

CONFLICT OF INTEREST; VOTING CONFLICT; MISUSE OF POSITION; ABUSE OF POSITION

MEMBER OF BOARD OF COMMISSIONERS OF NORTH BROWARD HOSPITAL DISTRICT PARTICIPATING IN AND VOTING ON MATTERS CONCERNING THE DISTRICT'S ELECTRONIC HEALTH RECORDS DATABASE

To: Ray Berry, Commissioner (Board of Commissioners of North Broward Hospital District)

SUMMARY:

A prohibited conflict of interest would not exist under Section 112.313(7)(a), Florida Statutes, if a Commissioner on a hospital district board participated in discussions and decisions during board meetings regarding the selection of an electronic health records database provider for the District because, under the facts provided, he does not have an employment or contractual relationship with the District or any database vendor. Nor would a voting conflict exist under Section 112.3143, Florida Statutes, if he were to vote on the matter. Guidance concerning the applicability of Section 112.313(6), Florida Statutes, and the amendment in Article II, Section (8)(g)(2), Florida Constitution, is also provided with regard to the Commissioner's expression of his position and opinion on the matter outside board meetings. Referenced are CEO 22-3, CEO 21-1, CEO 20-7, CEO 19-23, CEO 10-14, CEO 04-17, CEO 86-24, and CEO 81-47.

QUESTION 1:

Would a prohibited conflict of interest exist under Section 112.313(7)(a), Florida Statutes, for a member of the Board of Commissioners of the North Broward Hospital District if he participates in discussions and decisions during Board meetings concerning selecting an electronic health records (EHR) database provider for the District?¹

Under the facts presented, Questions 1 is answered in the negative.

In your letter of inquiry, you indicate that you serve as an appointed member of the Board of Commissioners for the North Broward Hospital District ("District"). You explain that your duties as a Commissioner include Board oversight and decision-making with regard to the

¹ The six questions in your inquiry have been rephrased and consolidated into three issues, as presented herein; all of the material in your questions is addressed in this opinion.

District's purchases, policies and operations. You indicate that the District may be issuing a bid solicitation for a new EHR database. You inquire as to whether any of the following information could create a prohibited conflict for you.

You state that your father-in-law was diagnosed with a serious ailment and received treatment for the ailment at a non-District hospital operated by the South Broward Hospital District d/b/a Memorial Healthcare System ("Memorial"). You state that your father-in-law's medical history and records were located at Memorial. Your father-in-law subsequently transferred to a District hospital. You write that Memorial and the District utilize different EHR databases to store patient records. Memorial uses an EHR database called Epic and the District hospitals use another, called Cerner.

You state that the District hospital requested your father-in-law's records from Memorial, but that the records were never transmitted. You state that the reason the records were not transmitted is because Cerner and Epic's databases do not integrate or communicate well with each other. You state that, because your father-in-law's records were never transmitted, you believe the District hospital did not obtain information in his records that might have prevented him from being mistreated. You believe that the District was partly responsible for your father-in-law's alleged mistreatment and subsequent passing. After his passing, in an effort to improve the District's sharing and receipt of records, you contacted the District's Chief Executive Officer ("CEO") and Chief Administrative Officer and stated that you would not sue the District as long as they found a way for Cerner and Epic, and any other EHR database, to communicate and transmit information between one another, and to create procedures to prevent such an occurrence from happening again. You state in an email that you told the CEO:

. . . somewhat hyperbolically, that if he accomplished this [you] would not sue the District for the death of [your] father-in-law. [You] had no real intention of suing. [Your] goal was to create a sense of urgency so that the communication of medical records between the hospitals would be achieved

In particular, you specifically state, and District's counsel agrees, that this was an informal and unwritten promise and that it is unenforceable. You state that, two years later, the databases still do not communicate well but the District is now considering replacing Cerner with Epic as its EHR database.

In your private capacity, you own and operate a company that assists hospitals with healthcare revenue cycle management, which is the process that hospitals use to track revenue. Your company works with hospitals that use Cerner, Epic and other EHR databases. One aspect of your business consists of assisting hospitals with "legacy wind down," which occurs when a hospital transitions from one EHR database to another. In a legacy wind down, your company liquidates all the accounts receivable in the client-hospital's old EHR database, thereby terminating the old EHR database. You state that you have no current contractual or financial relationships with any of these EHR database companies; nor have you had any previous contractual or financial relationships with any of these companies. You state that you are not employed by them and you have never been paid by one of the EHR database companies. It is the hospitals and healthcare systems that hire you and your company to review their revenue cycles, not the EHR database companies.

Regarding the District's decision to solicit bids for a new EHR database, you state that neither you nor your company would be financially affected regardless of which EHR database company is selected, and you also indicate that neither you nor your company have any employment or contractual relationships with any EHR database company anticipated to be

involved in the EHR selection process, or with any other EHR database company. At this time, the only companies being considered by the District are Epic and Cerner.

Related to your concerns as to whether there might be a prohibited conflict of interest, Section 112.313(7)(a), Florida Statutes, provides, in relevant part:

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 clause of this statute prohibits a public officer or employee from having any employment or contractual relationship with a business entity or agency that is regulated by or that is doing business with his or her agency. Under the above facts, neither you nor your company is employed by the District or any EHR database company, and neither you nor your company has a contractual relationship with the District or any EHR database company. Your statement to District personnel that you would not sue the District as long as it ensured that its EHR database, and all other databases, could transmit information between each other likewise would not constitute a contractual relationship because your statement, which you admit was "somewhat hyperbolic," would be unenforceable. In light of these things, you would not have a conflict under the first clause of Section 112.313(7)(a), Florida Statutes. See CEO 86-24 ("a business entity is doing business with an agency where the parties have entered into a lease, contract, or other type of legal arrangement under which one party would have a cause of action against the other in the event of a default or breach").

