

MAR 15 2024

**BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS**

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CONFIDENTIAL

In re: Joseph Pinder, III,

Respondent.

Complaint No.: 23-225

ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT/COMPLAINANT

Respondent, Joseph Pinder, III, served as a member of the Islamorada Village Council in Islamorada, Florida. Complainant is Cheryl Meads of Hobe Sound, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Article II, Section 8(h)(2), Florida Constitution, and Section 112.313(6), Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on February 29, 2024.

ALLEGATION ONE

Respondent is alleged to have violated Article II, Section 8(h)(2), Florida Constitution, by using public funds for his election campaign.

APPLICABLE LAW

Article II, Section 8, provides as follows:

Ethics in government.—A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:

(h)(1) A code of ethics for all state employees and nonjudicial officers prohibiting conflict between public duty and private interests shall be prescribed by law.

(2) A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest.

ANALYSIS

Respondent was elected to the Islamorada Village Council on November 3, 2020, and re-elected on November 8, 2022. (ROI 6, 8) He currently serves as the Mayor. (ROI 6) Carlos Garcia owns Attention Media, LLC (AML). (ROI 8, 15)

It is alleged that Respondent "used public funds for his election campaign":

- 1) by using a Village contract employee, Carlos Garcia, who works for AML, a media company, to create and post a video on social media, in which Respondent thanked people for voting for him; and
- 2) by having another Village employee who was on the clock take part in the video. (ROI 2, 8)

The chronology of events is as follows:

2020 Village election – Garcia filmed campaign videos for two candidates, one of whom was Respondent. (ROI 16)

November 3, 2020 – the "Buddy Pinder for Islamorada Village Council" Facebook Page posted a 57 second video titled "Thank you all for your support!!!" (ROI 9, Exhibit A) The campaign signs read: "Buddy Pinder for Village Council Seat 3." (ROI 9, Exhibit A) Sometime thereafter, Garcia asked Respondent and the other candidate who he had filmed whether he could present an idea to the Council. (ROI 16)

Beginning of 2021 – Garcia proposed a media service to the Village Council, which was not approved. (ROI 11) The second time the proposal was offered, it was approved unanimously by the Council. (ROI 11, 16)

February 25, 2021 – the Islamorada Village Council unanimously approved a four-month contract with AML to develop a media outreach pilot program for the Village. (ROI 12) The scope of services included that the content produced for the project would be curated by AML with the direct input from Council members and Village staff, that AML would work closely with each Council member, including attending events, and AML would capture the necessary information required to produce the content. (ROI 12, Exhibit B) The contract stated, "AML shall not provide social media or marketing service to political candidates that are running for Village Council or any other position within the Village." (ROI 12, Exhibit B)

June 2021 – the Village Council extended AML's contract for an additional three months. (ROI 12, Exhibit B)

Around September 2021 – Village Manager Greg Oravec approved social media postings until his resignation. (ROI 17)

March 31, 2022 – Village Manager Greg Oravec resigned. (ROI 17)

November 13, 2022 – Garcia filmed a video titled, "Thank you Islamorada" between noon and 2:00 or 3:00 p.m. (ROI 22, 23) The 86 second video was filmed in segments with Respondent riding his three-wheeled bicycle through the Founder's Park gate and around the lighthouse. (ROI 22, Exhibit A) Respondent was displaying campaign signs and a large American flag. (ROI 19) The campaign signs read, "Joseph 'Buddy' Pinder for Islamorada Village Council, Seat 1 – Paid by Joseph 'Buddy' Pinder Candidate for Village Council Seat 1." (ROI 19, Exhibit A) At the 22 second mark, Respondent stops to "high five" the park attendant. (ROI 19, Exhibit A) Respondent denied that he had discussed this with the park attendant or park supervisors prior to the filming. (ROI 24) According to Respondent, the purpose of the video was to express his thanks to the community and Garcia determined the content. (ROI 23) Anne Onsgard, Facilities Supervisor, stated that she has appeared in AML videos before and said the videos are typically "free-flowing" and not planned or structured. (ROI 27)

November 14, 2022 – AML released a video to its Islamorada Social Instagram titled, "Thank you Islamorada." (ROI 19, Exhibit A) Garcia said that he did not receive any additional compensation directly from Respondent for this video. (ROI 20)

November 15, 2022 – AML released a video titled, "Thank you Islamorada" to its Islamorada Social's Facebook and YouTube Channels. (ROI 19, Exhibit A)

