

FILE 2699 – August 10, 2017

CONFLICT OF INTEREST

STEPCHILD OF SUPERINTENDENT OF SCHOOL DISTRICT BEING CONSIDERED FOR CONSTRUCTION CONTRACT AWARD

To: *J. Ray Poole, Esq. (Nassau County School District)*

SUMMARY:

A prohibited conflict of interest under Section 112.313(3) or 112.313(7)(a), Florida Statutes, would not be created were the superintendent of a public school district to award, or recommend the award of, a construction contract to a construction company that is partly owned by the superintendent's adult stepchild. Referenced are CEO 90-36, CEO 96-6, CEO 99-5, CEO 00-22, CEO 11-4, and CEO 14-9.¹

QUESTION:

Would a prohibited conflict of interest be created were the superintendent of a public school district to award, or recommend the award of, a construction contract to a construction company that is partly owned by the superintendent's stepson?

Under the circumstances presented, your question is answered as set forth below.

In your letter of inquiry and in conversations with our staff, you state that you are requesting this opinion on behalf of the Superintendent of a School District (Superintendent). You state that pursuant to statutory authority afforded in Chapter 1001, Florida Statutes, the Superintendent routinely makes recommendations to the School Board regarding contracts for services, goods, and

materials to the School District. You relate that the Superintendent also is responsible for ensuring that contracting parties comply with the terms of those contracts. You state that the Superintendent has an adult stepson that is a one-third owner of a commercial construction company. You relate that from time to time the School District enters into contracts with construction companies to provide construction services. Large contracts are awarded via the competitive bid process whereas competitive bidding is not required for small contract awards. In either instance, the Superintendent makes recommendations to the School Board regarding whether to enter into such contracts, which are then put to a vote by the School Board. Thus, you ask whether there is any provision of the Code of Ethics for Public Officers and Employees that would prohibit the Superintendent from awarding, or recommending an award of, a contract to a construction company partly owned by the Superintendent's stepson.

Section 112.313(3), Florida Statutes, provides:

DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision . . . This subsection shall not affect or be construed to prohibit contracts entered into prior to:

- (a) October 1, 1975.
- (b) Qualification for elective office.
- (c) Appointment to public office.
- (d) Beginning public employment.

¹ Prior opinions of the Commission on Ethics can be viewed at www.ethics.state.fl.us.

Section 112.313(3), Florida Statutes, has two parts. The first part of Section 112.313(3) prohibits the Superintendent, acting in her official capacity as a purchasing agent,² from purchasing services from a business entity of which the Superintendent, her spouse, or her child is an officer, partner, director, or proprietor or in which the Superintendent, her spouse, or her child has a material interest.³ The Superintendent's stepson, as a one-third owner of a commercial construction company that in the future may seek the award of a construction contract with the School District, holds a material interest in the company. However, the prohibition in the first part of Section 112.313(3) is inapplicable in the instant matter because the term "child" as it is used in this prohibition does not include a stepson. Unlike other statutes, such as the anti-nepotism law contained in Section 112.3135, Florida Statutes, the Legislature has included only the terms "spouse" and "child" for the purposes of Section 112.313(3) and not the broader term "relative."⁴ In light of the penal nature of ethics statutes, the Commission has strictly construed the definition of statutory terms that would create a conflict of interest and applied the rule of statutory construction *expressio unius est exclusio alterius* (the express mention of one thing in a

² The term "purchasing agent" is defined in Section 112.312(20), Florida Statutes, to mean "a public officer or employee having the authority to commit the expenditure of public funds through a contract for, or the purchase of, any goods, services, or interest in real property for an agency, as opposed to the authority to request or requisition a contract or purchase by another person."

³ "Material interest" is defined in Section 112.312(15), Florida Statutes, to mean "direct or indirect ownership of more than 5 percent of the total assets or capital stock of any business entity."

⁴ For the purposes of the anti-nepotism standard a "relative" includes one's stepson. See Section 112.3135(1)(d), Florida Statutes. However, it applies only to situations where the relative is being considered for appointment, employment, promotion, or advancement "in or to a position in the agency" in which the official serves or over which the official exercises jurisdiction or control. As the stepson's prospective position in the instant matter is in a privately-owned commercial construction company and not in a governmental agency, this provision would not apply here. See also, CEO 11-4.

statute implies the exclusion of other things not mentioned). See CEO 99-5, CEO 96-6, and CEO 14-9. In CEO 14-9, we determined that a public official's former spouse's daughter is not the public official's "stepdaughter" subject to prohibitions of the anti-nepotism law, narrowly construing the term "stepdaughter" for the purposes of the anti-nepotism statute. In addition, Black's Law Dictionary (10th ed. 2014) defines "child" to include a "son or daughter" and separately defines "stepchild" to mean "[t]he child of one's spouse by a previous marriage . . . generally not entitled to the same legal rights as a natural or adopted child." See also Walt Disney World Co. v. McCrea, 754 So.2d 196, 198 (Fla. 1st DCA 2000); in reversing the award of attendant-care benefits, the court determined that the terms "child" and "stepchild" are legally distinct. Similarly, in the instant matter, the term "stepson" is not tantamount to or subsumed in the term "child," within the meaning of the prohibition contained in Section 112.313(3).⁵ Therefore, no conflict of interest would exist under the first part of Section 112.313(3).