The second clause of Section 112.313(7)(a), Florida Statutes, prohibits a public officer or employee from having any employment or contractual relationship that would create a continuing or frequently occurring conflict of interest, or that would create an impediment to the full and faithful discharge of his or her public duties. In that neither you nor your business would have an employment or contractual relationship with any of the parties involved in the District's decision, or with the District itself, this part of the statute does not apply.

Question 1 is answered accordingly.

QUESTION 2:

Would a voting conflict occur if the District Commissioner participates and votes during Board meetings on selecting an electronic health records database provider for the District?

This question is answered in the negative.

You also inquire whether you would have a voting conflict under Section 112.3143, Florida Statutes, the voting conflict law, in the event the District were called upon to vote on the selection of an EHR database company. Section 112.3143, Florida Statutes, provides, in relevant part:

No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. [Section 112.3143(3)(a), Florida Statutes]

* * *

No appointed public officer shall participate in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the

special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter. . . . [Section 112.3143(4), Florida Statutes]

These statutory provisions indicate that a public officer would have a voting conflict if a measure would inure to his or her "special private gain or loss,"² or if he or she knows that it would inure to the special private gain or loss of a principal by whom the officer was retained (or the parent organization or subsidiary of a corporate principal by which the officer was retained), a relative, or a business associate of the public officer. Under the facts presented, your voting on this matter would not financially affect you or your company. There likewise is nothing in the facts that would indicate any resultant gain or loss to a principal you have been retained by or the parent organization or subsidiary of such principal. Finally, there is nothing in the facts that indicate that a relative or business associate of yours would experience a gain or loss as a result of your voting on this issue. Thus, you would not have a voting conflict if the matter of an EHR database company were to come before the District.

² The definition of "special private gain or loss," found in Section 112.3143(1)(d), Florida Statutes, is as follows:

"Special private gain or loss" means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

With regard to your question as to whether you could participate in the discussion of the matter being voted on, Section 112.3143(4), Florida Statutes, addresses this issue. The prohibitions in this provision essentially prohibit you from participating in any matter that would inure to the special private gain or loss of you or those other individuals or entities delineated in the paragraph above, which inurement would result in a voting conflict, as discussed above. Since nothing in the facts indicates that you would have a voting conflict, there would be no prohibition from expressing your opinions at public board meetings.

Question 2 is answered accordingly.

QUESTION 3:

Would a prohibited abuse or misuse of your position occur if the District Commissioner expresses his position and opinion concerning the selection of an electronic health records database provider on District stationary, to District staff, or verbally within the community, so long as he clarifies he is voicing only his personal opinion and not the opinion of the Board?

Your question is answered as follows.

We draw your attention to the prohibitions in Article II, Section (8)(g)(2), Florida Constitution,³ and Section 112.313(6), Florida Statutes, which essentially operate to prohibit you from misusing or abusing your public position or the resources of your position to benefit yourself, your spouse or child, or a business with which you are affiliated. See CEO-21-1.

Article II, Section 8(g)(2), Florida Constitution, states, in relevant part:

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. . . .

³ It should be noted that Article II, Section 8(g)(2), Florida Constitution, will be redesignated as Article II, Section (8)(h)(2) on December 31, 2022.

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. This section shall not be construed to conflict with s. 104.31.

Both of these provisions involve a public officer or public employee abusing, corruptly using, or attempting to use his or her position (or resources within his or her trust) to obtain a special privilege, benefit or exemption for himself or herself or for the parties or entities listed above. In determining whether one would be "corruptly" using or "abusing" his or her position or any resources with his or her position, one's intent becomes involved.⁴ As we have said before concerning the proper use of advisory opinions:

[I]ntent generally is determined from an examination of all relevant circumstances. We are able to do this on the basis of evidence presented through investigation and hearing when a complaint is filed, but in rendering an advisory opinion we are [subject to] a lack of access to information concerning all circumstances of the situation as well as information concerning the credibility of the individuals involved.

CEO 81-47; see also CEO 22-3, Question 3. For this reason, we can only caution you that, while the situation presented in this Question does not automatically present a prohibited conflict of interest, this is not meant to imply that a corrupt intent could not occur and a violation of the prohibitions in Article II, Section 8(g)(2), Florida Constitution, and Section 112.313(6), Florida Statutes, could not be found.⁵

⁴ The requisite intent needed to violate the amendment is highly similar, if not identical, to that of the statute. 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. See CEO 19-23 and CEO 21-1; see also Section 112.312(9), Florida Statutes, and Rule 34-18.001(4), Florida Administrative Code.

⁵ Your inquiry and accompanying materials indicate you may already have engaged in communications and made statements concerning the bid solicitation process. While we appreciate your candor in providing information in this regard, our advice in the instant opinion is prospective; we express no views as to whether your prior conduct could violate any of the prohibitions discussed herein.

In addition, we do not typically provide guidance in response to entirely hypothetical inquiries where the facts giving rise to the potential ethical issue are not provided with particularity in the inquiry. See CEO 04-17, Question 4; CEO 10-14, note 1; and CEO 20-7, Question 2. The finding of misuse or abuse of one's position is a fact-specific analysis. As such, we decline to answer this question, inasmuch as it appears that the question is wholly hypothetical. While we understand that every question seeking guidance for prospective conduct is, to some degree, speculative, too many facts are in doubt at this time for us to render an opinion. See CEO 04-17.

Question 3 is answered accordingly.