December 6, 2022 – Respondent was sworn in for a second term on the Village Council. (ROI 6, Exhibit A)

July 2023 – January 2024 – Human Resources Director Evie Engelmeyer posted content to the Village social media accounts. (ROI 17)

December 12, 2023 – the Council considered approval of a one-year contract with AML. (ROI 31) Kimberly Matthews, Interim Village Manager, advised the Council that the AML

contract was initially a Council-driven initiative, which complicates proper oversight of a contract or vendor, therefore, Garcia should report to the Village Manager. (ROI 31) At this Council meeting, John Quick, Village Attorney, stated that the Village Charter provides that the Council employs only two people – the Village Manager and Village Attorney – and everyone else reports to the Village Manager or the Manager's appointed staff and contractor/vendor communications should be with the Village Manager and staff. (ROI 32)

2023 – Garcia said that he recorded 84 videos for the Village during this year, 14 of which were of Respondent and eight of the 14 were filmed during community events. (ROI 29) He estimates Respondent appeared in six videos, just slightly above the average of 4.6 videos per Councilmember. (ROI 29, Exhibit B)

January 2024 – AV/Social Media Specialist assumed the social media posting duties from Engelmeyer. (ROI 17)

October 25, 2022 – the Village Council unanimously approved a continued agreement with AML through September 30, 2023. (ROI 12, Exhibit B) Again, the contract stated, "AML shall not provide social media or marketing service to political candidates that are running for Village Council or any other position within the Village." (ROI 12, Exhibit B)

January 9, 2024 – the proposed contract renewal was removed from this agenda meeting and the contract reverted to a month-to-month agreement. (ROI 12)

January 22, 2024 – After discussion with staff and Council members, Interim Village Manager Matthews issued a notice of termination of the agreement between the Village and AML, effective February 1, 2024. (ROI 33, 36, Exhibit B) Matthews stated that AML was not meeting the contract requirements according to results of an audit conducted by the internet technology

staff. (ROI 36, Exhibit D) Neither staff nor Council members expressed any objection to the termination of the contract. (ROI 36)

The Complainant asserts that Respondent engaged in conduct alleged to be a misuse of public position and an abuse of public position to obtain a disproportionate benefit by using public resources to create and post to social media, around November 14, 2022, a "Thank you for your Support" video which included an on-the-clock Village employee. (ROI 2) Respondent displayed campaign signs on his bicycle in the video. (Exhibit A)

The allegation raises two separate potential ethical provisions – one found in the Constitution and the other found in the statutes. To violate the Constitutional prohibition, Respondent must have received a "disproportionate benefit" and possess the requisite wrongful intent. The Commission on Ethics defined the term "disproportionate benefit" and prescribed the requisite intent for finding a violation of the Constitutional prohibition. Rule 34-18.001, *Florida Administrative Code*, defines a disproportionate benefit as "a benefit, privilege, exemption or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of his or her public duties." Rule 34-18.001(2)(a), F.A.C. The rule also specifies that the requisite intent necessary for finding a violation of the disproportionate benefit prohibition is "that the public officer or public employee acted, or refrained from acting, with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties." Rule 34-18.001(4), F.A.C.

In CEO 19-23, the Commission expounded on the intent requirement of the Constitutional amendment, noting that it is "highly similar, if not identical," to the intent required to show a violation of Section 112.313(6) because both the rule and the amendment "require an act or

omission committed with a 'wrongful intent' and for the purpose of obtaining a result 'inconsistent with the proper performance' of one's public duties." CEO 19-23.

Respondent must have used or attempted to use his public position and/or resources thereof in a manner inconsistent with the proper performance of his public duties, that he knew his conduct was wrong, and that he engaged in the conduct in order to further a special privilege, benefit, or exemption for himself or another.¹ *Blackburn v. State, Commission on Ethics*, 589 So. 2d. 431 (Fla. 1st DCA 1991). It is not inconsistent with the proper performance of the public duty to communicate with constituents to thank them for their vote.

Public resources and tax dollars that fund such resources are to be used for governmental purposes; not for political activity. The contract between AML and the Village Council ensured that "AML shall not provide social media or marketing service to political candidates that are running for Village Council or any other position within the Village." (ROI 12, Exhibit B) The overt political solicitations on Respondent's bicycle would be supportive of the "wrongful intent" required; however, the vote had already occurred. He was no longer a candidate running for office.

