinance.

The Board has the power to interpret and apply the Ordinance and has, on occasion, interpreted the Ordinance contrary to the interpretation of City Management. The Board may not amend the provisions of the Plan, without the approval of the City Commission. The Board may make recommendations to the City Commission for amendments to the Plan.

Included with this request are job descriptions of each of the City employees who have been appointed by the City Commission to the Board. Each of the employees, to a greater or lesser extent, has duties and responsibilities with the City that may impact on the City's desire to amend the Plan through the enactment of ordinances. For example, amendments to the Plan may arise as a result of negotiations between the City and its unions. The employees appointed to the Board are part of the City's collective bargaining negotiating team. The elected members of the Board, the election of whom the City has no control, have been and may continue to be members of the union negotiating team responsible for negotiating pension benefits. There are occasions where an appointee cannot be consulted on pension matters within her City responsibilities, because doing so may create a government-in-the-sunshine law violation due to her participation on the Board.


Within the factual context outlined above, an advisory opinion is requested as to whether simultaneous service as a trustee of the City's General Employees' Retirement Plan by an Assistant City Manager, the City's Director of Finance and Administrative Services, or the City's Human Relations Director would create a prohibited conflict

under the Code of Ethics for Public Officers and Employees pursuant to Section 112.313(7)(a), Florida Statutes,² and if so, do the provisions of Section 112.313(7)(b), Florida Statutes,³ negate that conflict.

It appears that simultaneous service as a trustee of the City's General Employees' Retirement Plan by an Assistant City Manager Director of Finance and Administrative Services, or the City's Human Relations Director would not create a prohibited conflict under the Code of Ethics for Public Officers and Employees pursuant to Section 112.313(7)(a), Florida Statutes, consistent with prior advisory opinions of the Commission. CEO 06-16, CEO 94-45, and CEO 87-77. Moreover, in the event that there is a conflict under Section 112.313(7)(a), it appears that the provisions of Section 112.313(7)(b), Florida Statutes, negates such conflict inasmuch as the ordinance creating the Plan mandates that members of the Board be members of the Plan.

Thank you, in advance, for the Commission's review and response to this request for an advisory opinion. If you have any additional questions or concerns, please let me know.

Sincerely,



Mark Herron

cc: Richard Salamon, City Manager
Kimberly A. Kisslan, City Attorney

² Section 112.313(7)(a), Florida Statutes, provides as follows:

No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

³ Section 112.313(7)(b), Florida Statutes, provides as follows:

This subsection shall not prohibit a public officer or employee from practicing in a particular profession or occupation when such practice by persons holding such public office or employment is required or permitted by law or ordinance.