JG/kbh/ks

cc: Ray Berry

ORIGINAL

June 28, 2022

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FLORIDA
COMMISSION ON ETHICS

JUL 05 2022

RECEIVED

The Florida Commission on Ethics
ATTN: Legal Section
P. O. Drawer 15709
Tallahassee, FL 32317-5709

Re: Ethics Opinion Request on the Permissibility of Conduct under the Code of Ethics for Public Officers and Employees

To Whom It May Concern:

This correspondence is being written as a formal request for an opinion from the Florida Commission on Ethics (the "Commission") regarding my participation in discussions as a sitting commissioner of the Board of Commissioners of North Broward Hospital District (the "District's Board"). The North Broward Hospital District (the "District") is a special district of the State of Florida established under ch. 2006-347, Laws of Florida (as amended by ch. 2007-299, Laws of Florida) (the "District's Charter") whose commissioners are appointed by the Governor of Florida. Because I was appointed to the District's Board (a public board), I am subject to the Florida Code of Ethics for Public Officers and Employees, Pt. III of Chapter 112, Florida Statutes (Florida's Code of Ethics").

Pursuant to the District's Charter, my duties as a commissioner of the District's Board include board oversight and decision-making activities pertaining to the District's purchases, policies, and operations. Recently, the vendor of the District's electronic health record ("EHR") database alleged that my personal experiences and comments at board meetings constitute a prohibited conflict of interest under Florida's Code of Ethics and such comments have irreparably tainted other members of the District's Board. I disagree with the allegations; yet to be sure, I am seeking a formal advisory opinion from the Commission. The Commission's website indicates that an advisory opinion may be requested from the Commission by sending a letter to the Commission that; (1) presents a question based on a real situation; and (2) includes a detailed description of the situation. All material facts pertinent to this request and necessary for your review are presented below in the section titled "Situation". I understand that your opinion is binding on the conduct presented unless material facts were omitted or misstated in the request for the opinion. Accordingly, the questions and information required for requesting an opinion from the Commission are as follows.

Questions

Question 1: Does a prohibited conflict of interest exist where an appointed commissioner of a taxing district has personal and professional experience working with many EHR databases and

participates in the discussion of pros and cons of a change to the EHR database used by the taxing district?

Question 2: Does a prohibited conflict of interest exist where an appointed commissioner of a taxing district who has personal and professional experience working with many EHR database providers (one of which is the current EHR database provider at the District) expresses a preference for one of the providers at board meetings when the District may be issuing a future bid solicitation for a new EHR database?

Question 3: If the commissioner's father-in-law was being seen at a non-District hospital and passed away, in part, because of the inability of the District's EHR database to integrate with the non-District hospital's EHR Database and the commissioner promised not to sue the District if the District promised to find a way to simply integrate or have them communicate more effectively, is a prohibited conflict of interest created under §112.313(6), Florida Statutes, art. II, s. 8(g)(2) of the Florida Constitution, or any other statute or rule governing the conduct of public officers and employees?

Question 4: Does the above situation in Question 3 create a voting conflict of interest that prevents the commissioner from voting for an EHR database should such decision come before the District's Board?

Question 5: To the extent that any voting conflicts of interest are present, do any of these conflicts of interest prevent the commissioner from voicing his personal opinions at public board meetings or individually to the District's employees?

Question 6: Does it create a prohibited conflict of interest for the commissioner to express his position and opinion to others on official stationery or verbally as a member of the District's Board so long as the commissioner makes clear that it is only his personal opinion and not the opinion of the Board?

The Situation

My father-in-law was diagnosed with Multiple Myeloma and received care and treatment for this diagnosis at a non-district hospital, a hospital operated by South Broward Hospital District d/b/a/ Memorial Healthcare System ("Memorial"). My father-in-law's medical history and records were located at Memorial. Memorial and the District utilize different EHR databases to house patient medical records. The District uses Cerner and Memorial uses Epic.

Sometime in or about 2019, after transferring himself from Memorial to a District hospital, my father-in-law was given an infusion of a new Multiple Myeloma drug at the District hospital. The District requested my father-in-law's medical records from Memorial, which were needed to properly care for him. Despite the attempts by Memorial to transmit the records, because Cerner and Epic do not integrate or communicate well with one another, the medical records were never transmitted. As such, the District was unaware that my father-in-law had extensive lung damage from this prior treatment for Multiple Myeloma, which took place at Memorial. Had the medical

records been timely sent over to the District, the District would have been aware of my father-in-law's circumstances, and he may still be alive today. This is my opinion and I have made it clear that this is my personal opinion.

I was distraught after my father-in-law's death, both because a wonderful man was lost, but also because in my opinion, the District, where I serve as a commissioner, was partly responsible. I understood that my personal feelings could not interfere with my fiduciary responsibilities to the District. Instead, I wanted to use this as an opportunity to improve the continuity of care for the residents of Broward County and implement processes to be sure that something like this never happens again. To that end, I contacted the then-serving Chief Executive Officer and the Chief Administrative Officer of the District. I promised them both that I would not sue the District so long as they promised to find a way to get Cerner and Epic and any other EHR to communicate and transmit information with one another, and so long as proper procedures were implemented to prevent this from occurring again.

Despite both of their promises, two years later both systems still do not communicate well. Because of this, as well as several other issues that have since been identified regarding Cerner (such as inefficient processes and financial concerns), it has been recommended, and the District's Board agrees, that the District should consider replacing Cerner (possibly with a new version of Cerner) and potentially engage Epic or another EHR database vendor to house the District's medical records.