In respect to the Village employee who appeared in the video to "high five" Respondent as he passed by her booth at the park entrance, the encounter is not indicative, without more, of anything other than a friendly gesture.

Respondent utilized and benefited from a Village resource that was equally available to all Council members via a Council-approved contract with AML. Some members chose to use it while others did not. His conduct did not conflict with the contract's terms. Based on the foregoing, it

¹ The language of the statute differs from the amendment in that the statute applies no matter who receives the "special privilege, benefit, or exemption," while the Constitutional amendment applies only when a "disproportionate benefit" is received by the public officer or public employee, his or her spouse, children, or employer, or a business with which he or she has an enumerated affiliation. In this case, it is alleged that only Respondent received a benefit.

does not appear that sufficient evidence exists to find Respondent had a wrongful intent with respect to obtaining a disproportionate benefit.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Article II, Section 8(h)(2), Florida Constitution.

ALLEGATION TWO

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by using public funds for his election campaign.

APPLICABLE LAW

Section 112.313(6), Florida Statutes, provides as follows:

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

The term "corruptly" is defined by Section 112.312(9), Florida Statutes, as follows:

"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 a public servant which is inconsistent with the proper performance of his or her public duties.

In order to establish a violation of Section 112.313(6), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.
2. Respondent must have:
 - a) used or attempted to use his or her official position or any property or resources within his or her trust,
 - or

- b) performed his or her official duties.
3. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for him- or herself or others.
4. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting him- or herself or another person from some act or omission which was inconsistent with the proper performance of public duties.

ANALYSIS

The facts are presented under Allegation One. Based on the foregoing, it does not appear that sufficient evidence exists to find Respondent had a wrongful intent with respect to misuse of public position.

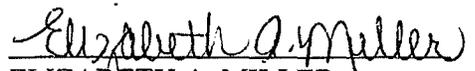
Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes.

RECOMMENDATION

It is my recommendation that:

1. There is no probable cause to believe that Respondent violated Article II, Section 8(h)(2), Florida Constitution, by using public funds for his election campaign.
2. There is no probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes, by using public funds for his election campaign.

Respectfully submitted this 15th day of March, 2024.


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CEO 19-23—October 30, 2019

ABUSE OF PUBLIC POSITION

ARTICLE II, SECTION 8(h)(2), FLORIDA CONSTITUTION

To: Gigi Rollini, Esq., Attorney for the Bay Laurel Center Community Development District (Ocala)

SUMMARY:

Advice is provided to members of the board of supervisors of a community development district concerning the prohibition found in Article II, Section 8(h)(2), Florida Constitution, as implemented by Rule 34-18.001, Florida Administrative Code. Referenced is CEO 82-32.

QUESTION:

Will members of the board of supervisors of a community development district acting in a manner fully compliant with the requirements of Chapters 112 and 190, Florida Statutes, as well as all other applicable statutes and ordinances, be considered to have abused their position to obtain a disproportionate benefit, as prohibited by Article II, Section 8(h)(2), Florida Constitution?¹

Under the circumstances presented, your question is answered in the negative, provided they do not engage in coercive, intimidating, or similarly abusive conduct on behalf of themselves or others.

In your letter of inquiry and additional information provided to our staff, you state you are bringing this inquiry on behalf of the Bay Laurel Center Community Development District's Board of Supervisors. You relate the District is a local unit of special purpose government and derives its authority from Chapter 190, Florida Statutes (Community Development Districts), as well as from Marion County ordinances. You state the District, the service area of which you approximate covers over 13,000 acres, is responsible for storing, processing, delivering, and distributing water, wastewater, and reclaimed water to its residents and commercial customers.

Your specific inquiry deals with the recent amendment ("Amendment 12") to Article II, Section 8 of the Florida Constitution, specifically Article II, Section 8(h)(2), which states:

A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or

she owns an interest. The Florida Commission on Ethics shall, by rule in accordance with statutory procedures governing administrative rulemaking, define the term “disproportionate benefit” and prescribe the requisite intent for finding a violation of this prohibition for purposes of enforcing this paragraph. Appropriate penalties shall be prescribed by law.

In accordance with the language contained in the Constitutional prohibition, the Commission adopted Rule 34-18.001, Florida Administrative Code, which became effective on September 30, 2019. In Rule 34-18.001(2), the term “disproportionate benefit” is defined as “a benefit, privilege, exemption or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of his or her public duties.” The Rule lists several factors the Commission should consider in determining whether a benefit, privilege, exemption, or result constitutes a “disproportionate benefit.”² It then provides² in Rule 34-18.001(4) “the requisite intent needed to find a violation of the Constitutional prohibition, stating the public officer or public employee must have “acted, or refrained from acting, with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties.”