The second part of Section 112.313(3) prohibits the Superintendent from acting in a private capacity to facilitate sales of goods, services, or realty to the School District. In the instant matter, assuming that the Superintendent is not personally connected in any capacity (is not an officer, partner, director, salesperson, etc., of the company) with her stepson's company,

⁵We also are not inclined to insert the term "minor" as a modifier of the definition of "child" for the purposes of Section 112.313(3), Florida Statutes. As noted above, the first part of the statute is designed to prohibit conflicts of interest arising from a public officer or employee purchasing services for their agency from a business entity which they, their spouse, or their child serves as an officer, partner, director, or proprietor, or has a material interest. As minor children do not typically serve as the officer, partner, director, or proprietor of business entities nor do they typically hold a material interest in a business entity, the purpose of the statute would be severely curtailed were it to only apply to prohibit the expenditure of public funds to invest in the business entities of a *minor* child.

then no conflict of interest would exist were the Superintendent to award, or recommend the award of, a construction contract to the company that is partly owned by her stepson.

Section 112.313(7)(a), Florida Statutes, 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 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 private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties.

This provision addresses only certain prohibited contractual and employment relationships on the part of a public officer, not contractual relationships formed with or maintained by others (e.g. those of an officer's extended family). See CEO 90-36. Therefore, Section 112.313(7)(a) also does not apply here.

Finally, and without in any way intending to suggest doubt as to the Superintendent's personal integrity, we bring to your attention Sections 112.313(6) and 112.313(8), Florida Statutes, which provide:

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. [Section 112.313(6), Florida Statutes]

DISCLOSURE OR USE OF CERTAIN INFORMATION.—A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for

information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), Florida Statutes]

These provisions prohibit the Superintendent from corruptly using her position or the resources thereof, or using "inside information," for the purpose of benefitting herself or any other person or entity.

Accordingly, under the facts represented, we find no violation of Section 112.313(3) or 112.313(7) would occur were the school Superintendent to award, or recommend the award of, a construction contract to a company partly owned by her stepson.

cc: J. Ray Poole, Esq.

MA/cm

2699



The Nassau County School District

1201 Atlantic Avenue
Fernandina Beach, Florida 32034

J. Ray Poole
Chief of Legal Services

(904) 491-9900
Fax (904) 277-9042
ray.poole@nassau.k12.fl.us

June 13, 2017

Virlindia Doss, Executive Director
The Florida Commission on Ethics
P. O. Drawer 15709
Tallahassee, FL 32317-5709

Dear Ms. Doss:

I am in need of an ethics opinion on the following issue:

Does the Code of Ethics for Public Officers and Employees, Section 112.311, et seq., Florida Statutes, bar the Superintendent of a public school district from awarding, or recommending an award, of a construction contract to a construction company that is partly owned by the Superintendent's adult stepchild?

The relevant facts are as follows:

The Superintendent of the Nassau County School District is an elected official. The Superintendent is responsible for exercising general oversight over the district school system. Section 1001.49, Florida Statutes. The Superintendent is required to "recommend to the district school board the desirable terms, conditions, and specifications for contracts for supplies, materials, or services to be rendered and see that materials, supplies, or services are provided according to contract." Section 1001.51(11)(i), Florida Statutes. The Superintendent is also to "[a]ct for the district school board as custodian of school property." Section 1001.51(4), Florida Statutes. The Superintendent routinely makes recommendations to the Nassau County School Board regarding contracts for services, goods and materials with third parties, and the Superintendent is responsible for ensuring that third parties comply with the terms of those contracts.

The Superintendent has an adult stepson. The adult stepson is part owner of a commercial construction company, which is organized as a corporation. He is one of several shareholders in the company.

Our mission is to develop each student as an inspired life-long learner and problem-solver with the strength of character to serve as a productive member of society.

The Nassau County School District does not discriminate on the basis of race, color, national origin, gender, age, disability or marital status in its educational programs, services or activities, or in its hiring or employment practices.

7

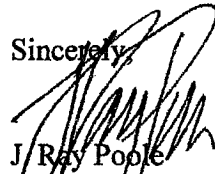
Virindia Doss, Executive Director
June 13, 2017
Page 2

From time to time, the Nassau County School District enters into contracts with construction companies. Large contracts with construction companies are awarded based upon competitive bid, whereas competitive bidding is not required for small contracts. In either event, the Superintendent makes recommendations to the Nassau County School Board concerning whether to enter into such contracts, and the recommendations are put to a vote by the School Board.

Would the Code of Ethics for Public Officers and Employees, Section 112.311, et seq., Florida Statutes, bar the Superintendent from awarding, or recommending an award, of a construction contract to the construction company that is partly owned by the Superintendent's adult stepchild?

I would greatly appreciate an ethics opinion on the foregoing issue. I request that the name of the school district be withheld from the opinion. Should you have any questions, please do not hesitate to contact me.

Sincerely,



J. Ray Poole
Chief of Legal Services