A public workshop was held by the District's Board regarding the EHR databases, and I voiced my concerns to the other commissioners and to the public. Cerner was in attendance. Following my comments, Cerner began an investigation and engaged a law firm to evaluate my relationship with Epic and determine whether I have a conflict of interest. I recently learned that the law firm had a call with the District's Office of the General Counsel. During the call, the law firm indicated that it believes that I have a conflict of interest under Florida's Code of Ethics that prohibits me from voting on and participating in any decisions and discussions regarding Cerner or the District's EHR database. Further, the law firm alleges that based upon my previous participation regarding these matters, the District's Board is "tainted" and they, Cerner, will never get a fair opportunity to be considered during a bid solicitation. This law firm subsequently sent a letter to the District's Office of General Counsel which I've enclosed as Exhibit 1. The letter is blatantly false and intentionally misleading.

I currently own and operate a company that specializes in healthcare revenue cycle management. Revenue cycle management is the process used by hospitals to track revenue from a patient's initial encounter with the hospital to payment for the services provided. My company works with hospitals that use Cerner, Epic, and other EHR databases. One component of my business is to assist hospitals with "legacy wind down" which occurs when a hospital moves from one EHR database to another. In a legacy wind down, my company works with the old EHR database until all accounts receivables under that old database have been liquidated. While I may have my personal preferences, I have no current or past/contract or financial relationship with any of these

EHR database vendors and I am not employed by any of them. In fact, I have never been paid by a single one of the EHR systems. My clients are the hospitals that I serve. When I work a legacy wind down it's not the new EHR that I am working with -- it's the one the hospital wishes to replace. Hospitals and healthcare systems hire me and my company to review their revenue cycle and assist them in transitioning from one EHR database to another EHR database. My company's role and my personal participation is limited to working with these databases to serve my clients and meet their needs. The database that I work with is solely dependent upon the EHR database utilized by the hospital or healthcare system. Outside of this, I have no personal or professional relationship with any of these EHR database vendors.

Thank you in advance for your assistance. I appreciate the Commission's time and effort in looking into my situation, and I look forward to hearing the Commission's answers to my questions. Should you have any questions or concerns, please do not hesitate to contact me, Ray Berry, CEO Health Business Solutions, at 10620 Griffin Road, Suite 204, Cooper City, Florida 33328 or at 954-658-5591.

Sincerely,



Ray Berry
Commissioner
Board of Commissioners of North Broward Hospital District

cc: George S. LeMieux, Esq.
Las Olas Centre
450 East Las Olas Blvd., Suite 1400
Fort Lauderdale, FL 33301

Latour T. Lafferty, Esq.
401 E. Jackson Street, Suite 1500
Tampa, FL 33602

Heyward, Katharine

From: Heyward, Katharine
Sent: Tuesday, August 9, 2022 9:46 AM
To: 'Epstein, Linda J'
Subject: RE: An opinion Commissioner Berry has requested from the Commission on Ethics

Thank you very much.

From: Epstein, Linda J <lepstein@browardhealth.org>
Sent: Tuesday, August 9, 2022 8:58 AM
To: Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us>
Cc: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>
Subject: RE: An opinion Commissioner Berry has requested from the Commission on Ethics

Good morning, Katharine. I was on vacation last week, so I apologize for the delay in responding to your email below. To answer your question, I confirmed that there is no written and legally enforceable contract or agreement between Commissioner Berry and the North Broward Hospital District ("District") setting forth any promise that Commissioner Berry would not sue the District if it promised that its EHR database would interface with other databases. As such, there would be no cause of action for any breach of contract.

Please let me know if you have any other questions that I may answer regarding this issue. Thank you.

Linda Epstein, Esq

General Counsel

1800 NW 49th St., Fort Lauderdale, FL 33309

t- 954.473.7031 | f- 954.473.7440

lepstein@browardhealth.org



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BrowardHealth.org

From: Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us>
Sent: Friday, August 5, 2022 11:39 AM
To: Epstein, Linda J <lepstein@browardhealth.org>
Cc: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>
Subject: An opinion Commissioner Berry has requested from the Commission on Ethics

EXTERNAL EMAIL - Use Caution

Ms. Epstein,

I am an attorney for the Florida Commission on Ethics. Commissioner Ray Berry is seeking ethics advice from us and he gave me permission to contact you. He stated that he had made a promise with the District that he would not sue the District if it promised that its EHR database would effectively interface with other databases. Can you tell me if this promise was conveyed in a legally enforceable contract or agreement, such that a breach could create a cause of action? If so, was it reduced to writing and could you send me a copy, if applicable?

Thank you.

Katharine B. Heyward

Attorney

Florida Commission on Ethics

P.O. Drawer 15709

Tallahassee, FL 32317-5709

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(850) 488-3077 (Fax)

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Heyward, Katharine

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Linda Epstein, Esq

General Counsel

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Cc: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>
Subject: An opinion Commissioner Berry has requested from the Commission on Ethics

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Thank you.

Katharine B. Heyward

Attorney

Florida Commission on Ethics

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Heyward, Katharine

From: Ray Berry <rberry@hbsfocus.com>
Sent: Friday, August 5, 2022 4:41 PM
To: Heyward, Katharine
Cc: Lafferty Latour LT; glemieux@gunster.com; Zayas, Maria; Steverson, Kathryn
Subject: Re: Questions regarding Mr. Berry's request for a formal opinion

Ms. Hayward,

I raised the issue with former CEO of Broward Health, Gino Santorio, about the lack communication between Broward Health's IT system and the other county hospitals' IT systems. My ask of Gino Santorio was to resolve the communication issue regarding the sharing of critical patient data in real-time between the Broward Hospitals. I told him, somewhat hyperbolically, that if he accomplished this I would not sue the District for the death of my father-in-law. I had no real intention of suing. My goal was to create a sense of urgency so that the communication of medical records between the hospitals would be achieved and lives would be saved.