You inquire about how Article II, Section 8(h)(2) will apply to the District’s Board of Supervisors, which is comprised of five members. You relate the Board primarily is responsible for managing the District and that its duties include assessing and levying taxes and special assessments, approving budgets, exercising control over District properties, controlling the use of District funds, hiring and firing District employees, and financing improvements to the District. You indicate the District Board members are subject not only to the requirements of Chapter 190—which governs the operation of special districts such as community development districts—but also to those of the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes).

You question whether the District Supervisors could be found in violation of the prohibition in Article II, Section 8(h)(2) of the Florida Constitution, even if their conduct is in compliance with the provisions set forth in Chapters 190 and Part III, Chapter 112, Florida Statutes. Your concern stems from the fact that one of the Supervisors currently serving on the Board is employed by the District’s developer, another Supervisor has an ownership interest in the developer, and three of the Supervisors are District customers. Considering this, you state many actions or votes taken by the Board will affect a District Supervisor or a business connected to a District Supervisor, and this effect may be greater than that experienced by others residing within the District who are not affiliated with the developer or who are not District customers.

In particular, you indicate the District has a licensing agreement with the developer who is affiliated with the two Supervisors. Under this agreement, the developer disposes of the byproducts of the District’s wastewater treatment, such as biosolids and effluent. You state the District Board—including these two Supervisors—must vote at meetings

held every other month to approve payment to the developer to dispose of the waste. Another example you provide of an imminent matter the District Board will face is that it sets the rates for water and wastewater services and these rates personally affect the three District Supervisors who are District customers. You foresee situations similar to these commonly arising before the District Board.

You state the statutory scheme developed for community development districts in Chapter 190 contemplates and permits individuals affiliated with a district developer—or individuals with a personal interest in the operation of the district—to serve as district supervisors. In particular, you emphasize Section 190.007(1), Florida Statutes, which states “[i]t shall not be a conflict of interest under chapter 112 for a board member or the district manager or another employee of the district to be a stockholder, officer, or employee of a landowner or of an entity affiliated with a landowner.” See CEO 82-32 (recognizing and applying Section 190.007(1)).³

However, you inquire whether the District Supervisors may still be found in violation of the prohibition found in Article II, Section 8(h)(2) of the Florida Constitution, as implemented in Rule 34-18.001, Florida Administrative Code, even if their conduct is in full compliance with the ethical standards and conflict of interest exceptions found in Chapters 112 and 190. In particular, you ask whether their mere service as voting members of the Board may be enough to trigger a violation of the new Constitutional prohibition, considering they either are affiliated with a developer interfacing with the District or are District customers themselves.

By its very language, the prohibition in Article II, Section 8(h)(2) of the Florida Constitution is triggered only if public officers and public employees are acting in a manner contrary to the proper performance of their duties (i.e., engaging in abusive conduct). The prohibition requires not just conduct resulting in an out-of-proportion benefit to the public officer, public employer, or other enumerated recipient, but also that the public officer or public employee has abused his or her public position to obtain that benefit. Therefore, so long as a District Supervisor is acting in full compliance with all statutes and ordinances governing the operation of the District and his or her conduct as a public officer, an abuse of public position will not be present.

The language in Rule 34-18.001 further emphasizes this point. Rule 34-18.001(2) states the term “disproportionate benefit” encompasses only a benefit, privilege, exemption, or result that is “inconsistent with the proper performance” of a public officer’s or public employee’s public duties. In other words, if the benefit, privilege, exemption, or result arising from the public officer’s or public employee’s conduct is contemplated by and consistent with the standards governing his or her public conduct, a “disproportionate benefit” will not be present. And Rule 34-18.001(4) states the requisite intent needed to violate the Constitutional prohibition is a “wrongful intent” to obtain a benefit, privilege, exemption, or result “inconsistent with the proper performance” of a public officer’s or public employee’s public duties.

Applying this reasoning to your question, so long as a District Supervisor’s actions—including service on the Board or voting—are consistent with the proper performance

of his or her public duties, meaning in full compliance with all applicable statutes and ordinances, including Chapters 112 and 190, Florida Statutes, the Constitutional prohibition found in Article II, Section 8(h)(2) of the Florida Constitution will not be triggered. In such a circumstance, the District Supervisor will not have abused his or her position with the requisite intent or obtained a “disproportionate benefit” as that term is defined in Rule 34-18.001.