Ray Berry

Sent from my iPhone

On Aug 5, 2022, at 11:02 AM, Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us> wrote:

You don't often get email from heyward.katharine@leg.state.fl.us. [Learn why this is important](#)

Mr. Berry,

Thank you for your prompt response. Would you mind giving me the name and contact information of the person who made this promise to you?

Thank you very much.

Katharine Heyward

From: Ray Berry <rberry@hbsfocus.com>
Sent: Thursday, August 4, 2022 4:43 PM
To: Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us>
Cc: Lafferty Latour LT <ltlafferty@gunster.com>; glemieux@gunster.com; Zayas, Maria <MZayas@gunster.com>
Subject: RE: Questions regarding Mr. Berry's request for a formal opinion
Importance: High

Please see below. I am available for a call if you need any further clarification. My number is 954-658-5591

From: Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us>
Sent: Wednesday, August 3, 2022 4:33 PM
To: Ray Berry <rberry@hbsfocus.com>
Cc: Lafferty Latour LT <ltlafferty@gunster.com>; glemieux@gunster.com; Zayas, Maria <MZayas@gunster.com>
Subject: Questions regarding Mr. Berry's request for a formal opinion

You don't often get email from heyward.katharine@leg.state.fl.us. [Learn why this is important](#)

Commissioner Berry,

I need additional information in order to respond to your request for a formal opinion. Please provide your answers to the questions below by close of business on Monday, August 8, 2022. You can respond by email, if you like. My email address is heyward.katharine@leg.state.fl.us.

1. Am I correct in understanding that neither you nor your company will be financially affected no matter which EHR vendor is selected? That is correct.
2. Am I correct in understanding that neither you nor your company have any employment or contractual relationships with any entity involved in the EHR selection process? That is correct.
3. Am I correct in understanding that neither you nor your company have any employment or contractual relationships with any EHR vendor? That is correct.
4. The letter from Cerner indicates Epic is a "Legacy Receivable" for your company. What does this mean? Does it create any contractual relationship between Epic and your company? No contractual relationship is created. When a hospital decides to change systems, the process to end the prior system is referred to as "a legacy system wind down". On behalf of the client hospital, we process the remaining receivables in the system that the hospital is leaving. We work for the Hospital at their direction exclusively. We have never done a legacy Wind down in EPIC. There is no relationship with the system it only with the hospital.
5. Who are the EHR vendors being considered by the District? Are only Epic and Cerner being considered?. Yes, that is my understanding.
6. Are you currently—or have you ever been—involved in litigation against the District? If so, please describe the causes of action as well as the outcome of such litigation. No.
7. Regarding your understanding with the District not to file a lawsuit if they "promised" to ensure its EHR database would effectively interface with other databases, was this promise conveyed in a legally enforceable contract or agreement, such that its breach could create a cause of action? Or was it instead a mutual understanding reached in conversation or communication with District officers/employees that had no binding legal effect? The promise was oral. There is no contract or agreement.
8. Related to Question #7, is it acceptable to you if the Commission confirms with the District whether the understanding was either a legally enforceable agreement or an informal promise? Yes. Related to Question #7, is it acceptable to you if the Commission confirms with the District whether the understanding was either a legally enforceable agreement or an informal promise? Yes, it is acceptable to me. You may reach out directly to the General Counsel of the District, Linda Epstein. Her number is (954) 473-7031 and her email address is lepstein@browardhealth.org.

9. Would the outcome of the selection process of the EHR vendor affect your right to pursue legal action against the district? No.

Thank you.

Katharine B. Heyward

Attorney

Florida Commission on Ethics

P.O. Drawer 15709

Tallahassee, FL 32317-5709

(850) 488-7864

(850) 488-3077 (Fax)

ethics.state.fl.us

Physical address:

325 John Knox Road

Building E, Suite 200

Tallahassee, FL 32303

Heyward, Katharine

From: Heyward, Katharine
Sent: Friday, August 5, 2022 11:39 AM
To: 'lepstein@browardhealth.org'
Cc: Steverson, Kathryn
Subject: An opinion Commissioner Berry has requested from the Commission on Ethics

Ms. Epstein,

I am an attorney for the Florida Commission on Ethics. Commissioner Ray Berry is seeking ethics advice from us and he gave me permission to contact you. He stated that he had made a promise with the District that he would not sue the District if it promised that its EHR database would effectively interface with other databases. Can you tell me if this promise was conveyed in a legally enforceable contract or agreement, such that a breach could create a cause of action? If so, was it reduced to writing and could you send me a copy, if applicable?

Thank you.

Katharine B. Heyward

Attorney

Florida Commission on Ethics

P.O. Drawer 15709

Tallahassee, FL 32317-5709

(850) 488-7864

(850) 488-3077 (Fax)

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Physical address:

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Building E, Suite 200

Tallahassee, FL 32303

Heyward, Katharine

From: Ray Berry <rberry@hbsfocus.com>
Sent: Thursday, August 4, 2022 4:43 PM
To: Heyward, Katharine
Cc: Lafferty Latour LT; glemieux@gunster.com; Zayas, Maria
Subject: RE: Questions regarding Mr. Berry's request for a formal opinion

Importance: High

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Sent: Wednesday, August 3, 2022 4:33 PM
To: Ray Berry <rberry@hbsfocus.com>
Cc: Lafferty Latour LT <ltlafferty@gunster.com>; glemieux@gunster.com; Zayas, Maria <MZayas@gunster.com>
Subject: Questions regarding Mr. Berry's request for a formal opinion

You don't often get email from heyward.katharine@leg.state.fl.us. [Learn why this is important](#)

Commissioner Berry,

I need additional information in order to respond to your request for a formal opinion. Please provide your answers to the questions below by close of business on Monday, August 8, 2022. You can respond by email, if you like. My email address is heyward.katharine@leg.state.fl.us.

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that its breach could create a cause of action? Or was it instead a mutual understanding reached in conversation or communication with District officers/employees that had no binding legal effect? The promise was oral. There is no contract or agreement.

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9. Would the outcome of the selection process of the EHR vendor affect your right to pursue legal action against the district? No.

Thank you.

Katharine B. Heyward

Attorney

Florida Commission on Ethics

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Tallahassee, FL 32317-5709

(850) 488-7864

(850) 488-3077 (Fax)

ethics.state.fl.us

Physical address:

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Tallahassee, FL 32303

Heyward, Katharine

From: Heyward, Katharine
Sent: Wednesday, August 3, 2022 4:33 PM
To: 'rberry@hbsfocus.com'
Cc: Lafferty Latour LT; 'glemieux@gunster.com'; 'Zayas, Maria'
Subject: Questions regarding Mr. Berry's request for a formal opinion

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3. Am I correct in understanding that neither you nor your company have any employment or contractual relationships with any EHR vendor?
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8. Related to Question #7, is it acceptable to you if the Commission confirms with the District whether the understanding was either a legally enforceable agreement or an informal promise?
9. Would the outcome of the selection process of the EHR vendor affect your right to pursue legal action against the District?

Thank you.

Katharine B. Heyward

Attorney

Florida Commission on Ethics

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Physical address:
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Building E, Suite 200
Tallahassee, FL 32303

Heyward, Katharine

From: Zayas, Maria <MZayas@gunster.com>
Sent: Wednesday, August 3, 2022 4:24 PM
To: Heyward, Katharine
Subject: RE: Missing Exhibit (#2790) - Berry
Attachments: George LeMieux.vcf

Here it is!

George LeMieux
Gunster
Senator, Chairman of the Board
Business Litigation
(954) 468-1300 Work
954/648-2440 Mobile
glemieux@gunster.com
glemieux@gunster.com
450 E. Las Olas Blvd., #1400
Fort Lauderdale, FL 33301

Thank you,
Maria Zayas



Maria Zayas
Executive Assistant to Senator George S. LeMieux
Las Olas Centre, 450 East Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301-4206
P 954-462-2000, ext. 58574 F 954-523-1722
gunster.com | mzayas@gunster.com

From: Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us>
Sent: Wednesday, August 3, 2022 4:18 PM
To: Zayas, Maria <MZayas@gunster.com>
Subject: RE: Missing Exhibit (#2790) - Berry

Can you give me Senator LeMieux' email address? Thanks.

From: Zayas, Maria <MZayas@gunster.com>
Sent: Thursday, July 14, 2022 5:49 PM
To: Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us>
Cc: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>; Lafferty Latour LT <tlafferty@gunster.com>
Subject: RE: Missing Exhibit (#2790)

Good afternoon, Katharine:

Thank you for your patience! Attached is a copy of Exhibit 1.

I have also copied Latour Lafferty. He represents Ray Berry here at Gunster along with Senator LeMieux and will be able to answer any questions you may have.

Many thanks,
Maria Zayas



Maria Zayas
Executive Assistant to Senator George S. LeMieux
Las Oas Centre, 450 East Las Oas Boulevard, Suite 1400
Fort Lauderdale, FL 33301-4206
P 954-462-2000, ext. 58574 F 954-523-1722
gunster.com | mzayas@gunster.com

From: Heyward, Katharine <HEYWARD.KATHARINE@leg.state.fl.us>
Sent: Tuesday, July 12, 2022 5:00 PM
To: Zayas, Maria <MZayas@gunster.com>
Cc: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>
Subject: Missing Exhibit (#2790)

Ms. Zayas,

You can email the missing exhibit for the Ray Berry request to me: heyward.katharine@leg.state.fl.us. Thanks.

Katharine B. Heyward

Attorney
Florida Commission on Ethics
P.O. Drawer 15709
Tallahassee, FL 32317-5709
(850) 488-7864
(850) 488-3077 (Fax)
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Physical address:
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Building E, Suite 200
Tallahassee, FL 32303

AUG 02 2022

RECEIVED

July 25, 2022

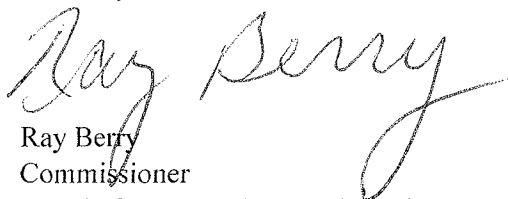
The Florida Commission on Ethics
ATTN: Kerrie J. Stillman
P. O. Drawer 15709
Tallahassee, FL 32317-5709

Re: Ray Berry's request for an Ethics Opinion (File No. 2790)

Dear Director Stillman:

This correspondence is being written in response to your attached request. I have consented to the release of my name in the publications related to this request. Please find attached the executed document as requested.

Sincerely,



Ray Berry
Commissioner
Board of Commissioners of North Broward Hospital District

Cc: George Lemieux
Lafferty Latour
Maria Zayas
Via email

Heyward, Katharine

From: Zayas, Maria <MZayas@gunster.com>
Sent: Thursday, July 14, 2022 5:49 PM
To: Heyward, Katharine
Cc: Steverson, Kathryn; Lafferty Latour LT
Subject: RE: Missing Exhibit (#2790)
Attachments: BrowardBOCLetter.5.17.22 4884-5006-4160 v.1.pdf

Good afternoon, Katharine:

Thank you for your patience! Attached is a copy of Exhibit 1.