Regarding the District Board’s upcoming votes—in particular, the approval of the licensing agreement and the setting of water rates—assuming a Board Supervisor by voting will not violate any applicable provision in Chapters 112 or 190, he or she similarly will not have abused their position to obtain a disproportionate benefit under the Constitutional prohibition. However, again, this lack of abuse to obtain a disproportionate benefit is contingent on the Board Supervisors ensuring their votes comply with all applicable statutes and ordinances. For example, Chapter 190 alone will not insulate a Supervisor from a violation of the Constitutional prohibition if the Supervisor were to take a bribe or similar under—the—table money in exchange for action that otherwise would be in conformity with the provisions of Chapter 190.

To the extent you also inquire whether existing authority interpreting and defining Section 112.313(6), Florida Statutes, may be used to interpret and define the prohibition in Article II, Section 8(h)(2), we note first there are certain differences between the statutory provision and the Constitutional amendment. Section 112.313(6), Florida Statutes, states:

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

The language of the statute differs from the amendment in that it is triggered not only when a “disproportionate benefit” results from misconduct by a public officer or public employee, but when a “special privilege, benefit, or exemption” of any degree results. Moreover, the language of the statute applies no matter who receives the “special privilege, benefit, or exemption,” while the Constitutional amendment applies only when a “disproportionate benefit” is received by the public officer or public employee, his or her spouse, children, or employer, or a business with which he or she has an enumerated affiliation. Therefore, it cannot be said the amendment and the statute are identical.

However, the requisite intent needed to violate the amendment is highly similar, if not identical, to that of the statute. As previously described, the intent needed to violate the prohibition contained in Article II, Section 8(h)(2) is described in Rule 34-18.001(4), which states the public officer or public employee must have acted, or refrained from acting, “with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties.” By comparison, the intent needed to violate the statute is found in Section 112.312(9), Florida Statutes, which states the term “corruptly,” as used in Section 112.313(6), means conduct:

. . .one 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.

Both the amendment and the statute require an act or omission committed with a “wrongful intent” and for the purpose of obtaining a result “inconsistent with the proper performance” of one’s public duties. Therefore, the Commission’s existing authority interpreting and clarifying the intent needed to violate Section 112.313(6) may be used as guidance deciding allegations or issues under the Constitutional amendment.⁴

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 25, 2019, and **RENDERED** this 30th day of October, 2019.

Kimberly B. Rezanka, *Chair*

[1] While your inquiry contains three numbered questions, this opinion, while addressing each question, combines them into one general query.

[2] These factors are listed in Rule 34-18.001(3), Florida Administrative Code, which states the Commission must consider:

- (a) The number of persons, besides the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, who will experience the benefit, privilege, exemption, or result;
- (b) The nature of the interests involved;
- (c) The degree to which the interests of all those who will experience the benefit, privilege, exemption, or result are affected;
- (d) The degree to which the public officer or public employee, his or her spouse, children, employer, or business with which he or she contracts, in which he or she is an officer, a partner, a director, or a proprietor, or in which he or she owns an interest, receives a greater or more advantageous benefit, privilege, exemption, or result when compared to others who will receive a benefit, privilege, exemption, or result;
- (e) The degree to which there is uncertainty at the time of the abuse of public position as to whether there would be any benefit, privilege,

exemption, or result and, if so, the nature or degree of the benefit, privilege, exemption, or result must also be considered; and

(f) The degree to which the benefit, privilege, exemption, or result is not available to similarly situated persons. As used in this chapter, “similarly situated persons” means those with a commonality or like characteristic to the public officer or public employee that is unrelated to the holding of public office or public employment, or a commonality or like characteristic to the public officer’s or public employee’s spouse, children, or employer, or to any business with which the public officer or public employee contracts, serves as an officer, partner, director, or proprietor, or in which he or she owns an interest.

[3] Similar exceptions for special districts are recognized in Chapter 112, such as Section 112.3143(3)(b), Florida Statutes, which, in part, permits officers of independent special tax districts elected on a one-acre, one-vote basis to vote in that capacity. See also Section 190.006(2)(b), Florida Statutes.

[4] Indeed, records of, and commentary concerning, the Constitution Revision Commission which fashioned the amendment support its reliance on the institutional knowledge and agency expertise of the Commission on Ethics in administering the amendment.