I have also copied Latour Lafferty. He represents Ray Berry here at Gunster along with Senator LeMieux and will be able to answer any questions you may have.

Many thanks,
Maria Zayas



Maria Zayas
Executive Assistant to Senator George S. LeMieux
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gunster.com | mzayas@gunster.com

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Cc: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>
Subject: Missing Exhibit (#2790)

Ms. Zayas,

You can email the missing exhibit for the Ray Berry request to me: heyward.katharine@leg.state.fl.us. Thanks.

Katharine B. Heyward
Attorney
Florida Commission on Ethics
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Physical address:
325 John Knox Road
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Tallahassee, FL 32303

May 17, 2022

**VIA EMAIL: LEPSTEIN@BROWARDHEALTH.ORG;
BBAUMAN@BROWARDHEALTH.ORG**

Linda Epstein
General Counsel
Broward Health
1600 South Andrews Avenue
Fort Lauderdale, FL 33316

Brett Bauman
Senior Associate General Counsel
Broward Health
1600 South Andrews Avenue
Fort Lauderdale, FL 33316

Re: Commissioner Ray Berry Conflict of Interest

Dear Ms. Epstein and Mr. Bauman:

Thank you for taking the time to talk with me on Friday, April 22, 2022, regarding the conflict of interest of Commissioner Ray Berry. This letter is a memorialization of our conversation. Kutak Rock is investigating whether the Board of Broward Health's process of electronic medical record software renewal or selection has been biased or tainted by a conflict of interest by Commissioner Berry.

Our document requests, made under the Florida Sunshine Law chapter 286, occurred in February of 2022, yet we have not received documents from you. Due to the time-sensitive nature of this issue, we have reviewed video footage, the website of Mr. Berry's company, and a letter written by Mr. Berry to the Board of Broward Health. Even based on that limited review, it is clear that Commissioner Berry has a conflict of interest. Commissioner Berry has used his public position on the Broward Health Board to secure a special privilege and benefit for himself and his family. Commissioner Berry has placed his own private interests, and the interests of his family, ahead of the public's interests which has created a clear conflict of interest. His failure to recuse, and the Board's failure to demand his recusal, are a glaring violation of Florida law and Broward Health's Code of Conduct and Ethics. (**Exhibit 1**, Florida Statutes 112.313(6); **Exhibit 2** North Broward Hospital District – Broward Health, FL Code of Ordinances, Section 2.7).

KUTAKROCK

Linda Epstein
Brett Bauman
May 17, 2022
Page 2

Commissioner Berry supplied information to members of the Board that upon the death of Berry's father-in-law, the Leider family agreed to not pursue action against Broward Health if improvements were made to the interoperability of medical record exchange between healthcare systems. (**Exhibit 3**, January 21, 2022, letter to Members of the Broward Health Board). It is this personal situation that is driving Mr. Berry's improper use of his position as a Commissioner to influence the decision of the Broward Health Board as to the selection of an EMR system.

Under the insistence of Commissioner Berry, the Broward Health Board of Commissioners has been addressing whether to continue contracting with the current EMR platform, Cerner, or whether a new platform should be considered. Understanding that each hospital system has different needs and requirements, the Board of Broward Health commissioned Cumberland Consulting Group to perform an objective, third-party review and to make a recommendation as to the best overall fit for Broward Health. At the June 17, 2020, meeting of the Compliance and Ethics Committee of the Board, representatives of Cerner and Epic presented the benefits of each of their platforms. Mr. Donald Trigg, for Cerner, presented first. After his presentation, Commissioner Berry began asking questions of Mr. Trigg. Commissioner Berry asked Mr. Trigg multiple questions regarding the ability to share records between platforms such as Epic and Cerner. Board member Nancy Gregoire interjected to say she "knows what this means" to Commissioner Berry, upon which he stated that he has "personal experiences with" medical record gaps between sister facilities that are on Epic and those that are on Cerner. When the Cerner representative indicated that Cerner could communicate with Epic and that the only thing holding that back is consent of the patient, Berry seemed to be dissatisfied with the answer and indicated he is "really interested in ER's" ability to communicate records and believes that Cerner and Epic are not able to share. "Marcos" with Cerner indicated that Epic and Cerner do, in fact, have the ability to share records between systems. (*See* video recording of June 17, 2020, Compliance and Ethics Committee of the Board, at approximately 31 minutes 45 seconds.)

After the presentations of both Epic and Cerner, Cumberland Consulting presented its analysis. Cumberland found that the medical record platform that was the best choice for Broward Health was Cerner. After learning that Cerner was recommended, Commissioner Berry challenged how this result was derived. He went on to question why Cumberland had attributed 30% weight to what staff, physicians, and the administration wanted, and a lengthy interrogation took place. Cumberland pointed out that even if the delta was changed by decreasing that multiplier, Cerner would still have resulted as the best choice for Broward Health. As seen in the presentation, the final numbers were clear that Cerner is the best choice for Broward Health. (*See* video recording of June 17, 2020, Compliance and Ethics Committee of the Board, starting at 1:16:20, numerical results at 1:32:40).

KUTAKROCK

Linda Epstein
Brett Bauman
May 17, 2022
Page 3

Unhappy with the result and unwilling to accept this answer, Commissioner Berry, in a November 17, 2021, Board Meeting, leveled allegations against Broward Health's current EMR platform, Cerner. (See video recording of November 17, 2021, Regular Board Meeting, starting at 55:03). Commissioner Berry states in this meeting that he has had a thousand hospital clients across the country in his personal business and that "they're all moving in one direction and Broward Health is moving in a completely opposite direction." He goes on to say that "too many times, the ideas and thoughts that I've brought from the technology transfer I bring from other facilities are either simply ignored or put through a bogus process of elimination." He admitted that since the time of Cumberland Consulting's review, he hired and paid personal funds to a company to conduct a different review. (See video recording of November 17, 2021, Regular Board Meeting, at 58:00). A company that might now be involved in the EMR selection process if the name of that company were known. Why? Because he wanted different results.

Commissioner Berry was so dissatisfied with the outcome that Cerner was the best choice that he wrote a seven-page letter to the Members of the Broward Health Board on January 21, 2022. (**Exhibit 3**, letter to Members of the Broward Health Board). Even if the conduct above wasn't a clear breach of Commissioner Berry's duties (which it was), the content and overall tone of this letter establish his conflict of interest. The letter is fraught with statements that shine a bright light on Mr. Berry's bias and conflict. It starts with the statement that a letter received from Cerner's Chief Client Services Officer is an attempt to "rush this Board into approving a Cerner contract renewal that is not in the best interest of Broward Health, the county, or the patients our providers serve." He goes on to accuse Mr. Dalton, Cerner's Chief Client Services Officer, of making misleading statements and Mr. Berry then uses unverified numbers to allege that Cerner has cost the VA billions of dollars more than some proposed budget. There are multiple times that Commissioner Berry accuses Mr. Dalton of lying and misrepresentation. Commissioner Berry stated that he has "firsthand experience" with "poor" interoperability performance under Cerner, yet Cerner had previously informed the Board that it does, in fact, have the interoperability Mr. Berry is concerned about. Of most concern is the following statement by Commissioner Berry, found on page three of his letter, which states:

"I believe my father-in-law would be here today if Broward Health had better interoperability. I have told this story multiple times and truly believe this to be true. Neither I, my wife or sisters-in-law filed any lawsuit, and this decision was due to the fact that we had an agreement with the administration of Broward Health to forgo a suit so long as the intention was to get the district to serve the citizens of Broward County better through an interoperability process. I have recently seen that all those efforts have failed, and I don't understand why. I believe that I was misled to further the agenda of not publicly bidding this EHR out."

KUTAKROCK

Linda Epstein
Brett Bauman
May 17, 2022
Page 4

Commissioner Berry admits that his personal interests are the driving force for his involvement in this process. He even is so blatant as to say, in the above letter, "I am anti-Cerner at Broward Health."

Commissioner Berry also criticizes Cumberland in his letter to the Board. Berry states that "[d]espite multiple requests, former administrators at Broward Health hid the Cumberland results from me." Note that he uses the term "me." Not the Board. Not Broward Health. "Me." In that same paragraph he states "[m]y repeated request was ignored by the administration, and I was told that Cumberland was stupid and didn't know what they were doing, and our staff directed this final report." Again, Mr. Berry's use of "me" and "my" is not coincidental. These statements, coupled with his expressed frustration in the November 17, 2021, board meeting that his thoughts and ideas have been ignored, show a very personal focus on this issue, one that prevents him from being objective and instead places his own personal interests above the needs of Broward Health and the community it serves.

In this same January 2022 letter, Mr. Berry goes on to say that he has "been involved in over 20 EHR implementations and the best ones are internally driven." As to his involvement with EHR implementations, Epic is listed on Mr. Berry's company's website as a "Legacy Receivables", which indicates a business relationship between Mr. Berry and Epic, yet another conflict of interest. (**Exhibit 4**, "Legacy Receivables" from Health Business Solutions website). Tellingly, Commissioner Berry's company does not appear to have a business relationship with Cerner in that same area.

Finally, in the most revealing of his conflict, Commissioner Berry has led Broward Health to violate public procurement processes to ensure his vendor of choice is chosen. The entire process of selecting EMR software in a fair and equitable manner has been violated. Under §287.057 of the 2021 Florida Statutes, "[t]he competitive solicitation process authorized in this section shall be used for procurement of commodities or contractual services in excess of the threshold amount provided for CATEGORY TWO in §287.017 (\$35,000). Any competitive solicitation shall be made available simultaneously to all vendors, must include the time and date for the receipt of bids, proposals, or replies and of the public opening, and must include all contractual terms and conditions applicable to the procurement, including the criteria to be used in determining acceptability and relative merit of the bid, proposal, or reply." The chapter goes on to outline the invitation, request for proposal, and invitation to negotiate process. None of these steps took place here. The Board of Broward Health, whose members often look to Commissioner Berry during discussions surrounding EMR replacement, did not engage in a competitive solicitation process, as outlined under Florida Law. Rather, the process was limited to presentations between Cerner and Epic—and no other EMR vendor—apparently because Commissioner Berry wanted to narrow the selection process to further his personal agenda driven by his prejudice and conflict of interest.

KUTAKROCK

Linda Epstein
Brett Bauman
May 17, 2022
Page 5

In summary, Mr. Berry's presence on this Board and very vocal positions on the matter of EMR platform selection have made it evident that he is on a personal mission. His private interest, which he has held above the interest of Broward Health or the community, is a misuse of his public position to further his personal position, which is a clear violation of his duty as Commissioner. As such, the entire selection process has been tainted. Commissioner Berry's unwillingness to recuse himself, and the failure of the Board to demand his recusal, has created a serious litigation threat and any decision made at this point would likely be set aside by a Court.

The Board must ensure the recusal of Commissioner Berry on any discussions of this topic and no voting should occur on the EMR until the entire selection process has been reconducted in a fair and equitable manner.

Sincerely,

Diane R. Carter